

Affirmative Action in Antidiscrimination Law and Policy

AN OVERVIEW AND SYNTHESIS

WILLIAM M. LEITER
SAMUEL LEITER

SECOND EDITION



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Dedicated to Sheila Leiter—William's beloved wife and editor

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One

Introduction

Introduction to Second Edition

Of Updates and Supplements

The purpose of the second edition is twofold: (1) to update the first edition published in 2002 to the onset of the Obama administration, particularly with respect to the nonremedial, diversity rationale which has been advanced to support preferences associated with traditionally practiced affirmative action; and (2) to supplement the first edition's primary focus on race/ethnic/gender discrimination by examining age, disability, sexual orientation, and criminal justice antidiscrimination initiatives. A new chapter—chapter 8—has been added to explore these initiatives and their affirmative action dimensions. Other supplements appear throughout the volume, including an examination of the impact of immigration and ethno-racial intermarriage on affirmative action; proposed affirmative action in the criminal justice arena; the U.S. Civil Rights Commission's critique of federal procurement programs; and previously uncovered efforts at housing integration.

The updating herein will review recent Supreme Court opinions on employment discrimination; educational admissions; the dilution of minority voting strength; electoral districting; and the statute of limitations in Title VII of the 1964 Civil Rights Act. Additional updating will focus on single-sex education; the treatment by the lower courts of the strict scrutiny requirement imposed on affirmative-action operations by the Supreme Court; the impact of English-immersion programs mandated by California for school children with limited English skills; programs designed to abolish state and local affirmative action; and recent statistics on employment patterns for groups protected by affirmative action.

Nonremedial, diversity affirmative action of central importance to the second edition involves an extremely controversial doctrine, which was enunciated at the Supreme Court level by Justice Powell in 1978¹ but remained

in limbo for twenty-five years due to the Supreme Court's refusal to treat the issue. Finally in 2003, the Court decided that the diversity rationale undergirding the University of Michigan's race/ethnic preferential admission program at its law school satisfied the dictates of the Equal Protection Clause. This decision legitimated the diversity rationale as an alternative to the traditional remedial basis of affirmative action in the area of public university admissions.

As described in the Introduction to the First Edition replicated in its essentials below, the traditional remedial rationale for affirmative action was to remedy prohibited discrimination, which was banned by law, and which had been cultivated by the nation's systemic mistreatment of minorities and females. Clearly, this remedial objective is furthered by diversity efforts—what we call nonremedial affirmative action because diversity advocacy calls for race/gender/ethnic preferences comparable to those in remedial affirmative action, and is doubtless driven by remediation objectives.² As presented by Justice Powell, though, and facially by diversity advocates, diversity affirmative action advocated that members from a wide variety of groups should be well represented in the nation's higher educational apparatus—not necessarily to correct illegal discrimination—but to expose differences in ideas among people, and to generate a robust exchange of ideas on campus. Currently, the diversity rationale is a dominant element in the ongoing debate over protected-group preferential treatment.

Introduction to First Edition, 2002

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 to work toward a comprehensive review, which we attempt in this book.

Affirmative action differs from other antidiscrimination initiatives in that (1) it targets and seeks to remedy societal bias (as manifested in public and private illegal 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; (3) it seeks to integrate institutions by race, ethnicity, and gender.³ As will be seen, the doctrine of *disparate impact*

is a particularly central reason for the quarrel over affirmative action, and thus 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 became 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 anti-meritocratic 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* overtly neutral practices that disparately impact minorities and women; and government-sanctioned (*de jure*/intentional) segregation of protected groups in education and housing.⁴ 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 some half-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.⁵ 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 ethno-racially “balanced” housing through the indirect means of subsidizing the movement of the poor to higher socioeconomic areas. More than any other recent experiment in social engineering, this profusion of minority and female privilege evoked public outcries 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. 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 Appendix One to this volume at 337–54.)

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 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 flashpoint of America’s civil rights agenda. The book covers affirmative action’s origins and growth; the reasons for its current predicament; its impact on American society; and its future antidiscrimination 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 operations 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 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. The new chapter 8 treats age, disability, and sexual orientation discrimination. In chapter 9, 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 VII)⁶—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 (what we call *disparate-impact* affirmative action) 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 which the Supreme Court, over time, has issued in interpreting Title VII. 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, (as this volume goes to print) the Court has refused both to clarify critical aspects of that standard and 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 intrusion on 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 to which we will turn in chapter 2.

Two

The Roots of Affirmative Action; The Women's Movement; and Affirmative Action's Group Coverage

Reconstruction and the Origins of Affirmative Action

Reconstruction's Enduring Achievement

Affirmative action first cropped up in the modern era as a theory for advancing education, work, and voting opportunities for disadvantaged minorities. Affirmative action's initial agenda was to complete the task that post-Civil War Reconstruction had undertaken, but abandoned, a full century earlier, namely, the integration of America's black community into the economic and political mainstream. Affirmative action's operational concept was the achievement of nonracial civic equality—a notion that Reconstruction had inserted into our constitutional order. In this sense, affirmative action as a legal right originated in the Reconstruction era.¹

Indeed, the inception of modern affirmative action might best be understood as a continuation or revival of Reconstruction. In the aftermath of the Civil War, as in recent history, the overriding antidiscrimination issue was whether to take “special action” in order to counteract the effects of historical discrimination. Then the specific problem was how to emancipate the slaves whom the Thirteenth Amendment had liberated in 1865. Should—the critical question was—these “freedmen” “be viewed as individuals ready to take their place as citizens and participants in the competitive marketplace, or . . . [should] their unique historical experience oblige the federal government to take *special action* on their behalf?”² After a titanic struggle with President Andrew Johnson, the Republican majority in Congress opted for a form of federal intervention based on the principle of equal citizenship.³

This decision was one of the most significant events in our entire constitutional history. In contemporary constitutional theory, equality is a