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AFFIRMATIVE ACTION

An Encyclopedia

Volume I: A–I

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TIMELINE OF MAJOR EVENTS IMPACTING AFFIRMATIVE ACTION

See individual entries for an in-depth description of these events.

Major Historical Events Relating to Affirmative Action

1865

End of American Civil War.

Ratification of the Thirteenth Amendment, constitutionally abolishing the institution of slavery.

Freedmen's Bureau Act is passed by Congress; the Freedmen's Bureau is later described by Justice Thurgood Marshall as one of the country's earliest affirmative action programs.

1866

Civil Rights Act of 1866 enacted by Congress; act identifies certain basic civil rights that shall not be abridged on account of race.

1868

Ratification of the Fourteenth Amendment, which in part provides that states shall not deprive an individual of due process of law or the equal protection of the laws.

1870

Ratification of the Fifteenth Amendment, prohibiting states from depriving an individual of the right to vote on account of race or previous condition of involuntary servitude.

1875

Congress enacts the Civil Rights Act of 1875, which provides sweeping civil rights in the area of public accommodations; however, most of the act is held unconstitutional eight years later in the *Civil Rights Cases*.

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1876

Reconstruction ends in the South; beginning of segregationist and discriminatory Jim Crow laws throughout the South.

1883

The Supreme Court decides the *Civil Rights Cases*, declaring the Civil Rights Act of 1875 unconstitutional and declaring that Congress lacks the authority to regulate private conduct under the Fourteenth Amendment; the *Civil Rights Cases* decision represents a colossal setback for civil rights in the South.

1896

The Supreme Court decides *Plessy v. Ferguson*, ratifying the state practice of "Jim Crow" and segregation and creating the separate-but-equal doctrine.

1920

Ratification of the Nineteenth Amendment, granting women the right to vote.

1935

The first usage of the term "affirmative action" is found in Section 10c of the National Labor Relations Act of 1935, which states that the National Labor Relations Board (in a case involving unfair labor practices) might "take such affirmative action, including reinstatement of employees with or without back pay."

1941

President Franklin Roosevelt issues Executive Order 8802, requiring nondiscrimination practices by defense contractors.

1945

Congress enacts the GI Bill, providing special benefits to veterans and arguably becoming the largest affirmative action program in U.S. history.

1954

The Supreme Court decides *Brown v. Board of Education*, holding "separate-but-equal" racial segregation in public schools to be a violation of the Fourteenth Amendment.

Major Current Events Relating to Affirmative Action

1961

President John Kennedy issues Executive Order 10925, making the first modern reference to "affirmative action" in federal government policy by mandating that federal contractors "take affirmative action" to ensure that no discrimination is employed against minorities.

1964

Congress enacts the Civil Rights Act of 1964, a sweeping piece of legislation that bars discrimination based upon race, color, sex, religion, or national origin in public accommodations, in employment, and in federally funded educational programs.

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1965

President Lyndon B. Johnson gives his famous Howard University speech, in which he argues that civil rights laws alone are not adequate to remedy discrimination and inequality; Johnson uses the "chained-runner" metaphor during the speech.

President Johnson issues Executive Order 11246, expanding on President Kennedy's Executive Order 10925 and ordering "affirmative action" to ensure no discrimination by contractors and federal employees on account of race, creed, color, or national origin in the hiring and employment of minority employees; E.O. 11246 also requires contractors to document their compliance with the executive order.

Congress enacts the Voting Rights Act of 1965, which ensures that the rights of citizens to vote will not be denied or impaired because of racial or language discrimination.

1967

President Lyndon B. Johnson amends Executive Order 11246 to cover gender discrimination, as does Executive Order 11375.

1969

President Richard M. Nixon promotes race-conscious affirmative action in his Philadelphia Plan, the most forceful race-conscious/preferential program for minorities up to that time; the Philadelphia Plan calls for timetables and goals by which the construction industry is obligated to increase minority employment.

Executive Order 11478 is promulgated. Executive Order 11478 supersedes Executive Order 11246 in part and prohibits discrimination on the basis of race, color, religion, sex, or national origin (and is later amended to prohibit discrimination on the basis of handicap, age, sexual orientation, and status as a parent). The order requires most federal government employers to take affirmative action to ensure equal employment opportunities.

1972

Congress enacts the Equal Employment Opportunity Act, which amends and strengthens Title VII of the Civil Rights Act of 1964, which had made it illegal for employers to discriminate against any individual because of race, color, religion, sex, or national origin; the 1972 act expands the groups covered by Title VII and gives the Equal Employment Opportunity Commission (EEOC) new enforcement powers.

Congress enacts the Education Amendments (Title IX), which prohibit gender-based discrimination by public and private institutions receiving public funds.

1973

Congress enacts the Vocational Rehabilitation Act, which includes qualified individuals with disabilities in affirmative action requirements for federal contractors.

1974

The Supreme Court decides *DeFunis v. Odegaard*, the first Supreme Court case dealing with the constitutionality of affirmative action as the central issue in the case. The Court rules that a white student's challenge of "reverse discrimination"

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in a university affirmative action admission plan is moot (and not reviewable on the merits) because the student was subsequently admitted to the school. The Court will not take another case dealing with this topic until the seminal *Regents of the University of California v. Bakke* case in 1978.

Congress enacts the Vietnam Era Veterans' Readjustment Assistance Act, which includes veterans with disabilities and Vietnam veterans in the then-typical affirmative action requirements for federal contractors.

1975

The Supreme Court decides *Albemarle Paper Co. v. Moody*, stating that the goals of antidiscrimination laws are twofold, to bar "like discrimination in the future" and "eliminate the discriminatory effects of the past"; the goal of eliminating the discriminatory effects of the past becomes the chief compelling government interest for affirmative action plans.

1976

The Supreme Court decides *Franks v. Bowman*, in part holding that affirmative action may be appropriate to eliminate discriminatory effects of the past.

1978

The Supreme Court decides *Regents of the University of California v. Bakke*, a landmark affirmative action case that rejects fixed racial quotas in the educational context as unconstitutional while allowing for the use of race as one factor in admissions policies.

1979

The Supreme Court decides *United Steelworkers of America v. Weber*, holding that a voluntary affirmative action plan by a private employer is permissible under Title VII provided that a "manifest racial imbalance" exists in the job at issue, the job is historically one that was segregated by race, and the plan does not "unnecessarily trammel" the rights of nonminority employees and is temporary.

1980

The Supreme Court decides *Fullilove v. Klutznick*, allowing flexible modest quotas/set-asides (10 percent set-aside for minority contractors) in the federal contracting context for minority contractors in response to prior institutional discrimination.

1984

The Supreme Court decides *Firefighters Local Union No. 1784 v. Stotts*, holding that white employees with more seniority on the job cannot be laid off in lieu of newer minority employees on the job, regardless of the existence of affirmative action plans; that is, a bona fide seniority system is a legitimate and protected practice under Title VII of the 1964 Civil Rights Act.

1986

The Supreme Court decides *Wygant v. Jackson Board of Education*, declaring that affirmative action plans that lay off nonminority teachers on account of race are not legally permissible; the Court also rejects the "role model theory" and concern for diversity in the general population as legitimate justifications for imposing an

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affirmative action plan upon employees and holds that affirmative action cannot be lawfully used in the context of reduction-in-force layoffs where race is a factor.

The Supreme Court decides *Local 93, International Association of Firefighters v. City of Cleveland* and *Local 28 of the Sheet Metal Workers' International Association v. EEOC*, upholding in both cases court-ordered (i.e., not voluntary) racially conscious hiring and promotion affirmative action plans after past discrimination has been documented.

1987

The Supreme Court decides *Johnson v. Transportation Agency, Santa Clara County*, upholding a gender-based affirmative action plan and holding that a severe underrepresentation of women and minorities when compared to the qualified labor force is sufficient justification for maintaining a gender-conscious affirmative action plan, so long as the use of race and/or gender is only "one factor" in choosing candidates.

The Supreme Court decides *United States v. Paradise*, upholding a lower federal court's imposition of strict racial quotas in the employment hiring context as an appropriate remedial measure in response to four decades of overt and defiant racism by the State of Alabama Department of Public Safety.

1989

The Supreme Court decides *City of Richmond v. J.A. Croson Co.*, holding that the use of state/local racial quotas/set-asides (30 percent set-asides for minority contractors) in the contracting arena is impermissible; the *Croson* decision rejects a contracting set-aside scheme similar to the one the Court had approved in *Fullilove* in the 1980s; in *Croson*, the Court states for the first time that affirmative action is a "highly suspect tool," a decision that marks the beginning of the current era, where the Court views affirmative action with suspicion. Before *Croson*, the Supreme Court was generally considered to be supportive of affirmative action.

1990

The Supreme Court decides *Metro Broadcasting, Inc. v. FCC*, ultimately holding that the Federal Communications Commission's minority preference policies do not violate the Equal Protection Clause because they are consistent with legitimate congressional objectives of increasing program diversity.

President George H.W. Bush refuses to sign the Civil Rights Act of 1990, which Bush believes will inevitably lead to rigid racial quotas in affirmative action plans in employment.

1991

Congress enacts the Civil Rights Act of 1991, containing many of the same provisions as the failed Civil Rights Act of 1990; the 1991 measure contains many provisions meant to reverse Supreme Court decisions of 1988–1989, which were deemed too draconian, onerous, or unfavorable to the employee in the Title VII and affirmative action contexts.

1992

The U.S. Circuit Court of Appeals for the Fourth Circuit holds in *Podberesky v. Kirwin* that race-based scholarship programs do not satisfy a "compelling govern-

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mental interest" as is required for race-conscious plans under the Fourteenth Amendment unless there is a finding of a need for the program to remedy the present effects of past discrimination.

1995

The Supreme Court decides *Adarand Constructors, Inc. v. Peña*, holding that the use of federal race-based preferences in the contracting context is impermissible except in the most exceptional circumstances; the Court imposes the strict scrutiny standard on federal racial classifications, holding that use of a racial classification must be narrowly tailored to fulfill a "compelling governmental interest"; this decision explicitly overrules the *Metro Broadcasting* and *Fullilove* decisions to the extent that those decisions applied a less onerous test than strict scrutiny.

In a speech after the *Adarand* decision, President Bill Clinton states that affirmative action is still needed by society, but should be restructured to ensure that the plan does not reversely discriminate, a speech (and proposal) that becomes known as "Mend It, Don't End It"; on the same day as the speech, Clinton releases a White House memorandum that calls for the elimination of any affirmative action program that (1) uses fixed racial quotas; (2) creates preferences for the unqualified; (3) reversely discriminates; or (4) is not temporary in nature (i.e., no permanent programs).

1996

The Federal Fifth Circuit Court decides *Hopwood v. Texas*, rejecting the University of Texas's affirmative action program under the Fourteenth Amendment and rejecting Justice Lewis Powell's assertion in the *Bakke* case that diversity in higher education could be a compelling state interest; the *Hopwood* decision is the first of several important and conflicting federal circuit court cases on this subject, ultimately leading to Supreme Court review of the *Gratz v. Bollinger/Grutter v. Bollinger* cases in 2003.

1997

California's Proposition 209 goes into effect, essentially abolishing affirmative action in the state; Proposition 209 prohibits affirmative action (granting any preferential treatment to any individual or group based upon race, sex, color, or ethnicity) in the areas of public employment, contracting, or education.

In response to the *Hopwood* decision, Texas adopts its "10 Percent" percentage plan as a race-neutral alternative to affirmative action in higher education, requiring all public colleges and universities in the state to admit the top 10 percent of the graduating high-school classes in the state; Florida follows Texas's lead several years later, becoming the second state to adopt a percentage plan in lieu of affirmative action.

The U.S. Court of Appeals for the Ninth Circuit upholds the constitutionality of California Proposition 209 in *Coalition for Economic Equity v. Wilson*; the Supreme Court refuses review of the case.

A lawsuit is filed in federal district court in Michigan challenging the University of Michigan's admissions program as providing unjust preferences to minorities; this lawsuit culminates in 2003 in the landmark decisions by the Supreme Court on affirmative action in *Gratz v. Bollinger* and *Grutter v. Bollinger*.

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1998

Washington State adopts Initiative 200, which, like Proposition 209 in California, abolishes affirmative action in the state.

2000

Florida adopts the educational component of Governor Jeb Bush's One Florida Plan, ending the use of affirmative action in the state.

A federal district court judge upholds the use of race as constitutional and as a permissible factor to consider in admissions at the University of Michigan in *Gratz v. Bollinger*; the case is appealed.

2001

A federal district court judge rejects an affirmative action plan used at the University of Michigan law school in *Grutter v. Bollinger*; the case is appealed.

2002

The federal Sixth Circuit in the University of Michigan law school case (*Grutter*) holds that the affirmative action program being used is unconstitutional; however, before the Sixth Circuit can issue an opinion in the undergraduate case (*Gratz*), the Supreme Court announces that it will consolidate and review both cases.

2003

The Supreme Court decides the *Gratz v. Bollinger* and *Grutter v. Bollinger* cases, heralded as the "Alamo for affirmative action" and as landmark cases even before the Court issues its decisions. In *Gratz*, the Court declares the University of Michigan undergraduate admissions process unconstitutional in violation of the Fourteenth Amendment because the plan uses race-conscious preferences that, according to the Court, make race the determining factor for many applicants and interfere with the individualized consideration of each applicant. In *Grutter*, the Court upholds the affirmative action plan utilized at the University of Michigan Law School, holding that the plan is narrowly tailored to achieve a compelling governmental interest because it does allow for individual consideration of each applicant. In so holding, the Court declares that diversity in higher education is a compelling government interest, adopting Justice Powell's diversity rationale announced twenty-five years earlier in *Regents of the University of California v. Bakke*. However, the majority opinion also states that affirmative action in higher education should no longer be needed in twenty-five years (i.e., 2028).

INTRODUCTION

Affirmative action is positive action to improve the participation of members of certain groups in various aspects of society, such as the workforce and higher education. The groups targeted by affirmative action are typically those groups defined by a personal characteristic, such as race or gender, on the basis of which the group's members have historically been subject to systematic or institutional discrimination. Affirmative action often involves providing special benefits or allocating special resources to improve the group's situation. Most often, affirmative action is used to refer to programs that consider the group's personal characteristic as a positive factor in determining whether an individual is entitled to the benefits of the program. For example, some affirmative action programs use race preferences or are race conscious because entitlement to the benefits of the program is based, at least in part, on whether an individual is a member of a minority racial group. However, not all affirmative action involves preferences. Some affirmative action programs do not consider the group characteristic (such as minority racial status or gender) in allocating benefits. Such programs aim to increase the participation of the targeted groups via other means, such as taking action to ensure that targeted group members are aware of the program's benefits, to ensure that group members can seek the benefits on equal terms with others, and to identify and eliminate discriminatory practices. In the modern era, the number of groups viewed as potential affirmative action beneficiaries has been expanding to include veterans of the U.S. armed forces and persons with disabilities. However, there is a continuing debate as to which groups (if any) should receive the benefits of affirmative action, particularly when the affirmative action program involves group-based preferences.

When preferences are used to provide benefits to these groups pursuant to an affirmative action program or plan, the governmental or private organization engages in what has been described as "benign discrimination" (or "positive discrimination," a term used by the European Union, Canada, and South Africa, among others). Benign discrimination is often distinguished from "invidious discrimination," which is discrimination intended to burden groups in society and is prohibited under various federal civil rights statutes and federal judicial decisions. "Benign discrimination" means that the government (or private organization) is

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indeed discriminating on the basis of skin color, gender, or other group characteristic; however, the discrimination is done with a benign purpose: to benefit persons instead of to burden them. Those not ultimately receiving benefits they believe they deserve or have earned because of their merit or other factors often claim that such "benign discrimination" is, in essence, not benign, but malignant as it relates to them, and is classified as "reverse discrimination."

Affirmative action has been one of the most controversial issues in the United States during the last several decades. Perhaps no issue in the modern American dialogue engenders such intense debate, controversy, and, sometimes, heated argument as the topic of affirmative action. The debate covers not only the proper scope and role of affirmative action programs, but also the question of whether or not such programs should exist at all under the U.S. Constitution. Thus affirmative action is debated not only from a political perspective, but also from the historical, sociological, moral, and constitutional/legal perspectives. The issue also encompasses conflicting concerns. For example, polls taken in 2002 suggested that a majority of Americans considered themselves concerned with equality and issues of fairness, even though approximately 70 to 80 percent of individuals polled were generally opposed to affirmative action that involved "preferences" or "quotas" and believed that such programs should be eliminated. A poll in the May 2, 2003, edition of the *Chronicle of Higher Education* similarly reported that 80 percent of the individuals (four of every five) polled stated that it was important for colleges and universities to adequately prepare minority students, while 64 percent of the same individuals stated that they opposed or strongly opposed the notion that colleges and universities should admit applicants who were statistically (i.e., on the basis of grade point averages and standardized test scores) less qualified to achieve diversity under affirmative action plans.

Such opposition, like many issues of affirmative action, appears to be divided along racial lines, with only 3 percent of the white individuals polled saying that they strongly support the use of racial preferences in higher education. Phrased another way, if pollsters are to be believed, white individuals statistically do not generally support affirmative action, while people of color generally do. The same *Chronicle of Higher Education* report indicated that only 7 percent of the white individuals polled strongly agreed with the notion that affirmative action programs in higher education benefited society as a whole. Conversely, 27 percent of black respondents and 22 percent of Hispanic respondents strongly agreed with the notion that affirmative action programs in higher education benefited society. In between these two groups, roughly 14 percent of the Asian Americans polled strongly agreed with the notion of affirmative action benefiting society as a whole.

While "affirmative action" is considered a modern term created in the 1960s, the history of the concept of affirmative action is older and more extensive than most people realize. This history can be traced back hundreds of years, depending on how broadly one defines the term "affirmative action." In *A History of Affirmative Action, 1619–2000* (2001), Philip Rubio argues that to fully understand all the issues of "affirmative action" in the United States today, one must trace its origins back to early slavery in the United States and the resulting relationship between whites and minority groups in America. Rubio thus begins his treatment of "affirmative action" with the landing of the first Africans at Jamestown in 1619. In

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describing the long lineage of affirmative action in America, Rubio writes as follows:

> More than any other controversy in the 1990s (with the possible exception of the one surrounding the criminal justice system), affirmative action sums up the story of the United States: the struggle for justice, equality, and self-determination and whether African Americans will or even should be able to enjoy chosen labor and increased life chances. It represents the history of white supremacy, privilege, and guilt versus black protest, militance, and demands for compensation and reparations; black reality against white denial; formal equality versus remedial preferential treatment; and the debate over integration, assimilation, segregation, and separation. The black-led struggle against discrimination has been the primary impetus for people of color, women, and other oppressed groups also to demand political and social equality. (Rubio 2001, 3)

Thurgood Marshall, the first African American to serve on the U.S. Supreme Court, took a similar approach to dating the genesis of affirmative action in America. Justice Marshall once commented that the Reconstruction (1865–1875) Amendments (Thirteenth, Fourteenth, and Fifteenth) to the U.S. Constitution, along with Reconstruction civil rights legislation such as the Freedmen's Bureau, were meant to provide benefits to the newly freed slaves in the South and thus constituted the first real affirmative action program in America. In fact, Marshall once stated in his separate opinion in the famous case *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), that the United States had "several affirmative action programs" during the middle to late 1800s.

Thus the concept of affirmative action dates back far beyond the modern period, and this encyclopedia, therefore, contains many references and entries dealing with the broader historical moorings of affirmative action. It would do the reader a great disservice to exclude entries on the historical context and merely focus on the last several decades of modern affirmative action usage. Echoes of the famous century-old debates between Booker T. Washington and W.E.B. Du Bois concerning how to improve the lot of racial minority groups in America and ensure equality can be heard in affirmative action debates today. It was this historical context in the antebellum period, the postbellum period, Reconstruction, and the segregationist era that ultimately gave birth first to antidiscrimination laws, such as the various civil rights acts, and then to modern affirmative action programs.

Yet despite the early history and forms of affirmative action in the United States dating back to the 1860s and 1870s, for some, the notion of affirmative action has its real genesis in the twentieth century, when the term "affirmative action" was first officially sanctioned by the federal government. The term first appears in the labor context as part of the National Labor Relations Act of 1935. This legislation specified that employers should use "affirmative action" to ensure that victims of discrimination (workers) were put back in the situation they had been in prior to the discrimination. However, the first official usage of the term "affirmative action" in conjunction with providing equal opportunities for racial minorities came in 1961, when President John F. Kennedy issued Executive Order 10925, which required federal contractors to take "affirmative action" in employing workers on a nondiscriminatory basis. Since 1961, various presidents have sought to expand or

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reduce the usage of affirmative action to include different beneficiaries or different topical areas.

Affirmative action programs were initially envisioned as temporary programs needed to provide a level playing field for minorities and other groups that had suffered historical discrimination. Once the field was leveled, or, to use another metaphor, once all runners in the race were able to fairly compete by starting from the same point and without being hobbled by previous discrimination, then the need for affirmative action would arguably be eviscerated. As most modern affirmative action programs are largely an extension of the antidiscrimination laws of the 1950s and 1960s, it would again be shortsighted not to include in the encyclopedia entries on antidiscrimination laws. When antidiscrimination laws alone proved to be only partially effective in breaking down the vestiges of inequality, segregation, racism, and sexism in the United States, affirmative action programs were advanced as a more aggressive and proactive alternative means to achieve equality. Some people subdivide affirmative action programs into "soft" or "weak" and "hard" or "strong" programs. For such individuals, soft affirmative action programs involve the enforcement of civil rights laws in an aggressive fashion, but nothing more, and such programs certainly do not use racial or gender preferences. Hard affirmative action programs involve the use of preferences to advance one group over another. Hence an understanding of these earlier antidiscrimination laws is relevant to the affirmative action debate, in part to gauge whether affirmative action is a necessary corollary and in part to understand the entire history of affirmative action.

From the relatively straightforward use of preferences or bonuses in contracting, education, and employment, affirmative action has grown to impact many other programs, such as busing, housing, lending, licensing, redistricting, and voting. Thus the idea of affirmative action today involves a plethora of different fields and government programs and practices, not just the traditional areas of education, employment, and contracting. Likewise, the group of beneficiaries of such programs has been expanding from African Americans to other minority groups, then to females, and more recently to people with disabilities and to U.S. veterans. Each group has its own reason(s) for considering itself a proper beneficiary of affirmative action programs, most typically that the group has been the victim of past systematic discrimination. Today, many advocate affirmative action based on socioeconomic factors, claiming that those who come from economically disadvantaged backgrounds should receive the benefit of such programs.

Interestingly, if one defines the concept of preferences in the broad sense, the United States has employed preferences in many different contexts beyond race or gender. Veterans receiving special benefits as a result of active-duty military service are an example of the government discriminating against one class of individuals (nonveterans) to the benefit of another class (veterans). Similarly, when colleges and universities offer a seat to an entering student due to his or her parents' attendance at that institution (i.e., legacy) or by virtue of one's athletic abilities, the school is employing a preference of a sort and is discriminating against one class of individuals (nonathlete or nonlegacy student) to the benefit of another. Supporters of affirmative action today, especially those who argue for the use of hard or strong racial preferences, point to the accepted use of preferences in other areas of society. In essence, the argument is that society has per-

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mitted and condoned the use of preferences for other groups for years, and allowing preferences for members of minority classes should be treated no differently now. Opponents of affirmative action argue that racial preferences are unique in that the constitutional equal protection guarantee, which forbids a state to deny a citizen the "equal protection of the laws" on account of race, was specifically intended to make race irrelevant in modern society. Thus, for opponents of affirmative action, veterans' preferences or a legacy preference are not analogous to racial preferences on constitutional grounds.

Starting with the seminal Supreme Court decision in *Regents of the University of California v. Bakke* (1978), courts entered the modern debate on the constitutionality of governmental affirmative action programs primarily by addressing challenges to such programs under the Equal Protection Clause of the Fourteenth Amendment (as it relates to state governments and actions) and the Due Process Clause of the Fifth Amendment (as it relates to actions taken by the federal government). The Equal Protection Clause, ratified in 1868 as part of the Fourteenth Amendment, specifies that no state shall deprive an individual of "the equal protection of the laws." The Due Process Clause of the Fifth Amendment specifies that a person shall not be deprived of his or her life, liberty, or property, without due process of law. The debate regarding the constitutionality of programs that favor one race over another also has its genesis in the Reconstruction Amendments, namely, the Thirteenth, Fourteenth, and Fifteenth Amendments. The Supreme Court began reviewing the constitutionality of such programs as early as 1883 in the *Civil Rights Cases*, 109 U.S. 3 (1883), a consolidated case dealing with the constitutionality of the sweeping Civil Rights Act of 1875. In this infamous case, the Supreme Court held most of the Civil Rights Act of 1875 to be unconstitutional. The Court further held that African Americans should no longer be, in the words of one justice, "the special favorites of the law." The Court also held in the *Civil Rights Cases* that America's several early "affirmative action programs" (in the words of Thurgood Marshall) for the benefit of African Americans were no longer needed. The decision in the case was clearly out of touch with the condition of African Americans in society, as the country was entering what has been described as the nadir of race relations and equality for minorities in the United States. Nonetheless, the Court concluded in 1883 that substantial equality had been achieved and progressive legislation was no longer needed. The 1883 case is also remembered today for the stinging rebuke contained in the dissent to the decision by Justice John Marshall Harlan, who asserted that African Americans and other minorities in the United States still needed affirmative assistance to achieve equality and opportunity.

Thus, starting with the *Civil Rights Cases*, the constitutionality of preferential programs has been an issue. Since the *Civil Rights Cases*, and continuing through the modern era in such cases as *Regents of the University of California v. Bakke*, *Adarand Constructors, Inc. v. Peña*, and *Gratz v. Bollinger* and *Grutter v. Bollinger*, the framework for analysis of the constitutionality of a race- or gender-based preference program on the state level has been the Fourteenth Amendment and, in particular, the Equal Protection Clause; on the federal level, the framework has been the Fifth Amendment Due Process Clause (which the Supreme Court has stated implies an equal protection clause applicable to the federal government). Each case has refined in some way our constitutional understanding of preferen-

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tial programs under the Fourteenth or Fifth Amendments or has implied some type of limitation on when an affirmative action plan can be used. Therefore, many of the entries in the following pages concern the most important and influential affirmative action cases. Obtaining an understanding of the constitutionality of such programs is, of course, essential in the debate as to whether or not the country should continue to employ race- or gender-based affirmative action plans.

In the 1980s and 1990s, attacks against the use of affirmative action intensified. During the Reagan administration, the federal government was hostile to affirmative action and the aggressive promotion of civil rights issues. During the 1990s, several courts began to declare affirmative action to be illegal in different contexts. In the late 1990s and the first several years of the new century, several states, through statewide initiatives, began to pass state laws or referenda prohibiting the use of affirmative action plans to favor one race over another. The most notable state actions were California's Proposition 209, Washington Initiative 200, and the One Florida Plan Initiative.

The practice of affirmative action in the United States has international comparisons as well. Countries such as India, Canada, and Malaysia have long employed affirmative action programs, and regional affiliations such as the European Union have also practiced affirmative action. A host of other countries have also experimented with affirmative action in recent years, including Australia, Brazil, China, Japan, Great Britain, and South Africa. Additionally, as argued by Supreme Court justice Ruth Bader Ginsburg in a 1999 law review article, several treaties impose affirmative action obligations. Examination of these different international practices, often referred to as "positive discrimination" or "compensatory discrimination," as well as the international treaties that impose affirmative action obligations upon their signatories, may be helpful in analyzing the use of affirmative action in the United States. Therefore, entries describing international affirmative action practices are included in this work.

Today, countless questions abound from a variety of disciplines regarding affirmative action. In the legal discipline, a multitude of questions arise: Are affirmative action programs unconstitutional? Do they violate federal antidiscrimination statutes? Does the Fourteenth Amendment require color-blind or gender-blind behavior by the government, or can racial/gender preferences be employed under affirmative action programs? What are the legal barriers or mandates for affirmative action today? What legal requirements must be met for the proper use of affirmative action programs?

Sociological research, data, and theories are helpful in the debate, and such research and data generate countless other questions: Has equality been achieved? Has the goal of a "level playing field" been achieved? Does a "glass ceiling" exist for minorities and women in employment and education, and if so, are affirmative action programs the appropriate means to rectify the situation? What groups have been discriminated against? How broad or narrow should the remedy be to cure past discriminations? Do affirmative action plans or programs actually help or hurt the classes they are supposed to benefit? Do affirmative action programs create backlash, displaced aggression, and increased racial friction? Many of the entries in this work address these legal and sociological questions.

Likewise, in the realms of political science and history, questions abound as to whether the allocation of goods and resources of society is being handled properly

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through affirmative action programs. Modern affirmative action programs were deemed to be of a temporary nature, yet no end to such programs appears in sight. What is the final end date for such programs? Will there ever be an end date? How can society achieve the dream of Dr. Martin Luther King Jr. that individuals be judged upon the content of their character, as opposed to the color of their skin? Is affirmative action the appropriate means? Does it work? Should society rely on a less aggressive means of achieving true equality, such as relying on antidiscrimination laws alone, or is affirmative action not enough, and should society seek more aggressive remedial means such as reparations?

Thus, taken in its totality, the topic of affirmative action today involves a maze of historical events (some going back hundreds of years), scholarly literature and research, judicial cases, constitutional restrictions, statutes, executive orders, regulations, studies, and popular writings on the subject. The list of questions grows the more one reads and studies the issue of affirmative action in the United States. The increasing interrelatedness and connection of various issues from different disciplines, from historical events to sociological research, from legal restrictions to philosophical beliefs of justice, makes the field of affirmative action hard to completely comprehend. Yet knowledge of all of these different areas is essential in understanding and formulating conclusions on affirmative action. Harvard law professor Christopher Edley commented in 1998 that in discussing affirmative action, many individuals do not adequately prepare as they would for other topics and, through this lack of preparation, propagate misconceptions. According to Edley, in the area of affirmative action, "many [individuals] think that shooting from the hip should suffice. This is not rocket science; this is harder than rocket science" (Roach 1998, 26).

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SEAN RICHEY

Affirmative Action, Arguments for

Proponents of affirmative action programs and initiatives typically support affirmative action on the basis of theories of justice, democracy, social utility, and diversity. Based on the premise of compensatory justice, supporters argue that affirmative action serves as compensation to minorities and women for the nation's history of discriminatory laws and practices aimed at curbing or suppressing constitutional rights. The premise of democracy holds that the inclusion of minorities and women in educational and work settings that previously did not accept these groups fosters the development of a democratic view by minorities and nonminorities through the development of a group consciousness and ideal of inclusiveness. The social utility premise contends that affirmative action benefits society by creating minority role models that motivate other minorities to achieve, creating a more diverse society inclusive of all groups, and increases the pool of applicants for universities and jobs by eliminating the biases inherent in merit testing.

The argument for affirmative action based on the premise of compensatory justice owed to women and minorities is centered on the rights guaranteed to all citizens under the Constitution and on the Lockean theory of natural rights. Proponents of affirmative action argue that minorities have been denied their constitutional rights of liberty and justice for centuries through slavery, the denial of the right to vote, "separate-but-equal" systems of education, and the denial of such basic liberties as equal access to public facilities. Many of these practices were institutionalized through the full support and sanction of many individual state governments and the federal government in many instances. Due to this history of discrimination and oppression, women and minorities are owed special consideration in employment and university admissions as repayment for the hardships they have been forced to endure and the subordinate social, political, and economic status in which they have been placed.

Tied to the argument based on compensatory justice is evidence that women and minorities are still being socially and systematically denied equality, as evidenced in the extremely small representation of these groups as chief executives of Fortune 500 companies, as holders of political offices at all levels of government, and in the population of students at the nation's most prestigious colleges and universities. Women still earn lower salaries than their male counterparts in many occupations. Affirmative action has been the most successful means to in-

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crease the percentage of minorities in positions to which they previously had no access and thus bolster their professional, social, and financial positions. Lawsuits against Texaco, Denny's, and Avis have shown that blatant discrimination by large companies still exists against their minority workers and customers. Women and minorities have made tremendous progress in education and in the workplace over the past few decades as a result of affirmative action programs. Eliminating these programs would only retard further progress or, even worse, reverse the progress these groups have already made.

The argument for affirmative action based on the principle of democracy contends that a diverse population fosters a society desiring inclusiveness and equality for all citizens. Social and educational learning in classrooms is maximized when students from different backgrounds share their diverse thoughts and perceptions, while only a limited amount of learning can be achieved solely through textbooks, lectures, and discourse among students from the same or similar backgrounds. As universities strive to create diverse student bodies by offering special consideration and financial privileges to athletes and musicians, they should also be allowed to offer the same advantages to minorities and women to ensure a demographically diverse student body. The same holds true for businesses striving to create a diverse environment by employing workers from different universities and possessing various talents and skills.

The argument for affirmative action based on a utilitarian view holds that affirmative action benefits all of society, not just minorities and women. First, creating a system that produces women and minority doctors, teachers, and lawyers produces a group of specialists and leaders more aware and willing to serve the needs of those less fortunate in their communities. That is, it is argued that minority professionals are more apt to practice their profession in traditionally underrepresented and diverse communities, thereby further spreading the allocation of services throughout society. These leaders also serve as role models for members of their minority group, inspiring other individuals to achieve the same degree of success in a given field.

Second, affirmative action eradicates discrimination. It is argued that affirmative action is a more aggressive and needed continuation to the antidiscrimination laws. That is, while the antidiscrimination laws were a necessary start in the war to achieve equality, more proactive and aggressive programs like affirmative action are needed to achieve full integration and equality in society. Third, it is sometimes argued that affirmative action programs actually increase the quality of job applicants and performance on the job. With some affirmative action programs, the pool of applicants for job positions and admission slots is increased and is more inclusive and more competitive because employers and universities are required to increase the scope of applicants they consider for vacancies. Overall, it is argued, the consequence of affirmative action is a society more able to deal with an increasingly diverse national economy.

Proponents also point to the societal detriment that can result without affirmative action. By 2050, it is estimated that the majority of the U.S. population will be comprised of minorities. Unless minorities are offered special opportunities in education and job placement, the nation will be unable to meet the demands of a more diverse society in years to come. It is argued that universities that do not actively seek minority applicants will be unable to financially support their insti-

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tutions, and companies will have extremely limited employee pools. Classrooms and the workplace must reflect the diversity existing in the general population. As the baby-boom generation places a strain on the Social Security system, the pool of workers supporting this system will have to include highly qualified and well-paid minorities to boost revenues to Social Security. Statistics also show that more educated people commit fewer crimes and are more aware of the benefits of nutrition and healthy lifestyles. If minorities continue to represent the largest population of prison inmates and the least healthy of the American population through a lack of education and job opportunities, the health, welfare, and justice systems will be unable to bear the resulting financial burden produced over the next century as a result of the increasing minority population.

Supporters of affirmative action use the U.S. military's success in implementing affirmative action policies and programs as a prime example of the program's capability to succeed if properly implemented. The military forces have aggressively recruited and sought out qualified officer candidates from minority pools, coupled with the enforcement of antidiscriminatory policies and integrative programs. These actions have increased the proportion of minorities in high-level positions, produced a military workforce that views discrimination as being more prevalent in society at large than in the military, and fostered a perception that opportunities are open to all personnel regardless of race and gender.

See also Affirmative Action, Criticisms of; Affirmative Action Plan/Program; Constitution, Civil Rights, and Equality; Discrimination; Education and Affirmative Action; Employment (Private) and Affirmative Action; Employment (Public) and Affirmative Action; Equal Protection Clause; Military and Affirmative Action; Minority Professionals and Affirmative Action; Role Model Theory.

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Affirmative Action, Criticisms of

Continued examinations of affirmative action policies have forced opponents and proponents alike to reexamine the nation's societal goals against individual freedoms. Since the policy's inception, affirmative action as a racial (or gender) preference measure has generated much debate in the arenas of education, contracting, and employment. Although proponents and opponents have debated the merits of affirmative action, the vast writings on affirmative action policies reflect several arguments that have remained consistent through time and throughout the debate. These arguments have revolved around three rationales: compensatory, corrective, and redistributive. The moral, color-blind, and diversity rationales, which overlap the aforementioned positions, have been central to the debate as well. These different theories (as discussed more fully in this entry) may be summarized as the following criticisms: first, affirmative action programs engage in reverse discrimination against whites; second, affirmative action programs unfairly

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utilize race (and sometimes gender) as a selection/promotion device when such decisions should be based upon merit and qualifications alone; third, affirmative action policies move the United States away from the goal of a "color-blind" Constitution and society; fourth, affirmative action programs stigmatize recipients of the programs and cause others to unfairly doubt the strength of the recipient's true merit and qualifications for the position in question; fifth, affirmative action programs create a condition of dependency and expectation among recipients of the program (and minority-group members as a whole); and finally, if affirmative action was needed, it was needed only as a temporary measure to achieve equality in the 1960s to the 1980s, and as substantial equality has been achieved, the program should be terminated.

The notion of *compensation* posits that damages should be awarded to victims who have been harmed or injured. Some affirmative action supporters have argued that because of past forms of discrimination, such as slavery, Jim Crow laws, and de facto segregation (as well as the continuation of these events as negatively impacting minorities in employment and education), minority-group members are entitled to compensation. That is, because of lingering negative impacts of these past events, compensation should be paid to make up for these past forms of discrimination. In the context of education and admissions, the idea of compensation has met much opposition. Because minorities have been discriminated against due to their particular group membership and not individual qualities, supporters have argued that compensation for group discrimination should also be in the form of group remedies. While supporters have suggested that affirmative action is needed to remedy past discrimination, opponents have argued against racial preferences for the following reasons: first, racial preferences penalize those, especially present-day white males, who have done nothing to warrant their reduction of equal opportunities (i.e., racial preferences reversely discriminate against whites); and second, racial preferences award benefits to members of preferred groups who may not deserve the benefit of preferential treatment.

Corrective arguments for affirmative action pertain to efforts aimed at righting present wrongs, as opposed to compensation for past injuries to a group. For example, if government agencies, private businesses, or educational institutions enforce policies that have a disparate impact on particular racial/ethnic groups, then such organizations should discontinue their discriminatory practices. That is, if an organization has instituted employment guidelines, rules, or regulations that have no bearing on the tasks one needs to perform on the job, and in turn, evidence suggests that these same rules act as barriers for women or minorities, then these barriers should be dismantled to prevent future discrimination that is systemic in nature. Hence this remedy focuses on outcomes and relies on the assumption that parity between groups is the target goal. Supporters of corrective measures have argued that traditionally, white males have received most, if not all, social benefits and rewards, including college admissions to prestigious institutions. In contrast, qualified minorities have received proportionately very few of these same rewards. Affirmative action practices expand the pool to qualified applicants while including more minorities. Opponents have rebutted this practice for two major reasons: (1) individuals should not be rewarded based on their inherent qualities, such as race or sex, but should be rewarded based on their individual talents and merit; and (2) affirmative action violates the principle that

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"the prime function of government is to remove artificial barriers to equal opportunity" (Swanson 1981, 256). Opponents have argued that by supporting the use of affirmative action polices, the government actually facilitates barriers to equal opportunity.

Contrary to corrective arguments that focus on present discriminatory practices or wrongs, redistributive arguments assume that "society is in some ways unjust, and the injustice is sufficient to warrant taking steps toward a more just situation" (Francis 1993, 30). If the underlying assumption is that society is unjust, and, as a result, there are those who have and those who do not have within society, an attempt is made to strike a balance. The redistributive rationale concedes that there are limited social rewards and benefits that, if distributed disproportionately, will perpetuate inequality. Injustices of this nature in many cases need a redistributive measure to rectify such an imbalance in society. Supporters of redistributive measures have argued that rewards have been historically withheld from minorities because of their race and ethnicity. Hence by considering race, a more equitable distribution of rewards is encouraged. The consideration of race reduces the disparities of rewards between whites and underrepresented groups. Opponents have argued that using race to enforce policies that aim to redistribute wealth, social goods, or equality is incorrect and undermines the principles of equity and justice. Government contracts, entrance to elite postsecondary institutions, and employment should be distributed as a result of the talents and abilities of the individuals seeking entrance, employment, or contracts.

Although these rationales are very prominent, the moral position is central to both opponents' and supporters' sense of justice. In many cases, supporters argue from a moral standpoint that affirmative action is the right policy approach to take. The basis of this moral stance is that past racial discrimination, which according to supporters has not been adequately addressed in this country, continues to foster racial discrimination. In many cases, the moral position is intertwined with other supportive rationales, such as corrective and compensatory ones. Opponents of affirmative action policies typically argue in response that regardless of this rationale in support of such programs, affirmative action is immoral, wrong, and unfair. It is a discriminatory policy being used to correct discrimination. Phrased another way, there is no such thing as good discrimination and bad discrimination, or benign discrimination and invidious discrimination, only discrimination. Once again, affirmative action is considered unfair and wrong because there are identifiable losers, namely, those who lose out on an opportunity due to the racial preference embedded in the policy. With identifiable winners and losers, the game analogy is applied and the rules are scrutinized. If race is a factor that can tip the balance, the identified losers may emerge with a sense of relative deprivation, frustration, and discontent with the rules and eventually conclude that the game and rules were unfair.

Opponents of affirmative action have argued that whether the intent is invidious or benign, discrimination is wrong and immoral. Color-blind advocates have proposed that instead of implementing a policy that essentially perpetuates discrimination, antidiscrimination laws should be aggressively enforced to eliminate all forms of racial discrimination. Although opponents have acknowledged that discrimination exists, they continue to reject the use of race-specific remedies. The argument is that institutions should not solicit information about race or

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implement policies that take into account the racial composition of those impacted by the policies. It is proposed that using color-blind remedies, such as class-based affirmative action, which deemphasizes race, might yield redistributive outcomes. Color-blind remedies shift the focus from racial injustice measures to needs-based or welfare measures, which do not address the discrimination experienced by those minority groups who fall within the income group of the middle class. The argument is that class-based affirmative action is more likely to redistribute awards to the most needy and deserving. Supporters of affirmative action have varied in their responses to class-based strategies; however, the prevailing counterargument is that avoiding race-specific remedies is not possible if society wishes to correct the legacy of racial discrimination in order to foster equal opportunity and racial equality.

Diversity arguments take into consideration the changing demographics of the country and recognize that all racial/ethnic and cultural groups should be included in the economic and educational enterprises of the country. Proponents have argued that diversity yields favorable outcomes for individuals, organizations, and society. Opponents have argued that diversity arguments are weak and are not compelling enough to hold up in a court of law. Others have argued that diversity goals raise the issue of racial quotas and minimize merit. Essentially, diversity arguments have been countered by the same age-old arguments used against compensatory, corrective, and redistributive rationales.

In the 1990s, proponents of affirmative action and the diversity rationale faced a groundswell of opposition that emerged from the courts, the popular press, public referenda, and federal and state legislatures. In essence, a conservative ideological convergence of various sectors of society—legislative, judicial, and the media—aided in the growing opposition to diversity and affirmative action measures, in particular. However, in spite of the increased affirmative action challenges that were launched against higher-education institutions during this period and the early 2000s, diversity arguments gained ground and became central to the legal defense of these institutions, thereby adding credibility to the diversity rationale. It has been argued in the courts that U.S. Supreme Court justice Lewis Powell's decision in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), asserted that student diversity in the arena of higher education enhances the educational experiences of those students, and therefore the use of race in this instance benefits society. In the words of Justice Harry Blackmun in *Bakke*, "[I]n order to get beyond racism, we must first take account of race . . . [a]nd in order to treat some persons equally, we must treat them differently. We cannot—we dare not—let the Equal Protection Clause perpetuate racial supremacy."

Since the *Bakke* decision, educators, as well as college administrators, have felt intuitively that diversity positively contributes to the educational environment and enhances students' learning outcomes. Due to this assumption, many colleges and universities have voluntarily implemented affirmative action admissions policies to be more inclusive of underrepresented groups. Before clear evidence was available, it was argued that a diverse student population provided educational benefits for the learning environment. Others, however, disagreed with this assertion and argued that diversity compromises standards of excellence. With the advent of new diversity research produced for the University of Michigan cases (*Grutter v. Bollinger*, 123 S. Ct. 2325, 2003 U.S. LEXIS 4800 [2003], and *Gratz v. Bollinger*, 123

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S. Ct. 2411, 2003 U.S. LEXIS 4801 [2003]), substantial evidence has shown that educational benefits result from maintaining a racially and ethnically diverse student body. Furthermore, students of a diverse student body are more likely to learn how to work with people from different cultural/racial and class backgrounds and, therefore, are more attractive to potential employers. Opponents have conceded that diversity yields desirable benefits; nevertheless, they argue that affirmative action is not the appropriate means by which to achieve a diverse student body or workforce. However, affirmative action in higher education will exist for some time to come, as the Supreme Court in *Gratz* and *Grutter* declared diversity in higher education a compelling governmental interest that may be addressed by narrowly tailored race-conscious affirmative action plans.

See also Affirmative Action, Arguments for; Color-Blind Constitution; Constitution, Civil Rights, and Equality; De Facto and De Jure Segregation; Discrimination; Education and Affirmative Action; Equal Protection Clause; Fourteenth Amendment; *Gratz v. Bollinger/Grutter v. Bollinger*; Jim Crow Laws; Meritocracy; Relative Deprivation Theory; *Regents of the University of California v. Bakke*; Reverse Discrimination; Slavery.

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DENISE O'NEIL GREEN

Affirmative Action, Decline in Usage of

Affirmative action, which arguably was in its heyday in the 1970s and early 1980s, has been under attack in the 1990s and early 2000s on both the state and federal levels. Unlike the ultimate demise of segregation through Supreme Court rulings, affirmative action programs have been severely curbed or completely eradicated in various state education systems due to efforts by interest and citizen groups. These groups have instigated policy changes by rallying public support, spearheading the passage of state ballot initiatives, and swaying the opinions of state leaders. The most prominent group has been the California-based Center for Individual Rights (CIR), led by Ward Connerly. After eliminating affirmative action in California by successfully gaining voter support for its referendum, it successfully targeted affirmative action policies and effected policy changes in Texas, Michigan, Alabama, Washington, and Florida. On the federal level, in the court system, there have been several key cases that have been described as seriously limiting the ability of institutions to employ affirmative action programs. In the decisions of *Grutter v. Bollinger*, 123 S. Ct. 2325, 2003 U.S. LEXIS 4800 (2003), and *Gratz v. Bollinger*, 123 S. Ct. 2411, 2003 U.S. LEXIS 4801 (2003), the Supreme Court indicated that it did not expect affirmative action to be needed or employed in the United States by the end of the next quarter century (i.e., 2028, or twenty-five years from the date of the *Gratz* and *Grutter* decisions).

On the state level, ironically, the CIR has utilized the same strategy employed by the National Association for the Advancement of Colored People (NAACP)