Civil Rights

France Says *Non* to Affirmative Action: Will the U.S. Do the Same?

*By Elizabeth K. Dorminey**

After devoting a half-century to devising (new) justifications for differential treatment of citizens on the basis of race, the Supreme Court appears, at last, to be edging towards a plainer meaning of the Constitution's Equal Protection Clause: one that would prohibit the practice. At the same time, on the other side of the Atlantic, French President Nicolas Sarkozy commissioned a study group to determine whether France's Constitution could (or should) be altered to permit "positive discrimination" (as "affirmative action" is rendered in French) to address that country's social inequities. Simone Veil, a highly respected member of the Académie Française, former President of the European Parliament, and member of France's Constitutional Council, was selected for this task, and in December 2008 declared that any such change would be fundamentally incompatible with France's core values of *liberté, égalité,* and *fraternité.* With its recent decision in a case brought by white firefighters in New Haven, Connecticut, who alleged that they were denied promotions after passing a test that was scrapped because very few minority candidates achieved passing grades, the Supreme Court has moved a step closer—but not all the way—to declaring that differential treatment on the basis of race is unconstitutional.

These parallel developments afford an opportunity for a comparative look at French and U.S. affirmative action and anti-discrimination laws. This article suggests that in both nations, whose traditions and constitutions have much in common, the principle of equality before the law is paramount and should guide both judges and legislators.

The U.S. Declaration of Independence (1776) asserts that "all men are created equal, [and] that they are endowed by their Creator with certain unalienable Rights, [] among these [] Life, Liberty, and the pursuit of Happiness." The Fourteenth Amendment to the U.S. Constitution (1868) provides that "No State shall... deny to any person within its jurisdiction the equal protection of the laws." Written only a few years after the Declaration of Independence, France's Declaration of the Rights of Man and of Citizens (1793) provides in Article VI: "All the citizens, being equal in [the eyes of the law], are equally admissible to all public dignities, places, and employments, according to their capacity and without distinction other than that of their virtues and of their talents." The Preamble to the Constitution of the Fifth Republic (1946) declares in Article I that "the French republic is indivisible, secular, democratic, and social. It assures equality before the law of all citizens without distinction based on origin, race, or religion, and respects all creeds. Its organization is decentralized. The law favors equal access by men and women in all matters relating to voting and election, and to professional and social opportunities." (Unofficial translation.) The similarities are undeniable.

On this side of the Atlantic, the Supreme Court has wrestled with the problems of equal protection and affirmative action, with varying degrees of success, for a half-century France has confronted the problem more recently, and Mme Veil's committee concluded that, given the country's law, history, and traditions, and the way affirmative action has evolved in other countries, notably the United States, differential treatment cannot be reconciled with the principles of "*liberté, egalité, et fraternité*."

Many countries have experimented with affirmative action programs, particularly in public education and government contracting, but their fairness and effectiveness have been hotly debated. In *Affirmative Action around the World: An Empirical Study* (2004), the American economist Thomas Sowell analyzed affirmative action programs in India, Malaysia, Sri Lanka, Nigeria, and the United States, and concluded that affirmative action programs rarely benefit those they are intended to help. Instead, they tend to exacerbate tensions between preferred and non-preferred groups, often with unexpected, even disastrous results, conferring additional benefits mainly on the already privileged elite of the targeted population.

In the United States, affirmative action programs designed to achieve racial diversity in education have been challenged both in the courts and at the polls.[1] The Supreme Court recently invalidated race-based assignments to public elementary and secondary schools in Seattle on constitutional grounds, concluding that assigning pupils to schools based on their race was incompatible with the Constitution's principle of equal treatment, whatever the societal benefits of racial integration.[2]

The legality of affirmative action programs in the university setting is less clear. In some recent cases, academically qualified white students, denied admission to university programs in favor of less academically qualified minority students, have challenged affirmative action programs on equal protection grounds. A federal court in Texas invalidated that state's minority preference program, but courts in other states, and the Supreme Court, have held that the goal of achieving a diverse student body can justify state-sponsored discrimination.[3] Although some states have enacted race-neutral and sex-neutral admission criteria—adopting, for example, admissions criteria linked to geography or class rank—the Supreme Court most recently held that states may still use race-based preferences in admissions at the university level, without violating the Equal Protection Clause, so long as there is what the Court regards as a good reason for practicing such discrimination.[4]

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There also have been vigorous court challenges to another category of affirmative action—set-asides for minority contractors bidding on public works projects—again with mixed results.[5] Preferences in these programs are justified in much the same manner as education. The government has claimed that preferential treatment for some minority groups is necessary to promote social and economic progress, as well as to erase the effects of past discrimination, and the Court has allowed them to do so as long as the program passes "strict scrutiny." Yet, frequently, as Sowell found in his study, those of the underrepresented minority groups who are granted the benefits of these set-aside programs are wealthy builders and contractors who already enjoy considerable economic success, much in the same manner as race-based preferences in higher education often help the sons and daughters of affluent minority-group members gain admission over less privileged, nonminority applicants with similar credentials. In the United States and in other countries, such programs have led to charges of "window dressing," where "minority ownership" is a veneer that results in only a few, successful members of the minority class actually reaping the benefits of the "set-aside" contracts. Thus, as Sowell notes, these affirmative action programs can exacerbate existing hostility between members of the preferred and non-preferred classes and lead everyone to question the achievements of every member of the preferred class.

France, of course, has both a different constitution and a different history, but as a diverse society faces many of the same problems of high levels of crime and social unrest among minorities who are disproportionately unemployed and undereducated. In 2004 President Nicolas Sarkozy proposed revising the Preamble to the French Constitution to permit members of certain minorities to gain access to opportunities in education and employment on a preferential basis. To study this proposal, President Sarkozy commissioned Mme Veil to assemble a committee and prepare a report. Her answer, released in December 2008, was a resounding "no."[6]

Its mission was to consider the creation of constitutional rights to facilitate solutions to complex social problems, and to that end, the committee studied affirmative action policies from many countries, including the United States, heard testimony from more than two dozen individuals, and made a searching examination of French law and policy, as well as an examination of other countries' laws and policies. In the end, it was France's distinct history, dating back to the Declaration of the Rights of Man and of Citizens (1793) that was decisive. Mme Veil's committee concluded that preferences simply cannot be reconciled with the overriding principle of equality that is central to the French state. The committee advanced four broad reasons for its conclusions.

First, laws that treat citizens differently based on their racial or ethnic background are only justified in countries where such groups have been victims of de jure discrimination in the past. For example, in the United States, slavery during much of the 19th century and segregation during much of the 20th were enforced by law. France has no history of state-sanctioned, race-based discrimination. This appears to be the principal reason that Veil's committee found affirmative action to be arguably justifiable in countries like the United States and South Africa but unjustifiable in France.

Second, the committee found that it would be paradoxical, to say the least, to adopt affirmative action programs at a time when, in even those countries like the United States, where there is a history of *de jure* discrimination, such measures are falling out of favor. The Veil Report cited the obvious tension between affirmative action and the 14th Amendment of the United States' Constitution noted in the *Bakke* decision,[7] and quoted with approval Chief Justice Roberts' comment in the *Seattle School District* case that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[8]

Third, there are definitional difficulties. "Race" and "origins" are hard to define, and even harder to assign, particularly in a country like France where there has been a high degree of intermarriage and very strong resistance to the idea of documenting or collecting statistical data based on race, religion, and ethnicity. This would pose substantial practical obstacles to the implementation of any "positive discrimination" program.

Fourth, as Sowell noted in his study, the Veil committee found that preferences for certain groups would impair the ability of all French citizens to live together in harmony because they would breed resentment between favored and non-favored communities.

Having been charged with considering the creation of new constitutional rights to facilitate preference programs to redress the challenging social problems of unemployment and undereducation in minority communities and promoting diversity, the committee concluded that these problems could be resolved within the existing constitutional framework and no change was warranted. This the committee distilled to three ideas.

First, the committee found that the principal shortcoming of the current set of constitutional "tools" to redress these problems was not that they were inadequate, but that they were underutilized. In its current form the French Constitution protects a broad array of rights, offering arguably the greatest protection of rights available to citizens of any western nation.[9] Upon this base the Constitutional Council, France's highest juridical body, has developed a jurisprudence that has significantly enriched these fundamental rights. The risk of undue expansion of rights through "judge-made law" has always been checked by the corrective power of Parliament. The committee considered its report to be a step in the direction of making existing rights better known to the populace. Moreover, the French Constitution is not the only protector of basic rights. An ensemble of international and European Community laws, conventions, and treaties offer additional protection, and French judges, by virtue of Article 55 of the Constitution, may take these into account, and may refuse to enforce a domestic law if it is found to be contrary to international norms.

Second, the committee considered that any reform of the Preamble to the Constitution should have widespread popular support, reflecting a general consensus of public opinion, and that was lacking. The importance of such consensus was recognized in President Sarkozy's charge to the committee. The

committee answered this charge by consulting diverse sources encompassing many differing philosophies and backgrounds. No consensus on the desirability of a constitutional amendment promoting diversity emerged.

Third, the committee concluded that leaving the Constitution alone would not preclude salutary social change. In fact, the opposite is true. There is a wealth of constitutional resources presently available to bring about the desired outcomes, without tampering with the constitution. To that end, the Veil Report recommended renewed emphasis on the enforcement of laws that prohibit discriminatory treatment. If "positive discrimination" is prohibited, negative discrimination also is proscribed. A country in which rights are not guaranteed by law may as well not have any constitution at all. The path to real equality lies through the constitution's guarantee of equal treatment for all.

In closing the committee stressed that there was nothing illegitimate about its mission. Quite the opposite: their study identified better ways than a change to the Preamble to bring about the desired result. The Veil Report enumerates not impossibility, but myriad possibilities for progress through the application of existing law; specifically, laws that prohibit and provide redress for acts of discrimination.

Policies in the United States designed to combat discrimination—to ensure that individuals are not treated less well than other similarly situated individuals because of their race, age, gender, sexual orientation, disability, religion, or national origin—have enjoyed broad support. Title VII of the Civil Rights Act of 1964 explicitly prohibits discrimination in employment, and established the Equal Employment Opportunity Commission (EEOC) to handle individuals' complaints of discrimination against their employers.[10] The EEOC provides a forum for the filing, investigation, mediation, and (sometimes) resolution of specific discrimination claims. Prior to actually filing a discrimination lawsuit, a party must comply with the EEOC's administrative procedures. The EEOC is authorized to file suit on behalf of an individual, but does so only in a very small proportion of the cases it investigates. Most discrimination cases that end up in federal court are brought by individuals, singly or in groups, rather than by the government. However, the plaintiffs in these lawsuits are real people, with specific and concrete claims that they have been discriminated against on the basis of some prohibited factor. Unlike the broad demographic groups to whom the benefits of affirmative action are directed, these claimants are not anonymous members of a class that the government has determined to be entitled to preferential treatment based on historical mistreatment, but individuals with current, real grievances who seek redress.

As Mme Veil's committee noted, the European Union has directed its member states to adopt programs to combat discrimination. In compliance with that directive, France has established an entity called the High Authority to Combat Discrimination and For Equality (*Haute Autorité de Lutte Contre les Discriminations et Pour l'Égalité*, or HALDE).[11] Established in 2004, this organization could fulfill many of the same functions that the EEOC has in the United States, by providing a forum for the adjustment of individual complaints of discrimination, and could also serve an important educational function: to inform employers and landlords of their responsibilities, as well as to educate individuals about their rights. Investing this organization with the resources necessary to carry out its mission could produce lasting benefits to society while remedying individual wrongs and would certainly be consistent with the Veil Report's admonition to make better use of available law.

In the U.S., the EEOC is authorized to seek money damages, up to a cap of $300,000, for violations. If the EEOC is not successful in resolving a claim, the aggrieved individual is authorized to file a lawsuit to seek redress. The financial liability not only of potential damages, but also the cost of defense, serves as a powerful deterrent. The U.S. has earned an unfortunate reputation as an excessively litigious society, but the threat of severe financial penalties can influence corporate behavior in positive ways. On a practical level, the EEOC is largely a self-funded program that does not depend exclusively upon government allocations to survive, but instead counts on individual litigants acting as "private attorney-generals" to enforce the law. In contrast to the EEOC, the HALDE is a relative newcomer, having been established only in 2004, in a country where litigation rarely produces the magnitude of money damages that have made lawsuits such a popular pastime in the United States. As with the EEOC, anyone who believes they are the victim of discrimination may file a written complaint with the HALDE, but its emphasis so far is on education and mediation rather than litigation, and monetary awards (so far) are modest and infrequent.

Like the EEOC, the HALDE can only address forms of discrimination that are prohibited by law, not all manifestations of bias or unfairness. The program is still in its infancy. In its fourth annual report, published in May 2009, the HALDE reported that in 2008 it processed 917 complaints concerning discrimination in employment and housing: 25% percent alleged discrimination based on race, 17% alleged disability discrimination, and 8% alleged age discrimination, with other complaints concerning family status and union activity making up the remainder.[12] In contrast, the EEOC reported that in FY 2008 it received 95,402 complaints.[13] The scope of the HALDE is also being tested. In May 2009 the mayor of Courneuve, a western suburb of Paris, filed a complaint with the HALDE on behalf of his city against President Sarkozy, alleging that the President and government discriminated against his city, and has encouraged other municipalities to join in the action.[14] It does not appear that the architects of this program contemplated its use by municipalities against the State. It remains to be seen how the Courneuve action will proceed, and how effective the HALDE will prove as a remedy for discrimination in France.

The U.S. Supreme Court recently had another opportunity to explore the fine points of race discrimination in employment. This term the Court decided *Ricci v. DeStefano*,[15] reversing the Second Circuit's decision that had affirmed summary judgment for the city in a case brought by 18 firefighters in New Haven, Connecticut, who alleged that the city violated Title VII and the Equal Protection Clause of the Constitution, when it refused to make any promotions following administration of a promotions exam on which only one minority candidate received a passing grade.

The New Haven case shines a spotlight on employment practices and some intensely political aspects of the affirmative action debate. To avoid the appearance of bias, New Haven, at considerable expense, had contracted with a professional test-writing firm to prepare and administer a race-neutral promotions exam to its firefighters. In 2003, 118 applicants took the test for promotion to the ranks of captain and lieutenant: 41 candidates (25 white, 8 black, and 8 Hispanic) took the captain test, and 77 applicants (43 white, 19 black, and 15 Hispanic) took the lieutenant test. When the examinations were scored, no blacks, and at most 2 Hispanics, achieved scores that made them eligible for promotion to captain; and no blacks or Hispanics scored well enough to be eligible for promotion to lieutenant. Expressing concern that it might face an employment discrimination lawsuit from nonwhite candidates if the results of the exam were certified, the city refused to certify the results and no promotions at all were made.

The city successfully avoided suit by nonwhite applicants; the white applicants sued instead. The district court granted summary judgment for the defendant city, finding that the political motivation to avoid making promotions that might appear to be racially biased did not, as a matter of law, constitute racial discrimination, and thus that the plaintiffs had failed to marshal sufficient evidence to prevail on their Title VII claim. A panel of the Second Circuit Court of Appeals initially granted a summary affirmance. The firefighters moved for rehearing en banc, which gave rise to a contentious order in which the requested rehearing was denied, over strident dissents, by the majority. The panel withdrew its summary affirmance and adopted the district court's decision as its own.

The Supreme Court, in a 5-4 split, found in favor of the firefighters. Justice Kennedy, writing for the majority, concluded that all the evidence pointed to the conclusion that the city had thrown out the test results because the higher scoring candidates were white. This was an express, race-based decision, and decisions based on race, the Court held, are only justifiable where there is a "strong basis in evidence" that impermissible disparate impact amounts to an illegitimate racial preference:

> [U]nder Title VII, before an employer can engage in intentional discrimination for the asserted purpose of avoiding or remedying an unintentional disparate impact, the employer must have a strong basis in evidence to believe it will be subject to disparate-impact liability if it fails to take the race-conscious, discriminatory action.[16]

In briefs to the Supreme Court, the city had questioned the race neutrality of the promotion tests, suggesting that this justified rejecting the results. This issue had not been raised before the district court or the Second Circuit.[17] Justice Kennedy, writing for the five-justice majority, and Justice Alito, in a concurring opinion joined by Justices Scalia and Thomas, soundly rejected this argument, pointing to voluminous evidence in the record that showed that the city had spent $100,000 on a consultant to prepare a scrupulously race-neutral written exam, and had engaged independent assessors from outside Connecticut, two-thirds of whom were minority group members, to serve as assessors for the oral portion of the exam. The majority found that the city's decision to reject the promotions test results was motivated by the race of those who passed, and that this violated Title VII's prohibition of racial discrimination.

In a typically concise and pungent separate concurrence, Justice Scalia noted that *Ricci* leaves for another day the inevitable battle between Title VII's prohibition on disparate treatment and its approval of remedies for "disparate impact."[18] "Title VII's disparate impact provisions place a racial thumb on the scales, often requiring employers to evaluate the racial outcomes of their policies, and to make decisions based on (because of) those racial outcomes."[19] Justice Scalia concludes: "[T]he war between disparate impact and equal protection will be waged sooner or later, and it behooves us to begin thinking about how—and on what terms—to make peace between them."[20]

In a dissent joined by Justices Stevens, Souter, and Breyer, Justice Ginsburg says that the majority "pretends" that the city threw out the test results based on the successful test-takers' race, and fails to take account of a history of racial discrimination in its own and other cities around the country.[21] She noted that the plaintiffs in *Ricci* "attract this Court's sympathy" (to which Justice Alito, in his concurrence, replied: "'Sympathy' is not what petitioners have a right to demand. What they have a right to demand is evenhanded enforcement of the law....").[22] Justice Ginsburg focused on alleged flaws in the test and on history, and reaffirmed her view of the legitimate role of disparate impact in righting past wrongs.[23] Indeed, her point is well-taken if one agrees that the Court, in the name of justice, may legitimately subordinate process to results. Not everyone agrees with that, and the polarizing tension between these two camps is what drives 5-4 splits and confirmation battles.

On January 20, 2009 Barack Obama became the first African-American President of the United States. Does this mean that we have achieved a color-blind society? That would be nice, but it is probably not true. Was he selected because we have already had 43 white presidents and it was time for a black man to get the job? Certainly not. Did he benefit from race-based affirmative action in education and employment? We do not know, and likely, never will, but the mere existence of such programs will always give his detractors an opportunity to cast doubt on his accomplishments. Preferences cause problems. This lingering doubt and distrust make it hard to achieve the ideal society envisioned by Dr. Martin Luther King, Jr., where people are "judged on the content of their character, not the color of their skin."

On the other hand, it is indisputable that President Obama's election is the direct product of laws that prohibit discrimination against a person on the basis of race. In the segregated South, state laws preventing blacks from voting, attending schools, shopping at stores, visiting restaurants and hotels, and using public transportation on an equal footing with whites persisted well into the 1960s. Such laws were fundamentally at odds with the plain meaning of the Equal Protection Clause, but somehow courts had worked a way around those words. Ironically, it was a Supreme Court decision that authorized segregation in the first place, holding that "separate but equal" was a legitimate reason for the State to treat people differently on the basis of their race.[24]

In *Grutter* Justice O'Connor found the law school's race-conscious admission program to be sufficiently narrowly tailored

to serve the compelling state interest of attaining a critical mass of underrepresented minority students. However, she said that the Court was mindful that a

> core purpose of the Fourteenth Amendment was to do away with all... governmentally imposed discrimination based on race…. Accordingly, race-conscious admissions policies must be limited in time…. We see no reason to exempt race-conscious admissions programs from the requirement that all governmental use of race must have a logical end point.[25]

Justice O'Connor then continued:

> We take the Law School at its word that it would "like nothing better than to find a race-neutral admissions formula" and will terminate its race-conscious admissions program as soon as practicable. It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education. Since that time, the number of minority applicants with high grades and test scores has indeed increased…. We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.[26]

Twenty five years separated *Bakke* and *Grutter*, and Justice O'Connor seems to be suggesting that another 25 years of preferences may do the trick. The Supreme Court's decision in *Northwest Austin Mun. Utility Dist. No. One v. Holder*[27] to allow the Voting Rights Act, reauthorized in 2006 for another 25 years, certainly supports this timetable, though the Court's opinion foreshadows the war between rights and remedies in the context of voting rights as well.

With the Veil Report, France declared that equal protection trumps remedial action, and thus avoided the conflict that has simmered, and occasionally boiled, in the U.S. for a century. A slim majority in *Ricci* adopted a more stringent test—"a strong basis in evidence"—to justify race-conscious remedies, but, as Justice Scalia observes, this is not a resolution: "[T]he war between disparate impact and equal protection will be waged sooner or later, and it behooves us to begin thinking about how—and on what terms—to make peace between them."[28] The American Civil War of the 19th century was a protracted, bloody, and emotional affair. The Civil Rights War of the 20th century, conducted in large part to remedy the effects of the 19th century conflict, continues into the 21st. It remains to be seen when, and on what terms, it will end.

Endnotes

1 Voters in four states—California, Washington, Michigan, and most recently Nebraska—have passed ballot initiatives to prohibit their state governments from engaging in any form of affirmative action. In Colorado in 2008, a similar ballot initiative lost by a very narrow margin.

2 Parents Involved in Community Schools v. Seattle School District 1, 127 S.Ct. 2738 (2007).(Roberts, C.J.) (parents brought action against school district challenging, under Equal Protection Clause, student assignment plan that relied on racial classification to allocate slots in oversubscribed high schools; *held,* allegedly compelling interest of diversity in higher education could not justify districts' use of racial classifications in student assignment plans, *abrogating Comfort v. Lynn School Comm.,* 418 F.3d 1 (1st Cir. 2005); and districts failed to show that use of racial classifications in their student assignment plans was necessary to achieve their stated goal of racial diversity).

3 *Cf.* Hopwood v. Texas, 78 F.3d 932 (C.A.5 1996) (Hopwood I) (holding that diversity is not a compelling state interest); *with* Smith v. University of Wash. Law School, 233 F.3d 1188 (9th Cir. 2000) (holding that it is); *and* Doe v. Kamehameha Schools/Bernice Pauahi Bishop Estate, 470 F.3d 827 (9th Cir. 2006) (school's policy of giving preference to students of Native Hawaiian ancestry did not violate 42 U.S.C. § 1981).

4 Grutter v. Bollinger, 539 U.S. 306, 123 S.Ct. 2325, (2003) (O'Connor, J.) (law school had a compelling interest in attaining a diverse student body; and admissions program was narrowly tailored to serve its compelling interest in obtaining the educational benefits that flow from a diverse student body, and thus did not violate the Equal Protection Clause); Gratz v. Bollinger, 539 U.S. 244, 123 S.Ct. 2411 (2003) (Rehnquist, J.) (university's freshman admissions policy violated Equal Protection Clause because its use of race was not narrowly tailored to achieve respondents' asserted compelling state interest in diversity).

5 *See, e.g.,* Richmond v. J.A. Croson Co., 488 U.S. 469, 507, 109 S.Ct. 706 (1989) ((plurality opinion) (minority set-aside program struck down because city failed to demonstrate compelling governmental interest justifying the plan, and plan was not narrowly tailored to remedy effects of prior discrimination.); Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227, 115 S.Ct. 2097 (1995) (O'Connor, J.) (all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by reviewing court under strict scrutiny).

6 Rapport au Président de la République, *Redécouvrir le Préambule de la Constitution*, rapport du comité présidé par Simone Veil (La Documentation Framçaise, 2008) (hereinafter "Veil Report.").

7 Regents of the University of California v. Bakke, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978).

8 Veil Report at 55, n.4 (citing *Parents Involved in Cmty. Sch.*, 127 S.Ct. at 2738).

8 *Parents Involved in Cmty. Sch.*, 127 S. Ct. at 2768.

9 For example, Article 225-1 of the French penal code defines as discrimination, and prohibits, "all distinctions made among physical persons based on their origin, sex, family status, pregnancy, appearance, name, state of health, disabiity, genetic characteristics, morals, sexual orientation, age, political opinions, union activity, or their membership, or non-membership, real or imagined, in any specific ethnic group, nation, race, or religion." (Unofficial translation).

10 *See* 29 U.S.C. §2000e *et seq.; see also* 42 U.S.C. §1981 (creating a private right of action in Federal court for individuals who claim they have been denied the right to contract based on race).

11 Established by law n° 2004-1486 of December 30, 2004.

12 Statistics available at (www.halde.fr/raport-annuel/2008).

13 Statistics available at (www.eeoc.gov).

14 Reported at www.france-info.com/spip.php?article288122&theme=81&sous_theme=185 (May 5, 2009).

15 Ricci v. DeStefano, -- S. Ct. --, 2009 WL 1835138 (June 29, 2009).

16 Slip op. at 15; *see* Griggs v. Duke Power co., 401 U.S. 424 (1971).

17 Ricci v. DeStefano, 2009 WL 952214 (April 7, 2009) (petitioners reply brief on the merits) at *23-*24.

18 Slip op. at20-21 (Scalia, J., concurring).

19 **Id*. Certainly this is true in the case of the Office of Federal Contract Compliance Programs (OFCCP), which enforces Executive Order 11246 and requires most Federal contractors to submit reports detailing the racial and sexual composition of their workforce. The OFCCP is empowered to punish statistical disparities, which compels employers to make many race-conscious decisions in hiring, promotions, and layoffs.

20 *Id*. at 21.

21 *Id*. at 28 (Ginsburg, J., dissenting).

22 *Id.* at 28 (Ginsburg, J.); 27 (Alito, J.).

23 Justice Ginsburg's dissent in Ricci is consistent with her dissent in

AT&T v. Hulteen, -- S. Ct. --, 2009 WL 1361539 (May 18, 2009) (applying principle of non-retroactivity to hold that the Pregnancy Discrimination Act (PDA) does not compel employers to restore leave credit denied pursuant to a bona fide seniority plan, consistent with existing law when denied, that the PDA would not have allowed to be denied; Justice Ginsburg, joined by Justice Breyer, dissented, and would have required restoration because PDA was meant to erase all vestiges of historical discrimination).

24 Plessy v. Ferguson, 163 U.S. 537, 559, 16 S.Ct. 1138 (1896) (Harlan, J., dissenting) ("Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law").

25 *Grutter*, 539 U.S. at 341-42 (citing Palmore v. Sidoti, 466 U.S. 429, 432, 104 S.Ct. 1879 (1984)).

26 *Grutter*, 539 U.S. at 342-43 (citations omitted).

27 Northwest Austin Mun. Utility Dist. No. One v. Holder, -- S. Ct. --, 2009 WL 1738345 (June 22, 2009).

28 *Ricci*, slip op. at 21 (Scalia, J., concurring).