



What Affirmative Action Is (And What It Is Not)

At the center of our current public policy debate is a fundamental struggle over what "affirmative action" is and really means. This struggle carries enormous implications for women's lives, since affirmative action has provided women with opportunities they were previously denied despite their merit. Poll after poll concludes that Americans firmly support "affirmative action" to create opportunities for women and people of color, while they vigorously oppose "quotas" and "preferences" for unqualified candidates. Opponents of affirmative action have thus attempted to redefine affirmative action as a synonym for "quotas" and "preferences".

Yet, in a string of cases spanning more than two decades, the Supreme Court has made clear that lawful affirmative action *in no way* permits or requires quotas, reverse discrimination, or favorable treatment of unqualified women and minorities. Most recently, the Supreme Court confirmed in two cases involving the University of Michigan's use of affirmative action in its admissions processes, *Grutter v. Bollinger* and *Gratz v. Bollinger*, that race or ethnicity are factors that can be considered when evaluating individual candidates. Because mischaracterizations and distortions of affirmative action are so dangerous, it's important to take another look at the principles established by the Court in defining the range of lawful affirmative action programs.

AFFIRMATIVE ACTION MEANS TAKING POSITIVE STEPS TO END DISCRIMINATION, TO PREVENT ITS RECURRENCE, AND TO CREATE NEW OPPORTUNITIES THAT WERE PREVIOUSLY DENIED TO QUALIFIED WOMEN AND PEOPLE OF COLOR

The Supreme Court has consistently made clear that gender or race can be taken into account in programs designed to expand opportunities for women and people of color. Indeed, in the words of Justice Blackmun, "In order to get beyond racism, we must first take account of race. There is no other way." And as Justice O'Connor emphasized in *Adarand v. Peña*: "The unhappy persistence of both the practice and the lingering effects of racial discrimination against minorities in this country is an unfortunate reality and government is not disqualified from acting in response to it." The same is true for sexism: gender-based affirmative action programs are an antidote to the sex discrimination that too often infects decisions about jobs, education, and business opportunities.

At the same time, however, the Court has developed a number of safeguards to ensure that affirmative action programs are fair and justifiable:

The Court has upheld programs designed to eliminate actual discrimination or to respond voluntarily to a serious underrepresentation of women in a workforce. For example, in *Johnson v. Transportation Agency, Santa Clara County*, the Court upheld an employer's affirmative action plan that allowed gender to be considered as a positive factor when choosing among qualified candidates for jobs in which women were severely underrepresented. The employer developed its plan after its review found that no women were employed in any of its 238 skilled craft jobs.

First, there must be a strong reason for developing the affirmative action program.

Lawful affirmative action programs may be based on other reasons as well. For example, in *Regents of the University of California v. Bakke*, Justice Powell noted that a university's educational interest in attaining a diverse student body could justify appropriate affirmative action programs for school admissions. In *Grutter*, the Court reaffirmed this principle, concluding that University of Michigan Law School's interest in attaining a diverse student body provided a compelling justification for its affirmative action policy. Writing for the Court, Justice O'Connor explained the importance of diversity: "In order to cultivate a set of leaders with legitimacy in the eyes of citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity."

Second, affirmative action programs must apply only to qualified candidates.

The Court has never wavered from its insistence that affirmative action must only apply to women and minorities who are qualified for the employment, education, or business opportunities in question.

The Court has also recognized that, commonly, several qualified candidates may present varying mixtures of experience, skills, and credentials -- so that no single candidate is clearly most qualified. For example, in *Johnson*, both Paul Johnson (the male plaintiff claiming reverse discrimination) and Diane Joyce (the woman who ultimately received the promotion to road dispatcher) had the requisite four years' experience, although Ms. Joyce's experience was more recent and arguably more relevant. Mr. Johnson received a score of 75 to Ms. Joyce's 73 in the graded oral interview, where 70 was a passing score. The Court upheld the county's use of Ms. Joyce's gender as a positive factor in choosing between these similarly-qualified candidates -- especially since no woman had ever held the position of road dispatcher.

- Quotas -- i.e., earmarking a fixed number or percentage of slots for members of specific groups without regard to qualifications -- are not allowed. For example, the Department of Labor regulations implementing the program requiring federal contractors to engage in affirmative action (Executive Order 11246) specifically state that affirmative action plans may not include "rigid and inflexible quotas which must be met."

Programs may rely on flexible numerical goals to measure progress in expanding opportunities only where there is a demonstrated link between the goals and the availability of qualified women and people of color in the relevant pool.