Affirmative action programs

Definition: Affirmative action program (AAP) from *The AMA Dictionary of Business and Management*

Procedures to achieve or remedy an imbalance in hiring and employment as applied to minorities and women. Often mandated by government, it sometimes includes quotas governing the percentage of minorities and women represented in an organization.

Summary Article: Affirmative Action from *American Government A to Z: The Supreme Court A to Z*

The term *affirmative action* describes programs that give special consideration or preference to members of previously disadvantaged groups, most commonly African Americans, in areas such as university admissions, employment, and government contracting. The nation and the Supreme Court have been sharply divided since the 1970s on the wisdom and legality of such programs.

Supporters argued that “race-conscious remedies” were needed to compensate for the effects of past discrimination and to achieve a more diverse, representative student body or workforce. Opponents said minority preferences amounted to “reverse discrimination” against whites and a race-based spoils system.

The Supreme Court ruled on fourteen affirmative action cases between 1974 and 1995, with confusing results. The Court approved some use of affirmative action in school admissions, job training, contract set-asides, admission to union membership, and promotions, but never with the agreement of more than six justices. It forbade the use of affirmative action in layoffs to preserve the jobs of African Americans at the expense of more senior white employees.

Two of the Court’s strongest supporters of affirmative action, Justices William J. Brennan Jr. and Thurgood Marshall, retired in 1990 and 1991, respectively. With the appointment of Justice Clarence Thomas to succeed Marshall, the Court had a conservative majority generally opposed to racial preferences. In a series of decisions beginning in 1993, the Court limited the power of state legislatures to use race in drawing congressional district lines to promote the election of minorities. (See reapportionment and redistricting.) In addition, the Court in 1995 narrowed the federal government’s power to give minority-owned companies preferences in awarding government contracts. The 5-4 decision overruled a ruling issued only five years earlier.

More on this topic:

- Discrimination
- Reapportionment and Redistricting
- School Desegregation

The Court was sharply divided on the issue. Two justices, Antonin Scalia and Clarence Thomas, argued...
that the government could never consider race in making decisions; Chief Justice William H. Rehnquist and Justice Anthony M. Kennedy also consistently voted against upholding racial preferences. On the opposite side, four liberal-leaning justices—John Paul Stevens, David H. Souter, Ruth Bader Ginsburg, and Stephen G. Breyer—defended the use of racial preferences to remedy past discrimination.

The pivotal vote on the issue belonged to Justice Sandra Day O'Connor, who shared the conservative bloc's discontent with racial preferences but stopped short of opposing affirmative action altogether. Instead, she argued that affirmative action policies could be upheld in some instances if they were narrowly tailored to remedy past discrimination.

The justices' divisions mirrored the divisions in the country at large. Some members of Congress introduced bills to prohibit racial preferences in government contracts and other areas. There were also moves in some states to restrict affirmative action. California voters in 1996 approved a precedent-setting ballot initiative that prohibited the state from using racial preferences in college and university admissions, public employment, or government contracts.

Closer Look

Allan Bakke talks with fellow graduates after receiving a degree in medicine from the University of California, Davis, in June 1982.

Source: AP Images/Walt Zeboski

Allan Bakke successfully sued the University of California (UC) regents for admission to medical school after being denied under an affirmative action plan. His case became the first test of the constitutionality of racial criteria in state-supported education.

Bakke was thirty-two years old when he decided to seek admission to medical school, and he recognized that his age would be an obstacle. His age was always listed as a primary reason schools he applied to did not admit him. His application to UC-Davis was impressive: he ranked in the 97th percentile on the Medical College Admissions Test (MCAT), and his application scored just two points shy of the automatic admission mark; nevertheless he was rejected. After learning that sixteen of the available slots were set aside for minorities, Bakke filed a lawsuit seeking admission and change to a system that discriminated against whites. (Adapted from Melvin I. Urofsky, 100 Americans Making Constitutional History [Washington, D.C.: CQ Press, 2004].)
With the political debate raging, the Court passed up or missed opportunities to weigh in again on the issue. In November 1997, for example, the Court declined to hear an appeal by civil rights groups seeking to nullify the California ballot measure. In 2002, however, the Court agreed to hear two closely watched companion cases challenging racial preferences in admissions at the University of Michigan.

In a dramatic end-of-term ruling, the Court in 2003 upheld the use of race in college and university admissions to achieve what the majority declared to be a “compelling interest” in attaining a diverse student body. With O'Connor writing the opinion, the Court voted 5-4 to uphold the use of race as one factor in admissions decisions at the university's law school. In the companion case, however, O'Connor joined a 6-3 majority in ruling that the university's main undergraduate college's more rigid system, which awarded points for race, was unconstitutional because it was not “narrowly tailored.”

Supporters of affirmative action hailed the favorable decision in the law school case and generally minimized the likely impact of the adverse ruling in the undergraduate case. Opponents, however, promised further litigation against any universities that exceeded the rulings' limits on considering race in admissions.

The justices had not returned to the issue of university admissions by 2011, but the Roberts Court issued closely divided decisions on school desegregation and employment that disappointed traditional civil rights groups. In 2007 the Court limited school districts' ability to use race-based assignments to promote diversity in enrollment. Two years later, the Court ruled that employers ordinarily cannot adopt race-conscious policies unless they have a strong basis to believe the action is necessary to avoid liability for unintentional discrimination.

Admissions

When the affirmative action issue first reached the Court, the justices sidestepped it. In DeFunis v. Odegaard (1974) the Court, by a vote of 5-4, refused to rule on a white plaintiff's challenge to the use of racial preferences by the University of Washington's law school in admitting students. The plaintiff had been admitted to the school under a court order and was due to graduate in the spring of 1974, only months after the Court heard arguments in the case. On that basis, the majority ruled the case moot—that is, no longer presenting a live controversy.

Four years later, in Regents of the University of California v. Bakke (1978), the Court established the rule that went unchanged for the next twenty-five years. By a 5-4 vote, the Court ruled that state universities cannot set aside a fixed quota of seats for minority group members; a different five-justice majority said race can be considered as one factor in admissions.

The plaintiff in the case, Allan Bakke, had twice been denied admission to the medical school at the University of California at Davis. He challenged the school's decision to set aside sixteen seats for minority applicants in each medical school class of one hundred students. Bakke claimed the practice violated both his right to equal protection of the laws and Title VI of the Civil Rights Act of 1964, which forbids discrimination in federally funded programs.

Four members of the Court—Chief Justice Warren E. Burger and Justices Rehnquist, Stevens, and Potter Stewart—said the set-aside violated Title VI and did not decide the constitutional issue. Four others—Brennan, Marshall, Byron R. White, and Harry A. Blackmun—found no violation of Title VI or of the Constitution. Justice Lewis F. Powell Jr. cast the decisive vote that effectively established the rule of the case. He provided the fifth vote to strike down the school's quota system, saying it violated
both Title VI and the Equal Protection Clause. But he also said universities could make limited use of minority preferences to attain “a diverse student body.”

Critics of affirmative action hoped the Court would return to the issue in a case challenging racial preferences at the University of Texas Law School. The federal appeals court in Texas issued a broadly worded ruling in 1995 that barred any use of race in admissions to state colleges and universities. Both sides in the case urged the Court to review the decision, but the justices declined to hear the case.

Instead, the Court returned to the issue in two suits originally filed in fall 1997 by unsuccessful white applicants to the University of Michigan Law School and its undergraduate College of Literature, Science, and the Arts. Evidence in the separate trials showed that the law school considered an applicant’s race as one factor in trying to achieve what admissions officials called a “critical mass” of students from underrepresented minority groups: African Americans, Hispanics, and Native Americans. The college automatically awarded minority applicants twenty out of the one hundred points needed to qualify for admission.

Both at trial and before the Court, the university mounted a vigorous defense. It presented detailed statistical and sociological evidence of the educational benefits of diversity as well as supporting briefs not only from civil rights groups but also from major corporations and a group of retired military officers. The Bush administration filed a brief that urged the Court to hold procedures at both schools unconstitutional but stopped short of ruling out any consideration of race in admissions.
The differences between the policies proved critical to the Court’s 2003 decisions upholding the law school procedures (Grutter v. Bollinger) but ruling against the policies at the college (Gratz v. Bollinger). In Grutter, O’Connor said the law school engaged in “a highly individualized, holistic review of each applicant’s file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment.” Writing for the majority in Gratz, Rehnquist said the point system at the college made race the “decisive” factor “for virtually every minimally qualified underrepresented minority applicant.”

Despite the mixed results, affirmative action supporters counted the rulings as a substantial victory, largely because of the Court’s clear holding that diversity was a compelling interest that could justify some form of race-conscious admissions. But O’Connor qualified the holding by suggesting that affirmative action policies should be periodically reviewed and possibly eliminated in a quarter-century. “We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today,” she wrote.

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**Employment**

The Court has allowed both private and government employers to establish voluntary affirmative action programs to benefit African Americans or women. The pivotal ruling came in United Steelworkers of America v. Weber (1979). In that case the Court held, 5-2, that such programs do not violate the job discrimination provisions found in Title VII of the 1964 Civil Rights Act. Stewart joined the four justices who had endorsed race-conscious remedies in Bakke to form the majority in the case; Powell and Stevens did not participate.

**More on this topic:**

Job Discrimination

The Weber decision upheld a training program established by Kaiser Aluminum and the steelworkers’ union in 1974 that reserved half of all in-plant craft-training slots for minorities. In the Court’s opinion Brennan said that Congress could not have intended the civil rights law to prohibit private employers from voluntarily taking steps to open opportunities for blacks in job areas traditionally closed to them. In sharp dissents, Burger and Rehnquist both accused the majority of twisting the legislative history to achieve a result directly opposed to the language of the act.

President Ronald Reagan expressed strong opposition to affirmative action, and his administration urged the Court to reverse its course in several employment-related cases. In its next two such cases,
the Court limited use of affirmative action in layoff situations.

In Firefighters Local Union No. 1784 v. Stotts (1984), the Court voted 6-3 to overturn a judge's order that had protected the jobs of black firefighters who had been hired following a consent decree in a race discrimination suit. The judge's order had required the Memphis fire department to meet budget cutbacks by laying off more senior whites. In an opinion by Justice White, the Court agreed with the administration that Title VII protected the seniority system. Two years later the Court, by a 5-4 vote, extended the Stotts ruling by finding an equal protection violation in a school board's voluntary use of affirmative action plans to protect recently hired black workers in a similar layoff situation. The case was Wygant v. Jackson Board of Education (1986).

O'Connor, who had been named to the Court by Reagan in 1981, joined the majority in opposing the affirmative action plans in both Stotts and Wygant. But she distanced herself from the administration's position in a separate opinion in Wygant. "The Court is in agreement," she wrote, "[that] remedying past or present racial discrimination by a state actor is a sufficiently weighty state interest to warrant the remedial use of a carefully constructed affirmative action program."

Six weeks later, on July 2, 1986, the Court held in separate cases that neither court-ordered minority quotas for union admission nor race-based job promotions violated the 1964 Civil Rights Act.

In Local #28 of the Sheet Metal Workers' International v. Equal Employment Opportunity Commission, the Court, by a 5-4 vote, upheld an order requiring the union, which had refused to admit African Americans, to increase its nonwhite membership to 29.23 percent by August 1987. In Local #93, International Association of Firefighters v. City of Cleveland, the Court held, 6-3, that the Civil Rights Act did not prevent the city from resolving a bias complaint by agreeing to promote one black firefighter for every white promoted.

In February 1987 the Court upheld, by a vote of 5-4, another challenged affirmative action plan: a one-black-for-one-white promotion quota imposed on Alabama's state troopers by a federal judge. Dissenting in the case were Rehnquist (now the chief justice), White, O'Connor, and Scalia.

The Court settled any remaining doubts about the legality of some affirmative action programs in March 1987 by upholding such a plan to benefit women. The 6-3 decision in Johnson v. Transportation Agency, Santa Clara County, Calif., stated that the voluntary plan by the county transportation department to move women into higher-ranking positions did not violate Title VII—thereby extending the holding in Weber to public employers. Rehnquist, White, and Scalia dissented.

A decade later, the Court was ready to return to the issue of affirmative action in the workplace in a case involving the Piscataway, New Jersey, school board. The case stemmed from a Title VII civil rights suit brought by a white teacher, Sharon Taxman, who had been laid off in 1989 in a budget-cutting move while an equally qualified black teacher in the same department was retained on account of racial diversity. Taxman, who was later rehired, won a jury award of $144,000 in back pay and interest, and the federal appeals court in Philadelphia upheld the award. The Supreme Court agreed to hear the school board's appeal in June 1997. Five months later, however, the school board settled the case with a $430,000 payment to Taxman that was financed largely by civil rights groups in order to remove the case from the Court's docket.

Traditional civil rights groups' fears of an adverse ruling on affirmative action in the workplace were realized in 2009 with the Roberts Court's decision to limit voluntary race-conscious policies by

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employers. The ruling in Ricci v. DeStefano found that the city of New Haven, Connecticut, violated Title VII by discarding the results of a firefighter promotion examination because whites significantly outperformed black candidates. The city said it feared so-called “disparate impact” liability if it awarded promotions based on the test scores. In a 5-4 decision, however, the Court held that employers cannot adopt race-conscious policies to avoid disparate impact unless they have “a strong basis in evidence” for believing the action necessary to prevent liability for unintentional discrimination. For the majority, Kennedy said a less stringent standard “would amount to a de facto quota system.” In dissent, Ginsburg said the ruling did “untold” damage to the goal of “equal opportunity in fact, and not simply in form.”

**Government Programs**

The Court twice upheld the federal government's broad discretion to fashion minority preference policies, but in 1989 it ruled that state and local governments have less freedom to do so. Then in 1995 the Court held that the federal government was subject to the same strict standard limiting racial preferences in government contracts that applied to state and local governments. In Fullilove v. Klutznick (1980) the Court upheld, 6-3, Congress's provision in the Public Works Employment Act of 1977 to set aside a certain percentage of federal funds for contracts with minority-owned businesses. “In the continuing effort to achieve the goal of equality of economic opportunity,” Burger wrote for the Court, “Congress has necessary latitude to try new techniques such as the limited use of racial and ethnic criteria to accomplish remedial objectives.”

Following the Fullilove decision, dozens of state and local governments adopted similar set-aside programs for minority-owned businesses. In 1989 the Court struck down, 6-3, an especially rigid plan adopted by Richmond, Virginia. The plan required the prime contractor on every city construction project to subcontract at least 30 percent of the dollar amount of the contract to minority-owned businesses.

Writing for the Court in City of Richmond v. J. A. Croson Co., O'Connor said states can adopt race-conscious remedial programs “only when they possess evidence that their own spending practices are exacerbating a pattern of prior discrimination” and only if they “identify that discrimination, public or private with—some specificity.” O'Connor's opinion was joined by Rehnquist, White, Stevens, and Kennedy; Scalia concurred separately.

One year later, however, the Court reaffirmed the federal government’s power to adopt “benign race-conscious measures”—even a measure not adopted to compensate victims of past discrimination. The 5-4 decision in Metro Broadcasting Inc. v. FCC (1990) upheld a Federal Communications Commission policy that gave special credit to members of minority groups in applying for new broadcast licenses and required some radio and television stations to be sold only to minority-controlled companies. During the Reagan administration the FCC tried to dismantle the policy, but Congress ordered it kept in place.

In his final opinion on the Court, Brennan emphasized the congressional finding that preferential programs were needed for broadcast diversity, which he described as an important government objective. As in Fullilove, he said, the Constitution granted deference to Congress; the strict scrutiny standard of Croson did not apply. White and Stevens changed sides from Croson to create the majority. O'Connor led the four dissenters in calling the new decision a “departure” from the Court’s previous rulings that racial classifications are not permitted “except in the narrowest of circumstances.”
Only five years later, the Court reversed itself on the issue. In Adarand Constructors, Inc. v. Peña (1995) O'Connor led a 5-4 majority in adopting the strict scrutiny standard for federal minority set-aside programs. “All racial classifications imposed by whatever federal, state or local government actor, must be analyzed by a reviewing court based on strict scrutiny,” O’Connor wrote. “In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.”

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—Justice Sandra Day O'Connor

The decision, which explicitly overruled Metro Broadcasting, reinstated a challenge by a white contractor to a Transportation Department program that gave minority-owned companies some preferences in bidding on federally financed road construction projects. The Clinton administration sought to uphold the program when the case returned to lower federal courts, but the federal appeals court for Colorado ruled that the administration had failed to demonstrate a sufficient government interest to justify the policy. The appeals court later upheld a redrawn program; the Supreme Court agreed to hear the company’s appeal of that decision, but then changed its mind and dismissed the case in November 2001.

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