

What Does It Really Mean?

By Sherry J. Williams

Race Neutrality

There has been much debate about the issue of race neutrality recently, with opponents of affirmative action calling for the elimination of race-conscious policies in favor of race-neutral policies. Affirmative action proponents, with equal fervor, argue that the use of numerical goals is the *only* way to achieve equality and there is much contentiousness surrounding the issue. Because the traditional view of affirmative action is more than 30 years old, it is prudent to question the reasons affirmative action opponents find race neutrality so appealing and why affirmative action proponents find it ineffective.

Race-neutral equates to white male

There is a growing body of scholarship on white racial consciousness. These views are well-captured and discussed in several articles which have been compiled in the collection "Critical White Studies: Looking Behind the Mirror," edited by Richard Delgado and Jean Stefancic (Temple University Press, Philadelphia, 1997). One of the authors, Barbara J. Flagg, in the essay "The Transparency Phenomenon, Race-Neutral Decision-making, and Discriminatory Intent," addresses the issue of race neutrality

and its true meaning, making the following observations:

Whiteness is a transparent quality [meaning whites do not see their whiteness] when whites interact with whites in the absence of people of color... Transparency casts doubts on the concept of race-neutral decision-making... I suggest that whites should respond to the transparency phenomenon with a deliberate skepticism concerning race neutrality... Given whites' tendency not to be aware of whiteness, it's unlikely that white decision-makers do not similarly misidentify as race-neutral [the] personal characteristics, traits, and behaviors that are, in fact, closely associated with whiteness.

The reality of these observations plays itself out every day of our lives. Justice Sandra Day O'Connor cautioned against this phenomenon in *Croson* (see "Court Decisions," May/June 2000 *MBE*, page 38) when she viewed the actions of black political bodies that were making decisions that benefited black businesses. But somehow, when the opposite occurs, white political bodies making decisions that favor white businesses, there is a tendency to treat that as a

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There is a growing body of opinion to call for an end to affirmative action. An equally vocal body is sounding the alarm, such end would precipitate the damage to the economy and women owned businesses. I mention the damage to the economy to clarify the thinking about the topic, Chuck Schabl and Sherry looked at the history, the rationing from the perspective of the business contracting officer and the courts. A crystal ball will not predict how the Court will rule on Adarand, the contractors which either reassure or a.

Whether or not race neutrality, it may indeed become a necessity.

race-neutral activity.

It is said that the laws are race-neutral. But, in many cases, the laws were developed by white males, which, therefore, means that there was a reliance on white male norms, white male customs, white male traditions, white male views, and white male opinions, in the development of those laws. So, the only way that we can truly say that laws, rules, and regulations are race-neutral is to accept that race neutrality, in most cases, equates to a white male standard. This may be appropriate in a fairly homogeneous society. But ours is an ever-increasing heterogeneous society.

Examples of the white male standard frequently play out in purchasing activity, as revealed when buyers were interviewed while conducting disparity studies. When asked: "If you call three white contractors to solicit quotes, is that a discriminatory act?" most buyers, both minority and majority, replied, "No." And, when asked, "If you call three black contractors to solicit quotes, is that a discriminatory act?" the answer from most buyers, both minority and majority, was "Yes." If buyers believe that, by law, their view of the above scenarios is acceptable, then we need to revisit the laws that they rely on.

Does the Law Support Racism/ Sexism?

Although this body of thought is not new, our courts have seemingly ignored it for the most part. In so doing, our judicial system is effectively *legalizing* discrimination. In other words, by *not* acknowledging that race-neutral laws may well be *unconsciously* race conscious in favor of white males, our laws are creating a two-tiered legal system—one for white males, and another for everyone else. This two-tiered system protects the notion of the racial superiority of white males by stating that there is a measure of soci-

etal discrimination that our laws cannot reach.

By simply looking to the language of these laws and regulations, the courts have deemed certain laws race-neutral, even though they have been proven to have a discriminatory impact. This, the courts argue, is not enough to warrant the utilization of race-conscious measures to counter the law.

Maybe not. But it is enough to strike the law itself? And that is where we must go with the analysis of race neutrality.

The Higher Standard of Race Neutrality: Universality

Race neutrality should be held to a higher standard than race consciousness. Unfortunately, most people do not see the rationale for this, therefore, race neutrality is never pushed to its limits in order to achieve its real meaning. In order to get to the higher plane of race neutrality, we must first be conscious of race. We cannot skip this vital step in our evolution, else the two-tiered system will most assuredly be the result.

In order to achieve this heightened legal standard, the laws must be challenged. Every law in the United States should come under serious review and scrutiny by a diverse group of stakeholders to ensure that it survives the scrutiny of many cultural norms, instead of simply the white male cultural norm.

I call this the principle of universality. If our laws are not universal in their objective and impact, then they are not race-neutral. They are unconsciously race-conscious—which is an unacceptable standard.

For example, our procurement laws are mainly geared toward large firms that have been in existence for a long time. It does not take much analysis to determine the disparate impact that these laws have on small, minority, and female owned businesses. Thus, these laws deserve to be struck down and revamped to

have a universal appeal that will allow all contractors to compete on equal footing. By so doing, we take the race and gender neutrality to its ultimate dimension, moving the laws beyond racial distinctions because they have included and integrated them.

Another example involves the concept of business capacity. Most procurement standards purport to consider this nebulous concept when evaluating potential contractors, thus failing to take into account how easy it is in many cases for small businesses to demonstrate greater capacity—if given the chance.

In the face of our country's sorry record of discrimination, our laws should not be given the presumption of race neutrality. Just as Flagg suggests for whites, everyone should view race-neutral laws with skepticism in an effort to err on the side of inclusion. In so doing, purportedly race-neutral laws that are found to have a disparate impact on any group should be assumed to be unconsciously race conscious until proven otherwise, and treated accordingly.

California is perfect ground for testing this principle. No longer are whites a majority in that state. And with Proposition 209 and the recently decided *Hi-Voltage Wire* case (see Publisher's Page, November/December 2000 *MBE*, page 1), the citizens of California must ensure that their laws and the implementation of those laws are universal, as race consciousness for addressing discrimination is no longer an option under any scenario. If the laws of the State of California or any municipality are unconsciously race conscious, then the only way to address this inequity is to fix the law. Proposition 209, with its strong language regarding non-discrimination and equal opportunity, should support the rigorous reviews of laws and the rejection of presumptions of race neutrality. The diverse citizens of California should scruti-

Race Neutrality *(continued)*

nize closely—and test widely—their laws to ensure that they are fair, equitable, nondiscriminatory and inclusive—in other words, that they are universal.

The Possibilities of Our Future

It is important that we fully appreciate the shifting tides that are occurring in America. Numerous news articles report that, as in California, whites are no longer a majority in many communities in the United States. With the changes in demographics will also come predictable changes in political and economic control. This process calls for vigilance on the part of citizenry. We must take care that our political leaders and our judiciary do not use color-blindness and race neutrality to place political and economic control exclusively in the hands of white males.

Our nation is evolving in ways to

which we are not accustomed. We must not allow fear of change or selfish motives to stop the natural evolution that would occur without political or judicial intervention. Otherwise, we will find ourselves facing the same dilemmas as countries such as Zimbabwe and South Africa where the white minority controls the vast majority of economic resources, even though control was gained through bloody and illicit means. The black majority struggles to determine how to include more people into the economic benefits of their country, however, any suggestion of reclaiming the economic resources controlled by this small white minority will result in the black majority's facing the wrath of the European community. To avoid such consequences in the United States, we must be genuine in our promotion of business development and equal

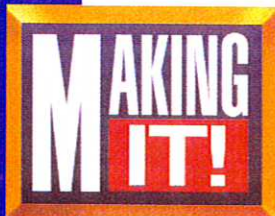
opportunity for *all* racial and *both* gender groups.

These are uncertain times for all Americans, but they should be exciting times for those of us who have been labeled "minority." We no longer have to look for catchall categories to describe "us" and "them." And it's time we stop measuring our success using the white male standard as our benchmark. We simply should be who we are.

To reap the benefits that are *our due*, we must not allow decisions regarding our future to be made with blinders on. While the rights of white males must be protected, we must be sure that they are not being protected more than, and to the detriment of, the rights of women and other racial groups. If we do not protect America for *all* Americans, the tremendous opportunity that we have for multiculturalism to become the American standard will simply pass us by.

With the *Adarand* case on the horizon, to be reheard by the U.S. Supreme Court in October 2001, we must make haste to define race neutrality and color-blindness in ways that represent our evolving America.

In the following article, "The DBE Presumption," we suggest that a possible course of action is to eliminate the DBE presumption, which could "possibly" moot the case before the Supreme Court. To achieve this objective, we must seek immediate discussions with the U.S. Department of Transportation and the U.S. Department of Justice regarding their strategies for arguing this case—both of which have been unnervingly quiet on this issue. Once we move beyond *Adarand*, then city by city and state by state, we must begin the slow and arduous task of review, analysis and change of laws and the legal systems to incorporate new definitions of race neutrality. The key is that *we* must do it—*all* of us—the diverse, inclusive America. ♦



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