From the introduction of Africans into the American colonies through the first half of the twentieth century, the practice of denying people of African descent privileges and rights granted to members of other groups was the norm in both social custom and law. After the abolition of slavery, most labor union locals explicitly prohibited membership to African Americans. And the establishment of union shops in private and public enterprises typically resulted in the expulsion of African Americans from skilled labor positions. Federal support of labor unionization through the National Labor Relations Board contributed substantially to the marginalization of African American workers. Only with the threat of a march on Washington in the midst of World War II did President Franklin D. Roosevelt relent and issue Executive Order 8802 banning employment discrimination by the federal government and defense contractors. But the ban against discrimination required no special effort to include members of the groups previously excluded.

The first directive aimed at encouraging inclusiveness was Executive Order 10952, issued by President John F. Kennedy in 1961. This order directed that contractors on projects receiving federal funds “take affirmative action to ensure that applicants are employed, and employees are treated during their employment, without regard to race, creed, color, or national origin.” To monitor this Kennedy established the Equal Employment Opportunity Commission (EEOC).

Under pressure from increasing civil disobedience, a Congress dominated by southern Democrats reluctantly passed the Civil Rights Act of 1964, which prohibited discrimination on the basis of race, color, or national origin in the distribution of benefits in any federally assisted programs (Title VII) and prohibited employers (of at least fifteen people), employment agencies, and labor organizations from using race, color, religion, sex, or national ori-
gin to exclude individuals from the full benefits offered by those agencies (unless the use of such factors served a bona fide occupational qualification). Title VII also prohibited employment practices that perpetuated the effects of past discrimination (except where this might result from a bona fide seniority or merit system) but did not require preferential treatment to achieve racial balance.

In 1965 President Lyndon Johnson issued Executive Order 11246, which established the Office of Federal Contract Compliance (OFFCC) under the Department of Labor. Because local unions (especially of the AFL) were rigidly segregated and rabidly opposed to making jobs available to minorities, OFFCC required that prospective contractors to the federal government show that they had proactive plans to ensure the inclusion of minorities in their workforce. In 1970 under President Nixon, OFFCC instituted the Philadelphia Plan, requiring that the highly segregated construction contractors and labor unions of Philadelphia employ more minority workers. The Plan was extended in Order 4, requiring employers with at least fifty employees and $50,000 in government business to develop “specific goals and timetables” to correct for the underutilization of minority workers or face the loss of government business.

In 1971 a Revised Order 4 was extended to include women as well as minority workers. Major corporations (Bethlehem Steel, AT&T) and universities (Columbia University) were forced to end discriminatory practices and initiate affirmative action plans to employ and promote more women and minorities. And the Supreme court, in *Griggs v. Duke Power Co.* (1971), extended the prohibition against discrimination from disparate treatment (intentionally treating one individual different from another individual on the basis of irrelevant factors such as race, sex, national origin, or religion) to disparate impact (whereby a practice, procedure, or test that on face value is neutral nonetheless produces an underrepresentation of a group formerly excluded from such positions and is unnecessary for the performance of the duties required by the position in question).

Thus, requiring a high school diploma for jobs that could be performed without need of such would disproportionately affect blacks and other groups who historically had been denied equal educational benefits. By outlawing irrelevant “colorblind” requirements and recruitment based on personal networks, affirmative action has made it possible for more people—both black and white, men and women—to have opportunities that otherwise would have been reserved for a privileged few.
Because of continued resistance to the inclusion of minorities by universities and housing authorities, in 1971 the Department of Health, Education and Welfare required recipients of federal funds to “take affirmative action to overcome the effects of prior discrimination” and “even in the absence of such prior discrimination, a recipient in administering a program may take affirmative action to overcome the effects of conditions which resulted in limiting participation of a particular race, color, or national origin.” To illustrate, “where a university is not adequately serving members of a particular racial or nationality group, it may establish special recruitment policies to make its program better known and more readily available to such group, and take other steps to provide that group with more adequate service.”

After the abolition of slavery many states continued to deny African Americans the equal protection of the law, and to remedy this, the Fourteenth Amendment to the U.S. Constitution was passed prohibiting state and local governments from denying persons within their jurisdiction equal protection of the law. Although designed to outlaw invidious discrimination against African Americans, it has in recent times been used equally to challenge benign discrimination. Despite many differences among the Justices on this issue, the Supreme Court has remained consistent in allowing benign discrimination as a remedy for official findings of continuing invidious discrimination and in cases of voluntary remedy.

A case of voluntary remedy is illustrated by Kaiser & United Steelworkers v. Weber, in which the Supreme Court upheld a voluntary agreement between a union (the United Steelworkers of America) and a corporation (Kaiser Aluminum and Chemical Corporation) to correct the discrepancy between the percentage of blacks in skilled craft positions (0%) and the percentage of blacks in the local labor force (39%). This agreement required reserving for minorities 50% of the openings in a training program (sponsored by the corporation) until the discrepancy was eliminated. Both the union and the corporation tacitly acknowledged that each had engaged in years of racial discrimination against black workers to exclude them from such positions.

And in 1986, the Supreme Court upheld an order requiring that Sheet Metal Workers Union, Local 28 admit 29% of new members from minority groups. The union was founded in 1888 with an “all-white” requirement for membership. In 1964 the State of New York initiated a suit that led to a state court’s ordering the use of a race-neutral testing procedure for selecting apprentices for membership. Because of numerous “bad-faith” attempts to
evade and delay the admission of nonwhites, the union was ordered to cease discriminating and to admit 29% minorities (the percentage of nonwhites in the relevant labor pool in New York City) by July 1981. The union was found in contempt of court in 1982 and 1983, and again ordered to admit 29% of new members from minority groups. The union appealed to the Supreme Court, arguing that the numerical goal amounted to a quota and rewarded individuals who had not been the specific victims of past discrimination by the union. The EEOC under the Reagan administration (directed by Clarence Thomas) supported the union’s brief.

The Supreme Court upheld the hiring goal and rejected the contention that Title VII limited relief only to direct victims of discrimination. For the majority, Justice Brennan stated: “The purpose of affirmative action is not to make identified victims whole but rather to dismantle prior patterns of employment discrimination and to prevent discrimination in the future” (478 US 474; Greene, pp. 126–7). Because union membership was typically the result of sponsorship by existing union members, it was necessary that the union admit a substantial number of minority members to insure that its past discriminatory practices no longer served to discourage minority applications. Numerical goals were not a means to ensure a racial balance but were intended only as a “benchmark against which the court could gauge petitioners’ efforts to remedy past discrimination” (478 US 474; Greene, p. 127).

Because of widespread resistance to the inclusion of women and minorities in the workplace, the Department of Labor was aggressive in requiring goals, timetables, and good faith efforts on the part of federal contractors. This plus the use of quotas in cases of egregious discrimination established a climate in which many white males felt their chances for success were being diminished unfairly. This has encouraged the view that affirmative action is synonymous with programs that use race and sex to meet a quota.

The debate about affirmative action has accordingly centered primarily around policies that are interpreted as giving preferential treatment to women and minorities. Unfortunately, this has shifted attention from affirmative action programs emphasizing outreach and recruitment (special efforts to make employment opportunities known to women and minorities), development (skill enhancement, diversity management, mentoring), and support (child care, flexible working hours).

Since Baake, affirmative action has been recognized as a legitimate means of increasing diversity in higher education. Institutions of higher learning should provide a forum where many points of view can be pre-
presented and discussed. Soon over 50% of the working force in the United States will be of non-European origin. It is in everyone’s interest that all segments of the population be provided with sound educations. This forward-looking orientation is meant to help prepare us for a future in a global, multicultural world.

The other justification for affirmative action is backward-looking, seeking to ensure that those discriminated against do not bequeath their disadvantages to their progeny. Most African Americans see banishing slavery, segregation, and the unequal application of law as necessary but not sufficient to offset the accumulated effects of racist practices over the last hundred years.

For critics of affirmative action, making it illegal to discriminate against individuals on the basis of sex or race makes it illegal to correct for racism and sexism by taking race and sex into account. But for supporters of affirmative action, making a special effort to include women and minorities is what the legacy of racism and sexism requires. If A unjustly pushes B down, then A is obligated to pull B up. If one group harms another, it has an obligation to repair the harm caused. Such examples reflect a general moral principle of restitution. It is absurd to condemn acts of corrective justice as if they were malicious attempts to exclude young white males.

Although the primary rationale of the Fourteenth Amendment, the Civil Rights Act of 1964, and its subsequent extensions was to end policies and practices aimed at excluding African Americans, the remedies they provide have been extended to other groups historically discriminated against: women, the elderly, the disabled, Hispanic, Asian, and Native Americans. This means that alleviating injustices to African Americans has helped alleviate injustices to many other groups as well. But the belief that antidiscrimination laws and policies need not be supplemented with aggressive outreach engenders a policy of benign neglect that perpetuates the effects of the past. It is not enough for A to cease pushing B down. A must actively work to pull B up. This is the spirit of affirmative action.

In the selections presented, many argue that actively working to include members of historically excluded groups amounts to little less than reverse discrimination in which white males are denied opportunities because of their sex and race. Others defend the need to take race and gender into consideration in order to compensate for the continuing effects of racism and sexism. The historical legacy, they claim, creates a need to exhibit blacks,
women, and other historically maligned groups in positive roles that challenge historical stereotypes.

Questions and issues to consider: Do individuals or groups suffer the ills and reap the benefits of racism and sexism? Does taking race and sex into account mean that those who benefit most will have been harmed least, and those who have been harmed most will benefit least? Is taking race into consideration precluded by the Fourteenth Amendment and the 1964 Civil Rights Act? Did African Americans suffer a loss as a result of slavery and segregation? If so, is compensation owed to members of the current generation of African Americans? Did European Americans reap a benefit as a result of slavery and segregation? If so, are younger European Americans morally required to relinquish unjustly acquired advantages? Is the goal of affirmative action proportional representation? Should there be any attempt to compensate for societal and institutional discrimination, where there is often no intent to cause harm to any particular individual? Is diversity a legitimate goal for taking race and sex into consideration in granting employment, educational, and investment opportunities? Do policies that take race and gender into consideration incorporate a form of reverse discrimination? Is being a member of the white race and the male gender grounds for being denied educational, employment, and investment opportunities?

**SUGGESTED FURTHER READING**


