

Affirmative Action ⁱⁿ Antidiscrimination Law and Policy



An Overview and Synthesis

SAMUEL LEITER AND WILLIAM M. LEITER

**Affirmative Action
in
Antidiscrimination
Law and Policy**

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Robert J. Spitzer, editor

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An Overview and Synthesis

Samuel Leiter
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*In memory of our beloved
sister Lillian*

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Chapter One



Introduction

The Topic

The subject of this treatise/casebook is the legal and ideological controversy over the application of affirmative action policy to combat discrimination based on race, national origin/ethnicity, and gender. Racism, sexism, and ethnic discrimination have long represented a seemingly intractable problem. Affirmative action was conceived as an attack on this ingrained problem but today it is widely misunderstood. We feel the time is ripe for the comprehensive review that we attempt in this book. To maintain our primary focus, we have left for another day examination of the more recent—still evolving—initiatives against discrimination based on age, disability, and genetic testing.

Affirmative action differs from other antidiscrimination initiatives in that (1) it targets *societal* bias (as manifested in public and private action), not individual malefactors; (2) it mandates race, ethnic, and gender-conscious remedies for the disproportionately adverse effects—the so-called *disparate impact*—of societal discrimination on protected groups, whether or not specific discriminatory intent on the part of individual defendants can be isolated; and (3) it seeks to integrate institutions by race, ethnicity, and gender.¹ As will be seen, the doctrine of *disparate impact* is a particularly central reason for the quarrel over affirmative action, and thus is a central theme of this book.

Affirmative action connotes remedial consideration of race, ethnicity, or sex as a factor, among others, in decision making about outreach, jobs, government contracting, K-12 student assignment, university admission, voting rights, and housing. The goal of this process is to redress the disadvantage under which members of disparately impacted groups are said to labor. The relative weight accorded to the race, national origin/ethnicity, or sex factor varies from program to program; thus affirmative action remedies range from disseminating job information to preferential employment and admissions

practices, classroom integration, the creation of majority-minority legislative districts, and court-ordered quotas in egregious discrimination cases.

Opponents of affirmative action generally portray it as a radical departure from equal opportunity's original goal. In their version, the founding fathers of modern civil rights reform conceived of racial, ethnic, and gender discrimination as *intentional* maltreatment—*disparate treatment*, so-called—and strictly limited the remedy to parity—*equal treatment*, as it came to be known. Affirmative action came into being by displacing these time-honored precepts with the revolutionary notion that the *group* effects of societal bias warrant government intervention, wholly apart from the question of intent. The upshot, according to the critics, has been the ascendancy of protected-group preferences and antimeritocratic equality of *results*.

In this book, we endeavor to present an evenhanded account of these claims, and the counterclaims of affirmative action's advocates in the spheres of employment, contracting, education, voting rights, and housing. We focus on affirmative action as the remedy for the effects of *both* facially neutral practices that disparately impact minorities and women; and government-sanctioned (de jure/intentional) segregation of protected groups in education and housing.² (See chapters 3, 4, 5, 6, and 7 in this volume.) In addition, we visit the alternative rationale of *diversity*, that is, increased nonremedial inclusion of protected groups in the economy and education.

A Thumbnail History

Affirmative action came to the fore about half a century ago, at the beginning of a new era in civil rights reform. Prior reform initiatives had dealt mainly with intentional racial maltreatment of individuals and other traditional barriers to equal treatment. However, during our recent tumultuous confrontation with the nation's racist past, the ideology of reform took on a far more proactive cast. True equality, it was said, would be unattainable without some form of compensation for the inherited disadvantage of disparately impacted minorities and females.³ Under the umbrella-label of *affirmative action*, providing such special assistance on the basis of group membership—rather than individual victimization—displaced *equal treatment* as the hallmark of federal policy.

From the late 1960s, affirmative action fostered a nationwide torrent of court-orders, government programs, and voluntary plans, which provided benefits ranging from outreach and special training; hiring goals and timetables; preferences in hiring, promotion, and university admission; public school integration; political representation; and—to a limited degree—"balanced" housing. More than any other recent experiment in social engineering,

this profusion of minority and female privilege evoked public outcry against claimed overinclusiveness, violations of the merit principle, and “reverse discrimination.” Nonetheless, with the spirited support of the courts until the end of the 1980s, affirmative action set the standard for equal opportunity in the public and private economies, and society as a whole. By the 1990s, the early limitation of “protected groups” to blacks had yielded to widespread coverage of Hispanics, women, American Indians, and Asians. In its heyday, affirmative action represented the centerpiece of America’s most ambitious, most promising, attempt to overcome the scourge of race, ethnic, and gender bias. (For a sampler of the extensive federal program, see the appendix to this chapter.)

The promise has not been fulfilled. Affirmative action has surely worked important policy changes, but there is no avoiding the fact that antiminority discrimination and sexism remain forces to be reckoned with. Whether affirmative action is up to this task is open to increasingly serious question. A series of adverse court rulings and state referenda in the 1990s have raised doubts about its legality. Public opposition is great. One cannot discount the possibility that affirmative action will soon be discarded or emasculated. The day may come when we have learned how to handle our racial/ethnic, and gender differences; what the history of affirmative action teaches is that such a day is not yet upon us.

The Book

Affirmative action is indisputably the flash point of America’s civil rights agenda. The affirmative action literature is voluminous, but no comprehensive account of its major legal/public policy dimensions exists. This book aims to fill the gap.

The book covers affirmative action’s origins and growth; the reasons for its current predicament; its impact on American society, and its future anti-discrimination role, if any. We have immersed ourselves in the literature of discrete disciplines that deal with these subjects: law, history, economics, statistics, sociology, political science, urban studies, and criminology. Our text integrates the relevant legal materials (constitutional and statutory provisions, regulations, and case law) with analysis and commentary that draw upon the ranking specialists (academic and otherwise) in the cited fields of study. We are convinced that affirmative action would make an outstanding case study in constitutional law, and respectfully offer our treatment as a model for constitutional studies. Though the subject is intricate, our goal is simple: to further a better understanding of affirmative action’s complexities through an evenhanded presentation of its roots, substantive components and diverse applications, eye-crossing issues, and endlessly debated impact.

In chapter 2 of this interdisciplinary synthesis, we examine the government's abortive attempt to eradicate the effects of racial discrimination after the Civil War. We also discuss the women's rights movement, and examine the question of which groups should be covered by affirmative action. Chapter 3 deals with the genesis and operations of affirmative action in employment. Chapters 4 and 5 describe affirmative action's role in education. In chapter 6, we recount affirmative action's record in countering voting-rights discrimination. Chapter 7 treats America's limited efforts to deploy affirmative action against residential segregation. In chapter 8, we raise central legal questions and summarize primary ideological claims including those made by a representative sample of distinguished disputants.

This book highlights affirmative action's legal dimensions. Here there has been no "separation of powers." Rather, the separate institutions of our national government—the courts, the bureaucracy, and the legislature—have all been involved in saying what law is. Often, the study of lawmaking is artificially truncated because our texts and courses focus on one branch to the neglect of others. Our study attempts to reduce this myopia. Further, it underscores the lack of guidance provided by Congress and the Supreme Court in critical areas. Thus, Congress—in equal employment opportunity (Title VII⁴)—did not formally adopt disparate-impact theory until some two decades after the courts and the administrators had nourished it into a flourishing concern. (And Congress has yet to define what it means by the concept.) Likewise, it was not until 1968 that the Supreme Court ruled that its 1954 decision to end racial segregation in the public schools also required racial integration. The merit of governmental ambiguity is a question that should also be explored in connection with the bureaucracy. At the heart of major affirmative action programs is the administrative requirement that good faith efforts be employed to provide compensatory benefits to protected groups. What constitutes good faith depends on the differing values of the scrutinizing bureaucrats who may impose serious sanctions for what are viewed as deviations from that slippery standard.

Our interdisciplinary approach argues that a central reason for affirmative action's current predicament is uncertainty over the objective of antidiscrimination law. Had Congress, in the beginning, defined *discrimination* in Title VII, we might have been spared the fevered dispute over whether that law contemplates affirmative remediation (*equal results*) or only discrimination cessation (*equal treatment*). However, as we show in chapter 3, this fundamental substantive issue was left open. The concept of affirmative action as a remedy for disparate impact came into being as a court-sanctioned administrative interpretation of this legislative gap. In effect, the bureaucracy, with the courts' blessings, took it upon itself to complete Congress' unfinished business. It seems fair to say that Congress was primarily responsible for the

legal muddle that is reflected in the conflicting rulings that the Supreme Court, over time, has issued in interpreting Title VII. (See pages 79–83, 225–231 in this volume for a delineation of the continuing issues.) For its part, as will be seen, the Supreme Court has magnified the legal muddle on the constitutional level by initially failing to muster a majority on the issue of the proper standard of affirmative action judicial review. Further, the Court has refused both to clarify critical aspects of that standard and to determine the validity of nonremedial affirmative action.

We believe that this lamentable state of affairs is directly attributable to the government's consistent departures from constitutional norms. The repeated failure of both Congress and the Supreme Court to discharge their responsibilities, coupled with the bureaucracy's immersion in the legislative sphere, have challenged the principle of separation of powers, and have deprived the public of sorely needed guidance. In our view, this perspective on affirmative action deserves greater emphasis.

Remembrance of Things Past

Affirmative action is not our first equal opportunity program. We see it as a revival of the ill-fated attempt to make citizens out of slaves after the Civil War. The past is prologue, and it is the past that we will turn to in chapter 2.

Note on Citations

Except where incorporated in this volume, citations in public documents extracted herein have been omitted without notification. Where the footnotes of these documents were reproduced, their numbers were changed to follow the order of the authors' citations.

The authors' citations conform with *The University of Chicago Manual of Legal Citations* (Bancroft-Whitney, 1989). Unless otherwise noted, where citations from other documents are reproduced in this volume, the style of the original was maintained.

Newspaper articles cited by the authors may be paginated differently in library newspaper indexes.

The bracketed numbers located in excerpts from U. S. Supreme Court opinions (introduced by boldface titles) refer to page numbers in the *United States Reports*. There are also bracketed references to pages in the *Federal Reporter* and *Federal Register* in this volume's extended excerpts reproduced from these sources and introduced with boldfaced titles.

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Appendix to Chapter One



A Sampler of Federal Affirmative Action Programs Explicitly Mandated or Authorized by Statute or Administrative Regulation

This sampler consists of excerpts from two sources: The portions titled “Equal Employment Opportunity Laws,” and “Grants and Other Assistance” are from the Congressional Research Service.⁵ The materials under the titles of “Military Recruiting” and “Federal Procurement Policies and Practices” are from a report to President Clinton.⁶

Equal Employment Opportunity Laws

... The evolution of federal law and policy regarding affirmative action in employment may be traced to a series of executive orders dating to the 1960's which prohibit discrimination and require affirmative action by contractors with the federal government. The Office of Federal Contract Compliance Programs, an arm of the U.S. Department of Labor, currently enforces the E.O. [Executive Order] 11246, as amended, by means of a regulatory program requiring larger federal contractors, those with procurement or construction contracts in excess of \$50,000, to make a “good faith effort” to attain “goals and timetables” to remedy underutilization of minorities and women. ...