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Affirmative Action: Not the Harsh Impact on Whites That Some Assume

Fred L. Pincus

Abstract Fred Pincus explains what affirmative action is. He dispels the conservative truism that affirmative action is about reverse discrimination against White Americans. Affirmative action has benefited the overwhelming majority of people who have ever applied for work or applied to a college or university because it established a procedure for fairness and makes decisions less arbitrary. Intentional interventions into the racial practices and outcomes of institutions are the only effective way to correct historic and contemporary racial inequalities. New affirmative action-type measures will have to be taken to reduce racial and other inequalities.

Keywords Affirmative action · Racial discrimination · Employment · Higher education · Racial inequality · White Americans

Affirmative action is one of the most contentious and misunderstood policies intended to create a more egalitarian society. There is disagreement about what constitutes affirmative action, whether it is effective, and whether it is just or fair. Many Whites believe that they, as a group, are harmed by race-based affirmative action. Some of this disagreement can be addressed by

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examining quantitative data and legal regulations (Kiely and Marcuis 2018; Pincus 1993, 1999, 2003). But much of the controversy goes beyond facts and involves politics, philosophy, and emotion for which there are no correct and incorrect answers.

The affirmative action debate precedes President Donald Trump's time in office and will likely continue afterward. However, his conservative attacks on federal regulations and his not-so-subtle attacks on people of color and support of White supremacists do not bode well for affirmative action. In one of the major affirmative action cases to come before the federal courts during his term, the Trump administration took the side of those criticizing affirmative action in college admissions. This case will be discussed in a later section.

Much of the opposition to affirmative action denies the existence of systemic racism and White privilege. In her study of White Tea Party supporters in Louisiana before the 2016 election, Arlie Russell Hochschild (2016) uses the metaphor of White people patiently waiting in line to achieve the American Dream that is just over the hill. They have worked hard and followed the rules. They are not bothered when someone before them lets a friend, relative, or coworker cut in the line in front of them; this is seen as legitimate networking. However, suppose the government allows a person of color, who is less likely to have the same networks, to cut into the line in front of them. In that case, Whites would get angry and see this as illegitimate, unfair, and an example of reverse discrimination.

This way of thinking is partially due to the American myth that anyone who works hard can get ahead, regardless of barriers they may confront. This myth is reinforced by conservative think tanks and legal groups that have opposed affirmative action for decades. Systemic racism has no place in this way of thinking.

Since there is so much misinformation about affirmative action, I want to spend most of this chapter looking at the facts: What is affirmative action? What are attitudes toward affirmative action? Does affirmative action help people of color and women? Does affirmative action hurt Whites? I will end by addressing the broader political question: What should the future of affirmative action be?

One caveat before proceeding. Affirmative action alone will not solve the problem of racial inequality in employment or higher education. It should be an essential part of an anti-racism tool kit that can be used against structural racism and economic inequality. I will return to this point at the end of the chapter as well.

What Is Affirmative Action?

Many important policies are intended to be "color blind" and anti-discriminatory in that they mandate treating Whites and people of color the same. Not hiring someone because they are Black or not admitting someone to a college because they are Latinx would be considered racial discrimination. Civil rights laws require employers and colleges to treat Whites and people of color equally. However, if these nondiscrimination policies resulted in few Blacks hired or few Latinxs admitted to college, that would not necessarily be unfair or illegal. If employers found that fewer Blacks were qualified or if college admissions officers found that fewer Latinxs had the necessary grades and test scores, so be it. Meritocratic requirements (i.e., the highest-scoring people get the job or college seat) are required. In other words, treat people equally and let the chips fall where they may.

However desirable and necessary color-blind and anti-discriminatory laws are, they do not constitute affirmative action. *Affirmative action policies take race into account in a variety of ways. They go beyond meritocratic, color-blind, anti-discrimination laws and policies.* In the labor force, this often involves setting goals and timetables to increase people of color's employment. In higher education, it usually consists of using race as one of many factors in college admission. I will refer to this as the "race-plus" policy.

It should come as no surprise that even the terminology about affirmative action is contentious. For example, some writers talk about "soft" vs. "hard" affirmative action. Their version of "soft" affirmative action refers to what I have called "anti-discrimination laws" above. For example, Melvin Urofsky (2020) refers to soft affirmative action as "programs that would open the doors of opportunity – whether in industry, education, or government – to minorities that have hitherto been excluded. This would be achieved in part by federal law to ensure that national, state, and local governments as well as private employers did not discriminate against minorities" (2020, 57).

"Hard" affirmative action, on the other hand, would refer to those programs that go beyond color-blind policies in that they take race into account. Many of these hard/soft writers come to the same conclusion that Urofsky does: "I strongly favor what I have called the 'soft' version ... I am not enamored of the 'hard' version which is numbers-driven" (2020, xvii).

My translation of Urofsky and his colleagues is that they like anti-discrimination laws, but they do not like affirmative action. While everyone has a right to their own definitions, I will focus on those policies that go beyond anti-discrimination laws.

Many people mistakenly equate "goals" and the "race-plus policy" with "quotas." In the first page of Urofsky's recent book, he says "The use of quotas, even if the firms often used the euphemism of 'goals,' offended many people" (2020, ix). Yet, the term "goals" does not even appear in the index of his book, although "quotas" do. As we shall see, goals and quotas are *not* the same thing and the use of quotas in affirmative action is rare.

While the theme of this book is how racism impacts both White people and people of color, any discussion of affirmative action must also consider gender. White men and women might well be impacted in different ways. In terms of college admissions, as we shall see, Asians, in addition to Whites, are an advantaged group in that they are overrepresented in higher education. So, it is sometimes necessary to compare Whites and Asians, on the one hand, to non-Asian people of color, on the other.

In this chapter, I will focus on two types of affirmative action after discussing attitudes toward affirmative action. First, I will discuss the affirmative action policies in the labor market that are overseen by the Office of Federal Contract Compliance Programs (OFCCP) of the U.S. Department of Labor. Next, I will examine the admission policies for institutions of higher education.

Attitudes Toward Affirmative Action

Public opinion polls have surveyed Americans about affirmative action for many years although the results are often contradictory. First, the phrasing of the questions has a great impact on the results. On the one hand, respondents are supportive of affirmative action programs that help people of color. On the other hand, when asked if they support racial preferences as opposed to merit, respondents strongly support merit.

The data in Table 13.1 show that when asked a general question about support for affirmative action for both women and minorities, respondents respond increasingly positive between 2001 and 2018. Women are more supportive than men. Blacks and Latinxs are more supportive than Whites.

The same trend occurs when respondents are asked if they think affirmative action to increase the number of Black and minority students on college campuses is a good thing or bad thing. In 2017, 71% said it was a good thing, an 11% increase from 2003.

However, when asked how important race should be in college admissions decisions, almost three-quarters of respondents say it should not be considered at all (see Table 13.2). Even strong majorities of Blacks and Latinxs say race should not be considered at all. Whites and Republicans are especially

Table 13.1 Percent of adult population that support affirmative action for women and minorities

Target of affirmative action	Year	
	2001	2018
For women	53	65
Men's answers	49	61
Women's answers	57	69
For minorities	47	61
White's answers	44	57
Black's answers	69	72
Latinx's answers	64	66

Note 57% of Whites supported affirmative action for minorities in 2018 compared to 72% of Blacks (Norman 2019)

Table 13.2 Percentage saying race or ethnicity should be a ____ in college admissions decisions in 2019

Type of respondent	Importance of race or ethnicity			
	Major factor	Minor factor	Not a factor	Total
All adults	7	19	73	100
Race/ethnicity				
Whites	4	18	78	100
Blacks	18	20	62	100
Latinxs	11	22	65	100
Asians	13	29	58	100
Political affiliation				
Republican	4	12	85	100
Democratic	10	26	63	100

Note 78% of Whites thought race should not be a factor in college admissions compared with 62% of Blacks (Graf 2019)

opposed to using race. One particularly interesting finding is that Asians, who have grades and test scores that are even higher than Whites, are the *least* hostile to using race in the admissions process.

The strong White opposition to using race as a factor in college admission is consistent with the growth of feelings of White victimization. A 2017 survey shows that 55% of Whites believe that Whites are discriminated against. Eleven percent say that they, personally, have been discriminated against in college admissions and 19% say they have been discriminated against in applying for jobs (Gonyea 2017).

These ambivalent attitudes toward affirmative action, along with the belief in White victimization, should be viewed in the context of a conservative

backlash against all civil rights policies since the 1960s. *U.S News and World Report, the Harvard Business Review and the Rutgers Law Review* all carried articles on the "dangers of reverse discrimination" as far back as the late 1960s. Conservative foundations like the Institute for Educational Affairs and the Earhart Foundation supported anti-affirmative action scholars in the 1980s (Pincus 2003). The Center for Individual Rights, which brought lawsuits against the University of Texas (see below) has received funding from a host of right-wing foundations including Bradly, Olin, Scaife, and Donors Trust and also has ties to Koch Brothers organizations (SourceWatch 2017, 2019).

Students for Fair Admissions (SFFA), who sued Harvard and the University of North Carolina continues the tradition (see below). Although it claims to be a pro-Asian student organization with a $10 membership fee, the *Harvard Crimson* found that SFFA received six-figure grants from the Searle Freedom Trust and Donor's Trust that totaled $750,000 in 2016 (Caldera 2019).

These and other organizations promote hostility toward affirmative action, misinformation about what affirmative action is, and the belief in White victimization. The next section begins to describe the reality of affirmative action.

Affirmative Action in Employment

The largest federal affirmative action program is based on Executive Order 11246 issued by President Lyndon B. Johnson in 1965. Guidelines to implement this program were first issued in 1968 and revised in 1971. Federal contractors and subcontractors, excluding those in construction, who have 50 or more employees and a $50,000+ federal contract are required to develop an affirmative action plan within 120 days of receiving a contract. Failure to develop and implement an affirmative action plan could result in a contractor losing the current contract and being declared ineligible to receive additional contracts. This is called being "debarred."

These guidelines apply only to a select group of federal contractors. Smaller federal contractors and most non-contractor corporations and businesses, large and small, are not required to have affirmative action plans. *Most employers in the United States are not subject to affirmative action regulations.*

Contractors meeting the 50/$50,000 criteria must first conduct a *utilization study* of their employees. Basically, they must count the number of

women, people of color, veterans, and disabled people in each department and in each occupational category.[1]

The employer must also determine the percentage of people of color and female employees who are in the "availability pool"; i.e., those outside the company who qualified and are potentially available for the job. This is a complex issue and requires some explanation.

For most less skilled clerical, sales, blue-collar, and service jobs, availability is calculated as the percentage of people of color or women in the surrounding labor force. In more skilled jobs like carpenters, on the other hand, the availability would be the percentage of people of color or women workers employed in that job in the immediate geographical area.

For professional and managerial jobs, however, the availability may well be state-wide or even national. For nurses, for example, the Black availability might be defined as the percentage of Blacks getting nursing degrees in the entire state in the last five years. For college faculty, on the other hand, the availability of female mathematicians might be the percentage of Ph.D.'s in mathematics granted to women in the past five years in the entire country.

There are pages of regulations specifying how these figures are calculated. The important point here is that the availability pool is an estimate of the percentage of *qualified* people of color and female workers in a job category.

Employers must then compare their actual distribution of people of color or female employees in a specific job category in a specific department to the people of color and female distribution in the availability pool. If the actual employment is equal to or greater than the availability, the employer is "in compliance." If, on the other hand, the actual employment distribution is below the availability figure, the employer is "underutilized." The employer must follow this same procedure for each job category in each department.

Contractors and Affirmative Action

If a contractor is underutilizing people of color and women, a set of goals and timetables must be included in the affirmative action plan. An appropriate goal would be to hire enough qualified people of color and female employees to reach the percentage distribution stated in the availability pool.

The timetable must be based on the conditions facing that specific contractor. Employers with big turnovers might be able to reach the goal in a

[1] For the purposes of this chapter, I will not discuss veterans and the disabled. They deserve their own special discussion.

few months, while one with little turnover might take a few years. Contractors in expanding industries would have shorter timetables than those in stagnant or contracting industries.

Next, the contractor must specify procedures to achieve the goal. This "good faith effort" means trying to "cast a broad net" to encourage diversity among those who apply for the position. Employers should publicly advertise jobs rather than rely on informal networking. Advertisements should contain a statement like "Equal Opportunity Employer; Women and Minorities Encouraged to Apply." Some advertisements should be placed in publications targeted at qualified women and people of color. Employers should send letters to well-known women and people of color in the field asking for referrals, send letters to schools who train large numbers of qualified women and people of color, and make recruiting trips to conferences that might be attended by qualified women and people of color. In other words, employers must go out of their way to increase the hiring pool of potential women and people of color candidates.

The contractor is not required to submit the affirmative action plan to the OFCCP for approval. The plan must simply be kept on file in the contractor's office. What happens if the contractor fails to meet the goal specified in the plan? Probably nothing.

First, only the employer is likely to know that the goal was not met since the OFCCP does not review the hiring process of each employer for each year. In the unlikely event that the employer is ever investigated by the OFCCP, all the contractor would have to do is submit the plan and show that they followed the procedures to encourage women and people of color to apply for the position. If the contractor can demonstrate that the White male who applied for the administrative position was more qualified than any of the Black and female applicants, there is no problem. Affirmative action guidelines *require* meritocratic hiring. Mandatory or voluntary quotas are *illegal* under these guidelines.

Although many affirmative action critics believe that goals and quotas are the same thing, there are important differences. Most importantly, court-imposed quotas must be met. Goals require only a good faith effort. This will be discussed further below.

While these affirmative action regulations involve a certain amount of effort and cost on the part of federal contractors, *they do not force contractors to hire unqualified people, nor do they permit quotas*, apart from those that may have been mandated by a court. Some contractors, however, may pressure personnel officers to illegally hire unqualified underutilized minorities

to avoid problems with OFCCP officials. It is difficult to determine how extensive this practice may be.

Construction contractors are also required to establish goals and timetables. However, they are not required to have full affirmative action plans on file because they do not have the same kind of stable labor force as a manufacturer might have. Many construction contractors hire different people from one job to the next.

The OFCCP does conduct "compliance reviews" of certain contractors who are suspected of not fully complying with guidelines. The number of annual reviews has been sharply declining—6232 in 1989, 4162 in 2000, 2345 in 2015, and only 1331 in 2019. In two-thirds of these reviews, the contractor agreed to change some aspect of the affirmative action plan to bring it into compliance (Pincus 1993; Program Office, n.d., 2002; Urofsky 2020). These are called "conciliation agreements."

Although 1331 may seem like many reviews, it is important to remember that there were over 133,700 prime contractors in 2017 and an even larger number of subcontractors that fell under the OFCCP guidelines. At the rate of 1331 reviews each year, it would take the OFCCP *more than 100 years* to review all contractors even once. Consequently, contractors do not really have to worry very much about being reviewed. The number of race/ethnicity/gender conciliation agreements and consent decrees dropped from 297 in 2015 to 184 in 2019.

If the compliance officer and the contractor cannot reach an agreement, there are several levels of appeal available to the contractor. Recalcitrant contractors can ultimately be debarred; i.e., they can lose their existing contracts and be declared ineligible to receive future contracts. However, this is extremely rare.

According to the OFCCP, only 43 contractors had been debarred in the first 37 years of the agency's history through 2002, about 1.2 debarments per year. These 43 companies account for a tiny fraction of the more than half-million companies that have been government contractors since 1972. Twenty-five of the companies were declared ineligible during the 1972–1980 period which covered the Nixon, Ford, and Carter administrations. Four were declared ineligible during the Reagan years (1981–1988), three during the Bush Sr. years (1989–1992), eight during the Clinton years (1993–2000) and one during the first two Bush Jr. years.

A Freedom of Information Act request to get more recent data found only five companies that had been debarred between 2009 and 2019, a rate of less than 0.5 per year. This is a dramatic decline from previous decades.

What does a government contractor have to do to be debarred? The official list provides this information on 40 of the 43 companies debarred between 1972 and 2002. Half of the companies flagrantly violated the OFCCP regulations by refusing to develop an affirmative action plan or refusing to submit required statistical information. The remaining half were debarred for refusing to make good faith efforts to implement goals and timetables or by not abiding by some other part of the conciliation agreement.

The reality is that the federal affirmative action regulations that are administered by the OFCCP do not put a great deal of pressure on federal contractors to increase their hiring of women and minority workers. If a contractor is willing to be even the least bit flexible, the chances are good that the OFCCP will sign off on their affirmative action plans. Even after being debarred, companies can be reinstated if they make the necessary changes. Sixty percent of the companies debarred between 1972 and 2002 were eventually reinstated. In fact, the median period of debarment for the 26 reinstated contractors was only 9.5 months!

I have gone into so much detail about the OFCCP guidelines for several reasons. First, they are the least known of all affirmative action policies. Second, affirmative action critics usually do not discuss them. Third, they are the least controversial since the final hiring decisions are supposed to be meritocratic and companies are only required to *try* to meet their goals. Employers are only required to show that they have made a good faith effort to cast a broad net to find qualified candidates for their positions. Fourth, they affect more employees than other affirmative action policies.

Hiring and Promotion Quotas

The most controversial of all affirmative action policies are "quotas"; i.e., policies that reserve certain positions for qualified people of color or female candidates. This specifies a hiring or promotion floor; i.e., at least that number of women or minorities must be hired or promoted. This is different from the historic use of antisemitic quotas as a ceiling; i.e., no more than a certain number of Jews may be hired.

Although the concept of quotas is quite controversial, one thing is clear: quotas and goals are not the same. First, especially in court-imposed quotas, the employer or school must hire a person of color or female for that position, under penalty of law. If no qualified person of color or woman is found, either the position must remain empty or the employer must seek special permission to hire or promote a White male. In the case of goals, on the other hand, the employer must merely make a good faith effort to hire or promote a qualified

person of color or woman; if none is found, there are no legal consequences and a White or male may be hired or promoted.

Second, in a consent decree (i.e., a legally binding agreement between two parties) with quotas, a White male with superior work experience or credentials, could be passed over in favor of a qualified, but less experienced person of color or female applicant. When goals are being used, a more qualified White male must be hired or promoted over a less qualified person of color or female applicant since the final hiring must be meritocratic. Affirmative action critics who say that goals and quotas are the same are either misinformed or intellectually dishonest.

The 1972 Equal Employment Opportunities Act made it legal for courts to impose hiring and promotion quotas on employers that were found guilty of discrimination. Quotas could also be used as a remedy as part of consent decrees, or out-of-court settlements in discrimination lawsuits.

Before a quota can be imposed by a court, a group of people of color or female employees generally sues an employer for race and/or sex discrimination. One possible outcome of these lawsuits is that the government and plaintiffs enter a consent decree with the employer that contains a quota system of hiring and/or promotion. The quotas might require the hiring of one Black for every five Whites until the percentage of Black employees reaches the level of Blacks in the availability pool.

Even under quotas, employers are not forced to hire unqualified people. Generally, the employer has some criteria which make the prospective employee "qualified"; e.g., an educational credential, a minimum score on a test, a minimum level of experience, etc. Employees who don't meet these criteria cannot be considered for the position. Hence, all those who do meet the criteria are seen as able to carry out the duties of the position.

Next, the qualified Whites (or males) are ranked from "most qualified" to "least qualified" in terms of the criteria. The same is done for the qualified people of color (or women). If only 10 people can be hired or promoted and there is a 50–50 quota, the top 5 Whites and the top 5 people of color are chosen. Even though all the selected people of color (or women) are qualified, it is possible that some of them may be less qualified (i.e., their scores are lower) than some of the Whites (or men) that were not chosen. For example, a woman who scored 85 out of 100 might be promoted while a man who scored 86 would not. While such a decision has a great impact on that particular man, such small differences in scores would not warrant the conclusion that the man would have done a better job than the woman.

There is a widespread belief, especially among Whites, that quotas are very common across the country. However, it is getting more and more difficult

for hiring and promotion quotas to meet the "strict scrutiny" test of constitutionality. A variety of court decisions have concluded that there must be a "compelling state interest" to justify a quota. This is usually interpreted as the state has the duty to combat intentional race or gender discrimination when no other policy is likely to work.

Second, the quota system must be "narrowly tailored" which is generally interpreted as not "unduly trammeling" on the rights of White males. The consent decree cannot require that 100% of new hires be people of color or women since this would make it impossible for White males. In fact, the quota proportions must have some connection to the availability pool. In addition, the quota system cannot be in effect indefinitely; e.g., it may be in effect until the percentage of minority/female employees reaches a percentage equivalent to the availability pool.

In fact, court-imposed quotas are few and far between. Reskin (1998), in fact, says that there were only 51 court-approved quotas in effect in the early 1980s.

Non-contractor businesses can, of course, voluntarily adopt the goals-and-timetables type of affirmative action. In certain limited cases, non-contractors can adopt quota plans if they meet certain conditions: (1) a company has used hiring or promotion practices that are not job-related and have an adverse impact on people of color and/or women; (2) a company has used prior discriminatory practices; or (3) the labor pool is limited due to prior discrimination (Fick 2014; Service 2010). Of course, the voluntary affirmative action plan must also meet the strict scrutiny criteria outlined above.

Does Affirmative Action Work?

Does affirmative action increase the number of people of color and women employees? This is a complex question since it is necessary to disentangle the impact of simple anti-discrimination policies from affirmative action policies and from other employment and policy trends.

Women, for example, have increased their representation in the labor force and in predominantly male jobs, and the male–female income gap has declined somewhat. However, is this due to affirmative action, to sex discrimination lawsuits, to the increasing necessity for two-income families, to changes in the labor force, or to a combination of these and other factors?

I reviewed six different large-scale empirical studies that used multivariate analysis to answer this question. They cover the period from the late 1970s through the early 2000s. Two compared contractors and non-contractors (Kurtulus 2015; Leonard 1989); one looked at what happened with those

who had just become contractors compared with those whose contracts had ended (Miller 2017); one looked at the results of a survey of employers (Holzer and Neumark, 1998); and two looked at major sex and race discrimination verdicts and settlements that contained required affirmative action regarding managerial occupations (Hirsh and Cha 2017, 2018).

While it is difficult to compare the findings from these diverse studies, I have tried to summarize them in Table 13.3. The authors of each study are listed in column 1 and the time period covered is listed in column 2. In columns 3–8, a "–" indicates a negative impact of affirmative action on that race/gender group; a "+" indicates a positive impact; a "0" indicates no impact or a negligible impact. There are several "not available" designations since not all the studies showed data by race/ethnic group. Miller, for example, talks about White women and all Blacks.

Looking down each column, Table 13.3 shows that both Black males and females benefit from affirmative action in three of the studies and "all Blacks" benefit in a fourth study. This is consistent with expectations. In the Kurtulus study, data also show that Native American men and women also benefit from affirmative action, Hispanic men are hurt, and Hispanic women, Asian women, and Asian men are not impacted. Summarizing previous studies

Table 13.3 Impact of affirmative action by race and gender in six multivariate studies

Authors	Years covered	Males		Females		Groups	
		White	Black	White	Black	All women	All Blacks
Hirsh and Cha (2018)	1997–2007	na	–	–	–	na	na
Hirsh and Cha (2017)	1996–2008	na	+	+	+	na	na
Miller (2017)	1978–2004	na	na	0	na	na	+
Leonard (1989)	1974–1980	na	+	0	+	na	na
Kurtulus (2015)	1973–2003	na	+	–	+	na	na
Holzer and Neumark (1998)	1992–1994	–	–	+	–	na	na

Note "+" means positive impact of affirmative action; "–" meant negative impact; "0" means no impact. Sometimes data were only reported for "all females" and/or "all Blacks." Studies not proving data for a race/ethnic group are indicated by "na"

of police, Garner et al. (2020) shows that Blacks are helped by affirmative action.

The impact of affirmative action on White women is less clear in Table 13.3. Two of the studies show positive impacts, two of the studies show negative impacts, and another two show no impact. The study on police mentioned above shows that "all women" benefit but we have no way to know how minorities faired because they did not use race/ethnic groups.

The lack of a clear positive impact on White women is surprising since it seems to be "common knowledge" that White women are beneficiaries of affirmative action. Many cite an Associated Press article in *The New York Times* discussing an untitled U.S. Labor Department 1995 report saying that "since the 1960s, affirmative action had helped five million members of minorities and six million women move up in the workplace." After repeated inquires, I finally located the report in the House Subcommittee on Employer-Employee Relations in 1995. In fact, the report simply showed the increase in the number of women in managerial, professional, sales, and clerical jobs between 1972 and 1992. Part of this increase was probably due to affirmative action, but we do not know by how much.

The available data show that affirmative action plans have positive impacts on the hiring of Black men and women. However, the impact on White women and other people of color is unclear.

Affirmative Action in Higher Education

Occupying a space somewhere between the goals/timetables approach and the quota approach is the race-plus policy. Race-plus policies permit race/gender to be considered as one of many factors in the final decision as long as it is not the *major* factor. Although employers can use the race-plus policy on a voluntary basis to rectify severe employment segregation, the race-plus policy has been more extensively used in higher education.

The underrepresentation of Blacks, Hispanics, and native Americans in higher education has been a major national issue for four decades. Since the late 1970s, colleges and universities around the country have used the race-plus principle that was articulated in the 1978 Bakke decision to help diversify their campuses (*Regents of the University of California v Bakke*, 1978). UC-Davis had set aside 18 seats for people of color and Alan Bakke, a White applicant who was not admitted, claimed that less qualified minorities were admitted. The Supreme Court found in favor of Bakke and said that the quota system was unconstitutional.

There were several important principles that resulted from this decision. First, the court ruled that although race cannot be considered as the *only* factor, it can be considered along with other factors such as economic disadvantage, athletic and music skills, parents' alumni status, etc. The court specifically cited Harvard University's race-plus undergraduate admissions policy as being constitutional. Second, the race-plus policy was not justified on the basis of compensating for past discrimination. Instead, Justice Lewis Powell said that a diverse student body contributes to a better educational experience for students through a more robust interchange of ideas. As a result of the Bakke decision, this race-plus policy has been used in admissions to undergraduate, graduate, and professional schools around the country.

Several developments during the mid-1990s led to restrictions on the use of the race-plus principle. In 1995, the Regents of the University of California voted to ban the use of race in admission and hiring. The following year, California voters approved Proposition 209 which banned the use of race as a factor in admissions, hiring, and promotions in all public institutions throughout the state. The U.S. Supreme Court declined to rule on a legal challenge to Proposition 209.

Also, in 1996, the Federal Appeals Court for the Fifth Circuit issued the *Hopwood vs. Texas* (1996) decision which involved the University of Texas law school. The court held that the race-plus principle was unconstitutional. Since the U.S. Supreme Court refused to rule on the case, none of the educational institutions in the Fifth Circuit (Texas, Mississippi, and Louisiana) could use the race-plus principle while the rest of the country could.

In 2003, the U.S. Supreme Court issued two important rulings relating to the University of Michigan. First, it said that giving prospective undergraduate candidates a certain number of points for being a person of color was unconstitutional. On the other hand, using race as one of many factors in the law school's "holistic" admissions process was constitutional (*Grutter v Bollinger*). This was reaffirmed by the Supreme Court in 2013 in a case sometimes referred to as Hopwood II.

Eight states have banned affirmative action in college admissions—California (1996), Washington (1998), Florida (1999), Michigan (2006), Nebraska (2008), Arizona (2010), New Hampshire (2011), and Oklahoma (2012). These bans were enacted through ballot initiatives, legislative referenda, court decisions, or state laws. Texas also banned affirmative action in 1996 but it was overturned by the Supreme Court in 2013. As we discussed in a previous section, conservative organizations promoted these bans including Students for Fair Admissions, the Center for Individual Rights, and the American Civil Rights Institute.

Baker (2019) used multivariate analysis to determine why one state would enact a ban while others would not. First, states with low percentages of White enrollment at flagship institutions were likely to ban affirmative action. This scarcity, Baker argued, caused the predominantly White population to feel threatened by race-plus affirmative action. Also, having a nearby state ban affirmative action increased the likelihood of neighbors instituting a ban.

In 1978, many affirmative action *supporters* viewed the Bakke decision's race-plus policy as a *defeat* for affirmative action because the court limited the use of voluntary quotas. There were numerous large demonstrations across the country criticizing the court. It is ironic that decades later, even the race-plus principle is under legal attack and affirmative action supporters are mounting a vigorous campaign to defend the Bakke decision that they once criticized as too narrow.

The Future of Affirmative Action

This brief review demonstrates how affirmative action policies in employment and higher education are supposed to work. Although I am a strong supporter of affirmative action, it is only one of many tools that can be used against racism in America. Larger issues of economic, structural, and cultural racism are beyond the scope of even the most effective affirmative action policies.

On the positive side, affirmative action makes it more difficult for individual college and employment recruiters to discriminate against anyone, White applicants included. It is harder for schools, employers, and government institutions to have discriminatory recruitment criteria at the institutional level. This, alone, is ample justification for keeping vibrant affirmative action policies.

On the other hand, the history of racism in the United States has created other barriers that go beyond affirmative action. For example, race and especially family income are both well-known predictors of educational attainment at all levels for a variety of reasons including the legacy of poor housing, poor schools, poor healthcare, low-paying jobs, and the high cost of college (Gilbert 2011). During the COVID-19 crisis, families got together with friends and neighbors to help their children navigate distance learning. Given the reality of race and class housing segregation and friendship networks, the more privileged White and upper-income students ended up getting the most support (Goodnough 2020). Larger structural changes are needed at all levels of society. Bernie Sanders' 2019 call for free college tuition would be a step in the right direction.

In my own city of Baltimore, for example, the prestigious Johns Hopkins University offers scholarships to any "high achieving" city resident that graduated from a city public school and meets the entrance requirements. The Baltimore Scholars Program offers a free ride for students from families with incomes of $80,000 or less and a partial scholarship for family incomes up to $150,000. In this predominantly Black city, only a handful of residents were able to qualify. Others could not overcome the race and class barriers that permeate Baltimore and other cities.

Getting back to affirmative action, per se, the almost fifty-year-old employment policies administered by the OFCCP have been institutionalized to some extent, even though implementation is weaker now than in the past. There is evidence from the studies I reviewed that many federal contractors implement these policies even when they are no longer required to do so because they are good business practices.

The Trump administration, to no one's surprise, aimed its deregulation and budget-cutting guns at the OFCCP. First it proposed to eliminate the OFCCP altogether by merging it into the Equal Employment Opportunity Commission although congress successfully resisted (Bertram 2018; Wilcher 2017). Next, the administration tried to slash the OFCCP budget in F2018 and 2019 but Congress also resisted that ploy. The number of OFCCP employees, however, declined to 496 in FY2020, fifty less than in FY2018.

Even more successful were the new regulations issued to weaken the OFCCP. One legal group that represents employers put it this way: "The good news for contractors is that the OFCCP's actions are almost all pro-business" (Kiely and Marcuis 2018). Only single-issue audits of contractors can be conducted meaning that if a contractor is suspected of discriminating against women, the disabled, and veterans, three separate audits must be conducted rather than one. The OFCCP was reminded to respect religious exceptions to discrimination. If a compliance evaluation ends with an Early Resolution Agreement, another compliance evaluation cannot be conducted for five years. These and other regulations make it more difficult for the OFCCP to do its job (Younies 2018). The goal may be to slowly chip away at employment-based affirmative action.

Affirmative action in higher education also faces an uncertain future. The lawsuit against Harvard University (*Students for Fair Admissions v Harvard*) alleging discrimination against Asians is critical. The plaintiffs allege that Harvard misuses its holistic review of prospective students by rating Asians low on personality characteristics, thus hurting their chances to be selected. Even though Asians are overrepresented at Harvard, the suit alleges that there is an informal quota to keep Asian enrollment from going any higher.

Consistent with its anti-regulation and anti-minorities political orientation, the Trump administration, of course, opposed Harvard's race-plus plan.

The lawsuit was brought by Students for Fair Admissions, a conservative organization that has also sued the University of North Carolina and other schools alleging discrimination against Whites and Asians. Although a federal district judge ruled in favor of Harvard in the fall of 2019, the case is widely expected to end up before the U.S. Supreme Court that currently has a conservative, anti-affirmative action majority.

Another challenge to affirmative action comes from critics who want to substitute color-blind policies to replace race-based affirmative action. Richard Kahlenberg (2014) and others have argued for years that since Blacks are overrepresented among low-income people, affirmative action that favors lower income students would act as a proxy for race; i.e., Black students would benefit from class-based affirmative action. In addition, class-based affirmative action would help to economically diversify college campuses which is also a major problem.

The empirical evidence comparing the two types of affirmative action is mixed. For example, two recent simulation studies argue that racial representation is substantially lower in class-based affirmative action than in race-based affirmative action (Reardon 2015; Xiang and Rubin 2015). On the other hand, other studies show that under certain circumstances, class-based plans can yield enrollment for people of color that is comparable to race-based plans (Gaertner and Hart 2015; Kahlenberg 2014).

Rather than taking an either/or approach, we should argue that both be done at the same time. After all, both race and class are predictive of academic success. The Reardon et. al. simulation study concludes that this combined race/class approach provides the biggest opportunity for students of color. Under no affirmative action plan, Black and Latinx enrollment would be a combined 5% of students. Compare this with 10% in a strong class-based plan, 26% in a strong race-based plan, and 38% in a strong combined plan. Unfortunately, few participants in this debate argue to add class-based affirmative action to the race-plus policies.

Another set of allegedly color-blind plans is what is usually referred to as the "top 10 percent plans." Texas, for example, accepts the top 10% of high school graduates to the University of Texas and Florida accepts the top 20%. Texas allows admission to the campus of the student's choice but Florida only guarantees admission to public university system. This top-percent plan takes advantage of the fact that most K-12 systems are highly segregated, so this is supposed to ensure a more adequate enrollment of Black and Latinx students without giving preference to any single race. In fact, the more segregated the

K-12 schools are, the larger the number of Black and Latinx students would be admitted. Whether or not the top-percent plans should be labeled "color blind" depends upon one's perspective.

Comparing these top 10% plans to more traditional race-based affirmative action policies is complex. In a review of the literature, Flores and Horn (Flores 2015) argue that the data for all three states show that Black and Latinx students are less likely to be enrolled in the *flagship* campuses than under race-based plans. The Black and Latinx enrollment gets redistributed to the less prestigious campuses. In Texas, the data are more favorable to the top 10% enrollment plan but Flores and Horn say that this is due to the rapid growth of the Latinx population, not to the plan itself (also see Kahlenberg 2014).

Klasik (2015) conducted a simulation of what a top 10% plan would look like in the University of Maryland system. Compared with a race-based admissions system, Klasik found that a top 10% plan would increase White and Latinx enrollment but decrease Black enrollment in Maryland.

Although these class-based affirmative action and top-percent plans are more likely to withstand legal scrutiny than the race-plus plans, it is likely that they will be less effective in terms of achieving racial equity in higher education. If the court strikes down race-plus plans in education, the decision might also negatively impact affirmative action in employment.

In terms of how affirmative action affects Whites, the empirical evidence is limited. Although half of Whites *believe* that anti-White discrimination is a serious problem, less than one-fifth believe that they, personally, have been discriminated against. Affirmative action is often blamed for much of this so-called reverse discrimination.

The empirical studies on hiring that were discussed in Table 13.3 showed inconsistent effects of affirmative action on White women and most did not measure the effects on White men. In a study going back two decades, Pincus (2003) found that the number of EEOC complaints and lawsuits filed by Whites alleging race-based employment discrimination was relatively small.

On the positive side, affirmative action policies weaken the impact of the "old-boy-network" to recruit employees and college students. By making recruitment policies public and subject to numerical review, affirmative action helps working-class Whites who tend to be less well connected than wealthy Whites who benefitted from the old-boys-network. This is often called "broadening the eligibility pool." Deemphasizing legacy admissions policies that primarily benefit the children of wealthy alumni would also benefit working-class Whites.

Seats at prestigious universities are scarce with rejection rates as high as 95%. When rejected, Whites can blame affirmative action without really knowing how admissions committees viewed their strengths and weaknesses. At many private elite universities, more legacy students, predominantly White, are admitted than affirmative action students but few people complain about that. Getting your kids into the same elite college that you attended is often seen as a justified privilege while affirmative action is not. The 2019 college admissions scandal added a new dimension to the role of privilege as 50 wealthy White families were accused of bribing officials at a variety of selective public and private universities to get their children admitted (Hearon 2020).

When you are in a crowded parking lot and see an empty space that turns out to be for the handicapped, you might think "If this weren't for handicapped, I could have gotten the space." This is doubtful, since someone else would have probably taken it. The problem is too many cars and not enough spaces. This is also the case for college admissions at elite universities.

Affirmative action increases competition for jobs and college seats which reduces White chances somewhat. In previous times, however, Blacks and Latinxs were not permitted to compete at all. Competition is part of the American Dream—except when White privilege is threatened.

Discussion Questions

Q1: Many Whites believe that affirmative action amounts to "reverse racism" or discrimination against White Americans. Does the data presented here support or reject that belief?
Q2: In what ways does affirmative action benefit White Americans?
Q3: In what ways does affirmative action reduce institutional racism?

References

Baker, D. J. 2019. "Pathways to Racial Equity in Higher Education: Modeling the Antecedents of State Affirmative Action Bans." *American Educational Research Journal* 56 (5): 1861–95.

Bertram, C. G. 2018. *Trump Administration Proposes Cuts to OFCCP Budget*, February 14. Retrieved from governmentcontractorcomplianceupdate.com.

Caldera, C. G. 2019. "Public Filings Reveal SFFA Mostly Funded by Conservative Trusts Searle Freedom Trust and Donors Trust." *Harvard Crimson*, February 7.

Fick, B. J. 2014. "The Case for Maintaining and Encouraging the Use of Voluntary Affirmative Action in Private Sector Employment." *Notre Dame Journal of Law, Ethics and Public Policy* 11: 15–70.

Flores, S. M. 2015. *Texas Top Ten Percent Plan: How It Works, What Are Its Limits, and Recommendations to Consider.* The Civil Rights Project.

Gaertner, M. N., and M. Hart. 2015. From Access to Success: Affirmative Action Outcomes in a Class-Based System. *University of Colorado Law Review.* https://scholar.law.colorado.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1047&context=articles.

Garner, M., A. Harvey, and H. Johnson. 2020. "Estimating Effects of Affirmative Action in Policing: A Replication and Extension." *International Review of Law and Economics* 62: 105881.

Gilbert, D. 2011. *The American Class Structure in an Age of Growing Inequality, Eighth Edition.* Thousand Oaks: Sage.

Gonyea, D. 2017. Majority of White Americans Say They Believe Whites Face Discrimination. www.npr.org/2017/10/24/559604836/majority-of-white-americans-think-theyre-discriminated-against/.

Goodnough, A. 2020. "They Can't Afford a Learning Pod. Now What?" *New York Times,* August 15, A1, A7.

Graf, N. 2019. *Most Americans Say Colleges Should Not Consider Race or Ethnicity in College Admissions,* February 25. Retrieved from PEW Research Center: www.pewresearch.org/fact-tank/2919/02/25.

Hearon, S. 2020. *The Biggest Names Associated With the College Admissions Scandal: Where Are They Now?* May 21. Retrieved from usmagazine: www.usmagazine.com/celebrity-news-pictures/college-admissions-scandal.

Hirsh, E., and Y. Cha. 2017. "Mandating Change: The Impact of Court-Ordered Policy Changes on Managerial Diversity." *ILR Review* 70 (1): 42–72.

Hirsh, E., and Y. Cha. 2018. "For Law and Markets: Employment Discrimination Lawsuits, Market Performance, and Managerial Diversity." *American Journal of Sociology* 123 (4): 1117–60.

Hochschild, A. R. 2016. *Strangers in Their Own Land: Anger and Mourning on the American Right.* New York: New Press.

Holzer, H. J., and D. Neumark. 1998. *What Does Affirmative Action Do?* Cambridge: National Bureau of Economic Research, Working Paper 6605.

Kahlenberg, R. D. 2014. *The Future of Affirmative Action: New Paths to Higher Education Diversity after Fisher v University of Texas.* New York: The Century Foundation Press.

Kiely, C. E., and Am J. Marcuis. 2018. *The OFCCP's Been Busy—9 New Directives This Year, Largely Pro-Business,* September 20. Retrieved from huntonlaborblog.com.

Klasik, D. 2015. *Can a Percent Plan Be a Successful Race-Neutral Alternative to Race-Conscious Affirmative Action in Maryland?* College Park: Maryland Equity Project.

Kurtulus, F. A. 2015. "The Impact of Affirmative Action on the Employment of Minorities and Women: A Longitudinal Analysis Using Three Decades of EEO-1 Filings." *Journal of Policy Analysis and Management* 35 (1): 34–66.

Leonard, J. S. 1989. "Women and Affirmative Action." *Journal of Economic Perspectives* 3 (1): 61–75.

Miller, C. 2017. "The Persistent Effect of Temporary Affirmative Action." *American Economic Journal: Applied Economics* 9 (3): 152–90.

Norman, J. 2019. *Americans' Support for Affirmative Action Programs Rises*, February 27. Retrieved from Gallup: news.gallup.com/poll/247046.

Pincus, F. L. 1993. "Enforcing Federal Affirmative Action Guidelines: Compliance Reviews and Debarment." *Journal of Intergroup Relations* 20: 3–11.

Pincus, F. L. 1999. "Reverse Discrimination: Fact and Fiction." *Perspectives: The Newsletter of Prejudice, Ethnoviolence and Social Policy* 7 (April/May): 1–6.

Pincus, F. L. 2003. *Reverse Discrimination: Dismantling the Myth.* Boulder: Lynne Rienner Publishers.

Program Office. 2002. *Facts on Executive Order 11246 Affirmative Action.* Retrieved from Office of Federal Contract Compliance Programs: www.dol.gov/esa/regs/compliance/ofccp/aa.htm.

Program Office. n.d. *Quick Facts.* Retrieved from Office of Federal Contract Compliance Programs: www.dol.gov/esa/media/reports/ofccp/ofqfacts.htm.

Reardon, S. F. 2015. *Can Socioeconomic Status Subsitute for Race in Affirmative Action College Admissions? Evidence From a Simulation Model.* Princeton: Educational Testing Service.

Reskin, B. 1998. *The Realities of Affirmative Action in Employment.* Washington, DC: American Sociological Association.

Service, C. R. 2010. *Affirmative Action in Employment: A Legal Overview.* Washington, DC: Congressional Research Service RL30470.

SourceWatch. 2017. *Center for Equal Opportunity.* Retrieved from SourceWatch: https://www.sourcewatch.org/index.php/Center_for_Individual_Rights.

SourceWatch. 2019. *Center for Individual Rights.* Retrieved from SourceWatch: https://www.sourcewatch.org/index.php/Center_for_Individual_Rights.

Urofsky, M. I. 2020. *The Affirmative Action Puzzle: A Living History from Reconstruction to Today.* New York: Pantheon Books.

Wilcher, S. 2017. *Trump Administration Proposes Merger of EEOC Under Guse of Efficiency*, August 15. Retrieved from insightsintodiversity.com.

Xiang, A., and D. B. Rubin. 2015. Assessing the Potential Impact of a Nationwide Class-Based Affirmative Action System. *Statistical Science* 30 (3): 297–327.

Younies, A. 2018. *OFCCP's Trump-era Audit Directives Combine Elements from Former Administrations*, December 9. Retrieved from hrunlimitedinc.com.