

The Evolution of Affirmative Action: A Critical Review

The universities have a heavy responsibility in these times. We who toil within the severely insulated cloisters of the universities like to pride ourselves upon our intellectual integrity—a sort of puritanism of the mind. . . . Too often our search for Truth becomes an escape device. We may come to conceive of the quest after Truth as an end in itself and fall in the unconscious error of assuming that there is no connection between the Truth and the practice and that it is not academically respectable to tackle the practical.

Ralph Bunche (1940, p. 571)

AFFIRMATIVE ACTION IN THE UNITED STATES arose from the effort to ameliorate the disparate access of historically disadvantaged groups to employment and educational opportunities. The complexity of the affirmative action puzzle lies in the fact that it is not a single program but includes distinct initiatives bundled together under the general rubric of affirmative action. With its inception in governmental executive orders, affirmative action meant only *positive action* designed to remedy the present effects of past discrimination.

The earliest use of the modern-day term *affirmative action* can be found in Executive Order 10925 initiated by President John F. Kennedy. It specifically

refers to nondiscrimination in the employment processes of federal contractors:

The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin. (Legal Information Institute [LII], n.d., para 3)

Similarly, the Civil Rights Act of 1964 contains the following reference to affirmative action:

In administering a program regarding which the recipient [of federal funding] has previously discriminated against persons on the ground of race, color, or national origin, the recipient must take affirmative action to overcome the effects of prior discrimination. (LII, n.d., para 3)

Broadly conceived, affirmative action can be understood as positive action through programs initiated by governmental entities that benefit certain groups. Harvard legal scholar Randall Kennedy defines *affirmative action* as “policies that offer individuals deemed to be affiliated with a beneficiary group a preference over others in competitions for employment, education, or other valued resources” (Kennedy, 2013, p. 20).

Four separate streams of affirmative action have emerged from its original framing in the 1960s as positive action for underrepresented groups: (a) executive orders that apply to federal contractors in employment; (b) federal court decisions that ordered or overturned affirmative action programs in discrimination cases, including school desegregation; (c) voluntary admissions programs in universities; and (d) voluntary affirmative action practices by corporations and other entities responding to stakeholder pressures. The courts, bureaucracy, and the legislature have all been involved in interpreting affirmative action (Leiter & Leiter, 2011). The intersection of these forces is illustrated by the 2007 Supreme Court decision in *Parents Involved in Community Schools v. Seattle School District No. 1* (551 U.S. 701) that outlawed

voluntary integration programs supported by school boards and educators and foreshadowed the subsequent decision in *Fisher v. University of Texas* relating to university admissions (Orfield, 2013).

Organization of the Monograph

Our focus in this monograph is on the narrowing role of affirmative action in voluntary admissions processes in colleges and universities due to the challenges that have arisen in successive Supreme Court cases. Despite the volatility of affirmative action in the admissions arena, the employment area, which is governed primarily by governmental executive order, has remained relatively stable. For this reason, our analysis focuses on the road ahead for college and university admissions policies. To address the frequent confusion between affirmative action in admissions and employment, in this chapter we delineate the primary differences between these two separate branches of affirmative action. The chapter further chronicles the convergence of interests leading to affirmative action's codification in governmental policy.

The second chapter presents an overview of key Supreme Court decisions that have reshaped how universities and colleges can consider race and ethnicity in admissions processes. We examine the decisive turning point in judicial thought that moved from remedial, disparate-impact affirmative action designed to address a legal wrong to a singular, nonremedial rationale based on the educational benefits of diversity as a "compelling state interest." We further highlight the Supreme Court's interpretive shift in relation to the Equal Protection Clause from protection of the rights of minorities to protection of the rights of all citizens, including White Americans. This interpretation has been the centerpiece of subsequent legal challenges to affirmative action.

In the third chapter, we focus on the substantive body of empirical research that addresses the impact of diversity on the educational process through the structural, curricular, and interactional dimensions of diversity, as well as through campus racial climate. Research findings indicate that structural diversity alone will not necessarily yield the educational benefits of diversity. A campus ecosystem guided by intentional practices and interventions will enhance cross-racial interactions and strengthen campus racial climates.

Without such interventions, inhospitable campus climates on predominantly White campuses can lead to heightened stress and isolating experiences for minoritized students.

The fourth chapter shifts the focus to the precollege experience and addresses three critical junctures that have been linked to increasing the ability of minoritized students to obtain a bachelor's degree: academic preparation for college, graduation from high school, and enrollment in college (see Swail, Redd, & Perna, 2003, for review). We share findings on the impact of state bans on affirmative action on campus climate, student access, and success and examine the results of alternative efforts to remedy disadvantage through state-based percent admissions plans.

The limitations placed on the use of race and ethnicity in the admissions processes lead to a focus in the fifth chapter on the use of socioeconomic status (SES) as a potential proxy for disadvantage. The chapter explores the complexities of class-based admissions policies and examines research assessments of the controversial mismatch theory, as well as the undermatch theory that forms a counterpoint to it. Due to the continuing need of campuses to create inclusive learning environments, the sixth chapter addresses the narrow window still available to institutions to enhance diversity by sharing examples of institutional admissions strategies that have been viewed as race-neutral. The monograph concludes with research-based recommendations for institutional admissions practices.

Affirmative Action Redux

The birth of contemporary affirmative action cannot be understood simply as a moral imperative arising from the recognition by forward-looking American presidents of the four centuries of discrimination that have undergirded American history. Rather, theorists suggest that affirmative action represents a specific social movement that has arisen within the context of a general social movement, namely, the civil rights movement (Rhoads, Saenz, & Carducci, 2005).

Legal scholar Derrick Bell's theory of *interest convergence* illuminates how affirmative action emerged as a course of action related to the advancement of

civil rights. In his view, social movements such as the progressive and radical protests of the 1960s are more likely to bring about change when they converge with other interests that may be differently motivated (Bell, 2000). Bell cites the historic decision in *Brown v. Board of Education of Topeka* (1954) that declared state laws establishing separate public schools for White and Black students to be unconstitutional as an example of this theory (Bell, 2000). The decision provided a boost to U.S. foreign policy efforts by appearing to close the distance between the nation's ideals and its practices, while addressing the concerns of those on the far left during the McCarthy era who saw racial segregation as evidence of a flawed society (Bell, 2000). From the vantage point of interest convergence theory, Blacks and other minorities could not obtain meaningful relief from discrimination unless and until that relief resolved issues or interests of primary concern to the majority (Bell, 2003).

If affirmative action is interpreted as governmental programs that benefit certain groups, scholars suggest that it began long before the 1960s (see, for example, Feagin, 2006, 2014; Kantrowitz, 2012; Katznelson, 2005; Stokes, Lawson, & Smitherman, 2003). Viewed from a broad historical lens, these programs over the last few generations have primarily benefited White Americans through the social reproduction of intergenerational wealth. The unjust enrichment of White citizens in early forms of governmental affirmative action can be traced from the period of Black enslavement forward through programs that privileged White citizens that were codified by law, normalized in policy, and shaped through everyday interactions (Feagin, 2014; Stokes et al., 2003). These programs have provided “concrete material advantages” gained over several centuries that have been protected by the federal government and that have reproduced racial inequality (Feagin, 2014, p. 14).

One of the most prominent examples of federal programs with disproportionate benefits to White citizens is the federal Homestead Act that from its enactment in 1863 until 1935 provided approximately 246 million acres of land to predominantly White beneficiaries at low or no cost (Feagin, 2006). With parcels ranging from 160 to 320 acres, White families were able to accrue substantial wealth in both initial and subsequent generations (Feagin, 2006, 2014). In fact, research indicates that approximately 46 million

Americans are the descendants of the initial homestead families and beneficiaries of this governmental allocation of land (see Feagin, 2006, for review).

Over the last five generations, Blacks were kept away from the acquisition of wealth and opportunity by discriminatory governmental actions, as well as through violence perpetrated by the Klu Klux Klan and others (Feagin, 2014). From 1882 to 1927, lynchings of 3,513 Black men and 76 women were recorded, and it is estimated that between the Civil War and the present, as many as 6,000 lynchings of Black men and women were enacted in the southern states and certain areas of border and northern states (Feagin, 2014). Research by Jennifer Mueller on White families and minority families in a southwestern state demonstrates that White families reported more than six times more transfers of monetary resources than minority families, as well as disproportionate inheritances of land, homes, and businesses (Mueller, 2013). Five times as many instances of such assets were from government-derived assets (Mueller, 2013).

And looking back at the 20th century, Ira Katznelson argues for a change in the historical attention span of affirmative action to begin with programs that privileged White citizens seven decades ago, “when affirmative action was White” (Katznelson, 2005). Important features of public policy in the 1930s and 1940s took shape in the waning days of Jim Crow segregation in the South (Katznelson, 2005). In Katznelson’s view, during the New Deal and the Fair Deal, the federal government, though appearing to be race neutral, actually served as an instrument of White privilege in the management of large-scale national programs that created new and powerful sources of racial inequality through dealing with welfare, work, and war (Katznelson, 2005).

To attain the consent of Congress, legislative bills had to obtain the support of southern Republicans and Democrats and the Jim Crow contingent in the House and Senate (Katznelson, 2005). The South’s representatives sought to preserve their region’s social structure within policy initiatives by disproportionate committee representation, carefully attending to legislative rules, and capitalizing on the relative indifference of other members of Congress (Katznelson, 2005).

Katznelson illustrates the Whiteness of affirmative action and its exclusionary impact through a number of prominent examples of New and Fair

Deal programs that were overseen by decentralized state and local administrations. Under the Federal Emergency Relief Administration (FERA), grants generated by local administration resulted in racial differences in the size of grants given to families. The Social Security Act of 1935 left 65% of Blacks out of this program—even 70 to 80% in different locations in the South—because most Blacks at the time were farmworkers and domestics who did not qualify for Social Security benefits due to their low income. Similarly, the Fair Labor Standards Act of 1938 provided an extensive exemption for agricultural workers from the minimum wage and overtime requirements of the law, affecting many Black laborers.

Further, the Servicemen's Readjustment Act of 1944, better known as the GI Bill, while providing the widest range of benefits to returning veterans ever offered in a single initiative by the federal government, served as one of the most significant instruments for widening the racial gap in postwar America (Katznelson, 2005). The bill linked congressional oversight to local, nearly all-White administrative decentralization under the auspices of the Veterans Administration and placed vital powers under state and district control (Katznelson, 2005). Local control and overt discrimination often made it difficult for Blacks to obtain mortgages, with a profound impact on home ownership and subsequent wealth accumulation (Katznelson, 2005). The disparate legacy of these New and Fair Deal programs not only cost money and opportunity but also projected humiliation by limiting human possibility (Katznelson, 2005).

In sum, the historical record portrays the advantages provided by governmental affirmative action that differentially benefited White Americans over a period of generations and had an extensive and tangible impact on the accumulation of intergenerational wealth, educational access, and other benefits. This record provides a counterpoint to the current debate over affirmative action and the relatively recent emphasis on the continuing rights of the majority.

With this historical background in mind, we next offer a chronology of contemporary affirmative action that illustrates Derrick Bell's theory of interest convergence. The creation of contemporary affirmative action programs by moderate White presidents during periods of racial turbulence also

coincides with the development of race-conscious admissions policies by leading universities.

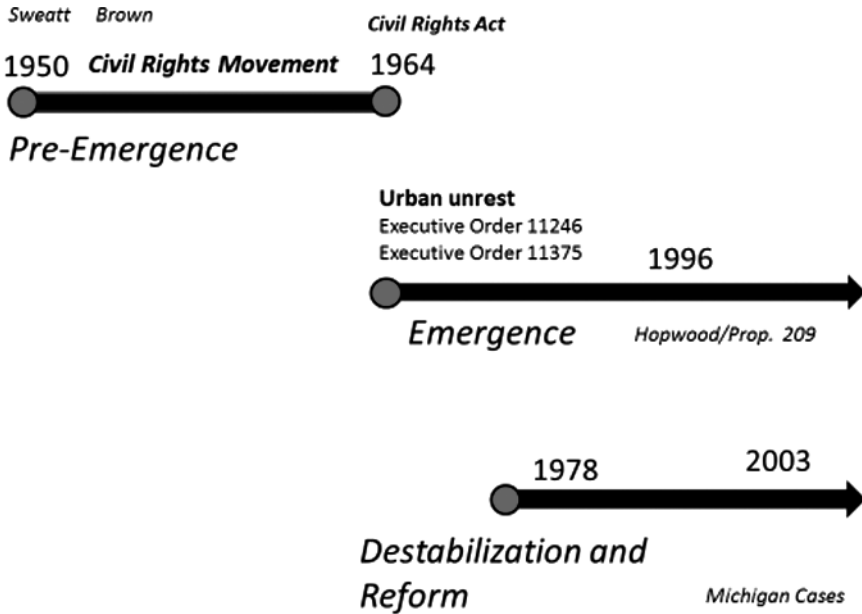
Contemporary Affirmative Action as Public Policy

Contemporary affirmative action emerged as public policy in direct response to the threat of protests and marches. The chronology of affirmative action can be framed in three phases: (a) the preemergence phase that ended with the adoption of legislative action in 1964 and 1965, (b) the emergence phase of affirmative action as public policy with the adoption of executive orders in 1964, and (c) the destabilization and reform period that ensued in 1978 (Rhoads et al., 2005). Because of a clear assault on affirmative action in university admissions dating from the *Regents of the University of California v. Bakke* (438 U.S. 265) decision in 1978, the emergence phase was weakened and coexisted from *Bakke* forward with a period of destabilization and reform (Rhoads et al., 2005). Figure 1 depicts these three phases with the destabilization and reform stages of affirmative action culminating in the 2013 *Fisher v. University of Texas* case (570 U.S.) that we discuss later in the monograph.

In the preemergence phase, President Franklin D. Roosevelt issued Executive Order 8802 (1941) prohibiting racial discrimination in employment for workers in the defense industries and government based on race, creed, color, or national origin, just days before a threatened march on Washington by A. Philip Randolph (Stokes, Lawson, & Smitherman, 2003).

The emergence phase began in the 1960s, when President John F. Kennedy and his successor, President Lyndon Baines Johnson, sought to respond to the civil rights protest movement and the urgent need for access to public institutions. In 1961, President Kennedy articulated this mandate in Executive Order 10925, requiring federal contractors to take affirmative action to ensure that both as applicants and employees, individuals are treated without regard to their race, creed, color, or national origin. Kennedy essentially introduced the language of affirmative action as positive deeds to address racial discrimination, without the overtones of compensatory justice or racial preferences (Katznelson, 2005).

FIGURE 1
A Chronology of Affirmative Action in Higher Education



Source: Rhoads et al., 2005, p. 199.

Following racial turbulence, the forced desegregation of the University of Alabama, sit-ins, and the March on Washington in 1963, Kennedy spoke to the nation in a bold and forward-looking civil rights address that called for authorization of civil rights legislation to prevent discrimination. Noting the disparate realities faced by Black Americans and the explicit denial of their rights, Kennedy declared that the nation faced a moral crisis and emphasized the need to move ahead to guarantee equality of treatment for all citizens:

One hundred years of delay have passed since President Lincoln freed the slaves, yet their heirs, their grandsons, are not fully free. They are not yet freed from the bonds of injustice. They are not yet freed from social and economic oppression. And this Nation, for all its hopes and all its boasts, will not be fully free until all its citizens are free. (Kennedy, 1963, para. 7)

The Civil Rights Bill, H.R. 7152, initiated by the Kennedy administration, underwent a number of compromises and passed the House on October 29, 1963, a few short weeks before Kennedy's assassination (Purdum, 2014).

President Johnson, who took office following the assassination of President Kennedy, was able to muster the political support needed to pass the landmark Civil Rights Act of 1964 that strengthened voting rights in federal elections and addressed desegregation of public facilities, public accommodations, and public schools. In addition, Title VI prohibits discrimination in federally assisted programs, and Title VII prohibits discrimination in employment based on race, color, national origin, and gender. The Civil Rights Act provided a clear desegregation mandate for higher education by restricting the spending of federal funds in segregated schools and colleges and enabling the federal government to bring lawsuits on behalf of minority plaintiffs (see Conrad & Weerts, 2004, for review).

Yet uncertainty over the objectives of civil rights law is a primary source of affirmative action's "current predicament" (Leiter & Leiter, 2011, p. 5). One of the shortcomings of Title VII of the Civil Rights Act of 1964 is its failure to define key terms such as *discrimination* (Leiter & Leiter, 2011). Had Congress defined Title VII from the start, the dispute over whether the law involves affirmative remediation (equal results) or only the cessation of discrimination (equal treatment) could have been resolved (Leiter & Leiter, 2011). This "legal muddle" has resulted in conflicting Supreme Court rulings over time (Leiter & Leiter, 2011, p. 6).

The Equal Employment Opportunity Commission (EEOC) was formed as part of Title VII and initially was restricted to investigating and conciliating individual complaints without the power to initiate lawsuits, conduct adversary hearings, or issue cease-and-desist orders (Leiter & Leiter, 2011). Subsequently, the powers of the EEOC expanded significantly through the Equal Opportunity Act of 1972, which enabled filing lawsuits in federal court and initiating "pattern or practice" suits against private employers (U.S. Commission on Civil Rights [USCCR], 2005). The scope of EEOC's responsibilities later increased in terms of enforcement authority for the Equal Pay Act of 1963 and the Age Discrimination in Employment Act of 1967 (USCCR, 2005). With the passage of the Americans with Disabilities Act of 1990 and

the Civil Rights Act of 1991, the EEOC assumed responsibility for investigating complaints relating to discrimination against qualified individuals with disabilities in employment processes (USCCR, 2005).

The actual codification of affirmative action as the definitive standard for addressing underutilization of minorities and women in employment took place with the signing of Executive Order 11246 (1965) by President Johnson. This groundbreaking executive order required the preparation of annual affirmative action plans with goals and timetables for federal contractors with \$50,000 or more in federal contracts and 50 or more employees. Specific reporting requirements are codified within Chapter 60 of Title 41 of the Federal Code of Regulations, overseen by the Office of Federal Contract Compliance (OFCCP), an agency created in 1965 within the Department of Labor.

During the preemergence and emergence phases, colleges and universities began to adopt a series of voluntary measures in their admissions processes to address the underrepresentation of minority students. Although little empirical evidence exists explaining when and how race-conscious affirmative action began at a wide range of institutions, these measures coincide with events in the civil rights movement (Stulberg & Chen, 2014). Experiencing the moral impact of this movement, President James Perkins at Cornell University and President Harlan H. Hatcher and Provost Roger W. Heyns at the University of Michigan initiated race-conscious admissions programs in 1964 (Stulberg & Chen, 2014). Other early adopters of race-conscious admissions programs included top liberal arts schools such as Swarthmore, Wesleyan, and Dartmouth, as well as selective doctoral research universities, such as the University of Pennsylvania and the University of California at Los Angeles (Stulberg & Chen, 2014). The first wave of affirmative action in higher education arose from liberally minded administrators inspired by the nonviolent civil rights movement; a later wave occurred at the time of urban riots and campus protests (Stulberg & Chen, 2014). Despite the well-intentioned early efforts of universities to address the underrepresentation of minority students, the viability of affirmative action in university admissions was soon to come under legal challenge.

From its outset, affirmative action was opposed and limited in its force, particularly during the Reagan administration in the 1980s, through

conservative court appointments and budget and staffing cuts in enforcement agencies (see Collins, 2011, for review; Orfield, 2013; Rhoads et al., 2005). Clearly, the most salient determinant of the permissible scope of affirmative action programs has been the composition of the Supreme Court. Since the court interprets the law and sets the legal stage for legislative practices, changes in the composition of the court have dramatically affected the outcome of affirmative action cases.

With the 2006 retirement of Justice Sandra Day O'Connor, who had been appointed as the first female justice on the court by President Ronald Reagan, and her replacement by Justice Samuel Alito, as well as the appointment of conservative Chief Justice John Roberts, a perceptible shift occurred from a more temperate view of academic freedom and the First Amendment protections accorded universities in their decision making to a rather austere perspective that put the court in the driver's seat (see Horwitz, 2013, for review). In the next chapter, we will examine specific critiques of higher education articulated by the Supreme Court in *Fisher v. University of Texas* that reflect an increased distrust of academic decision making.

Tensions in the Interpretation of Affirmative Action

The early manifestations of contemporary remedial affirmative action were designed to counteract historical discrimination and can be seen as a revival of Reconstruction-era precepts of equality as a fundamental principle of democracy (Leiter & Leiter, 2011). In its classic formulation, affirmative action differs from other antidiscrimination measures in three respects: (1) it seeks to remedy social bias rather than individual violations; (2) it mandates race-, ethnic-, and gender-conscious remedies for adverse effects or the disparate impact of social discrimination; and (3) it seeks to integrate institutions in terms of race, ethnicity, and gender (Leiter & Leiter, 2011). In successive phases, affirmative action has evolved from (1) a mechanism for prohibiting discrimination to (2) compensatory or remedial justice designed to address prior discrimination to (3) practices designed to address contemporary realities, such as the pursuit of educational diversity in higher education or as

a mechanism for addressing structural imbalances in the workforce (Crosby, 2004; Daye, Panter, Allen, & Wightman, 2012).

As a study in contrasts, affirmative action brings into play a dichotomy of interests and jurisdictions. As we have noted, the divided sovereignty between the federal government and the states in matters of civil rights is clearly etched into Constitutional and legal precedents and has given rise to a problematic bifurcation of authority. In addition, the emphasis on the rights of individuals in alleging reverse discrimination as opposed to protection of group rights deflects attention from racial oppression, discrimination on the basis of race, and concerns associated with inequality based on group membership (see Donahoo, 2006, for review; Feagin, 2014).

Interpretation of the Equal Protection Clause of the Fourteenth Amendment (1868) is at the crux of the current legal debate over affirmative action in admissions. The genesis of the Fourteenth Amendment (1868) represented a form of federal intervention based on the principle of equal citizenship but was enacted only following a “titanic struggle” with President Andrew Johnson (Leiter & Leiter, 2011, p. 7). Its original intent was to ensure the rights and equal citizenship of minority citizens.

The Equal Protection Clause of the Fourteenth Amendment prohibits state violation of civil rights for individuals born or naturalized in the United States in terms of three general groupings of rights (“privileges and immunities,” “due process,” and “equal protection”) but does not identify specific national rights or challenge the states’ role in civil rights jurisdiction (Leiter & Leiter, 2011). Specifically, the clause indicates that “no State shall . . . deny to any person within its jurisdiction the equal protection of the laws” (U.S. Const. amend. XIV, 1868). The Equal Protection Clause does not apply to private universities because of the lack of government involvement, but those institutions that receive federal funds are subject to the nondiscrimination requirements of Title VI of the Civil Rights Act of 1964 (Nguyen, 2014). The majority of private institutions are recipients of federal funds (Nguyen, 2014).

The vagueness of the Equal Protection Clause in delineating the domains of federal and state rights has come at a price and resulted in limitations that the 19th-century Supreme Court placed on racial equality, raising serious doubts about the scope of the federal role (Leiter & Leiter, 2011). Due

to this lack of clear definition, interpretation of the Equal Protection Clause has been the focal point of challenges to affirmative action brought before the Supreme Court. In the *Fisher v. University of Texas* case (2012), for example, Justice Antonin Scalia expressed incredulity over the argument that the Fourteenth Amendment protects minorities:

My goodness, I thought we've—we've held that the 14th Amendment protects all races. I mean, that was the argument in the early years, that it protected only—only the blacks. But I thought we rejected that. You—you say now that we have to proceed as though its purpose is not to protect whites, only to protect minorities? (Abigail Noel Fisher v. University of Texas at Austin, 2012, p. 41)

This perspective underscores Justice Scalia's view that Whites are not protected by affirmative action, in sharp contrast to the long history of governmental advantages provided to White citizens shared in Katznelson's (2005) research. In the next section, we identify contrasting interpretations of affirmative action in hard or soft terms and discuss the widespread public backlash against the concept of affirmative action.

The Backlash Against Affirmative Action

Ironically, over time the meaning of affirmative action has come to be framed in negative rather than positive terms and often is misunderstood to imply preference for minority groups that can result in unfair advantages relative to White Americans. Conservatives frequently present hard versions of affirmative action conveyed in terms like “racial quotas” or “racial preferences,” whereas most universities and colleges have embraced soft versions that focus on race-conscious, nonpreferential programs that enhance minority or female participation in a given institution (Rhoads et al., 2005).

The growing backlash against affirmative action has arisen in a highly politicized social context and found expression in Supreme Court decisions relating to university and college admissions that reflect the perspectives of the court's conservative majority. This backlash has, to a great degree, obscured,

recalibrated, and even nullified the purposes and practices of affirmative action in its various forms. Interpretations of whether minorities continue to experience disadvantage, whether America has attained a color-blind society, and how the Constitution defines equality through the lens of the Fourteenth Amendment are at the core of current disputes over affirmative action programs.

In the years since the landmark 1978 *Bakke* decision, the Supreme Court has reinterpreted and significantly narrowed the interpretive leeway accorded to colleges and universities in race-conscious admissions processes. Scholars indicate that the court has essentially constricted and reversed civil rights law while leaving unresolved the broader racial issues that gave rise to affirmative action, with the conclusion that policies designed to level the higher educational playing field are both unfair and unnecessary (Donahoo, 2006; Feagin, 2014; Greytak, 2014; Orfield, 2013). This substantive shift has created a more conservative set of rules for affirmative action that, in turn, establish a significantly more consequential legal framework for colleges and universities (Greytak, 2014). Despite a social context of ongoing racial inequality, the Supreme Court has implemented a mandate of “constitutional colorblindness” in its recent interpretive judgments, while negating the need for compensatory, remedial justice (Kennedy, 2013).

From a postracial, color-blind perspective, America is seen as having attained a state in which race, ethnicity, gender, and other ascriptive characteristics no longer affect life opportunities. Color blindness implies that physically identifiable, ascriptive characteristics are invisible or unseen. The 2008 election of Barack Obama as the first minority president was viewed by some as emblematic of an era in which race no longer matters. Yet in the post-civil rights era, contemporary racial inequality is reinforced through facially nonracial, subtle institutional practices justified through themes of traditional liberalism: equality, meritocracy, and equal opportunity that underpin what sociologist Eduardo Bonilla-Silva terms “racially illiberal goals” (Bonilla-Silva, 2010, p. 7). Yet the denial of racism in and of itself can be seen as a strategy of positive, in-group presentation (Van Dijk, 1992).

In fact, the issue of racial injustice toward Black Americans remains among the most systematic and long-standing examples of racial

injustice in American society (Gutmann, 1996). In the view of sociologist Joe Feagin, within a racially hierarchical society, White-on-Black oppression remains an independent social reality that cannot be reduced to class stratification or other realities (Feagin, 2006). The Supreme Court's decisions in the definitive affirmative action cases in the 20th and 21st centuries can be seen as reflecting an overarching White racial framing (Feagin, 2013) that overlooks the differential and empirically documented experiences of minority students in terms of socioeconomic background, differential educational access, segregated housing, and first-generation-in-college status. From this perspective, affirmative action has been composed of limited efforts to increase the social capital of minorities without altering the prevailing system of White privilege (Donahoo, 2006). The view of a changed America presented by the Supreme Court implies that the United States has overcome the systemic racism that has characterized 90% or roughly 350 years of its history of slavery and legalized segregation (Feagin, 2006).

Viewed through the lens of critical race theory (CRT), a theory rooted in legal analysis, affirmative action involves the “property” interests pertaining to race that include access to education and employment (Donahoo, 2006). CRT postulates that race and racism are a permanent aspect of American society (see Museus, Ravello, & Vega, 2012, for review; DeCuir & Dixson, 2004). And critical race theorists specifically focus on disrupting dominant narratives of success based on meritocracy that are deeply embedded in the larger society (Parker & Villalpando, 2007). CRT contradicts assertions by the conservative Supreme Court justices that racial inequality is no longer a defining characteristic of American experience.

Unpacking the interwoven strands of affirmative action requires consideration of how different interest groups, including conservative law firms, think tanks, and foundations such as the Center for Individual Rights and the Center for Equal Opportunity, as well as Republican judges, have reinterpreted its foundational concepts (see Riccardi, 2014, for review). For its supporters, affirmative action is viewed as a limited mechanism for addressing the impact of racial and gender inequality; its opponents see it as a process by which Black and Hispanic students are given preference or special treatment that can result in their stigmatization.

In framing their arguments, the opponents of affirmative action have essentially co-opted civil rights language, claiming that consideration of race in higher education discriminates against Whites (Yosso, Parker, Solorzano, & Lynn, 2004). The notion of reverse discrimination complicates the search for racial equality by ignoring the history of racism in the United States and by inciting fear among White citizens of the impact equality measures could have on the country's social order (Donahoo, 2006). Saran Donahoo indicates that the rhetoric around reverse discrimination "suggests that affirmative action may reduce the value of whiteness to the equivalent value traditionally ascribed to blackness" (Donahoo, 2006, p. 299). Other scholars point out that the ahistorical rhetoric of reverse discrimination turns the wheels back on civil rights progress with adverse effects on minority students in the guise of a race-neutral, color-blind meritocracy (Yosso et al., 2004). By adopting the language and judicial strategies of the civil rights movement, conservative opponents of affirmative action have created a powerful ideological niche by arguing that the use of "racial preferences" in higher education is morally wrong (Rhoads et al., 2005).

Adding to the contentious debate, affirmative action has pitted minority groups against each other because of the virtual exclusion of Asian Americans from formal affirmative action programs in university admissions. Asian American protests against Senate Constitutional Amendment 5 in California that would have repealed part of the state's landmark ban on affirmative action (Proposition 209) divided Asian Americans who were concerned about the impact on admissions to the competitive University of California system (see Shyong, 2014, for review).

Contrasting Affirmative Action in Employment and Admissions

Unlike the voluntary programs that pertain to college admissions and other related ad hoc programs such as special scholarships that evolved in the late 1960s and 1970s (see Kennedy, 2013, for review), the employment requirements for federal contractors have remained virtually unchanged since their

inception in Executive Order 11246 and the Title 41, Chapter 60 of the Federal Code of Regulations and, if anything, have been strengthened.

Despite decades of remedially based affirmative action in the employment sphere on behalf of women and minorities, the vast majority of the individuals who run the most powerful institutions, including higher education, are still White men (Feagin, 2014). Research indicates that the primary beneficiaries of affirmative action in the hiring of faculty and staff have been women rather than minorities (Rai & Critzer, 2000). For example, White women's representation among full-time faculty in four-year public and private research universities grew from 27.8% in 1993 to 38.7% in 2011, with minority women representing only 8.0% of the full-time faculty (Integrated Postsecondary Education Data System, 2014). By contrast, the representation of African American faculty has hovered at roughly 4% during the same time period, without any appreciable gains (Integrated Postsecondary Education Data System, 2014).

While voluntary affirmative action admissions programs primarily have focused on race and ethnicity, affirmative action policy for federal contractors in employment also addresses the hiring and advancement of women, persons with disabilities, and protected veterans. Recent employment-related developments have, in fact, augmented the requirements for federal contractors in their affirmative action plans with respect to individuals with disabilities (IWDs) and veterans. Effective March 24, 2014, the Office of Federal Contract Compliance Programs (OFCCP) issued a Final Rule to Section 503 of the Rehabilitation Act of 1973 that establishes a nationwide 7% utilization goal for disabled persons in each of a federal contractor's job groups. The final rule requires contractors to invite applicants to self-identify as an individual with a disability (IWD) at both preoffer and postoffer stages of the application process. The rule also requires specific language be used when incorporating the equal opportunity clause into subcontracts (U.S. Department of Labor, 2013a).

In addition, effective March 24, 2014, the OFCCP established a final rule relating to the Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VEVRAA) requiring that federal contractors establish an annual hiring benchmark for protected veterans based on the national percentage of veterans

TABLE 1
Differences Between Affirmative Action in Employment and Admissions

	<i>College and University Admissions</i>	<i>Employment Practices of Federal Contractors</i>
Origins	Evolved from ad hoc university practices in the 1960s and 1970s	Established through Executive Order 11246 (1965)
Governing Body	Administration of colleges and universities in concert with judicial rulings	Office of Federal Contract Compliance Programs (OFCCP)
Target Population	Focuses on underrepresented minorities and women; can exclude Asian Americans if not deemed underrepresented	Minorities, women, persons with disabilities, protected veterans, LGBT and transgendered individuals
Types of Institutions	Voluntary	Annual Affirmative Action Plan (AAP) required for federal contractors
Methodology/ Standards	Holistic review of applications with strict scrutiny required for use of race	Goals and timetables based on statistical comparison between availability and incumbency in the reasonable recruitment area

in the civilian labor force or related data (U.S. Department of Labor, 2013b). Protected veterans include disabled veterans, veterans who served on active duty during a war or campaign, veterans who received an Armed Forces Service Medal, and recently separated veterans within 36 months of release from active duty. Parallel to the requirements related to individuals with disabilities, contractors must invite applicants to self-identify as a protected veteran at both preoffer and postoffer stages of the application process.

Broadening the scope of affirmative action's protections, on July 21, 2014, President Barack Obama amended Executive Order 11246 by adding "sexual orientation" and "gender identity" as protected characteristics from discrimination by federal contractors in hiring, promotion, and termination processes.

Similar language was also added to Executive Order 11478 prohibiting discrimination based on sexual orientation and gender identity by the federal government in the employment of civilians. These changes came under fire from social conservatives who sought a faith-based religious exemption from the requirements (Snow, 2014). Table 1 summarizes key differences between employment and admissions affirmative action programs in higher education.

As we have seen in this chapter, although originally conceived as a remedial program to redress discriminatory practices that transpired over several generations, affirmative action has undergone significant reinterpretation and been accompanied by intense political and legal challenges throughout its brief, half-century history. Given the sociohistorical background on the rise of affirmative action provided in this chapter, we next consider the defining Supreme Court decisions that have redefined the parameters of nonremedial affirmative action in university admissions during the period of destabilization and reform.