Affirmative Action

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AFFIRMATIVE ACTION. Courts, regulators, and legislators at both the state and federal level sometimes demand that race (and occasionally gender) be considered a positive factor in governmental decision making. The manner in which government may affirmatively recognize an individual based on such immutable traits as race and gender has divided the nation. On one side, defenders of affirmative action argue—in the words of Supreme Court Justice Harry Blackmun in Regents of the University of California v. Bakke (1978)—that “in order to get beyond racism, we must first take account of race. There is no other way.” For these individuals, preferential treatment is an equalizer—responsive to past and present discrimination. On the other side, opponents of benign racial classifications fear that substituting group identity for individual identity is a harbinger of a return to the days of “separate but equal.” For these individuals, affirmative action runs contrary to Justice John Harlan’s admonition in Plessy v. Ferguson (1896) that “our constitution is color-blind, and neither knows nor tolerates classes among citizens.”

Federal Efforts. Federal affirmative action efforts have been launched in all three branches. Congress has authorized programs that use race preference to allocate government funds and benefits in the Small Business Administration, the Department of Transportation, and the Federal Communications Commission. The Supreme Court endorsed court-initiated hiring and promotion plans to remedy illegal discrimination. While these legislative and judicial initiatives are significant, federal affirmative action efforts are principally the province of the executive branch. Through executive orders and agency initiatives, affirmative-action programs have been established within the departments of Commerce, Defense, Labor, and Transportation as well as at the Equal Employment Opportunity Commission (EEOC), Federal Communications Commission (FCC), and Small Business Administration. The Department of Justice, moreover, plays a critical role in advancing the government’s position on affirmative action before the courts. Affirmative action is also a factor in presidential appointments, including appointment of judges. Finally, through the power to recommend and veto legislation, the President has also played an instrumental role in defining legislative initiatives in this area. Although executive-branch efforts are, of course, subject to judicial review and legislative oversight, neither Congress nor the courts have been especially active in checking the executive. For example, no executive-initiated affirmative action plan designed to increase minority business ownership has been successfully challenged in either Congress or the courts.

Federal affirmative action programs date back to the efforts of the Reconstruction Congress to assist former slaves to become freedmen. Remarkably, Congress’s 1866 debates over these measures are strikingly similar to debates in the 1990s. Opponents called the measures “class legislation” and argued that rather than promoting “equality before the law,” they “overlap the mark and land on the other side.” Proponents argued that it would be a “cruel mockery” “not [to] provide for those among us who have been held in bondage all their lives” and that therefore the “true object of [such race-specific legislation] is the amelioration of the condition of the colored people.”

One hundred years later, affirmative action battles began with President Lyndon B. Johnson’s historic June 1965 Howard University commencement address. Speaking of the “devastating heritage of long years of slavery,” the President “pledged not just to open the gates of opportunity” but to see to it that “all our citizens have the ability to walk through those gates.” For example, the Johnson administration—pursuant to Executive Order 11246—established an Office of Federal Contract Compliance within the Department of Labor and launched the so-called Philadelphia Plan of withholding federal contract awards from employers with inadequate minority representation. The Nixon administration, although technically opposed to race preferences, expanded upon these efforts. In addition to institutionalizing Executive Order 11246 programs, President Richard M. Nixon
created the Office of Minority Business Enterprise within the Department of Commerce and issued three executive orders to “help establish and promote minority business.”

During the Carter years, federal departments and agencies strengthened existing affirmative-action programs (especially in the Small Business Administration and the Office of Federal Contract Compliance) and launched numerous race- and gender-conscious initiatives. Carter initiatives included efforts to demand adequate minority student representation in tax-exempt private schools, the granting of preferences to minority and women broadcasters, the establishment of a minority business set-aside for Department of Transportation highway programs, and EEOC efforts to balance the workplace. The Carter Justice Department also defended private, state, and federal affirmative-action initiatives before the Supreme Court in United Steelworkers of America v. Weber (1979) (upholding a private company’s one-minority for one-nonminority promotion scheme), Regents of U. of Calif. v. Bakke (1978) (invalidating a minority student quota at a California medical school), and Fullilove v. Klutznick (1980) (upholding a minority business set-aside for a federal public works employment program).

Challenges under Reagan. Ronald Reagan ran on a platform in 1980 that disavowed the Carter administration’s reliance on “quotas, ratios, and numerical requirements to exclude some individuals in favor of others.” His Assistant Attorney General for Civil Rights, William Bradford Reynolds, argued that race and gender preferences are “as offensive to standards of human decency today as it was some 84 years ago when countenanced under Plessy v. Ferguson.” In court, the administration persistently subscribed to this view. The Reagan Justice Department challenged affirmative-action programs before the Supreme Court in such cases as Wygant v. Jackson Board of Education (1986), invalidating a collective bargaining agreement that allowed for senior minority teachers to be laid off ahead of junior minority teachers; Sheet Metal Works v. EEOC (1986), approving a court-ordered affirmative-action plan in a statutory employment discrimination lawsuit; and Richmond (City of) v. J. A. Croson Co. (1989), invalidating a municipal set-aside plan for city-funded construction.

Outside of court, however, the Reagan administration record is less clear. On one hand, the President opposed numerical proofs of discrimination in voting rights and other legislation, appointed numerous individuals who questioned affirmative-action programs, and supported the Justice Department’s frontal assault on affirmative action. On the other hand, the administration left in place several of its predecessors’ most controversial programs and policies. For example, after the Supreme Court rejected Department of Justice efforts to dismantle affirmative-action programs, the administration reluctantly embraced Executive Order 11246. More striking, President Reagan strongly backed Small Business Administration and other executive-initiated set-aside programs.

The Bush administration has generally supported affirmative-action programs. Bush appointees at the Civil Rights Commission and the FCC, for example, disavowed Reagan administration efforts to dismantle affirmative action. President George Bush also spoke of his “commitment to affirmative action” in criticizing efforts at the Department of Education to limit minority scholarships. Finally, the Bush administration supported minority set-asides. At the same time, President Bush claimed to be a strong opponent of quota hiring. Moreover, the Bush Department of Justice unsuccessfully opposed Bush FCC appointees before the Supreme Court in Metro Broadcasting Inc. v. Federal Communications Commission (1990), upholding the granting of preferences to minority broadcasters.

Debate over Affirmative Action. Apparent inconsistencies in the Bush administration’s handling of preferential treatment help explain why the affirmative action debate appears intractable. Proponents and opponents of preferences both advance strong arguments why their position is essential to the eradication of artificial line drawing on the basis of race and gender. The Carter administration, for example, viewed affirmative action programs “as an essential component of our commitment to expanding civil rights protections” because “racism pervades every aspect of social activity.” In contrast, the Reagan administration characterized “bureaucratic numerical regulations” as “inherently discriminatory” because the “obvious and not-so-obvious barriers that once marked blacks as inferior and second-class citizens largely have been eliminated.”

Affirmative action remains divisive because neither the Carter nor the Reagan vision predominates. Witness the struggle over the Civil Rights Act of 1991, which demanded that an employer must demonstrate “business necessity” whenever its employment practices disproportionately burden women and minorities. Proponents of the bill claimed that racism and sexism are cloaked, not explicit, and therefore numerical proofs are needed to ward off illegal pernicious discrimination. Opponents of the bill—most notably George Bush—dubbed the measure a quota bill since employers would rather hire on the basis of race and
gender than be embroiled in costly controversial litigation. Bush vetoed the bill in 1990 on that ground. Ironically, in the wake of his controversial appointment of an African American, Clarence Thomas, to the Supreme Court, President Bush capitulated in 1991 and signed the bill after Congress had modified it slightly.

The affirmative action wars seems destined to continue. The inability of the Reagan administration to challenge effectively executive-branch-sponsored race and gender preference demonstrates that these programs are extraordinarily well entrenched. At the same time, opposition to quota hiring too is extraordinarily strong. As the battle over the Civil Rights Act of 1991 reveals, the line separating undesirable quotas from desirable antidiscrimination measures is quite murky. With feelings running so strong on both sides, this murkiness suggests that consensus is unlikely to form. Instead, the struggle over affirmative action will likely remain a prominent feature of political conflict.

**BIBLIOGRAPHY**


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