



Curriculum Units by Fellows of the Yale-New Haven Teachers Institute
1996 Volume I: Multiculturalism and the Law

Affirmative Action Debate

Curriculum Unit 96.01.12
by Carolyn Kinder

Introduction

The issue of affirmative action is complex. The relations among races and between sexes, assertions of individual rights, and demands for equality in distributions of society's benefits constitute the fundamental social problems of our times.

The purpose of this unit is to look at situations for which individuals can get preferential treatment and in which situations they cannot. This is an important issue because preference is given to many individuals under government pressure through affirmative action programs. It is not clear that the results of such pressure does not always agree with justice.

This unit is designed for students in grades 4-8. The focus will be on content which specifically addresses affirmative action laws and court decisions. Students will understand that it is up to the courts to decide the different forms of preferential treatment. The courts will make decisions on their constitutionality and on their justice.

The school will have an important role in shaping attitudes about issues that deals with affirmative action. Teachers serve increasingly diverse student populations from a variety of cultural backgrounds. Culture shapes how individuals perceive, relate to, and interpret their environment. The school must reform the bureaucratic processes. On one hand, there are those who view the affirmative action policies as necessary to provide equity to minorities, but on the other hand, there are those who see it as reverse discrimination. This poses a problem because people are fearful of what their differences mean in a multi cultural society.

Hopefully this unit will raise a level of awareness and provide some information and activities that will bring meaning to the "Affirmative Action Debate."

Included in this unit is content materials, lesson plans, resource materials, a list of field trips, and a bibliography. An electronic version of this unit is available.

Affirmative Action

In the United States, active efforts that take in account race, sex, and national origin for the purpose of remedying and preventing discrimination is affirmative action. Under the landmark Civil Rights Act of 1964

and subsequent executive orders and judicial decisions, the federal government requires certain businesses and educational institutions that receive federal funds to develop affirmative action programs. Elements of an affirmative action plan include a written policy, self-evaluation to identify deficiencies, steps to correct them on a timetable, and accountability by senior management. The Office of Federal Contract Compliance and the Equal Employment Opportunity Commission (EEOC) monitors them. ¹

Affirmative Action has been criticized as reverse discrimination, usually against white males. The U. S. Commission on Civil Rights argued until 1983 that only if society were operating fairly would measures that take race, sex, and national origin into account be preferential treatment. After the Commission on Civil Rights was reorganized in late 1983, it held an opposite position. In January 1984, it approved a statement that racial preferences merely constitute another form of unjustified discrimination. ²

In 1965, the Johnson Administration issued an executive order to government contractors requiring them to take affirmative action to make sure that they were not discriminating against women and minorities. From that time until the early 1980's companies and universities having contract with the federal government were required to establish goals and timetables.

The Bakke Case

In 1978, in the University of California Regents v. Bakke, the U.S. Supreme Court held (5-4) that fixed quotas may not be set for places for minority applicants for medical school if white applicants are denied a chance to compete for those places. The Supreme Court struck down a special admissions program for minorities at a state medical school, on the grounds that it excluded a white applicant because of his race and violated his rights under the Equal Protection Clause. Alan Bakke applied to the University of California Davis Medical School two consecutive years and was rejected; in both years black applicants with significantly lower grade point averages and medical aptitude test scores were accepted through a special admissions program which reserved sixteen minority places in a class of one hundred. The University of California did not deny that its admission decision was based on race. Instead, it argued that its racial classification was designed to assist minorities, not to hinder them. The special admissions program was designed first, to reduce the historical deficit of traditionally disfavored minorities in medical schools and the medical profession; second, to counter the effects of societal discrimination; third, to increase the number of physicians who will practice in communities currently under served; and fourth, to obtain the educational benefits that flow from an ethnically diverse student body. ³

The court held that these objectives were legitimate and that race and ethnic origin may be considered in reviewing applications to a state school without violating the Equal Protection Clause. However, the court also held that a separate admissions program for minorities with a specified quota of openings which were available to white applicants violated the Equal Protection Clause. The court ordered Bakke admitted to medical school and the elimination of the special admission program. It recommended that California consider an admissions program developed at Harvard that considered disadvantaged racial or ethnic background as a plus in an overall evaluation of an applicant but did not set numerical quotas or exclude any persons from competing for all positions. ⁴

The court, however, said that professional schools may consider race as a factor in making decisions on admissions. Reactions to the decision were predictable. Supporters of affirmative action, particularly government officials from affirmative action programs, emphasized the Supreme Court's willingness to allow quotas which excluded whites from competing for a certain number of positions.

Since Bakke won the case, he completed medical school and became a practicing physician. Most observers felt that the Supreme Court was not going to permit racial quota systems.

United Steelworkers of America v. Weber, 1979

However, in *United Steelworkers of America v. Weber* 1979, the court held (5-2) that employees and unions could conduct voluntary training programs designed to improve skills of minority employees even if qualified white employees were excluded, provided that the programs were temporary, did not trammel white interests, and were intended to overcome manifest racial imbalance. The Supreme Court approved a plan by Kaiser Aluminum Corporation and the United Steelworkers Union, developed under pressure from the federal government, to reserve 50 % of new, higher paying skilled jobs for minorities. When Weber was excluded from access to these jobs, and black workers with less seniority and few qualifications were accepted, Weber filed suit in federal court claiming he had been discriminated against because of race in violation of Title VII of the Civil Rights Act of 1954. Title VII prevents all discrimination in employment on the basis of race. It does not specify only discrimination in employment against blacks or minorities. ⁵

The Supreme Court held that Title VII of the Civil Rights Act let employers and unions in the private sector free to take such race conscious steps to eliminate manifest racial imbalances in traditionally segregated job categories. It held that Title VII does not prohibit such affirmation action plan. ⁶

Other Cases

Yet the Supreme Court has continued to express concern about whites who are directly and adversely affected by government action solely because of their race. In *Firefighters Local Union v. Stotts*, 1984, the court ruled that a city could not lay off white firefighters in favor of black firefighters with less seniority. The U. S. Justice Department under President Reagan used this decision to argue that any affirmative action plan which granted preference to one race over another was unconstitutional. But the Supreme Court has not yet adopted a completely color-blind standard. ⁷

In *Fullilove v. Kutznick* (1980), the court found (6-3) that constitutional rights of white businessmen were not violated by the federal law requiring that 10% of funds for public works be allotted to qualified minority contractors. ⁸

How can the Bakke, Weber, Stotts, and Fullilove decisions be reconciled? It is likely that uncertainties will continue about how far affirmation action programs can go without becoming reverse discrimination.

Affirmative Action in the Reagan Administration

The Reagan Administration's position has been that true equality in education and employment can only be achieved by ignoring race and sex altogether and by adopting color-blind standards of evaluation not by favoring blacks, women, or other minorities over white males. Clarence Thomas, chairman of the Equal Employment Opportunity Commission in the Reagan Administration, has been outspoken in his belief that corporations and governments should not be held to statistical standards to prove that they are hiring enough minorities and women. Taking account of in hiring, he said that this violates Title VII of the 1964 Civil Rights Act. This section of the Act prohibits discrimination in employment. ⁹

However, in spite of the Administration's rumblings, nothing much has happened that affects the way state and local governments and private corporations run their affirmative action programs. For a while, the Reagan

Administration considered revoking President Johnson's original Executive Order 11246, and flatly prohibit any numerical quotas, goals, ratios, or objectives. But the White House retreated in the face of charges that such a sweeping order would roll back progress in civil rights. ¹⁰

The Legal Status of Affirmative Action

Between 1978 and 1987, the U.S. Supreme Court ruled on at least eight major cases concerning affirmative action. In all but one of these cases, the court approved some form of preferences for under represented minorities or women. The one circumstance under which preferences were not approved was in the case of layoffs of present employees where there was not proof that the employer had previously discriminated against minorities. However, the court approved the use of racial preferences, though not quotas, in public higher education in the 1978 Bakke Case, and it approved hiring preferences for minorities and women in private industries in a series of cases such as Weber in 1979. In both public and private hiring decisions, the court has even approved the use of quotas under certain specified conditions. ¹¹

In general, then the U. S. Supreme Court until 1989 asserted that hiring and admissions preferences for under represented minorities and women were legal. The key was that they be inclusionary. Their purpose must be to include the under represented or to make the student body or work more diverse. It is noteworthy that many of these rulings were made by a five-vote majority of the court, which is the bare minimum. The composition of the court has changed since even the most recent of these rulings, and the court has been known to reverse itself in the past. In 1989 the court overturned the practice of setting aside a percentage of local government contracts for minority businesses. Later that year, the court issued a series of decisions making it harder for minorities and women to prove discrimination and easier for white males to challenge affirmative action plans. Hence, it appears that in the 1990s, affirmative action programs will be harder to justify.

Racial inequality has persisted in the United States even though deliberate racial discrimination has been illegal for more than 20 years. This fact has convinced many Americans that steps beyond mere nondiscrimination are necessary to undo the effects of centuries of racial discrimination. One such step is affirmative action.

The Affirmative Action Debate Today

Affirmative action is controversial because many whites, especially white males, see it as reverse discrimination. Is preference in hiring, promotion, or admission for minorities or women unfair to white males who may have better qualifications? In some law and medical schools, white males with higher grade averages or admission test scores have been turned down in favor of minorities with lower scores. These white males are often not themselves guilty of discrimination. They maintain that they are being made to pay unfairly for someone else's discrimination. Furthermore, it is argued, that these policies hurt overall societal achievement by considering factors other than who is most qualified.

The constitutional question posed by affirmative action programs is whether or not they discriminate against individual whites in violation of the Equal Protection Clause of the Fourteenth Amendment. A related question is whether or not affirmative action programs discriminate against individual whites in violation of the Civil Rights Act of 1964, particularly Title VI, which prohibits discrimination in programs receiving federal financial assistance, and Title VII, which prohibits discrimination in private employment. Clearly, these questions are for the Supreme Court, but unfortunately the court has failed to develop clear-cut answers.

The House of Representatives education committee has opened debate on the future of affirmative action with Republican leaders calling for a review of existing programs, and witnesses claiming such policies are unfair to non-minorities at universities and in other settings. We must rethink affirmative action.

Long termed supporters of affirmative action defended programs at colleges, universities and in other employment situations, calling the policies essential to provide new opportunities for under represented groups. They feel that affirmative action programs have played a critical role in opening up opportunities for women and minorities to begin to take their rightful place in our society, and these measures are urgently needed today as ever.

Equal opportunity is still not within grasp. Affirmative action is taken advantage of by privileged people instead of those who lack the means for advancement. Affirmative action has also created ill-feelings between racial groups who believe one is benefitting at the expense of another.

Thirty years of affirmative action has not been enough to create a level playing field after 300 years of inequality. A number of groups that now criticize affirmative action were among those who benefitted from the policy when it was introduced. We need a system of checks and balances.

There are no successful models of affirmative action anywhere in the world. Even though programs must be implemented to increase minority participation into higher education. Better qualified applicants will get opportunity for jobs in the next two decades.

Diversity in our colleges and universities improves the learning process for everyone. Current laws on affirmative action must be changed to end many scholarship and fellowship programs for students of color.

Those who support affirmative action are equally strong in their belief that not to have affirmative action would be unfair to minorities and women. They argue that just getting rid of active discrimination is not enough to create truly equal opportunity for two reasons. First, is the lingering effects of past discrimination. Even those who see current black disadvantages as resulting from disproportionate poverty, rather than from current discrimination acknowledge that this poverty itself is the effect of past discrimination. Thus, people who are poor because of past discrimination find it harder to gain the qualifications necessary for admission or hiring. Second, is the effect of current institutional discrimination, especially in the elementary and secondary education. Factors such as segregation, low teacher expectations, tracking, and the use of biased tests prevent many minority students from learning and achieving on the same level as whites. In this context, to expect them to do so is unfair, and doing nothing to offset the effects of past and institutional discrimination perpetuates that discrimination.

Some opponents of affirmative action say that reforming the schools so that they come closer to ideal of creating equal opportunity is a better approach than affirmative.

Supporters of affirmative action also contend that some of the tests used to assess people's qualifications contain racial or sexual biases. Moreover, these tests are not very accurate predictors of future success. Law school admission criteria, for first-year academic performance of law students, and college admissions tests are only about half that accurate. Thus, determining who is "best qualified" is a haphazard process subject to great error.

Let's Look Affirmative Action Over

Has affirmative action actually changed things to the point that minority group members and women enjoy an

advantage over white males? Examination of income figures does not support this. Among young adults, white males continue to enjoy higher incomes than black and Hispanic males and women of any race. Black and Hispanic unemployment rates remain well above those of whites. Moreover, whites continue to graduate from college and enter medical, law, and graduate schools at double or more the rate of blacks and Hispanics.

Women also remain under represented in law and medical schools, although their presence there has increased significantly. All these things suggest strongly that the effects of past and institutional discrimination outweigh any advantage affirmative action may bring to minorities or women. Even when we consider only those who complete college, minorities and women still do not appear to enjoy any overall advantage due to affirmative action. In 1980, young black male college graduates had greatly narrowed the income gap with white males, but they still learn 4% less. Among young college-educated women, blacks had a narrow lead over whites, but neither had anywhere near the income of white males. ¹²

Even so, it does appear that affirmative action has helped certain segments of the minority and female populations a good deal. A definite narrowing of the income gap between blacks and whites has occurred among people who do have jobs, particularly those with relatively high education levels. Law and medical schools are enrolling significantly more blacks, Hispanics, and women than they did before affirmative action even though most of their students are still white males. Firms with government contracts, which are covered by federal affirmative action requirements, have nearly twice the percentage of minority employees as firms without government contracts.

Still, it is only the more educated segments of the minority and female populations that have truly benefitted from affirmative action. So far, affirmative action has done little for the chronically impoverished underclass, many of whom are lucky to get a high-school diploma. Affirmative action has probably contributed to a trend that was already under way in the black and Hispanic populations: The middle class is rising in status, while the situation of the poor is worsening. This has produced increased social-class differences within the black and Hispanic populations. To achieve racial equality we must implement policies to improve the situation of the chronically poor, which affirmative action does not do.

However, today all states and most cities have affirmative action plans. Numerical goals are a common component of these EEO/AA (Equal Employment Opportunity/Affirmative Action) plans. Virtually all plans designate blacks, Hispanics, and women as beneficiaries; many add handicapped persons, homosexuals, older workers, ex-offenders, and rehabilitated alcoholics and drug abusers. ¹³

The U.S. Justice Department, under Attorney General Edwin Meese, has been largely unsuccessful in its efforts to eliminate racial and sexual preferences in affirmative action. After the Stotts decision in 1984, the Justice Department urged federal courts to give a sweeping interpretation to that decision and declare any employment decision based on race or sex to be illegal. But federal courts have so far rejected this broad approach and have continued to uphold affirmative action plans with numerical goals and racial and sexual preferences.

November 1994, angry white men staged a protest at the polls, voting in a Congress that has attacked affirmative action, school lunches, Medicare and other government initiatives.

Affirmative action studies indicate that white women are, at best, ambivalent. While women have made great strides in the labor force in the 30 years since the mandate has existed, a large number of white women arguably is the greatest beneficiaries of affirmative action. They believe such programs have outlived their usefulness.

A large segment of the population is under the impression that minorities, especially African-Americans, are the chief beneficiaries of affirmative action. Attacks on such programs by politicians and disgruntled job-seekers, scholarship applicants and small business owners are often described as justified rage at minorities. To a large extent, observers say, women have been silent on the issue.

A recent poll in California found that while a large majority of women of color are opposed to the anti affirmative proposal called the California Civil Rights Initiative, however, a sizable majority of white women, 66%, favor it. Many younger women, expressed no connection to battles for equality that were waged in earlier years, while another large number of women had philosophical doubts about giving preferential treatment to anyone, according to an article in the *San Francisco Chronicle*.¹⁴

Women's groups and civil rights advocates say there is a lot of confusion about affirmative action, and that, in part, is the reason why opposition seems so high in the poll results.

Conclusion

The importance of affirmative action is being taken down, and with resistance. New York Mayor Rudolph Guiliani has discontinued the practice of steering city contracts to female and minority owned businesses. This administration believes in hiring the best qualified.

In California, the voters will get to decide in 1996 whether to abolish the state's affirmative action program. Before that happens the University of California Board of Regents may act on a request that the school discontinue its affirmative action policy. The request was made by a member of the board who is black. He would to away with ethnic outreach and replace it with economic outreach to the poor. ¹⁵

Nationally, the Republican contenders for the presidency in 1996 lived up in opposition to affirmative action. President Clinton announced a review of all 160 programs to determine which have outlived their usefulness. ¹⁶

The Supreme Court is looking more skeptically at affirmative action. In the *Adarand Constructors v. Pena* case, the Court decided that all affirmative action programs are suspect and must be strictly scrutinized to see if they really serve a forcible government interest. The court also let stand a lower court ruling in the *Poidberesky v. University of Maryland* case that race-based scholarships given by public universities are unconstitutional. ¹⁷

This unit demonstrates the difficulty of the court's determination of individuals preferential treatment in given situations. There are many decisions of which the court must determine the constitutionality.

The United States is a multi cultural nation. It is one of the most diverse nations of the world in terms of race and ethnicity. We have such a rich culture of people of all kinds. These individuals must be given the equal protection under the law. Affirmative action cannot achieve that end. However, it is necessary, until we can come up with solutions that provide equality and liberty for all, we must provide preferential treatment for those who are not accorded justice.

Lesson Plan I

Preferential Treatment

“A Matter of Gender”

Objective *Students will recognize that there are class and school activities that can cause for their exclusion.*

Discussion: Sometimes there are sport and cultural activities in the class or school that make students feel excluded. Some of these activities can show preference toward males or females. Students will problem solve a situation using the following scenario.

Scenario *The boys in the class are playing football outside and the girls want to play. The teacher refuses to let the girls play, because she feels that only boys should play this football.*

Procedure *Divide students into small groups. They will discuss the following questions:*

1. What is meant by preferential treatment?
2. How do both girls and boys feel about the teacher’s decision?
3. Do you think that this is fair?
4. How would you handle the situation?
5. Should there be school rules that show preferential treatment? Explain.

Writing Activity *Use a graphic organizer to discuss the group ideas. Each individual will write at least one paragraph using ideas from the graphic organizers.*

Lesson Plan II

“You Want to Run Track”

Objective *The students will learn how to defend and dispute an issue in preparing for a debate.*

Preparing For a Debate

Discussion *You want to run track this year. However, the Maple Middle School coach is only accepting students with natural green hair this year. You have natural purple hair, therefore, you will not be allowed to run track. Use this issue to debate why you should be able to run track. Convince the coach that hair should not keep you from realizing your goal.*

Ask yourself: What are my reasons for my opinion?

Write your opinion and list a word or phrase for each of your reasons below.

Write the opposing opinion and its reasons in the dispute column.

Defend	Dispute
My opinion is: The other side's opinion is:	
_____	_____
_____	_____
_____	_____
_____	_____
My reasons are: Their reasons are:	
_____	_____
_____	_____
_____	_____
_____	_____

Lesson Plan III

Taking a Survey

Objective Students will learn how a survey can tell you how other classes felt about issues.

Discussion Think about an issue discussed in this unit. Decide which issue you would like to use for your survey. Choose your opinion and write it on the lines provided. Ask your classmates if they agree or disagree with your opinion. Have them write their names under the appropriate heading below.

The opinion for this survey is _____

Agree Disagree

Lesson Plan IV

Loaded Language

Objective *The students will identify words that can be hurtful and to consider proper responses.*

Discussion *All children have experienced hurtful words in their lives. Name calling or teasing can damage their self-esteem. Use the following words and discuss how you feel when someone calls or uses these words or phrases.*

Words or phrases How do you feel?

1. Stupid
2. You act like an animal
3. Retarded
4. Dummy
5. Slow
6. Moron
7. Jerk

What are some success strategies for responding to name calling? Make a list and share with other classmates.

Lesson Plan V

Television

Objective *Students will watch five commercials and discuss what message is being sent. Write out your response to each commercial.*

Procedure

What is the main idea? _____

What does it mean to you _____

How does it make you feel? _____

Why do you feel that way? _____

Lesson Plan VI

"Exclusion"

Objective *The students will use role playing to discuss and solve problems.*

Scenario *Mary and Sue are very close friends. They are studying and a new student, Rose of different ethnicity, asks to be a part of the group. They begin to talk about Rose.*

Write how you would handle this situation.

1. What advice do you have for Mary and Sue?
2. How could you make Rose feel welcome?

Notes

1. See David Rosenbloom, "The Civil Service Commission's Decision to Authorize the Use of Goals and Timetables in Federal Equal Employment Opportunity Programs, *Western Political Quarterly* , 26 (June 1973), pp. 236-51.
2. Ibid., pp. 236-51.
3. Regents of the University of California v. Bakke, 438 U.S. 265 (1978).
4. Ibid., 438 U.S. 265 (1978).
5. United Steelworkers v. Weber, 443 U.S. 193 (1979).
6. Ibid., 438 U.S. 265 (1978).
7. Firefighters Local Union v. Stotts, 467 U.S. 561 (1984).
8. *Fullilove v. Klutnick* Statement on Affirmative Action and Diversity Adopted by the Board of Directors of the American Council on Education, <http://www.berkshire-aap.com/articles/neliweb.html>, p. 2.
9. Fortune, September 1995, p. 26.
10. See Evelina R. Moulder "Affirmative Action in Local Governments," Municipal Yearbook 1986 (Chicago: International City Managers Association, 1986), pp. 24-28.
11. Ibid., p. 28.
12. Ibid., p. 24.
13. Ibid., p. 25.
14. Garland L. Thompson, "Reverse Discrimination,": *Black Issues in Higher Education* , p. 32.
15. Adarand v. Pena, "Some Thoughts Regarding the Present Affirmative Action Debate, <http://www.berkshire-aap.com/articles/neliweb.html>, p. 2.
16. ACE and Affirmative Action, <http://www.berkshire-aap.com/ace/ace-aa.html>, p. 4.
17. Ibid., p. 8.

Resource List

Critical Examination of Race, Ethnicity, Class, and Gender

Purpose To promote the integrated study of race, ethnicity, social class, and gender as lenses for performing critical analysis and evaluations of prevailing and practice on education. Dues \$10. Contact Patricia J. Lavke, EDCI, College of Education, Texas A&M University, College Station, TX 77843-422

School Volunteers for New Haven:

Law: Speakers

The Court Process

Civil Rights

Constitutional Law

Bill of Rights

Affirmative Action

Field Trips

Yale University, School of Law

Whalley Jail—7th grade and up—small groups

Student Reading List

Bains, R. *Harriet Tubman: The Road to Freedom* , New Jersey, Trail.

The biography of a slave whose fight to freedom was the first step in her becoming “conductor” on the underground railroad.

Gogol, S. *Vatsana’s Lucky New Year* , Minneapolis: Lerner, 1992.

A story about a young girl that must make choices, face prejudice, and learn about her heritage.

Hoyt, D.G. *Oang Anh: A Vietnamese-American Boy* , New York: Holiday House, 1992.

A story of a young man who successfully relates to two cultures—one old, one new.

McKissack, P. & F. *Ida B. Wells-Barnett: A Voice Against Violence* , New Jersey, Enslaw, 1991.

A biography of the female journalist who campaigned for the civil rights of women and other

minorities and was a founder of the NAACP.

Mohr, N. *Felta* , New York: Dail, 1979.

A family experiences prejudice when they move to a new neighborhood.

Otfinoski, S. *Marian Wright Edelman* , New York: Blackbirch, 1991.

A biography of the lawyer and social reformer who is known for her work on behalf of children's rights.

Porter, A.P. *Jump at de Sun* , Minneapolis, Carolrhoda, 1992.

The story of author Zora Neale Hurston and her battles against racism and poverty.

Rosenberg, M.B. *Living in Two Worlds* , New York: Lathrop, Lee & Shepard, 1986.

A photo essay about the special world of bi-racial children.

Sammartino, S. *I Speak for the Women* , Minneapolis: Carolrhoda Books, 1993.

A story about Lucy Stone, powerful speaker for women's rights and the abolition of slavery.

Yep, L. *Child of the Owl* , New York: Harper and Row, 1977.

A young girl learns what it means to be both Chinese and American.

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