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MIDDLE-CLASS WHITE PRIVILEGE

Ruth Colker*

The law and economics approach to anti-discrimination law, with its key principles of efficiency and personal autonomy, perpetuate disturbing and stereotypical attitudes about race. The author examines both educational affirmative action and employment affirmative action in the United States. Through devices such as alumni preference programs, educational institutions are able to indirectly maintain a white, propertied social and economic structure. Similarly, employers and professional organizations are able, through aptitude tests and word-of-mouth recruiting, to avoid affirmative action initiatives. By relying too heavily on the "efficiency" of law and economics, courts are ignoring non-discriminatory employment options. The law and economics approach must locate and address white privilege before criticizing minority attempts to even the score.

L'approche du droit et de l'économie à l'égard de la législation sur l'anti-discrimination, dont les principes clés sont l'efficacité et l'autonomie personnelle, perpétue les attitudes gênantes et stéréotypées au sujet de race. L'auteur examine l'action positive dans le domaine de l'éducation et de l'emploi aux États-Unis. Grâce à des moyens tels que les programmes de préférence des anciens, les établissements d'enseignement peuvent, indirectement, conserver une structure de propriété économique et sociale blanche. De même, les employeurs ou les organismes professionnels peuvent, au moyen de tests d'aptitude et du recrutement par bouche-à-oreille, éviter les initiatives de l'action positive. En se fiant trop à «l'efficacité» du droit et de l'économie, les tribunaux ignorent les options d'emploi non discriminatoires. L'approche du droit et de l'économie doit d'abord trouver et régler le privilège des Blancs avant de critiquer les tentatives des minorités à égaliser le jeu.

I. INTRODUCTION

My children wake up each morning in comfortable, warm beds in a safe neighbourhood within walking distance of an excellent public school. They are the beneficiaries of an excellent health insurance program and already have a trust fund for their college education. My son's daycare centre is equipped with computers, climbing equipment, art supplies, books and hundreds of toys. Although my son is developmentally disabled, he receives outstanding and free intervention services from the school district on a virtual one-on-one basis. My daughter's public school has a computer lab and classes with only twenty children. Our house is filled with books and educational toys, as well as two computers. If my daughter decides to apply to Harvard University someday, she can take advantage of the alumni preference for children of alumni even though I am the only person in her family tree who attended Harvard.

Heck-Faust Memorial Chair in Constitutional Law and Professor of Law, Michael E. Moritz College of Law, Ohio State University. I would like to thank Professors Martha Chamallas and Jules Lobel for their helpful conversations relating to this topic. A longer version of this article can be found in Ruth Colker, *American Law in the Age of Hypercapitalism: The Worker, the Family, and the State* (New York: New York University Press, 1998).

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In American culture, none of those advantages are called “affirmative action” by middle-class whites.¹ If, at age eighteen, my daughter has higher standardized test scores than another teenager, few middle-class whites would complain that she had an unfair advantage. And, if upon graduation from college or graduate school, she has a better academic record than another student, few middle-class whites would complain that she had an unfair advantage. In my middle-class circles, no one has ever cautioned me to think twice about taking advantage of my race and class privilege on behalf of either of my children. (I would probably be criticized if I failed to.) It is presumed that I will use my financial resources to buy opportunities for them. In other words, my daughter’s race and class privilege is unlikely to cause her to have to face stigma or prejudice later in life within the middle-class circles in which she is likely to operate.² Stigma and prejudice face African-American but not Caucasian beneficiaries of race-based affirmative action.³ Harvard President Derek Bok commented on this distinction in 1985 when he asked why whites resent affirmative action for blacks but do not express “similar resentments against other groups of favored applicants, such as athletes and alumni offspring.”⁴ In the words of Patricia Williams, “affirmative action for the children of Founding Fathers just doesn’t seem to carry the stigma.”⁵ This well-accepted social principle within the dominant culture⁶

¹ Working-class people and racial minorities may nonetheless have a different perspective. For example, Patricia Williams acknowledges that she must “confess to a certain class envy” in reading of a family that was able to take advantage of “every imaginable privilege of Boston’s ‘Brahmin’ society,” including admissions to Harvard for “sons who couldn’t read until their teens.” P. Williams, “The Pathology of Privilege” (May 1996) *The Women’s Review of Books* 1.

² My son, of course, may face stigma for receiving assistance to ameliorate the effects of his disabilities. But this potential stigma is a consequence of his disabilities rather than his race, gender or class.

³ Of course, if my daughter were to take advantage of a gender-based affirmative action program, people might say that she would face prejudice or stigma.

⁴ M. Lind, *The Next American Nation: The New Nationalism and the Fourth American Revolution* (New York: The Free Press, 1995) at 169.

⁵ P. Williams, *supra* note 1 at 1.

⁶ “Embedded deep within the affirmative action debate are two durable assumptions. The first is that affirmative action means that unqualified, or lesser qualified, individuals will be selected over more qualified individuals. ... The second assumption ... is that there exists a negative relationship between affirmative action and workforce productivity.” M. Selmi, “Testing for Equality: Merit, Efficiency, and the Affirmative Action Debate” (1995) 42 U.C.L.A. L. Rev. 1251 at 1251–52. For the view that “elitism” is becoming less fashionable, see W.A. Henry III, *In Defense of Elitism* (New York: Doubleday,

reflects the emerging acceptance of law and economics in our legal and political culture.

Law and economics is winning. The work of law and economics scholars like Richard Posner and Richard Epstein now dominates antidiscrimination law.⁷ This field of law uncritically helps perpetuate devices that assist propertied whites gain access to educational institutions or employment settings but seeks to destroy comparable devices that assist African Americans. While hiding behind principles like efficiency and personal autonomy, this field of law actually reflects disturbing and stereotypical attitudes about race. As we will see, black employment is inefficient whereas white employment is efficient.

II. LAW AND ECONOMICS

The two key principles of law and economics are efficiency and personal autonomy,⁸ which are strongly reflected in the work of Richard Epstein. For example, he argues that government interference in the marketplace through antidiscrimination law actually harms rather than helps disadvantaged groups in society. With respect to people with disabilities, he argues that the source of their mistreatment at the workplace lies in “government interference with the control of their labor. Like everyone else, the disabled should be allowed to sell their labor at whatever price, and on whatever terms, they see fit.”⁹ Similarly, in the educational context, Richard Posner has argued that an affirmative-action program designed to attain proportional representation of racial minorities is inefficient because it distorts the results of pre-existing personal preferences: “[T]his sort of intervention would, by profoundly distorting the allocation of labor and by driving a wedge between individual merit and economic and

1994).

⁷ I use the phrase “antidiscrimination law” to include constitutional law under the equal protection clause of the Fourteenth Amendment as well as to include statutory law under civil rights statutes. For the purposes of this article, these areas of the law are conceptually equivalent.

⁸ “Economics has developed an extensive critique of regulation. According to this critique, market-like instruments should replace bureaucratic rules wherever possible. Substituting the former for the latter promise efficiency and liberty by lowering the cost and coercion of achieving policy goals.” R. Cooter, “Market Affirmative Action” (1994) 31 *San Diego L. Rev.* 133 at 134.

⁹ R. Epstein, *Forbidden Grounds: The Case Against Employment Discrimination Laws* (Cambridge, MA: Harvard University Press, 1992) at 484.

professional success, greatly undermines the system of incentives on which a free society depends.”¹⁰

As a judge, Posner has made a similar argument in an employment discrimination case. Rather than preclude an employer from using a word-of-mouth recruitment system, which perpetuated the racial segregation of the workplace, Posner applauded the efficiency of the employer’s practice: “It is clear, as we have been at pains to emphasize, the cheapest and most efficient method of recruitment, notwithstanding its discriminatory impact.”¹¹

The personal-autonomy principle permits Epstein to question the validity of government authorizing or requiring affirmative action for a discrete subgroup of society. He writes: “There is no external measure of value that allows the legal system or the public at large to impose its preferences on the parties in their own relationship. There is thus no reason to have to decide whether we should weigh the need for merit in employment decisions against the need for diversity in workers.”¹² Similarly, Posner has argued that affirmative action on behalf of racial minorities has “no logical stopping point” short of a standard of “perfect equality.”¹³ The government interferes with personal autonomy when it imposes its views about which subgroups are entitled to affirmative action on employers.

Posner’s concern for efficiency, however, appears to dampen when such arguments are used to *support* race-based affirmative action. One argument that is sometimes made on behalf of race-based affirmative action is that it can serve as an easy proxy for socio-economic disadvantage, since African Americans disproportionately come from economically deprived households. At this point, Posner backs off from his overarching concern for efficiency. He states: “To say that discrimination is often a rational and efficient form of behavior is not to say that it is socially or ethically desirable.”¹⁴ Even if race-based affirmative action is the most efficient way to achieve socio-economic diversity, given the costs of acquiring individualized information, Posner argues that we should not permit the use of race-based categories by state actors. At that point, Posner becomes a staunch formal-equality theorist, arguing that we must not confuse what is

¹⁰ R.A. Posner, “The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities” (1974) 18 Sup. Ct. Rev. 1.

¹¹ *EEOC v. Consolidated Service Systems*, 989 F.2d 233, 236 (7th Cir. 1993).

¹² Epstein, *supra* note 9 at 413.

¹³ Posner, *supra* note 10 at 18.

¹⁴ *Ibid.* at 11.

“efficient” with what is “good” or “right.”¹⁵ (By endorsing the formal-equality principle, he is also backing away from the personal-autonomy principle since he is allowing a moral stance — antidiscrimination — to trump an employer’s preferences in hiring practices.) These inconsistent strands of law and economics have created a patchwork of case-law that consistently disserves the interests of African Americans who desire to gain access to higher education or employment at the workplace. Part III of this article discusses educational affirmative action and Part IV discusses employment affirmative action. As Michael Lind has stated so provocatively, entry to the professional classes in the United States “depends on two institutions: prestigious universities and state systems of professional accreditation. These represent the primogeniture and entail of the white overclass.”¹⁶

II. EDUCATIONAL AFFIRMATIVE ACTION

Educational institutions of higher education have never relied exclusively on the “merit” principle in deciding whom to admit. Until the 1920s, admissions at elite institutions was often restricted to those males who could afford to pay the tuition and had taken courses generally only available in private schools.¹⁷ Social and economic status therefore played an important role in admissions long before the advent of modern “testing” for admissions purposes.

Elite educational institutions modified their admissions practices in the 1920s in response to what was perceived to be a problem with their increasing identification as institutions admitting immigrant Jews and Catholics. Harvard President A. Lawrence Lowell, for example, tried to respond to this problem by imposing a ceiling on the number of Jews admitted, but backed down from this proposal after a barrage of public criticism. Instead, he invoked an alumni preference policy that discriminated against children of immigrants, many of whom were Jewish or Catholic.¹⁸ He employed an indirect rather than direct

¹⁵ *Ibid.*

¹⁶ Lind, *supra* note 4 at 152.

¹⁷ “Throughout most of the nineteenth century, Harvard and Yale admitted almost everyone who could meet the academic requirements and pay the tuition. While there was no institutional policy of discrimination, the colleges maintained certain academic criteria, including a Latin language requirement, that prevented many public school students from even qualifying for admission.” J.D. Lamb, “The Real Affirmative Action Babies: Legacy Preferences at Harvard and Yale” (1993) 26 *Colum. J.L. & Soc. Probs.* 491 at 492–93.

¹⁸ *Ibid.* at 494.

method of discrimination. As a result of this policy, at least twenty-five per cent of Harvard's entering classes were the sons of graduates, a figure that has remained relatively stable ever since.¹⁹

Although Harvard has presumably discontinued its practice of overt discrimination against Jewish or Catholic applicants, it has never discontinued the alumni preference. The alumni preference clearly offers applicants a procedural and substantive advantage in the admissions process. Procedurally, all other applications go to an admissions committee for review before reaching the desk of the Dean of Admission. The application of a legacy applicant, by contrast, goes directly to the Dean of Admission for reading. The Dean then places comments in the file such as: "Not a great profile but just strong enough #'s and grades to get the tip from lineage."²⁰ The alumni preference is clearly a "preference"; an admitted nonlegacy candidate, on average, scored 130 points higher than an admitted legacy candidate for the time period 1983–1992.²¹

Although racial minorities are often targeted as obtaining an unfair advantage in the admissions process, legacy candidates obtain an equal or greater advantage. As one commentator has observed: "If legacies [in 1988] had been admitted ... at the same rate as other applicants, their numbers in the freshman class would have dropped by close to 200 — a figure that exceeds the total number of blacks, Mexican Americans, Puerto Ricans, and Native Americans enrolled in the freshman class."²²

The legacy preference was historically introduced to intentionally discriminate against recent immigrant groups, such as Jews and Catholics. Today, it has a disparate impact against Asian Americans and other minority groups that are unlikely to be able to take advantage of an alumni preference. The Office of Civil Rights of the United States Department of Education concluded that "the higher admission rate for white applicants over similarly qualified Asian-American applicants is largely explained by the preference given to legacies and recruited athletes, two groups at Harvard that are predominantly white."²³

¹⁹ *Ibid.* at 495–96.

²⁰ *Ibid.* at 501.

²¹ *Ibid.* at 504–505.

²² *Ibid.* at 503–504.

²³ *Ibid.* at 502.

In the 1970s, elite American universities began to change their admissions policies to present an image of more racial, ethnic, religious and geographic diversity.²⁴ Many institutions that were historically restricted to white men were opened to women and various racial minorities. While these changes were made, some remnants of prior admissions practices remained in place and new ones were added. Alumni preference continued to benefit a subset of whites, although, for the first time, female applicants could benefit from this preference. (At state schools, political connections rather than alumni preference were often a favoured plus.²⁵) Athletic preferences preferentially benefited male athletes who, at some institutions like Harvard, were also predominantly white.

A new admission policy that emerged in this time period was increased reliance on grades and especially test scores. Whereas graduation from elite secondary schools and the ability to pay were the admissions criteria prior to the 1920s, the post-Second World War era saw the emergence of purported “merit” criteria of grades and test scores. When scholarships eventually became available for students from impoverished backgrounds in the 1960s, many African Americans were still unable to attend elite institutions because of this recently invoked “merit” criteria.

Admissions testing originally began as an attempt to help make threshold judgments about candidates’ abilities to succeed. Over time, however, these tests evolved “from a threshold to a relative measure” and, in turn, led to the disproportionate rejection of African-American applicants at exactly the time when they became formally eligible for admission and financial aid.²⁶ By the 1970s, “almost all of legal education embraced the liturgy of competitive admissions that had until the 1970s been restricted to a handful of elite law schools.”²⁷ Today, it is estimated that only 5.9 per cent of college-bound high school seniors can meet the competitive criteria used by elite institutions, with only 0.4 per cent of college-bound African American seniors meeting these criteria.²⁸

²⁴ *Ibid.* at 496.

²⁵ A.J. Scanlon, “The History and Culture of Affirmative Action” [1988] B.Y.U.L. Rev. 343 at 354.

²⁶ E.J. Littlejohn & L.S. Rubinowitz, “Black Enrollment in Law Schools: Forward to the Past?” (1987) 12 Thurgood Marshall L. Rev. 415 at 427.

²⁷ Scanlon, *supra* note 25 at 352.

²⁸ See J. Owings, M. McMillen & J. Burkett, *Making the Cut: Who Meets Highly Selective College Entrance Criteria* (National Center for Education Statistics, U.S. Department of Education, Office of Educational Research and Improvement, April

The question raised by these tests is what criteria of purported merit do they seek to measure. Early attacks on the Law School Admission Test (LSAT) by minority groups focused on the inability of those tests to predict success in law school. The empirical evidence suggested that the tests equally predicted success for minority and majority students, although it was not a particularly good predictor for either group.²⁹ Because no evidence of predictive inequality was found, “this significant flaw [in its predictability for any group] was lost in the pressure to have some testing instrument.”³⁰ Also lost in the debate was how important it was to predict first-year grades in law school as a criterion for admissions: “If merit as defined by future academic performance is the trait required for admission, then standardized tests that predict such performance are acceptable. If future academic performance is not the sole goal of admissions the use of such tests is problematic.”³¹ The obsession with testing that began to overtake American culture in the 1970s therefore caused institutions to be blind to the accuracy or relevance of testing, while also discounting the significance of the disparate impact against racial minorities.

Even when institutions purportedly attempt to diversify their student body, they rarely abandon prime reliance on grades and test scores. As Derrick Bell argues:³²

[T]he response of educational institutions to minority demands for increased access ... serves to validate and reinforce traditional admissions policies that favor upper-class applicants over those of more modest socio-economic backgrounds, regardless of their race. As with so many other black-led civil rights reforms, preferential admissions will likely help more upwardly-mobile white than black applicants, although it is the latter who are enveloped in a cloud of suspected incompetency by these programs ... The decision to maintain grades and test scores as the prime criteria for admission advantages the upper class and ensures that the nation’s economically privileged will continue to occupy the great majority of the highly sought-after seats in prestigious colleges, medical, and law schools.

Two divergent transformations in American thinking about admissions to educational institutional therefore took place in the 1970s. On the one hand, Americans increasingly believed that admissions were largely based on “merit,” placing great weight in the reliability of standardized tests to evaluate merit. On

1995) at 4 (Table 1).

²⁹ Scanlon, *supra* note 25 at 353.

³⁰ *Ibid.*

³¹ D.E. Van Zandt, “Merit at the Right Tail: Education and Elite Law School Admissions” (1986) 64 *Tex. L. Rev.* 1493 at 1515.

³² D.A. Bell, Jr., “Preferential Affirmative Action” (1982) 16 *Harv. C.R.-C.L. L. Rev.* 855 at 865.

the other hand, Americans began to believe that racial minorities were the only group to sometimes gain admissions without meeting such objective criteria.³³ They were targeted as a group undeserving of admissions on merit grounds alone. In Anthony Scanlon's words:³⁴

The problem the minority students had was that they were neither politically nor academically well connected. Already told through the media and fellow students that they were less able, they did not have the network or support of 'preferentially' admitted majority students. Nor could the minority students, at most law schools, reach a critical mass that could provide its own support network.

Minority group members got singled out as a group getting "preferential" treatment while majority group members, who were even more likely to have obtained preferential treatment, were not subject to criticism or stigma. One might simply say that there were various criteria used for admissions purposes — test scores, parents' educational status, political connections, talent in male sports and race. One would not necessarily label any of these criteria as more or less appropriate or problematic. The perspective underlying law and economics, however, has cleverly assisted American society to group these criteria along racist lines — to not question the criteria that benefits whites and males and to question the criteria that benefit racial minorities.³⁵ This is not to suggest, of course, that law and economics has caused these groupings. It is to suggest that law and economics is a tool that has been used, in collaboration with racism, to help create this social, political and economic framework. In other words, the pre-existing desire of many people in society to view merit through a racial lens has helped facilitate the growing popularity of law and economics.

The case that best captures this collaboration between law and economics and racism is *Hopwood v. State of Texas*³⁶ because, relying on law and economics scholarship, the Fifth Circuit overturned a racial criterion in admissions while

³³ "While tirades against affirmative action regularly fill the pages of magazines and newspapers, the most disturbing form of affirmative action — preference given to children of alumni, known as 'legacies' — is usually ignored by critics." J.K. Wilson, *The Myth of Political Correctness* (Durham, NC: Duke University Press, 1995) 149.

³⁴ Scanlon, *supra* note 25 at 354.

³⁵ "Legacies are the oldest form of affirmative action, dating from the efforts to exclude Jews from elite colleges in the 1920s, but they have been virtually immune from criticism." Wilson, *supra* note 33 at 149. When the Office of Civil Rights investigated whether Harvard's use of legacy preference discriminated against Asian-American applicants, the office upheld Harvard's use of the legacy preference despite its adverse impact because these preferences were "long-standing and legitimate" (at 151).

³⁶ 78 F.3d 932 (5th Cir. 1995).

affirming a preference for whites. In *Hopwood*, the Fifth Circuit concluded that a university may not consider an individual's race in the application process. However, it did state that a school may consider an applicant's "relationship to school alumni."³⁷

It takes little imagination to understand how the alumni factor serves to benefit only a small subset of the white population, since the University of Texas excluded blacks from consideration for admission until 1950 when the United States Supreme Court decided *Sweatt v. Painter*.³⁸ In 1971, for example, the University of Texas School of Law admitted no black students. Virtually³⁹ every child of every alumni from that year is white yet, in the name of formal equality, we permit an alumni preference while we do not permit a minority racial preference.

"Never have white judges, relying exclusively on the work of white scholars, spoken so authoritatively about the black experience in America," said Professor Leland Ware in criticism of the decision of the Fifth Circuit Court of Appeals in *Hopwood v. State of Texas*.⁴⁰ Professor Ware is correct to note that scholarship by whites played a decisive role in the Fifth Circuit's decision overturning the admissions program at the University of Texas School of Law. Richard Posner's 1974 law review article on the *DeFunis* case⁴¹ was cited three times with approval by the court while a request by the Thurgood Marshall Legal Society and the Black Pre-Law Association to intervene was denied. Posner's work established the proposition, which could not be contradicted by these predominantly black organizations, that: "The use of a racial characteristic to establish a presumption that the individual also possesses other, and socially relevant, characteristics, exemplifies, encourages, and legitimizes the mode of thought and behavior that underlies most prejudice and bigotry in modern America."⁴² Why, then did alumni children also not face such prejudice and bigotry?

³⁷ *Ibid.* at 946.

³⁸ 339 U.S. 629 (1950).

³⁹ Adoption and racial intermarriage cause me to say "virtually."

⁴⁰ L. Ware, "Tales from the Crypt: Does Strict Scrutiny Sound the Death Knell for Affirmative Action in Higher Education?" (1996) 23 J. C. & U. L. 43 at 78.

⁴¹ Posner, *supra* note 10.

⁴² *Supra* note 36 at 946 (citing Posner, *supra* note 10).

Posner's conjecture about prejudice, having been uttered in 1974 without empirical support, became a settled fact more than twenty years later when quoted by the Fifth Circuit. Had the court quoted black scholars, like Randall Kennedy, they instead would have had to deal with the more empirically based claim that "[t]he problem with this view [that affirmative action entrenches racial divisiveness] is that intense white resentment has accompanied every effort to undo racial subordination no matter how careful the attempt to anticipate and mollify the reaction."⁴³ As for the stigma argument, Professor Kennedy responds: "In the end, the uncertain extent to which affirmative action diminishes the accomplishments of blacks must be balanced against the stigmatization that occurs when blacks are virtually absent from important institutions in the society ... This positive result of affirmative action outweighs any stigma that the policy causes."⁴⁴ Why, one must wonder, was Judge Posner's 1974 law review cited as an authority on the effects of affirmative action on our society rather than Professor Kennedy's 1986 law review article that also sought to discuss the issue in "cost-benefit" terms but actually referred to evidence in support of its claims? If Posner is correct, why then, one must wonder, do so many African Americans support affirmative action? Are they just plain stupid? Or, are they as smart as white alumni in recognizing the value of a degree from a well-respected institution, irrespective of the admissions criteria? The importance of the *Hopwood* opinion is that it makes clear what one might only have been able to cynically suggest before — that scholars in the field of law and economics manipulate their purported concern for efficiency and personal autonomy in a way that serves the interests of propertied whites.⁴⁵

Let us pretend for a moment that alumni preferences were held to the same strict scrutiny standard as racial preferences in cases such as *Hopwood*. They must meet a compelling state objective and use means that are narrowly tailored toward the achievement of those state objectives. In the language of law and economics, we should not permit the use of an inefficient criterion — race — as a proxy for another characteristic which we want to measure. We should insist on the use of highly accurate indicators. Employing such reasoning, the Fifth

⁴³ R. Kennedy, "Persuasion and Distrust: A Comment on the Affirmative Action Debate" (1986) 99 Harv. L. Rev. 1327 at 1330.

⁴⁴ *Ibid.* at 1331.

⁴⁵ For further discussion of the unevenness of antidiscrimination law for whites and blacks, men and women, heterosexuals and homosexuals, see R. Colker, "Whores, Fags, Dumb-Ass Women, Surly Blacks, and Competent Heterosexual White Men: The Sexual and Racial Morality Underlying Anti-Discrimination Doctrine" (1995) 7 Yale J.L. & Feminism 195.

Circuit says that it is offensive to use a racial preference as a proxy for another characteristic, such as diversity of viewpoint, because the preference does not meet the narrowly tailored portion of the constitutional standard. We should seek to use criteria that more perfectly match the characteristic we purport to measure.

Under this standard of efficiency, we could not justify the alumni preference if it was being used inefficiently as a proxy for another characteristic such as alumni donations or academic excellence. Alumni donations can be directly measured; no proxy is necessary or efficient. Moreover, giving weight to alumni donations contradicts the stated admissions criteria that is supposed to be “needs-blind.” How can a process be needs-blind while also giving weight to alumni children because of the beneficial effect on fundraising? And, as Michael Lind has noted, if we justify legacy preference on a financial basis then “it might save time and trouble simply to sell diplomas for their children to rich alumni parents through the mail.”⁴⁶

Academic excellence is an often expressed justification for this preference. Harvard Dean of Admissions William Fitzsimmons justified the preference in 1991 by stating that “children of alumni are just smarter; they come from privileged backgrounds and tend to grow up in homes where parents encourage learning.”⁴⁷ The empirical evidence, however, does not support this claim since these admittees, on average, have lower grades and test scores than non-legacy admittees. In addition, the standard measures of excellence (grades and test scores) probably already *overstate* the abilities of this group, because they are likely to have had the economic resources to maximize their performance on these measures. In any event, the equation of alumni children with superior academic excellence (beyond the predictions that would otherwise be made from grades and test scores) is not logical, rational or efficient. The last time Harvard compared the performance of legacy and non-legacy classmates was 1956, when a study “showed Harvard sons hogging the bottom of the grade curve.”⁴⁸

Alternatively, one might argue that the alumni preference is not intended to stand as a proxy for something else; it stands for itself — that a university values the children of its alumni preferentially because of their prior experience as children of alumni at that institution. Those children have something in common — each has grown up in a household in which one of the parents graduated from

⁴⁶ Lind, *supra* note 4 at 331.

⁴⁷ J. Larew, “Why are droves of unqualified, unprepared kids getting into our top colleges? Because their dads are alumni” (1991) 23 *Washington Monthly* 10 at 11.

⁴⁸ *Ibid.*

that institution. It is true that the composition of this group has been socially constructed. One is not inherently, biologically, an alumni child. One becomes an alumni child because of something that one's parent has done either before or after one's birth. One then acquires this trait through one's parent.

But how valuable is a group identity that has possibly only existed for one generation? And does being the child of an alumni really shape identity in any meaningful way?⁴⁹ Can it meet a compelling state-interest standard? It is hard to come up with a justification for alumni preference that comes close to establishing a compelling, or even strong, state interest.⁵⁰ In the language of law and economics, there is no objective basis for this preference.

Justifications for racial affirmative action are, in fact, much stronger. As with the alumni category, it is now commonly acknowledged that race is a socially constructed experience. Anthropologically, racial differences among humans do not genuinely exist. But, historically, we have created meaning that attaches to certain characteristics which we label "race." The social construction of those traits makes them no less real. An institution might value having someone present at a university who grew up identified as a member of a particular racial group. And, unlike the alumni preference, this form of self-identity may have been passed on for many generations and learned at an early age. The views of the members of this group need not be identical for their presence to be valuable or noteworthy. In fact, the *differences* in their viewpoints might help rebut social stereotypes such as "all blacks think alike." But their presence reflects the reality of a genuine social category.

⁴⁹ I have observed that my daughter started to shape her self-identity with reference to her race and gender at about the age of four. For example, when we were taking a walk when she was four years old, she stopped and stared at an African-American male who was delivering the mail. His occupation was obvious both by his activity and his clothing. She then observed, "He can't be a mail carrier because his skin is too dark and he's a boy." Where she got the idea that mail carriers must be white women, I don't know. The important point is that at such a young age she was already shaping her perceptions of others (and most likely herself) according to gender and skin colour. I am quite confident, however, that she had no idea that I attended Harvard University when she made those comments.

⁵⁰ "Unlike affirmative action for under-represented minorities, which seeks to compensate for past wrongs and improve racial equality, legacy preferences serve no noble purpose. This is affirmative action for rich, privileged white students, providing special treatment for students with the most advantages." Wilson, *supra* note 33 at 151.

Posner, when he spoke about the effect on prejudice and bigotry, misunderstood the justification for more than token participation by a racial minority group at an institution. The point is not that all blacks think alike, therefore, we need more blacks to attain diversity in viewpoint. The point is that all blacks do *not* think alike and that fact will not be apparent until there are more than a token number of blacks present at an institution.

Posner is fond of reciting formal equality arguments to overturn affirmative action but it is terribly misleading to suggest that the law of educational admissions is really formally equal. Alumni preference policies are not subject to judicial challenge, despite their disparate impact against racial minorities, because disparate impact theory under the Constitution or Title VI of the *Civil Rights Act* of 1964 requires proof of “intent” to racially discriminate that courts have ruled is not available in such situations. This is why the Office of Civil Rights ruled against the Asian-American complainants in the case against Harvard University. Disparate impact existed, but no direct evidence of intent to exclude Asian Americans was found. The historical evidence that alumni preference was originally created to exclude other immigrant groups — Jews and Catholics — was not considered sufficient evidence of unlawful intent.⁵¹

Racial preference policies for racial minorities, however, are subject to judicial challenge because they purportedly harm whites intentionally. Formal equality results in unequal justice where whites get preferences and blacks do not. Posner’s version of law and economics requires blacks to justify the obvious benefits of more than token diversity (without listening to black scholarship) and permits whites to perpetuate segregation without justification. This is not formal equality but maintenance of a white, propertied social and economic structure.

IV. EMPLOYMENT AFFIRMATIVE ACTION

Individualized employment decisions, like individualized educational admissions decisions, require the specification of criteria for selection. In the employment area, those criteria are often considered to be merit-based unless they involve race-based affirmative action. Yet many of these criteria benefit whites despite the fact that they do not correlate significantly with the capacity to perform the job in question. The criteria that disproportionately benefit whites include word-of-mouth recruiting, high school or college diploma requirements and “general intelligence” tests. When challenged as giving an unfair employment advantage to non-black candidates, these devices are often

⁵¹ See generally Lamb, *supra* note 17.

applauded by law and economics theorists despite little evidence of fairness or efficiency. By contrast, when any system is imposed to give a “plus” to a black candidate for employment, these same theorists criticize the preference by hiding behind concerns for formal equality.

These employment criteria have not been consistent over time. Standardized testing is a twentieth-century phenomenon that began to be commonplace in civil service employment as overt race and gender barriers were eliminated. Such tests are presumed to test an applicant’s ability to perform a job when, in fact, “employment tests provide only limited information regarding an individual’s potential, and even less information as to the comparable abilities of competing candidates.”⁵² As blacks came to have more schooling in the 1970s, a college education became increasingly important,⁵³ although the actual value of a college degree is often presumed rather than empirically established. Whites have the opportunity to benefit from examination and education requirements irrespective of whether those criteria correlate with positive workplace performance. American culture simply presumes such a correlation.

When Epstein defends educational requirements, he does not rely on empirical evidence. Instead, he refers to the “global social perception that education, like good personal habits, is always job related.”⁵⁴ And, as is typical when such assertions are made, he relies on the work of Richard Posner to support his statement.⁵⁵ Posner, in turn, created a presumption of such correlation based on “judicial and professional experience with educational requirements in law enforcement.”⁵⁶ In fact, courts that have examined the empirical evidence concerning educational requirements have not shared Judge Posner’s presumption or conclusion.⁵⁷ As in the *Hopwood* case, a presumption

⁵² Selmi, *supra* note 6 at 1262.

⁵³ “While the average black in 1980 now had twelve years of school, compared to twelve and a half for whites, other differences persisted. As college education became more important, whites maintained a significant advantage. In 1980, 17.1 per cent of whites had college diplomas, as compared to only 8.4 per cent of blacks.” T.A. Cunniff, “The Price of Equal Opportunity: The Efficiency of Title VII After *Hicks*” (1995) 45 Case Western Reserve L. Rev. 507 at 535–36.

⁵⁴ Epstein, *supra* note 9 at 214.

⁵⁵ *Ibid.* at 214, n. 24.

⁵⁶ *Aguilera v. Cook County Police and Corrections Merit Board*, 760 F.2d 844 (7th Cir.1985).

⁵⁷ See *Freeman v. City of Philadelphia*, 751 F. Supp. 509 (E.D. Pa. 1990); *Officers for Justice v. Civil Service Comm’n*, 473 F. Supp. 801 (W.D. Calif. 1979); *Vanguard Justice Society v. Hughes*, 471 F. Supp. 670 (D. Md. 1979).

about the abilities and interests of blacks has been created by Posner's non-empirical scholarship.

A more complete picture of American employment patterns would reveal quite a different story. As Randall Kennedy explains:⁵⁸

[A] long-standing and pervasive feature of our society is the importance of a wide range of nonobjective, nonmeritocratic factors influencing the distribution of opportunity. The significance of personal associations and informal networks is what gives durability and resonance to the adage: "It's not what you know, it's who you know." As Professor Wasserstrom wryly observes, "Would anyone claim that Henry Ford II [was] head of the Ford Motor Company because he [was] the most qualified person for the job?"

One area of employment that is often considered meritocratic, but which is based on a history of exclusionary tactics, is admission to the legal bar. In the early nineteenth century, admissions standards were greatly reduced to permit virtually any eligible man to practice law.⁵⁹ Women and blacks were, of course, formally excluded from the practice of law.⁶⁰ By the late nineteenth century, this practice began to come under attack as articles complained that "horde upon horde" were "connected with the practice of so noble a profession."⁶¹ It was at this time that Christopher Columbus Langdell's views with respect to legal education came to predominate American culture. Two explanations for his influence on the profession are his ties to Harvard and his "scientific" justification for promoting legal education.⁶² In other words, the elitist values of law and economics began to emerge during the age of Darwin and were partly responsible for the development of more formal standards for admissions to the bar. In 1921, and again in 1971, the American Bar Association expressed approval of the bar examination as a criterion for admission to the bar.⁶³ Today, only the state of Wisconsin relies on the diploma privilege for bar admission,

⁵⁸ Kennedy, *supra* note 43 at 1332–33 (quoting Professor Wasserstrom).

⁵⁹ D.R. Hansen, "Do We Need the Bar Examination? A Critical Evaluation of the Justification for the Bar Examination and Proposed Alternatives" (1995) 45 Case Western Reserve L. Rev. 1191 at 1195.

⁶⁰ See generally D.L. Rhode & D. Luban, *Legal Ethics*, 2d ed. (New York: Foundation Press, 1995) at 71. When the American Bar Association unknowingly admitted three black lawyers to membership in 1912, it immediately passed a resolution precluding further associational miscegenation. "The association thereby committed itself to lily-white membership for the next half-century." J.S. Auerbach, *Unequal Justice: Lawyers and Social Change in America* (New York: Oxford University Press, 1976) 65–66.

⁶¹ Hansen, *supra* note 59 at 1197–98.

⁶² *Ibid.* at 1199.

⁶³ *Ibid.* at 1201.

eschewing the bar examination. Hence, reliance on the bar examination as a rigorous tool for admission to the bar is a phenomenon of the late twentieth century. The role of the legal bar to weed out the “hordes” who desired to practice law was an expression of overt class bias. This class bias persists today as “bar associations tend to concentrate on low-status attorneys who have committed improprieties, turning a blind eye to the abuses of name partners at prestigious firms.”⁶⁴

Whereas in the eighteenth and nineteenth centuries formal barriers excluded African Americans and women from the practice of law, today the bar exam disproportionately excludes African Americans from the practice of law.⁶⁵ Although one cannot prove directly that the examination requirement was created to weed out African Americans, circumstantial evidence does support this view. For example, the state of South Carolina eliminated the diploma privilege and instituted the bar examination requirement exactly three years after the first black law school opened in the state.⁶⁶ The “reading the bar” rule was eliminated in 1957, shortly after a black applicant used this method to gain admission.⁶⁷ The state of South Carolina, of course, defends each of these changes on race-neutral grounds⁶⁸ and it may be true that multiple factors (including racism) caused these changes. Similarly, in Philadelphia, applicants for admissions to the bar were photographed and black applicants were seated consecutively in the same row “to facilitate the grading of their examinations.”⁶⁹ The racially conscious grading of the bar examination followed a covertly discriminatory preceptorship and registration system under which not a single black was admitted to the Pennsylvania bar between 1933 and 1943.⁷⁰ Hence, the bar exam (with its racial impact) is of recent vintage in the United States.

The bar exam persists as a selection device, despite its disparate impact, because it is thought to weed out incompetent applicants to the bar. In fact, the evidence suggests that “the bar exam is essentially an achievement test and does not test for what lawyers actually do.”⁷¹ It simply verifies a student’s prior

⁶⁴ Lind, *supra* note 4 at 153.

⁶⁵ Hansen, *supra* note 59 at 1219.

⁶⁶ *Richardson v. McFadden*, 540 F. 2d 744 at 747 (1976).

⁶⁷ *Ibid.* Under the “reading the bar” rule, an applicant apprenticed with a lawyer for a designated period of time and then automatically became a member of the bar.

⁶⁸ *Ibid.* at 748.

⁶⁹ Auerbach, *supra* note 60 at 294.

⁷⁰ *Ibid.* at 128.

⁷¹ Hansen, *supra* note 59 at 1206.

privilege “that have already been tested for at least three times in a law student’s career, namely, during undergraduate training, the LSAT, and law school training.”⁷² Recognizing the correlation between law school grades and passage of the bar examination, the Fourth Circuit stated: “An applicant for the Bar who has graduated from an accredited law school arguably may be said to stand before the Examiners armed with law school grades demonstrating that he possesses sufficient job-related skills. Why, then, any bar examination at all?”⁷³

If the bar exam were required to withstand a rigorous standard of justification, it is doubtful that it would pass muster. Commenting on the selection of a cut-off score for passage of the bar exam, for example, the Fourth Circuit noted: “We tend to agree with appellants’ expert that, if this second system is utilized in the precise manner described by the Bar Examiners, it would be almost a matter of pure luck if the ‘70’ thereby derived corresponded with anybody’s judgment of minimal competency.”⁷⁴ And, when upholding the constitutionality of the bar exam under a very lenient constitutional standard, the Fourth Circuit acknowledged: “That is not to say that such an unprofessional approach leaves us with much confidence in the precise numerical results obtained.”⁷⁵ Despite the apparent inefficiency of the bar examination, it has never been attacked by scholars in the field of law and economics. Instead, one might argue that the persistence of the bar examination is a reflection of the Langdellian trend toward trying to introduce scientific principles into the selection of lawyers, irrespective of the validity of those principles.

In fact, when the law tries to force employers to justify examination or education requirements, scholars in the field of law and economics complain loudly. The case that exemplifies this phenomenon is *Griggs v. Duke Power Co.*,⁷⁶ which was decided under Title VII of the *Civil Rights Act* of 1964, rather than the Constitution. As in the bar examination example, *Griggs* serves as an excellent demonstration of how educational and testing requirements change as overt entry barriers to blacks are eliminated. In *Griggs*, the employer changed the rules for promotion from labourer into higher-level jobs the day that Title VII went into effect (2 July 1965). For the first time, employees were required to pass a high school equivalency program in order to be promoted. Such

⁷² *Ibid.*

⁷³ *Supra* note 66 at 749, n. 11.

⁷⁴ *Ibid.* at 750.

⁷⁵ *Ibid.* at 750, n. 14.

⁷⁶ 401 U.S. 424 (1971).

performance could only be established by achieving a proscribed score on the Wunderlic general intelligence test or the Bennett AA general mechanical test.

The United States Supreme Court concluded in the *Griggs* case that when such devices produce disparate impact against blacks, that they must be justified by business necessity.⁷⁷ Because employers have been unable to construct the evidence of test validity required under this standard, “the routine use of the Wunderlic and Bennett tests, condemned in *Griggs*, is today a thing of the past.”⁷⁸ One might have expected law and economics scholars to applaud this result as it encourages employers to choose efficient, job-related selection devices rather than rely on presumptions about correlations between test scores and job performance. Instead, this line of cases has been roundly criticized as making it too expensive for employers to use testing and educational requirements that will withstand judicial scrutiny.

Richard Epstein has led the charge against requiring validation of such tests, presuming that testing serves a valuable purpose. His source for that proposition is the industry that creates and promotes these tests.⁷⁹

Notwithstanding their embattled status under Title VII, there is a widespread belief on the part of those who design and use general employment tests that these provide accurate and essential predictions of job success for individual workers and should therefore be regarded as an important, indeed an indispensable, aid in hiring and promotion decisions.

His reasoning is circular. He insists that we should permit educational and testing requirements to give young people an incentive to obtain more education.⁸⁰ But, of course, we could also caution young people from thinking that increased education always results in increased employment opportunities. They may want to consider other factors in seeking higher education such as the intrinsic satisfaction from such education or the differing types of jobs that may become available. Young people who choose to pursue a doctoral degree in the humanities must recognize that they may have had a higher earning potential through an inexpensive certificate program in the health-care field yet

⁷⁷ This is a higher standard than was employed in the Fourth Circuit’s bar examination case. See *Richardson, supra* note 66 at 748: “Under the Equal Protection Clause of the Fourteenth Amendment the issue is still whether the examination is job related, albeit a less demanding inquiry [than under Title VII].”

⁷⁸ Epstein, *supra* note 9 at 215.

⁷⁹ *Ibid.* at 236.

⁸⁰ “[B]y reducing the returns on education, it removes one of the incentives that young people have to expend money, time, and effort on acquiring an education.” *Ibid.* at 215.

presumably enter the field for its intrinsic value. Carried to its logical conclusion, however, Epstein's argument would permit employers to virtually bar any individual from low-level employment who could not obtain high test scores or a college diploma irrespective of his or her aptitude for that particular job. For myself, an employer would make a terrible mistake in presuming that I was competent to perform adequately at a mechanical job, such as was at stake in the *Griggs* case, based on my ability to perform well on a general-intelligence test.

Another employment device that often harms the employment opportunities of blacks is word-of-mouth recruiting.⁸¹ The American labour force is heavily segregated along racial lines. Because of segregation in friendship and housing patterns, word-of-mouth recruiting therefore results in perpetuation of those segregated patterns at the workplace. As the Fifth Circuit concluded in 1973, word-of-mouth recruiting "operates as a 'built-in-headwind' to blacks" at a workforce in which only 7.2 per cent of the employees are black.⁸² Similarly, a 1994 University of Minnesota study of poor youths in Boston found that blacks in the sample had more schooling but lower wages than whites, because whites had better employment contacts: "Whites who found jobs through relatives earned 38 per cent more than the blacks who did. But for those who got jobs without contacts, the white-black earning gap was only 5 per cent."⁸³ Word-of-mouth recruiting therefore affects both employability and wages.

Word-of-mouth recruiting has been upheld as "efficient" even when the evidence demonstrates that it would have been equally efficient to notify the state unemployment service of a job opening. Then, however, the applicants would have been disproportionately black given the disproportionately high rate of unemployment in the black community. In other words, unemployment by a particular racial group is easily perpetuated if word-of-mouth recruiting rather than notification of the state unemployment office is the primary method of recruitment for an entry level job: "[T]he presence of unconscious discrimination may prevent a competing firm from recognizing the opportunity presented by the

⁸¹ For a discussion of word-of-mouth recruiting at Bethlehem Steel, see M. Johnson, "Affirmative Action Isn't the Only Example of Group Privileges" *The Atlanta Constitution* (31 March 1996). In this example, the employer gave first preference to the children of employees and justified the preference by stating: "The son or daughter, knowing the father is present, are going to do the best they can ... That's an asset for the company."

⁸² *United States v. Georgia Power*, 474 F.2d 906, 925 (5th Cir. 1973).

⁸³ J. Tilove, "White "Legacies" vs. Affirmative Action" *The Arizona Republic* (9 April 1995).

discriminated class of employees, further constraining the effect of market competition as a means of eradicating employment discrimination.”⁸⁴ An employer may choose to pursue an application process that minimizes its costs, but which process will it choose? Will it choose to notify the state unemployment office or will it encourage employees to tell their friends and relatives of employment openings? Both mechanisms are cheap and thereby efficient. The first process, however, will usually result in large numbers of minority applicants and the second (in an already segregated workplace) will usually not.⁸⁵ A search for efficiency, combined with conscious or unconscious racism, may result in the choice of word-of-mouth recruitment. The Seventh Circuit has ratified word-of-mouth recruitment as consistent with the principles of efficiency and thereby presumed that it is also consistent with the principle of nondiscrimination. The argument by the EEOC in these cases that state employment services were not, but should have been, used for employment advertising was ignored. There is no reason to equate efficiency with nondiscrimination. Multiple efficient sources for employees exist. Why, one should ask, was a particular device chosen?

The first word-of-mouth recruitment case to be decided by the Seventh Circuit is *EEOC v. Chicago Miniature Lamp Works*.⁸⁶ Chicago Miniature relied primarily on word-of-mouth recruiting for the job classification in question — entry-level factory jobs. This word-of-mouth recruiting resulted in blacks, who have historically been underrepresented in Chicago Miniature’s workforce, continuing to be underrepresented in its applicant pool. By contrast, this system worked to the advantage of Hispanics who were well represented at the workplace and, accordingly, the applicant pool. The trial court found for the plaintiffs in the disparate impact claim.⁸⁷ On appeal, the Seventh Circuit overruled the district court judge, finding that the factory was located in a Hispanic and Asian part of Chicago where it was unrealistic to expect blacks to desire to work. It blamed the low application rates for blacks on lack of interest in such jobs, rather than on any affirmative actions on the part of the employer.

⁸⁴ Selmi, *supra* note 6 at 1281.

⁸⁵ Hence, as early as 1968, Professor Blumrosen, who has also worked for the EEOC, suggested that “a requirement outside of the South that all employers utilize the employment service with respect to all jobs will benefit Negro job seekers to a proportionally greater extent than white, and should be imposed.” A.W. Blumrosen, “The Duty of Fair Recruitment Under the Civil Rights Act of 1964” (1968) 22 Rutgers L. Rev. 465 at 481.

⁸⁶ 947 F.2d 292 (7th Cir. 1991).

⁸⁷ *EEOC v. Chicago Miniature Lamp Works*, 622 F. Supp. 1281 (N.D. Ill. 1985).

In the court's words: "Miniature is not liable when it passively relies on the natural flow of applicants for its entry-level positions."⁸⁸

Eight years later, the *Miniature* holding was transformed into the conclusion that word-of-mouth recruitment is inherently "efficient" and "cheap" in *EEOC v. Consolidated Service Systems*,⁸⁹ a race-discrimination suit brought against a cleaning company owned by an immigrant from Korea.⁹⁰ As the defendant admitted, he relied almost exclusively on word-of-mouth recruiting to hire employees for his company, which employed unskilled employees at minimum wage. Nearly all the employees of the company were Korean American, despite the fact that the company was situated in the majority-black city of Chicago. Writing for the Seventh Circuit Court of Appeals, Posner J. affirmed the district court's decision dismissing the suit. Judge Posner was apparently heavily persuaded by the efficiency of Consolidated's hiring practices. Not less than four times, Posner J. recites that Consolidated picked the cheapest and most efficient method of hiring through word-of-mouth recruitment. As Posner J. says: "It is clearly, as we have been at pains to emphasize, the cheapest and most efficient method of recruitment, notwithstanding its discriminatory impact."⁹¹ Judge Posner's nonempirical assertion about efficiency entirely overlooked the efficiency of notifying the state unemployment office of job openings.

Judge Posner's nonempirical assertions were recently repeated in a dissenting opinion by Seventh Circuit Judge Manion in *EEOC v. O & G Spring and Wire Forms Specialty*.⁹² In this case, the district court found, and the court of appeals affirmed, that the defendant had failed to offer justification for its pattern of *zero* blacks hired for a six-year period preceding the filing of a charge of race discrimination against O & G. Judge Manion criticized the EEOC's overwhelming statistical case with the assertion that "English-speaking job seekers may not want to work in an environment of predominantly foreign languages."⁹³ As in the *Chicago Miniature Lamp Works* case, he concluded that lack of interest on the part of blacks in the area was more likely to explain the low rate of black employment than an act of discrimination by the employer. The

⁸⁸ *Supra* note 86 at 305.

⁸⁹ *Supra* note 11.

⁹⁰ As with Posner's unsubstantiated claim in 1974 about the effects of affirmative action on blacks, an unsubstantiated claim about the effect of word-of-mouth recruiting became true when recited again eight years later.

⁹¹ *Supra* note 11 at 236.

⁹² 38 F.3d 872 (7th Cir. 1994).

⁹³ *Ibid.* at 888.

only evidence about the interest of blacks in such employment contradicts Manion J.'s assertion. After a complaint of discrimination was filed with the EEOC, there was a dramatic increase in applications by African Americans at the company.⁹⁴ Did African Americans all of a sudden become interested in working alongside non-English-speaking employees? As with the affirmative-action cases, Manion J. makes assumptions about blacks that one would not make about whites. This case reflected an employment setting in which Polish Americans and Spanish-speaking Americans worked side-by-side. Those two groups of whites did not share a common language but appeared to be comfortable with each other in the workplace. Yet Manion J. assumed that African Americans, who spoke yet a different language, would not be comfortable working alongside these two groups.

Manion also overlooked the arguments available concerning economic rationality in this case. Unlike the *Consolidated Service* case, O & G was located in the heart of a predominantly black neighbourhood. It was therefore economically rational for blacks to seek employment at O & G. Since Manion J. could make claim to no argument of economic rationality, he therefore invented national origin or language animus on the part of African Americans, with no testimony to support such animus in the record. It is far easier to blame unemployed blacks for their low employment record than to cast blame on O & G management.

Judge Manion's theme strongly reflects the values of efficiency and objectivity found in law and economics. To bolster his efficiency argument, he quotes Posner J.'s opinion in *Consolidated Service*: "It would be a bitter irony if the federal agency dedicated to enforcing the antidiscrimination laws succeeded in using those laws to kick these people off the ladder by compelling them to institute costly systems of hiring."⁹⁵ Word-of-mouth recruiting should be tolerated because it is the cheapest, even if it knowingly results in a loss of employment opportunities for African Americans.

Applying the principle of objectivity, he contends that there is no way to argue why one subgroup deserves preferential treatment over another subgroup: "By not taking the language factor into consideration the EEOC has in effect put a quota on one vulnerable group at the expense of another."⁹⁶ But the "language

⁹⁴ *EEOC v. O & G Spring and Wire Forms Speciality Co.*, 705 F. Supp. 400 at 403 (N.D. Ill. 1988).

⁹⁵ *Supra* note 92 at 893.

⁹⁶ *Ibid.* at 892.

factor” was Manion J.’s invention because the evidence showed that it did not deter the employment of two groups of whites at that workplace.

The clever move in Manion J.’s opinion is to twist a requirement for equal treatment — giving blacks and others an equal opportunity to hear about openings and be hired at O & G — into a “quota” that purportedly pits “one vulnerable group” against another.⁹⁷ The logic is that affirmative action is inefficient because it reflects non-merit-based preferences for blacks, but word-of-mouth recruitment for non-blacks is permissible because it is efficient despite its granting non-merit-based preferences for non-blacks. The measure of efficiency is the extent of black employment. When rates of black employment gets higher, we must attribute it to “quota madness”⁹⁸ rather than the removal of barriers toward advancement. When white employment declines, we must attribute it to affirmative action. Black employment is inefficient whereas white employment is efficient.

V. CONCLUSION

It is not typical for scholars to examine diverse areas of the law such as alumni preference in admissions at educational institutions and word-of-mouth recruitment in employment settings. Such an examination, however, allows us to acquire a snapshot that might otherwise escape us. We can uncover values that might otherwise remain hidden.

Alumni preferences for white children and word-of-mouth recruiting for white employees are practices that help perpetuate class advantage for a subgroup of whites in our society. Despite the inefficiency of disrupting the merit principle by limiting the applicant pool or creating a two-tiered definition of merit, these practices are upheld as praiseworthy. When blacks try to change the rules so that they, too, can have an opportunity to gain access to education or employment, they are told by whites that they are perpetuating stereotypes and stigma through affirmative action or “quota madness.” Maybe it’s time for whites to examine their own sources of privileged affirmative action — from private schools to safe neighbourhoods to good nutrition — and ask whether their success is really based solely on “merit.” For law and economics scholars to truly apply colour blind principles, they must locate and describe white privilege, not simply the modest attempts by blacks to attempt to even the score.

⁹⁷ *Ibid.* at 892.

⁹⁸ See J. Bovard, “The Latest EEOC Quota Madness” *The Wall Street Journal* (27 April 1995) A14.

Canada seems to have escaped many of the phenomena that describe the hiring and educational practices in the United States. Testing for education or employment is not as widespread in Canada as it is in the United States. Affirmative action is constitutionally protected. Canadian universities are generally public institutions, which do not have the money-conscious perspective of elite, private American universities. A formal bar exam does not serve as a barrier to admission to the Canadian bar; instead, a more practice-oriented process is used to determine who is qualified to practice law. In other words, law and economics does not seem to be winning in Canada. And, for the sake of its national commitment to multiculturalism, I hope it does not.