Chapter One

Introduction

The Topic

The subject of this treatise/casebook is the legal and ideological controversy over the application of affirmative action policy to combat discrimination based on race, national origin/ethnicity, and gender. Racism, sexism, and ethnic discrimination have long represented a seemingly intractable problem. Affirmative action was conceived as an attack on this ingrained problem but today it is widely misunderstood. We feel the time is ripe for the comprehensive review that we attempt in this book. To maintain our primary focus, we have left for another day examination of the more recent—still evolving—initiatives against discrimination based on age, disability, and genetic testing.

Affirmative action differs from other antidiscrimination initiatives in that (1) it targets *societal* bias (as manifested in public and private action), not individual malefactors; (2) it mandates race, ethnic, and gender-conscious remedies for the disproportionately adverse effects—the so-called *disparate impact*—of societal discrimination on protected groups, whether or not specific discriminatory intent on the part of individual defendants can be isolated; and (3) it seeks to integrate institutions by race, ethnicity, and gender. As will be seen, the doctrine of *disparate impact* is a particularly central reason for the quarrel over affirmative action, and thus is a central theme of this book.

Affirmative action connotes remedial consideration of race, ethnicity, or sex as a factor, among others, in decision making about outreach, jobs, government contracting, K-12 student assignment, university admission, voting rights, and housing. The goal of this process is to redress the disadvantage under which members of disparately impacted groups are said to labor. The relative weight accorded to the race, national origin/ethnicity, or sex factor varies from program to program; thus affirmative action remedies range from disseminating job information to preferential employment and admissions
practices, classroom integration, the creation of majority-minority legislative districts, and court-ordered quotas in egregious discrimination cases.

Opponents of affirmative action generally portray it as a radical departure from equal opportunity’s original goal. In their version, the founding fathers of modern civil rights reform conceived of racial, ethnic, and gender discrimination as intentional maltreatment—disparate treatment, so-called—and strictly limited the remedy to parity—equal treatment, as it came to be known. Affirmative action came into being by displacing these time-honored precepts with the revolutionary notion that the group effects of societal bias warrant government intervention, wholly apart from the question of intent. The upshot, according to the critics, has been the ascendancy of protected-group preferences and antimeritocratic equality of results.

In this book, we endeavor to present an evenhanded account of these claims, and the counterclaims of affirmative action’s advocates in the spheres of employment, contracting, education, voting rights, and housing. We focus on affirmative action as the remedy for the effects of both facially neutral practices that disparately impact minorities and women; and government-sanctioned (de jure/intentional) segregation of protected groups in education and housing. (See chapters 3, 4, 5, 6, and 7 in this volume.) In addition, we visit the alternative rationale of diversity, that is, increased nonremedial inclusion of protected groups in the economy and education.

A Thumbnail History

Affirmative action came to the fore about half a century ago, at the beginning of a new era in civil rights reform. Prior reform initiatives had dealt mainly with intentional racial maltreatment of individuals and other traditional barriers to equal treatment. However, during our recent tumultuous confrontation with the nation’s racist past, the ideology of reform took on a far more proactive cast. True equality, it was said, would be unattainable without some form of compensation for the inherited disadvantage of disparately impacted minorities and females. Under the umbrella-label of affirmative action, providing such special assistance on the basis of group membership—rather than individual victimization—displaced equal treatment as the hallmark of federal policy.

From the late 1960s, affirmative action fostered a nationwide torrent of court-orders, government programs, and voluntary plans, which provided benefits ranging from outreach and special training; hiring goals and timetables; preferences in hiring, promotion, and university admission; public school integration; political representation; and—to a limited degree—“balanced” housing. More than any other recent experiment in social engineering,
this profusion of minority and female privilege evoked public outcry against claimed overinclusiveness, violations of the merit principle, and “reverse discrimination.” Nonetheless, with the spirited support of the courts until the end of the 1980s, affirmative action set the standard for equal opportunity in the public and private economies, and society as a whole. By the 1990s, the early limitation of “protected groups” to blacks had yielded to widespread coverage of Hispanics, women, American Indians, and Asians. In its heyday, affirmative action represented the centerpiece of America’s most ambitious, most promising, attempt to overcome the scourge of race, ethnic, and gender bias. (For a sampler of the extensive federal program, see the appendix to this chapter.)

The promise has not been fulfilled. Affirmative action has surely worked important policy changes, but there is no avoiding the fact that antiminority discrimination and sexism remain forces to be reckoned with. Whether affirmative action is up to this task is open to increasingly serious question. A series of adverse court rulings and state referenda in the 1990s have raised doubts about its legality. Public opposition is great. One cannot discount the possibility that affirmative action will soon be discarded or emasculated. The day may come when we have learned how to handle our racial/ethnic, and gender differences; what the history of affirmative action teaches is that such a day is not yet upon us.

The Book

Affirmative action is indisputably the flash point of America’s civil rights agenda. The affirmative action literature is voluminous, but no comprehensive account of its major legal/public policy dimensions exists. This book aims to fill the gap.

The book covers affirmative action’s origins and growth; the reasons for its current predicament; its impact on American society, and its future anti-discrimination role, if any. We have immersed ourselves in the literature of discrete disciplines that deal with these subjects: law, history, economics, statistics, sociology, political science, urban studies, and criminology. Our text integrates the relevant legal materials (constitutional and statutory provisions, regulations, and case law) with analysis and commentary that draw upon the ranking specialists (academic and otherwise) in the cited fields of study. We are convinced that affirmative action would make an outstanding case study in constitutional law, and respectfully offer our treatment as a model for constitutional studies. Though the subject is intricate, our goal is simple: to further a better understanding of affirmative action’s complexities through an evenhanded presentation of its roots, substantive components and diverse applications, eye-crossing issues, and endlessly debated impact.

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In chapter 2 of this interdisciplinary synthesis, we examine the government’s abortive attempt to eradicate the effects of racial discrimination after the Civil War. We also discuss the women’s rights movement, and examine the question of which groups should be covered by affirmative action. Chapter 3 deals with the genesis and operations of affirmative action in employment. Chapters 4 and 5 describe affirmative action’s role in education. In chapter 6, we recount affirmative action’s record in countering voting-rights discrimination. Chapter 7 treats America’s limited efforts to deploy affirmative action against residential segregation. In chapter 8, we raise central legal questions and summarize primary ideological claims including those made by a representative sample of distinguished disputants.

This book highlights affirmative action’s legal dimensions. Here there has been no “separation of powers.” Rather, the separate institutions of our national government—the courts, the bureaucracy, and the legislature—have all been involved in saying what law is. Often, the study of lawmaking is artificially truncated because our texts and courses focus on one branch to the neglect of others. Our study attempts to reduce this myopia. Further, it underscores the lack of guidance provided by Congress and the Supreme Court in critical areas. Thus, Congress—in equal employment opportunity (Title VII)—did not formally adopt disparate-impact theory until some two decades after the courts and the administrators had nourished it into a flourishing concern. (And Congress has yet to define what it means by the concept.) Likewise, it was not until 1968 that the Supreme Court ruled that its 1954 decision to end racial segregation in the public schools also required racial integration. The merit of governmental ambiguity is a question that should also be explored in connection with the bureaucracy. At the heart of major affirmative action programs is the administrative requirement that good faith efforts be employed to provide compensatory benefits to protected groups. What constitutes good faith depends on the differing values of the scrutinizing bureaucrats who may impose serious sanctions for what are viewed as deviations from that slippery standard.

Our interdisciplinary approach argues that a central reason for affirmative action’s current predicament is uncertainty over the objective of antidiscrimination law. Had Congress, in the beginning, defined *discrimination* in Title VII, we might have spared the fevered dispute over whether that law contemplates affirmative remediation (*equal results*) or only discrimination cessation (*equal treatment*). However, as we show in chapter 3, this fundamental substantive issue was left open. The concept of affirmative action as a remedy for disparate impact came into being as a court-sanctioned administrative interpretation of this legislative gap. In effect, the bureaucracy, with the courts’ blessings, took it upon itself to complete Congress’ unfinished business. It seems fair to say that Congress was primarily responsible for the
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legal muddle that is reflected in the conflicting rulings that the Supreme Court, over time, has issued in interpreting Title VII. (See pages 79–83, 225–231 in this volume for a delineation of the continuing issues.) For its part, as will be seen, the Supreme Court has magnified the legal muddle on the constitutional level by initially failing to muster a majority on the issue of the proper standard of affirmative action judicial review. Further, the Court has refused both to clarify critical aspects of that standard and to determine the validity of nonremedial affirmative action.

We believe that this lamentable state of affairs is directly attributable to the government’s consistent departures from constitutional norms. The repeated failure of both Congress and the Supreme Court to discharge their responsibilities, coupled with the bureaucracy’s immersion in the legislative sphere, have challenged the principle of separation of powers, and have deprived the public of sorely needed guidance. In our view, this perspective on affirmative action deserves greater emphasis.

Remembrance of Things Past

Affirmative action is not our first equal opportunity program. We see it as a revival of the ill-fated attempt to make citizens out of slaves after the Civil War. The past is prologue, and it is the past that we will turn to in chapter 2.

Note on Citations

Except where incorporated in this volume, citations in public documents extracted herein have been omitted without notification. Where the footnotes of these documents were reproduced, their numbers were changed to follow the order of the authors’ citations.

The authors’ citations conform with The University of Chicago Manual of Legal Citations (Bancroft-Whitney, 1989). Unless otherwise noted, where citations from other documents are reproduced in this volume, the style of the original was maintained.

Newspaper articles cited by the authors may be paginated differently in library newspaper indexes.

The bracketed numbers located in excerpts from U. S. Supreme Court opinions (introduced by boldface titles) refer to page numbers in the United States Reports. There are also bracketed references to pages in the Federal Reporter and Federal Register in this volume’s extended excerpts reproduced from these sources and introduced with boldfaced titles.
Appendix to Chapter One

A Sampler of Federal Affirmative Action Programs Explicitly Mandated or Authorized by Statute or Administrative Regulation

This sampler consists of excerpts from two sources: The portions titled “Equal Employment Opportunity Laws,” and “Grants and Other Assistance” are from the Congressional Research Service. The materials under the titles of “Military Recruiting” and “Federal Procurement Policies and Practices” are from a report to President Clinton.

Equal Employment Opportunity Laws

...The evolution of federal law and policy regarding affirmative action in employment may be traced to a series of executive orders dating to the 1960’s which prohibit discrimination and require affirmative action by contractors with the federal government. The Office of Federal Contract Compliance Programs, an arm of the U.S. Department of Labor, currently enforces the E.O. [Executive Order] 11246, as amended, by means of a regulatory program requiring larger federal contractors, those with procurement or construction contracts in excess of $50,000, to make a “good faith effort” to attain “goals and timetables” to remedy underutilization of minorities and women...
Public and private employers with 15 or more employees are also subject to a comprehensive code of equal employment opportunity regulation under Title VII of the 1964 Civil Rights Act. Except as may be imposed by court order to remedy “egregious” violations of the law, or by consent decree to settle pending claims, however, there is no general statutory obligation on employers to adopt affirmative action measures. But the EEOC [Equal Employment Opportunities Commission] has issued guidelines to protect employers and unions from charges of “reverse discrimination” when they voluntarily take action to correct the effects of past discrimination. [See appendices 1 and 2 in chapter 3 in this volume.] Federal departments and agencies, by contrast, are required to periodically formulate affirmative action plans for their employees and a “minority recruitment program” to eliminate minority “underrepresentation” in specific federal job categories.

Section 717 of [the] 1972 Amendments to Title VII of the 1964 Civil Rights Act empowers the Equal Employment Opportunity Commission to enforce nondiscrimination policy in federal employment by “necessary and appropriate” rules, regulations, and orders and through “appropriate remedies, including reinstatement or hiring of employees, with or without back-pay.” Each federal department and agency, in turn, is required to prepare annually a “national and regional equal employment opportunity plan” for submission to the EEOC as part of “an affirmative program of equal employment opportunity for all . . . employees and applicants for employment.”

Section 717 was reinforced in 1978 when Congress enacted major federal civil service reforms including a mandate for immediate development of a “minority recruitment program” designed to eliminate “underrepresentation” of minority groups in specific federal job categories. The EEOC and Office of Personnel Management have issued rules to guide implementation and monitoring of minority recruitment programs by individual federal agencies. Among various other specified requirements, each agency plan “must include annual specific determinations of underrepresentation for each group and must be accompanied by quantifiable indices by which progress toward eliminating underrepresentation can be measured.”

In addition, the following are among the statutes and regulations that relate to employment policies of the federal government or under federal grant and assistance programs:

5 U.S.C. § 4313(5): Performance appraisal in the Senior Executive Services to take account of individuals’ “meeting affirmative action goals, achievement of equal employment opportunity requirements, and compliance with merit principles. . . .”
5 U.S.C. § 7201: Establishes a “Minority Recruitment Program” for the Executive Branch and directs each Executive agency, “to the maximum extent possible,” to “conduct a continuing program for the recruitment of members of minorities for positions in the agency . . . in a manner designed to eliminate underrepresentation of minorities in the various categories of civil service employment within the Federal service, with special efforts directed at recruiting in minority communities, in educational institutions, and from other sources from which minorities can be recruited.”

22 U.S.C. § 4141(b): Establishes the Foreign Service Internship Program “to promote the Foreign Service as a viable and rewarding career opportunity for qualified individuals who reflect the cultural and ethnic diversity of the United States . . .”

42 U.S.C. § 282(h): The Secretary of HHS [Health and Human Services], and the National Institutes of Health, “shall, in conducting and supporting programs for research, research training, recruitment, and other activities, provide for an increase in the number of women and individuals from disadvantaged backgrounds (including racial and ethnic minorities) in the fields of biomedical and behavioral research.”

41 C.F.R. Part 60 (1994): Sets forth the body of administrative rules issued by the Office of Federal Contract Compliance Programs [OFCCP] within the Department of Labor to enforce the affirmative action requirements of E.O. 11246 on federal procurement and construction contractors. All contractors and subcontractors with federal contracts in excess of $10,000 are prohibited by the Executive Order from discriminating and required to take affirmative action in the employ[ment] of minority groups and women. Federal contractors and subcontractors with 50 or more employees and government contracts of $50,000 or more must develop written affirmative action compliance programs for each of their facilities. OFCCP rules direct these larger contractors to conduct a “utilization analysis” of all major job classifications and explain any underutilization of minorities and women by job category when compared with the availability of qualified members of these groups in the relevant labor area. Based on this analysis, the contractor’s affirmative action plan must set forth appropriate goals and timetables to which the contractor must direct its “good faith efforts” to correct deficiencies. In addition, OFCCP has established nationwide hiring goals of 6.9 percent for women in construction, and regional and local goals for minorities in construction, which are set out in an appendix to the agency’s affirmative action in construction regulations. 41 C.F.R. [§] 60-4. [OFCCP’s current affirmative action regulations covering larger service and supply contracts are excerpted in appendix 3 in chapter 3 of this volume.]
48 C.F.R. [§] 22.804 (1994): Affirmative action program under Federal Acquisition Regulations requires written affirmative action plans of federal nonconstruction prime and subcontractors with 50 or more employees that comply with DOL [Department of Labor] regulations to assure equal opportunity in employment to minorities and women.

48 C.F.R. [§§] 52.222-23, 52.222-27 (1994): Prescribes clause for inclusion of federal contracts that requires “[g]oals for minority and female participation, expressed in percentage terms for the Contractor’s aggregate workforce in each trade on all construction work in the covered area” and “to make a good faith effort to achieve each goal under the plan in each trade in which it has employees.”

[Military Recruiting]

... Because minorities are overrepresented in the enlisted ranks and underrepresented in the officer corps, ... the armed forces have focused recently on the officer “pipeline.” The services employ a number of tools:

Goals and Timetables: The Navy and the Marine Corps, historically less successful than the other services in this arena, have responded in recent months by setting explicit goals to increase minority representation in the officer corps. Both services seek to ensure that, in terms of race and ethnicity, the group of officers commissioned in the year 2000 roughly reflects the overall population: 12 percent African American, 12 percent Hispanic, and 5 percent Asian. Department of the Navy officials point out that this represents a significantly more aggressive goal than had been the case, when the focus for comparison had been on college graduates; the more aggressive goal implies vigorous outreach and other efforts. ... Moreover, the Navy and the Marine Corps have set specific year-by-year targets for meeting the 12/12/5 goal.

Outreach, Recruiting, & Training: All of the services target outreach and recruiting activities through ROTC [the Reserve Officers Training Corps], the service academies, and other channels. Also, the services have made special, race-conscious (though not racially exclusive) efforts to recruit officer candidates. For example, the Army operates a very successful “preparatory school” for students nominated to West Point whose academic readiness is thought to be marginal; the enrollees are disproportionately but ... not exclusively minority.

Selection Procedures: All of the services emphasize racial and gender diversity in their promotion procedures. The Army, for example: instructs officer promotion boards to “be alert to the possibility of past

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personal or institutional discrimination—either intentional or inadvertent;” [and] sets as a goal that promotion rates for each minority and gender group [are] at least equal [to] promotion rates for the overall eligible population. . . . [If, for example, a selection board has a general guideline that 44 percent of eligible lieutenant colonels be promoted to colonel, the flexible goal is that promotions of minorities and women be at that same rate. . . . [The procedure] establishes a “second look” process under which the files for candidates from underrepresented groups who are not selected upon initial consideration are reconsidered with an eye toward identifying any past discrimination; and [the procedure] instructs members of a promotion board carefully so that the process does not force promotion boards to use quotas. . . .

Management Tools: These include performance standards, reporting requirements, and training and analytic capacity.—Personnel evaluations include matters related to effectiveness in EO [Equal Opportunity] matters. [Department of Defense] DoD maintains the Defense Equal Opportunity Management Institute, which trains EO personnel, advises DoD on EO policy, and conducts related research.—DoD conducts various surveys and studies to monitor equal opportunity initiatives and the views of personnel.—Most important, DoD requires each service to maintain and review affirmative action plans and to complete an annual “Military Equal Opportunity Assessment” (MEOA). The MEOA reports whether various equal opportunity objectives were met and identifies problems such as harassment and discrimination.

The MEOA includes both data and narrative assessments of progress in 10 areas. One of these is recruitment and accessions (i.e., commissioning of officers). Other areas include . . . completion of officer and enlisted professional military education (e.g., the war colleges and noncommissioned officer academies), augmentation of officers into the Regular component, [and] assignment to billets that are Service defined as career-enhancing. . . . In addition to these formal efforts, the Services support the efforts of non-profit service organizations, such as the Air Force Cadet Officer Mentor Action Program, that strengthen professional and leadership development through mentorship, assist in the transition to military life, and support the establishing of networks. . . .

[Grants and Other Assistance]

. . . 7 U.S.C. § 3154(c): The Secretary of Agriculture is authorized “to set aside a portion of funds” appropriated for certain research on the production and marketing of alcohols and industrial hydrocarbons for
grants to colleges and universities to achieve “the objective of full participation of minority groups.”

7 C.F.R. § 1944. 671(b) (1994): Equal Opportunity and outreach requirements applicable to... [Department of Agriculture] Housing Preservation Grants program state that “[a]s a measure of compliance, the percentage of the individuals served by the HPG [Housing Preservation Grants] grantee should be in proportion to the percentages of the population of the service area by race/national origin.”

7 C.F.R. §§ 3403.1, 3403.2 (1994): [A goal of the] USDA [United States Department of Agriculture] regulations... is to “...encourage minority and disadvantaged [participation] in technological innovation.” For purposes of this program [a] “minority and disadvantaged individual is defined as a member of any of the following groups: Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, or Subcontinent Asian Americans.”

12 U.S.C. § 1441a (r-w): Provides for various incentives, including “preference points” on proposals and minority capital assistance programs, to preserve and expand bank ownership by minorities and women; authorizes establishment of Resolution Trust Corporation [RTC] guidelines to achieve parity in distribution of RTC contracts, and “reasonable goals” for subcontracting to minority and women-owned businesses and firms; and provides a “[m]inority preference in acquisition of institutions in predominantly minority neighborhoods.”

12 U.S.C. § 2907: Any donation or sale on favorable terms of [a] bank branch in [a] minority neighborhood to minority or women-owned depository institutions shall be a factor in determining the seller or donor institution’s compliance with the Community Reinvestment Act.

15 C.F.R. § 917.11(d) (1994): A “factor considered” in the approval of proposals under the Sea Grant Matched Funding Program “will be the potential of the proposed program to stimulate interest in marine related careers among... minorities, women, and the handicapped whose previous background or training might not have generated such an interest.”

47 C.F.R. § 73.3555(d)(2)(ii) (1994): Federal Communications Commission (FCC) multiple ownership rules provide exemption for “minority-controlled” broadcast facilities from certain restrictions on the granting or transfer of commercial TV broadcast stations which result in an aggregate national audience exceeding twenty-five percent. “Minority means Black, Hispanic, American Indian, Alaska Native, Asian and Pacific Islander.”
68 F.C.C. 2d 381, 411-412 (1978). FCC policy awards a quality enhancement credit for minority ownership and participation in station management in the comparative licensing process. When faced with mutually exclusive applications for the same broadcast channel, the FCC initiates a proceeding to compare the merits of the competing applicants based on specific factors including: diversification of control of mass media communications, full time participation in station management by owners, proposed program service, past broadcast record, efficient use of frequency, and character of the applicant. Under the FCC’s preference policy, ownership and active participation in station management by members of a minority group are considered a plus to be weighed in with the other comparative factors.

68 F.C.C. 2d 983 (1978): FCC “Distress Sale” Policy. Under this policy, existing licensees in jeopardy of having their licenses revoked or whose licenses have been designated for a renewal hearing are given the option of selling the license to a minority-owned or controlled firm for up to seventy-five percent of fair market value. The minority-assignee must meet the basic qualifications necessary to hold a license under FCC regulations and must be approved by the FCC before the transfer is consummated. . . .

20 U.S.C. § 1047: Authorizes grants and contracts by the Department of Education (ED) with “historically black colleges and universit[ies]” and other institutions of higher education serving a “high percentage of minority students” for the purpose of strengthening their library and information science programs, and establishing fellowships and traineeships for that purpose.

20 U.S.C. § 1063b: Authorizes ED grants to specified postgraduate institutions “determined by the Secretary [of Education] to be making substantial contributions to the legal, medical, dental, veterinary, or other graduate education opportunities for Black Americans.”

20 U.S.C. § 1069f(c): Reservation of 25% of the excess of certain educational appropriations for allocation “among eligible institutions at which at least 60 percent of the students are African Americans, Hispanic Americans, Native Americans, Asian Americans . . . Native Hawaiians, or Pacific Islanders, or any combination thereof.”

20 U.S.C. § 1070a-41: “Priority” in selection for Model Program Community Partnership and Counseling Grants given to program proposals “directed at areas which have a high proportion of minority, limited English proficiency, economically disadvantaged, disabled, nontraditional, or at-risk students. . . .”
20 U.S.C. §1112(d): “Special consideration” to be given [to] “historically Black colleges and universities” and to institutions having at least 50% minority enrollment in making grants for teacher training and placement.

20 U.S.C.S. § 1132b-2: In awarding facilities improvement grants, the ED [Education] Secretary or each State higher education agency “shall give priority to institutions of higher education that serve large numbers or percentages of minority or disadvantaged students.”

20 U.S.C. § 1134e: In making grants for post-graduate study, the . . . Secretary [of Education] shall “consider the need to prepare a larger number of women and individuals from minority groups, especially from among such groups which have been traditionally underrepresented in professional and academic careers,” and shall accord a “priority” for awards to “individuals from minority groups and women” pursuing study in specified professional and career fields.

20 U.S.C. § 1134s: The ED Secretary “shall carry out a program to assist minority, low-income, or educationally disadvantaged college students” to pursue a degree and career in law through an annual grant or contract.

20 U.S.C. §§ 1135c, 1135d: The ED Secretary shall “carry out a program of making grants to institutions of higher education that are designed to provide and improve support programs for minority students enrolled in science and engineering programs as institutions with a significant minority enrollment . . . .” Eligibility for such grants is limited to “minority institutions” (minority enrollment in excess of 50%) or other public or private nonprofit institutions with at least 10 percent minority enrollment.

20 U.S.C. § 1409(j)(2): The ED Secretary “shall develop a plan for providing outreach services” to historically Black colleges and universities, other higher educational institutions with at least 25% minority student enrollment, and “underrepresented populations” in order to “increase the participation of such entities” in competitions for certain grants, contracts, and cooperative agreements.

20 U.S.C. § 1431(a)(3): “Priority consideration” for fellowships and traineeships in special education and related services shall be given to “individuals from disadvantaged backgrounds, including minority and individuals with disabilities who are underrepresented in the teaching profession or in the specialization in which they are being trained.”

20 U.S.C. § 2986(b): A portion of state allotment of critical skills improvement funds to be distributed for various purposes, including “re-
Enrollment or retraining of minority teachers to become mathematics and science teachers.”

20 U.S.C. § 3156(a): Program to assist local educational agencies “which have significant percentages of minority students” to conduct “alternative curriculum” schools which “reflect a minority composition of at least 50 percent” and contribute to school desegregation efforts.

20 U.S.C. § 3916: Fifteen percent of National Science Foundation funds available for science and engineering education is to be allocated to faculty exchange and other programs involving higher educational institutions with “an enrollment which includes a substantial percentage of students who are members of a minority group.”

20 U.S.C. § 5205(d): No less than 10 percent of Eisenhower Exchange Fellowship Program funds “shall be available only for participation by individuals who are representative of United States minority populations.”

20 U.S.C. § 6031(c) (5): ED “shall establish and maintain initiatives and programs to increase the participation” of “researchers who are women, African-American, Hispanic, American Indian and Alaskan Native, or other ethnic minorities” in the activities of various authorized educational institutes.

42 U.S.C. § 292g (d)(3): For a three-year period beginning on October 13, 1992, historically black colleges and universities are exempted from provision rendering certain institutions ineligible for student loan program based on high loan default rate.

42 U.S.C. § 293a: “Special consideration” in scholarship grant program to be given “health profession schools that have enrollments of underrepresented minorities above the national average for health profession schools.”

42 U.S.C. § 293b(3): Institutional eligibility for faculty fellowship program based on “ability to . . . identify, recruit and select individuals from underrepresented minorities in the health profession” with potential for teaching and educational administration.

42 U.S.C. § 1862d: At least 12 percent of amounts appropriated for the Academic Research Facilities Modernization Program shall be reserved for historically Black colleges and universities and other institutions which enroll a substantial percentage of Black American, Hispanic American, or Native American students.

34 C.F.R. § 74.12 (1994): Department of Education (ED) Uniform Administrative Requirements for Grants to Institutions of Higher Education,
Hospitals, and Nonprofit Organizations “encourage” ED grantees and subgrantees to use minority-owned banks. . . .

34 C.F.R. § 318.11(a)(15), (16) (1994): Includes “[t]raining minorities and individuals with disabilities” and “minority institutions” among several optional funding priorities under special education training program.


34 C.F.R. Part 607, § 607.2(b) (1994): An institution of higher education is eligible to receive a grant under the Strengthening Institutions Program even if it does not satisfy certain other generally applicable state authorization or accreditation requirements if its student enrollment consists of specified percentages of designated minority groups.

34 C.F.R. Parts 608, 609 (1994): “The Strengthening Historically Black Colleges and Universities Program . . . provides grants to Historically Black Colleges and Universities to assist these institutions in establishing and strengthening their physical plants, academic resources and student services so that they may continue to participate in fulfilling the goal of equality of educational opportunity.” (§ 608.1).

34 C.F.R. § 637.1 (1994): “The Minority Science Improvement Program is designed to effect long-range improvement in science education at predominantly minority institutions and to increase the flow of underrepresented ethnic minorities, particularly minority women, into scientific careers.”

34 C.F.R. § 641.1 (1994): “The Faculty Development Fellowship Program provides grants to institutions of higher education . . . and nonprofit organizations to fund fellowships for individuals from underrepresented minority groups to enter or continue in the higher education professorate.” . . .

42 U.S.C. § 3027: State plans for grant programs on aging “shall provide assurances that special efforts will be made to provide technical assistance to minority providers of services.”

42 U.S.C. § 3035d: Provides that the Assistant [Health and Human Services] HHS Secretary “shall carry out, directly or through grants or contracts, special training program and technical assistance designed to improve services to minorities” under the Older Americans Act.

42 C.F.R. § 52c.2 (1994): Minority Biomedical Research Support Program makes grants to higher educational institutions with 50 percent or other “significant proportion” of ethnic minority enrollment.
42 C.F.R. § 62.57(h) (1994): Among factors considered in making certain State loan repayment grants to State applicants is “[t]he extent to which special consideration will be extended to medically underserved areas with large minority populations.”

42 C.F.R. § 64a.105(d)(2) (1994): “Preferred service” for purposes of obligated service requirement for mental health traineeships includes service in any public or private nonprofit entity serving 50 percent or more specified racial or ethnic minorities. . . .

29 U.S.C. § 718b(b): Directs the [Department of Labor] Commissioner of the Rehabilitation Services Administration to develop an “outreach” policy for “recruitment of minorities into the field of vocational rehabilitation, counseling and related disciplines” and for “financially assisting Historically Black Colleges and Universities, Hispanic-serving institutions of higher education, and other institutions of higher education whose minority enrollment is at least 50 percent.”

29 U.S.C. § 771a: Authorizes [Department of Labor] grants for personnel projects relating to training, traineeships and related activities to historically Black colleges and universities and other higher educational institutions with at least 50% minority student enrollment. . . .


**Federal Procurement Policies and Practices**

. . . Throughout the federal government, several programs seek to increase procurement and contracting with minority- and women-owned businesses. The largest of these efforts are government-wide programs overseen by the [Small Business Administration] SBA; this overall effort is supplemented in some cases by agency-specific initiatives. Under these programs taken as a whole, some procurement contracts are set aside for sole-source or sheltered competition contracting, eligibility for which is targeted to minority-owned businesses (and in some cases non-minority women-owned businesses), but by statute available more broadly to “socially and economically disadvantaged” individuals. There is also

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a broad, race-neutral, sheltered competition or set aside for small businesses generally. This operates separately and has a lower priority than the more targeted efforts; still, over 93 percent of procurements are with non-minority firms. . . .

**Policies & Practices**

**Government-Wide Efforts**

**Goals:** Federal law establishes several overall, national goals to encourage broader participation in federal procurement: 20 percent for small businesses; 5 percent for small disadvantaged businesses (SDB's); and 5 percent for women-owned businesses. . . . The goal for women was added in the 1994 procurement reform legislation, the Federal Acquisition and Simplification Act. Racial minorities are presumed to be “socially disadvantaged” for purposes of the government-wide SDB program, mirroring the statutory presumption in the SBA’s § 8(a) program described below. . . . [This contentious presumption of disadvantaged status is discussed at length in chapter 2, pages 34–36.] The SBA consults with each agency to set annual agency-level goals to ensure progress toward the overall goal. (For contracts and firms above certain thresholds, the law requires subcontracting plans in furtherance of these goals.) The goals are themselves flexible, and hence relatively non-controversial. The government-wide SDB goal was met for the first time in 1993.

**Sole-source contracting:** Under the § 8(a) program, which is statutorily mandated, small SDBs can secure smaller contracts (usually less than $3 million) without open competition. This “sole sourcing” is accomplished when an agency contracts with SBA, which in turn subcontracts with the SDB.

For a company to participate in the § 8(a) program, SBA must certify that the firm is controlled and operated by **socially and economically disadvantaged persons.** By statute, persons from certain racial and ethnic groups . . . are presumed to be socially disadvantaged; persons are considered economically disadvantaged if they face “diminished capital and credit opportunities”—measured by asset and net-worth standards. [For a discussion and critique of the 8(a) program, see pages 34–36 in this volume.]

In FY [fiscal year] 1994, the § 8(a) program accounted for about 2.7 percent of all government procurement—about $4.9 billion. The number of certified § 8(a) firms grew from 3,673 in 1990 to 5,833 in 1994, of which 47 percent received contract actions.
Once a firm is certified and brought into the § 8(a) program, the 1987 amendments to the statute establish both a “graduation” period of nine years and a requirement that, over time, firms achieve an increasing mix of business from outside the § 8(a) program and outside federal contracting. Under the [first Bush] Administration, the SBA did not aggressively implement these 1987 statutory changes, but it has now done so. Moreover, in recent years there has been increasing emphasis on using competition among §8(a) and SDB firms rather than sole-source procurements.

Bid price preferences: Procurement reforms enacted by Congress last year [1994] authorize government-wide use of the 10 percent bid preference for SDBs which previously was a tool available primarily at DOD [Department of Defense] (the so-called “§1207 program”—see below). . . . These regulations could have a significant effect on procurement by SDBs in those agencies that do not use an effective set-aside scheme such as DOD’s “rule of two,” described below.

Agency-Specific Efforts

Department of Defense: In addition to participating in the goal-setting and § 8(a) efforts, DOD has two additional efforts, which are significant because DOD executes roughly two-thirds by amount of all federal prime contracts. These additional programs are part of DOD’s effort to meet its share of the government-wide goals mentioned above.

SDB shelters or rule-of-two set-asides: Contracting officers are authorized to limit bidding on a particular contract to small disadvantaged businesses (SDBs) if two or more such firms are potential bidders and the officer determines the prevailing bid will likely be within 10 percent of the fair market price.

SDB 10 percent bid preferences: Whenever there is full and open competition and procurement is based on price factors alone, contracting officers nationally add 10 percent to the price of non-SDB bidders, and then award the contract on the basis of the revised bids. (This is the “§ 1207” program. Although the applicable statute merely makes this tool available to DOD as a means of achieving its contracting goals, the Department’s procurement regulations mandate its use.)

Comparative usefulness of tools: Over 60 percent of DOD’s contracting with SDBs occurs through either this “rule of two” set-aside or through the § 8(a) program; the 10 percent bid price preference has been little-used in recent years because regulations require that the “rule of two” be used whenever possible, as it generally is.
Department of Transportation [DOT]: In addition to participating in the goal-setting and § 8(a) efforts, DOT manages an effort to encourage business with minority- and women-owned firms through its grants to state and local entities.\textsuperscript{15}

Subcontracting preferences: In addition to setting goals for subcontracting with women- and minority-owned firms, DOT requires that grant recipients (usually state or local authorities) provide an additional payment to contractors who attain certain levels of contracting with women- or minority-owned subcontractors and who provide certain technical assistance to those subcontractors. The payment is designed to compensate the prime contractor for additional costs for assisting the subcontractors. This compensation incentive is up to 1.5 to 2.0 percent of the total contract.\textsuperscript{16}

Graduation from sheltered competition: Unlike the § 8(a) program, the DOD and DOT programs do not require that firms graduate from preferences, or that firms have a mix of federal procurement and other business. There is, of course, the “natural” graduation which occurs if a firm becomes bigger than the “small” business size standard established by the Small Business Act, or the owner’s wealth rises above the applicable threshold.\textsuperscript{17}

Certification of eligibility[:] [I]n these programs [the certification process] differs from SBA’s certification for participation in the government-wide § 8(a) program. In the DOD programs, the firms self-certify that they are qualified; in the DOT program, the state/local grant recipient is responsible for certifying the subcontractor’s status.\textsuperscript{18}

Complementary Programs: Technical & Other Assistance

A number of agencies have other programs to assist women- and minority-owned firms seeking procurement opportunities. These include:

SBA maintains several programs that serve small businesses generally, by providing technical assistance, loan guarantees, and equity capital through Small Business Investment Companies (SBICs).

The Minority Business Development Administration (MBDA) at [The Department of] Commerce provides technical assistance and support for women- and minority-owned firms.

Several agencies maintain “Mentor-Protegé” programs which encourage majority firms to advise and nurture new and growing minority-owned firms by providing managerial and technical assistance.
SBA’s *Surety Bond Program* provides up to a 90 percent guarantee for bonds required of contractors and subcontractors on many public and private construction contracts, thereby lowering the small firm’s cost of doing business. In FY 1994, SBA approved more than 22,000 bid bond guarantees, resulting in 6,591 final bonds, for a total bond guarantee amount of $1.08 billion. Although this program is not specifically targeted, 24 percent of bonds went to minority firms; nearly half of these were African-American, and one-quarter were Hispanic. . . .

**Authors’ Note**: Mending Affirmative Action and the Clinton Administration

In 1995, the Supreme Court—in *Adarand v. Peña*—subjected racial/ethnic affirmative action to the highest standard of judicial review: strict scrutiny. (Discussed at pages 70–79 below.) Following the opinion, President Clinton announced his policy of mending not ending affirmative action, a mending that would conform to the dictates of *Adarand*. A major initiative here was announced in mid-1998, and was to be phased in during the last years of the administration. This policy concerned the much-criticized federal procurement efforts affecting Small Disadvantaged Businesses described in the report just excerpted. The administration remained strident in its defense of affirmative action for Minority Business Enterprises (MBEs) which have been very heavily represented in SDB undertakings. (For a critique of MBE programs, see pages 34–36 below.) The administration argued that government had a compelling interest in ameliorating America’s systemic discrimination that had hobbled minorities and minority enterprise. But there was a constitutional requirement enunciated in *Adarand* to narrowly target affirmative assistance to those situations where there was evidence that MBEs had suffered from discrimination.

To that end, the administration inaugurated a “benchmark” policy involving the determination of minority business capacity (as gauged by factors like size and age) in an extensive array of industries providing goods and services to the federal government. Minority capacity was to be measured against governmental utilization of that capacity in terms of dollars expended for their services. Where a significant discrepancy existed between capacity and utilization in a particular industry, MBEs were to be granted “price evaluation credits” of 10%, that is, MBE bids were to be considered 10% lower than those actually submitted for the purpose of boosting their competitiveness. Thus, MBEs were slated to get a bid-boost in the electronic equipment field (where minority firms received 1.2% of federal contracts although they held 7.6% of that industry in terms of their capacity); and the wholesale
durable goods sector (where minority capacity was 33.1%, and utilization 26.6%). There was no appreciable discrimination in a number of industries including food processing, social services, and management consulting. Firms controlled by members of minority groups were presumed to be socially disadvantaged in the Clinton program if “underutilized.” But MBE owners— to be eligible for benchmark credits—had to demonstrate economic disadvantage, which involved a “wealth cap,” net worth requirement of $750,000 excluding business and home equity. (For further discussion of group eligibility for affirmative action, see pages 34–38 below.)

The benchmark system was to guide federal administrators. Flexibility and administrative discretion were assured. Where “price-credits” failed to end underutilization, set-asides could be reinstituted. Further, a number of agencies were not subject to the “price-credit” system. For example, the Small Business Administration was still to employ the above-described “sole-source” contracting procedure. Likewise, federal grant-in-aid recipients like states and localities were exempt from required benchmark use.

The following includes other affirmative action changes made during the Clinton years: The Department of Defense Rule of Two was rescinded (see the Department of Defense procurement policy just discussed); the Federal Communications Commission promised not to consider minority-utilization in license applications as it was charged with doing in the past; and various programs for increasing minority teachers, scientists, foreign service officers, and managers of public broadcasting stations reportedly have been, or were supposed to be, reduced in size.