**Affirmative Action**

**Background**

As President Lyndon Johnson said in 1965, "You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say you are free to compete with all the others, and still just believe that you have been completely fair."

President Johnson's speech eloquently stated the rationale behind the contemporary use of affirmative action programs to achieve equal opportunity, especially in the fields of employment and higher education.

The emphasis is on opportunity: affirmative action programs are meant to break down barriers, both visible and invisible, to level the playing field, and to make sure everyone is given an equal break. They are not meant to guarantee equal results -- but instead proceed on the common-sense notion that if equality of opportunity were a reality, African Americans, women, people with disabilities and other groups facing discrimination would be fairly represented in the nation's work force and educational institutions.

The debate over affirmative action demarcates a philosophical divide, separating those with sharply different views of the "American dilemma" -- how the nation should treat African Americans, other people of colour and women. This division centres on a number of questions: to what extent discrimination and bias persist, especially in a systemic way; to what degree affirmative action programs have been effective in providing otherwise unavailable opportunities in education, employment, and business; and to what extent affirmative action programs appear to unduly benefit African Americans and other people of color at the expense of the white majority.

The continuing need for affirmative action is demonstrated by the data. For example, the National Asian and Pacific American Legal Consortium reports that although white men make up only 48% of the college-educated workforce, they hold over 90% of the top jobs in the news media, 96% of CEO positions, 86% of law firm partnerships, and 85% of tenured college faculty positions.

Affirmative action is not, as some critics charge, a uniquely modern concept fashioned by contemporary liberals in defiance of history or tradition. Although the techniques that we now call "affirmative action" are of fairly recent design, the conceptual recognition of the need to take affirmative, or positive legal action to redress discrimination's impact, rather than simply ending discrimination, has been around since the Civil War. During Reconstruction (the period immediately after the Civil War), the Constitution was amended and other federal initiatives, such as the creation of the [Freedman's Bureau](http://history.eserver.org/freedmens-bureau.txt), were undertaken to establish equal opportunity for the former slaves. These initiatives were at least modestly successful, bringing about African American participation in elections for the first time.

***Sporadic efforts to remedy the results of hundreds of years of slavery, segregation and denial of opportunity have been made since the end of the Civil War.***

A significant number of African Americans held public office, including two U.S. senators and 20 members of the House, between 1870 and 1900. But when the federal government withdrew its support for Reconstruction in the late 1800s, the gains made by African Americans were quickly stripped away and replaced by a patchwork system of legal segregation (including, in some instances, legal segregation of Latinos, Asians, and Native Americans as well). By 1896, in [Plessy v. Ferguson](http://www2.law.cornell.edu/cgi-bin/foliocgi.exe/historic/query%3D%5BGroup%20163%20U.S.%20537%3A%5D%28%5BLevel%20Case%20Citation%3A%5D%7C%5BGroup%20citemenu%3A%5D%29/doc/%7B%401%7D/hit_headings/words%3D4/hits_only), the Supreme Court had upheld the cornerstone segregationist doctrine of "separate but equal" - i.e., ruling that the Constitution permitted governments to require separation of the races in schools, public transportation, and elsewhere, so long as the opportunities offered the separate races were characterized as equal.

In the modern era, the concept of affirmative action was reborn on June 25, 1941, when President Franklin Roosevelt -- seeking to avert a march on Washington organized by civil rights pioneer [A. Philip Randolph](http://www.philsch.k12.pa.us/schools/randolph/A_P_Randolph.html) -- issued [Executive Order 8802](http://www.classbrain.com/artteenst/publish/article_71.shtml) requiring defense contractors to pledge nondiscrimination in employment in government-funded projects. Two years later, President Roosevelt extended coverage of the executive order to all federal contractors and subcontractors. In a 1947 report, the President's Committee on Fair Employment Practices found that, while African Americans comprised only three percent of the workers in defense industries in 1942, their number had increased to eight percent in 1945. But it also found "the wartime gains of Negro, Mexican-American and Jewish workers . . . began to disappear as soon as wartime controls were relaxed."

Successive presidents, under pressure from the African American community and civil rights advocates, continued the effort to increase minority employment opportunities and end job discrimination. It was not until President Kennedy issued [Executive Order No. 10925](http://www.eeoc.gov/abouteeoc/35th/thelaw/eo-10925.html), requiring not only that federal contractors pledge non-discrimination but that they "take affirmative action to ensure" equal opportunity, that the now-fractious phrase came into popular discourse. Kennedy's order also included penalties -- including suspension of a contract -- for non-compliance. This was succeeded by another executive order [(Executive Order 11246)](http://www.dol.gov/esa/regs/compliance/ofccp/fs11246.htm) issued by President Lyndon Johnson, along with the creation of the [Office of Federal Contract Compliance](http://www.dol.gov/esa/ofccp/) in the Department of Labor to enforce its non-discrimination and affirmative action requirements. The Executive Order was amended in 1967 to include prohibitions on sex discrimination by federal contractors, along with a requirement that they engage in good faith efforts to expand job opportunities for women. [Executive Order 11246](http://www.dol.gov/esa/regs/compliance/ofccp/fs11246.htm) remains among the most effective and far-reaching federal programs for expanding equal opportunity.

Implementation of affirmative action started slowly, with the construction industry the site of one of the first tests. In 1965, the [Office of Federal Contract Compliance](http://www.dol.gov/esa/ofccp/) created government-wide programs to redress the years of discrimination in the construction industry. The series of affirmative action programs was designed to boost minority employment by emphasizing hiring results in federally funded construction jobs.

In the 1970s, The Vietnam Era Veterans Readjustment Assistance Act of 1972 called for "the preferential employment of disabled veterans and veterans of the Vietnam era ... who are otherwise qualified." The act was amended a year later to require federal agencies and contractors to take affirmative action in employment and promotion for people with disabilities. These changes underscored the use of affirmative action as a balancing of competitive interests. Affirmative action was understood to be the creation of opportunities to compete and not an assurance of outcome or success.

The various programs culminated in the "Philadelphia Plan," implemented under President Nixon. This plan required contractors doing business with the federal government to commit themselves to self-determined numerical goals for minority. By withstanding challenges both in Congress and the courts, the Philadelphia Plan helped establish affirmative action as a way of life for American employers. Indeed, employers often embraced affirmative action as a good business practice, enabling them to tap into larger, more diverse, and more qualified pools of talent.

A key example of business support for affirmative action came early in Ronald Reagan's second term and from what would be considered a very unlikely source -- the conservative National Association of Manufacturers (NAM), which represents 13,500 companies. At issue was a split in the administration over proposals by President Reagan's most conservative appointees to revise and weaken [Executive Order 11246](http://www.dol.gov/esa/regs/compliance/ofccp/fs11246.htm) requiring employers with federal contracts to take positive steps -- including establishing goals and timetables -- to include minorities and women in their work force.

NAM, much to the surprise of the administration's conservatives, weighed in on behalf of keeping the executive order intact. In a letter to President Reagan, the business group said it "believes the current executive order provides the framework for an affirmative action policy" and argued that "the business community is concerned that the elimination of goals and timetables could result in confusing compliance standards on federal, state and municipal levels and a proliferation of reverse discrimination suits."

**Terms in the Debate**

The debate over affirmative action has swirled around a cluster of highly charged words, the use of which sometimes obscures, rather than enlightens, the discussion. It is important to note that affirmative action may come into play as a remedy where discrimination is acknowledged or has been found to exist.

Affirmative action itself has been defined as "any measure, beyond simple termination of a discriminatory practice, adopted to correct or compensate for past or present discrimination or to prevent discrimination from recurring in the future." (U.S. Commission on Civil Rights, Statement on Affirmative Action, October 1977.) Affirmative action means taking positive steps to end discrimination, to prevent its recurrence, and to creative new opportunities that were previously denied minorities and women.

An oft-used -- and deliberately misused -- term in the lexicon of affirmative action is "quotas." President George Bush, for example, in vetoing the [Civil Rights Bill of 1991](http://www.eeoc.gov/policy/cra91.html), labeled it "a quota bill," and opponents of affirmative action use the word as a general pejorative to taint all race-conscious remedies for discrimination. The courts, however, have provided a more accurate and precise definition: an absolute requirement that an employer hire a certain number of or percentage of employees from a specified group, without regard to the availability of qualified candidates or the presence of more qualified members of other groups. Such quotas are legally impermissible and are not a component of lawful affirmative action programs.

What affirmative action does sometimes involve is the establishment of a numerically expressed hiring goal, often in connection with a timetable. Indeed, as mentioned above, the [Executive Order 11246](http://www.dol.gov/esa/regs/compliance/ofccp/fs11246.htm) program covering federal contractors relies on the use of goals and timetables. Having established a goal, which is tied to the availability of qualified and available minority workers in the labor market, the employer pledges a "good faith" effort to achieve the goal within an aspirational timetable. Failure to achieve the goal, however, does not, in and of itself, subject the employer to sanctions unless the affirmative action has been judicially ordered as a remedy to illegal discrimination. "Goals," the [Citizens' Commission on Civil Rights](http://www.cccr.org/) has observed, "serve as one measure of nondiscrimination and of the effectiveness of affirmation action efforts, not as a mandate for minority or female employment."

**Affirmative Action & The Courts**

The Supreme Court first addressed affirmative action in three key cases in the late 1970s:

1978: In [Regents of the University of California v. Bakke](http://www2.law.cornell.edu/cgi-bin/foliocgi.exe/historic/query%3D%5BGroup%20438%20U.S.%20265%3A%5D%28%5BLevel%20Case%20Citation%3A%5D%7C%5BGroup%20citemenu%3A%5D%29/doc/%7B%401%7D/hit_headings/words%3D4/hits_only), the Supreme Court ruled that the University's special admission program setting aside a fixed number of seats for minorities at its medical school violated Title VI of the 1964 Civil Rights Act (which prohibits discrimination by federally funded programs). At the same time, however, in an opinion written by Justice Powell, it ruled that race could lawfully be considered as one of several factors in making admissions decisions. In his opinion, Justice Powell noted that lawful affirmative action programs may be based on reasons other than redressing past discrimination -- in particular, a university's educational interest in attaining a diverse student body could justify appropriate affirmative action programs.

1979: [United Steelworkers of America v. Weber](http://www2.law.cornell.edu/cgi-bin/foliocgi.exe/historic/query%3D%5BGroup%20443%20U.S.%20193%3A%5D%28%5BLevel%20Case%20Citation%3A%5D%7C%5BGroup%20citemenu%3A%5D%29/doc/%7B%401%7D/hit_headings/words%3D4/hits_only) involved a new in-plant training program for workers at a Louisiana plant that had hired few minorities in skilled positions. The employer and the union had agreed that 50 percent of the positions in the training program would go to African American employees and 50 percent to whites. Within each group, positions would be filled on the basis of seniority, meaning some junior African Americans would be admitted ahead of more senior whites.

In rejecting the claims of a white employee that the program violated Title VII of the 1964 Civil Rights Act, the Court said the law allowed affirmative action by private parties "to eliminate traditional patterns of racial segregation". One test of lawfulness was whether the program "unduly" trampled on the interests of white workers. The Court held that the plan passed the test because it did not require firing any white workers, nor did it create an "absolute bar" to white advancement. The plan was also permissible because it was "a temporary measure; it [was] not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance."

1980: In [Fullilove v. Klutznick](http://www2.law.cornell.edu/cgi-bin/foliocgi.exe/historic/query%3D%5BGroup%20448%20U.S.%20448%3A%5D%28%5BLevel%20Case%20Citation%3A%5D%7C%5BGroup%20citemenu%3A%5D%29/doc/%7B%401%7D/hit_headings/words%3D4/hits_only), the Supreme Court upheld a congressionally- enacted 10 percent minority business set-aside of federal funds for state and local public works. In the ruling, the Court stressed the remedial nature of the set-aside, with Chief Justice Burger writing that the program "was designed to ensure that ... grantees ... would not employ procurement practices that Congress had decided might result in perpetuation of the effects of prior discrimination which had impaired or foreclosed access by minority business to public contracting opportunities."

The Supreme Court continued to wrestle with the difficult issue of balance into the 1980s. In [Stotts v. Memphis Fire Department (1984)](http://www2.law.cornell.edu/cgi-bin/foliocgi.exe/historic/query%3D%5BGroup%20467%20U.S.%20561%3A%5D%28%5BLevel%20Case%20Citation%3A%5D%7C%5BGroup%20citemenu%3A%5D%29/doc/%7B%401%7D/hit_headings/words%3D4/hits_only) the Court took on the hard issue of whether seniority would determine the order of layoffs in the Memphis fire department even at the cost of wiping out affirmative action. It ruled that Title VII "precludes a district court from displacing a non-minority employee with seniority under the contractually established seniority system absent either a finding that the seniority system was adopted with discriminatory intent or a determination that such a remedy was necessary to make whole a proven victim of discrimination." The decision did not, however, prevent the use of affirmative action in hiring and promotion situations, as the Court apparently viewed displacing white workers from their jobs as far more serious than simply disappointing their hopes for a new opportunity.

Even before the ruling in stotts, the Reagan Justice Department, under Assistant Attorney General William Bradford Reynolds, had abandoned the department's traditionally vigorous enforcement of federal equal employment laws. In 1987 testimony before Congress, Reynolds said the department would end the use of any goals and timetables as a remedy to correct discrimination -- a stance the department carried into its court cases, relying almost exclusively on recruitment programs as remedies for employment discrimination, but refusing to look at the number of minorities or women actually hired or promoted.

At the same time, Reynolds and the department sought to undo the affirmative action remedies that had been agreed to prior to the Reagan administration. Reynolds construed Stotts as holding that any form of race or gender-conscious relief were impermissible. These views were rejected by the courts.

The court in 1986 again emphasized that lawful affirmative action programs cannot require that male workers be discharged to make way for female workers. In [Wygant v. Jackson Board of Education](http://www2.law.cornell.edu/cgi-bin/foliocgi.exe/historic/query%3D%5BGroup%20476%20U.S.%20267%3A%5D%28%5BLevel%20Case%20Citation%3A%5D%7C%5BGroup%20citemenu%3A%5D%29/doc/%7B%401%7D/hit_headings/words%3D4/hits_only), the Court held that a public employer may not lay off more senior white workers to protect the jobs of less senior black workers. Men and whites cannot be excluded from consideration for opportunities; all candidates must have the chance to compete and have their qualifications compared to others.

Two of the court's 1987 rulings -- [U.S. v. Paradise](http://www2.law.cornell.edu/cgi-bin/foliocgi.exe/historic/query%3D%5BGroup%20480%20U.S.%20149%3A%5D%28%5BLevel%20Case%20Citation%3A%5D%7C%5BGroup%20citemenu%3A%5D%29/doc/%7B%401%7D/hit_headings/words%3D4/hits_only) and [Johnson v. Santa Clara County Transportation Agency](http://www2.law.cornell.edu/cgi-bin/foliocgi.exe/historic/query%3D%5BGroup%20480%20U.S.%20616%3A%5D%28%5BLevel%20Case%20Citation%3A%5D%7C%5BGroup%20citemenu%3A%5D%29/doc/%7B%401%7D/hit_headings/words%3D4/hits_only) -- further dealt with Title VII and affirmative action plans. In Paradise, the Court upheld a one-for-one promotion requirement (i.e., for every white candidate promoted, a qualified African American would also be promoted) in the Alabama Department of Public Safety, finding it to be narrowly tailored and necessary to eliminate the effects of Alabama's long-term discrimination which the lower court had found "blatant and continuous." The Justice Department, which had originally intervened in the suit in the 1970s on the side of the African American plaintiff, switched sides during the Reagan administration.

In the second case, Johnson v. Transportation Agency, Santa Clara County, the Court upheld an employer's affirmative action plan that allowed gender to be considered as a positive factor when choosing among qualified candidates for jobs in which women were severely underrepresented. The employer developed its plan after its review found that no women were employed in any of its 238 skilled craft jobs. Both Paul Johnson (the male plaintiff claiming reverse discrimination) and Diane Joyce (the woman who ultimately received the promotion to road dispatcher) had the requisite four years' experience, although Ms. Joyce's experience was more recent and arguably more relevant. Mr. Johnson received a score of 75 to Ms. Joyce's 73 in the graded oral interview, where 70 was a passing score. The Court upheld the county's use of Ms. Joyce's gender as a positive factor in choosing between these similarly-qualified candidates -- especially since no woman had ever held the position of road dispatcher.

By 1989, the composition of the Supreme Court had changed and now included a strong majority of justices suspicious, if not downright hostile, to affirmative action. That hostility was evidenced in the Court's ruling in [City of Richmond v. Croson](http://www2.law.cornell.edu/cgi-bin/foliocgi.exe/historic/query%3D%5BGroup%20488%20U.S.%20469%3A%5D%28%5BLevel%20Case%20Citation%3A%5D%7C%5BGroup%20citemenu%3A%5D%29/doc/%7B%401%7D/hit_headings/words%3D4/hits_only), invalidating Richmond, Virginia's local ordinance establishing a minority business set-aside program.

In Croson, for the first time, the Court adopted the strict scrutiny standard of review demanding that an affirmative action program be supported by a "compelling government interest" and narrowly tailored to ensure the program fits that interest. While not rejecting all governmental race- conscious remedies, the Court set a very high standard for their continued use by state and local governments.

The court extended this tough standard in its 1995 ruling in [Adarand Constructors v. Pena](http://supct.law.cornell.edu/supct/html/93-1841.ZO.html), a 5-4 decision holding that strict scrutiny would also apply to federal affirmative action programs (although leaving open some issues, such as the degree of deference to be given to programs established by Congress). Again, however, the Court refused to reject properly-designed affirmative action. As Justice O'Connor emphasized: "The unhappy persistence of both the practice and the lingering effects of racial discrimination against minorities in this country is an unfortunate reality and government is not disqualified from acting in response to it."

Affirmative action in education has recently faced similar setbacks in the courts. In [Hopwood v. Texas](http://tarlton.law.utexas.edu/hopwood/enbancd.html) in 1996, the Fifth Circuit dismissed Justice Powell's opinion in Bakke, ruling that a university's interest in a diverse student body was never compelling, and that race could no longer be used as one among several factors in admissions decisions in Texas, Louisiana, and Mississippi. Earlier, in 1994, a Fourth Circuit panel ruled in Podberesky v. Kirwan that race-based scholarships were unconstitutional despite extensive evidence offered by the state of Maryland that such scholarships were an effective means of correcting the state's own past discrimination against African American students. The years 2000 and 2001 brought mixed results in the lower courts, as one district court judge, for example, upheld the affirmative action program used by the University of Michigan Law School, while another struck down the university's undergraduate admissions program.

**Recent Developments**

The court's decision in Adarand emboldened affirmative action's opponents to launch a full-scale assault in Congress and in state legislatures, as well as in the courts. They saw some success on the state level, as California enacted [Proposition 209](http://aad.english.ucsb.edu/pages/Prop-209.html) in 1996, which prohibits all affirmative action programs in employment, education, and contracting. The State of Washington followed suit as well, with Initiative 200. The effect of such efforts soon became clear, as the number of African Americans and Latinos admitted to California's top public universities quickly plummeted. Such initiatives, however, have failed in other states.

At the federal level, [President Clinton immediately made clear his determination to "mend, not end" affirmative action](http://www.civilrights.org/library/detail.cfm?id=290) in light of the [Adarand](http://supct.law.cornell.edu/supct/html/93-1841.ZO.html) decision. And the Administration's efforts paid off. Affirmative action's opponents failed in their attempts to move legislation in the late 1990s that would have banned all federal affirmative action programs. In fact, in 1998, Congress reauthorized the disadvantaged business enterprise (DBE) program run by the Department of Transportation (DOT) by an overwhelming bipartisan vote.

This DBE program directs that not less than 10% of funds appropriated for federal transportation procurement should be expended with small disadvantaged business enterprises (generally owned and controlled by women and minorities; however, socially and economically disadvantaged white males are also eligible to compete in the program). The DBE program relies on a system of aspirational goals established by states and localities based on the local availability of qualified DBEs. DOT has never penalized a state of locality for failing to achieve its goals, and the program explicitly prohibits quotas.

While consistently maintaining the constitutionality of its DBE regulations, the Department of Transportation made further changes in the DBE designed to improve the program's effectiveness and tailor it even more narrowly in response to the 1995 Adarand decision. In the fall of 2000, the [10th Circuit agreed, concluding that the regulations satisfied strict scrutiny](http://supct.law.cornell.edu/supct/html/93-1841.ZO.html) because they were justified by the government's compelling interest in ending discrimination against minority contractors and they were appropriately and narrowly tailored. In 2001, the Supreme Court accepted this case for review.