



Affirmative Action

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Background

AFFIRMATIVE ACTION has been the most contentious area of [CIVIL RIGHTS](#) law during the past 30 years. Despite several Supreme Court decisions, numerous EXECUTIVE ORDERS, and laws passed by legislators at the state and federal level, it is still considered an unsettled area of law. Because of this current lack of resolution, any article written about affirmative action may soon become outdated with the latest law or court decision. Nevertheless, the broad outlines of what affirmative action has been and presumably will be in the future can be established.

Affirmative Action Defined

Although the term "affirmative action" can be used in a variety of contexts, the most popular definition currently is within the arena of civil rights. There, affirmative action has been held to provide a special boost to qualified minorities, women, and disabled individuals in order to make up either for past [DISCRIMINATION](#) or for their under representation in a specific area of the work force or academia. Though these categories of individuals have historically benefited most, affirmative action programs can also apply to other areas of discrimination, such as age, nationality, and religion.

Affirmative action can be administered in several ways. One way is through "quotas," defined as a strict requirement for a proportion or share of jobs, funding, or other placement to go to a specific group, e.g. 50 percent of all new hires must be women. Another is "goals," which require agencies and institutions to exert a good-faith effort toward reaching the assigned proportion or share goal but do not require that the proportion be reached. Affirmative action can also take the form of intangible "boosts" for the respective beneficiaries of the program; for example, all men shorter than 5'8" will be given ten extra points on the physical fitness exam.

The reasons for affirmative action are myriad and tend to overlap, but generally two justifications have stood out. One is that the group has been discriminated against in the past, e.g. black Americans, and needs affirmative action in order to "catch up" to the majority that has not suffered discrimination. The other is that the group is under represented in whatever area is being scrutinized, e.g. women in construction jobs, and needs to be helped to achieve some sort of representation in the area. Even in this situation, however, there is the tacit admission that discrimination might be the underlying cause of the under representation.

History of Affirmative Action

Affirmative action has its origins in the civil rights movement of the late 1950s and early 1960s. The movement brought a dramatic change to U. S. social life through protests, court decisions, and legislative action, culminating in the passage of the 1964 Civil Rights Act, popularly known as Title VII.

But Title VII mentioned affirmative action in a positive sense only in the context of the American Indian. It allowed preferential treatment to be given "to individuals because they are Indians living on or near a reservation." Otherwise, Title VII outlawed discrimination in a "color blind" fashion. The relevant part of Title VII states: "Nothing contained in this [law] shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this [law] to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed . . . in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area."

This part of Title VII was passed to assuage the concerns of moderate members of Congress that the Civil Rights Act would become a quota bill, requiring reverse discrimination against whites. Civil rights leaders, who for the most part felt distinctly ambivalent about affirmative action, did not object to the inclusion of this passage. Many saw affirmative action as a way of dividing working class whites from blacks and the civil rights movement from its natural allies in the labor movement.

But the riots of the mid and late-1960s convinced more and more civil rights leaders that a color-blind policy of enforcing civil rights was not enough and that there had to be steps taken to ensure blacks could compete equally with whites. President Lyndon Johnson endorsed this view in a speech before Howard University in 1965 in which he stated: "You do not take a person who for years has been hobbled by chains and liberate him, bring him to the starting line and say you are free to compete with all the others."

That same year, Johnson issued Executive Order 11246, requiring firms under contract with the federal government not to discriminate, and to "take affirmative action to ensure that applicants are employed and that employees are treated during employment, without regard to their race, creed, color, or national origin." Although not specifying what would constitute affirmative action and not applying to any firms outside the federal government, this order is considered the first attempt at positive affirmative action by a governmental entity. The order also created the Office of Federal Contract Compliance (OFCC) to enforce this policy.

Because the term, affirmative action, was left intentionally vague by the executive order, however, the OFCC was unsure how to enforce it. The OFCC formulated several plans in cities, such as Cleveland and Philadelphia, to facilitate the hiring of minorities for federal government work, but for various reasons these plans were determined to be illegal or never seriously enforced. Johnson left office without any definite affirmative action plan put forth on his watch.

It was left to the Nixon administration, ironically considered an administration not particularly friendly to civil rights interests, to pick up the issue and promote the first serious affirmative action plan that required government-determined, numerically specific percentages of minorities to be hired.

In 1969, the Nixon administration picked up a plan that the Johnson administration had put forth for the construction industry in the city of Philadelphia, referred to as the Philadelphia Plan. The Johnson administration plan was faulted for not having definite minimum standards for the required affirmative action programs. The Nixon plan did issue minimum standards—specific targets for minority employees in several

trades. It did not require these minimum standards be met, simply that contractors submitting bids make a "good faith" effort to achieve these targets. This allowed the administration to argue it was not setting quotas, though critics of the plan suggested the administration was in fact doing so.

The Philadelphia Plan survived several challenges, both legal and Congressional, before being accepted as legitimate. The Plan set the tone for affirmative actions plans that followed. Soon, the standards put forth in the Philadelphia Plan were incorporated into Executive Order 11246 which affected all federal government contractors, who were required for the first time to put forth written affirmative action plans with numerical targets.

After the implementation of the Philadelphia Plan, legislation was passed at the federal, state, and municipal level implementing affirmative action plans using the Philadelphia Plan as a model. Today, almost all government affirmative action plans are offshoots of the Philadelphia Plan. Its mixture of numerical targets and requirements of "good faith" effort was a milestone in the history of affirmative action.

Supreme Court Decisions on Affirmative Action

The Supreme Court has given its opinion on affirmative action on numerous occasions since the Philadelphia Plan was put into effect in 1970. By-and-large, these Supreme Court decisions were more open to the idea of affirmative action during the 1970s and early 1980s and then gradually tightened the requirements for affirmative action plans. Generally, the question before the Supreme Court regarding affirmative action plans asked what kind of scrutiny to give the plans.

Griggs v. Duke Power Co.

Decided in 1971, this decision is generally held to have laid the foundation for affirmative action programs based on the rationale of under representation. The case involved black workers at a power plant in North Carolina who sued, arguing that the plant's requirements of a high school education or passing a standardized intelligence test in order to fill certain jobs was discriminatory. The plaintiffs argued that the requirements operated to disqualify blacks at a substantially higher rate than white applicants. The plant argued that the requirements served a legitimate business purpose.

A unanimous Supreme Court disagreed, ruling that the tests did not serve any job-related requirement. The Court pointed out that the plant had practiced discrimination in the past and that the effect of these requirements was to prevent black workers from overcoming the effects of such discrimination. "Practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices," said the court.

The effect of *Griggs v. Duke Power* was to legitimize the so-called disparate impact theory—the idea that if a qualification had a disparate impact on a specific group, an organization could justify that qualification only if it could prove a business related purpose for such a requirement. This point opened the door to forcing employers (including the government) to taking a hard look at the effect of their employment practices and their relation to race.

Regents of the University of California v. Bakke

This was the first instance of the court taking a case specifically involving affirmative action. The case involved a white man, Allan Bakke, who had applied for a seat at the medical school at the University of California at Davis. Bakke was rejected, and then he sued, arguing that less qualified minorities were being

allowed into the school under a quota system reserving a specific number of seats for minorities.

In a 5-4 ruling, a divided Supreme Court in 1978 ruled that the specific quota system used by the University of California at Davis was illegal but that race could be taken into consideration in determining admission slots at the school. The result was the first time the Court had held that reverse discrimination could be justified under certain circumstances.

United Steel Workers of America v. Weber and Fullilove v. Klutznick

These two cases, decided a year apart, further legitimized the use of affirmative action as a tool for increasing minority employment. In the *Weber* case, the Supreme Court in 1979 ruled that an affirmative action plan for on-the-job training that mandated a one-for-one quota for minority workers admitted to the program was legal, since the plan was a temporary measure designed to correct an imbalance in the workforce.

In *Fullilove*, the Supreme Court upheld the "minority business enterprise" provision of Public Works Employment Act of 1977, which requires that at least 10 percent of federal funds granted for local public works projects must be used by the state or local grantee to procure services or supplies from businesses owned by minority group members.

Johnson v. Santa Clara County Transportation Agency

This 1987 decision expanded the Court's protection of affirmative action programs to ones benefiting women. The Court ruled that the county agency did not violate civil rights laws by taking the female employee's sex into account and promoting her over male employee with a higher test score. By doing so, the court upheld the county's affirmative action plan directing that sex or race be considered for purpose of remedying under representation of women and minorities in traditionally segregated job categories.

City of Richmond v. J.A. Croson

Beginning with this case in 1989, the Supreme Court began to cut back on the leeway it had given affirmative action programs. The Court struck down a set-aside program mandated by the city of Richmond, Virginia, which required prime contractors awarded city construction contracts to subcontract at least 30 percent of the dollar amount of each contract to one or more "Minority Business Enterprises." The Court ruled that the city failed to demonstrate compelling governmental interest justifying the plan, and the plan was not narrowly tailored to remedy effects of prior discrimination.

In handing down this ruling, the Court determined that any [JUDICIAL REVIEW](#) of municipal affirmative action plans would be reviewed with "strict scrutiny." Under the strict scrutiny test, defendants are required to establish they have a compelling interest in justifying the measure or that the affirmative action program advances some important governmental or societal purpose. For all practical purposes, this ruling makes it very hard to justify an affirmative action plan unless past discrimination can be shown, and the under representation of minorities is a product of that discrimination.

Adarand Construction v. Peña

In this most recent Supreme Court case, the Court applied the standards propagated in *City of Richmond v. Croson* to the federal government, ruling that all racial classifications imposed by whatever federal, state, or local governmental actor must be analyzed by the reviewing court under strict scrutiny. The Court overturned a decision dismissing a suit brought by a contractor challenging the constitutionality of a federal program designed to provide highway contracts to minority business enterprises.

Encyclopedia of Everyday Law: Affirmative Action

The results in *Adarand* confirm that the conservative direction in which the Supreme Court is moving with respect to affirmative action plans. It seems clear after this decision that affirmative action plans will only survive court challenges by being narrowly tailored to rectify past discrimination.

However, any change in the Supreme Court could result in a reversal of fortune for affirmative action. Given the age of the current justices and the division of government between Democrats and Republicans, it remains impossible to predict the will of the Court in the future in regards to this controversial topic.

Forms of Affirmative Action

Affirmative actions can take different forms. Often affirmative actions are written into federal or state law. They can also take the form of voluntary plans or consent decrees. Occasionally, although rarely these days, a court will impose an affirmative action plan to remedy the effects of past discrimination.

Although affirmative action has been employed in the private sector, its use has been most pronounced in the public sector, in regard to both hiring and contract requirements. Affirmative action has been broadly used across a wide spectrum of federal, state, and municipal governments.

Samples of Affirmative Action at the Federal Level are as follows:

Department of Defense: Strives to award five percent of Department of Defense procurement, research and development, construction, operation and maintenance contracts to minority businesses and institutions.

Federal Home Loan Banks: Provides for preservation and expansion of minority owned banks.

Department of State: Mandates at least 10 percent of amount of funds appropriated for Department of State and foreign affairs diplomatic construction projects be allocated to American minority contractors.

NASA: Requires NASA administrator to establish annual goal of at least eight percent of total value of prime contracts and subcontracts awarded to be made to small disadvantaged businesses and minority educational institutions.

FCC: Must ensure that minority- and women-owned businesses have opportunity to participate in providing spectrum-based services.

Department of Energy: Works to achieve five percent of combined total funds of Department of Energy used to carry out national security programs be allocated to minority businesses and institutions.

Department of Energy: Strives for five percent of combined total funds of Department of Energy used to carry out national security programs be allocated to minority businesses and institutions.

Department of Transportation: Requires that not less than 10 percent of funds appropriated under the Intermodal Surface Transportation Efficiency Act of 1991 be expended on small and minority businesses.

Environmental Protection Agency: Must allocate no less than 10 percent of federal funding to minority businesses for research relating to requirements of Clean Air Act Amendments of 1990.

Affirmative Action at the State Level

ARKANSAS: Requires Division of Minority Business Enterprise to develop plans and participation goals for minority businesses.

CONNECTICUT: Mandates that contractors on state public works contracts make [GOOD FAITH](#) efforts to employ minority businesses as subcontractors and suppliers, allows municipalities to set aside up to 25 percent of dollar amount of construction and supply contracts to award to minority businesses.

DISTRICT OF COLUMBIA: Requires District of Columbia agencies to allocate 35 percent of dollar amount of public construction contracts to minority businesses.

FLORIDA: Allows municipalities to set aside up to 10 percent of dollar amount of contracts for procurement of [PERSONAL PROPERTY](#) and services to award to minority businesses.

ILLINOIS: Requires Metropolitan Pier and Exposition Authority to establish goals of awarding not less than 25 percent of dollar amount of contracts to minority contractors and not less than five percent to women contractors.

INDIANA: Requires that state agencies establish goal that five percent of all contracts awarded be given to minority businesses.

KANSAS: Allows Secretary of Transportation to designate certain state highway construction contracts, or portions of contracts, to be set aside for bidding by disadvantaged businesses only.

LOUISIANA: Requires establishment of annual participation goals for awarding contracts for goods and services and public works projects to minority- and women-owned businesses.

MARYLAND: Requires that Maryland award 14 percent of dollar amount of procurement contracts to minority businesses.

MICHIGAN: Establishes participation goals for awarding of government contracts to minority- and women-owned businesses.

NEW JERSEY: Allows municipalities to set aside certain percentage of dollar value of contracts to award to minority businesses.

NEW YORK: Allows municipalities to set aside certain percentage of dollar value of contracts to award to minority businesses.

OHIO: Provides that a prime contractor on a state contract must award subcontracts totaling no less than five percent of the total value of the contract to Minority Business Enterprises (MBE) and that the total value of both the materials purchased from MBE's and of the subcontracts awarded will equal at least seven percent of the total value of the contract.

TENNESSEE: Requires all state agencies to actively solicit bids from small businesses and minorityowned businesses whenever possible. Local education agencies and state colleges and universities may set aside up to 10 percent of their funds allocated for procurement of personal property and services for the purpose of entering into contracts with small businesses and minority-owned businesses.

Required Affirmative Action For Federal Contractors

Contractors with the federal government are required to have affirmative action plans under various federal laws. These laws include:

Executive Order 11246: This 30-year-old order, signed by President Johnson and amended by President Nixon, applies to all nonexempt government contractors and subcontractors and federally assisted construction contracts and subcontracts in excess of \$10,000. Under the Executive Order, contractors and subcontractors with a federal contract of \$50,000 or more and 50 or more employees are required to develop a written affirmative action program that sets forth specific and result-oriented procedures to which contractors commit themselves to apply every good faith effort.

Section 503 of the Rehabilitation Act of 1973: Requires affirmative action plans in all personnel practices for qualified individuals with disabilities. It applies to all firms that have a nonexempt government contract or subcontract in excess of \$10,000.

The Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VEVRAA): Requires affirmative action programs in all personnel practices for special disabled veterans, Vietnam Era veterans, and veterans who served on active duty during a war or in a campaign or expedition for which a campaign badge has been authorized. It applies to all firms that have a nonexempt government contract or subcontract of \$25,000 or more.

What An Affirmative Action Plan Should Include

The Office of Federal Contract Compliance Programs (OFCCP) suggests that non-construction contractors' written affirmative action plans include the following affirmative action as part of an action-oriented program:

- Contact with specified schools, colleges, religious organizations, and other institutions that are prepared to refer women and minorities for employment;
- Identification of community leaders as recruiting sources;
- Holding of formal briefing sessions, preferably on company premises, with representatives from recruiting sources;
- Conduct of plant tours, including presentation by minority and female employees of clear and concise explanations of current and future job openings, position descriptions, worker specifications, explanations of the company's selection process, and recruitment literature;
- Encouragement of minority and female employees to refer applicants;
- With special efforts the inclusion of minorities and women in personnel department staffs;
- The availability of minority and female employees for participation in career days, youth motivation programs, and related community activities;
- Recruitment at secondary schools, junior colleges, and colleges with predominantly minority or female enrollments;
- With special efforts the contact with minorities and women when recruiting at all schools;
- Special employment programs undertaken whenever possible, such as technical and non-technical co-op programs with predominantly black and women's colleges, summer jobs for underprivileged youth, and motivation programs for the hardcore unemployed;
- Inclusion of minority and female employees in recruiting brochures pictorially presenting work situations;
- Expansion of help-wanted advertising to regularly include the minority news media and women's interest media.

Voluntary Implementation of Affirmative Action

Both private and public employers use voluntary affirmative action. However, both private and public employers must satisfy certain criteria in order to comply with Title VII. The employer must have a legitimate reason for adopting a plan. Also, the plan cannot unduly interfere with the employment opportunities of non-minority or male workers or job applicants to the extent that their interests are "unnecessarily trammelled." The EEOC has promulgated Guidelines on Affirmative Action that explain how to develop a lawful affirmative action plan under Title VII.

Often, affirmative action remedies are agreed upon to settle a discrimination case. These remedies are implemented by a consent [DECREE](#). A court must approve provisions in consent decrees that provide for the employer's [ADOPTION](#) of an affirmative action program. Affirmative action contained in the decree is viewed as voluntary. The action may benefit individuals who were not the victims of the discriminatory practice at issue.

Abolishing Affirmative Action

In the 1990s, several states moved to abolish affirmative action programs. California voted in 1996 to abolish affirmative action, and Washington State voted similarly in 1998. The California ban asserts: "the state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." The wording of the Washington law is identical. Both laws were passed in voter referenda.

In addition, the 5th Circuit Court in *Hopwood v. Texas* in 1996 effectively abolished affirmative action for schools in that circuit (which includes Texas, Louisiana, and Mississippi), ruling that giving preferential treatment to minorities violates [EQUAL PROTECTION](#). More recently, Florida in 2000 decided to abolish affirmative action for colleges in the state, replacing it with an initiative to guarantee college admissions for the states' top high schools.

Whether these events prove to be a trend is hard to say. But between these actions and the recent Supreme Court decisions it is clear, for the moment at least, that affirmative action is in retreat.

Additional Resources

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