IMAGINING AFFIRMATIVE ACTION AND EQUAL OPPORTUNITY: 
AMERICAN FAILURES, CANADIAN CHALLENGES

by

Sandra J. Clancy

A thesis submitted in conformity with the requirements 
for the degree of Doctor of Philosophy 
Graduate Department of Political Science 
University of Toronto

© Copyright by Sandra J. Clancy 1997
The author has granted a non-exclusive licence allowing the National Library of Canada to reproduce, loan, distribute or sell copies of this thesis in microform, paper or electronic formats.

The author retains ownership of the copyright in this thesis. Neither the thesis nor substantial extracts from it may be printed or otherwise reproduced without the author's permission.

L'auteur a accordé une licence non exclusive permettant à la Bibliothèque nationale du Canada de reproduire, prêter, distribuer ou vendre des copies de cette thèse sous la forme de microfiche/film, de reproduction sur papier ou sur format électronique.

L'auteur conserve la propriété du droit d'auteur qui protège cette thèse. Ni la thèse ni des extraits substantiels de celle-ci ne doivent être imprimés ou autrement reproduits sans son autorisation.
The dissertation offers a critique of American affirmative action law in employment as it pertains to African-Americans. Specifically, it argues that the law contains an impoverished understanding of equal opportunity. American law describes affirmative action as measures designed to remedy instances of discrimination in work forces, and asserts that equal opportunity has been achieved in those work forces when specific numbers of minority workers have been hired. This formulation, however, does not adequately address the complex effects of past discrimination which limit the employment opportunities of many African-Americans. For example, inferior educational resources, inadequate housing, and concentration in inner-city ghettos affect the ability of African-Americans to find well-paying jobs. In addition, the understanding of affirmative action as remedy for work force discrimination allows no way to distinguish levels of disadvantage within the black community.

Canadian law, rather than describing affirmative action as remedy for workforce discrimination, describes it as a way to ameliorate disadvantage. Canadian law states that the pursuit of equal opportunity requires lawmakers to examine the actual economic conditions of certain groups to gauge the full extent of the disadvantages they face and to devise programs to address them. The Canadian law articulates a richer understanding of equal opportunity than the one presented in American affirmative action law. This understanding, however, resonates with arguments for equal opportunity that have been voiced by important public figures throughout American history. Therefore, inspired by the Canadian experience and employing arguments expressed in the American setting, the dissertation presents a novel justification for affirmative action directed toward the group which has come to be know as "the truly disadvantaged," poor urban African-Americans, based on a fuller understanding of equal opportunity than presented in contemporary American law.
Acknowledgments

Many people helped me in the writing of this dissertation. I would especially like to thank my dissertation committee members, Jennifer Nedelsky, Peter Russell and Robert Vipond for their direction and support from the very beginning. Frank Cunningham, Martha Minow, Richard Simeon, and Melissa Williams served on my defense committee and I appreciate their extraordinarily careful reading of my work as well as their thoughtful and detailed comments.

Several graduate students in particular provided me with friendship and lively intellectual engagement. My "thesis group" members, Peter Lindsay, Loralea Michaelis, Alice Ormiston, Tom Powers and Fredrika Scarth deserve special mention. Janine Clark and Tamara Myers read chapters and wrote back helpful and heartening words.

I thank my parents Joe and Marilyn Clancy for all their love and concern while I was writing.

The project could not possibly have been completed without Lou Kaczmarek. I thank him for his patience, unfailing encouragement and determination to see me through to the completion of the dissertation.
Table of Contents

INTRODUCTION 1

CHAPTER 1: A LIMITED VISION: THE AMERICAN LANGUAGE OF AFFIRMATIVE ACTION 9
1. Formal Equal Opportunity and the American Language of Affirmative Action 10
2. The Interpretation of Law 14
3. Politics and Interpretation 18
4. The Normative Dimension 21

CHAPTER 2: CHALLENGING THE CONSENSUS VIEW OF AMERICAN POLITICAL CULTURE: CANADIAN AND AMERICAN UNDERSTANDINGS OF EQUAL OPPORTUNITY 24
1. Negative Liberty and Formal Equal Opportunity 26
2. The Hartz-Horowitz Thesis 28
3. Hartz-Horowitz in Canadian Legal Scholarship 37
4. Hartz-Horowitz Revisited 39

CHAPTER 3: ESTABLISHING THE TERMS OF DEBATE: THE FIRST LEGAL DISCUSSIONS OF AFFIRMATIVE ACTION 47
1. The Civil Rights Act presented by President Kennedy 50
2. The Debate in the House of Representatives 52
3. The Debate in the Senate: Instituting Formal Equality 58
4. Formal Equal Opportunity 66
5. Libertarian Theory 69
6. Canada's First Legal Debate about Affirmative Action 72
7. Special Programs 73
8. The Canadian Human Rights Act Debate 78

CHAPTER 4: SYSTEMIC DISCRIMINATION: THE AMERICAN AND CANADIAN VERSIONS 87
1. Compensation and Preferential Treatment 90
2. The EEOC and Systemic Discrimination 93
3. Early Court Cases: Departing from the Civil Rights Act 96
4. The Second Circuit Court: Moving Back to Formal Equality 106
5. The Canadian Transformation of Systemic Discrimination 113
6. The Abella Commission 117
7. Equal Opportunity to Fully Develop One's Potential 118

CHAPTER 5: AMERICAN AND CANADIAN JUDICIAL OPINIONS: TO REMEDY DISCRIMINATION OR TO AMELIORATE DISADVANTAGE 122
1. The American Supreme Court: Remedying Discrimination 124
2. Critiques of the American Court's Approach 136
3. The Canadian Cases: Ameliorating Disadvantage 140
CHAPTER 6: THE 1990S: AMERICAN STALEMATE AND CANADIAN POSSIBILITIES

1. From Griggs to Weber: Constraining Equal Opportunity
2. The Civil Rights Act of 1990
3. The Employment Equity Act of 1986

CONCLUSION

1. "The Truly Disadvantaged" and Discrimination
2. Differences Within the African-American Community
3. Re-imagining Affirmative Action: Weber II

BIBLIOGRAPHY
INTRODUCTION

Thirty years after the creation of the first American affirmative action programs, it is not uncommon to encounter the claim that affirmative action law has "profoundly altered the meaning of American equality," transforming it from equal opportunity to equality of result. This formulation has become prevalent in legal debates, in scholarly writings by lawyers and in commentary by political scientists. It lends the impression that American law now provides a comprehensive theory of equality of result in relation to affirmative action. If this contention were true, it would represent a fundamental shift in a legal setting and culture that have been strongly attached to the ideal of equal opportunity. The claim calls out for examination.

This thesis has grown out of my desire to explore the argument that American affirmative action law provides a theory of equality of result. I have therefore undertaken a close analysis of the language of equality used in legal debates about affirmative action starting with the Civil Rights Act of 1964. My findings indicate that rather than offering a theory of equality of result, American lawmakers have consistently articulated an understanding of what I will call formal equal opportunity even in their arguments supporting affirmative action. By formal equal opportunity I refer to the belief that the attainment of equal opportunity requires the state

---


\(^2\) In the debate about the Civil Rights Act of 1990, Senators often used the equality of opportunity versus equality of result formulation. For example, Senator Coates referred to affirmative action as "replacing our pursuit of equal opportunity with a destructive search for equality of results," while Senator Hatch spoke of affirmative action as "results-oriented, not equality oriented." See my Chapter 6.


\(^4\) Political scientists Sidney Verba and Gary Orren, referring to affirmative action contrast the "equal opportunity to make of oneself what one can" with "equality of result [which] can be achieved only by containing the effects of equality of opportunity." *Equality in America: The View from the Top* (Cambridge, MA: Harvard University Press, 1985), pp. 5-6.
and employers to treat all individuals impartially and without regard to characteristics such as race. My argument may seem implausible given the fact that affirmative action law calls for measures that accord different treatment to individuals on the basis of characteristics such as race and gender. However, lawmakers have articulated a formal understanding of equal opportunity even while supporting affirmative action by conceiving of programs as compensation for past instances of intentional discrimination in discrete workforces. This does not constitute an argument for equality of result. Indeed, it amounts to an impoverished version of equal opportunity because it fails to address the many reasons responsible for the under-representation of members of affirmative action's target groups in the nation's workforces.

The inadequacies of the American version of equal opportunity in affirmative action law are brought into sharp focus when set against a large body of evidence that outlines the growing inequalities in American society since the creation of the first affirmative action programs. African-Americans, who were the focus of discussions about the Civil Rights Act of 1964, seem to be faring worse as a group now than they were in the 1960s. To take just one example, there is now a greater percentage of jobless African-Americans in the United States than in 1966. Scholars who are concerned about these inequalities have begun to reevaluate the contemporary practice of affirmative action in light of its seemingly failed promise of bringing about greater equal opportunity for all African-Americans. I will argue that the way American law conceptualizes affirmative action renders the programs incapable of properly addressing the particular problems faced by the poor, urban African-Americans knows as "the underclass." My enterprise is not to determine whether the unhelpful conceptualizations within affirmative action law have contributed to the growth of the

---

4 My claim is not that the position of poor African-Americans has steadily declined since the 1960s, but rather that a snapshot taken in the late 1990s shows worsened conditions since the earlier time period.

underclass, but rather to highlight the inadequate legal discourse by demonstrating how it renders affirmative action law unable to address the deep inequalities within American society. Therefore, instead of merely changing the practice of affirmative action, we need an entirely new legal language to describe its most basic assumptions, and most particularly the understanding of equal opportunity embedded in it.

Therefore, my overall goal in the thesis is to document in detail that American law has consistently envisioned affirmative action as remedy for past discrimination, thereby invoking a narrow understanding of equal opportunity, and then to provide an alternative legal language drawing inspiration from Canadian law. As I will describe below, Canada is a country with a culture that is similar to that of the United States, but Canadian lawmakers have developed a more adequate version of affirmative action. My intention is to offer a legal language that can serve as a concrete and viable alternative to the one that presently dominates within American law.

In Chapter 1 I will describe the methodology I have employed throughout the thesis to provide a complex descriptive analysis of American affirmative action law and its inadequate understanding of equal opportunity. Interpretation focuses on language and sees law as a cultural system within which lawmakers express meanings through the language they use. Culture would not be possible without a complex structure of shared meanings which help people to cope with the complexities of human existence. Indeed, culture can be defined as what individuals in a society believe to be real. Law is an important cultural system in American society which operates within the broader culture. The language used in legal debates both derives from the larger culture and in turn has power to shape understandings in that culture. The first advantage of perceiving of law as a culture system and focusing in detail on meanings expressed in law is that it has allowed me to clearly demonstrate that American lawmakers, far from arguing for equality of results, have persistently used an impoverished understanding of equal opportunity even in their arguments supporting affirmative action.
But conceiving of law as a cultural system offers not only a means to clearly see the inadequacies of the present American legal discussion of affirmative action: it also points to possible solutions. Clifford Geertz, a noted anthropologist, suggests comparative interpretive analysis as a way to forgo "an easy surrender to the comforts of merely being ourselves." by reevaluating the frameworks we take for granted as real, and then by examining the frameworks employed by people in other cultures.7

Therefore, alongside of my interpretation of American law, I have undertaken an interpretive analysis of the Canadian law of affirmative action. As I will explain in detail in Chapter 2, Canada has a culture which is similar to that of the United States, but its lawmakers have developed a different version of equal opportunity in their arguments supporting affirmative action and a different understanding of the types of programs that constitute affirmative action. Because of the similarities between the American and Canadian cultures, the meanings Canadian lawmakers express are not alien to American culture. Indeed, I will argue that the version of equal opportunity articulated by contemporary Canadian lawmakers is similar to one that American reformers have consistently used throughout American history to challenge the tenets of formal equal opportunity. For example, Canada's affirmative action law asserts that the state must play a role in ameliorating the conditions of disadvantage faced by members of certain groups. Affirmative action, as one lawmaker put it, helps to create the conditions which enable individuals to reach their potential as human beings. Using similar language, members of the Progressive movement in the 1920s in the United States criticized the tenets of laissez-faire capitalism and formal equal opportunity, arguing instead that the state must play a role in fostering the conditions that ensure opportunities for individual development. In short, the version of equal opportunity in contemporary Canadian law resonates with meanings derived from America's past. I will argue in Chapter 2 that we should

---

not fall into the trap of believing that the version of equal opportunity present in contemporary affirmative action law is the only way Americans have ever imagined this ideal.

I should make clear at the outset my reasons for not engaging with the vast philosophical literatures surrounding both the issue of affirmative action and the meaning of equal opportunity. My intention in the thesis is to provide a viable legal language of equal opportunity in affirmative action because, despite the many philosophical analyses which exist, American law has remained remarkably impervious to imaginative solutions developed within the confines of philosophical debate. My study takes place in the realm of legal discourse, and offers a concrete legal language drawn from a culture which shares many of the liberal values present within American culture. Related to this point, my thesis does not provide an extended moral justification supporting the vision of equal opportunity embedded in Canadian law as opposed to the one entrenched in American law. Rather, I will argue that both cultures share a commitment to the belief that all individuals should as much as possible choose their fates in life, rather than have their lives determined by circumstances. My argument is that Canada's law better describes this fundamental commitment.

Similarly, I want to emphasize that this study is not meant to be a comprehensive comparative analysis of the two countries' law. Instead, it aims to document a shortcoming which has endured in American law for thirty years, and draws upon Canadian legal resources to develop an alternative language. It is the case that American affirmative action law has for the most part been concerned with the issue of race while Canadian law initially developed with women's concerns in mind. But American law employs the same conceptual framework of affirmative action to cases regarding race and gender, and the same is true in Canadian law. It is these frameworks that I am most interested in in the thesis. Nor is my goal to explain why there are differences within the two countries' law. The purpose of looking to the Canadian example is to argue that since law is an institution which both expresses and shapes cultural meanings, it only makes sense to search for inspiration in a legal setting and culture which are similar to that of the United States.
From Chapters 3 to 6, I will proceed by examining American legal debates from important periods in the development of affirmative action law and contrasting them to arguments from comparable periods in the development of Canadian law. I will begin my interpretive analysis with the debate about the Civil Rights Act of 1964, which constituted the first American legal discussion of affirmative action. Like all first conversations about a topic, this discussion established the terms of debate for all subsequent legal discussions of the issue. Legislators who were opposed to the Act argued that it would sanction preferential treatment for African-Americans. In response, supporters insisted that the Act guaranteed only formal equal employment opportunity by forbidding present discrimination on the basis of race, and that it did not grant preferential treatment. As I will demonstrate in Chapter 3, supporters of the Act failed to perceive that the formula they offered did not address the many varied disadvantages wrought by hundreds of years of past discrimination, and therefore could not offer genuine equal opportunity. This inability to address the complexity of the disadvantages brought about by discrimination has remained a hallmark of all legal discussions of affirmative action in the United States. In contrast, in the discussion of the Human Rights Act of 1977, Canadian lawmakers set the stage for subsequent careful deliberations about the complex relationship between disadvantage and discrimination by arguing that "special programs" were needed in order to ameliorate the conditions of members of disadvantaged groups.

Scholars locate the beginning of the American transformation from equality of opportunity to equality of result in affirmative action law after 1964, when judges rejected many of the major proscriptions embedded in the Civil Rights Act. They consider the period from the mid-1960s to the mid-1970s as a pinnacle of this change as judges developed the concept of systemic discrimination. This revised understanding of discrimination, which will serve as the focal point of my Chapter 4, represented a departure from the prohibition against intentional discrimination in the Act. In contrast to legislators, judges after 1964 argued that equal opportunity could not always be achieved simply by eradicating intentional acts of discrimination. Rather, systemic discrimination, which takes the form of neutral employment
practices, such as skills test, which disparately impact African-American workers, also impedes equal opportunity. On this basis judges often ordered "affirmative relief" to combat systemic discrimination.

But observing that judges ordered a good deal of affirmative relief and asserting that judges articulated an argument for equality of result are two separate claims. Most judges never made coherent arguments about the relationship between systemic discrimination and affirmative action. When they did justify affirmative action, they often argued that the programs served as compensation for egregious acts of intentional discrimination, never clearly defining systemic discrimination. Judges never developed an understanding of equal opportunity different from the one articulated by legislators in 1964. In contrast, Canadian Judge Rosalie Abella, in a Royal Commission Report written for Canadian legislators to help them deliberate about affirmative action, did clearly articulate the meaning of systemic discrimination and developed a revised version of equal opportunity to accompany it. She described systemic discrimination as barriers, such as inadequate educational facilities, which stand between a person's ability and his or her potential.9

Subsequent Canadian judges, especially those on the Supreme Court, have built on the foundation provided by Abella and addressed the problems implicit in the American approach to affirmative action. In Chapter 5, I will review the two countries' Supreme Court decisions about affirmative action. Justice Brennan of the United States, in four decisions he wrote supporting affirmative action, justified it in the same way as had lower court judges, as remedy for past instances of discrimination in workforces. The Canadian Court, on the other hand, has argued that the pursuit of equal opportunity requires lawmakers to examine the actual economic conditions of members of minority group members to gauge the full extent of the disadvantages caused by past discrimination, and then to devise special programs to ameliorate them. Canadian judges do not consider affirmative action to be a way to remedy discrimination

---

in workforces, but rather as a means to address the complex and varied disadvantages which are the product of past discrimination and which impede members of minority groups from competing equally for job opportunities.

Chapter 6 provides an examination of the discussion of the Civil Rights Act of 1990 in order to highlight the continued inadequacies of the American discussion of affirmative action and to emphasize that lawmakers in the 1990s have not proposed arguments for equality of result. Instead, this legislative discussion resonated with the discussion of the Civil Rights Act of 1964 as all legislators claimed that the proposed legislation's purpose was to ensure that employers treat their employees impartially and without regard to irrelevant characteristics like race. Canadian legislators, in the discussion of the Employment Equity Act of 1985, provided an alternative set of formulations to demonstrate the compatibility of equal opportunity and affirmative action.

In my concluding chapter I will propose a revised legal language of affirmative action in the form of an argument for programs directed at "the truly disadvantaged," the urban African-American underclass whose economic conditions have decreased since the 1960s. The understanding of equal opportunity embedded in my argument stands in contrast to the one used in the contemporary American debate about affirmative action. Rather, I will describe equal opportunity as the equal ability for all individuals to fully develop their potential. Drawing upon Canadian law and meanings present in American history, I will propose a new legal language of affirmative action. My arguments are not based upon a theory of equality of result, but on a fuller understanding of equal opportunity than is now used in the American legal discussion of affirmative action.
CHAPTER ONE
A LIMITED VISION: THE AMERICAN LANGUAGE OF AFFIRMATIVE ACTION

My concern with arguments in the law stems from my observation that the American legal language of affirmative action, far from containing an argument for equality of result, employs a formal understanding of equal opportunity and pithy euphemisms and conceptualizations which do not capture the complexity of the problems associated with affirmative action. Specifically, this language does not take into account that the under-representation of African-Americans in the nation's workforces is intimately related to broader disadvantages they face outside of workforces. Patricia Williams' comment about the Supreme Court's description of equal opportunity in one affirmative action case succinctly expresses this sentiment. She states: "It seems an extraordinarily narrow use of equality, when it excludes from consideration so much clear inequality." 9

In this chapter I will briefly describe what I see as the inadequacies of the American legal language of affirmative action and illustrate the need for a reformulation of the understanding of equal opportunity in it. I will then explain the interpretive approach to law I have employed throughout the thesis to provide descriptive analyses of the understandings of equality opportunity in American and Canadian affirmative action law. Finally, I will describe the normative dimension of this project. The purpose of examining Canadian law is ultimately to use it as a model in the transformation of the American legal language of affirmative action. The inadequate American language currently employed in affirmative action law masks, and therefore does not seek to address, the complex and vast inequalities experienced by many African-Americans. Clifford Geertz eloquently captures the relationship between the language we use to describe reality and the quality of our moral judgements. He states: "If we want to be able capaciously to judge, as of course we must, we have to make ourselves able

capaciously to see." The contemporary American language of affirmative action does not help us to adequately see and therefore to direct our attention toward the nature of the inequalities faced by many African-Americans.

**Formal equal opportunity and the American language of affirmative action**

The language of formal equal opportunity has been deeply embedded in American arguments against affirmative action for the last thirty years. Surprisingly, as I will demonstrate throughout the thesis, it has often formed the basis of arguments in support of affirmative action too. The standard American legal argument against affirmative action states: Affirmative action is illegitimate because it provides *special or preferential* treatment to members of some groups on the basis of *irrelevant* characteristics like race and gender, rather than treating individuals impartially and without regard to those characteristics. Employers should ensure that all applicants have an *equal opportunity* to compete for jobs and be *assessed on the basis of merit*. Since formal barriers to achievement were made illegal by the Civil Rights Act of 1964, members of minority groups should exercise *individual initiative* to achieve success. If discrimination based on racial animus occurs, the individuals who have been harmed can bring suit against an employer and receive compensation. The norm of equality embedded in American political culture has never extended to *equality of result among groups*, but guarantees the equality of individuals. Affirmative action is *unfair*. This formulation has remained stable in the law as the dominant argument against affirmative action since 1964.

It is not unusual for key legal concepts and formulations, such as the notion that equal opportunity is necessarily antithetical to the special consideration of some groups, to come to be seen by citizens to capture complex realities. For example, Jennifer Nedelsky has shown that the defining way Americans think about constitutional law, as involving rights conceived as limits to democratic government, evolved out of James Madison's formulation of property

---

as the paradigmatic example of an individual right and his attempts to protect the private property of the few from the propertyless many. In the American setting, the complicated relationship between individual autonomy and democratic government eventually hardened into the now familiar conceptual framework of "rights as judicially enforced boundaries dividing the legitimate scope of government from the private sphere of individual liberty."\(^{11}\) As Nedelsky puts it, the "notion of 'rights' functioning as 'limits' to 'government' involves a complex set of abstractions and metaphoric links that nevertheless is taken as common sense by most Americans."\(^{12}\) Indeed, as Mary Ann Glendon points out, due to the growing legalization of American culture, legal language is now the main tributary to political language. Furthermore, she notes that given the increasing heterogeneity of American society, more and more people look to law as a carrier of shared values.\(^{13}\) The power of legal language to influence popular understandings makes it important to evaluate whether American legal conceptions really capture the complicated nature of the problems associated with affirmative action.

America's limited language of equal opportunity in affirmative action law appears inadequate in the face of an emerging awareness that the overall economic status of African-Americans as a group has deteriorated since the 1960s and the first appearance of affirmative action. A growing number of scholars use the label "the truly disadvantaged" to characterize the increasing ranks of poor inner-city African-Americans whose circumstances appear to be more difficult now than in the 1960s.\(^{14}\) These individuals face an array of disadvantages - low


\(^{14}\) The term was originally used by William Julius Wilson, *The Truly Disadvantaged: The Inner City, the Underclass, and Public Policy* (Chicago: University of Chicago Press, 1987) but has become a standard term in sociological and political writings. For example, see Bill Lawson (ed.), *The Underclass Question* (Philadelphia: Temple University Press, 1992).
incomes, isolated, crime-ridden neighborhoods, broken homes, inadequate housing, and poor education.\textsuperscript{15} Most distressingly, the gains made with thirty years of affirmative action seem to have bypassed them. The worsening conditions of this group serve as a potent contradiction to the claim made by lawmakers that affirmative action has transformed the American understanding of equality to equal of result. Indeed, there is a strange schism between the inequalities the American formulation of affirmative action takes into account and the inequalities that exist in American society. Since so much of the public discussion surrounding poverty and race in the United States takes place around the topic of affirmative action, there is an urgent need to assess whether the language of equal opportunity in it helps us to adequately address these issues.

My examination of American affirmative action law will reveal that even supporters of the programs have used the same unhelpful legal formulations as affirmative action's detractors. It is somewhat more difficult to envision how arguments in favor of affirmative action could employ the language of formal equal opportunity. Nevertheless, as far back as twenty years ago, Owen Fiss noted that the Supreme Court's civil right's jurisprudence, including its affirmative action jurisprudence, was characterized by attempts to justify progressive measures while staying within a formal equality framework.\textsuperscript{16} Ten years later, Kathleen Sullivan, commenting on a decision written by Justice Brennan in support of affirmative action, made a similar claim.\textsuperscript{17} She pointed out that Brennan justified affirmative action as remedy for discrete instances of discrimination against individual minority workers. Brennan's formulation fits


comfortably within a formal equality framework because it necessitates finding a perpetrator of wrongdoing and remediing his or her discriminatory behavior.

More recently, a number of scholars, recognizing the inadequacies of the present American language in favor of affirmative action, have attempted to transform it. For example, two thoughtful scholars criticize the use of the term "preferential treatment." even by affirmative action's supporters. Those who use the term to describe affirmative action, they argue, convey the mistaken impression that American society is now a well-functioning meritocracy and that minorities should be awarded preferences even though they may not be qualified. The continual use of the term impedes consideration of the reality that existing institutional structures continue to systematically disadvantaged minorities. Instead of affirmative action as preferential treatment, the authors argue, we need new metaphors. They take inspiration from George Eliot's statement: "It is astonishing what a different result one can get by changing the metaphor."19

I share this optimism about a change in formulations, and believe that such a change would have a widespread impact. Although the language of affirmative action began as the elite language of law, it has had a powerful impact on academic and popular discourse. For example, the term "preferential treatment" gained prominence in the debate of the Civil Rights Act of 1964 and has permeated all subsequent political discussions of affirmative action. Similarly, John Morrison reports that Congressional opponents of Title VII first developed quota rhetoric in an attempt to block passage of the law, and now opponents of affirmative action often equate any types of ameliorative programs with quotas.20 Finally, the term 'reverse

---


19Ibid. p. 18.

discrimination' was first used in the popular media after *DeFunis v. Odegaard*, a Supreme Court case. From 1971 to the early 1980s the term was always used in quotation marks in the press, but now it is an accepted term in political and popular debates. These isolated examples of the inadequacies of the legal language of affirmative action, and its power to shape popular understandings, calls out for an extended examination of the whole package of assumptions in American affirmative action law. The methodology of interpretation is a helpful tool in such an investigation.

**The Interpretation of Law**

The approach to law I have employed to examine American and Canadian affirmative action law is the interpretive method advocated most prominently by anthropologist Clifford Geertz who conceives law to be a cultural activity, an active part of society like art, science, religion and technology. In all these activities, participants express 'meanings,' that is, ways of making sense of what happens in the world by placing phenomena in larger structures of significance. Human beings are fundamentally self-defining and self-interpreting, categorizing reality according to conceptual structures. Categorization helps people to cope with the world's complexity and serves as the very basis for community, discourse and argument. Geertz describes this phenomenon as people enclosing themselves in sets of meaningful forms, webs of signification they themselves have spun. The study of culture, then, is "an elaborate venture in thick description" which has as its goal the examination of the conceptual frameworks people use to describe and structure social reality. As one set of researchers explains, the point of

---

21 See Morrison, p. 313. Morrison refers to a 1976 *U.S. World and News Report* article which commented on "a practice known as 'reverse discrimination.'"  
24 Geertz, "Thick Description," p. 7. For example, one anthropologist has shown through her analysis of hundreds of hours of discourse about the topic that Americans have a distinctive cultural model of marriage and that they use only eight metaphors to describe it. The metaphors are sharingness, lastingness, mutual benefit, compatibility, difficulty,
interpretation is not to "search for a reality before and behind the cultural world," but rather to gain entry into the conceptual worlds in which people live.  

Law is an especially important cultural institution because it marshals the power of the state behind certain meanings and not others. The first purpose of an interpretive study of law is to provide a clear articulation of the meanings embedded in law. As Geertz explains: "Law is a distinctive manner of imagining the real." Of course, people in one culture may describe a series of events differently from people in another culture, attributing them a different meaning and significance. Comparative law, then, should be seen as an enterprise in cultural translation, that is, an exploration of the different conceptual structures embedded in different law.

Law is necessarily a culture-specific activity because it takes place in the context of certain structures of meaning found in a culture. That is, like other cultural activities, it both draws from and shapes meanings in the broader culture. Shelley Gavigan explains:

law sets normative standards and informs, shapes, and constrains the content of collective and conventional thinking about social structure and the possibilities and necessities for change, and it is simultaneously informed by those conventional ideas and beliefs about social relations. Not simply nor evenly accurately characterized as a 'reflection' of society, or its 'hammer', the law...is both a product of and reproducer of the existing social order.

---


As this quotation makes clear, law does not necessarily reflect citizens' attitudes nor do legal pronouncements always determine citizens' opinions (although this may be the case in particular instances). My objective in asserting that law is culture-specific is to emphasize that it is not an independent system of meaning, but exists as part of a broader culture. Law will differ from culture to culture in the degree to which it reflects the attitudes of 'the people,' in its power vis-à-vis other modes of cultural activity, and the control it has over the processes of social life. But the careful analysis of legal language reveals influential structures of thought. Like all cultural institutions, law draws from pre-existing cultural norms and, especially through the stories related in Supreme Court decisions, has extraordinary power in turn to shape culture.

Interpretation's understanding of law as part of a broader culture explains my choice to examine Canadian legal formulations as possible inspirations for an American reformulation of key concepts associated with affirmative action. As I will explain in detail in Chapter 2, Canada is a country with many cultural similarities to the United States. It would not make sense to simply borrow meanings from a culture that would seem alien to American law. A further benefit of understanding law as part of a broader culture is that it has encouraged me to examine the United States' own diverse cultural heritage. Indeed, as I will also demonstrate in Chapter 2, understandings of equal opportunity expressed throughout American history, which are surprisingly similar to those articulated in contemporary Canadian affirmative action law, have provide further inspiration in my attempted transformation of American affirmative action law.

It is through language that humans express structures of thought and indeed 'create' social reality. As one writer eloquently stated: "We speak ourselves into being." Charles Taylor

---

29The study of culture must be distinguished from the study of public opinion, because culture comprises the prior, more fundamental ideational structures which are the basis of public opinion. See Mark Gregory and Christopher Eisengruber, "Introduction: Law and Political Culture," University of Chicago Law Review, 55, No. 2 (1988), p. 414.

30Gavigan, "Morgenthaler and Beyond."

31Anne Norton, Alternative Americas: A Reading of Antebellum Political Culture (Chicago:
explains the constitutive function of language by pointing to "the artificiality of the distinction between social reality and the language of description of that reality. The language is constitutive of the reality, is essential to being the kind of reality it is."32 The study of culture is the analysis of what people in that culture imagine to be real at any given time, which is revealed through their language. And legal language is an important source of cultural meaning.

James Boyd White provides valuable insight by designating law a form of rhetoric, and in keeping with Taylor, defining rhetoric as the central art by which culture is maintained and transformed.33 The verb 'rheo' originally meant 'to flow' or 'to gush forth' and this imagery helps us to comprehend how the flow of meaning, through which humans constitute themselves and their social reality, is expressed through public discourse.34 Further, law is a mode of rhetoric which is narrative in structure. James Boyd White tells us that law is a language of meaning in the fullest sense because it tells stories about real people and actual events and claims a meaning for what happens by writing an ending to the stories.35 Regarding legal language as a way of describing reality highlights law's importance. We should think of law as not only capable of shaping opinions about issues, but as actually describing to citizens what is real.

Therefore, the method of interpretation of law as a cultural institution in a comparative context serves several purposes in this thesis. First, I hope to draw attention to the crucial impact of legal formulations on more general perceptions of reality, and specifically in the case of the United States, on the way in which inadequate legal formulations of affirmative action


35 White, p. 36.
have constrained political and popular discussions of the topic. Further, as I have already mentioned, interpretation's understanding of the relationship between law and culture makes Canadian law an attractive model in my reformulation of America's legal formulations of equal opportunity in affirmative action precisely because of the cultural similarities between the two countries. Further still, the knowledge that legal meanings necessarily emanate from the culture at large has inspired me to closely examine the United States' complex cultural heritage to find evidence of alternative understandings of equal opportunity from the one present in current affirmative action debates. The language of equal opportunity in contemporary Canadian affirmative action law resonates with meanings present in American culture at earlier periods.

In short, the technique of interpretation will reveal the important, but sometimes subtle, differences between the American and Canadian approaches to affirmative action. This exercise is geared toward promoting better self-understanding on the part of Americans, and toward revealing to them that theirs is not the only or best way to conceptualize equal opportunity and affirmative action.

**Politics and Interpretation**

To say that law and culture are institutions in which individuals express shared meanings is not to portray either as monolithic or unidimensional. Charles Taylor, for example, points out that shared meanings give people a common language to talk about social reality, but he distinguished them from what he calls 'common meanings' which are shared aspirations or goals that serve as reference points for public discussions. Common meanings include such contested concepts as 'liberty' and 'equality.' Obviously, common meanings can often be the basis for bitter dispute as groups, individuals and lawmakers articulate their contents differently. As I will outline in Chapter 2, American history provides ample examples of public figures expressing differing visions of the nature of equal opportunity. And in Canada,

---

36 Taylor, pp. 31-33.
some public figures have recently begun to adopt American-style arguments against affirmative action, using the equality of result versus equality of opportunity formulation.\textsuperscript{37}

These conflicts reveal that the studies of culture and of politics are intimately connected. For while politics is traditionally viewed as a process in which competing groups struggle for dominance around opposing policy initiatives, politics can also be conceived as the result of socially constructed and historically variable meaning systems used by political actors to define the interests they seek. Politics, therefore, consists of struggles over contested meanings as much as struggles over competing interests.\textsuperscript{38} When any given policy is accepted, a corresponding vocabulary or set of understandings is integrated into the public repertoire.\textsuperscript{39} There is obviously a good deal at stake in struggles about the meaning of concepts like equality and affirmative action because meaning systems help to sustain social arrangements and inform and limit the possibilities of political struggle. Meanings systems are never completely autonomous from power relations; all privilege certain actors and viewpoints, making certain interests present and others absent. For example, the current abortion debate offers two opposing visions of what abortion is. The pro-choice forces see it as involving a woman’s bodily integrity while the pro-life forces see it as causing the death of a baby. Advocates on either side will not characterize their positions as mere opinions, but as descriptions of reality.\textsuperscript{40}

\textsuperscript{39} Michelle Celeste Condit, \textit{Decoding Abortion Rhetoric}, p. 96.
\textsuperscript{40} The fact that law is a forum for the struggle over contested meanings has been well illustrated in the area of abortion law. Janine Brodie has demonstrated that entirely opposing images of woman, the foetus and the relationship between the two have been depicted in Canadian legal discussions. Brodie examined the 1988 House of Commons discussion of abortion, discovering two different stories about abortion. The pro-choice narrative described woman as responsible moral agents who were fully capable of rational decision-making. It focused on the importance of women’s bodily integrity and described women as active agents for whom childbearing was not the only, or most important, life enterprise. There was very little mention of the foetus, except to link the concept of personhood to viability.

In contrast, the pro-life construction of abortion focused on the foetus as a fully-fledged, completely autonomous human being. One legislator found any mention of women’s bodily control distressing because, as he put it, “we are not talking about their own body.”
The American legal discussion of affirmative action is anomalous because while opponents and proponents disagree on the appropriateness of the programs, they both employ essentially the same language of equal opportunity to defend their positions.

Therefore, there is a political dimension to this project because my hope is that changing the way citizens envision affirmative action will lead them to change their opinions about its legitimacy. While the dominant American language of affirmative action perceives it as antithetical to equal opportunity, in Canada, lawmakers see affirmative action as promoting equal opportunity. Analysis of Canadian affirmative action law provides entry into a conceptual world in which the search for equal opportunity in the workplace entails a broad analysis of the status of different groups in society at large and requires special programs directed at ameliorating disadvantage. Given Americans' attachment to the norm of equal opportunity, it is not surprising that many citizens oppose affirmative action when the dominant understanding of it conceives it to be anti-theitical to equal opportunity. It is important, in any attempt to change citizens' minds about affirmative action, to provide a legal language in which affirmative action is imaged as consonant with equal opportunity. But the possibilities for the transformation of legal language are not endless. Some concern must be given to what is considered legitimate in the context of American culture. However, as two commentators note: "language's very plasticity...leaves us free, indeed encourages us and further, ought to encourage us self-consciously to engage in an interpretation that captures the aspirations of"...

The pro-life narrative presented the pregnant woman as providing shelter, nourishment and time for the baby. It imagined the abortion decision not as a woman's choice, but as a family or societal issue. Needless to say, the image of the woman and the foetus law adopts will have concrete consequences for the lives of citizens and will have a powerful effect on whether they imagine the abortion decision to entail a women's choice to live her life according to her own life plan or the death of a baby. See The Politics of Abortion.

In one survey, Sidney Verba and Gary Orren asked 'leaders' in ten fields the following question: "Do you prefer equal opportunity: giving each person an equal chance for a good education and to develop his or her ability or equality of result: giving each person a relatively equal income regardless of his or her education and ability." The approval rating for equality of opportunity was as follows: Business 98%, Labor 86%, Farm 93%, Intellectuals 89%, Media 96%, Republicans 98%, Democrats 84%, Blacks 86%, Feminists 84% and Youth 87%. Equality in America: The View From the Top (Cambridge, MA: Harvard University Press. 1985), p. 72.
embodied in the language." Analysis of the Canadian language does not lead Americans away from their indigenous language of equal opportunity, but rather provides a way to better articulate what Americans aspire to when they talk about equal opportunity.

My argument about the power of language to shape understandings and change opinions does not ignore the fact that different interests are at stake in the conflict over the appropriateness of affirmative action, nor that a good deal of it the opposition to it is fueled by racism. Nevertheless, opponents of affirmative action have the advantage of being able to appeal to a time-honored value, equal opportunity. Consider that in the present climate, it is easy for opponents of affirmative action to dismiss any consideration of its merits with an easy appeal to their "right to equal opportunity." My argument is that we can not hope to change the way people envision affirmative action, and hopefully reach a consensus about it, unless we provide a language that imagines it as consonant with equal opportunity.

The Normative Dimension

One of the most important benefits of interpretation's focus on meanings is to remind us that much of what we take to be 'real' and 'true' is shaped by the webs of meaning we inhabit and to challenge us to constantly reevaluate the frameworks we employ. In addition, there is a normative dimension to detailed comparative analysis as a way to reveal the partiality of familiar ways of conceiving of issues. Clifford Geertz eloquently captures this belief in a statement I quoted at the beginning of this chapter: "If we want to be able capaciously to judge, as of course we must, we have to make ourselves able capaciously to see." Geertz here

---


[46] Nicholas Leeman makes a similar connection between the nature of moral judgements and
refers to attempts to see the partiality of our own frameworks and to closely examine other ways of seeing issues.

In the context of this study, I will look at Canadian law's discourse of affirmative action as an alternative to the American way of envisioning affirmative action. My motivation in exploring Canada's different language of affirmative action lies in its ability to inspire Americans to reimagine a value they deeply cherish. The idea is that normative judgements about important issues are better when one recognizes the partiality of one's own point of view and attempts to see a problem in a new light. This applies to the limited way we define issues as well. The very language used in affirmative action debates constrains citizens' abilities to see inequalities in American society. Canadian law makers, on the other hand, insist that the pursuit of equal opportunity must include an analysis of the concrete circumstances of different groups in the political, social and legal contexts in which decisions about affirmative action's appropriateness are made. This analysis takes place with reference to the historical experiences of oppression of different groups. Their focus is not on remedying past discrimination in discrete workforces, but on ameliorating the many disadvantages which are the result of past discrimination.

The core tenet of an interpretive anthropological approach is the normative aspect of gaining access to the conceptual worlds of people in other cultures in order to see problems in a new way. But this is not possible until one can first accurately locate where one is, and this is made possible by reevaluating one's own assumptions. To return to an example I employed at the beginning of this chapter, it is not uncommon for American scholars to mistakenly argue that affirmative action has changed the meaning of equality from equal opportunity to equality

of result. The attention to detail required by comparative analysis, however, prods one to transcend easy formulations and inspires self-understanding. Comparative analysis makes us aware of the limited nature and partiality of the present American affirmative action legal debate in ways not possible merely with an internal critique. The awareness of our own partiality enables openness to new possibilities: those presented through knowledge of the experience of similar cultures like Canada and through deeper analysis of Americans' own cultural heritage. The danger of being content with the partial views of Americans' own present conceptual frameworks, of "an easy surrender to the comforts of merely being ourselves," according to Geertz, is that it cuts us off from the possibility of not only changing our opinions, but quite literally, and quite thoroughly, changing our minds.\footnote{Geertz, "The Uses of Diversity," p. 114.}

In the context of the United States' limited legal language for discussing affirmative action, it is wise to heed Geertz's observation about the relationship between the language we use to describe reality and the quality of our moral judgements. He states that the phrase "the limits of my language are the limits of my world" does not imply,

that the reach of our minds...is trapped within the borders of our society, our country, our class, or our time, but that the reach of our minds...is what defines the intellectual, emotional and moral space within which we live.\footnote{\textit{Ibid.} p. 113, (my emphasis).}

My enterprise in the thesis, therefore, is to offer an expanded legal language of equal opportunity and affirmative action which will help us to better see and therefore more adequately address the inequalities experienced by poor African-Americans. My goal is to provide a vision of affirmative action that captures the aspirations implicit in the American ideal of equal opportunity.
CHAPTER 2

CHALLENGING THE CONSENSUS VIEW OF AMERICAN CULTURE: CANADIAN AND AMERICAN UNDERSTANDINGS OF EQUAL OPPORTUNITY

Why do Canadian legal conceptions of affirmative action and equal opportunity provide fruitful models for an American reformulation of the two concepts? In contrast to commentators who emphasize significant differences between the two cultures, I will argue in this chapter that the similarities between them should encourage Americans to look to Canadian legal formulations in order to gain fresh insight into the topic of affirmative action. Specifically, I will take issue with several important comparative analyses of the two cultures which assume that the only version of liberalism present throughout American history has been classical, negative liberalism with its attendant understanding of formal equal opportunity. These analyses emphasize the differences between the two countries, describing Canada as less liberal individualistic and less committed to formal equal opportunity. I will argue that throughout American history, reformers have continually challenged the assumptions about the nature of liberty and equality embedded in negative liberalism and formal equal opportunity. Both Canada and the United States are liberal democracies, but the liberalism in each country has existed alongside of and been influenced by other ideologies. Therefore, I will present a fluid and dynamic portrait of each culture, one in which similar challenges to the tenets of formal equal opportunity have been mounted in each at various times.

While the comparative analyses I will critique provide a consensual description of American culture, portraying it as thoroughly liberal individualistic, they do a better job of demonstrating the different ideological strains within Canadian culture. According to the famous Hartz-Horowitz thesis, for example, a suspicion of state power, an overriding individualism and formal equal opportunity characterize American culture. Canadians, on the other hand, while still broadly committed to the ideals embedded in negative liberalism, are often willing to support state intervention in the economy, the good of the community over
individual interests, and challenges to formal equal opportunity. This portrayal of the two cultures show the cultural diversity within Canada, but it downplays the many similarities between the Canadian and American cultures. Canadian legal scholars, understandably cautious about American cultural dominance, sometimes employ the Hartz-Horowitz thesis to suggest why American models are not appropriate for Canadian politics and law. However, overstating the differences precludes consideration of how Canadian models may help Americans to reimagine their conventional way of envisioning affirmative action and the understanding of equal opportunity embedded in it.

My objective is not to overturn the Hartz-Horowitz thesis, or the other analyses of the American and Canadian cultures I will examine in this chapter, in order to replace them with a description of 'the one and only correct' version of liberalism embedded in the Canadian and American cultures. The history of American and Canadian ideas is too complex for such an enterprise to be successful. Rather, I plan to show that the Hartz-Horowitz thesis treats as settled the dominance of an American devotion to individual liberty defined as individual separateness, without adequately acknowledging that there have been constant challenges to it throughout American history. It is more accurate to see negative liberalism as always near the centre of the American and Canadian cultures, but accompanied by and influenced by other important political traditions.

Therefore, in this chapter I will briefly outline the main tenets of the theory of negative liberty and formal equality which the consensus school of American culture suggests has uniformly characterized American culture. This description will pave the way for my careful analysis of the Hartz-Horowitz thesis and the arguments of other scholars who agree with its rendition of American political culture. I will then outline the arguments of a prominent Canadian legal scholar who, relying on the Hartz-Horowitz thesis, suggests that because of the profound differences between the cultures, Canada should not adopt American legal models. Collectively, these arguments amount to a great deal of evidence about the differences in the American and Canadian cultures. To counter this evidence, the remainder of the chapter will be
devoted to describing selected periods in the American history of ideas in which public figures put forward challenges to the theories of negative liberty and formal equality. I conclude that rather than speaking of American culture as uniformly liberal, it is more appropriate to see both Canada and the United States as broadly liberal, with important communitarian and egalitarian elements.

**Negative liberty and formal equal opportunity**

There are a number of versions of Anglo-American liberalism, ranging from libertarianism to liberal egalitarianism, but the foundation of all liberal theory is the belief that freedom is an essential interest of all individuals and that freedom must entail the possibility of choosing one's life plans among a broad range of alternatives. All versions of liberalism are united in rejecting claims of a natural hierarchy in favour of the assertion that all humans are in some fundamental sense equal to one another, that is, morally equal as individuals. This includes a broadly conceived ability to "choose a reasonable plan of life," as well as an "equal capacity for self-respect and human dignity." But a commitment to individual liberty and the moral equality of individuals is too abstract and vague to constitute a political theory or a cultural ideal. Different versions of liberalism contain divergent understandings of the meaning and proper extent of individual liberty and the practical consequences of a belief in the moral equality of all individuals.

As we will see, the consensus view articulated by Louis Hartz sees American culture as characterized exclusively by the theory of negative liberalism, for which the absence of constraint on individual freedom is paramount. While no political theory could possibly only value liberty defined as individual choice, in negative liberalism this value is central. This version of liberalism assumes that individual preferences are the most ethically relevant features of human personality. Isaiah Berlin, for example, describes John Locke's belief that there must exist an area of personal freedom "which must on no account be violated: for if

---

overturned the individual will find himself in an area too narrow for even the minimal
development of his natural faculties...It follows that a frontier must be drawn between the area
of private life and public authority. "

Scholars generally associate negative liberty with
minimal state interference with the individual's pursuit of his or her own conception of the
good life. For example, according to C.B. MacPherson, the classical English political
philosophers linked negative liberty with the absence of two kinds of interference: by the state,
at least with the widest possible area of action consistent with all others having the same
freedom, and by any other individual. Therefore, in negative liberalism the state secures the
political conditions that are necessary for the exercise of personal freedom and protects
individuals from interference by other citizens. The idea of political equality comes into play in
this theory as the state permits citizens to share freedoms equally. These liberties include the
right to vote, to freedom of speech and liberty of conscience, to freedom of thought, and
freedom of the person.

The chief characteristic of this liberalism, as may be clear by now, is individualism.
Individuals derive their rights from their individuality, not from their social status or family
connections. The assumptions about human nature which are embedded in negative liberalism
include the notion that individuals are possessors of their capacities, owing nothing to society
for them. Further, rather than see society as made up of classes in which citizens derive much
of their identity from their rank or status, society is seen as a collection of separate and free
individuals.

Individual rights protect citizens from intrusions by the state and other citizens, allowing
individuals to secure a private domain of liberty given their status as politically equal entities.

---

discusses negative liberty from pp. 122-131.


Along with the right to political equality, negative liberalism guarantees the right to equal opportunity which enables individuals to pursue their life plans and achieve success, again not on the basis of rank, but on the basis of individual merit. In the private sphere individuals are assumed to operate within a protected realm of freedom, making self-willed choices about how to pursue their personal goals. The state ensures that no barriers exist which could impede individual achievement, such as laws forbidding certain classes of people from holding certain jobs based solely on their class. Formal equal opportunity requires that citizens be treated impartially by the state and not receive benefits or suffer burdens on the basis of such attributes as family connections. In the private sphere, however, inequalities are expected to exist because individuals will differ in terms of characteristics such as natural intelligence and ambition. In brief, formal equal opportunity ensures the political equality of individuals, but does not assume they are equal in abilities nor, in turn, that their material conditions will be equal. The comparative analyses of American and Canadian culture I will examine below all mistakenly describe the United States as uniformly characterized by negative liberalism and formal equal opportunity.

The Hartz-Horowitz thesis

I have chosen to analyze Louis Hartz's "fragment" theory of American political culture in *The Liberal Tradition in America* because his later application of the theory to English Canada, and Gad Horowitz's subsequent reflections upon it, form the foundation of a vast literature on the differences and similarities between the Canadian and American cultures. Indeed, almost all contemporary comparative analyses of the English Canadian and American political cultures use the Hartz-Horowitz thesis as a point of departure. Hartz's analysis centred on the

---


55 It is essential to note that most of these discussion have taken place among Canadian scholars.

56 One set of scholars has asserted that the Hartz-Horowitz thesis is "widely accepted in Canada as an explanation of the differences between Canadian political culture and that of the United States." See Walter C. Soderlund, Ralph C. Nelson, and Ronald H.
premise that both English Canada and the United States are fragments of a European whole. In Europe, "a marvelous organic cohesion has held together the feudal, liberal and socialist ideas."57 A complex society exists there that develops through a process that includes the attack and counterattack of these ideologies upon one another. Hartz explained:

There is a process of contagion at work in Europe, enormously subtle and ramifying, in which ideologies give birth to one another over time. This process actually begins with the feudal world, which, in a queer Hegelian sense, helps to generate the very attack against itself. That world not only gives its own "class consciousness" to every Enlightenment ideology, bourgeois and socialist, but it holds out as well the memory of a corporate community which, in the midst of revolution, men seek to recapture...So that at every point from medievalism to modernity, and within modernity itself, the European contagion is at work. Europe renews itself out of its own material.58

According to Hartz, in Europe ideologies develop in a dialectic of social change. Four elements - feudal or tory, liberal whig, liberal democratic and socialist - have evolved out of one another through interaction and confrontation. Whig or undemocratic liberalism is the natural reaction to a feudal tradition, democratic liberalism arises out of and as a reaction against whiggery, and socialism comes out of liberal democracy.

In The Liberal Tradition in America Hartz described American political culture as consensual and thoroughly liberal. He never precisely defined the elements of this liberalism. but he did refer to a belief in "the reality of atomistic social freedom" as the "master assumption of American political thought," indicating that by liberalism, he referred to classical, negative liberalism.59 The outstanding feature of the American community in Western history for Hartz


59Liberal Tradition, p. 61.
is that it lacked a feudal social structure and therefore the imposition of a liberal order did not necessitate the destruction of a previous social order. The American colonists were a fragment of seventeenth century England, representing one phase of its rich ideological spectrum. Hartz designated John Locke the political theorist whose ideas were most influential in America’s colonial period: his doctrine provided an explanation of the founding and development of the new nation. American society. Hartz argued. offered perfect replicas of the very images Locke used. There was a frontier that was a veritable state of nature and agreements, like the Mayflower Compact, that were veritable social contracts. Indeed. “the reality of atomistic social freedom” derived directly from Locke. Hartz noted that “because the basic feudal oppressions of Europe had not taken root, the fundamental social norm of Locke [free individuals in a state of nature] ceased in large part to look like a norm and began, of all things. to look like a sober description of fact.” Locke himself sometimes confused theory with reality. writing: “In the beginning all the world was America.”

Due to this correspondence between norm and reality. there were few Americans who denied the “self-evident” truths about equality and individual liberty advanced in 1776. Hartz stated:

The liberals of Europe always had a problem on their hands...of explaining how principles could be ‘self-evident’ when there were obviously so many people who did not believe them. Circumstances nearly solved this for the Americans... When one’s ultimate values are accepted wherever one turns. the absolute language of self-evidence comes easily enough.

Because liberalism did not have to battle feudalism in the United States. Lockeanism developed into a pervasive liberal ethic. Hartz emphasized that in America there exist no real conservative or socialist traditions.

Hartz’s theory attempted to account for the development as well as the origin of political culture. In Europe new ideologies develop in contact with existing ideologies. However.

---

60 Idem.
61 Ibid. pp. 60-62.
62 Ibid. p. 58.
"when a part of the European nation is detached from the whole of it, and hurled outward onto new soil, it loses that stimulus toward change that the whole provides. It lapses into a kind of immobility."63 This dynamic occurs because the ideological elements present in the European whole cannot provide material for change.64 Hartz noted that "[w]hen fragmentation detaches [ideology from its European context], and makes it master of a whole region, all sorts of magic inevitably takes place. First of all it becomes a universal, sinking beneath the surface of thought to the level of assumption."65 Americans, in keeping with their Lockean roots, are liberal individualists through and through: they have an unparalleled faith in property, a suspicion of too much state power, and an overriding individualism. As a "national embodiment of the concept of the bourgeoisie," they lack any sense of class consciousness, and despite great differences in wealth, a social equality exists so that none are made to defer to their "betters."66

Hartz, turning to English Canada in his introduction to The Founding of New Societies, noted that this liberal society has a "tory touch," that it is "etched with a tory streak coming out of the Revolution" but described the differences between the two countries as "delicate contrasts."67 Kenneth McRae, who wrote the section on English Canada in the book, also concluded that it is essentially a liberal fragment. The American revolution, according to McRae, was a political revolution executed within a social framework that was already basically liberal. Therefore, the American Loyalists who moved to Upper Canada after the Revolution were necessarily liberal. McRae, responding to previous research on the topic, asserted:

63 "Introduction," The Founding of New Societies, p. 3.
64 Soderland et al. correctly point out that Hartz posits two theories of ideological change (some societies develop in isolation, never recharging with new impetus, while others develop by generating their opposites), without providing sufficient reasons for the differences. See "A Critique," p. 66.
65 "Introduction," The Founding of New Societies, p. 5.
66 The Liberal Tradition, p. 51.
It is folly to represent the Loyalists as a genuine Tory aristocracy or a privileged class. For how could America cast off a social order that it never really possessed? And if the American experience was basically a liberal one, how could the main Loyalist heritage be anything else?\footnote{Kenneth McRae, "The Structure of Canadian History," in The Founding of New Societies, p. 235.}

McRae acknowledged some differences between Canadian and American political cultures, but designated them as "subtle" and "minor."\footnote{Ibid. p. 239.}

Gad Horowitz, a student of Hartz, entered the discussion with his now famous article entitled "Conservatism, Liberalism, and Socialism in Canada: An Interpretation," and his subsequent "Notes on 'Conservatism, Liberalism and Socialism in Canada.'" attempting to both stay within Hartz's framework but demonstrate significant political cultural differences between Canada and the United States. He argued that the difference between his analysis and that of Hartz was one of perspective: Hartz's focus on a world historical perspective led him to see minor differences between Canada and the United States. But, Horowitz noted, if one shifts the approach and sees English Canada from within the view of bourgeois fragments, the differences expand. As for McRae, Horowitz concluded that he was simply wrong in underestimating the significance of the tory touch in Canada.\footnote{"Conservatism, Liberalism, and Socialism in Canada: An Interpretation," Canadian Journal of Economics and Political Science, 32 (1966), p. 148.}

Horowitz, returning to the issue of the American Revolution, argued:

[P]re-revolutionary American was a liberal fragment with insignificant traces of toryism, extremely weak feudal survivals. But they were insignificant in the American setting; they were far overshadowed by the liberalism of that setting. The Revolution did not have to struggle against them, it swept them away easily and painlessly, leaving no trace of them in the American memory. [In Canada] where there was no overpowering liberalism to force them into insignificance, they played a large part in shaping a new political culture, significantly different from the American.\footnote{Ibid. p. 151.}
Horowitz concluded that Canada was a "bourgeois fragment touched by toryism." He stated that it is an exaggeration to argue that Canada was founded by British tories whose purpose was to build a society that would not be liberal like the United States, but neither was the country founded only by liberals.

Following Hartz’s dialectic, Horowitz pointed out that the tory touch helps to account for the presence of socialism in Canada. What socialists and tories share is "a conception of society as more than an agglomeration of competing individuals." Socialism combines the "corporate-organic-collectivist" ideas of toryism with the "rationalist-egalitarian" ideas of liberalism. A political culture with a touch of toryism will be more receptive to the characteristically socialist concern for "the good of the community as a corporate entity." Subsequent British immigration to English Canada, consisting of people carrying with them non-liberal ideas, helped to reinforce the toryism already in the political culture. Horowitz reported that between 1815 and 1850 almost one million Britons emigrated to English Canada and its population doubled in twenty years and quadrupled in forty. Later, immigrants carrying with them socialist ideas help to account for the presence of socialism in Canada.

---

72 Horowitz's theory generated a good deal of discussion in Canada. George Grant, for example, argued that the Loyalists were a genuinely tory element, who left the United States "with the belief that on the northern half of this continent [they] could build a community which had a stronger sense of the common good and of public order than was possible under the individualism of the American capitalist dream." See Lament for a Nation: The Defeat of Canadian Nationalism (Carleton, Ontario: Gage Publishing Limited, 1971), x. In contrast to both Horowitz and Grant, Rob Preece argued that Canadian conservatism has always been explicitly more a form of whig than tory doctrine, friendly to the ordered emancipation of individuality, to the diversity of human character, greater individual economic responsibility, sympathetic to capitalism, and favouring greater religious tolerance. This conservatism, he contends, has nothing to do with toryism. See Rod Preece, "The Myth of the Red Tory," Canadian Journal of Political and Social Theory, 1 (1977), p. 10.


The consequence, according to Horowitz, is that Canada is an imperfect fragment, with a special blend of toryism, liberalism and socialism: it is not a “one-myth culture” like the United State. He summarized:

My argument is essentially that non-liberal British elements have entered into English Canadian society together with American liberal elements at the foundation...This is not to deny that liberalism is the dominant element in the English Canadian political culture; it is to stress that it is not the sole element. that it is accompanied by vital and legitimate streams of toryism and socialism which have as close a relation to English Canada’s “essence” or “foundation” as does liberalism.\textsuperscript{75}

Because of the tory influence, English Canadian liberalism is “less individualistic, less ardentely populist-democratic, more inclined to state intervention in the economy, more tolerant of ‘feudal survivals’ such as monarchy. At its leftist edges, Canadian liberalism has merged with the democratic socialism of the CCF-NDP.\textsuperscript{76}

In terms of equality, Horowitz stated that socialists disagree with liberals about its essential meaning because socialists have a tory conception of society. In liberalism, the demand for equality is for greater formal equality of opportunity. In socialist thought the demand for equality is “for equality of condition rather than mere equality of opportunity; for cooperation rather than competition; for a community that does more than provide a context in which individuals can pursue happiness in a purely self-regarding way.”\textsuperscript{77} Horowitz did not assert that this conception of equality is the dominant one in Canada, merely that it is present in Canada in a way that it is not in the United States due to the influence of toryism and socialism in the English Canadian political culture mix.

Another influential analysis of the differences between the American and Canadian cultures has been provided by Seymour Martin Lipset, whose conclusions closely match those of the Hartz-Horowitz thesis. While Hartz saw the American revolution as a minor upheaval in an already thoroughly liberal culture, Lipset argued that the revolution was a major dynamic

\textsuperscript{75}\textit{Ibid}, p. 156.

\textsuperscript{76}\textit{Ibid}, pp. 161-162.

\textsuperscript{77}\textit{Ibid}, p. 147.
event which created new institutions and values that greatly changed the course of a society which contained significant aristocratic vestiges. The American colonists, he argued fought against primogeniture and privilege on the basis of the ideology of negative liberalism. "[A] national consciousness arose which infused men with a new awareness and a new confidence in what they were and in their own kind. [There emerged] a new value consensus." 

According to Lipset, while America's origins were revolutionary, Canada's were counterrevolutionary. He quoted Canadian historian Arthur Lower who pointed out that in Canada "colonial Toryism made its second attempt to erect on American soil a copy of the English social edifice," and that Loyalists "withdrew a class concept of life from the south, moved it up north and gave it a second chance." The central values around which Canadian institutions were constructed were Tory - accepting of the need for a strong state, of hierarchy in class relations and authority and deference in politics. The Loyalists' desire to construct a political system that was different from that of the United States and repeated fears of American encroachment fostered a counterrevolutionary and conservative ethos. Toryism, anti-Americanism and fear of United States expansion were contributing factors in the unification of the British North American colonies and in the formation of Canada's strong central government.

Lipset, like Hartz before him, determined that Americans were perfect liberal individualists. He described Americans as more achievement-oriented, universalistic, self-oriented and egalitarian than Canadians, while Canadians were more ascriptive, particularistic, collectivity-oriented and elitist than Americans. That is, Americans are more likely to treat

---


79 Ibid. p. 50.

80 Ibid. p. 47.

81 Ibid. p. 32.

82 Ibid. p. 48.
others in terms of their abilities and performances rather than inherited qualities when judging
them and placing them in roles; to apply a general standard to people rather than treat them
differently according to personal qualities or their membership in a class or group; to perceive
the separate needs of others rather than subordinate the individual’s need to the interests of the
larger group; and to stress that all people must be respected because they are humans rather
than emphasize the general superiority of those who hold elite positions. By using the term
egalitarian, Lipset did not mean to infer that Americans favour government efforts to equalize
incomes. Rather, by an egalitarian society, he meant that the differences between low status
and high status people are not stressed in social relations while in an elitist society those in high
status positions are thought to deserve more respect and deference. Indeed, in discussing the
relationship between equality and achievement, Lipset articulated the understanding of formal
equal opportunity embedded in liberal individualism. He noted:

On the one hand, the ideal of equal opportunity institutionalized the notion that
success should be the goal of all, without reference to the accidents of birth of class
or color. On the other hand, in actual operation these two dominant values resulted
in considerable conflict. While everyone was supposed to succeed, obviously certain
persons were able to achieve greater success than others. The wealth of the nation
was never distributed as equally as the political franchise.53

In his latest book, Lipset maintained that while probably the most similar people on earth.
Americans and Canadians still differ significantly according to their countries’ organizing
principles. Lipset elaborated upon his earlier studies of American and Canadian conceptions of
equality. Americans still stress individual success (meritocracy), equality of opportunity, and
reject the idea of government intervention in the economy to promote greater economic
equality. This has led to ironic consequences: the proportion of people living in poverty in the
United States is the highest among developed nations and the country continues to be
exceptional among developed nations in the low level of support provided for the poor in
welfare and housing.54

53 The First New Nation: The United States in Historical Perspective (New York: Basic

54 Continental Divide: The Values and Institutions of the United States and Canada (New
Turning to Canada, Lipset ultimately agreed with Horowitz that the values inherent in tory conservatism give rise in the modern world to social democratic redistributive and welfare policies. He acknowledged that in *The First New Nation* and *Revolution and Counterrevolution* his use of the label egalitarian to describe the United States and elitist to describe Canada may not have captured an important aspect of Canada’s political culture:

‘Egalitarianism,’ however, has many meanings, not all of which are incompatible with elitism. Conceptualized as ‘equality of results’ it enters into the political arena in efforts to reduce inequality on a group level. And it can be argued that tory stimuli, elitist in origin, produce social democratic responses — in particular, efforts to protect and upgrade the positions of less privileged strata, initially legitimized by communitarian or noblesse-oblige values...Canadians are committed to redistributive egalitarianism, while Americans place more emphasis on meritocratic competition and equality of opportunity.\(^{35}\)

The result, according to Lipset, is that Canadians, originally labeled more “conservative” in their values, may now be labeled more “leftist” and “progressive” in many ways than Americans. Lipset concluded: “Ironically....the conservative effort has stimulated an emphasis on group rights and benefits for the less privileged; the liberal one continues to stress more concern for the individual but exhibits less interest in those who are poor and outcast.”\(^{36}\)

**The use of the consensus theory in Canadian legal scholarship**

The Hartz-Horowitz-Lipset thesis is sometimes employed in Canadian legal scholarship to provide support for the argument that Canadians should resist the adoption of American legal models. In his book, *Politics and the Constitution*, Patrick Monahan has argued, like Clifford Geertz, that law is an important institution in which a political community attempts to articulate those values which are most fundamental to its identity. For this reason, he suggested, Canadians should avoid American legal models because American culture is significantly different from that of Canada. American style judicial review, according to Monahan, gives priority to the protection of individual rights and has an impoverished conception of communal

\(^{35}\textit{Ibid.}, p. 156.\)

\(^{36}\textit{Ibid.}, p. 225.\)
politics. Relying on the Hartz-Horowitz thesis, Monahan noted that this model of judicial review stems from the United States’ individualistic political culture in which “life is the individual pursuit of happiness rather than membership in a body politic. All roads converge on the atomistic, pre-political individual maximizing his or her self-interest.” Monahan suggested that Canada’s model of judicial review must reflect its more collectivist nature. Granting that Canadian political culture is broadly liberal, he argued that there are important features of the Canadian political tradition which, unlike the American, “cannot be placed within a purely individualistic framework.” Monahan’s argument is not surprising in the context of the vulnerability of Canadian culture to American influences. He endeavoured to pinpoint and preserve distinctive features of Canadian culture and institutions in the context of fears about cultural homogeneity. But the unintended drawback of this type of analysis is that by emphasizing the cultural differences between the two cultures, it comes close to ruling out the possibility of American consideration of Canadian models. In the following sections I review criticisms of the Hartz-Horowitz-Lipset thesis and provide a description of the diverse nature of American political culture and ideas.

The argument that I will develop below is that Hartz, Horowitz and Lipset were mistaken to assert that negative liberalism and formal equal opportunity have gone unchallenged throughout American history. Rather, I will argue, reformers have criticized these views of liberty and equality, conceptualizing a more socialized view of individuality and recognizing that liberty defined merely as absence of constraint leads to inequalities which preclude the development of meaningful autonomy. The American challenges to Lockean liberalism, because of the cultural similarities between Canada and the United States, resonate strongly with both Horowitz and Lipset’s descriptions of Canadian liberalism. My goal is to


58 Ibid. p. 92.
provide evidence that similar understandings of equal opportunity have been present in both American and Canadian culture.

**Hartz-Horowitz-Lipset revised**

H.D. Forbes has correctly pointed out that despite the continued popularity of the Hartz thesis in Canada, in the United States Hartz has been eclipsed by other interpretations of American culture.99 Hartz's work represented the high point of the "consensus school" in American historiography and was a response to scholarship stemming from the Progressive period in the early years of the twentieth century which had focused on conflict in American history. For example, Hartz, along with Richard Hofstader in *The American Political Tradition*, rebelled against the work of their contemporary Charles Beard who had portrayed the battle over the ratification of the Constitution as one pitting the interests of the economically powerful few against the masses.90

Critics now challenge Hartz's theory on two major counts. First, he mistakenly assumed the existence of only one ideological strain in American history, liberalism. Second, he provided a limited account of that liberalism. Historian Alan Brinkley, with Hartz in mind, makes the point clearly and succinctly:

> Liberalism is not, as some scholars in the 1940s and 1950s maintained, the only important political tradition in America. It has always coexisted, and often competed, with alternative traditions and movements in a diverse ideological world. But liberalism has been near the centre of American political and intellectual life since the beginning of the republic. And it has itself been a broad and changing set of beliefs, difficult if not impossible to define with any real precision.91

As I will show below, liberalism has often interacted with other ideological strains to produce hybrid elements in the culture, so that clear distinctions between ideologies often become

---


blurred. As only one example, David Greenstone's careful analysis reveals that Thomas Jefferson and John Adams respected both John Locke and the ancient republican writers, melding aspects of both outlooks in their writings and public discourse. 92

Because Hartz began his analysis with the American Revolution, he left out 168 years of colonial history, so that the profoundly important existence of Puritan thought was ignored. Similarly, Hartz overlooked the ideas of neo-classical republicanism. In their rejection of individualism and self-interest, neither of these bodies of thought can be labeled liberal theories. 93

Gordon Wood has illuminated Americans' interest in the ancient republics, especially during the revolutionary period. Republicanism focused on the character and spirit of the citizenry which, according to its tenets, had to include frugality, industry, temperance, simplicity and an abhorrence of luxury. 94 The essence of republicanism, and the ideal that dominated the American revolution according to Wood, was the sacrifice of individual interest for the greater good of the whole. Wood quoted a prominent religious figure who defined true liberty as "natural liberty restrained in such a manner, as to render society one great family where every one might consult his neighbour's happiness, as well as his own." 95 Liberty could be reconciled with the public good because politics rested not on the private rights of individuals against the majority will, but on the public rights of the collective against the privileged interests of the rulers. The willingness of the individual to sacrifice his personal wants for the greater good depended on public virtue. Republican thought, with its non-liberal understanding of liberty, also included a version of equal opportunity which would seem


95 Ibid. p. 61.
foreign to modern proponents of formal equal opportunity. Republicans believed equal opportunity to be consistent with "a rough equality of station." Wood explains:

Even the most radical republicans in 1776 admitted the inevitability of all natural distinctions: weak and strong, wise and foolish... Yet, of course, in a truly republican society the artificial subsidiary distinctions would never be extreme. not as long as they were based solely on natural distinctions. It was widely believed that equality of opportunity would necessarily result in a rough equality of station. that as long as social channels of ascent and descent were kept open. it would be impossible for any artificial aristocrats or overgrown rich men to maintain themselves for long. With social movement founded only on merit. no distinctions could have time to harden.96

The subsequent debates over the Constitution demonstrate a battle over conflicting visions of the new republic. The Federalists called for a large commercial republic in which inequalities in wealth and power between citizens were the inevitable result of individual liberty.97 In contrast, Anti-federalist thought drew on classical republican themes. The Anti-federalists "wanted a society in which there were no extremes of wealth. influences. education. or anything else - the homogeneity of a moderate, simple, sturdy and virtuous people."98 While the ratification of the Constitution represented a major shift away from republican ideals. it is incorrect to assert that it resulted in Lockean homogeneity and general ideological consensus. There exists an important and diverse body of work which documents conflict and ideological flux throughout the early history of the United States. These include Sean Wilentz's work on the influence of republican ideas in working class movements in New York City in the early 19th century; Arthur Schlesinger's analysis of the centrality of class conflict and calls for economic equality within the Jacksonian period; and the criticisms of individualism and capitalism in Populist ideology and politics.99

96 Ibid, p. 72.


David Greenstone’s extended critique of Hartz is based on the latter’s underdeveloped sense of the varieties of liberal thought which have been influenced by other American political traditions. Greenstone, focusing on the Civil War era, points out that Hartz neglected consideration of the Southern defense of slavery, much of it made in hierarchical and even collectivist terms. Further, Hartz ignored the elements of New England Puritanism in abolitionist thought. For example, Greenstone argues that Lincoln’s response to slavery cannot be understood in purely Lockean terms. Rather, Lincoln’s arguments included elements of what Greenstone calls reform liberalism, which has roots in the Puritan tradition. In this ideology, liberty was defined as the opportunity to cultivate and develop one’s physical, intellectual and moral faculties in order to become a full human being. Individuals did not just have the option, but also the obligation to do so, as well as the duty to help others do the same. As in republican thought, early proponents of reform liberalism saw this liberty as a condition for and entirely consistent with participation in the political community and therefore the common good. John Adams, an example of a reform liberal, wrote that the obligation of rulers is “to exert all their intellectual liberty to employ all their faculties, talents and power for the public, general, universal good....[and] not for their own separate good.” Reviewing the thought of Daniel Webster, John Adams and Abraham Lincoln, Greenstone concludes that their opposition to slavery was not rooted in a Lockean definition of individual liberty, but rather in their view that slavery’s greatest evil was that it precluded the opportunity for the voluntary pursuit of a moral life in which all humans could meaningfully develop their faculties. With this in mind, we can interpret Lincoln’s call for “a society of equals” in which the leading object of government is to “elevate the condition of men - to lift artificial weights from all

---

100 Greenstone, The Lincoln Persuasion, p. 55.
101 Ibid, p. 113.
shOuld... to afford all an unfettered start, a fair chance in the race of life. not as an articulation of negative liberty. but as an indication of his reform liberalism.\textsuperscript{103}

Another revealing example of the diverse strains in American political culture is the Progressive era, spanning from 1890 to 1920. Progressivism was an important movement which took place at a number of levels: there were philosophical analyses of the nature of liberalism, most prominently by Herbert Croly and Walter Lippman who founded the journal \textit{The New Republic}; Theodore Roosevelt's political platform which was devoted to the regulation of trusts; and labour and protective legislation directed mainly at women and children. In sum, "Progressivism was a national movement, which manifested itself at the federal, state and local levels of government and which was subject to considerable ideological debates."\textsuperscript{104}

Progressivism was a response to conservative social Darwinism and to laissez-faire liberalism. Reformers rejected the idea of a self-guiding market, a non-interventionist state, a negative conception of liberty, and formal equal opportunity. They shared a commitment to extending the democratic principle of equality from the civil and political spheres to the entire society and the economy. Although Progressives drew on liberal, republican, populist and socialist thought, they remained within a liberal framework in their intense devotion to individual liberty and their trepidations about fascist subordination of individual life to the community. But they attempted to redefine individual liberty for the modern age, seeing absence of restraint as only one dimension of individual autonomy. These ideas, as will be clear, had resonances with republican thought.

A crucial part of Progressive theory was the notion that social relations are a fundamental part of human life. This insight profoundly challenged the meaning of individuality embedded in negative liberalism and excluded the possibility of pre-social or non-social experience.

\textsuperscript{103}Richard Ellis, \textit{American Political Cultures} (New York: Oxford University Press. 1993). p. 47.

\textsuperscript{104}Young, \textit{Reconsidering American Liberalism}. p. 149.
Further, perhaps naïvely, Progressives saw no necessary tension between the individual and society. Croly and Lippman, for example, advocated the necessity of cultural and political education to facilitate the progressive integration of individual and societal interests. They stressed the themes of community and social integration made possible by individual action based on civic virtue. They envisioned a national government with lively and widespread political participation on the part of citizens. Community action was especially needed to control the rapidly changing socio-economic order caused by the growth of industrial and financial power in the form of trusts.

The idea of positive liberty was a keystone to Progressive thought. The ideal was of individual autonomy within the framework of community, and was contrasted to both conservative collectivist notions of freedom as subservience to an external purpose and negative liberty defined merely as absence of restraint. Rather, positive freedom required control over the resources necessary to carry out one's individual purposes. Obviously, material conditions of inequality negated this possibility and even compromised the ideal of equal rights formally guaranteed by law. Therefore, broadening the scope of freedom required the gradual equalization of social conditions through the intervention of government activity. John Dewey, a noted Progressive, argued that the forces unleashed by laissez-faire capitalism had resulted in a concentration of power and property that effectively denied the freedom of the working classes. The challenge of the 20th century, he suggested, was "not one of magnifying the powers of the state against individuals, but of making individual liberty a more extensive and equitable matter." The progressive movement was marked not only by intellectual activity but also by increased political activism to cope with the changes wrought by increased industrialization. Social workers, church leaders, and volunteer benevolent associations worked to establish


protective labour laws for children, sanitation codes, and social welfare programs. For example, beginning in 1910, a number of states provided "mother’s pensions" to allow children of widows to remain at home rather than being sent to foster homes or orphanages. Similarly, states began to set up worker’s compensation funds. At the federal level, Congress created the Children’s Bureau and the Women’s Bureau to investigate problems of exploitive labour practices and factory conditions.\(^{107}\) In addition, the settlement house movement began in Chicago in which privileged young people, most from the first generation of women university graduates, moved into poor sections of the city to establish neighbourhood settings for educational, cultural and social services. In brief, "some individual reformers, and the reform movement as a whole, combined a pursuit of economic justice, an expanded democracy, and opportunities for individual development...they urged a new understanding of the interdependence of all people, requiring collective solutions to problems."\(^{108}\)

The Progressive movement has had a great influence on politics and culture in the twentieth century. Some scholars argue that it provided many of the intellectual foundations for the New Deal and the Civil Rights Movement. The former was characterized by a belief that government had to intervene in the structure of modern industrial capitalism in order to ensure the citizenry a basic level of subsistence.\(^{109}\) The latter, as subsequent chapters will reveal, consisted of sustained efforts to elaborate upon a definition of equal opportunity consistent with the earlier challenges to liberal individualism and formal equal opportunity. All of this points to the wisdom of Richard Ellis’ choice to forgo the use of the singular ‘culture’ in reference to the United States. Rather, he suggests that “a satisfactory theory of American


\(^{108}\) Martha Minow, *Making All the Difference*, p. 245. See pp. 239 - 266 for Minow’s discussion of Progressivism. She points out that contemporary feminism’s focus on relationships have roots in progressive thought.

\(^{109}\) Brinkely, *The End of Reform*, p. 5.
political cultures must acknowledge both the pervasive individualism of American life and the centrality of the communitarian or egalitarian challenge.\textsuperscript{110}

The exercise of examining the American and Canadian cultures from an historical perspective opens possibilities for American consideration of Canadian legal models. and also brings forth evidence of varied understandings of equal opportunity within the United States' own liberal past. From my brief examination of several periods in American history, one derives a general picture of equal opportunity which stands in contrast to the theory of formal equal opportunity. In broad outline, this understanding assumes that large material inequalities necessarily impede an individual's opportunity to, as Greenstone put it, cultivate one's physical, intellectual and moral faculties in order to become a full human being. The possibility for every individual to meaningfully pursue this goal depends on positive state action; it cannot flourish in the absence of state intervention. This understanding falls within the realm of liberal thought because the goal is not for the state to determine how individuals should pursue their lives, but rather to provide the conditions for all to have a fair chance to succeed at what they choose to undertake. It will become clear in the succeeding chapters of this thesis that the terms of the debate of the contemporary American discussion of affirmative action are far removed from the ideals that were described above. In contrast, the Canadian discussion of affirmative action strongly resonates with them. Therefore, examination of the Canadian experience with affirmative action, oddly enough, brings Americans in close contact with ideals embedded in their past.

\textsuperscript{110}Ellis, American Political Cultures, p. 154. Ellis discusses the conflicts between what he calls a process-oriented understanding of equality and a results-oriented theory of equality throughout American history, pp. 43-62.
CHAPTER 3
ESTABLISHING THE TERMS OF DEBATE:
THE FIRST LEGAL DISCUSSIONS OF AFFIRMATIVE ACTION

The consensus view of American culture plays a large role in the contemporary American debate about affirmative action. Much of the force of the arguments against affirmative action derives from the contention that affirmative action constitutes a fundamental break with the basic tenets of American equal opportunity, a set of ideas about which, opponents of affirmative action say, there has been agreement throughout the country's history. These opponents regularly point to the Civil Rights Act of 1964 as the ultimate contemporary expression of a liberal consensus about equal opportunity. One commentator, for example, reports that while affirmative action has changed the meaning of American equality, "[a]t the time the Civil Rights Act was passed, equality of opportunity was a concept that, as much as is possible in political life, had an agreed upon if not self-evident meaning." It was only in 1965, he continues, that "the redefinition of American equality under the concepts of group rights and equality of result" began.

Given the endurance of the consensus theory in contemporary debates about affirmative action, it seems important to demonstrate that there was not agreement among legislators in 1964 about the meaning of equal opportunity. Indeed, the debate was the longest in Congressional history in large part because participants could not agree about the requirements of equality. The perception of consensus has been created and reinforced by the repeated citation of the final results of the debate by subsequent lawmakers attempting to discern legislative intent. In keeping with standard modes of legal analysis, lawmakers quote the express provisions of the Act when faced with disputes about its requirements. In their

---

111 Glazer, pp. 44-45.

112 Herman Belz, Equality Transformed, p. 8.

113 Ibid, p. 27.
attempts, the views of the supporters of the Act are accorded more weight than those of its opponents. Lawmakers find adherence to the principles of formal equal opportunity in sections prohibiting discrimination against individuals on the basis of characteristics such as race and gender.

Rather than examining only the final provisions of the Act, however, I will pursue a different type of analysis, one that articulates the cultural meanings present within the discussion. This method will reveal both a conflict among legislators about the appropriate definition of equal opportunity and also how the final version of the legislation was the result of a particular resolution of this conflict. The terms of the debate established in 1964 have structured all subsequent discussions of affirmative action. I agree with James Boyd White who has pointed out that.

[a] statute can be read not merely as a set of orders or directions or commands, but also as establishing a set of topics, a set of terms in which these topics can be discussed, and some general directions as to the process of thought and argument by which the statute is to be applied. [We should] see the statute as a way of starting a conversation of a certain kind on a certain set of topics.114

The legal conversation about affirmative action in the 1990s takes place using the understanding of equal opportunity embedded in the final version of the Civil Rights Act, but there was not a consensus between opponents and proponents about the meaning of equal opportunity. Opponents of the Act articulated what may be called libertarian arguments and claimed that rather than guarantee equal opportunity, the Civil Rights Act should only ensure equality before the law, which, they contended, had already been attained. Their opposition to the legislation was based on the argument that its passage would grant preferential treatment to African-Americans.

As will become clearer in subsequent chapters, the version of equal opportunity that was finally embedded in Title VII of Civil Rights Act was inadequate to the task of addressing the many inequalities faced by African-Americans in the 1960s. In focusing exclusively on

eliminating present discrimination in the nation's workforces, it did not sufficiently take into account the many continuing effects of past discrimination, such as the concentration of African-Americans in low-paying jobs and their lack of training for better employment opportunities. The absence of any exploration of ways to address disadvantage caused by past discrimination, beyond merely forbidding present discrimination, may partially be explained by the supporters' need to appease the more conservative legislators who were opposed to the Act and who were clearly not even committed to formal equal opportunity. This absence is a continuing legacy of the Civil Rights Act and has characterized all subsequent discussions of affirmative action.

This chapter's analysis of arguments made in the first affirmative action debates in the United States and Canada serves several purposes in the thesis. It provides an alternative perspective on the Civil Rights Act of 1964 by demonstrating in detail that the legislation is not an expression of a fundamental consensus about the meaning of equal opportunity. Further, close examination of the terms of debate established in the initial American discussion reveals how they excluded from consideration many aspects of the disadvantages wrought by past discrimination. In contrast, the terms of debate established in the Canadian Human Rights Act of 1977, which allows special programs designed to bring about equal opportunities for disadvantaged individuals and groups, provide alternatives to the inadequate American formulations and has allowed for a more fruitful discussion about how to attain equal opportunity.

Therefore, in this chapter I will outline the arguments put forward by the American legislators involved in the debate about the Civil Rights Act of 1964. Opponents of the bill continually reiterated the argument that it would mandate preferential treatment for minorities. In response, supporters articulated the now familiar refrain: the Civil Rights Act prohibits discrimination based on race, thereby guaranteeing equal employment opportunity, but it forbids preferential treatment. This expression of the theory of formal equal opportunity has
remained an enduring legacy of the debate, one that has reappeared in all subsequent legal discussions of affirmative action.

I will then describe the main assumptions and the major problems associated with the modern theory of formal equal employment opportunity that characterize the Act, focusing on its neglect of a whole array of background inequalities which impede the pursuit of real equal opportunity. I will then show, for the purpose of countering the consensus theory of equal opportunity, how the libertarian theory which characterized the arguments of opponents of the Civil Rights Act significantly differs from formal equal opportunity.

I will then describe the Canadian legislative debates. The Human Rights Act of 1977 states that "special programs" for the disadvantaged may be required, and are therefore allowed, to attain equal opportunity. There was no opposition to the section allowing special programs, and consequently very little discussion of it. Canadian lawmakers seemed determined not to mimic the American understanding of and practice of affirmative action. Subsequent legal reforms, which I will examine in later chapters, were accompanied by more elaborate articulations of the understanding of equal opportunity implicit in these legal reforms. The Canadian experience reveals a formulation of equal opportunity which better responds to past discrimination and its effects. Canadians have formulated a richer understanding of liberal equal opportunity, which I will describe in detail in subsequent chapters. In this chapter I want merely to illustrate the context in which the initial Canadian discussion of affirmative action took place and the formulations Canadian lawmakers employed to describe these programs.

The Civil Rights Act presented by President Kennedy

On July 19, 1963 President Kennedy sent a message and the bill that would eventually become the Civil Rights Act of 1964 to both Houses of Congress. Title VII provided for statutory authorization of a federal Equal Employment Opportunities Commission. This would convert the existing President’s Commission on Equal Employment Opportunity into a national commission with a congressionally approved and appropriated budget. Its function would be
to prevent discrimination against employees or applicants for employment because of race, color, religion, or national origin by government contractors and subcontractors, and by contractors and subcontractors participating in programs in which financial assistance was provided by the Government.\(^{115}\)

On May 8, 1963 Subcommittee No. 5 of the House Judiciary Committee began open hearings on the civil rights bill; these hearings concluded on August 2, 1963. During that summer, over 170 civil rights bills were proposed by members of the House of Representatives. At the termination of the hearings, the Civil Rights Subcommittee sat in private executive session to craft a revised bill. The full Judiciary Committee subsequently met in executive session and on November 20 favorably reported a new civil rights bill. The revised Title VII that emerged from these sessions began by declaring that the opportunity for employment without discrimination of the type contemplated in the bill was a right of all people in the United States.\(^{116}\) It based the authority for the bill on the commerce clause and the privileges and immunities clause of the fourteenth amendment. In contrast to the President's origin version, the Title also made it an unlawful employment practice for private employers to fail or refuse to hire or to discharge any individual because of race, color, religion, or national origin. Employment agencies and labor organizations were subject to similar restrictions.

The duties of the Equal Employment Opportunities Commission were set out in detail. Whenever a charge was filed by or on behalf of an employee, or by a member of the Commission, the employer, employment agency, or labor organization was to be furnished with a copy of the charges and the Commission was to make an investigation. If two or more members of the Commission determined that reasonable cause existed for crediting the charge, the Commission was to employ conciliation and persuasion to convince the respondents to refrain from their actions. If conciliation failed, within ninety days, the Commission could

\(^{115}\)Congressional Record, Senate, July 19, 1963, p. 11,163.

\(^{116}\)This version of the bill is printed in Hearings before the Committee on Rules, House of Representatives, January 9, 1964, p. 76.
bring a civil action in district or federal court to prevent the respondents from continuing to engage in the discriminatory practices. If the Commission decided not to bring an action, the person claiming to be aggrieved could, with the permission of one Commission member, bring a civil action. If the court found that the respondent had engaged in an unlawful employment practice, the court could enjoin the respondent from continuing, and order the respondent "to take such affirmative action, including reinstatement or hiring of employees...as may be appropriate." On January 9, 1964 the Rules Committee began ten days of hearings on the revised bill which ended on January 30, 1964. This, then, led to the discussion in the House as a whole which began on January 31, 1964.

**The debate in the House of Representatives**

In the following sections I characterize the debates which took place in the House of Representatives and the Senate surrounding the Civil Rights Act of 1964. I do not intend to imply that each member of Congress and each Senator provided identical arguments, but rather that there were identifiable patterns in the way they formulated the issues at hand. Further, the quotations that I have selected represent frequently articulated arguments.

In his opening address to the House, Emmanuel Celler (D - NY), the chairman of the House Judiciary Committee who was in charge of the bill for the Democrats in the House, provided a concise statement of the supporters' case for Title VII and indeed, the entire Civil Rights Act. It is clear that even his initial statement was formulated to meet the opponents' concerns that the Act would grant preferences to African-Americans. "The legislation before you...bestows no preference on any one group, what it does do is to place into balance the

---

117 The term affirmative action traces its lineage at least as far back as the Wagoner Act of 1935. There, it was used to define the authority of the National Labor Relations Board to redress an unfair labor practice by ordering the offending party "to cease and desist from such unfair labor practices, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of the Act. In March 1961, President Kennedy issued Executive Order 10,925 which ordered government contracting agencies to "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." See Hugh Davis Graham, *The Civil Rights Era: Origins and Development of National Policy, 1960-1972* (New York: Oxford University Press, 1990), p. 33.
scales of justice so that the living force of our Constitution shall apply to all people, not only to those who by accident of birth were born with white skin."\textsuperscript{118} He continued that "[t]he bill seeks simply to protect the rights of citizens to be free from racial and religious discrimination and to guarantee to them the full enjoyment of rights of citizenship."\textsuperscript{119} Expressing a recognition of the need for such a measure, he declared that "prejudice, ostracism, discrimination, humiliation, and proscription in many places are the order of the day" and compared the plight of blacks to that of Sisyphus in Greek mythology.\textsuperscript{120} Later, Celler substantiated his claim with figures provided by the Department of Labor: for black males with families, the unemployment rate was 3 times more than that of whites; while nonwhites represented only 11\% percent of the total civilian workforce, they represented more than 25\% of the long-term unemployed; 17\% percent of employed nonwhites had white collar jobs while the corresponding proportion among whites was 47\%.\textsuperscript{121}

From the very beginning of the debate surrounding Title VII, opponents insisted that the legislation sanctioned racial quotas while supporters responded that quotas would not be permitted. In the House debate the discussion never progressed farther than claims and counter-claims, while in the Senate supporters went to great lengths, adding amendments to Title VII, to insure that the use of racial quotas would not be sanctioned by it. Emmanuel Celler assured opponents that even if an employer were found to have discriminated, a "court could not order that any preference be given to any particular race, religion or other group, but would be limited to ordering an end to discrimination." Similarly, the new EEOC did not have power to "rectify existing 'racial or religious imbalances' in employment by requiring the hiring of certain people without regard to their qualifications simply because they are of a given race

\textsuperscript{118}Congressional Record, House of Representatives, January 31, 1964, p. 1,517.
\textsuperscript{119}Ibid, p. 1,519.
\textsuperscript{120}Ibid, p. 1,517.
\textsuperscript{121}Ibid. February 8, 1964, p. 2,600.
or religion." Speaker after speaker had to make assurances that racial balancing was not a goal of the title and that no special preferences would be given to black workers in terms of employment or promotion.

A major theme in the arguments of the opponents of Title VII was that the legislation gave too much power to the federal government. The Constitution, they claimed, did not grant to the federal government authority to interfere with the rights of private businessmen, including their right to hire employees on the basis of whether they would be an asset to the enterprise. Opponents claimed that this right was the very cornerstone of the free enterprise system and indeed the basis of freedom. They described the opposite of this freedom as Communism or a police state, in which the central government controls all aspects of both public and private life. The constitutional form of this argument was that there exists no right to be free from individual discrimination, that the 14th Amendment only forbids states from discriminating, not private individuals.

Opponents of the Civil Rights Act immediately seized upon the phrase affirmative action and argued that it was the component of the Act that would allow federal bureaucrats and judges to grant the preferential hiring of blacks. They argued that the equality that should be guaranteed to every individual was equality before the law. They based their opposition to the legislation on several arguments. First, they argued that Title VII would provide for more than equality before the law because it would allow for or perhaps even require the use of racial quotas, giving preferential treatment to black workers in job applications in order to effectuate racially balanced workforces. They perceived this as government legislating social, economic


123 See, for example, Ibid, Congressman Lindsay, January 31, 1964, p. 1.540; Congressman McCulloch, January 31, p. 1.547; and Congressman Goodell, February 8, p. 2.558.

124 See, for example, Ibid, Congressman Grant, February 1, 1964, p. 1.621; Congressman Hall, February 8, 1964, p. 2.603; and Congressman Sikes, February 10, 1964, p. 2.706.
and cultural equality. If this were to take place, and people were afforded jobs on the basis of race, the criterion of merit would be neglected.

The second argument used by opponents was that Title VII's anti-discrimination requirements represented an unconstitutional infringement upon the rights of private property. One of the most basic rights of an employer, they argued, was the ability to choose employees absent any governmental interference. This included the right to "discriminate" amongst prospective employees, although when asked, opponents never responded that employers had the right to discriminate on the basis of race.° For example, Congressman Waggonner asked for "the right to discriminate if I so choose because I think it is my right...I think it is my right if I am a businessman to run it as I please, to do with my own as I will. I think that is a right the Constitution gives to every man." This right was the basis of the free enterprise system and its infringement constituted a loss of freedom, not only for the employer involved, but for all people in a democratic society. Opponents argued that the loss of freedom caused by government interference in private property threatened the very existence of democracy, leading the United States along the path to Communism. Congressman Andrews (D - Alabama) provided the clearest statement of the core argument of opponents:

It is my considered opinion that the bill is in violation of the letter and the spirit of the Constitution of the United States; that its passage would destroy the individual rights which the Constitution was designed to protect, destroy not just the rights of the white citizens of this country, but also the rights of our colored citizens which it purports to protect; and its passage would be a power grab that could lead to a totalitarian dictatorship by the Federal Government.

The proponents of this bill ignore the 'natural' rights of man which no government has a right to violate. Among these rights is the right of every man to the fruits of his labor and the right of every individual to choose his associates. If these rights are denied to one, to a few, or to many they can be denied to all - by whatever group or authority that might happen to be in a position to exercise the power at any given time.°

°The exception here was the segregationists, like Senator Russell Long, who argued that God had ordained that whites and blacks not mix. Here, the argument was that both blacks and whites should be able to discriminate on the basis of race. See, for example, Congressional Record, Senate, April 4, 1964, p. 7,904.


Opponents constantly argued that nowhere in the legislation was the concept of equality defined. From the very beginning of the debate opponents charged that Title VII's ambiguity, due to the fact that it did not define equality and discrimination, would allow federal officials to arbitrarily charge employers with having contravened it. Many claimed that employers who did not keep racially balanced workforces might be vulnerable to charges of discrimination. Congressman Poff's (R - Virginia) statement was standard:

With all of its concern for inequality in employment opportunities, the equal employment opportunity title of this bill wholly fails to define "equality." Nowhere in the title can be found language to guide the Commission in its investigation of charges of racial discrimination...If the Negro labor force in a particular community constitutes 10 percent of the total labor force, will a company whose Negro employees constitute only 5 percent of the company payroll be considered guilty of discrimination?9128

This concern about racial balancing alternatively took the form of trepidation about the clarity of the language of Title VII, such that racial balancing would be a possibility, and certainty that racial balancing would eventuate. Congressman Dowdy (D - Texas), calling Title VII "the most vicious of anything contained in the entire bill." assured listeners that "[t]he employer would be affected in that he would be required, in the face of the threat of jail and fine, to maintain a racial balance in his employees."129

The arguments of the supporters of the legislation were fashioned to meet these concerns. Supporters of the legislation argued that the equality that was to be guaranteed by Title VII was the right to equality of economic opportunity. They argued that this right was the basis of all other rights and that therefore Title VII was the heart of the Civil Rights Act. Congressman Dent (D - Pennsylvania) argued: "It is my humble belief that man's first need is for his physical well-being and, therefore, the first right under any government that must be guaranteed in order that any and all other rights and freedoms can be enjoyed must be the right to an equal opportunity for gainful employment."130 Congressman Minish (D - New Jersey) concurred.

---

calling Title VII "the heart of the civil rights issue since opportunity to earn a living is basic to the enjoyment of other rights. It is essential that we assure equal employment opportunities for all Americans."\(^{131}\)

The elimination of racial discrimination, according to supporters, was a requirement of equal opportunity, and was all that the legislation mandated. Black workers, they argued, who had for centuries faced discrimination on the basis of race, should now be judged on the basis of their merits. Congressman Minish stated: "It is essential that we assure equal employment opportunities for all Americans so that men and women will be considered for jobs on the basis of merit, not on the color of their skin."\(^{132}\) Congressman Corman (D - California) reiterated this ideal: "When we hire people to work we want it to be based on their individual qualifications, not on the color of their skin."\(^{133}\) Congressman Donahue (D - Massachusetts) argued: "The just and sole purpose of [Title VII] is to insure that an individual's qualifications to do a particular job constitute the only measure by which he is given or continued in employment."\(^{134}\)

All of these themes emerged again in the Senate debate, and were discussed in greater detail there.\(^{135}\) In the Senate, however, legislators changed the wording of the Act to meet the demands of its opponents.


\(^{135}\) However, there took place in the House a discussion of gender discrimination that was not taken up again in the Senate. The version of the bill sent to Congress by President Kennedy forbade discrimination on the basis of race, color, religion and national origin. The issue of gender discrimination did not arise in the discussion until Congressman Howard Smith (D - Virginia), vigorous opponent of the legislation, offered an amendment to add "sex" as an additional category to Title VII, in the hope that the bill would then become so controversial that eventually it would be voted down in the House or the Senate. What ensued was the only sustained discussion of gender equality in the entire debate. A bipartisan coalition of five Congresswomen formed immediately to support Smith's amendment and it was eventually passed by a vote of 168-133. See *ibid.* pp. 2578-2582.
The debate in the Senate: Instituting formal equal opportunity

Because of rules allowing unlimited discussion in the upper house, Senators were able to more fully develop many of the same themes that had emerged in the House debate. Supporters of Title VII continued to formulate their responses to meet the arguments of the opponents. For example, Senator William's (D - Delaware) argued that the meaning of equality was clear. He noted:

Some people charge that H.R. 7152 [the Civil Rights Act] favors the Negro, at the expense of the white majority. But how can the language of equality favor one race or religion over another? Equality can only have one meaning, and that meaning is self-evident to reasonable men. Those that say equality means favoritism do violence to commonsense.\(^{136}\)

Senator Clark (D - Pennsylvania) provided another example of the supporters' argument that Title VII merely provided formal equal economic opportunity. He stated: "All [this title] does is to say that no American, individual, labor union, or corporation, has the right to deny any other American the very basic civil right to equal job opportunity...It would establish a legislative civil right for what has always been a sacred American constitutional right, the right to equal protection of the laws."\(^{137}\) Similarly, the theme of merit persisted in supporters' defense of Title VII: they insisted that the legislation would require hiring on the basis of merit in contrast to the present situation in which race often excluded candidates from consideration. Senator Kuchel (R - California) proclaimed: "It is right to stand up and say: Judge me for my ability, for my qualifications, for my talent. Do not judge me for the color of my skin."\(^{138}\)

But opponents were not satisfied with these assurances. They provided evidence that the passage of the legislation would result in what they considered to be undue governmental activity in promoting minority interests. Senator Talmadge (D-Georgia) read into the record a United States Treasury Department Memorandum for the mid-Atlantic region of the Internal

\(^{136}\)Congressional Record, Senate, April 23, 1964, p. 8,921.

\(^{137}\)Ibid. June 9, 1964, p. 13,080.

\(^{138}\)Ibid. March 30, 1964, p. 6,554.
Revenue Service dated March 27, 1964 which he argued was such an example. The memo outlined an "affirmative equal employment opportunity program" to be followed by directors to increase minority hiring and promotion. Among the proposals were directives to work actively with high schools and colleges with substantial or total minority group enrollment to encourage students to prepare themselves for careers with the IRS, seek out and encourage qualified minority member employees to apply for higher level professional positions, and consider minority group employees for various assignments in an effort to broaden their experience and qualify them for more responsible positions. Opponents used this sort of evidence to construct an argument that if Title VII were implemented, it would not be long before employers would be forced to hire unqualified black workers and maintain racial balances in their workforces. In this vein Senator Smathers (D - Florida) stated: "It is not written in the bill that there must be a quota system, but the net effect of the adoption of the proposed law would be that employers, in order to keep themselves from being charged with having discriminated, would, in time, have certain people working for them to meet the color qualifications, the religious qualifications, the creed qualifications, and so on." The consequences would be undue government intervention in the private sector, the diminished importance of the concept of merit, and the inevitable imposition of racial quotas. The repeated assertions finally forced supporters to address these issues by changing the legislation.

Opponents of the legislation in the Senate went to great lengths to explain their understandings of equality. Strom Thurmond (D - South Carolina), more than any other Senator, engaged in a philosophical discussion of the meaning of equality. He asserted that the Civil Rights Act was evidence of Americans' "mythological illusion about and mystical preoccupation with equality. The sole appearance in any of our historical documents of the word 'equality' is in the preamble of the Declaration of Independence. Nowhere is the word in


He read into the record a scholarly article from the *American Bar Association Journal* from August, 1960, the main argument of which was that the Constitution only guaranteed equality before the law. The author argued that the Preamble of the Declaration of Independence, which states "[t]hat all men are created equal, that they are endowed by their Creator with certain inalienable Rights, that among these are Life, Liberty and the pursuit of Happiness" indicates that Jefferson and others involved in the founding wanted recognition of "man's equality of freedom" and "equality at creation." In order to secure this kind of equality, they guaranteed only equality before the law. The author asserted:

> For all men to be 'equally free and independent' they must be 'equal before the law.' There is no such thing as freedom and independence under men. It exists under law or not at all. The 14th Amendment guarantee that no State shall deprive any citizen of 'equal protection of the laws,' is but another way of expressing man's inherent right to equality of freedom and independence under law.\(^{142}\)

The author contrasted this interpretation of the meaning of American equality with Gunnar Myrdal's interpretation of the "American creed," as containing the notions of cultural, economic, and social equality. Thurmond argued that the Civil Rights Act "went beyond" the equality of law, attempting to guarantee these other types of equality.

Both Senator Thurmond and Senator Spessard Holland (D - Florida) read into the record, at different times, an address made by former Supreme Court Justice Charles Whittaker reprinted in the March 23, 1964 issue of *U.S. New and World Report*. The following passage crystallizes into one argument several themes that run throughout the debate. First, according to Whittaker, equality should mean only equality before the law. Second, he associated freedom with democracy and "strict" equality with Communism. Third, he argued that too much equality is a threat to freedom. In a thinly-veiled allusion to civil rights supporters, Whittaker argued that many well-meaning people mistakenly hold the notion that equality means permanent economic equality. Rather, all men are "created equal in the sight of God" and that leads only to the concept that all men are entitled to equality before the law:


[D]emocracy, as a system of government, is not, and was never meant to be a leveler of men. Quite the contrary. It permits, and was intended to permit, the gifted, the energetic, the creative, and the thrifty, economically at least, to rise above the masses, and it intends to leave each man free to earn and find his own level on the stairway to the top. We may justifiably be disturbed by those who advocate socialist means and objectives as the answers to the problems of democracy, and especially to the problems of economic equality.

If men want permanent economic equality, they may find it in communism, for such is the central theme of that philosophy... If men want true liberty and a fair portion of equality - which it seems is all that ever can be had - they must turn to democracy and adhere to its principles."143

Thurmond, drawing upon Whittaker's arguments, more than once articulated what was to become a constant refrain on the part of opponents. This was the notion of meritocratic competition, that people who work hard necessarily succeed. Thurmond argued: "No two men in the world are equal. One who takes more exercise and eats more protein food is stronger than another. Another one reads more books; he learns more; he studies harder; he develops his faculties to a greater degree. Another has a deeper spiritual faith. They are not equal."144

Opponents fixed upon the idea that, through the Civil Rights Act, government was intending to "make men equal," thus intervening in the private sector and infringing economic and political liberty. Most opponents also held the view that since government had already established the equal protection of the laws, no additional legislation was necessary. Senator Ervin's (D - North Carolina) statement illustrates these points:

The idea that Congress can legislate equality among men is an idea which history explodes. It cannot be done. There is only one field in which a free society can legislate equality, and that is equality before the law.

Under the statutes which I have read, under the decisions which I have cited, and under the decisions which I have quoted, it is obvious that the United States has already established equality before the law for all American citizens, regardless of their race.

This [Title] is an effort to go beyond that, and to legislate equality in other fields. The bill ignores the fact that when a free society undertakes to legislate equality in any area except equality before the law, it destroys its own freedom.


That is what the bill would do. It would rob employers of the right to hire, to discharge, to promote, and to fix the compensation of their own employees in any case where a Federal bureaucrat or a Federal court rules that they were actuated by any racial motive in their actions.145

The theme that full equality and full freedom were incompatible reemerged throughout the debate. Making a similar point, Thurmond concluded: "We do not want equality. We want to leave people free. If people do not want to work hard, they have the freedom not to work hard. If people want to strive and get ahead, why not let them get ahead? This is the land of freedom. Why not let people go as far as their ability will permit them to go?"146 Senator Allen Ellender (D - Louisiana) made the same point in its most stark form, again demonstrating the perceived incompatibility of freedom, conceived as the absence of government intervention, and equality. Ellender noted: "This is a bill to have equality coerced by law in violation of the liberties Americans have always enjoyed. If I must make a choice between equality coerced by law and the preservation of the freedom of the individual - his freedom to be free from government tyranny - I shall take my stand on the side of freedom."147

In the Senate debate much more discussion was devoted to the relationship between the protection of private property and the protection of individual rights. Senator Fulbright (D - Arkansas) most succinctly stated the equation of freedom with property rights. "Truly," he argued, "the freedom of man must extend to encompass the right to use his property in any way he deems appropriate unless his action endanger the public."148 Opponents insisted that Title VII represented an unconstitutional infringement upon property rights. Senator Stennis (D - Mississippi) provided a standard account:

The Founding Fathers, in establishing this Nation, laid down certain inviolate principles. Through the years, generation after generation of Americans have preserved these fundamentals as the solid cornerstone upon which our free society rests. One of these fundamentals is the absolute right of our people to be secure in

147Ibid., March 18, 1964. p. 5.616.
and enjoy the private right to own and control their property and use it as they see fit...To pass a bill which destroys the right of private property by, in effect, taking the authority of management from the owner and placing it in a Federal commission would be a staggering blow to the integrity of our Constitution.\textsuperscript{149}

Some opponents of the bill even denied the existence of discrimination. Senator Eastland, for example, insisted: "We do not need a national law because there is no economic discrimination in the South. In my state there is no such thing as economic discrimination. In my state no person is denied a job because of his race."\textsuperscript{150}

As in the House debate, opposing Senators were suspicious that terms like discrimination were intentionally left undefined. Senator Eastland (D - Mississippi), for example, claimed that the term was placed in the bill and then left undefined "in order to increase the power of the bureaucrats and destroy the liberties of the American people."\textsuperscript{151} Their argument was that the federal government would construe the term discrimination as meaning the absence of a racial balance in a workforce, and therefore institute racial balancing. Unlike in the House debate, supporters did more than merely deny this possibility. They were forced to elaborate upon their arguments. Senators Clark and Case (R - New Jersey), who were in charge of Title VII in the Senate, on April 8, 1964 offered an "Interpretive Memorandum of Title VII." which provided a definition of discrimination which accords with the theory of formal equal opportunity:

It has been suggested that the concept of discrimination is vague. To discriminate is to make a distinction, to make a difference in treatment or favor, and those distinctions or differences in treatment or favor which are prohibited by [the legislation] are those which are based on any five of the forbidden criteria: race, color, religion, sex and national origin. There is no requirement in Title VII that an employer maintain a racial balance in his workforce. On the contrary, any deliberate attempt to maintain a racial balance, whatever such a balance may be, would involve a violation of Title VII because maintaining such a balance would require an employer to hire or to refuse to hire on the basis of race. It must be emphasized that discrimination is prohibited as to any individual.\textsuperscript{152}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{149} \textit{Ibid.} March 20, 1964, p. 5,811. See also Senator McClellan, April 14, 1964, p. 7,876.
\item \textsuperscript{150} \textit{Ibid.} April 18, 1964, p. 8,349.
\item \textsuperscript{151} \textit{Ibid.} March 20, 1964, p. 5,864.
\item \textsuperscript{152} \textit{Ibid.} April 8, 1964, p. 7,213.
\end{itemize}
\end{footnotesize}
On May 26, 1964 Senator Everett Dirksen (R - Illinois), the Senate minority leader, offered an amendment to the Civil Rights Act that was effectively a rewritten version of the entire bill.\(^{153}\) The amendment became known as the Dirksen-Mansfield substitute and contains the supporters' ultimate response to opponents' objections to the bill. This version of the bill passed as the Civil Rights Act. It provided for the reduction of authority of the EEOC. In states with fair employment practices commissions, no individual complainant could file a charge with the EEOC until the state or local agency had been given an opportunity to handle the problem under state law. Further, the original House version had allowed the EEOC, if conciliation with an employer failed, to bring suit against him/her in Federal court. Under the Dirksen-Mansfield substitute, only aggrieved persons could, after being notified that conciliation had failed, bring a suit in Federal court. However, the Attorney General was given authority (under Section 707) to institute a suit whenever he had reasonable cause to believe that there was a "pattern or practice" of discrimination in violation of Title VII.

Several other changes were made to Title VII, many of which were for the purposes of clarifying the position of proponents and answering the complaints of opponents. For example, Section 703(e) was added to allow for hiring on the basis of religion, sex, or national origin when it was a bona fide occupational qualification. Section 703(h) allowed for different standards of compensation pursuant to a seniority or a merit system, provided that the differences in treatment were not the result of an intention to discriminate because of race, color, religion, sex or national origin.

I focus here on Sections 703(j) which forbids 'preferential treatment' and 706(g) which authorizes affirmative action for two reasons. First, Section 706(g) is important because, subsequent to the passing of the Act, courts applied this section to employers found to be in violation of it by imposing goals and timetables for improving minority representation.\(^{154}\) Section 703(j), on the other hand, has often been used by judicial opponents of affirmative

\(^{153}\)Ibid, May 26, 1964, pp. 11,926-11,935.

\(^{154}\)For example, in Chapter 4 I will discuss Carter v. Gallagher, 452 F2d 315 (1971).
action to strike down programs. Second, I focus on these sections because both were put in place to appease opponents of the bill.

Section 703(j) was created in order to quell the fears of opponents about preferential hiring. It provided, in part:

Nothing contained in this title shall be interpreted to require any employer...to grant preferential treatment to any individual or to any group because of the race, color, religion, sex or national origin of such individual or group on account of the imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex or national origin.¹⁵⁵

Section 706 (g) was added to ensure that the type of discrimination that would be encompassed by the title would be intentional, that plaintiffs could not claim discrimination on the basis of a racial imbalance in a workforce. It provides: "If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without backpay."¹⁵⁶

Hubert Humphrey (D - Minnesota), who was in charge of the Civil Rights Act for the Democrats in the Senate, explained the differences between the House version of the bill and the Dirksen-Mansfield substitute. He highlighted Sections 703(j) and 706(g), calling both of them clarifying changes directed at calming the fears of the opponents of the bill. For Title 703(j) he stated:

The proponents of this bill have carefully stated on numerous occasions that Title VII does not require an employer to achieve any sort of racial balance in his workforce by giving preferential treatment to any individual or group. Since doubts have persisted, subsection (j) is added to state this point expressly.¹⁵⁷

For 706(g) he explained:

Section 706(g) is amended to require a showing of intentional violation of the title in order to obtain relief. This is a clarifying change. Since the title bars only

¹⁵⁵Ibid. May 26, 1964, p. 11,931.
¹⁵⁶Ibid. May 26, 1964, p. 11,931.
¹⁵⁷Ibid. June 4, 1964, p. 12,723.
discrimination because of race, color, religion, sex, or national origin it would seem already to require intent, and, thus, the proposed change does not involve any substantive change in the title. The express requirement of intent is designed to make wholly clear that inadvertent or accidental discrimination will not violate the title or result in entry of court orders.\textsuperscript{158}

The changes made to Title VII represent the proponents' responses to the conservative opposition to the Act. On June 19, 1964, the Senate voted to pass the Civil Rights Act by a vote of 73-27. On July 2, the House agreed to the Senate's revised version by a 289-126 margin.

It is impossible to determine whether proponents of the Civil Rights Act would have developed more adequate solutions to the problems caused by years of discrimination if they had not been faced with such sustained opposition. In any case, I have suggested that one reason for the structure of argument that has persisted in most affirmative action debates since 1964 is the fact that there was no consensus about the meaning of equal opportunity, and proponents had to structure their responses to meet the opponents' concerns about preferential treatment. This has resulted in the use of the 'equal opportunity versus preferential treatment' formulation in all subsequent legal discussions of affirmative action, which promotes the notion that equal opportunity is attained when all individuals receive equal treatment. This formulation, I will make clear in the following section, has impeded consideration of the complex effects of past discrimination and how their existence makes real equal opportunity unattainable.

\textit{Formal equal employment opportunity}

Formal equal employment opportunity, like all liberal theories, is based upon a belief in the equal moral worth of individuals, which demands that the state regard each one with an equality of respect "which is owed to persons irrespective of their social position."\textsuperscript{159} Based on this equal moral worth, the state must guarantee individuals equal liberties in the form of.

\textsuperscript{158}\textit{Idem.}

for example, rights to free speech and assembly, and the right to vote. It is the scarcer goods like quality education, jobs, income and political power that a liberal state does not guarantee equally to all, and this poses the question of what attributes of persons, beyond their equal moral worth, should be considered in the distribution.\textsuperscript{160}

In the contemporary formal theory of equal economic opportunity, the animating idea is "careers open to talents."\textsuperscript{161} This is a liberal theory because of its commitment to individual liberty in that "it ensures that peoples' fate is determined by their choice, rather than their circumstances."\textsuperscript{162} Accordingly, in the distribution of social goods, citizens are not judged on the basis of personal attributes like race and gender, which are "accidents of birth" and therefore irrelevant from a moral point of view, but on the basis of morally relevant characteristics such as qualifications, talent and motivation.\textsuperscript{163} Formal equal opportunity considers it fair for individuals to have unequal shares of social goods, like access to good jobs, if those inequalities are earned, that is, if they are a product of a person's choices and actions, rather than a person's social circumstances. These two requirements of choice and merit give rise to the doctrine of equal opportunity which dictates that "those who are at the same level of talent and ability, and have the same willingness to use them, should have the same prospects of success regardless of their initial place in the system."\textsuperscript{164}

This theory translates into the requirement that individuals should be treated impartially by the state, without regard to irrelevant personal attributes. Of course, legislation often applies to

\textsuperscript{160}Melissa Williams, "Voice, Trust and Memory: Marginalized Groups and the Failings of Liberal Representation" (Ph.D. diss., Harvard University, 1993), p. 99. Williams' discussion of formal equal opportunity helped me to understand all of its most basic assumptions.


\textsuperscript{163}Brian Barry, "Equal Opportunity," p. 28.

\textsuperscript{164}John Rawls, \textit{A Theory of Justice}, p. 73.
some groups of individuals and not others, but liberal equal opportunity requires that these distinctions not be based on attributes like race and gender. Adherence to equal opportunity so conceived assumes a belief in what J.R. Pole has called the "concept of interchangeability," which is "a conviction that the social, racial, educational and economic differences that divide people from one another are not the most significant indicators of their true qualities or abilities: that an interchange of circumstances, in other words, would produce an interchange of results."¹⁶⁵ Formal equal opportunity assumes that every individual has the same core identity which requires the recognition of their equal moral worth, so that given the absence of barriers based on morally arbitrary characteristics, people with equal talents will attain equal shares of social goods, regardless of their background circumstances.

Formal equal opportunity demands the existence of impartial procedures for the distribution of social goods, ones that ensure that individuals compete on the basis of merit. Once neutral procedures are in place, formal equal opportunity does not concern itself with outcomes, as people with superior levels of talent and ambition will gain more social goods. Herman Belz, a proponent of formal equal opportunity explains many of its core tenets:

The concept of equal opportunity is exemplified in impartial procedures that treat individuals equally - that is, that create a situation where they can compete on the basis of ability and be judged according to achievement, rather than irrelevant criteria over which they have no control. As public policy, equal employment opportunity consists of procedural requirements that, through the prohibition of racially motivated practices, have the positive effect of expanding the sphere of individual liberty. Equal opportunity is a persuasive and appealing social philosophy because it offers the prospect of individual achievement and progress. In policy terms it is concerned with forms, rules, procedures and practices that are directed toward the end of enabling individuals to demonstrate personal effort and merit.¹⁶⁶

A glaring problem with equal opportunity so conceived is its disregard of background inequalities. Individuals who have received inferior nutrition, parenting, and education, given the same level of talent, will most likely not be able to achieve the same level of success as relatively more privileged individuals. Formal equal opportunity is often called "abstract"


¹⁶⁶Belz, Equality Transformed, p. 10.
equality to indicate its disregard for background circumstances that often make up a large part of individuals' identities and limit their chances for success. For example, poverty and malnutrition correlate highly with developmental disabilities, limiting the opportunities a child can expect during her lifetime.\textsuperscript{167} Similarly, if self-respect is, as John Rawls has posited, perhaps the most important primary good and a determinant of social success, it is not hard to see how many African-Americans have been damaged by the existence of a legal system that took for granted and enforced their inferiority.\textsuperscript{168} As Melissa Williams points out: "Precisely those factors that were supposed to be "morally arbitrary" -- race, class, sex, etc. -- are the ones that correlate most highly with relative advantage and disadvantage at earlier stages of an individual's life. Consequently, a procedure that purports to treat all individuals alike will likely result in the success of the advantaged and the failure of the disadvantaged given equal levels of talent and ambition."\textsuperscript{169} In short, formal equal opportunity is too optimistic about the prospects of success for individuals with extreme background disadvantages.

\textit{Libertarian theory}

But for all its drawbacks, formal equal opportunity may be said to be an improvement upon the libertarian theory expressed by opponents of the Civil Rights Act. The consensus view of the Civil Rights Act is mistaken to equate the understanding of the requirements of equal opportunity of the proponents and opponents of the bill. Opponents expressed formulations which correspond to basic elements of libertarian thought. Libertarians begin with the view that real equality does not require equal opportunity, but rather equal rights to life.

\textsuperscript{167}Melissa Williams, "Voice, Trust and Memory," p. 104.

\textsuperscript{168}Rawls, \textit{A Theory of Justice}, p. 440. Cornel West correctly argues that the issue of self-respect is an integral component of equality. As he puts it: "The quest for black identity involves self-respect and self-regard, realms inseparable from, yet not identical to, political power and economic status...The issues of black identity...sit alongside black poverty as realities to confront and transform. The uncritical acceptance of self-degrading ideals, that call into question black intelligence, possibility, and beauty not only compound black social misery but also paralyze black middle-class efforts to defend broad redistributive measures." See \textit{Race Matters} (Boston, MA: Beacon Press, 1993), pp. 65-66.

\textsuperscript{169}Williams, p. 104.
liberty, and property, with liberty as the primary right which necessarily entails the following two rights. Libertarianism may be said to take the liberal value of individual choice to an extreme. The protection of the rights to life, liberty and property are paramount to libertarians because they "reflect the underlying Kantian principle that individuals are ends and not merely means" and they take seriously "the existence of distinct individuals who are not resources for others."170 A minimal state, limited to "the narrow functions of protection against force, theft, fraud, enforcement of contracts, and so on, is justifiable; any more extensive state will violate persons' rights not to be forced to do certain things, and is unjustifiable."171

It is important to provide a brief description of libertarian thought here because the arguments of the opponents of the Civil Rights Act resonate so strongly with it. Robert Nozick, perhaps the foremost contemporary libertarian thinker, begins from the premise that the only way to respect individuals' equal rights is to recognize the principle of self-ownership. Since individuals own themselves, they have a right to their natural assets, and this right necessarily entails a right to use their assets freely and to whatever flows from that use. The right to private property in turn flows from this free use of human assets.172 Indeed, "[a]ll libertarian thinkers agree that the right to (almost completely) unfettered private property is one without which the rights to life and liberty are rendered meaningless or at best completely ineffective."173 According to Nozick, whoever makes something is entitled to it, and any legal system that forces that person against his will to do something with it that he would otherwise not have done violates his rights.174 Opponents of the Civil Rights Act criticized the legislation precisely on the grounds that it represented a dangerous example of an over-zealous

---

171 Ibid. ix.
172 Ibid. p. 172.
174 Nozick, p. 160.
government violating employers' property rights by taking away their liberty to choose their employees, thus forcing them to "give away" parts of their property to employees.

Although Nozick admits that the present distribution of property is not legitimate in that some property has been attained by force or fraud, he argues that a just initial acquisition in which each person legitimately took possession of property, leaving "enough of and as good left in common for others" is theoretically possible. Given such a just initial acquisition, the choices of subsequent generations of individuals should determine subsequent distributions of holdings. The central claim of Nozick's, or any libertarian theory, is that if we assume that everyone is entitled to the goods they currently possess, then a just distribution is simply whatever distribution results from people's free exchanges. This may result in gross inequalities between individuals, as some will have talents that are more valued in a free market and may inherit property from ancestors, while others may have talents which are not valued and inherit no property. Extreme inequalities are justified, according to Nozick, because attempts to alleviate them, in the form of, for example, taxing wealthy persons to provide welfare payments to poor people, violates the former's rights by forcing them to do something they may not want to do. In fact, the value placed on individual choice in libertarian thought outweighs the commitment to equal opportunity. Nozick argues that if a person has legitimately acquired something, then that person has an absolute right over it, even if his choice to withhold it from others interferes with their chances of having equal opportunities. Nozick explains that there are only two ways to provide equal opportunity for all: by directly worsening the situations of those more favored with opportunity, or by improving the situation of those less well-favored. He continues:

The latter requires the use of resources, and so it too involves worsening the situation of some: those from whom holdings are taken in order to improve the

---

175 Ibid, p. 175. Amy Gutman criticizes Nozick by sketching a scenario of the landing of the Mayflower: One enterprising Pilgrim immediately runs onto shore to lay claim to an enormous tract of land, while his fellow Pilgrims remain on board long enough to agree to a political constitution. Libertarians might applaud his initiative. However, the scenario neglects the question of possible prior ownership by aboriginal peoples, calling into question the entire concept of a legitimate initial acquisition of property.
situation of others. But, *holdings to which these people are entitled may not be seized, even to provide equality of opportunity for others.* In the absence of magic wands, the remaining means toward equality of opportunity is convincing persons each to choose to devote some of their holdings to achieve it.\textsuperscript{176}

To reiterate, the arguments of the opponents of the Civil Rights Act, resonate strongly with, and are at times identical to those made by Nozick. Unlike Nozick, however, the opponents *did* claim that the existing distribution of property was just. That is, they argued that the disadvantages experienced by African-Americans were not the result of past discrimination because discrimination had been eliminated long ago. Therefore, they argued that the Civil Rights Act constituted a scheme to illegitimately confiscate the property of the nation's employers by taking away their discretion in hiring employees, and "give it" to African-Americans in the form of preferential treatment in employment. They did not propose that government should ensure equal opportunity, but instead argued that the only appropriate role for the state was to guarantee equality under the law, which they in turn said had already been achieved. Opponents of the Act consistently repeated that the legislation would bring about preferential treatment in contrast to equality before the law. The consensus theory of the Civil Rights Act is not correct. The inadequate terms of debate established in 1964, which have characterized all subsequent legal discussions of affirmative action, took form in the context of a fundamental dispute about the requirements of equal opportunity. As we will see below, the first Canadian discussion of affirmative action took place in a different context and established different terms of debate.

*Canada's first legal debate of about affirmative action*

The first federal legislative discussion of affirmative action in Canada surrounded the enactment of the Canadian Human Rights Act 1977. By 1977 the federal government had already established what it called "special programs" in the Public Service Commission, which were designed to improve the hiring and advancement of women and visible minorities.

\textsuperscript{176}\textit{Ibid}, p. 235. (my emphasis).
Further, most provincial human rights codes had provisions allowing the establishment of special programs to ameliorate the conditions of disadvantaged groups. The term affirmative action did not appear in the Act itself, but legislators and representatives of interest groups adopted the American wording to refer to the parts of the Act allowing special programs. Affirmative action did not generate the kind of controversy the Civil Rights Act of 1964 had, and in fact there was very little discussion of it in the legislative debate. Nor were there any theoretical considerations of the concepts of equality and discrimination. An acceptance of the compatibility of the ideas of equal opportunity and special programs is present in the arguments of lawmakers throughout the debate.

In this part of the chapter I will provide the context of the first Canadian legislative discussion of affirmative action in the form of descriptions of earlier human rights provisions allowing special measures, programs that existed before 1977, and arguments made by the interest groups most involved in the legislative debate. An analysis of arguments about equal opportunity and affirmative action in the legislative debate itself follows. Implicit in the earlier law, programs, and interest group arguments is the assumption that special programs and equal opportunity are compatible, unlike in the American discussion in which they were conceptualized as diametrically opposed. However, there was at this time no explicit formulation of this compatibility, and no extended discussion of the requirements of equal opportunity.

*Canada's special programs*

Perhaps one reason for the lack of resistance to affirmative action in Canada was the fact that the purview of the Human Rights Act was small. Like Title VII of the Civil Rights Act, the Canadian Human Rights Act prohibited discrimination in employment and established a specific body, the Canadian Human Rights Commission, to promote and enforce the legislation. In addition, it explicitly permitted voluntary special programs and granted authority to the Commission to order their implementation in the case of a finding of discrimination. But
the reach of the federal government in employment was smaller in Canada than in the United States. Through the Civil Rights Act of 1964 the federal government gained legal jurisdiction to address discrimination in the private sector. However, in relation to employment, the Canadian Human Rights Act covered only employment in the federal public service. Crown corporations and with "any operations in connection with federal work, undertakings or business."\(^\text{177}\) Therefore, the Canadian Human Rights Act of 1977 only covered about 10% of the Canadian workforce.

But the jurisdiction of the Commission cannot entirely explain the lack of resistance to affirmative action. Canada had a history of allowing the creation of special programs to advance the well-being of members of disadvantaged groups. By 1977, the provinces of Nova Scotia, British Columbia, New Brunswick, Ontario, Manitoba and the Northwest Territories had sections in their human rights codes allowing for the adoption of voluntary special programs.\(^\text{178}\) For example, the first such Canadian provision was adopted by Nova Scotia in 1969. Section 19 of the Nova Scotia Human Rights Act reads: "The [Nova Scotia Human Rights] Commission may approve programs of government, private organizations or persons designed to promote the welfare of any class of individuals, and any approved programs shall be deemed not to be a violation of the prohibitions of this Act."\(^\text{179}\) Moreover, at least one piece of federal legislation contained a stipulation giving the Minister of Indian Affairs and Northern Development authority to require that companies drilling for oil institute a special program before being granted a license by the government.\(^\text{180}\)


\(^{178}\)Ibid., pp. 156-7.

\(^{179}\)Idem.

\(^{180}\)The *Oil and Gas Production and Conservation Act 1972*, under the heading Affirmative Action Programs, Section 5(3), stated: "The Minister may require that any plan submitted pursuant to Subsection 2 include provisions to ensure that disadvantaged individuals or groups have access to training and employment opportunities."
The Report of the Royal Commission on the Status of Women in 1970 created impetus for the creation of special programs directed at women. The release of the Commission’s Report was a watershed event in Canadian history. The creation of the Commission took place in the context of a “new philosophy [on the part of the federal government] of welcoming women more fully into the public sphere.” Pressure had been put on Prime Minister Pearson by a group of leading Canadian women to create the Royal Commission on the Status of Women, which was established in February 1967. Thirty-four research projects were commissioned and public hearings were held across the country. The Commission was directed by the Government to “recommend what steps might be taken by the Federal Government to ensure for women equal opportunities with men in all aspects of Canadian society.” The Commission adopted as one of its four principles that “in certain areas women will for an interim period require special treatment to overcome the adverse effects of discriminatory practices.” It proposed numerous recommendations urging the Federal government to “take special steps to increase the number of women appointed to occupations and professions not traditionally female.” The Report did not provide a theoretical discussion of the relationship between its commitment to special measures and its mandate to provide equal opportunity.

The Royal Commission’s report was important because the National Action Committee on the Status of Women (NAC) and the Advisory Council on the Status of Women (ACSW)

---


183 The others are: (1) women should be free to choose whether or not to take employment outside their home; (2) the care of children is a responsibility to be shared by the mother, father and society; and (3) society has a responsibility for women because of pregnancy and child-birth, and special treatment related to maternity will always be necessary. See Report, xii.

184 Ibid. p. 114.
eventually formed in order to force the implementation of the Report's proposals, one of which was passage of a federal Human Rights Act. The section of the Report dealing with women in the public service relied on two previous reports, one commissioned by the Department of Labour and the other by the Public Service Commission, both of which identified discrimination against women as a problem that needed to be addressed. In the latter, Kathleen Archibald advocated that special programs be put in place to adjust the structure of employment in the Public Service where it imposed unfairly on women. She argued that while the International Labour Organization Convention on discrimination, signed by Canada in 1964, called for equal treatment, it nevertheless also recognized the necessity of "special measures designed to meet the particular requirements of persons who, for reasons such as sex, age, disablement, family responsibilities or social or cultural status, are recognized to require special protection or assistance, shall not be deemed discriminatory." The Royal Commission's report, however, did not provide an analysis of the nature of discrimination facing women or an extended discussion of the relationship between special programs and equal opportunity.

185 After the publication of the RCSW Report, Laura Sabia, NAC's future first president, convinced Minister of Manpower and Immigration Bryce Mackasey to provide enough money to bring women from across Canada for a conference on the future of the recommendations of the RCSW. From this Strategies of Change conference held in Toronto in April, 1972 emerged formal recognition of the newly formed NAC, a coalition of women's groups with the aim of maintaining communication with women across the country and getting the RCSW recommendations implemented. Lorna Marsden, "The Role of the National Action Committee on the Status of Women in Facilitating Equal Pay Policy in Canada" in Ronnie Steinberg Ratner (ed.) Equal Employment Policy for Women: Strategies for Implementation in the United States, Canada and Western Europe (Philadelphia: Temple University Press. 1980), p. 245. On May 31, 1973, the ACSW was established in the federal government as a semi-autonomous organization. Its mandate was to "advise the Minister Responsible for the Status of Women in respect to such matters relating to the status of women as the Minister may refer to the Council for its consideration, or the Council considers appropriate." Status of Women News. Summer, 1974. p.1.


187 Ibid. p. 9.
As I have already mentioned, in the early 1970s, the federal government began to establish programs aimed at increasing the employment of minorities and women in the federal government. For example, the Office of Native Employment, established in 1972, offered advice on applying for jobs and preparing for interviews while the Native Training Program was started in 1977 to help native employees adjust to working in the Public Service. A Black Employment Program began in 1973 in the Nova Scotia regional office to provide employment counseling. Other initiatives included recruitment of minorities, ensuring that information on positions was well distributed and opportunities for employment were explained at meetings and through formal presentations. Managers were encouraged to include minority members on selection boards at the initial stages of interviewing.

In terms of programs for women, in 1971 the Public Service Commission created the Office of Equal Opportunities for Women, charged with stimulating career opportunities for women. Regional branches of the office acted as resource centres for women, helping them to apply for jobs in the federal civil service and advising the departments on staff training and development courses to increase the promotion of women. In 1972, a Cabinet directive issued to all Government deputy heads instructed them to "take steps to encourage the assignment and advancement of more women to middle and upper echelon positions."188

In 1974, upon direct request from the ACSW, a directive went from the Prime Minister to all Crown corporations and agencies, stating the Government's commitment to equal access for women to job opportunities and training, and requesting that they take steps to improve the situation of women in their employ and report progress to the Minister Responsible for Women.189 In 1975, a joint Public Service Commission - Treasury Board policy statement asked all government departments to designate an officer responsible for an Equal Opportunities for Women Program, and to develop five year action plans to increase the

---


recruitment, staffing, training and development of women. The Treasury Board was responsible for the monitoring of the plans while the Public Service Commission was responsible for providing advice and assistance for the development and implementation of them. Jean Chrétien, President of the Treasury Board stated: "It is our objective that within a reasonable period of time, the representation of male and female employees in the public service will approximate the available proportion of interested and qualified persons of both sexes." Starting in January of 1976, each department was to submit its annual targets and action plans for approval by the Treasury Board. Advisory bodies were created to investigate each department's progress and report it to the Minister Responsible for Women.

**Draft legislation and reaction to it**

Therefore, by the time the Canadian Human Rights Act was seriously contemplated by legislators, Canada had a good deal of experience with special programs. On July 21, 1975, the Minister of Justice Otto Lang tabled Bill C-72, a draft Human Rights Act. It contained Section 15(1), entitled "Special Programs" which read:

> It is not a discriminatory practice for a person to adopt or carry out a special program, plan or arrangement designed to prevent disadvantages that are likely to be suffered by, or to eliminate or reduce disadvantages that are suffered by, any group of individuals when those disadvantages would be or are based on or related to the race, national or ethnic origin, colour, religion, age, sex, marital status or physical handicap of members of that group, by improving opportunities respecting goods, services, facilities, accommodation or employment in relation to that group.\(^{190}\)

The interest groups most involved in the development of the legislation after its initial introduction were NAC and ACSW. Both organizations activities' focused on women's economic issues. For example, in its first annual report the ACSW stated that it placed priority upon the establishment of a federal Human Rights Commission to facilitate equal access to employment opportunities for women. Its list of priorities for 1973-4 demonstrates this commitment: number one was the establishment of a Human Rights Commission, number two

was an amendment to the Canadian Labour Code to ensure equal access to job opportunities for women, and number seven was more equitable employment for women in the federal government.

After the introduction of the draft version of the Act, the Advisory Council on the Status of Women published a document titled *ACSW Recommendations on Bill C-72*, and three months later *Further Recommendations of the ACSW in Respect to the Proposed Federal Human Rights Commission*. The Council took part in a number of study groups and task forces and provided research to politicians.\(^{191}\) It appears that the ACSW believed the government's initiatives, especially the Chrétien directive, would effect major changes and therefore did not push for more aggressive special programs for women or more explicit regulations in the Human Rights Act.\(^{192}\)

Similarly, NAC did not pressure the federal government to explain the exact nature of special programs at this point, because it was primarily concerned with "equal pay for work of equal value" stipulations. For example, at its second annual meeting in May 1975, NAC had designated four priority areas: equal pay for work of equal value, childcare services, birth control and abortion, and family and property law. At that meeting, affirmative action was characterized as "a side issue to equal pay for work of equal value."\(^{193}\) In May 1976, NAC published the results of a survey distributed to both individuals and women's organizations in frequent contact with NAC. NAC received 33 responses from organizations with more than 500 members, 42 responses from organizations with less than 500 members, and 61 responses from individuals. Participants were asked to indicate which issue was most important to them, from a list of 24 issues offered by NAC. In all three categories, equal pay for work of equal value was ranked the most important issue. Affirmative action was not on the list.


\(^{192}\)*ACSW. Further Recommendations of the ACSW in Respect to the Proposed Federal Human Rights Commission*, p. 10.

Lorna Marsden, then President of NAC, argues that many Canadian women involved in the women's movement during this time were ambivalent about the concept of affirmative action because of its American origins. During the early 1970s there was enormous resentment by some Canadian nationalists involved in the women's movement toward the American feminists in Canada who they perceived as "taking over" the movement. This context, Marsden argues, explains why affirmative action was not on NAC's survey and why NAC did not pay more attention to the issue during the legislative debate.¹⁹⁴

Almost all of the discussion of the Human Rights Act in the *Status of Women News*, NAC's news magazine, concerned the topic of equal pay for work of equal value. For example, in her past-president's report in May 1977, Lorna Marsden noted that the Human Rights Act had been one of the three major issues of concern to NAC from May 1976 to May 1977. During the summer, NAC representatives had met with officials of the Departments of Labour and Justice to discuss the equal pay for work of equal value concept and on February 21, 1977 met with Secretary of State John Roberts to discuss it again.¹⁹⁵ Nevertheless, in its 1977 annual meeting in Ottawa, from March 18-21, NAC did recommend that Section 41(2)(a) of the Human Rights Act be strengthened to empower Human Rights Tribunals to require the employer to start an affirmative action program if the employer has been found to be guilty of discrimination. NAC repeated this demand in its brief to the Standing Committee on Justice and Legal Affairs and it was added to the Human Rights Act.

*The final draft: an equal opportunity to make the life one wishes to have*

The Canadian Human Rights Act of 1977 begins with the following statement of purpose:

> Every individual should have an equal opportunity with other individuals to make for himself or herself the life that he or she is able and wishes to have, consistent with his or her duties and obligations as a member of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex or marital status, or conviction


for an offense for which a pardon has been granted or by discriminatory employment practices based on physical handicap."\textsuperscript{196}

The Act provided for the establishment of the Canadian Human Rights Commission. The Commission was to receive complaints from individuals who had reason to believe they had been discriminated against, but also could itself initiate complaints. The Commission could appoint a conciliator for the purposes of attempting to bring about a settlement of the complaint and/or it could appoint a Human Rights Tribunal, consisting of not more than three members, to inquire into the complaint. The Tribunal would act in the same manner as a superior court of record, that is, for example, by summoning witnesses and compelling them to give evidence.

If the Tribunal found that an employer had discriminated, it could, according to Section 41(2)(a), order: "that such person cease such discriminatory practice and, in consultation with the Commission on the general purposes thereof, take measures, including adoption of a special program, plan or arrangement referred to in subsection 15(1), to prevent the same or a similar practice occurring in the future."\textsuperscript{197}

**The House of Commons discusses affirmative action**

There was no extended discussion of affirmative action and no dispute about its legitimacy in the House of Commons debate. On February 11, 1977 Minister of Justice Ronald Basford moved that Bill C-25, a second version of the Human Rights Act, be read a second time and referred to the Standing Committee on Justice and Legal Affairs. In his introduction of the bill he said that it was a response to the "deep and urgent concern in various parts of the country about the extent of racism and other illegitimate forms of discrimination practised in our country."\textsuperscript{198} The principles embedded in the new legislation, he continued, "rest upon the inherent dignity and the equal and inalienable rights of all members of the human

\textsuperscript{196}The Canadian Human Rights Act, p. 1.

\textsuperscript{197}Ibid., p. 22.

\textsuperscript{198}House of Commons, Debates, February 11, 1977, p. 2975.
family" which include "equal entitlement to all rights and freedoms including equal opportunity for self-realization and the enjoyment of life."¹⁹⁹ There were at present, Basford noted, "no comprehensive guarantees against infringement within the federal jurisdiction by corporations, citizens or government of many basic egalitarian rights." The Canadian Human Rights Act was to fill the void providing "over-all, comprehensive prohibition of discriminatory conduct by officials and private individuals within the federal domain."²⁰⁰ Although Basford did not mention affirmative action in his opening remarks, he explained that the bill required equal pay be given for work of equal value, the first time the concept had been implemented in legislation. Additionally, he specifically thanked the Advisory Committee on the Status of Women and "the various organizations concerned about women's rights, for their work and their advice to me on this subject."

Neither the Progressive Conservatives or the New Democratic Party disagreed with the need for the bill. Gordon Fairweather (PC - Fundy-Royal), speaking for the Progressive Conservatives, stated, "from the point of view of my party, I can tell the minister that we welcome the bill and will be anxious to see it progress as rapidly as possible."²⁰¹ He too acknowledged "an increase in racial and other tensions manifest in our country," and that the Human Rights Act was a response to it.²⁰² In terms of the purpose of the legislation, Fairweather explained: "Really, what the government is attempting in the human rights legislation might be likened to lighting a candle toward respect for each and every human being. I suggest that the cultivation of such respect requires more than law. It requires a fundamental commitment to the worth of humankind."²⁰³ Similarly, the NDP leader stated: "This party will support this bill at second reading. We have no desire whatever to hold it up."

¹⁹⁹Ibid. p. 2975.
²⁰⁰Idem.
²⁰¹Ibid. p. 2987.
²⁰²Ibid. p. 2978.
²⁰³Ibid. p. 2980.
He also noted: "To us, this bill...is timely because it is obvious that there is a serious danger of the poison of racial feelings being expressed in a way which is entirely damaging and harmful to our community."  

The Committee on Justice and Legal Affairs: Rejecting the American model

The Committee on Justice and Legal Affairs held hearings on the legislation in which there was a somewhat more in-depth discussion of affirmative action. In its brief to the Committee, the ACSW argued that affirmative action programs were important components of any strategy aimed at the integration of women into the workforce. It defined affirmative action programs as "a set of temporary measures to enable a disadvantaged group to catch up with the rest of the population."

It was in the Committee that the most specific discussion of the meaning of affirmative action took place. One member, Stuart Leggatt (NDP - Westminster), prodded discussants to elaborate upon their understandings of affirmative action. To a representative of the Advisory Council on the Status of Women he asserted: "'Affirmative action' is a very vague kind of phrase, and I am concerned that it is not fleshed out very much as to what affirmative action really means under the terms of the Bill. And I wondered if you could help the Committee by telling us how we could go about affirmative action."

Not only did Leggatt continually ask representatives to more fully articulate their use of the term affirmative action, he expressed concern that without the use of quotas, discrimination would persist. No other member of Parliament mentioned quotas, and none of the representatives of the organizations that came before the Committee agreed with his perceived need for them. To a representative of the Canadian Labour Congress, who in his testimony to

---

204 Ibid. p. 2983.
205 House of Commons, Committee on Justice and Legal Affairs. Minutes of Proceedings and Evidence, 8A:42.
206 Ibid. 8:12.
the Committee requested that training programs be included in Section 15(1) as one form of special programs, Legatt queried: "Should we not have something in this bill where at least there is some discretion on the part of the Commission to say that you need to hire a certain percentage of a particular group to redress the age old discrimination against some groups...Should we not have some provision for ultimately getting to the quota situation...after we have done everything we can through training programs and so on?" To this the representative retorted: "No. I will tell you why. We think good affirmative action programs can work. To go to the States, where they have tried a quota system, what often happens is, to meet a quota system, they hire 20 blacks, and what do they do. They sit in a corner doing jobs that do not add to their dignity very much. The good jobs still are not going to the blacks...This is why we want training included under Clause 15(1)."207

To a representative on the Advisory Council on the Status of Women, Leggatt argued that the present provisions did not go far enough, that they could not "change the structures of a particular industry" that had been, for example, freezing out women. Nora Frood responded: "But the proposed Act certainly does not say, you are quite right, that everybody from the time of proclamation will establish an affirmative action program in industries under federal jurisdiction, but certainly the use of the proposed Act may gradually work to break down the kind of situation you are describing. Without the provisions that are in the proposed Act we do not have anything to even work toward breaking down the very thing you are talking about and to provide equal opportunity."208

Similarly, Leggatt asked representatives of the National Action Committee for Women: "[A]fter the Commission investigates, takes affirmative action, what does it do? Does it then prosecute the employers for each time they hire and each time a single individual is allegedly discriminated against, and they have to go through separate hearings over and over again? Or should they have the power then to establish that in this particular industry we would like to see

207Ibid. 7:23.
208Ibid. 8:14.
more balance, and the way we could begin is we would like to have 20 per cent female in this particular industry and we will give you five years to do it or four years to do it?" Ms. Kaye and Mary Eberts both agreed that the Act, as written, embodied a private conception of discrimination, and suggested that the Tribunal pay for the cost of laying a complaint and that class action complaints be accepted, but neither took up Leggatt's argument about quotas. In fact, Ms. Kaye downplayed their importance in her remarks, explaining: "In implementing an affirmative action program, it is a thrust we have but we always place it in the context of saying we want the equal pay first and the affirmative action program will remedy itself in a way because as jobs become more equally paid, men will go into jobs that have traditionally been for women and you will not need the affirmative action enforcement mechanisms so much."\footnote{Ibid. 9:23.}

Despite the lack of enthusiasm for affirmative action expressed in the discussion, the Human Rights Act was enacted with Section 41(2)(a) which allows a Human Rights Tribunal, upon a finding of discrimination, to order the implementation of special programs. This provision did not generate the type of conflict exhibited in the United States for a number of reasons. Canada had a history of allowing special programs to advance the well-being of disadvantaged individuals. Further, women's groups seemed more interested in equal pay for work of equal value. Therefore, there did not develop a theoretical framework in the context of which lawmakers explained the concepts of affirmative action and equal opportunity. This conceptual work began to take place in the late 1970s.

The American and Canadian debates I have described in this chapter constitute, as James Boyd White pointed out, beginnings of the public conversations about affirmative action in the two countries. These debates and the laws they generated set the stage for further legal discussions. In the United States, for example, Supreme Court Justices continually refer to the Civil Rights Act in order to determine the true nature of equal opportunity and the legitimacy of affirmative action. Analysis of these early debates will help us to understand why the discussions took the forms they did. Further, it demonstrates that even at this early date.
lawmakers involved in the American and Canadian legal conversations about affirmative action employed significantly different formulations. Americans defined equal opportunity as merely the absence of discrimination, while Canadians spoke of the equal opportunity for self-realization. The Canadian legislation describes equal opportunity as the ability for all to make the life they wish to have. It sees special programs as an integral component of this aspiration. For Americans for whom the "equal opportunity versus preferential treatment" formulation embedded in the Civil Rights Act of 1964 has become so familiar as to seem commonsensical, these initial Canadian legal arguments provide a glimpse of an alternative ways to think about equal opportunity and affirmative action.
CHAPTER 4
SYSTEMIC DISCRIMINATION: THE AMERICAN AND CANADIAN VERSIONS

Despite the Civil Rights Act's prohibition against preferential treatment, beginning in 1965 American courts began to order employers to undertake "affirmative relief" to counteract past discrimination against African-Americans. In doing so, they often justified remedial action as a response to "systemic discrimination." The use of this new understanding of the nature of discrimination constituted a departure from the definition embedded in the Civil Rights Act of 1964, and represented lawmakers' recognition that merely forbidding acts of intentional discrimination in workforces would not bring about real equal opportunity. In this chapter I will compare the legal development of arguments about affirmative action in the United States from 1965-1975 and in Canada from 1978-1983 because these are the periods when the crucial concept of systemic discrimination was developed in each country. Many American judges, especially during the late 1960s, relied on this concept, which had been developed initially by officials in the Equal Employment Opportunities Commission (EEOC), to order affirmative relief for African-American workers. However, by the early 1970s, these same judges began to refuse to order such relief, relying instead on the provisions of the Civil Rights Act forbidding preferential treatment. I will argue that the narrow understanding of systemic discrimination judges employed, along with the notion implicit in their arguments that affirmative relief was compensation for past intentional discrimination in workforces, made judges hesitant to order relief when the evidence of past discrimination was not severe and premeditated.

Judges never succeeded in reconceptualizing the nature of equal opportunity to fit the revised understanding of discrimination they employed. As in the previous chapter, the cases I will examine clearly show American lawmakers' inability to adequately address the complex effects of past discrimination. For example, in Griggs v. Duke Power Co., in which the
Supreme Court first articulated the concept of systemic discrimination. Justice Burger defined it as employer practices which have the effect of excluding members of minority groups from workforces. The most important indication of systemic discrimination for Burger was evidence of statistical disparities between the number of minority workers in a given workforce and their number in the surrounding community. The Court's concern with the number of African-Americans in workforces represented a departure from the understandings of discrimination and equal opportunity expressed in the Civil Rights Act of 1964. But neither Burger nor lower court judges who decided affirmative action cases after Griggs ever considered the full implications of the concept of systemic discrimination, which calls for a reformulation of the nature of equal opportunity. Systemic discrimination focuses on the number of minority employees in a workforce compared to their available number in the surrounding community, so that an adequate understanding of equal employment opportunity to accompany it would require looking outside workforces to the many disadvantages faced by minority individuals that have been caused by past discrimination and that keep them from competing for employment opportunities. But American judges never made this advance. When they found an imbalance in a workforce, they ordered relief if it could be proved that the imbalance was a product of past workforce discrimination. In short, in this chapter I want to emphasize that a new understanding of equality was not developed between 1965-1975, a period which is considered by many scholars to be the pinnacle of affirmative action's transformation of the American concept of equality.

The types of arguments articulated in Canadian law were different, although Canadian officials in the Human Rights Commission did initially adopt the American concept of systemic discrimination from officials in the EEOC. However, Judge Rosalie Abella, head of a Royal Commission on Employment Equity, provided the invaluable function of transforming the American concept of systemic discrimination to accommodate a fuller understanding of equal opportunity and to form a coherent argument for affirmative action. She argued that to attain

---

equal opportunity for all, lawmakers had to consider the many complex factors impeding minority employment and create programs to address these disadvantages.

Abella, with the benefit of having observed the American experience, conceptualized affirmative action, or as she preferred to call it, employment equity, as a way to ensure the equitable participation of all groups in the workforce. In a 1985 report written for the Abella Royal Commission on Employment Equity, Alfred Blumrosen, former Chief Conciliator for the EEOC, suggested that in designing an affirmative action law, "Canada should seek ways and means of achieving meaningful results" without the litigation spawned by the concept of systemic discrimination. A new Canadian statute should not "repeat the experience of extensive litigation that is made necessary because proof of discrimination is a prerequisite to a requirement of affirmative action." Indeed, in her Royal Commission report, Rosalie Abella suggested that the employment equity statutory obligation operate on a no-fault basis - no prior finding of intentional discrimination would be necessary for implementation of an employment equity program. Rather, the emphasis of employment equity would be on whether a company ordered to implement a program had reached reasonable results given such factors as the number of minority employees available to work and the company's past hiring history.

In this chapter I will proceed in the following way. First, because the concept of compensation has been so central to the American arguments for affirmative action and is implicit in the American understanding of systemic discrimination, I will begin by describing the arguments about compensation put forward by civil rights leaders in the early 1960s in order to show the origins of the concept of affirmative action as remedy. I will then show that when judges after 1964 began to order affirmative relief, although they embraced the concept of systemic discrimination which by definition does not require findings of past discrimination.


nevertheless the concept of compensation arose in their decisions as they conceived of affirmative action as remedy for past discrimination. The concept of compensation is singularly unhelpful in affirmative action because it promotes a narrow understanding of the nature and dimensions of discrimination and a cramped understanding of genuine equal opportunity. Turning to Canadian law, it will become apparent that Canadian lawmakers explicitly argued that affirmative action does not entail compensation for past wrongs. They have devised better formulations of the concepts of discrimination and equal opportunity.

**Compensation and Preferential Treatment**

The rhetoric of compensation in affirmative action originally arose from the activism of African-Americans during the Civil Rights Movement. For example, in 1961 Whitney Young, executive director of the National Urban League, which was one of the major civil rights organizations in the country, began to articulate a case for "special consideration for blacks to compensate for the scars left by 300 years of deprivation." He presented versions of his argument at various conferences starting in 1961 and spent the winter and spring of 1963 elaborating upon it. In June 1963, the National Urban League issued a major policy statement calling for a decade of special effort in employment and education to compensate for past discrimination. Young presented the proposal at the League's 53rd annual conference in Los Angeles in July 1963. "The white leadership," he said, "must be honest enough to grant that throughout our history there has existed a special privileged class of citizens who received preferred treatment. That class was white. Now we're saying this: If two men, one Negro and one white, are equally qualified for a job, hire the Negro."

---


A version of Young's argument was published in the *New York Times Magazine* in October 1963. He asked for a domestic Marshall Plan for Black-Americans. Three hundred years of oppression could not be simply obliterated by now guaranteeing equal treatment. Citing the economic and educational disparities between blacks and whites due to centuries of racism and discrimination, he urged the nation to undertake an immediate and dramatic 'crash program' seen as "necessary and just corrective measures that must be taken if equal opportunity is to have meaning."\(^{216}\) In employment, this included,

> a planned effort to place qualified Negroes in all categories of employment, at all levels of responsibility. This would mean that employers would consciously seek to hire qualified Negro citizens and would intensify apprenticeship and training programs to prepare Negro employees and upgrade those already employed...

> Further, where Negroes have not been employed in the past at all levels, it is essential that there be conscious preferment to help them catch up. This does not mean the establishment of a quota system - an idea shunned by responsible Negro organizations and leaders. But, because we are faced with the hypocrisy of "tokenism," where the presence of 2 or 3 Negro employees is passed off as integration, we are forced, during the transitional stages, to discuss numbers and categories.\(^{217}\)

Young claimed the plan would last about 10 years. "This program makes historical sense as a rehabilitation of the damage inflicted upon the Negro by generations of injustice and neglect."\(^{218}\)

On another front, in Philadelphia starting in 1960, a loosely knit group of about 400 ministers began a "selective patronage campaign" aimed at forcing employers to hire more black employees. The ministers' technique was to approach one company at a time with suggestions for how the company could hire more black workers. If the company refused to negotiate, it was given an ultimatum to hire a specified number of black workers before a given date. This strategy worked with Pepsi-Cola, Esso, Sun Oil and Gulf Oil; by 1963 the


\(^{217}\)Ibid., p. 131.

\(^{218}\)Idem.
ministers had won concessions from 24 firms and the techniques had begun to be used by other organizations in other cities.\textsuperscript{219}

A similar strategy was employed by the Congress of Racial Equality (CORE). The national executive of CORE debated the issue of compensatory hiring at its February 1962 meeting and by the end of that year the leaders of the organization overwhelmingly endorsed the principle and a set of compensatory employment guidelines was drawn up.\textsuperscript{220} Gordon Carey, project director for national CORE stated in a letter to a Denver leader: "CORE has begun recently to change its 'line' on the national level. Heretofore, we used to talk simply of merit employment, i.e., hiring the best qualified person for the job regardless of race. But now CORE is talking in terms of 'compensatory' hiring. We are approaching employers with the proposition that they have effectively excluded Negroes from their workforce for a long time and that they now have a responsibility and obligation to make up for past sins."\textsuperscript{221}

Following this, CORE chapters began to boycott and picket banks, the construction trades, and major consumer goods manufacturers and a marked evolution in their demands occurred. There was an escalation in the number of jobs demanded, and a shift from seeking non-discriminatory practices to requiring agreements with guaranteed compensatory hiring agreements.\textsuperscript{222} August Meier and Elliot Rudwick, historians and former members of CORE claim that CORE's commitment to compensatory hiring became assured in December 1962 when it sponsored a New York area boycott of Sealtest Dairy Company and won a preferential hiring agreement. National CORE's two month boycott ended when Sealtest promised to hire

\begin{itemize}
  \item \textsuperscript{220} August Meier and Elliot Rudwick, \textit{CORE: A Study in the Civil Rights Movement} (Urbana: University of Illinois Press, 1975), p. 188.
  \item \textsuperscript{221} \textit{Idem}.
  \item \textsuperscript{222} \textit{Ibid}, p. 187.
\end{itemize}
10 black workers immediately and give "initial exclusive priority to all job openings, except those of contractual obligation, during 1963 to Negroes and Spanish Americans."223

In an August 1963 press conference even President Kennedy was confronted with the issue. A reporter asked: "Mr. President, some Negro leaders are saying...the Negro is entitled to some kind of special dispensation for the pain of second-class citizenship over these many decades and generations...What is your view in particular on the specific point that they are recommending of job quotas by race?" Kennedy replied that he did not think people in the black community favoured the idea that "there is some compensation due for the lost years...We are too mixed, this society of ours, to begin to divide on the basis of race and color."224

As I have shown in the previous chapter, legislators who were in favour of the Civil Rights Act of 1964 denied that the sort of programs worked out by civil rights leaders could be implemented according to the legislation. For this reason, there was no discussion of how to conceive of the programs in the debate about the Civil Rights Act. As I will show below, however, once judges began to order affirmative action programs, although they used the concept of systemic discrimination, they thought of affirmative relief as compensation for acts of past intentional discrimination.

The EEOC and systemic discrimination

Ironically given the nature of the discussion surrounding the Civil Rights Act of 1964, judges began to order affirmative action soon after the legislation's enactment. This had a good deal to do with the work done by the EEOC. Congress had given the EEOC authority to investigate complaints of discrimination brought by employees and attempt negotiations between parties in a dispute. If negotiations failed, the EEOC was empowered to direct the

223Ibid, p. 192.
complainant to bring suit in federal district court. Additionally, the Attorney General could file suit in federal district court if he had discovered a "pattern or practice" of discrimination. The EEOC and civil rights groups subsequently became engaged in litigation whose purpose was to bring to the courts a definition of discrimination that was different from that articulated in the legislative debate surrounding the Civil Rights Act.225

The EEOC's attempted transformation of the meaning of the concept of discrimination had its roots in efforts to find ways to achieve wholesale enforcement of Title VII by identifying and proving broad patterns of discrimination in workforces thereby encouraging the courts to require widespread remedies. The EEOC developed a national reporting system applicable to all employees covered under Title VII requiring the reporting employer or organization to identify the number of employees, union members, and apprentices by job category and by race, sex, and national origin.226 By the fall of 1967 its research staff had analyzed the data contained in the first batch of forms received from thousands of employers and broke it down into 9 major metropolitan areas. The data revealed, "with unprecedented precision," that black workers were disproportionately represented in blue-collar jobs throughout the nation. Within white collar categories, the majority of blacks worked in either low-paying clerical and sales positions or as hospital orderlies.227 In 1971, Alfred Blumrosen, the EEOC's Chief Conciliator, reported, "the entire approach to the solution of the problems of employment discrimination is being heavily influenced by the existence of the statistical information contained in the reports."228


Blumrosen argued that the EEOC's alternative understandings of discrimination in Title VII developed partially due to operational necessity. When it began to conciliate, the EEOC avoided confrontations which examined the morality of the employer, even though Congress had defined discrimination as involving intent to injure. An allegation of racism would make it difficult to discuss a meaningful resolution of complaints. "These considerations led the Commission to identify discrimination in reference to the effects of employer practices on minority and female opportunity, rather than by the intentions of the employer. In its testing guidelines and written reasonable cause decisions, and in amicus briefs to the courts, the commission propounded the notion that practices which adversely affected minorities were illegal, unless they could be justified."229 Similarly, because of the masses of complaints filed against employers in the early years of the Commission, it became clear to conciliators that it would be more efficient to require employers to restructure entire discriminatory systems at one time than accept the premise that only individual relief could be sought in each complaint.230 Blumrosen concludes: "These were operational imperatives which led the EEOC to conceive of Title VII claims as group claims as well as individual claims."231

The new concept of discrimination propounded by the EEOC was based on the idea that harm is not always intentional, that discrimination consists of conduct that has an adverse effect on minority group members, that the discrimination prohibited by Title VII was a class- or group-oriented phenomenon "that challenges the status of every member of the class," and finally that discrimination is not always perpetrated by individuals but may be the consequence of a system. Blumrosen noted, "[G]overnment attorneys from the EEOC and Departments of Labor and Justice pressed for acceptance of this definition of discrimination. Gaining


230Hugh Davis Graham reports that by January 1, 1967, the EEOC had received almost 15,000 complaints but had managed to conclude only 100 cases. See The Civil Rights Era, p. 235.

231Blumrosen, Modern Law, p. 80.
acceptance of this definition also became an integral part of the litigation efforts of the NAACP and the Legal Defense and Education Fund, Inc.\textsuperscript{232}

The early cases: Departing from the Civil Rights Act

The arguments which had been proposed by the EEOC and plaintiffs' attorneys were accepted by some judges and provided the basis for their granting of affirmative relief. Judges took advantage of Title VII's grant of judicial authority in forming remedies and retained jurisdiction in some cases for years. In a series of cases they interpreted Title VII to allow and sometimes require racial quotas in hiring, moving away from the prohibitions established by legislators in the discussion of the Civil Rights Act. African-American workers were allowed to file class action suits on behalf of themselves and other "similarly situated" workers. Judges relaxed the criteria of intent to discriminate, ordering that practices that were facially neutral but whose consequences were to create barriers to black employment were invalid. They gave weight to statistics showing black under representation in workforces. Defendants in these cases pointed to section 703(g)'s prohibition of preferential treatment but judges in the early cases often chose to ignore it or to interpret it to allow for affirmative relief. In 1971 the Supreme Court wholeheartedly accepted the EEOC's formulation and articulated a rule that was intended to help lower courts address systemic discrimination. In Griggs v. Duke Power Company the Court enunciated the \textit{prima facie} rule which required courts to determine the percentage of African-Americans in particular workforces compared to their percentage in the relevant labour market. A significant disparity constituted a \textit{prima facie} case of discrimination and placed the burden on the employer to explain whether the practices associated with the under representation of African-Americans, in the form of, for example, test requirements, were necessary from a business perspective. This definition of systemic discrimination, as I have pointed out, in itself requires no finding of past discrimination. Lower courts, however, were more comfortable using the formula when there was evidence of intentional

\textsuperscript{232}"Strangers in Paradise," p. 60.
discrimination in discrete workforces because they considered systemic discrimination for the most part to refer to such things as seniority systems which had been set up before 1964 which blatantly disadvantaged African-Americans. For example, some employers set up systems which made it harder for workers in low-skilled departments composed mostly of black workers to transfer to higher-paying departments. In this way, they hid their discriminatory intent. Once these sorts of systems were adjusted, however, judges did not proceed to consider how past discrimination had disadvantaged minority individuals more broadly outside workforce contexts, accounting for statistical disparities in workforces. They did not proceed to take a more nuanced view of the nature of discriminatory barriers. Therefore, by the mid-1970s, when judges were confronted with appeals against affirmative action programs brought by white workers, they began to find affirmative action invalid because the type of intentional discrimination they had seen before became less widespread.

A good example of the fact that judges thought of affirmative action as compensation for egregious acts of past discrimination is found in a 1974 law journal article written by Martin Slate, an appellate attorney for the EEOC. He noted that federal courts narrowed their orders to minimize objections to racial preferences, but "[t]hey have neither directly nor completely addressed the question of the legality of the preferences."\(^{233}\) The following factors were generally present in cases in which affirmative relief had been ordered: the defendant had virtually excluded blacks from the workforce for years, the defendant held the key to minority employment in a particular trade because of size or monopoly position, large numbers of qualified black workers had been available to work, the relief would only minimally affect the opportunities of white workers, industry conditions were generally favourable, the defendants' workforces were expanding so that there would be positions for non-minority workers as well as for minorities. Similarly, courts tended to choose employers whose profits would not be affected by the order and ones who had waived their hiring standards for whites since if they

had operated effectively with unqualified whites they could hardly be permitted to claim that hiring unqualified blacks would undermine business. Finally, courts were more willing to order relief when the discrimination had been severe and clearly premeditated.\textsuperscript{234} Because of the nature of pre-1964 discrimination it was not difficult to find widespread evidence of past intentional discrimination and it seems evident that judges thought of affirmative relief as compensation for this discrimination.

Nevertheless, courts did order a good deal of affirmative action programs because of the magnitude of the problem of past discrimination and the inefficiency of addressing it on an individual by individual basis. The first step away from the provisions of the Civil Rights Act, which referred only to discrimination against individuals, was judicial acceptance of class action. This took place in several early non-affirmative action cases. In \textit{Hall v. Werthen Bag Co.} the court averred that if racial discrimination occurred against black Americans in any form, whether as an employment practice or an individual action, it applied throughout the class and was "a 'Damoclean threat' to every black."\textsuperscript{235} In \textit{Oatis v. Crown Zellerbach Corp.} the court held that "racial discrimination is by definition class discrimination," and that not all black workers alleging discrimination on the basis of race in a particular workforce needed to file charges with the EEOC and pursue administrative remedies.\textsuperscript{236} The plaintiff was deemed to be acting "not for himself alone" but rather, as a "private attorney general" who puts on the "mantle of the sovereign in the public interest" to attack the problem of discrimination.\textsuperscript{237}

Another important step in the development of affirmative action law that ran counter to the Civil Rights Act was judicial determination that Title VII covered pre-Civil Rights Act discrimination, moving judicial focus to the effects of past discrimination in workforces. \textit{Quarles v. Philip Morris, Inc.}, although it did not involve an affirmative action program, was

\textsuperscript{234}\textit{Ibid.} pp. 318-320.

\textsuperscript{235}251 F. Supp. 184 (1966).

\textsuperscript{236}398 F2d 496, 499 (5th Cir 1968).

\textsuperscript{237}\textit{Jenkins v. United Gas Co.}, 400 F2d 28, 32 (5th Cir 1968).
significant because it was the first case in which a court ruled that the present consequences of past discrimination were covered by the Civil Rights Act 1964, and plaintiffs deserved relief for the effects of pre-1964 discrimination.\textsuperscript{238} It became the leading precedent for retroactive enforcement of the law. The situation was typical of the kind faced by the court in this time period. A collective bargaining agreement which required persons who wanted to transfer to new departments to give up their plant seniority was put in question because before 1964 black workers had been barred from working in better-paying departments. The requirement presented a greater burden for black workers since they were the group most likely to want to transfer.

Defendants, relying on the Civil Rights Act, argued that the present departmental seniority system was not unlawful because it limited on a nondiscriminatory basis the transfer privileges of all workers. They pointed to Section 703(h) of Title VII which stated that it was not an unlawful employment practice for employers to apply different conditions of employment pursuant to a bona fide seniority system, provided that such differences were not the result of an intention to discriminate because of race. Additionally, they referred to a memorandum written by Senator Clark, who had been in charge of Title VII for the Democrats in the Senate. He had argued: "Title VII would have no effect on seniority rights existing at the time it takes effect...This would be true even in the case where owing to discrimination prior to the effective date of the title, white workers had more seniority than Negroes."\textsuperscript{239}

The court rejected defendants' arguments, concluding instead that although "Congress did not intend to require 'reverse discrimination,' that is, the act does not require that Negroes be preferred over white employees who possess employment seniority. [i]t is also apparent that Congress did not intend to freeze out an entire generation of Negro employees into discriminatory patterns that existed before the act." This case addressed a situation in which past discrimination had clearly created an unfair promotion system. Therefore, the court

\textsuperscript{238}279 F. Supp. 505 (1968).

\textsuperscript{239}Ibid. p. 515.
accused the employer of both intentional and 'adverse effects' discrimination, noting "defendants have intentionally engaged in unlawful employment practices by discriminating on the ground of race against Quarles and other Negroes similarly situated. This discrimination, embedded in seniority and transfer provisions of collective bargaining agreements, adversely effects the conditions of employment and opportunities for advancement of the class." The Court fashioned a remedy which allowed all black workers hired before 1966, when the company stopped discriminating, to transfer from lower paying departments to higher ones without giving up seniority.

The first case in which a court determined that it could order hiring quotas according to the Civil Rights Act was one in which the employer's discrimination had been clear and widespread. In Local 53 of the International Association of Heat and Frost Insulators and Asbestos Workers v. Vogler, the court determined that Section 706(g) of the Civil Rights Act, which empowered courts both to enjoin defendants from engaging in unlawful employment practices and to order such "affirmative relief" as may be appropriate, granted courts authority to order hiring quotas. Local 53 had effectively controlled employment and training opportunities in the asbestos and insulation trades in its area of jurisdiction in Louisiana, and the union admitted prior discrimination in the form of excluding blacks from union membership and work referrals. A district court ordered the union to develop objective membership criteria and refer workers on a one black one white ratio until the new membership criteria were established.

The union argued that the injunction violated the Act's prohibition against preferential racial treatment or establishing a quotas system to correct racial imbalance, pointing to Section 703(j) of Title VII which states that nothing in the Act should be interpreted to require an employer "to grant preferential treatment to any individual or group...on account of the imbalance which may exist with respect to total number or percentage of persons." The

---

240 Ibid, p. 516,

241 407 F2d 1047 (5th Cir 1969)
appellate court disagreed, however, holding: "In formulating relief from [Title VII violations] the courts are not limited to simply parroting the Act's prohibitions but are permitted, if not required, to order such affirmative action as may be appropriate," and that "the District Court is invested with a large measure of discretion in modeling its decrees to ensure compliance with the Act." 242

U.S. v. Local 86, International Association of Bridge, Structural, Ornamental and Reinforcing Ironworkers presented a similar conclusion, establishing the practice of court-ordered hiring quotas. 243 Again, evidence of past discrimination was clear. A district court responded to a suit brought by the Attorney General that four Seattle unions and their apprenticeship and training committees had engaged in a pattern and practice of conduct which had denied blacks equal opportunities afforded to whites. The court found, relying both on statistics showing the low number of blacks working in the unions and specific instances of past discrimination, that the union "must not only refrain from future discrimination but must also undertake whatever affirmative action may be necessary to assure those discriminated against have full enjoyment of their right to equal employment opportunities." 244 It mandated that 30% of each of the union's apprenticeship programs be composed of blacks taken from the list of qualified apprentice applicants. The court proclaimed it would retain jurisdiction of the case until any time after June 30, 1973, when defendants could make a convincing case for termination. 245

Again, upon appeal, the union argued that such action constituted "preferential treatment" forbidden by Title VII's 703(j). However, the court held: "There can be little doubt that where a violation of Title VII is found, the [district] court is vested with broad remedial powers to remove the vestiges of past discrimination and eliminate present and assure the non-existence

242 Ibid., pp. 1052-53.


244 Ibid., p. 1202.

245 Ibid., p. 1247.
of future barriers to the full enjoyment of equal job opportunities by qualified black workers."\(^\text{246}\)

Moving even farther away from the Civil Rights Act, *U.S. v. International Brotherhood of Electrical Workers* raised the possibility that courts had no choice but to order affirmative relief upon a finding of discrimination, despite Section 703(j).\(^\text{247}\) The Attorney General initiated a suit under Title VII charging that defendants had engaged and were engaging in racial discrimination by excluding blacks from union membership and in the union referral and apprenticeship programs. A district court had found that there was evidence of discrimination both before the implementation of the Civil Rights Act of 1964 and enjoined any continuation of discriminatory practices in the referral system, but specifically refused to order affirmative relief designed to alleviate the continuing effects of past discrimination and the government's request that the court retain jurisdiction in the case. In doing so it relied strongly on 703(j).

In the circuit court, appellees asked the judges to decide whether the district court had erred in failing to grant affirmative relief. The appellate court interpreted 703(j) as meaning that affirmative relief could not be ordered simply because of a finding of racial imbalance. Although it did not itself determine what relief should have been granted, it concluded that the district court had erred in not granting specific affirmative relief. The court stated: "We believe section 703(j) cannot be construed as a ban on affirmative relief against continuation of effects of past discrimination resulting from present practices (neutral on their face) which have the practical effect of continuing past injustices. Any other interpretation would allow complete nullification of the stated purpose of the Civil Rights Act 1964."\(^\text{248}\)

*Griggs v. Duke Power*, a Supreme Court case which did not involve affirmative action, built upon the earlier case's findings about the effects of past discrimination and enunciated a

\(^{246}\)443 F2d 544, 552 (9th Cir 1971) cert. denied 404 U.S. 985.

\(^{247}\)428 F2d 144 (6th Cir 1970), cert. denied 400 U.S. 943.

\(^{248}\)Ibid, p. 147.
theory of systemic discrimination. Although in this case the employer had clearly discriminated, the concept of systemic discrimination developed by Justice Burger did not require findings of past discrimination. Prior to July 2, 1965 Duke Power Company openly engaged in racial discrimination against blacks by following an overt policy of limiting them to "dead end" jobs in one of five departments. The company abandoned this policy after Title VII became effective. However, after 1965 it instituted a policy requiring workers who wanted to transfer out of the "dead end" jobs to either have a high school diploma or to score successfully on two professionally developed ability tests. These requirements severely limited the opportunities of blacks because whites as a group had a higher percentage of diplomas and scored better on the tests than blacks as a group. Duke Power had taken no steps to determine whether persons having high school diplomas and scoring successfully on the tests performed better in the higher-paying jobs. In fact, before 1964 white workers who met neither requirement had been hired to perform these jobs.

In Griggs the Supreme Court held for the first time that a facially neutral employment practice that was not purposefully discriminatory (although this one probably was), but that nevertheless had the effect of excluding a group on the basis of race, was discriminatory and, if not shown by the employer to be job-related, was unlawful. The Court concluded that while Title VII's prohibitions speak in terms of individuals, the real problem of employment discrimination is not one of isolated bigotry directed toward particular persons. Rather, it lies in the institutionalized practices, such as testing procedures, that systematically exclude certain minority groups from the workforce and from certain job classifications.

Most importantly, the Griggs prima facie rule required a plaintiff to show a significant disparity between the percentage of class members in the workforce and the percentage in the relevant labour market, giving weight to significant racial imbalances in workforces. If there were significantly fewer minorities in a workforce than in the surrounding labour market,

250 Ibid, p. 432.
constituting a prima facie case of discrimination, the burden of proof shifted to the employer. He or she then had to either make a convincing case that the practices that were associated with the under representation were related to business necessity, or eliminate them.\textsuperscript{251}

Griggs' prima facie rule seemed to shift attention away from the question of whether an employer has discriminated to the issue of how minority individuals were faring in the job market. It seemed to draw attention to broader questions of why minority individuals were not well represented in certain workforces. According to Griggs, equal opportunity is not achieved when past discrimination has been eliminated, but rather the opinion seemed to aspire to explore ways to ensure widespread participation of all individuals in the nation's workforces. This would necessitate examining the many complex ways past discrimination had disadvantaged minority individuals and direct attention outside of workforces to such factors as inadequate educational facilities, which might account for why black applicants had fewer high school diplomas.

But the promise inherent in the Griggs decision never fully developed. It is important to point out that many courts did order significant affirmative relief in the late 1960s and early 1970s, and I list only some of them in order to give an idea of how important judge-ordered affirmative action has been in terms of the development of programs.\textsuperscript{252} There were

\textsuperscript{251}Ibid. p. 431.

\textsuperscript{252}see e.g., U.S. v. Central Motor Lines, Inc. 4 FEP Cases 216 (1971); Buckner v. Goodyear Tire and Rubber Co. 5 FEP Cases 1165 (1973); U.S. v. United States Steel Corp. 5 FEP Cases 1253 (1973); Stamps v. Detroit Edison Co. 6 FEP Cases 1326 (1973); Associated General Contractors of Massachusetts Inc. v. Altshuler 6 FEP Cases 1013 (1st Cir. 1973); Pennsylvania v. O'Neill 5 FEP Cases 713 (3rd Cir. 1973); United States v. Carpenters Local 169 4 FEP Cases 85 (7th Cir. 1971); United States v. N.L. Industries, Inc. 5 FEP 823 (8th Cir. 1973); Castro v. Beecher 4 FEP Cases 700 (1st Cir. 1972); Baker v. Columbus Memorial Separate School District 4 FEP Cases 921 (5th Cir. 1972); Armstead v. Starkville Municipal Separate School District 4 FEP Cases 864 (5th Cir. 1972); Commonwealth of Pennsylvania v. Sebastian 6 FEP Cases 1122 (3rd Cir. 1973); NAACP v. Allen 4 FEP 605 (M.D. Ala. 1972); Southern Illinois Builders Association v. Oglivie 5 FEP Cases 229 7th Cir. 1972); Baker v. Columbus Municipal School District 4 FEP Cases 921 (5th Cir. 1972); Armstead v. Starkville Municipal Separate School District 4 FEP Cases 864 (5th Cir. 1972); Pennsylvania v. Sebastian 6 FEP Cases 1122 (3rd Cir. 1973); United States v. Fraser 2 FEP Cases 847 (1970); and Strain v. Philpott 4 FEP 822 (1971).
comparatively few cases in which judges refused to grant affirmative relief.\textsuperscript{253} But by the mid-1970s, judges began to find affirmative action invalid. One reason for this change, I suggest, is that the type of blatant discrimination that occurred before 1964 ceased to be as widespread, but judges nevertheless still conceived of affirmative action as remedy for this type of discrimination.

A growing confusion regarding affirmative action and its justification after \textit{Griggs} is clearly illustrated in the following case. In \textit{Carter v. Gallagher} a district court ordered that, to eradicate systemic discrimination in hiring firefighters in Minnesota, the Civil Service Commission should give absolute preference to 20 qualified minority applicants in making them firefighters immediately.\textsuperscript{254} On appeal by defendants, the appeals court found that the procedures which had existed prior to the commencement of the suit for testing applicants' eligibility for the positions were unintentionally racially discriminatory. Of the 535 men in the fire department none were black, although blacks constituted 6.44\% of the Minnesota population in 1970. Relying on \textit{Griggs} the court determined that statistical evidence could make a prima facie case of discrimination. This case was different from the previous lower court cases I have examined because the court made no express finding of bad faith or evil motive on the part of defendants. Citing \textit{Griggs}, the court noted that "good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability."\textsuperscript{255}

Defendants vigorously argued that absolute preferences violated the 14th Amendment. The court articulated the perceived dilemma in the following manner: "[T]hus we reach the


\textsuperscript{254}425 F2d 315 (1971).

\textsuperscript{255}Griggs, p. 432.
crucial question which is whether giving absolute preference to 20 minority applicants who meet the qualification tests infringes upon the constitutional rights of white applicants whose qualifications are established to be superior."\textsuperscript{256} The court concluded that the minority preference provision of the decree discriminated in favour of minority persons and against whites. It agreed with the lower court that the absolute preference for 20 persons who qualify "has gone further than any of the reported appellate cases in granting preference to overcome the effects of past discriminatory practices and does appear to violate the constitutional right of equal protection of the law to white persons who are superiorly qualified."\textsuperscript{257} Instead of ordering a 20 person outright preference, it ordered a one to two ratio of minority applicants to whites be hired until 20 minority firefighters were employed, but did not explain the constitutional or statutory distinction between absolute and partial preferences.\textsuperscript{258} It seems that given the growing complexities of the effects of past discrimination presented in this case, the court came up with an unsatisfactory compromise solution. There was no express finding of discriminatory intent in this case, leaving the court at a loss as to how to proceed. The same sorts of problems are illustrated in the decisions I will examine below.

\textit{The second circuit court: Moving back to formal equal opportunity}

The arguments made by the second circuit appellate court provide a good illustration of the difficulty federal courts faced in conceptualizing affirmative relief, and in the following section I examine the cases it decided between 1973 and 1976. In these cases one sees the court moving away from the interpretation of Title VII established by earlier lower courts and in Griggs. The court began to find affirmative relief illegitimate, relying on the understanding of formal equal opportunity. Robert Belton argues that the recession of the mid-1970s

\textsuperscript{256}Ibid. p. 324.

\textsuperscript{257}Ibid. p. 328.

\textsuperscript{258}In \textit{U.S. v. N.L. Industries} 479 F2d 354 (8th Cir 1973) a court again determined that a one to one ratio was permissible while an absolute quotas would be unconstitutional without providing a reason for the distinction.
accounts for the increased claims of reverse discrimination on the part of white workers and the lessening judicial solicitude toward affirmative relief.\textsuperscript{259} As well, I will argue that the judiciary’s formulation of affirmative relief as compensation for past discrimination became harder to sustain in the context of situations in which the effects of past discrimination were not as clear-cut as in earlier cases. Although the systemic discrimination formula did not require discrete findings of past discrimination, judges clearly felt more comfortable ordering relief when the discrimination was severe and premeditated. The conception of equal opportunity developed before these cases was not complex enough to sustain arguments for affirmative action in the face of these later challenges. In fact, in the final case I will examine, a concurring opinion essentially came full-circle and supported the formal equal opportunity formulation articulated by legislators during the Civil Rights Act debate.

For example, in \textit{U.S. v. Wood, Wire and Metal Lathers International Union, Local No. 46} the 2nd circuit court allowed an affirmative action program because of the egregious actions of the defendant union, which were blatantly discriminatory.\textsuperscript{260} The labour union had exclusive jurisdiction over 2 types of construction work in New York City. In a district court settlement, the union agreed to follow the orders of an administrator assigned to negotiate between parties. As part of the agreement the union admitted past discrimination. The administrator ordered the union to develop objective rules in order to implement fair and equal hiring hall procedures. While the union did this, for the first time in its history, it ceased issuing work permits, decreasing the number of black workers eligible to be referred for work from 170 to 72. Permit holders were workers who paid dues to the union in order to use the union’s hiring hall to obtain work referrals. In response to the union’s action, the administrator ordered the union to issue 100 permits immediately to minority candidates and to issue at least 250 permits annually through 1975 on a one white to one black ratio.


\textsuperscript{260}471 F2d 408 (2nd Cir. 1973) cert. denied, 412 U.S. 939 (1973).
The 2nd circuit appeals court upheld the administrator's order somewhat reluctantly stating: "Admittedly requiring that the union issue a certain minimum number of permits is a sweeping use of the court's broad power under the Civil Rights Act: it is compelled, however, by Local 46's action in this case. Local 46, by ceasing to issue permits, can effectively close the area of work to the vast majority of non-white labourers, without engaging in any overt discrimination. Subject to review and revision in the light of changed circumstances, the requirement presents little danger of layoffs or other adverse effects on the ability of those already holding permits. The rights of the union to protect incumbent workers was recognized and made central to the administrator's proposal."\(^{261}\)

In *Bridgeport Guardian, Inc. v. Commission* the second circuit again supported the granting of affirmative relief with some reluctance.\(^{262}\) A statistical disparity in passing rates in the police examination in Connecticut established a prima facie showing of discrimination and defendants failed to prove that all parts of the test were job related. In this case, a crucial factor contributing to the court's reluctance was the absence of an express finding of past discrimination. Defendants were ordered to develop a new non-discriminatory test and to allot half of all the future vacancies to minorities until there were 50 minority patrolmen, 6 minority detectives, 6 minority sergeants, 3 minority lieutenants and 2 minority captains.

The court approved of the quotas for patrolmen but asserted: "We agree of course that hiring quotas are discriminatory since they deliberately favor minority groups on the basis of color...While we approve such relief somewhat gingerly, we do not believe [the district court judge] abused his discretion in imposing quotas on hiring here." But the court refused to sanction quotas in any position above patrolman, partially because there was no finding that discrimination had occurred in promotion procedures, and partly because of their impact on the rights of whites. "The imposition of quotas [for positions other than that of patrolman] will obviously discriminate against those whites who have embarked upon a police career with the


\(^{262}\) 5 F.E.P Cases 1344 (2nd Cir 1973).
expectation of advancement only to be thwarted because of their color alone. The impact of the quota upon these men would be harsh and can only exacerbate rather than diminish racial attitudes.\textsuperscript{263}

In a similar case, \textit{Vulcan v. Civil Service Commission} the tensions implicit in the previous two cases became more apparent.\textsuperscript{264} The 2nd circuit revealed its understanding of affirmative relief as compensation for past discrimination. The application of this formula, however, became difficult for judges because there were no express findings of intentional discrimination on the part of the fire department in question. A group of African-American and Hispanic applicants claimed that a firefighter exam was discriminatory on the basis of differential passing rates and the overwhelming disparity between minority group representation in the fire department and in the general population. Defendants could not prove that all parts of the exam were job related, but, as noted, there were no express findings of past discrimination. Plaintiffs suggested that until the development of a new non-discriminatory test, new firefighters be chosen on the basis of an affirmative action program to compensate for past injury to minorities. The court refused arguing:

\begin{quote}
No doubt there are exigent circumstances in which \textit{compensatory adjustments} are appropriate and even necessary to remedy constitutional violations. However, there are considerations which suggest that the courts should be hesitant about imposing them. Adjustments based on racial classifications, however well-intentioned, contain within themselves the seeds of further divisiveness regardless of their benevolent purposes. Attempts to make fair adjustments may be counterproductive and tend to generate resentments which serve to exacerbate rather than diminish racial attitudes. Those on an eligibility list who have high rankings, with the prospect of imminent appointment, may not understand why they should be bypassed in favor of minority applicants with lower ratings.\textsuperscript{265} (my emphasis)
\end{quote}

Until a new test was created, although this could take years, new firefighters would be chosen from the old eligibility list.

\textsuperscript{263} \textit{Ibid.} p. 1350.

\textsuperscript{264} \textit{5 F.E.P. Cases} 1229 (1973).

\textsuperscript{265} \textit{Ibid.} p. 1239.
In *Patterson v. Newspaper Deliverers' Union* the 2nd circuit upheld an affirmative action program created by an administrator in a settlement between parties again largely because of the blatant discrimination on the part of the union. The union separated delivery workers into two categories: those holding regular positions and "slappers," workers who were called in to perform whatever work was available on any given day. Slappers were in turn divided into four categories and were called to work on the basis of their category. Group I slappers being called more frequently than Group IV slappers. In the past the union had discriminated against minorities workers and limited union membership to the first sons of members. No person had made the theoretically possible advancement from Group III to regular worker since 1963 because Group I was comprised mostly of former regular workers, who were all white.

The administrator ordered that all minority persons on the Group III list be immediately moved to Group I. All new persons hired in the industry in Group III would be hired on a ratio of three blacks to two whites. As each regular position was filled by a Group I member, one Group III member was to be moved to Group I, on a one for one minority to non-minority basis.

A white Group III member brought suit charging that whites too had suffered from the union's advancement procedure which barred non-relatives of union members from Group I and regular positions. Judge Mansfield of the 2nd circuit responded that whites could not bring suit under Title VII which created no rights or benefits for non-minority persons or groups, and therefore limited his discussion to whether the relief granted by the administrator which favored black workers discriminated against white workers. He ruled that the agreement was lawful and that it also benefited white workers because it presented all Group III members with an opportunity they had never had before, the chance to move up to Group I and eventually to regular positions.

---

266 10 FEP Cases 349 (2nd Cir 1975)

Judge Feinberg, in a concurring opinion, stated that although he agreed with the court's ruling, "[n]evertheless, I believe a strong note of caution is called for and should be stated... Section 703(j) of the Civil Rights Act bars the use of court-ordered racial hiring quotas... A racial quota is inherently obnoxious, no matter what the beneficent purpose. Such a quota is demeaning and divisive. At best it is a lesser evil. It is not to be encouraged."268

While Feinberg noted that a reexamination of the use of quotas was necessary, this case, he argued, was not an appropriate one in which to accomplish it. First, there was clear and sustained discrimination against minorities for positions which required no special skills. Further, the settlement agreement provided benefits for white workers as well as for black workers, and the quota agreed to was to be of short duration. Finally, the plaintiff had not directed his complaint against the idea of quotas, but to the size of this particular quota and its effect on him.269

In *Kirkland v. Department of Correctional Services* the second circuit finally developed a formula which narrowed the circumstances in which district courts could order affirmative relief and made a significant move toward instituting a formal equal opportunity model in affirmative action cases.270 The plaintiffs in the case charged that a civil service examination for promotion from correction officer to correction sergeant was discriminatory on the basis of differential passing rates for whites and minorities. The plaintiffs included 117 persons who had either failed the civil service exam or who had passed but received a grade too low for appointment. The district court ordered the civil service to develop a non-discriminatory selection procedure and to appoint one minority group member for every three non-minority group members appointed to the position of sergeant until the percentage of black and Hispanic workers in the sergeant ranks equaled the percentage in the ranks of corrections officer.

---


269 *Idem*.

270 11 FEP Cases 38 (2nd Cir 1975).
The 2nd circuit court brought together arguments hinted at in earlier decisions to alter the district court's order. It stated it could "no longer speak in general terms of statistics and class groupings [but] must address individual rights." It distinguished the present case from previous one in which it had ordered quotas because those cases had presented clear-cut patterns of long-continued and egregious discrimination. The court pointed to "the paucity of the proof concerning past discrimination" and the fact that "although this is not dispositive of the matter, there is no claim that defendants at any time acted without the utmost good faith or with intention to discriminate." In this manner, the court downplayed the importance of statistical disparities and shifted weight to findings of intentional harm. Further, it approved temporary quotas, to be used until a new test could be developed, because this limited the benefits of an affirmative relief program to the members of the plaintiff class. The quota requirement for promotions was "based on a shifting and rapidly expanding racial base, wholly unrelated to the consequences of any alleged past discrimination." Concerned to limit the beneficiaries of relief, the court was equally determined to forbid quotas burdening a small number of readily identifiable candidates for promotion. Here, it echoed its previous hesitation in Bridgeport Guardian about infringing the rights of whites who had embarked upon careers and built up expectations of advancement.

In two later cases the court employed the Kirkland decision to first set aside a quota system and then to limit one. In the latter, EEOC v. Local 638, the court articulated its new formula: "the imposition of racial goals is to be tolerated only when past discrimination has been clear-cut and the effects of "reverse discrimination" will be diffused among an identifiable

\footnote{\textit{Ibid.}, p. 45.}

\footnote{\textit{Ibid.}, p. 44.}

\footnote{\textit{Ibid.}, p. 45.}

\footnote{\textit{Chance v. Board of Examiners} 11 FEP Cases 1450 (2nd Cir 1975) and \textit{EEOC v. Local 638} 12 FEP Cases 755 (2nd Cir 1976).}
group of unknown, potentid applicants rather than upon an ascertainable group of easily identifiable persons."\textsuperscript{275}

Judge Feinberg, in a concurring opinion, again expressed doubt about the very legality of racial quotas. Courts in the future, he argued, should focus on "individuals rather than on groups in granting relief, as by providing an immediate remedy to identifiable plaintiffs who were themselves discriminatorily denied jobs [because this] can accomplish much without resort to quotas."\textsuperscript{276} Feinberg's understanding of the requirements of equality harken back to the discussion in the Civil Rights Act 1964 and represents the reemergence of a formal equal opportunity model in judicial discussions of affirmative action. The choice open to judges, which they did not take, was to expand the breath of the discussion of how to attain equal opportunity to reasons why, for example, minority applicants had significantly lower passing rates in civil service exams. This would have led them to examine the broader effects of past discrimination which influence test scores, such as poverty, inferior educational resources, and the impact of living in isolated, segregated communities. American courts thought of affirmative relief as compensation for intentional discrimination which motivated employers to establish discriminatory practices. For judges, it seems, intentional discrimination had to be the cause of systemic discrimination. In the Canadian approach to affirmative action, as I will explain below, systemic discrimination does not have to be the product of intentional discrimination.

\textit{The Canadian transformation of systemic discrimination}

The Canadian Human Rights Commission (CHRC), which was established in 1977, adopted the concept of systemic discrimination articulated by the EEOC. The immediate contact between officials in the EEOC and the CHRC and the similarities between each agency's understanding of the concept of systemic discrimination and the role of affirmative

\textsuperscript{275}\textit{Ibid.}, p. 765.

\textsuperscript{276}\textit{Ibid.}, p. 766.
action make clear that the Canadian Commission was influenced by the American experience. Indeed, Gordon Fairweather, Chief Commissioner for the CHRC, and Russell Jurianz, one of the Commission’s counsel, went on a study tour of the EEOC in 1978. Peter Robertson, Head of Regional Operations for the EEOC, subsequently became a consultant to the CHRC. Indeed, Rhys Phillips, current Employment Equity Commissioner at the CHRC, credits Robertson with educating the human rights community in Canada about affirmative action during the late 1970s.

While affirmative action and the meaning of discrimination were rarely discussed during the Canadian Human Rights Act debates, in its first annual report the Canadian Human Rights Commission forcefully articulated its understanding of both concepts. It stated:

Discrimination under the Act is not defined purely in terms of intentional bigotry or irrational prejudice. Discrimination includes, rather, any adverse differential treatment or impact, whatever its motivation...We cannot therefore define discrimination purely in terms of behaviour motivated by evil intentions; the definition has to include the impact of whole systems on the lives of individuals - what is called structural or systemic discrimination. As well as offering redress in isolated cases of discrimination against specific individuals, therefore, the Commission must study employment systems and social programs from the point of view of their effects on certain groups.

The Commission’s report also criticized the formal equal opportunity model, arguing that "strictly equal treatment, while seeming to eliminate discrimination, may in some situations serve to perpetuate the under-utilization of groups that are already at a disadvantage because of previous discrimination." Therefore, the Commission advocated the use of special programs to address disadvantage.

The CHRC operated in the same manner as did the EEOC, negotiating with private employers upon complaints of discrimination brought by employees. In 1978, its first year of

---


278 Idem.


280 Ibid. p. 13.
operation, the Commission accepted 164 complaints and settled 11. In 1979 it had 226 complaints under investigation and settled 73. And in 1980 it had 373 cases under investigation and settled 79. The Commission also offered the services of Special Programs Officers who advised employers who wanted to identify and correct problems of systemic discrimination. It provided training and information sessions for managers and training personnel, and supplied assistance on how to set up special programs. For example, in 1979 the Commission helped Correctional Services Canada in designing a voluntary special program to determine the most effective means of introducing women into the correctional officer category in institutions for men. In 1980 a Systemic Discrimination Unit was organized within the Commission which housed specialists in the evaluation of personnel and management systems. It acted as an advisor to Commission staff and to employers who wished to satisfy themselves that their systems, policies and practices conformed to the Commission’s understanding of the requirements of the Human Rights Act.

Therefore, while the Commission did not settle as many complaints as the EEOC and did not play the role of intervenor in court cases, it did adopt the EEOC’s understandings of systemic discrimination and affirmative action. It is important to call attention to this work performed in the Commission because it, along with the work done at the Affirmative Action Directorate, which I will describe below, laid the foundations for the discussion of affirmative action in Judge Rosalie Abella’s pivotal Report on Equality in Employment.

The Affirmative Action Directorate

In 1979 the Affirmative Action Directorate (AAD) of the Canadian Employment and Immigration Commission (CEIC) was established. It acted as a consultant to private industry in the creation and implementation of affirmative action programs and ran a federal contractors

---


program to encourage Crown corporations and businesses with government contracts to adopt affirmative action programs. From 1979 to 1983, 49 of 1130 firms approached by the Directorate entered into agreements to establish programs.283

Elizabeth McAllister was hired to head the Affirmative Action Directorate, and her first assignment was to prepare a paper on affirmative action in the United States. The CEIC was interested in exploring the possibility of setting up preliminary affirmative action programs. McAllister reports that she read everything she could about the EEOC and the infamous Griggs v. Duke Power Company case, and then visited Washington to consult with officials in the agency. She credits Peter Robertson and Alfred Blumrosen of the EEOC as her two most important influences.284 Peter Robertson was subsequently hired as a consultant to the Directorate. In 1979 he prepared an hour long video on the meaning of systemic discrimination for the Directorate. McAllister reports that she hired Robertson many times to give talks on affirmative action because she knew "a pinstriped lawyer from Yale" would have a different impact on an audience than she could. Alfred Blumrosen, she reports, helped her to clarify what affirmative action was conceptually.

The Directorate established a national program with two consultants per region to convince the private sector to set up programs and advise them about how to do so, and to run a federal contractors program. McAllister reports that her experience with the AAD led her to believe that mandatory programs in the public and private sector were needed. In 1981, with the help and support of Minister of Employment and Immigration, Lloyd Axworthy, McAllister wrote a cabinet directive suggesting the implementation of mandatory affirmative action programs. Although there was agreement reached in the summer of 1982 that Parliament should proceed with a legislative program mandating affirmative action, the unemployment rate soared to 19% and the plans were delayed. Nevertheless, three pilot programs were


284 Elizabeth McAllister, interview by author, Ottawa, Ontario, August 10, 1994.
established within the federal public sector. The Royal Commission on Employment Equity was established in 1983, according to McAllister, to provide time before a mandatory programs could be instituted and to allow the private sector to comment on affirmative action.

**The Abella Commission: Systemic Discrimination Revised**

In her analysis of systemic discrimination, Judge Rosalie Abella began at the same starting point as had officials in the EEOC and the CHRC. She argued that the traditional model in which redress was made available for individuals who had been subjected to deliberate acts of discrimination was not adequate to the magnitude of the problem of discrimination. Because intent is often hard to determine, she argued that "the inexorable, cumulative effect on individuals or groups of behavior that has an arbitrary negative impact on them is more significant than whether the behavior flows from insensitivity or intentional discrimination."\(^{285}\) But, unlike the American preoccupation with such things as seniority systems and testing procedures, which keeps a focus on workplaces. Abella pointed to the systemic discrimination embedded in "the structure of systems designed for a homogeneous constituency" and to "practices based on stereotypical characteristics ascribed to an individual because of the characteristics ascribed to the group of which he or she is a member."\(^{286}\) Here, Abella indicated that she intended to extend her understanding of systemic discrimination beyond the confines of discrete workforces to include attitudes and practices which are prevalent in society at large and which prevent members of minority groups from having equal opportunities.

For example, in reference to barriers impeding women from equal employment opportunities, Abella pointed to attitudes held by educators about women's traditional roles that often result in women choosing educational options that limit their future opportunities and disqualify them from consideration for higher-paying jobs. Similarly, for women who want to


\(^{286}\)Ibid. pp. 9-10.
join the workforce later in life, Abella argued that the lack of training and educational opportunities relegate them to a narrow range of job options. In terms of visible minorities, Abella focused for the most part on the problems of newly arrived immigrant. She pointed to the lack of adequate language training available to them, so that many professionals with superior qualifications have their job opportunities severely restricted, often taking low-paying jobs in which their skills are not adequately utilized. Additionally, Abella listed a plethora of problems facing Canada’s aboriginal peoples, from lack of adequate educational facilities, to curricula that do not reflect their unique cultural heritages, to lack of childcare for native women who want to work outside the home. These examples of systemic discrimination represented a marked departure from the American court’s focus on ways to compensate for past intentional discrimination in discrete workforces.

*Equal opportunity as fully developing one’s potential*

Abella also clearly enunciated her rejection of the concept of formal equal opportunity. Formerly, she argued, the legal community believed that equality required treating everyone the same. Instead, Abella advocated an approach which recognized and accommodated the differences among individuals. Treating all people in the same manner would result in inequality. Acknowledging the complicated relationship between discrimination and disadvantage, Abella was careful to note that not all disadvantages derive from discrimination, but that the ones that do demand policy responses in the form of employment equity. This required a method that recognized the “pervasiveness and subtlety of discrimination.”

Equality in employment, according to Abella,

---


means that no one is denied opportunities for reasons that have nothing to do with inherent ability. It means equal access free from arbitrary obstructions. Discrimination means that an arbitrary barrier stands between a person's ability and his or her opportunity to demonstrate it. If the access is genuinely available in a way that permits everyone who so wishes to fully develop his or her potential, we have achieved a kind of equality.\textsuperscript{392}

Abella therefore articulated a form of equal opportunity that conforms to formal equal opportunity's aspiration to "careers open to talent." In Chapter 3, I explained that formal equal opportunity aspires to ensure that peoples' fates are determined by their choices and not their circumstances. But instead of formal equality's neglect of background circumstances, which often impede the realization of this aspiration, Abella made clear that such factors as inadequate educational and training opportunities are barriers which often block peoples' chances of demonstrating their talents. Therefore, these disadvantages must be recognized in any attempt to attain genuine equal opportunity.

Abella proposed an employment equity system in which employers themselves set annual internal employment objectives. An enforcement agency, perhaps the CHRC, would then determine whether the objectives were reasonable given the number of job openings the employer had, her prior record in terms of intentional discrimination, and the realities of the local labor market.\textsuperscript{393} Abella did not endorse the use of quotas because, she argued, they overlook regional considerations and the different demands faced by different industries and groups.\textsuperscript{394} Further, she recognized the broader reasons that explain why members of certain groups often lack skills, arguing:

To be unwilling to hire someone because he or she lacks qualifications is entirely legitimate; to presume an absence of qualifications because of some stereotypical disqualifying assumption attributed to all individuals in a certain group is not. It is wrong to suggest, as many have, that the main reason women, native people, disabled persons and some minorities are underemployed is their lack of qualifications. It may be one of the reasons, certainly, but it is a distant second to

\textsuperscript{392}p. 2.

\textsuperscript{393}Ibid. p. 205.

\textsuperscript{394}Ibid. p. 212.
the subtle but powerful wall of systemic discrimination that surrounds employment opportunities.\textsuperscript{395}

This statement reflects, I suggest, a more nuanced appreciation than presented in the American cases of the many complicated factors involved in attempts to attain equal opportunity. The American cases seem blind to the fact that the effects of past discrimination are not solely limited to workforces and that many individuals are unable to gain the qualifications necessary to compete for well-paying jobs, thus partially explaining the under-representation of minorities in workforces. A key goal, for Abella, was to provide individuals with access to such things as educational opportunities thus enabling them to compete for employment opportunities.

Abella's focus on access to opportunities free from arbitrary barriers conforms to a broader understanding of equal opportunity than offered by formal equal opportunity. C.B. Macpherson, for example, has described an understanding of equal opportunity which entails equal access to conditions favorable to the development of human potential.\textsuperscript{396} Since differences in resources and power lead to different outcomes and opportunities, Macpherson argued that genuine equal opportunity has to mean more than providing individuals with equal rights. Rather, it entails removing impediments that prevent individuals from equally developing their intellectual, moral, artistic, physical and civic-minded capacities. Therefore, the liberal individualistic vision of the state as merely protecting individual's rights to negative freedom had to be transformed, according to Macpherson, to allow a portrait of the state as actively removing obstacles and creating conditions favorable to equal access to opportunities. MacPherson's arguments resonate with the arguments of reform liberals like Abraham Lincoln, whose beliefs I described in Chapter 2, and who conceived of real freedom as the opportunity to develop all of one's facilities to be a full human being. Therefore, Abella's argument about equal opportunity as full and equal participation in the body politic and as a means to fully develop one's potential recall an ideal deeply imbedded in American culture.

\textsuperscript{395}p. 213.

\textsuperscript{396}Democratic Theory: Essays in Retrieval, pp. 70-76.
In the decade after the passage of the Civil Rights Act of 1964 lawmakers did depart from the prohibitions embedded in the legislation, but they did not develop a theory of equality of result. Rather, they worked to remedy past workforce discrimination and to eliminate its most blatant effects. But the cases presented to judges in which there were significant underrepresentations of minority workers but no evidence of intentional discrimination might have encouraged them to consider alternative reasons to explain the under-representation. Judges retained a limited vision of the nature of discrimination and of equal opportunity. Judge Abella's expanded vision, as we will see in the following chapter, established the foundation for more precise deliberations about how affirmative action can promote equal opportunity.
CHAPTER 5
AMERICAN AND CANADIAN JUDICIAL OPINIONS ABOUT
AFFIRMATIVE ACTION:
TO REMEDY DISCRIMINATION OR TO AMELIORATE
DISADVANTAGE

Just as the American lower courts in the 1960s and 70s failed to develop an adequate understanding of equal opportunity in their affirmative action decisions, the American Supreme Court has been unable to devise a more helpful version of equal opportunity even in its arguments supporting affirmative action. In this chapter I will describe and critique four American Supreme Court’s decisions in support of affirmative action written by Justice Brennan. By conceiving of affirmative action programs as remedies for discrete instances of intentional discrimination in workforces, Brennan ran into trouble justifying affirmative action in settings in which the nature of the discriminatory barriers facing members of groups kept them from even applying for employment, thus leaving no written record of past workforce discrimination on the part of the employer. This was the situation in the final case I will examine in which no woman had ever been hired as a road dispatcher by the Santa Clara County, California Transportation Agency, although there was no written record of instances in which women had been directly barred from employment. Brennan allowed the voluntary affirmative action program, but did not clearly explain why he did so.

The Canadian cases provide more complex and satisfactory understandings of the nature of discrimination, disadvantage and equal opportunity, and I will examine several important ones in the second part of this chapter. Affirmative action is not considered by Canadian judges to be remedy for past discrimination, but rather as a way to ameliorate the lives of disadvantaged groups and individuals. Judges demonstrate an appreciation for the difficulty in determining the precise relationship between discrimination and disadvantage in many circumstances; as a practical matter, they seem to recognize that it is not always possible to

discern the varied ways discrimination works to disadvantage groups, so that justifying affirmative action by reference to past discrimination alone will not bring about equal opportunity. Rather, they argue that equal opportunity can be attained by examining the actual needs of groups within society and fashioned means to address those needs. In keeping with this broader vision, Canadian law provides a reformulation of the types of programs characterized as affirmative action. For example, one judge suggested that to allow native people in Manitoba to take a leading role in the wild rice industry in that province, the government should provide them with capital and management assistance.²⁹⁸

The Canadian courts have, I will argue, begun to develop an approach to affirmative action which sees it as promoting the full participation of all citizens in the economic, political and social life of the society. This approach entails a belief that the pursuit of equal opportunity demands a decisive move away from formal equal opportunity's demand for equal treatment. Rather, since all laws differentially impact society's various groups and individuals, lawmakers have to be cognizant of the effects of laws on citizens, which in turn requires that they examine the actual position of different groups in society in relation to one another. Donald Galloway has argued that the Canadian Supreme Court seems to be developing what he calls a "swings and roundabouts" approach to equality.²⁹⁹ In this scheme, a law which too heavily burdens an individual, making it impossible for her or him to be an equal member of society, will be found to be illegitimate, as will a law which too heavily burdens a group which already carries a disproportionate proportion of society's burdens. Although Galloway does not discuss affirmative action, his theory accords with the Court's opinions on affirmative action, and in the second part of this chapter I will outline exactly how his theory characterizes Canadian law's approach to affirmative action. The understanding of equal opportunity and affirmative action in this "swings and roundabouts" approach replaces the illusory "neatness" of the

American approach of remedying past discrimination with difficult determinations of how to mediate claims from different disadvantaged groups. But, unlike American affirmative action law, it acknowledges the fact that all state actions benefit some groups and burden others, and attempts to achieve real equal employment opportunity by lessening the burdens on disadvantaged groups. In this chapter I will first examine the American cases and then contrast them to the Canadian cases.

**The American Supreme Court: remedying discrimination**

In this first section I will closely examine the American Supreme Court's approach to affirmative action. Specifically, I will look at the Court's only four decisions in favour of affirmative action based on Title VII of the Civil Rights Act of 1964 and argue that the arguments of Justice Brennan, who wrote all the majority opinions, remain close to the structure of argument of the principle of formal equality. Justice Brennan's majority decisions all contained the argument that the literal meaning of the words in Title VII had to be read in the context of its legislative history. Congress, he contended, intended to improve the social and economic conditions of black Americans by providing them with opportunities to work in traditionally segregated job categories. When he finally enunciated specifically what Title VII demands in *Local 28 of Sheetmetal Workers v. EEOC*, the third case I will examine, he claimed that when past discrimination is particularly egregious, courts may order affirmative action as a remedy.\(^{300}\) Throughout these cases, Brennan's arguments were consistently met with opposition based on the argument that the plain words of Title VII prohibit discrimination against individuals, and therefore do not allow judges to require employers to initiate race-conscious measures which might benefit African-Americans who themselves had not been directly victimized. In these four cases, Brennan garnered support from enough other Justices in order to sustain majority opinions because of his argument that affirmative action was a remedy for past discrimination and because of his constant recitation that the opinions he

\(^{300}\)106 S.Ct. 3019 (1986).
provided were narrow and did not address the question of the legitimacy of affirmative action in general, but only in the context of the specific facts of the cases at hand.

The first Title VII affirmative action case the Supreme Court decided was *United Steelworkers of America v. Weber* and the most important aspect of this case for Brennan was the fact that the affirmative action program in question was voluntary, thus not necessitating that he provide reasons for what Title VII requires, but only for what it permits. The steelworkers union and Kaiser Aluminum and Chemical Corporation entered into a collective-bargaining agreement in 1974 covering terms of employment at Kaiser's fifteen plants. The agreement included affirmative action plans designed to eliminate conspicuous racial imbalances among Kaiser's almost exclusively white craft workers by reserving for black employees fifty percent of the openings in in-plant craft-training programs until the percentage of black craft workers in the plants was commensurate with the percentage of black workers in the local labour force. Until 1974, Kaiser hired as craft workers for that plant only persons who had prior craft experience and because black workers had long been excluded from craft unions, few were able to present such credentials. Therefore, before 1974, only 1.83% of the skilled craft workers at the plant was black.

In the first year of the affirmative action program, seven black and six white craft-trainees were selected from the Gramercy, Louisiana plant's production workforce. All of the seven black workers had less seniority than white workers who had been passed over for entry into the training programs. Brian Weber, a white production worker, challenged the legitimacy of the plan, arguing that it infringed his rights by discriminating against him on the basis of colour, contrary to Title VII of the Civil Rights Act of 1964.

Rejecting Weber's claim, Justice Brennan's majority opinion argued that the primary concern of Congress in enacting the prohibitions against racial discrimination in Title VII was the plight of black workers in the economy, and the prohibitions were primarily addressed to the problem of opening opportunities for black workers in occupations which had been

---

traditionally closed to them. Therefore, to interpret the statute to forbid all race-conscious affirmative action would bring about an end completely at variance with the very purpose of the statute. While Title VII contains Section 703(j) which provides that nothing in the statute should be interpreted to require an employer to grant preferential treatment for the purposes of racial balancing, Brennan argued that it does not say that the statute does not permit preferential treatment. Thus, Title VII's prohibitions did not condemn all private, voluntary race-conscious affirmative action designed to "abolish patterns of racial segregation and hierarchy." An examination of the legislative history of Title VII, according to Brennan, showed that the drafters of the statute wanted it to be a catalyst to cause employers to examine their employment systems in order to eliminate "the last vestiges of an unfortunate and ignominious page in this country's history."

Brennan made clear that the scope of his decision was narrow. Since the Kaiser program was voluntary, the case did not involve the question of what Title VII requires or what a court might order to remedy a violation of Title VII. The only question before the Court was whether Title VII forbids private employers and unions from implementing affirmative action programs like the one Kaiser developed. He emphasized that he was not defining the line between all permissible and impermissible affirmative action programs, but only concluding that the Kaiser plan fell on the permissible side of the line. Finally, Brennan argued that a significant reason why this plan was permissible was its moderate nature. It did not unnecessarily trammel the interests of white workers. It did not

302 Brennan quoted Senator Humphrey, leader of the Civil Rights Act of 1964 for the Democrats in the Senate: "The crux of the problem is to open employment opportunities for Negroes in occupations which have traditionally been closed to them." See ibid. p. 2744.

303 Recall from my Chapter 3 that Section 703 (j) states that the Act cannot be interpreted "to require any employer...to grant preferential treatment to any individual or to any group because of the race...of such individual or group."

304 Weber, p. 2728.


306 Ibid. p. 2724.
require the discharge of white workers, nor did it create an absolute bar to their advancement, because half of those trained each year were white. Moreover, the plan was a temporary measure, one not intended to maintain racial balance, but designed to eliminate a manifest racial imbalance. Once the percentage of blacks in the craft worker positions was commensurate with their percentage in the labour force, the program would be eliminated.

In *Firefighters v. Cleveland* Brennan addressed another narrow question, this time whether Section 706(g) of Title VII precluded the admissibility of a consent decree which provided relief that benefited individuals who were not the actual victims of the defendant’s discriminatory practices. Section 706(g) forbid courts from ordering the promotion of individuals unless those individuals have themselves been direct victims of the employer’s discrimination. In this case, Brennan relied on the distinction between a consent decree and a court order, again, as in *Weber*, avoiding the question of whether Title VII allows a court to order affirmative action as a remedy for past discrimination. Rather, he argued that the voluntary nature of the agreements in consent decrees made them fundamentally different from court orders, and as such, Section 706(g) did not apply to the former. Therefore, he allowed an affirmative action program which provided for the promotion of individuals who themselves had not been direct victims of the employer's discriminatory practices.

In 1980 the City of Cleveland, after having been found guilty in District Court on several prior occasions of intentional discrimination in hiring and promoting black and Hispanic firefighters, entered into settlement negotiations with the Vanguards, a group of minority firefighters, in order to develop a consent decree. In November of 1981 the two parties entered the decree into District Court which contained an agreement that a fixed percentage of already planned promotions be reserved for minorities, and provided for the creation of appropriate minority goals for certain ranks. The plan was to remain in effect for nine years. At the

---

307 478 U.S. 501 (1985). Section 706(g) says: "No order of the court shall require...the hiring, reinstatement, or promotion of an individual as an employee...if such individual...was refused employment or advancement...for any reason other than discrimination on account of race, colour, sex, or national origin."

hearing regarding the decree in January of 1982, the Firefighter's Union objected that it had not been involved in negotiations. The judge refused to pass the decree and ordered all three parties to engage in discussions.

On January 11, 1983, the City and the Vanguards lodged another consent decree with the court. The union membership overwhelmingly rejected this agreement. Despite the union's objections, District Court Judge Lambros passed the agreement on January 31, 1983, noting that the plan was "not unreasonable in light of the demonstrated history of racial discrimination in promotions in the City of Cleveland Fire Department." A Court of Appeal agreed, stating that the plan "was fair and reasonable to non-minority firefighters," emphasizing the "relatively modest goals set forth in the plan." The plan did not require hiring unqualified minority firefighters or the discharge of any non-minority firefighters, it did not create an absolute bar to advancement by non-minorities, and it was of a relatively short duration.

Relying on Weber, Brennan argued again that the voluntary action available to employers and unions seeking to eradicate traditional patterns of racial segregation and hierarchy may include race-conscious relief that benefits individuals who are not actual victims of discrimination. The sole issue raised by the union in this case was whether the decree was an impermissible remedy under 706(g) of Title VII. Brennan's argument focused on the voluntary nature of the agreements in consent decrees, noting that while 706(g) might apply to court orders of affirmative action, it did not apply to consent decrees. "Consequently, whatever the limitations Congress placed in 706(g) on the power of federal courts to impose obligations on employers or unions to remedy violations of Title VII, these simply did not apply when the obligations are created by a consent decree."  

308 It required 66 promotions to Lieutenant, half of which were to be minority firefighters. There were to be a total of 52 promotions to Captain, Battalion Captain and Assistant Chief, and because 10 minority firefighters had qualified for these positions, 10 were to be promoted.  
309 Ibid. p. 512.  
310 Ibid. p. 513.  
311 Ibid. p. 529.
A crucial factor contributing to Brennan's decision was the fact that the consent
consisted use of "reasonable race-conscious affirmative action."\textsuperscript{312} Brennan agreed with the
lower courts' assessment of the reasonableness of the plan in the context of prior
discrimination on the part of the employer.

Justice O'Connor, in her concurring opinion, stated that she wrote separately in order to
emphasize that the Court's holding in this case was a narrow one. Non-minorities were still
free to challenge race-conscious remedies as violative of their rights under Section 703 of Title
VII, which, she said, may forbid employers from granting preferential treatment on the basis of
race, but because the present plaintiffs had not done so, it was not necessary to decide that
question in this case. Dissenter Justice White criticized Brennan for limiting his discussion to
706(g) and not considering the legitimacy of affirmative action in the context of Title VII more
broadly.

\textit{Local 28 of Sheet Metal Workers v. EEOC} was the only case Brennan decided which
dealt directly with court-ordered affirmative action and he made sure to provide many reasons
to justify it.\textsuperscript{313} The history of the union's discriminatory practices was the deciding factor in
the outcome of the case. Indeed, that history was so egregious that even an opponent of
affirmative action, Justice White, agreed that this case may be an exception to his general belief
that affirmative action is forbidden under Title VII.

The case addressed a 1975 District Court order charging the union in question to end its
discriminatory practices and establish a 29% non-white membership goal, based on the
percentage of non-white workers in the relevant labor pool in New York City, to be achieved
by 1981. In the early 1960s the New York State Supreme Court affirmed the determination of
the State Commission on Human Rights that the union had excluded black workers from the
union and from the sheet metal apprenticeship program, and directed it to develop objective
admissions standards. When the Court's order proved ineffective, the Human Rights

\textsuperscript{312} Ibid, p. 516.

\textsuperscript{313} 106 S. Ct. 3019 (1986).
Commission commenced three more proceedings in an effort to end the union's practices. In 1971 the United States initiated the present action under Title VII and Executive Order 11246. In 1976 a District Court ordered the 29% membership goal, noting that "the record in both state and federal court against these defendants is replete with instances of...bad faith attempts to prevent or delay affirmative action." In 1982 and again in 1983, the District Court found the union guilty of civil contempt in disobeying its orders, and it amended the order to allow the union until 1987 to achieve the membership goal. At that point, the union challenged the court order, arguing, as had the union in *Firefighters v. Cleveland*, that Section 706(g) of the Civil Rights Act authorized a district court to award preferential relief only to actual victims of discrimination.\(^{315}\)

Justice Brennan reiterated the argument that appropriate race-conscious relief furthers the broad purposes underlying Title VII, which was to open employment opportunities to minorities in occupations which were traditionally closed to them. Going beyond arguments made in the two previous cases, he held that Title VII allowed judges to order affirmative action "where an employer or a labour union has engaged in persistent or egregious discrimination, or where necessary to dissipate the lingering effects of pervasive discrimination."\(^ {316}\)

Justice Brennan disagreed with plaintiff's interpretation of Section 706(g), arguing that the debate in Congress concerning what Title VII did and did not require culminated in the conclusion that employers or unions could not adopt racial quotas simply because of a racial imbalance in the workforce. However, Congress gave no intimation as to whether such measures would be appropriate as remedies for Title VII violations. "An examination of the legislative policy behind Title VII discloses that Congress did not intend to prohibit a court


from ordering affirmative action in appropriate circumstances as a remedy for past discrimination."

Again, Brennan explicitly pointed to the narrowness of his decision, stating that preferential remedies were not always appropriate. In particular, preferential treatment could not be employed to create a racially balanced workforce. Rather, a court could resort to its use when confronted with an employer who had engaged in egregious discrimination or when necessary to dissipate the lingering effects of pervasive discrimination. "Whether there might be other circumstances that justify the use of court-ordered affirmative action is a matter that we need not decide here. We note only that a court should consider whether affirmative action is necessary to remedy past discrimination in a particular case before imposing such measures, and that the court should also take care to tailor its orders to fit the nature of the violation it seeks to correct."\(^{318}\)

Brennan then listed the factors which led him to believe that affirmative action was necessary in this case. First, both the District Court and the Court of Appeals agreed that the program was necessary in light of the defendant's "foot-dragging resistance" even to orders simply enjoining it from engaging in discriminatory practices. Because of the union's reputation as hostile to minorities, another injunction against discrimination would not have been enough to open employment opportunities for minorities and thus combat the lingering effects of past discrimination. Second, the District Court's membership goal was not used to achieve racial balance but only to rectify a conspicuous racial imbalance. Third, the membership goal was a temporary measure. Fourth, it did not unnecessarily trammel the interests of white workers; it did not require any member of the union to be laid off, did not discriminate against existing union members, and it was not an absolute bar to the admission of white workers.\(^{319}\)

\(^{317}\)Ibid, p. 3,032.

\(^{318}\)Ibid, p. 3,050.

\(^{319}\)Ibid, p. 3,052.
In dissent, Justice White argued that this may have been an unusual case in which the defendant's past discrimination was so egregious as to warrant some remedial measures, but they could not take the form of strict quotas, as they did in this case.\footnote{Ibid, p. 3,062.} In choosing a particularly egregious case of past discrimination in which to articulate his approach to affirmative action, Brennan opened the way for criticism in cases where the nature of past discrimination was less severe.

The issue of the factual predicate for affirmative action programs arose again in Johnson v. Transportation Agency, Santa Clara County, California, and Justice Scalia took this occasion to write a comprehensive opinion challenging Weber and the subsequent cases which justified affirmative action as a remedy for past discrimination.\footnote{107 S. Ct. 1442 (1987).} This time, because the defendant had not been previously found guilty of intentionally discriminating on the basis of race or sex, Brennan relied not on actual findings of past discrimination, but on the implication that the imbalance in the workforce was caused by discrimination. But he never provided an analysis of the nature of this type of discrimination, nor how affirmative action could combat it. Conservatives on the Court quickly pointed out that he had come dangerously close to implicating "societal discrimination" as a cause of the imbalance, and pointed to a recent 14th Amendment decision in which a majority of the Court agreed that affirmative action could not remedy this sort of discrimination.\footnote{Wygant v. Jackson Board of Education, 106 S.Ct. 1842 (1986).} Justice Scalia criticized Brennan for betraying the very standards he had previously employed to justify affirmative action.

Johnson addressed the question of the legitimacy of an affirmative action plan voluntarily adopted by the Agency, which provided that in making promotions to positions within a traditionally segregated job classification in which women were under represented, the Agency could consider as one factor the sex of a qualified applicant. The plan set aside no specific
number of positions for women or minorities, but required that short-range goals be established and annually adjusted to serve as hiring guides.

When the Agency’s Road Division announced a vacancy for the position of road dispatcher in 1979, none of the Skilled Craft Worker positions was held by a woman. Twelve Agency employees applied for the promotion, including Diane Joyce and Paul Johnson. In 1975 Joyce had become the first woman in the Agency to fill the position of road maintenance worker. In interviews by a two-person board, Johnson achieved a score of 75, while Joyce ranked next with a score of 73. Both Joyce and Johnson were rated qualified for the job, but on the basis of the plan, Joyce was given the position.

Johnson filed a complaint with the EEOC alleging that he had been denied the promotion on the basis of sex in violation of Title VII. Brennan’s assessment of the legality of the plan was guided partially by his decision in Weber. He argued that employers seeking to justify the adoption of a plan did not need to point to their own prior discrimination, but only to a “conspicuous...imbalance in traditionally segregated job categories.” Voluntary affirmative action could play a crucial role in furthering Title VII’s purpose of eliminating the effects of discrimination in the workplace, and it should not be used to thwart such efforts. The difference between Weber and Johnson, however, was that in the former case there was clear evidence that the union had barred black workers from membership. In Johnson, there was no written record of women having ever been barred from employment by the Transportation Agency.

According to Brennan, the Agency’s plan acknowledged that the low number of women in the skilled craft positions was partially a result of the fact that women had not been strongly motivated to seek training or employment in these positions. The Agency’s description of the program illustrates two justifications for the plan and the latter constituted a departure from the

---

123Johnson, p. 1451. Brennan, joined by Justice O’Connor in her concurring opinion, pointed out that the imbalance in a workforce did not have to be such that it would support a Title VII case against the employer, since few employers would voluntarily adopt affirmative action plans if in order to do so they had to compile evidence that could be used to support a Title VII case against them. See p. 1453.
Court's emphasis on identifiable discrimination. The Agency had adopted the program because "mere prohibition of discriminatory practices is not enough to remedy the effects of past practices and to permit attainment of an equitable representation of minorities, women and handicapped persons." Brennan, in agreeing with the Agency's plan, might have argued, as had Judge Abella in the Canadian context, that attitudes held by educators about women's traditional roles often result in women choosing career paths which disqualify them from higher-paying jobs. He might have noted that simply ignoring this more subtle type of discrimination will not lead to real equal opportunity. Unfortunately, he did not make these types of arguments.

Nevertheless, the concurring and dissenting opinions in Johnson brought to the fore conflicts about how to justify affirmative action that had been simmering in the background of the earlier cases. Justice O'Connor, in her concurring opinion, criticized Brennan for not providing a clearer justification for affirmative action in this case. She explained that she understood the Weber decision as determining that Congress in the Civil Rights Act of 1964 had permitted affirmative action only as a remedial device to eliminate discrimination or the lingering effects of discrimination. She based her concurrence in the Johnson decision on her belief that the statistical disparity in the workplace would have been sufficient for a prima facie Title VII case brought by unsuccessful women job applicants. In other words, she based her opinion on her belief that the disparity was caused by systemic discrimination on the part of the employer, even if it had not been previously discovered through litigation. Unfortunately, O'Connor did not provide any clues about how she would have argued the case on the basis of systemic discrimination.

---

134 Ibid. p. 1446.

135 Ibid. p. 1446. Recall that in Griggs v. Duke Power Co., 401 U.S. 424 (1971), the Supreme Court ruled that a significant statistical imbalance in an employer's workforce constituted a prima facie case of discrimination. The employer then had the burden of showing that any business practice which had a disparate impact upon minority applicants or workers could be justified by 'business necessity.'
Justices White and Scalia, in their dissenting opinions, expressed an understanding of *Weber* which was narrower than O'Connor's. They both argued that they understood Brennan's use of the phrase "traditionally segregated jobs" to imply that the employer's plan in that case did not violate Title VII because it was designed to remedy the intentional and systematic exclusion of black workers by the employer and the union.126 This, they argued, clearly was not Brennan's interpretation of Title VII in the present case which dealt with discrimination on the basis of sex.

But Scalia was not satisfied to criticize *Johnson* according to the criteria set out in *Weber*, but called the latter case into question too. In his dissenting opinion, he began by arguing that the Agency's plan could not have had as its goal to remedy prior discrimination because none, as he put it, "had existed" in this case. Rather, the Agency's goal was to mirror the racial and sexual composition of the entire county labour force. The plan was partly intended to overcome societal attitudes which had limited the entry of women into certain jobs. Scalia pointed to *Wygant v. Jackson Board of Education*, a Supreme Court decision handed down one year earlier, which determined that affirmative action programs which had as their goal remedying societal discrimination violated the Equal Protection Clause of the Constitution.127 The same standard, he suggested, should be applied to Title VII cases.

Scalia argued that the *Weber* decision be overruled because it thoroughly misinterpreted the intentions of Congress in writing Title VII. Like Rehnquist and White before him, he asserted that the words of the statute were plain: it is an unlawful employment practice "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual...because of such individual's race, colour, religion, sex, or national origin."128 Brennan's many justifications for the programs (that they were designed to break down patterns of segregation, that they did not trammel the interests of white workers, that they were


127 106 S. Ct. 1842.

temporary measures etc.) did not derive from the plain meaning of the statute but were "judicially derived codes of conduct, the contours of which are determined by no discernible standards aside from...the divination of congressional "purposes" belied by the face of the statute and its legislative history." 329

Scalia's arguments in Johnson could have been countered by the argument that the goal of rectifying hundreds of years of discrimination requires an analysis of how present disadvantage is the result of this past discrimination. The four cases I have described contain the most supportive arguments for affirmative action that exist in the American legal setting and yet they were narrow, conceiving affirmative action as a remedy for past discrimination in workforces. In many ways, Brennan's critics were correct in that he did not fully describe what Title VII requires in reference to affirmative action. In the following section I explain in detail problems with Brennan's approach.

**Critiques of the American Court's approach**

The American Court's reliance on the concept of past discrimination as a justification for affirmative action is problematic on several counts. As Kathleen Sullivan points out, the approach taken by Justice Brennan fits into a "sin-based" paradigm and is a form of corrective justice. 330 It can be placed comfortably within a formal equality model because of the necessity of finding a perpetrator of wrong-doing. The principle of formal equality as applied to employment requires the eradication of the behaviour of individuals who have engaged in discriminatory practices. Here the goal is to isolate and punish racial discrimination viewed as instances of individual badness in an otherwise non-discriminatory social realm. 331

---


As a practical matter, this way of describing affirmative action invites claims that white or male workers, who are innocent of the behaviour of their bosses, should not pay for other's sins. As a result, it dooms affirmative action to future challenges even while legitimating it. It subjects affirmative action plans to potentially protracted litigation over the "factual predicate" for adopting them. Demanding that programs serve to remedy past discrimination may deter voluntary implementation because employers will not want to admit discrimination, thus exposing themselves to possible lawsuits.

The problem of basing the justification for affirmative action on past discrimination is evident in the final American decision I examined in which there was no concrete evidence of past discrimination by the employer despite the fact that no woman had ever been hired as a skilled craft worker in California's Santa Clara County Transportation Agency. Justice Brennan allowed the program on the implicit assumption that the absence of women in this position must have been the result of past discrimination in the Agency. But, Brennan did not look outside of the Agency's workforce to consider the more general societal discrimination of women or their unequal employment conditions. This is characteristic of the Court's affirmative action jurisprudence. The American Supreme Court has consistently insisted that it cannot be engaged in the enterprise of examining the relative status of groups in society. For example, in *University of California Regents v. Bakke*, Justice Powell argued that "[t]he kind of variable sociological and political analysis necessary to produce such rankings [among groups] simply does not lie within the judicial competence - even if they were politically feasible and socially desirable." Similarly, in *Wygant*, Powell reiterated another form of the concern about recognizing groups. "Societal discrimination," he said, "is insufficient and over expansive. In the absence of particularized findings, a court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to effect the future."

---


Owen Fiss has noted that much of the Court's civil rights jurisprudence is characterized by attempts to justify progressive measures while staying within a formal equality framework. He shows the futility of the Court's endeavour to deliberate about affirmative action using a constricted understanding of discrimination which defines it as isolated acts of harm. This approach denies the full force of the historical reality of the oppression of certain groups. Justice Brennan's approach moved beyond a strict formal equality principle because it did not require, as would Scalia and Rehnquist, that only victims of acts of discrimination benefit from different treatment, but neither did it embrace a more substantive approach to equality. Fiss argues that the Court must face the inadequacies of what he calls the "anti-past discrimination principle":

[O]nce the connections between victim and beneficiary and between past perpetrator and present cost-bearer are severed, we have ceased talking about the perpetration of past discrimination in an individualized sense. The past discrimination we are talking about is of a more global character - for example, that the group were slaves for one century and subject to Jim Crow laws for another. The ethical significance of this global past discrimination cannot be denied; it gives the group an identity and might explain why we are especially concerned about its welfare. But at the same time it should be understood that once we start talking of global past discrimination, the link between the proposed anti-past-discrimination principle and the original anti-discrimination principle become highly attenuated. We have embarked on another journey altogether, one that is decidedly not individualistic...

Fiss correctly perceives the confusing nature of the American Court's attempt to justify affirmative action programs on the basis of identifiable acts of past discrimination in discrete workforces. If we say that past discrimination is limited to identifiable acts of harm, then we ignore the global nature of past discrimination. But, as Alan Freeman points out, statutes like the Civil Rights Act of 1964 would not even have been initiated if not for the widespread historical oppression of African-Americans. However, at the same time, an attempt to realistically assess the nature of past discrimination may be an impossible task for judges. As

---


Fiss also points out, "[a] true inquiry into the nature of past discrimination necessitates evidentiary judgements that are likely to strain the judicial system - consume scarce resources and yield unsatisfactory results. It would require the courts to construct causal connections that span significant periods of time..."337

Sociologist William Julius Wilson has convincingly argued that the effects of past discrimination are incredibly complex.338 As I will make clearer in the conclusion, he points out that historic discrimination accounts for the disproportionate concentration of low-income African-Americans in large cities in the middle of this century. This has left African-Americans especially vulnerable to recent structural changes in the economy such as the relocation of manufacturing industries out of the cities.339 It may be beyond the scope of judges, as the Court has pointed out, to untangle the myriad ways past discrimination has resulted in present disadvantage. But if lawmakers limit themselves to only remedying clearly identifiable past discrimination, then they leave unaddressed the many damaging effects of past discrimination. And that surely is not a recipe for attaining real equal opportunity. Therefore, we need an approach to affirmative action which recognizes that lawmakers, and especially judges, cannot discern all the ways discrimination has caused disadvantage, but at the same time, attempts to address these disadvantages. As will become clear upon examination of the Canadian cases, Canadian law provides inspiration for formulating an approach to this problem. Canadian judges do not envision affirmative action as a way to remedy discrimination in workforces. Rather, they see it as a way to ameliorate disadvantage. This understanding requires them to examine the social, political and economic status of groups within society. For example, one Canadian judge determined that native Canadians in Manitoba are a disadvantaged group, and suggested that the government provide them with financial assistance to allow them to take a

337Fiss, p. 145.


339Ibid, p. 34.
role in the wild rice industry in that province.\textsuperscript{340} Judges have not found it necessary to make all the causal connections between past discrimination and present disadvantage. Therefore, the fears expressed by Owen Fiss about the inability of judges to determine all the consequences of past discrimination need not be fatal as Canadian judges see affirmative action as ameliorating disadvantage. Furthermore, it is imperative to note that Canadian judges do not experience themselves as bypassing their judicial competence in making determinations about the relative disadvantage of groups in society. While the American Court has consistently insisted that it cannot make, in the words of Justice Powell, “the kinds of variable sociological and political analyses necessary to produce rankings” among groups, this task is fundamental to the Canadian Court’s enterprise of ameliorating disadvantage.

\textit{The Canadian Cases - Ameliorating Disadvantage}

In this section I will examine the Canadian Supreme Court’s only three affirmative action cases, its first equality rights cases under the Charter, and several lower court decisions in which judges have employed the approach articulated in the higher Court’s decisions to justify affirmative action. While the objective of American affirmative action law is to remedy past identifiable discrimination, Section 15(2) of the Canadian \textit{Charter of Rights and Freedoms} does not contain the word discrimination, but sanctions "any law, program, or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups."\textsuperscript{341} Canadian judges consider affirmative action to be a way for members of disadvantaged groups to improve their well-being, arguing that the search for real equal opportunity must include an analysis of the status of groups in the political, social, and legal contexts in which decisions are made. In contrast to the American cases, they express concern with the effects of laws and programs on different groups in the community. In their arguments judges insist that special programs targeted toward members of disadvantaged groups, and not the identical treatment of individuals, will result in equal opportunity.

\textsuperscript{340} See p. 183 above.

\textsuperscript{341} Schedule B, Constitution Act 1982, (U.K.), c. 11.
Because of the relatively smaller number of Canadian cases and the recent development of the Court's equality jurisprudence under the Charter, I will examine both the Court's equality rights and affirmative action cases in order to explain the understanding of equality implicit in them. I will explicate how the Canadian focus on disadvantage rather than discrimination fits into a framework which sees equality as rooted in the equal membership of every individual in society. The Canadian Court has not explicitly articulated this view of equality, but its concern with the impact of laws and programs on the conditions of groups and individuals reveals an attachment to an approach which promotes the active participation of all citizens in the community.

This approach recognizes that laws always have differential impacts on different individuals and groups. Donald Galloway calls it a "swings and roundabouts" approach to equality to ensure equal membership in society. What one individual or group loses on one occasion, because of a law or program, he, she or it may regain on another occasion. The goal is a more equitable distribution of benefits and burdens through many different impacts. This system requires that lawmakers make efforts not to excessively burden members of disadvantaged groups. At the same time, members of groups that are not disadvantaged must not be so negatively impacted by any law as to make it impossible for them to be equal members of society. This understanding of equal opportunity both forbids discrimination conceived as harmful acts motivated by animus and promotes positive measures designed to enable members of disadvantaged groups to fully participate in society. The latter goal of improving the lot of members of disadvantaged groups requires that lawmakers take into account differences among groups in the political community. It envisions a positive role for the state in creating the conditions which enable individuals to be equal members of society.

The Canadian Supreme Court has explicitly stated that the goal of affirmative action is the amelioration of disadvantage, and legal observers have recognized that in order to justify affirmative action, this disadvantage need not be directly related to specific instances of past discrimination. Rather, the presumption underlying the programs is that the disadvantage that
is addressed by affirmative action has been caused by discrimination. As Michael Pierce points out: "The crux of the disadvantage issue under s.15(2) is whether the group or individual is commonly, traditionally or historically disadvantaged."

Similarly, Coleen Sheppard argues that the focus on disadvantage directs courts to examine the "actual, social, economic and political indices of disadvantage, for example, poverty, denial of opportunity, exclusion from participation in social institutions and prejudice."

In the cases that I will examine in detail below, the Court systematically rejected assumptions implicit in the American cases. In the first case Athabasca, the Court determined that affirmative action programs, conceived as measures to "improve the lot" of minorities, could not be conceptualized as infringing the equality rights of members of non-target groups. In the second, Action Travail des Femmes, the Court made clear that affirmative action should not be seen as a remedy for past discrimination, and discrimination in any case could not be limited to intentional acts of harm. In Andrews the Court stated its concern with the impact of laws and practices on the conditions of individuals and groups. In the final lower court cases I will examine, it is clear that the judges have adopted the Supreme Court's understanding of affirmative action as ameliorating disadvantages, but faced with claims from different disadvantaged groups, have run into trouble mediating these claims. I will attempt to show how application of the equal membership theory of equality may have aided them. The equal membership theory does not provide a comprehensive framework for how to carry out affirmative action programs, but its explanation of the purpose of affirmative action may help judges to more clearly deliberate in these cases.

It was not until the late 1980s and early 1990s that the Canadian Court began to develop a specific approach to affirmative action. But its earlier cases reveal the beginnings of the present Canadian approach, which is based on a recognition that members of disadvantaged groups

---


deserve different treatment. In its first affirmative action case, *Athabasca Tribal Council v. Amoco*, the Supreme Court faced the question of whether Alberta’s Energy Resources Conservation Board had authority to prescribe the implementation of an affirmative action program as a condition of its approval of a tar sands plant proposed by Amoco Canada Petroleum Company and other companies, collectively referred to as Aslands.\(^{144}\) This was not a Charter case and the opinion provided a limited argument in support of affirmative action. Nevertheless, it demonstrates the Justices’ unwillingness to adopt the concept of reverse discrimination and shows their understanding of affirmative action as encompassing broad strategies to "advance the lot" of disadvantaged groups.

Although the specifics of a program were never agreed to, the Athabasca Indians wanted Aslands to, among other things, establish recruitment goals, create training and counseling programs, and sponsor native business opportunities programs as a condition of starting the project. Aslands based its opposition to the plan on the lack of authority of the Conservation Board to decide this issue, and more importantly, on the argument that affirmative action breached Alberta’s Individual’s Rights Protection Act which provided that "no employer...shall discriminate against any person with regard to employment or any term or condition of employment."\(^{345}\) Aslands contended, and the Court of Appeals agreed, that affirmative action programs, in preferring members of one group on the basis of race, discriminate against members of other races.

The Supreme Court unanimously concluded that the Board did not have authority to order the programs, although Justices Laskin, Ritchie, Dickson and McIntyre, in an opinion written by Ritchie, stated that the issue of affirmative action, while not necessary to the determination of the case, warranted discussion.\(^{346}\) Ritchie pointed out that Aslands’ contentions were in


\(^{345}\)Ibid. p. 710.

\(^{346}\)Justice Larmor, writing for the other group and noting that he “earnestly shared” Ritchie’s opinion about the legitimacy of affirmative action, said that he was confirmed in his decision not to write about the issue by the fact that the Alberta legislature had since amended the Individual’s Rights Protection Act to allow affirmative action programs. Ibid.
accord with a "reverse discrimination theory" and that adoption of this theory "would in my view mean that in the Province of Alberta it would be unlawful to pursue a policy favouring any individual or group of individuals on the grounds that in doing so other individuals would be discriminated against." Arguing that programs designed for the betterment of one group should not be construed as discriminating against other inhabitants, he said: "The purpose of the plan as I understand it is not to displace non-Indians from their employment, but rather to advance the lot of Indians so that they may be in a competitive position to obtain employment without regard to the handicaps which their race have inherited."

Concluding that the Alberta statute was not inconsistent with affirmative action, he expressed his view that the very purpose of affirmative action was, like the Act itself, to promote equality. Referring to the statute's guarantee that "all persons are equal in dignity and rights without regard to race," he argued, borrowing from a dissenting opinion in the Court of Appeals decision: "If these high sounding words have any meaning and significance at all, surely one cannot read the statute in a way to result in or have the effect of reaching the very opposite effect to the declared purpose."

In 1987 the Canadian Supreme Court revisited the issue of affirmative action in *CN v. Canada (Human Rights Commission)*, a case that concerned the scope of affirmative action under the Canadian Human Rights Act. Justice Dickson's key conclusion in this case was that affirmative action should not be conceived as a remedy for past discrimination. Rather, affirmative action was meant to respond to systemic discrimination which negatively burdened members of certain groups. The Court moved away from the paradigm implicit in the American cases by explicitly arguing that the attainment of equality did not require neutral

---

p. 742.


348 *Idem.*

349 *Idem.*

procedures which treat individuals in the same way. This case dealt with a program similar to those contemplated in the American Supreme Court cases. In a unanimous decision, Chief Justice Dickson adopted the vocabulary of Judge Rosalie Abella's *Report of the Commission on Equality in Employment* and referred to the program in question as an employment equity program. The issue at hand was whether a Human Rights Tribunal was within its jurisdiction in ordering the Canadian National Railway (CN) to institute an employment equity program to address the problem of systemic discrimination in the hiring and promotion of women.

Action Travail des Femmes, a public interest pressure group, alleged that CN was guilty of discriminatory hiring and promotion practices, contrary to the Canadian Human Rights Act, by denying employment opportunities to women in certain unskilled, blue-collar positions. A Human Rights Tribunal was constituted in 1981 to study the complaint. By 1982, 155 complaints against CN had been lodged with the Commission and another Tribunal was established to consider the class complaint. The Tribunal found that the recruitment, hiring and promotion policies of CN prevented and discouraged women from working in blue collar jobs. In Canada as a whole 13% of blue collar workers were women, as compared to the St. Lawrence Region of CN where women made up only 0.7% of blue collar workers. Therefore, the Tribunal ordered CN to hire one woman for every four non-traditional positions, until 13% of the workers in "non-traditional" jobs were women.

CN made an application to the Federal Court of Appeal, charging that the Human Rights Commission had exceeded its jurisdiction by imposing a "specific and detailed program containing mandatory quotas," contrary to Section 41(2)(a) of the Act. Recall that this section provided that if a Tribunal finds that an employer has discriminated, the Tribunal can order the employer to "take measures, including adoption of a special program, plan or arrangement

---

referred to in subsection 15(1), to prevent the same or a similar practice in the future. Justice Hugessen's judgement for the Court of Appeal set aside the hiring goal, arguing that Section 42(1)(a) only allowed measures whose purpose was to prevent future discriminatory practices - it could not be used to authorize "restitution for past wrongs." He concluded: "There is nothing of prevention in this. The measure imposed, is, and is stated to be, a catch-up provision whose purpose can only be to remedy the effects of past discriminatory practices."

Justice Hugessen's comments formed the basis of Justice Dickson's majority decision for the Supreme Court. Dickson's main contention focused on the impossibility of distinguishing between remedy and prevention in affirmative action and here one can see the sharp difference from the approach taken by the American Court. It was often necessary to refer to historical patterns of discrimination in order to design strategies for the future. The goal of an employment equity program was not to "compensate past victims or even provide new opportunities for specific individuals who had been unfairly refused jobs or promotions in the past...[but rather to] ensure that future applicants and workers from the affected group will not face the same insidious barriers that blocked their forbears."

Employment equity programs, then, work in three ways, according to Dickson. "to create a climate in which both negative practices and negative attitudes can be challenged and discouraged." First, they place members of disadvantaged groups in the workplace despite

---

352 In Chapter 3 I pointed out that Section 15(1) of the Canadian Human Rights Act reads: "It is not a discriminatory practice for a person to adopt or carry out a special program, plan or arrangement designed to prevent disadvantages that are likely to be suffered by, or to eliminate or reduce disadvantages that are suffered by, any group of individuals when those disadvantages would be or are based on or related to the race, national or ethnic origin, colour, religion, age, sex, marital status or physical handicap of members of that group by improving opportunities respecting goods, services, facilities, accommodations or employment in relation to that group."

353 *CN v. Canada*, p. 1131.


355 *Idem*. 
any intentional discrimination on the part of the employer. But they also address what the American Court has called "societal discrimination." For example, according to Dickson, by allowing members of groups to prove their ability, the programs address the problem of negative stereotyping. Third, the programs create a critical mass of the previously excluded group, and this in turn has significant effects. It eliminates the problem of tokenism - no longer will one or two women, for example, "represent" all women. Minorities will not be placed at the periphery of management concerns. In addition, having a critical mass further addresses inequities in hiring because the informal processes of economic life, for example, members of minority groups recommending that their friends or family members apply to the company, will help to produce a significant minority applicant flow. Finally, if more women work in blue collar jobs, the stigma of women in such positions will be reduced. In general, a critical mass encourages a significant correction of the previous discriminatory system.

Dickson concluded: "The dominant purpose of employment equity programs is to improve the situation of the target group in the future." 

Among the numerous lower court cases dealing with affirmative action, the one to provide the most in-depth analysis of the relationship between s. 15(1) and s. 15(2) of the Charter is Apsit v. Manitoba Human Rights Commission. The fact that a number of Canadian experts consider this case to depart from the dominant approach to affirmative action established in Canada to this point highlights the differences in approaches between Canada and the United States. Their comments reflect a recognition, similar to the one made by William Julius Wilson, of the impossibility of accurately gauging all the ways present disadvantage has been caused by past discrimination. The judge in Apsit suggested that in order for an affirmative action program to be lawful, there had to be a relationship between the cause of the group's disadvantage and the specific goals of the program. The commentators I mentioned have argued that this requirements comes dangerously close to the American Court's insistence that

\[^{156}\text{Ibid. p. 1145.}\]
\[^{157}\text{[1988] 1 W.W.R. 629.}\]
affirmative action be a remedy for past discrimination, but I will take a more generous interpretation of his remarks.

The Manitoba Department of Natural Resources adopted a policy giving preference to people with native background in the issuing of licenses to grow wild rice on designated Crown land. The program was struck down not because the judge disagreed with the evidence that native people constitute a disadvantaged group for whom special consideration was justified, but because the object of the program had no relationship to the cause of the native community's disadvantage. Dale Gibson has argued that there is no support in the wording of section 15(2) to warrant this interpretation because section 15(2) refers only to the amelioration of the conditions of disadvantaged individuals and groups, not to the causes of their disadvantage. Further, he argued, it would be impossible to determine all the causes of disadvantage of native peoples, nor should one affirmative action program address all of them.358 Beatrice Vizkelety makes a similar point, arguing that the legitimacy of affirmative action should not rest on the government's ability to prove the causes of disadvantage, and that this decision moves dangerously close to the American court's requirement that affirmative action programs must be justified by reference to past discrimination.359 Michael Pierce agrees, noting that the use of something as "amorphous, complex and indeterminate as the cause of a group's disadvantage as a key for evaluating the form of amelioration leaves almost any affirmative action program open to challenge. There is little hope that anyone can determine the specific causes of a group's disadvantage."360


360Pierce, p. 293.
While it is true that requiring a finding of past discrimination to justify an affirmative action program would represent a departure from Canadian law, it is not clear that Justice Simonsen's decision requires such an endeavour. The judge seems to have required a connection between the causes of the disadvantage that the affirmative action program in question was meant to address, and the object of the program. In order to illustrate his point, he used the following example. If a government determined that a group in our society had a significant educational disadvantage, it could not, under s.15(2), adopt a special program to give the group first priority in granting of commercial fishing licenses. His argument is not that we need to determine all the causes of a group's disadvantage, but rather that we need to devise programs to address the actual disadvantages themselves.

Although it is difficult to determine the eventual outcome of this issue, other aspects of the case fall squarely within the emerging Canadian approach. For example, the court had no trouble finding that native people were a disadvantaged group. Examination of the data taken from Statistics Canada concerning educational levels, unemployment factors, income levels, value of housing or equity in property and general unemployment figures established a significant disadvantage. The government of Manitoba stated that the objective of the program was to encourage native people to take a leading role in the wild rice industry, an objective with which the judge did not quarrel. Indeed, he argued that s. 15(2) was a vehicle which could bring about genuine equal opportunity.

In terms of a mismatch between the cause of the disadvantage and the object of the program, Simonsen argued that the inability of the native people to take a leading role in the wild rice industry was not related to an inability to obtain wild rice permits, but rather to a lack of resources to take advantage of the opportunities available in the industry. Demonstrating that he did not object to the purpose of the program, he concluded that "the target group need[s] capital and management assistance in order to achieve its objective to have a leading role in the

---

361 Apsit, p. 637.
industry.\textsuperscript{362} Contrary to the commentators, if Apsit is interpreted as simply requiring a match between the nature of the disadvantages faced by minority group members and the programs devised to help them, then it provides a helpful model for an approach to affirmative action.

Perhaps the most important case in the development of the Canadian judiciary's approach to affirmative action is \textit{Andrews v. Law Society of British Columbia}, not because it was an affirmative action case, but because it was the Court's first attempt to define the equality right in the Charter. The case arose because Andrews, a permanent resident of Canada but a citizen of the United States, charged that British Columbia's law restricting admission to the bar to Canadian citizens infringed his equality rights under Section 15(1) of the Charter of Rights and Freedoms. Since this was the first Supreme Court case to be decided on the basis of the Charter's equality provisions, the Court took the opportunity to elaborate on the general meaning of equality under the Charter.

Several commentators have concluded that Justice McIntyre, who wrote the majority decision, articulated a fundamentally contradictory understanding of equality in \textit{Andrews}, at times indicating that equality requires the elimination of discrimination defined as stereotyping members of groups on the basis of group characteristics, and at others that equality is concerned with the impact of laws and programs, with the aim of equalizing burdens between different groups.\textsuperscript{363} However, Donald Galloway's analysis, which I will describe in detail, provides an overall framework which relieves the perceived tensions in the case and accords, I suggest, with the Court's previous affirmative action cases.\textsuperscript{364}

Galloway addressed the Court's seeming conceptual confusion in \textit{Andrews} regarding the relationship between equality and discrimination. The Court described an understanding of

\begin{footnotesize}
\textsuperscript{362} \textit{Ibid.}, p. 643.


\end{footnotesize}
discrimination, he argues convincingly, which is not tied exclusively to the concept of eliminating distinctions which treat people differently on the basis of group characteristics. as in American formal equal opportunity, but also to the concept of equal membership in society. Implicit in the Court's arguments, according to Galloway, is the understanding that since all laws distinguish between individuals, distinctions that discriminate are ones that treat individuals as less than full members of society.\footnote{Galloway finds evidence in the Court's decisions for three different approaches to equality. He calls them the equal membership model, the social disadvantage model, and the human dignity model. I think the first one best accords with the approach taken by McIntyre in Andrews and with the court's affirmative action jurisprudence. Further, is the most comprehensive of the three approaches described by Galloway, containing important elements of the other two.} Therefore, a law which determined that only men could be charged with murder would be discriminatory not because it unfairly or unreasonably categorized on the basis of sex, but because it unfairly burdened men to the point were they could not possibly be equal members of society. Similarly, a law which burdens a member of a group which already shares most of society's burdens might be discriminatory because it too might make it impossible for that individual to be an equal members of society. This understanding of Section 15(1) jurisprudence, I suggest, accords with the understanding of affirmative action that courts have been developing, that is, as positive action to achieve equality conceived as full participation for all as equal members of society. I will describe the two paradigms implicit in the Andrews decision which some commentators perceive to be contradictory, and then show how Galloway's theory of equal membership melds these two paradigms into a coherent framework. In the final section I elaborate on the understanding of affirmative action that flows from this framework.

Justice McIntyre stated at the outset in Andrews that equality entails the promotion of a society in which all are recognized at law as humans who deserve concern, respect and consideration,\footnote{[1989] 1 S.C.R. 143, p. 171.} and he also noted that equality is a comparative concept, "the condition of which may only be attained or discerned by comparison with the condition of others in the
social and political setting in which the question arises. This immediately distinguished the Court's approach from the American approach which claims that equality is not well-served by attempts to compare the relative position of groups in society.

The Court again quickly distinguished itself from the American Court's jurisprudence by rejecting an intention-based account of discrimination. Instead, it stated that reaching the goal of equality requires eliminating practices which have discriminatory effects. Drawing from Judge Rosalie Abella's Report on Equality in Employment, and reiterating what Justice Dickson had earlier affirmed in *CN v. Canada*, Justice McIntyre argued that discrimination did not need to be motivated by an intentional desire to harm, but could be an "accidental by-product of innocently motivated practices or systems that had a disproportionately negative impact upon certain groups." Indicating his concern with the actual impact of laws and practices he stated:

In simple terms, then, it may be said that a law which treats all identically and which provides equality of treatment between "A" and "B" might well cause inequality for "C," depending on differences in personal characteristics and situations. To approach the ideal of full equality before and under the law - and in human affairs an approach is all that can be expected - the main consideration must be the impact of the law on the individual or the group concerned. Recognizing that there will always be an infinite variety of personal characteristics, capacities, entitlements and merits among those subject to a law, there must be accorded, as nearly as possible, an equality of benefit and protection and no more of the restrictions, penalties or burdens imposed upon one than another.

Justice Bertha Wilson's opinion straightforwardly embraced and elaborated upon McIntyre's arguments about equality and the effects of laws on the actual conditions of different groups and individuals in society. Wilson stated that she was in complete agreement with McIntyre's interpretation of s. 15(1) of the Charter, but wrote separately to emphasize some of his points. Her analysis makes clear that the disadvantage of groups need not be the result of specific findings of past discrimination. In relation to citizens, non-citizens were a

---

"discrete and insular minority", that is, "a group lacking in political power and therefore vulnerable to having their interest overlooked and their rights to equal concern and respect violated." Following McIntyre, she noted that the determination that non-citizens constituted a category analogous to the categories enumerated in s. 15(1) could not be made only in the context of the law which was subject to challenge, "but rather in the context of the place of the group in the entire social, political and legal fabric of our society." Moreover, Wilson elaborated by pointing out that the range of discrete and insular minorities will change with political and social circumstances, so that s. 15(1) had to be interpreted with a good deal of flexibility. She concluded by saying: "Given that s. 15 is designed to protect those groups who suffer social, political and legal disadvantage in our society, the burden resting on government to justify the type of discrimination against such groups is appropriately an onerous one."

Some Canadian commentators have suggested that concern with the effects of laws leads to an understanding of equality as equality of result, which is antithetical to equality of opportunity. But this seems to me to assume an American-type conceptualization of equal opportunity. The Canadian Court, instead, I want to argue, has hinted at an alternative understanding of equal opportunity in Andrews, one in which the attainment of real equal opportunity requires lawmakers to examine the social and economic status of group members and the effects of laws on them. Equal opportunity still requires, however, that laws which unfairly stereotype on the basis of group characteristic are illegitimate.

---

370 Andrews, p. 152.


For example, at one point in his analysis, McIntyre shifted from a concern with the effects of laws to a concern with the character of the distinctions drawn in law, inviting the claim that Andrews provides a fundamentally contradictory understanding of equality. McIntyre argues:

I would say then that discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individuals or groups not imposed on others, or which withholds or limits access to opportunities, benefits and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed. (emphasis added)374

McIntyre's concern with personal characteristics seems to introduce a conception of equality as the elimination of laws which discriminate by unfairly stereotyping members of groups, a conception of equality close to that used in the American cases. This definition of discrimination accords with a comment made by Justice Wilson in a recent equality case McKinney v. University of Guelph, in which she stated that "[i]t is, I think, now clearly established that what lies at the heart of Section 15(1) is the promise of equality in the sense of freedom from the burdens of stereotypes and prejudice in all their ugly manifestations."375

What are we to make, then, of the Court's seemingly contradictory opinions about the nature of equality and discrimination? Analysis of one more cases demonstrates the Court's attempt to move away from a formal equal opportunity approach and develop one which recognizes that laws will always effect different groups and individuals differently. The goal, therefore, is not to treat all groups and individuals in the same manner, but to make sure that no law too heavily burdens any group or individual.

Hess and Nguyen v. The Queen concerned the question of whether s. 146(1) of the Criminal Code, which made it an offense for a male to have sexual intercourse with a female under the age of 14 years, was discriminatory because it restricted its ambit to male offenders.

and female victims. Justice Wilson argued that the legislation was not discriminatory because, as a matter of biological fact, the impugned offense could only be committed by men. She rejected the proposition that the law made an invidious distinction between men and women, one based on negative stereotypes of men, and she gave a clue as to the criterion to be used in order to determine whether a legal distinction would be considered by the Court to be illegitimate. She noted:

Thus, were the legislature suddenly to decide that first degree murder would only be an offense when committed by a man, one would face an illegitimate distinction that would trigger s. 15(1). It would place a serious burden on males that was not imposed on females when there was no reason related to sex for imposing such a decision.

The analysis of Andrews and this subsequent decision provides evidence that the Court is trying to forge an approach in which both distinctions based on prejudice and those that too heavily burden groups will be illegitimate. Thus, it is trying to combine the American approach of protecting individual freedom against discrimination with an approach which attempts to equalize benefits and burdens among different individuals and groups. The Court is developing, according to Galloway, a "swings and roundabouts" approach to equality in s. 15(1). This interpretation explains its concern with the differential impact of laws on different groups and individuals in society. Galloway explains the first part of this approach:

A particular law may have a differential impact on different individuals, but nevertheless other differential laws may on other occasions negate this effect. What one person or group loses on one occasion, he, she, or it may regain on another occasion. This is the key to understanding why the mere fact that a law has a differential impact does not, by itself, entail that a person has had her status as an equal member violated...In the last instance, equality will be achieved not through uniformity of impact of each law but through systematic equalization of many different impacts.


Dale Gibson points out the problematic nature of this argument. While the legislature described the offence as "penetration" and men by definition can only perform this act, women can nevertheless engage in sexual intercourse with boys under the age of 14. See his "Equality for Some," p. 18.

Hess, p. 928.

Galloway, p. 72.
But, this goes only half way to explaining the Court’s approach to equality in s. 15(1). Wilson’s comments in *Hess* point to a further consideration. To repeat the example she used, if only men could be charged with first degree murder, according to Galloway, no person who fell in the group (men) could possibly regard himself as still being a full member of the community, and therefore as a person deserving respect and concern, no matter how many other benefits were accorded by other legislation. Galloway states that s. 15(1):

> accords to each person a particular status in a non-hierarchical social system and attempts to ensure that no group or individual shall be accorded a lesser status by law. A law which places heavy burdens on individuals who belong to groups which already carry relatively heavy social burdens and which experience more than their share of disadvantage will fail to meet the demand. But so will a law which places a differential burden on individuals who do not belong to such groups, when the burden is such that it cannot be offset by future benefits.380

This explanation of the Court’s approach to s. 15(1) fits well with the court’s earlier affirmative action cases. Equal opportunity requires that no individual be too heavily burdened by a law as not to be able to equally participate in society. Lawmakers, then, must promote measures designed to achieve the full participation of all members of society.

Very recently, lower courts and human rights tribunals have begun to conceive of affirmative action as a way to ameliorate disadvantage, and have grappled with the issue of how to address claims from members of disadvantaged groups who argue that they have been excluded from affirmative action programs designed to address the conditions of other disadvantaged groups. In the first of these cases that I will examine here, a human rights tribunal unsuccessfully explained its decision, while in the second a court was more successful. I will use these two cases to show how conceiving of equality as equal membership may have guided the judges in their deliberations, enabling them to better justify their arguments.

*Roberts v. Ontario (Ministry of Health)* analysed Ontario’s Assistive Devices Program, which covers some costs of devices for individuals with long-term disabilities. Funding was

---

restricted to people who were 22 years old or younger. Mr. Roberts, aged 73 and legally blind, applied for financial support to assist him to buy a closed circuit television magnifier and was refused. The question at issue was whether the Assistive Devices Program was an affirmative action program designed to ameliorate the conditions of people under the age of 22 with long-term disabilities. Mr. Roberts lost the decision.

Constance Backhouse, who wrote the Human Rights Commission decision, relied upon McIntyre's analysis of the meaning of equality in defending the Assistive Devices Program as a measure designed to ameliorate disadvantage. It was set up, she insisted, to accommodate differences between the able-bodied and the disabled. Equality does not demand that members of all groups be treated equally. Rather, articulating a form of the equal membership theory, she noted: "[t]he proper focus of equality law is to ensure that vulnerable groups are enabled to exercise their rights and participate in opportunities so as to be able to contribute fully to the development of the community." 382

Backhouse's decision accorded with Justice Wilson's argument about the impossibility of defining exhaustively a range of disadvantaged groups. She noted: "The concept of "disadvantage" should be left open so that it can accommodate the needs of groups which may emerge in the future as we peel more and more layers off the surface of discrimination." 383

Backhouse argued that the beneficiaries of affirmative action programs must be individuals who suffer "hardship, economic disadvantage and disadvantage generally." 384 She had little trouble concluding that disabled persons, as a class, suffer economic deprivation in Ontario and that the Assistive Devices Program was developed and implemented in order to assist beneficiaries to achieve greater equality of opportunity. She too ruled against Mr. Roberts.

381 10 C.H.R.R. [1989].
382 Ibid. p. 6364.
383 Ibid. p. 6359.
384 Ibid. p. 6374.
Mr. Robert's complaint, however, did not argue that the program was unfair to able-bodied persons, but rather that it was under-inclusive in limiting beneficiaries to persons under 22 years of age. Backhouse's response to this charge was unsatisfactory. She replied that virtually all affirmative action programs will fail to be fully inclusive of all disadvantaged groups. Excluded groups could always lobby the Ontario Ministry of Health for the expansion of programs or bring a claim of discrimination against it on other grounds, apart from the affirmative action program. If complaints such as Mr. Robert's succeeded, then the very concept of affirmative action would fail and in the long run disadvantaged groups would lose in comparison with advantaged groups.385

Backhouse did not explain why disabled individuals under the age of 22 were more disadvantaged than those over that age, or alternatively, why individuals over the age of 22 had less of a claim to be equal members of the community through the use of the Assistive Devices Program. The objective of the program was to benefit disabled individuals who are disadvantaged in relation to able-bodied people, not to benefit young disabled people.386 It may be that disabled individuals over the age of 22 and senior citizens receive more benefits generally than do those under the age of 22. Backhouse should have included all disabled individuals in the program or provided a better explanation for the distinction it made, based on the differing needs of disabled individuals under and over the age of 22.

In R v. Willocks, a 1995 Ontario case, a somewhat more satisfactory explanation was provided for an affirmative action program which differentiated between disadvantaged groups.387 In this case, a Jamaican-Canadian claimed that his rights under Section 15(1) of the Charter had been violated because he was barred from participating in an alternative justice program available for aboriginal offenders. In the alternative justice program, a trial judge

385 Ibid. p. 6375.
387 22 O.R. (3d), 552.
seeks the guidance and recommendations of a council of aboriginal Elders that participates in the design and supervision of sentences. The Ontario court ruled that the program for aboriginal people constituted a valid affirmative action program within Section 15(2) of the Charter, and although it established priorities among disadvantaged groups, it was not "grossly unfair" to non-native offenders. This case was made somewhat easier because one reason the program was deemed not to be grossly unfair was the fact the appellant could have entered another alternative justice program but for the nature of his conviction.

Justice Watts prefaced his remarks by noting that the full scope of Section 15(2), as well as the precise nature of its relationship with Section 15(1) had not yet been authoritatively determined. However, he stated that Section 15(2) authorizes affirmative action programs as long as their object was the amelioration of conditions of disadvantaged individuals or groups. He stated:

It is beyond controversy that aboriginal persons are a disadvantaged group in the Canadian justice system. Their disadvantage, made manifest by their over-representation, recidivism rates and over-incarceration, is rooted in fundamental cultural differences, in particular, concepts of what constitutes justice.

The relevant alternative justice programs for aboriginal offenders. I am satisfied, have as their object or purpose making better or improving the lot of such a group in the criminal justice system.388

Watts concluded by arguing that in any such program designed to ameliorate the conditions of one group, others will be "disadvantaged" by their non-eligibility for participation. Section 15(2) does not ask that an affirmative action program address at once all individuals or groups who suffer disadvantage. Rather, "there must be some room left to establish and give effect to priorities amongst disadvantaged groups, provided there is no gross unfairness."389 The judge intimated that one of the reasons there was no gross unfairness in this case was that the appellant would have been eligible for another alternative justice program.


389 *Ibid.* p. 571. In my concluding chapter I will explain a full rationale for distinguishing between disadvantaged groups.
if he had not been convicted of domestic abuse, a crime which disqualifies applicants from such programs.

It seems to me that in the final two cases the decisions might have been improved by a consideration of Galloway's swings and roundabouts approach. For example, Backhouse might have articulated the particular disadvantages faced by younger individuals with long-term disabilities and clearly explained the different circumstances of older individuals which justified their exclusion from the program. She might have made clearer why their exclusion from the program did not constitute excessive burdens. The Willocks case seems to fit better with the swings and roundabouts formula. Here, the offender was not excessively burdened because he could have taken advantage of another program but for the nature of his offense.

These Canadian affirmative action cases, considered in the context of discourse present in legislative debates and important governmental reports, point to an understanding of affirmative action as state action promoting equal opportunity conceived as equal participation of all individuals in the community. Evidence for this interpretation can be found in Judge Rosalie Abella's Report on Equality in Employment in which she stated that employment equity helps to ensure that "access is genuinely available in a way that permits everyone who so wishes the opportunity to fully develop his or her potential" and aids in the creation of environments which allow citizens "equitable participation" in all aspects of society. This understanding of affirmative action is an improvement upon the American approach despite the fact that it calls for difficult determinations about how to mediate claims from different groups. This requires examining the history of discrimination against groups as well as their present conditions of disadvantage. It directs programs toward ameliorating disadvantage with the knowledge that no one group has a monopoly upon heightened consideration. In the conclusion, I will make a case for affirmative action directed at one group in the American setting and draw out the full implications of the arguments introduced in this chapter.

---

Abella, p. 1-3. Abella refers to some group's restricted employment opportunities, limited access to decision-making processes, little visibility as contributing Canadians, and a circumscribed range of options generally.
Vigorous public debates about the legitimacy of affirmative action have continued well into the 1990s in the United States, and the ideal of equal opportunity has remained at the centre of these debates. For example, Phil Gramm, Republican presidential hopeful, promised that if elected, he would sign an executive order to end affirmative action. Employing the language of formal equal opportunity, he stated: "I will fight for equal and unlimited opportunity for every American, but there will be special privileges for no one." On the other end of the political spectrum, former Democratic Representative Kweisi Mfume of Maryland and supporter of affirmative action, referring to President Clinton’s announced review of the federal government’s affirmative action programs, argued that the review would allow people to “see that there are really still benefits to be achieved in helping us to reach the kind of society where equal opportunity is there for all people.” Does the appeal to equal opportunity on the part of a supporter of affirmative action indicate that lawmakers have developed a new and different set of formulations from those articulated by Justice Brennan?

In this chapter I will examine the American Senate’s discussion surrounding the Civil Rights Act of 1990 in order to shed light on this question. My close analysis will provide strong evidence that supporters of affirmative action have neither transformed the American language of equality into equality of result, nor formulated a different version of equal opportunity than the one articulated in the Civil Rights Act of 1964 and by subsequent lawmakers. The discussion provides a distressing picture of the inadequacies of the current language of affirmative action in the United States. The debate about the legislation took on a bizarre and confusing cast as both supporters and opponents of affirmative action used the

---


same sets of formulations to defend their positions. For example, Democrats argued that affirmative action promotes the goal of equal treatment for all individuals while Republicans argued that the elimination of affirmative action would ensure equal treatment. It seems important to recall, in light of this strange and limited discussion, the role of political language in shaping our judgements about important issues. As Mary Ann Glendon has pointed out: "The way we name things and discuss them shapes our feelings, judgements, choices and actions, including political action. History has repeatedly driven home the lesson that it is unwise to dismiss political language as 'mere rhetoric.'" The fact that supporters of affirmative action in the 1990 debate did not articulate an adequate language of equal opportunity has important consequences, including limiting the chances that future consensus about the issue will arise. The American debate about affirmative action and equal opportunity calls out for a reformulation of the language used by supporters of affirmative action.

Here again, the Canadian House of Commons debate surrounding the Employment Equity Act of 1985 provides us with helpful alternatives. American legislators, both Republicans and Democrats, relied on a series of pithy formulations in their arguments - they spoke of the elimination of barriers versus preferential treatment; equality of opportunity versus equality of result; equal treatment versus preferences: merit versus favoritism; and colorblind measures versus measures that promote racial tension. The Canadian discussion provided alternative versions of the relationships between these concepts. Equal opportunity, legislators noted, entails both the removal of discriminatory barriers and special measures designed to promote the welfare of disadvantaged individuals and groups. They pointed out that in order to attain real equal opportunity, outcomes must be analysed because drastically unequal conditions decrease the possibility that equal opportunity exists. Other legislators argued that merely instituting equal treatment as public policy is a detriment to everyone because society overlooks, and therefore cannot benefit from, the talents and abilities of members of

---

disadvantaged groups. Taken together, the Canadian arguments provide a significant alternative to the American language of affirmative action.

**From Griggs to Weber: constraining equal opportunity**

In order to understand the debate about the American Civil Rights Act of 1990, it is important to revisit the *Griggs v. Duke Power Co.* decision which became the focus of discussion in the debate. Recall that in *Griggs* the Supreme Court approved of the concept of systemic discrimination and that the decision encouraged lower court judges to order affirmative action programs to combat this form of discrimination.\(^{394}\)

In the unanimous Supreme Court decisions written by Chief Justice Burger, the Court developed what became known as the *Griggs* prima facie rule which required plaintiffs to show a significant disparity between the percentage of minority members in an employer's workforce and the percentage in the relevant labor market. If the disparity were shown, the employer then had to make a convincing case that the practices that were associated with the underrepresentation were related to business necessity. The Court determined: "Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question."\(^{395}\) In *Griggs* the Court determined that Duke Power Company's requirements that all applicants for entry level positions have high school diplomas did not have a manifest relationship to the employment in question.

*Griggs* moved away from a strict formal equal opportunity model by focusing attention not on the motivations of employers but on the effects of their practices. In *Griggs* the Supreme Court ruled for the first time that a facially neutral employment practice that was not purposefully discriminatory, but that nevertheless had the effect of excluding a group of employees, was discriminatory. I have argued, however, that the Supreme Court never took advantage of the full implications of the theory of systemic discrimination by extending its

\(^{394}\) U.S. 424.

scope of investigation outside of workforces to the many complex effects of past discrimination which result in significant racial disparities within workforces.\textsuperscript{396}

In 1989 the Supreme Court decided \textit{Wards Cove Packing v. Antonio} in which it attempted to constrain Griggs' understanding of systemic discrimination.\textsuperscript{397} The majority of the Court determined that plaintiffs in Title VII cases, in order to establish a prima facie case of discrimination, could no longer point to a significant racial imbalance in a workforce, but had to show that "each challenged practice has a significant disparate impact on the employment opportunities for whites and non-whites."\textsuperscript{398} The Court argued that if plaintiffs did not have this burden of proof, a significant racial imbalance in an employer's workforce would result in him being "haled into court and forced to engage in the expensive and time-consuming task of defending the 'business necessity' of the methods used to select the other members of his workforce. The only practicable option for any employers would be to adopt racial quotas, insuring that no portion of their workforces deviated in racial composition from the other portions thereof."\textsuperscript{399} While an employer had the burden of producing evidence of business justifications for his practices, the ultimate burden of persuasion remained with the plaintiff. The Court ruled that "the ultimate burden of proving that discrimination against a protected group has been caused by a specific employment practice remains with the plaintiff at all times."\textsuperscript{400}

The discussion of the Civil Rights Act of 1990 became focused on the question of the appropriate burden of proof to be borne by plaintiffs in discrimination suits. This in turn led to a debate about affirmative action as Republicans, agreeing with the Supreme Court, charged that in overturning \textit{Wards Cove} Democrats intended to institute a system of quotas. Democrats

\textsuperscript{396}See Chapter 4.
\textsuperscript{397}109 S.Ct. 2115 (1989).
\textsuperscript{398}\textit{Ibid.}, p. 2125.
\textsuperscript{399}\textit{Ibid.}, p. 2122.
\textsuperscript{400}\textit{Ibid.}, p. 2126.
countered that going back to the *Griggs* rule would ensure that no individual would have her or his right to equal treatment violated. Despite the fact that *Griggs* had provided an expanded understanding of the nature of discrimination and pointed to a richer understanding of equal opportunity, Democrats and Republicans both interpreted *Griggs* as guaranteeing the individual's right to equal treatment. Because of the way the debate was structured to focus on technical questions of burden of proof, no compromise position between Democrats and Republicans emerged; the structure of debate narrowed the field of available options.

The *Griggs-Wards Cove* dispute, which centred on the question of burden of proof and the standards employees need to meet to make a claim of a violation of a right masked the underlying issue of how to attain real equal opportunity. In order for a more fruitful discussion of real equal opportunity to have occurred, the following questions might have been considered: can equal opportunity be reached by ensuring that employers treat job candidates impartially and without regard to race and/or does it necessitate concern for the chronic underrepresentation of minority groups in certain job categories and the reasons for that underrepresentation?; if connections can be made between past state-sponsored discrimination and the present numbers of members of minority groups in workforces, are preferences for members of those disadvantaged groups appropriate?; if connections could be shown, how do we address the disadvantages? - through more educational resources and outreach programs, through mandatory recruitment and training programs, or should preferences include using race and gender as one factor in an employment decision?; is real equal opportunity achieved even when the material conditions of minorities continue to be drastically lower than those of white males?; when does a preference interfere with the legitimate interests of majorities? These questions were not addressed in the debate about the Civil Rights Act of 1990 as participants directed their attention to the narrow issue of appropriate burden of proof to be borne by plaintiffs in discrimination suits.
The Civil Rights Act of 1990

The Senate's first discussion of the Civil Rights Act of 1990 took place from July 10 to July 18, 1990. More than one Senator involved in the discussion noted that the issue of the definition of business necessity was the central point in the debate. Democrats wrote the bill in order to overturn six Supreme Court cases and four other rulings dealing with attorneys fees. But by far the greatest attention was devoted to Wards Cove which changed the standards of business necessity to make it easier for employers to defend themselves against charges of discrimination. In the end, it was this issue that kept the opposing sides from agreeing on compromise language and it "derailed negotiations" between the Democrats and Republicans. The original bill which came out of the Senate's Committee on Labor and Human Resources stated that an unlawful employment practice was established if a complaining party demonstrated that an employment practice or a group of practices resulted in a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent failed to demonstrate that the practice was required by business necessity. In this version, business necessity was defined as "essential to job performance." At the very beginning of the Senate debate on July 10, 1990, Senator Kennedy offered the Kennedy-Jeffords substitute which changed the meaning of business necessity to "bears a substantial and demonstrable relationship to effective job performance." Senator Kennedy argued that this new language would put to rest the charge that the bill would lead to the use of quotas because it overturned Wards Cove and merely went back to the Griggs standard. The Republicans countered that if the Democrats really wanted to go back to the Griggs language, they should

---

402 See, for example, Senator Kennedy's remarks, ibid, p. 9947 and Congressional Quarterly Weekly Report, July 21, 1990, p. 2316.
403 Ibid, p. 9319.
404 Ibid, p. 9323.
adopt the very language used in Griggs, which defined business necessity as having a "manifest relationship to the employment in question." On July 16, Republican Senator Nancy Kassebaum offered an amendment which defined business necessity to mean "the challenged practice has a manifest relationship to the employment in question or that the respondent's legitimate employment goals are significantly served by - even if they do not require - the challenged practice or group of practices." Democrats argued that this language basically preserved the Wards Cove decision. In the end, the Republicans did not offer the amendment because they were certain they did not have enough votes to win. The final version of the bill passed by the Senate contained the following definition of business necessity:

(A) in the case of employment practices involving selection (such as hiring, assignment, transfer, promotion, training, apprenticeship, referral, retention, or membership in a labour organization), the practices or group of practices must bear a significant relationship to successful performance of the job; or

(B) in the case of employment practices that do not involve selection, the practice or group of practices must bear a significant relationship to a significant business objective of the employer.

The definition of business necessity became known in the debate as the "black box language" upon which an agreement depended. Several Senators articulated their frustration at the form of the debate, seeming not to comprehend that their language made it impossible to address broader questions about the nature of equal opportunity. Senator Simpson, urging his colleagues to vote for the Kassebaum amendment complained: "So we diddle around here. It is lawyers dancing on the head of a pin for months now talking about if we just took this word instead of that word, if we use "substantial" here, if we use "significant" here, if we use "dominant" here, if we use "manifest" here, and on down the line." Senator Kassebaum herself expressed anxiety about the confusing nature of the legal language: "From all that I can

405 See for example, Senator Hatch's remarks, *ibid*, p. 9328.
understand - and I am not a lawyer - at this point I am rather relieved that I am not a lawyer because it is amazing the contortions that we can get into trying to come up with whether we are using the right word or the wrong word. From the perspective of one who is not a lawyer, it seems to me sometimes that the nuances escape me."409

As I have argued, affirmative action by its very nature entails going beyond the removal of barriers and pursuing positive means to address minority under-representation. However, not one participant in the American debate described equality as anything other than a negative, individual right. Most Democrats referred to equal opportunity as formal equal opportunity, that is, as the individual’s right to be free from discrimination. If there were ever an indication that three decades of affirmative action had not changed the dominant American meaning of equal opportunity to equality of result, this debate seems to be it. Both Democrats and Republicans pledged that their versions of the business necessity language would result in the protection of the individual’s right to equal treatment.

Ted Kennedy, in his introduction of the bill in the Senate, argued that in Wards Cove the Supreme Court unfairly shifted the burden of proof from employers to employees. "The new standards, set up by the Wards Cove decision," he continued, "make it far more difficult and expensive for victims of discrimination to challenge the barriers they face."410 Kennedy claimed that the bill strengthened the laws prohibiting discrimination and ensured that there would be adequate remedies upon findings of discrimination. Preempting charges that the bill would force employers to require quotas, he asserted:

[W]e intend to go back to the Griggs decision. The Griggs rule did not lead to quotas in the past, and there is not a shred of evidence that it will lead to quotas in the future. It is a mockery of civil rights and the fundamental principle of equal justice under law for opponents of this legislation to raise the false hue and cry of quotas.

409Ibid. p. 9851.
410 Ibid. p. 9322.
Mr. President, the Supreme Court ruling in 1989 sent a disturbing message that the right to be free of discrimination, the right of equal opportunity is a lesser right than Congress intended when we enacted the major civil rights statutes in the past.\textsuperscript{411}

Howard Metzenbaum, arguing for the bill, noted that it would assure fair treatment and equal opportunity. He stated: "After all, is that not the essence of the American dream? Is that not what we are supposed to be all about, giving everybody a fair chance to succeed, removing artificial barriers so a person can go as far as his or her abilities will take them?\textsuperscript{412} Senator Dodd, another supporter, noted: "To restore the heart and soul of our civil rights laws - to guarantee all working Americans of all colors, genders, and religions equal protection under the law - the Congress in my view, must act to overturn the 1989 Supreme Court rulings...Passage of S. 2104 would send a very strong and powerful message to working men and women in this country that equal employment opportunity is a personal freedom that we intend to uphold in this Congress.\textsuperscript{413} Senator Domencini noted: "I strongly believe our country should have effective laws to protect civil rights. We must assure that people are treated fairly and are judged on the basis of their abilities, not by their race, gender, national origin, or religion.\textsuperscript{414}

Another expression of the simplified nature of the discussion was all participants' focus on quotas. The discussion turned into a series of claims that the Civil Rights Act of 1990 would lead to quotas and counterclaims that it would not. Virtually every Democrat who spoke assured the Senate that the passage of the bill would not lead to quotas.\textsuperscript{415} They all argued that Griggs had not lead to quotas. Senator Akaka, for example, noted that some business leaders had complained that the legislation would force the adoption of quotas. He responded: "I do

\textsuperscript{411}Ibid, p. 9322.
\textsuperscript{412}Ibid, p. 9334
\textsuperscript{413}Ibid, p. 9914. For similar statements from Democrats see Senator Mikulski, \textit{ibid}, p. 9845 and Senator Kerry,\textit{ibid}, 9958.
\textsuperscript{414}Ibid, p. 9823.
not believe this is true. Quotas were neither enforced nor mandated under Griggs ruling, and I do not foresee it happening now.\footnote{Ibid, p. 9853.} As I have shown in Chapter 4, it is the case that some employers did adopt quotas and some courts order quotas as remedies on the basis of the Griggs decision.\footnote{See for example Carter v. Gallagher, 425 F 2nd 315 (1971); U.S. v. N.L. Industries 479 F2nd 354 (1973); and United Steelworkers v. Weber 99 S. Ct. 2721 (1979).} It can be argued that they were a necessary means to address the fact that African Americans had been barred from some forms of employment. Senator Paul Simon, for example, argued: "For those who say this bill is going to result in quotas, we have had the Griggs decision for 18 years. We have not had any quotas. But we have had opportunity for people. There is no question if we leave the law stand as it is, we are going to deny opportunities to a great many people."\footnote{Congressional Record, p. 9348. Senator Mitchell makes a similar statement, ibid, p. 9947, as does Senator Bumpers, ibid, p. 9898.}

Republicans, on the other hand, all argued that if the bill passed, all employers would be forced to institute a system of quotas. Senator Gorton noted: "[T]he bill in its present form will in the view of this Senator require most if not all national employers to engage in a quota-based hiring system in order to prevent constant debilitating lawsuits on the part of disgruntled persons who do not receive employment..."\footnote{Ibid, p. 9897. See also, Thurmond, p. 9343, Wilson, p. 9844 and Gorton, p. 9917.} Claims that a particular piece of legislation will lead to one result and counter-claims that it will not are not unusual in legislative discussions. But the exclusive focus on whether quotas had existed or would in the future be used is symptomatic of the restrictive scope of the discussion of affirmative action. For example, nobody spoke of alternative ways to increase minority representation in workforces, such as providing training courses for higher-level positions.

A standard conceptual shorthand used by participants in the debate was the opposition of equal opportunity and equality of results. In fact, participants, both Republican and Democrat, used a series of absolute dichotomies. These dichotomies included: the elimination of barriers
v. special treatment; merit v. quotas; colorblind measures v. racial tension; and justice v. favoritism. These simplistic dichotomies, as we will see, do not appear in the Canadian employment equity discussion.

Senator Hatch, in his opening statement argued:

Look, it does not take many brains to realize that quotas have never worked. They will never work. They are discriminatory, they are unfair, they fly in the face of hiring the best available person for the job, they fly in the face of education and training. They support group rights, not individual rights. Quotas are results-oriented, not equality oriented.¹²⁰

The opposition between equality and results gives the mistaken impression that equal opportunity somehow has nothing to do with outcomes, with the actual conditions under which people live. But, even if we conceive of equality as consisting of neutral measures or procedures designed to ensure that all compete fairly, we would still want to look at the results of those procedures to see whether they are working. As Kim Crenshaw points out, "no measure of a process's effectiveness can be wholly separated from the purpose for which it was initiated."¹²¹ Indeed, one of the purposes of the Civil Rights Act of 1964 was to improve the employment conditions of African-Americans and participants in that debate referred extensively to statistics showing black unemployment and underemployment as a reason for the passage of the Act.¹²² My point is that the use of the simplified opposition of equality and results cannot adequately express the multitude of concerns associated with affirmative action.

The following statement by Senator Coates includes many of the formulations articulated throughout the debate, especially the equality of opportunity versus equality of result formulation. He argued:

---

¹²⁰Ibid., p. 9337.


¹²²For example, Congressman Emmanuel Celler, who was in charge of Title VII for the Democrats in the House, referred extensively to statistics showing the unequal economic conditions between black and white Americans. See Congressional Record, February 8, 1964. p. 2600.
[E]ven in the most open society there must be some closed questions. And undoubtedly the most essential is the equal treatment of all its members - a uniform respect for individual worth. It is an imperative rooted in Judeo-Christian principle and national precepts. It is a demand of conscience and compassion.

The history of America is propelled by the gradual widening of the circle of legal inclusion and protection. To minorities and women. To the innocent and the elderly and the handicapped. We strive to create a society where the only entrance fee for contribution and accomplishment is talent and industry...

[This bill] replaces our pursuit of equality opportunity with a destructive search for equality of results...

This bill legalizes, even mandates, the very thing it sets out to prohibit - discrimination. It asks for equal outcomes rather than equal opportunity. Instead of promoting healthy and equal competition, it would create racial polarization. Instead of leading us on the path to a color-blind society, it would magnify our differences, and lead to tension and resentment. Instead of embracing justice, it embraces favoritism.423

Senator Wilson focused on the incompatible nature of affirmative action and merit. He argued:

We like to think that as a nation we stand for a tradition of real opportunity, under which we have been entitled to believe that men and women should be and are judged on the basis of their merits as individuals...I will criticize quotas and other unfair practices that deny rather than advance opportunity for individuals wherever I find them. And I will say that anybody who does not understand that hiring by quotas is wrong because it is unfair does not understand the American tradition of judging people on their individual merit.424

The simplified nature of the language was also expressed in some Senators' exaggerated description of the impact of the bill on Americans. Senator Helms articulated an absolutist choice between two visions of America, declaring that no compromise position was possible. In choosing how to vote on the bill, Senators were choosing between two antithetical visions of America. Helms argued:

One vision is of an America stratified by racial and ethnic quotas - an America whose law codifies the system where benefits and advantages are doled out according to group identity rather than merit and the content of character.

The other vision is one which will focus on an agenda to enhance the progress of every citizen by removing obstacles to individual initiative.425

---

423 Congressional Record, p. 9816.


Here, Helms is reciting another standard formulation. Equal treatment means the removal of barriers while equal results means according benefits on the basis of group identity.

Senator Hatch agreed, arguing:

As I said before, the further we as a nation retreat from the principle that all Americans must be treated the same, the closer we come to the quagmire of the spoils system that has more to do with one's birth than one's qualifications. An individual's qualifications and abilities will be less important than the numerical standing of the group to which he or she belongs. An eventually group will be pitted against group.426

Senator McCain made the argument that any deviation from equal treatment would result in racial and ethnic tension. McCain stated:

In our increasingly diverse ethnic and racial mix, it is even more imperative that our Government reduce barriers and tensions and promote a colorblind society...The credo of an open opportunity society - one that allows individual creativity, ability, and initiative to determine success, rather than artificially manipulated outcomes - is an essential social glue. It is a common denominator that no one can seriously say is invalid or unjust. This principle unites us and must be maintained to keep us united. Quotas divide us. Quotas segment us. Are we going to forge a Balkanized society where employment opportunities and economic success can rise and fall because of one's race or ethnic background.427

Toward the end of the debate, Senator Dole announced that no agreement had been reached on the appropriate definition of business necessity, despite the best efforts of the White House and the Democratic leadership in the Senate. Dole's explanation underscores the great efforts devoted to finding the right "black box" language:

[A]s far as this Senator is concerned, the administration has gone the extra mile in trying to reach a negotiated agreement with Senator Kennedy and the other proponents of this bill. Last night the President's Chief of Staff, John Sununu, and White House Counsel, Boyden Gray, were in the majority leader's office until 12:30 in the morning, trying to negotiate an agreement on the definition of the words "business necessity." President Bush himself telephoned into the meeting to encourage the negotiators in their efforts. As Senator Danforth has indicated, no agreement was reached.428

Dole concluded by using the very language that had made it impossible to reach a compromise.

"The bill is not about racial justice; it is not about equal opportunity or individual rights. This

426 Ibid. p. 9843.
427 Ibid. p. 9894.
428 Ibid. p.9954.
The Employment Equity Act of 1986

The Canadian language of employment equity is much better suited to answering the sorts of questions about how to attain real equal opportunity that I posed at the outset of the previous section. The language of equality rights in the Canadian debate about Employment Equity Act of 1986 was markedly different from that used in the American debate. Participants did not appeal to the individual's right to equal treatment; in avoiding this language they found alternative ways to express their understandings of equal opportunity and how employment equity fosters it. Participants defined equal opportunity to require both the elimination of discriminatory barriers and the promotion of special programs for members of disadvantaged groups. Canadian participants, instead of merely positing an opposition between equal treatment and equal results, attempted to show how it was necessary to observe the actual political and economic status of members of groups to gauge whether they have real access to equal opportunity. There was a recognition that the achievement of equal opportunity requires special measures; that special measures and the removal of barriers are consistent aims; that the talents and abilities of members of disadvantaged groups are often overlooked; and that employment equity and merit are compatible. Finally, neither the government nor the

---


opposition parties engaged in the sort of exaggerated rhetoric about the consequences of passing or not passing the bill.

The Conservative Government proposed the Employment Equity Act in 1985. The main point of contention in the discussion about the Act was the question of an appropriate enforcement mechanism. The Government bill demanded that companies under federal jurisdiction provide Canadian Employment and Immigration and the Canadian Human Rights Commission with statistical data on their workforces. Companies themselves were then to determine their own targets and attempt to reach them. After analysis of the data and of progress made by companies, the Canadian Human Rights Commission could bring suit against companies who they thought were still engaging in systemic discrimination.  

In contrast to the American debate, opponents of the bill argued that the legislation was too lenient on employers by allowing them to set their own employment targets. They suggested that the government should set the targets for each company and that the Human Rights Commission did not have appropriate resources to monitor the programs. Warren Allemand described the Liberal Party's main opposition to the Act:

My principle criticism of the Bill is that it simply instructs employers to introduce employment equity while making no provision for a monitoring agency. There are no penalties for employers who do not move ahead with the introduction of employment equity. It is true that employers must file reports and there are penalties if they do not file the reports. However, if the report does not show sufficient progress, the penalty set out in the Bill is for not filing the report as opposed to a penalty for not proceeding with employment equity. 

Sergio Marchi stated the Liberal Party's complaint about the Canadian Human Rights Commission: "The Canadian Human Rights Commission, as we all know, is strapped for resources with respect to personnel and finances as it is. We all know that [it] is a reactionary body. It reacts on a one-on-one, a case by case basis. If we are talking about a national employment equity program which is going to ensure and guarantee that Canadians receive the

---


434 Ibid, p. 7280.
equality which should be theirs, I feel it would be unfair to expect the Commission to undertake that kind of enforcement mechanism.\textsuperscript{435}

All participants, however, agreed on the correct definition of equal opportunity as more than the individuals right to equal treatment. And, all participants agreed that positive measures were required to attain meaningful equality of opportunity. In contrast to the American discussion, not one member of the House of Commons defined equality as simply the individual's right to equal treatment. Walter McLean, Minister Responsible for the Status of Women, argued for the "full participation" of the target groups in the Canadian economy. "Results are what matter and results are what we are seeking to achieve."\textsuperscript{436} Barry Turner agreed, noting that the purpose of the Bill was to achieve results so that all Canadians could realize the economic benefits of employment.\textsuperscript{437} Cyril Keeper stated his understanding of equality and affirmative action in the following manner:

Affirmative action is fundamental to our values in a society which firmly believes in equality of opportunity and condition. Since we value the opportunity for people to participate in society as a whole, our citizens must have the fullest opportunity to develop as individuals and the community must have access to the full potential of its human resources. We do not want to see anyone in our society excluded from that participation. It is only on the basis of each person being given an opportunity to develop and become productive in society that we can have a community in which we can have pride and a sense of security.

Affirmative action is a means of confirming our value of equality in Canadian life. It has long been stated that Canadian society is far from equal and that a number of groups in Canadian society are far from reaching the goal of equality....

The need for affirmative action is based upon lack of equality. Most Canadians want a society in which people have equality of opportunity and human condition.\textsuperscript{438}

Canadian participants continually referred to the fact that employment equity was directed toward ensuring equal opportunity for the four specific target group mentioned in the Employment Equity Act - women, visible minorities, aboriginal peoples and people with

\textsuperscript{435}Ibid. p. 7922.

\textsuperscript{436}Ibid. p. 7309.

\textsuperscript{437}p. 8196.

\textsuperscript{438}Ibid. p. 8196.
disabilities. This was in contrast to the American discussion in which participants spoke of abstract individuals. Patrick Boyer pointed to the "importance of having, at different stages in our evolution as a country, programs that will help offset the workings of a system that, by any objective criterion, are not really fair to the overall community." He continued:

I think that is perhaps the one shared basis of philosophical agreement between socialists and Progressive Conservatives, our overriding concern for community.

That, of course, goes back to where we both come from, from the 19th century, tracing back to our philosophical origins and realizing the overriding concern for the well-being of the community in ensuring that there are no groups, be they women, be they youth, be they visible minorities, or any other groups, that are being excluded on the basis of prejudice or discrimination. There is then clearly a role for the Government to step in...439

In arguing for special programs for members of disadvantaged groups, participants referred to two earlier instances in which members of groups had been recipients of preferential programs. The first was after World War II when programs gave preference to veterans, and the second was the federal government's initiatives to increase the number of Francophones in the federal public service.440

As I have noted, the fact that participants spoke in terms of equality for specific groups rather than equality for "the individual" gave the discussion a much less abstract quality than the American. Participants referred to the specific needs of members of the target groups. Sheila Finestone, for example, asked, given that up to 20 percent of the projected increase in the labour force in the next decade would involve young native people, whether the government had considered increasing pre-employment and life-skills training programs, especially in the northern remote areas.441 Walter McLean, Minister Responsible for the Status of Women, recited a long list of statistics to illustrate the concrete circumstances of women and their need for the bill. For example, he pointed out that 3/4 of all women work in only 5 of 22

439 Ibid. p. 7929.

440 See Lorne Nystrom, ibid, p. 2823, Patrick Boyer, p. 7926, and David Orlikow, p. 8177.

441 Ibid. p. 2827.
major occupations; most of these are low paying or dead-end jobs offering limited scope for advancement; in 1984 women accounted for 71% of all part-time workers, leaving them with fewer benefits and job security; if women did not work outside the home, over 60% more families would live below the poverty line; and 85% of all single-parent families are headed by women and 47% of those families live in poverty. This sort of detail grounded the debate and gave a sense of the types of programs needed to achieve equal opportunity.

The major difference between the American and Canadian discussions was that Canadian legislators unanimously approved of the concept of employment equity for members of disadvantaged groups. In contrast to Americans, they conceptualized employment equity as compatible with equal treatment and with the ideals of merit, fairness, qualifications and equal opportunity. Canadians were willing to admit that employment equity involved "special initiatives." Patrick Boyer put it most succinctly: "Employment equity requires not only equal treatment for everyone but also special initiatives and arrangements aimed at specific groups." Further, Canadians had a much less simplistic language; they often took pains to articulate the relationship between values, such as the relationship between special measures and merit.

Flora McDonald, Minister of Employment and Immigration, set the tone for the discussion with her introduction of the Employment Equity Act for second reading. She posited the compatibility of equality and special measures - special measures may be needed to ensure equality and the full participation of excluded groups in the workforce. She argued:

This Bill is about opportunity, because employment equity is about opportunity, opportunity for Canadians everywhere to earn a decent living and participate fully in our society, opportunity for people to be judged by what they can do. Bill C-62 is a crucial step forward, the first major step in ensuring equal access to new opportunities for Canadians.

The fact that we are giving employment equity legal status creates an important precedent. We are showing as legislators, that we are committed to bringing greater social justice to the workplace. We are proving that this House believes strongly

---

442 Ibid. p. 7309.
443 Ibid. p. 7926.
that every Canadian is entitled to equal opportunities for employment, and furthermore, we are promoting a spirit of fairness, cooperation and understanding which, I firmly believe, will be reflected throughout this country...

We have gone beyond the removal of barriers. We have demanded in this legislation that employers take special measures to ensure that women, native people, handicapped persons and visible minorities are able to participate fully in the workplace.**44**

A prominent formulation in the American discussion described the removal of barriers and special treatment as incompatible. Canadians, on the other hand, saw no contradiction between these concepts. Flora McDonald reiterated: "Under this legislation, employers must identify barriers to target groups, and they must remove them. They must adopt special measures that will involve senior level commitment and management accountability."**445**

Monique Landry added:

The purpose of employment equity is, first to get rid of obstacles to employment, to identify and eliminate discriminatory measures and practices, to implement special provisions to correct the effects of past discrimination, to ensure equitable representation of all Canadian men and women, and finally to promote economic development by making full use of the abilities of all Canadian men and women.**446**

The Canadian discussion of employment equity avoided the simplified opposition of equality of opportunity and equality of results. Participants attempted to articulate a more nuanced understanding of the relationship between the two conceptual shorthand terms. For example, Monique Landry pointed out that employment equity "emphasized the need to assess results within the organization of the employer to ensure that employment practices have effectively improved employment opportunities."**447** And Mary Collins observed: "[Employment equity] is consistent with the very beliefs outlined in Section 15 of the Charter of Rights and Freedoms that we should have positive action to ensure that all Canadians have equal opportunity. We are not prepared to waste the talents and abilities of so many Canadians

**444**Ibid, p. 7277.


**446**Ibid, p. 7839.

**447**Ibid, p. 7841.
just because they may be members of a group which, in the past, has suffered discrimination.\textsuperscript{448}

One of the major formulations of American opponents of the Civil Rights Act of 1990 was the antithetical nature of affirmative action and merit. In the Canadian context, even Conservative legislators argued that special measures and merit were indeed compatible. Mary Collins, for example, referred to "the myth that if you had a strong back, common sense and determination, you could do anything you wanted to do...The Horatio Alger myth is perpetuated in Canada." Nevertheless, she continued:

To my mind, it is the mark of the kind of society in which all believe that we truly provide for equality of opportunity, that we do not allow the weaker in our society to become still weaker, economically or socially, and that it is justified to have special measures to ensure that the economically weaker members of our society have an opportunity to improve their status...

How do we balance employment equity with our concept of a merit system? I do not think they are incompatible. We are still saying, with employment equity, that people have to have basic qualifications to do a job. We are not saying that unqualified people will be given jobs. We are saying that through adequate training opportunities people, who traditionally have been disadvantaged because they are part of a minority group will now be given the appropriate consideration for employment opportunity.\textsuperscript{449}

Patrick Boyer also talked about the compatibility of employment equity and merit. Speaking about employment equity in a "philosophical context" he argued:

This is the context in which I speak about the merit system or about meritocracy. I believe that the ideal system is one in which people are hired and promoted on the basis of merit...

In a country such as ours, with people from so many different national backgrounds, different religions, walks of life and political beliefs, you really cannot have any other system. What we want to see is the very best for our country. We want Canada to realize its full potential. Let us not see discrimination against anyone. Let us see only hiring the best. That is the ideal. We must always keep that in mind. Even when special programs are brought in, such as in this Bill, it is not to detract from that ideal but to work closer toward it...It is in that context that we see this legislation introduce a concept that can redress and do some fine tuning in the working of meritocracy.\textsuperscript{450}

\textsuperscript{448}Ibid. p. 7285.

\textsuperscript{449}Ibid. p. 7284.

\textsuperscript{450}Ibid. p. 7928.
Another of the major themes in the American affirmative action debate was the contradictory nature of affirmative action and fairness. Rob Nicholson, reversing the equation, pointed out:

I believe that this Bill is firmly based on the concept of fairness. The concept of fairness is one which is characteristic of the Canadian people and it is something for which we are known abroad. We are known for the even-handed approach that we take to matters outside our country. I believe that Canadians support the idea of employment equity because they recognize that this country is made up of so many different groups and individuals that we have to be sure that Canada's economic benefits are shared equally and fairly. We know that the groups to which this Bill referred had not in the past shared equally and fairly.\textsuperscript{451}

In brief, the Canadian discussion was markedly different from the American one. Canadians articulated both a different understanding of equal opportunity and an entire language of how employment equity promotes equal opportunity. The discussion reflects an attempt to see the relationships between many complex concepts and realities. It offers an alternative to the familiar set of formulations I outlined in Chapter 1 which make up the dominant American argument against affirmative action. To recall Clifford Geertz, it shakes us out of an easy surrender to the comforts of merely being ourselves by challenging what many Americans regard as common sense. In the following concluding chapter, I will provide a language of equal opportunity and affirmative action inspired by the Canadian experience but appropriate for the American setting.

\textsuperscript{451}Ibid, p. 7808. For a similar statement, see Otto Jelinik, p. 8179.
CONCLUSION

Throughout this dissertation I have outlined the many inadequacies of American law's description of affirmative action as remedy for past discrimination and the limited vision of equal opportunity accompanying this formulation. Patricia Williams' comment, with which I began this thesis warrants repetition. Speaking of the American Supreme Court's description of equal opportunity in an affirmative action case, she responded: "It seems an extraordinarily narrow use of equality, when it excludes from consideration so much clear inequality."452 The legal language of affirmative action I will offer in this concluding chapter brings to the fore and seeks to address those inequalities the traditional American language keeps hidden. It does not, however, contain a theory of equality of result. Rather, the language captures the aspirations implicit in the time-honoured American value of equal opportunity. It is inspired both by the contemporary Canadian legal discourse of affirmative action and by meanings embedded in American culture.

In order to address the inequalities the traditional American legal approach to affirmative action overlooks, the practice of affirmative action itself needs to be reconceptualized. Indeed, some traditional supporters of affirmative action have begun to question its usefulness as presently practiced in the context of the growing economic inequalities among African-Americans in the United States. They argue that traditional affirmative action programs benefit more advantaged African-Americans but do not help "the truly disadvantaged," the poor urban residents whose economic conditions are worse now that in the 1960s.453


453 I am not claiming here that the economic conditions of the urban underclass have steadily decreased since the 1960s. I use the touchstone of 1964 because that is the year that the Civil Rights Act passed. My argument is that despite the gains made since 1964, right now the conditions of the underclass are worse than at that point.
Therefore, my goal in this final chapter is to offer a viable legal language for affirmative action programs directed toward promoting equal opportunity for the group called the truly disadvantaged. Throughout the thesis I have tried to document the partiality of American law's vision of affirmative action and to shed new light on the issue by offering a portrait of Canadian law's treatment of it. The core tenet of my interpretive anthropological approach is the benefit of gaining access to the conceptual frameworks used by lawmakers in a culture which is similar to that of the United States. In turn, Canada's law offers an expanded view of the range of concerns associated with affirmative action and the goal of attaining equal opportunity. For example, lawmakers do not restrict their purview to remedying discrimination in discrete workforces, but extend their concerns to the relative disadvantage of groups within society and direct ameliorative programs toward the neediest.

In this chapter I will consider Canadian law's expanded vision in the context of the American setting. I will begin by outlining the kinds of the disadvantages the urban underclass experience and argue that it is impossible, for a number of reasons, to address these problems with an approach that aims merely to remedy discrimination. Instead, I will argue, we need an approach to affirmative action which perceives the following: that the effects of past discrimination are extremely complicated and that this discrimination has affected different African-Americans in dissimilar ways. In relation to this latter point, American law should recognize that there are differences within the African-American community between those individuals who will benefit from traditional affirmative action programs and those who, because of the particular disadvantages they face, will require more imaginative programs in order to attain genuine equal opportunities.

In the final section I will develop a hypothetical United States Supreme Court decision outlining the need for affirmative action programs directed at ameliorating the conditions of disadvantage experienced by the truly disadvantaged. The understanding of equal opportunity

---

454 My overall intention is to offer a transformed legal language of affirmative action and by focusing on the truly disadvantaged I do not mean to imply that they are the only group which deserves attention.
described in this decision contains the assumption that societal conditions need to be examined in order to devise strategies to address them. Because of differing situations experienced by individuals, varied measures are required to address them. The approach I will propose does not advocate equality of results, but rather remains within the American liberal tradition because it seeks to provide equal opportunities for all individuals.

The truly disadvantaged and discrimination

In 1964, Hubert Humphrey declared that the primary concern of Congress in enacting the Civil Rights Act's prohibitions against racial discrimination was with "the plight of the Negro in our economy." I have shown in Chapter 3 that speaker after speaker argued that providing equal economic opportunity and the ability to find and retain a well-paying job was the goal at the heart of the Civil Rights Act. Given these criteria of review, the Civil Right Act and developments flowing from it, including affirmative action, have not been wholehearted successes. No doubt, there have been substantial improvements for middle-class African-Americans. But, the overall unemployment rates of African-Americans as a group are higher now than in the 1960s. For example, in 1966 the unemployment rate for African-Americans over the age of 16 was 7.3% while by 1984 it had reached 14.4%. By December of 1994, because of a brief expansion in manufacturing jobs, the rate decreased to about 10%. Furthermore, as I will outline below, the economic status of poor African-Americans has deteriorated since the 1960s.

\[\text{Reference numbers}\]

\[\text{Footnotes}\]

\[\text{Note:}\]


\[\text{For example, the number of African-Americans in professional, technical, managerial and administrative positions increased by 57% from 1972 to 1983. The fraction of black families earning $25,000 or more (in 1982 dollars) increased from 10.4% in 1960 to 24.5% in 1982. See William Julius Wilson, The Truly Disadvantaged: The Inner City, the Underclass, and Public Policy (Chicago: University of Chicago Press, 1987), p. 109.}\]

\[\text{Ibid. p. 31.}\]

\[\text{William Julius Wilson, When Work Disappears, p. 145.}\]
The group referred to as the truly disadvantaged consist of poor African-American individuals who live in segregated and increasingly isolated inner-city neighborhoods that are characterized by concentrated and persistent levels of joblessness. Commentators now use the term hypersegregation to describe neighborhoods that are entirely made up of African-American residents who rarely leave their neighborhood and therefore almost never encounter white people.\textsuperscript{459} The obstacles facing these individuals are substantially different from those experienced by poor African-Americans during the time that legislators contemplated the Civil Rights Act of 1964. For one thing, the level of concentrated poverty has increased in inner-cities - in 1960 less than one-third of the American poverty population lived in central cities while in 1991 close to one-half of the nation's poor inhabited cities. In 1991, 7 out of 8 people living in inner-city ghetto areas (defined as areas in which 40% of the population is poor) were minority group members, and most of them were African-Americans. While in 1980, the number of African-Americans living in ghetto areas was 4.5 million, in 1990 this number had climbed to 6 million.\textsuperscript{460} Therefore, not only are there more jobless African-Americans in the United States than in the 1960s, but more African-Americans now live in areas of concentrated poverty.

The dramatic change in the nature of inner-city African-American neighborhoods is starkly illustrated by the transformation of 3 much-analyzed communities in Chicago's South Side area - Washington Park, Grand Boulevard and Douglas, collectively know as Bronzeville. In the 1950s, Bronzeville was a largely segregated but flourishing community consisting of working, middle, and upper class African-Americans. Although there were poor residents, there was a high level of "social organization," in the form of, for example, community-owned businesses, schools, churches and political organizations. In 1950 69% of all males over 14 who lived in the Bronzeville neighborhoods worked in any given week. By 1990, only 25%


\textsuperscript{460}When Work Disappears, pp. 10-14.
in Douglas worked in a given week, 30% in Washington Park and 25% in Grand Boulevard. In the same year, in the 12 predominantly African-American communities with ghetto poverty rates, only 30% of the male residents over the age of 16 held a job in a typical week of the year.461

An array of reasons to account for the present highly concentrated levels of joblessness among African-Americans in inner-cities has been offered by scholars and all of them implicate some form of discrimination. A good deal of scholarly energy has been devoted to the reasons for the initial creation of segregated inner-city communities and various forms of discrimination stand at the centre of these analyses. After the abolition of slavery, Jim Crow laws were instituted throughout the southern states, and African-Americans had few options other than to work on large cotton plantations as sharecropper. Sharecropping as an economic system, which in some parts of the country remained in force until the 1960s, largely recreated the conditions of slavery.462 As many African-Americans migrated north after World War II, they moved to urban industrial centres where they faced different types of discrimination. For example, in Chicago and other major cities, as African-Americans moved into traditionally white neighborhoods, riots often erupted. Both the federal and city governments responded, not by working toward integration, but rather by constructing segregated housing projects.463

In the late 1940s and 1950s, the federal government withheld mortgage capital from many predominantly African-American inner-city neighborhoods, making it difficult for these urban areas to attract families able to purchase their own homes.464 Douglas Massey reports, “the black ghetto was constructed through a series of well-defined, institutional practices.


behaviors and public policies by which whites sought to contain growing black urban populations. As I have explained in Chapter 4, until 1964 widespread employment discrimination resulted in higher levels of unemployment for African-Americans and their disproportionate concentration in blue-collar positions. The fact that black Americans on average earned far less than white Americans, combined with racial segregation which confined black Americans to cities, led to high levels of concentrated poverty in inner-cities.

As if the situation were not complex enough, William Julius Wilson reports that discrimination alone cannot account for the present situation facing the truly disadvantaged. He points out that "the disappearance of work in many inner-city neighborhoods is partly related to the nation-wide decline in the fortunes of low-skilled workers." Just as African-Americans started to take advantage of the changes brought about by the Civil Rights Act in the late 1960s, the American economy began to change from one dominated by the production of goods to one in which higher-order service and information exchange sectors dominate. These job sectors require relatively highly-skilled workers. Compounding the problem, technological innovations spurred on by the globalization of the American economy also produced a major shift in the educational requirements of employment. Further still, many companies that were located in inner cities and provided well-paying, low-skilled jobs simply went out of business. For example, New York City lost 360,000 manufacturing jobs in the 1980s as factories either shut down or moved away. The result is a nationwide gap in the employment opportunities between low-skilled and college educated workers which has especially hurt poor African-Americans. Wilson reports that 57% of Chicago's employed inner-city African-American fathers who were born between 1950 and 1955 worked in manufacturing and construction jobs in 1974. By 1987, construction and manufacturing employment in this group had fallen to

466 Ibid. p. 25.
As late as the 1968-70 period, more than 70% of all African-Americans working in metropolitan areas held blue collar jobs and more than half of them worked in goods-producing industries. Between 1973 and 1987, the number of employed African-American males aged 20-29 working in manufacturing industries fell from 3 to every 8 to 1 in every 5.

The trend has been exacerbated further still by the fact that many companies that were once based in inner cities have moved to the suburbs. One economist notes: "Not only has the number of manufacturing jobs been decreasing, but new plants now tend to locate in the suburbs to take advantage of cheap land, access to highways, and low crime rates; in addition, businesses shun urban locations to avoid buying land from several different land owners, paying high demolition costs for old buildings, and arranging parking for employees and customers." Therefore, a surprisingly monumental and often prohibitive obstacle for poor inner-city residents is the high cost and travel time associated with employment in the suburbs.

The effects on inner-city neighborhoods of diminished numbers of working and middle-class residents and an increased number of jobless inhabitants can only be described as devastating. First, neighborhoods have been deprived of key structural resources in the form of, for example, income to sustain neighborhood services. They lack what residents in other communities take for granted - good schools, job training programs, childcare facilities, adequate public transportation, carpools, and informal job information networks. Studies on the effects of economic pressure caused by unstable work and low income on mental health demonstrate that the result is emotional depression, feelings of low self-efficacy, and low levels of efficacy in terms of what parents believe to be their influence over their children and

---

468 When Work Disappears, pp. 30-31.

469 Quoted in ibid, p. 37.


471 When Work Disappears, p. 55.
their children's environment. It is no coincidence, then, that in the 1980s, crack cocaine addiction began to emerge as a major problem in ghetto neighborhoods, and following directly on its heels, gun violence. In 1984, there were about 80 homicide deaths per 100,000 African-American males aged 15 to 17; by 1992 that figure had risen to more than 180 homicides per 100,000.

Jonathan Kozol has provided an extended description of the conditions under which children in Mott Haven, an almost entirely African-American neighborhood in New York consisting of 48,000 individuals, are forced to live. The median household income for the community is $7,600 and there are an estimated 7,000 intravenous drug users in the neighborhood. It is impossible to make an argument that children who are born into this community have opportunities equal to children in more affluent neighborhoods. It is just as impossible to determine with any precision exactly which aspects of the disadvantages faced by these children are the product of past discrimination and which are the product of overall structural changes in the American economy which have led cities to cut their overall budgets. Only 13% of the doctors practising primary care in Mott Haven are certified by medical boards. The city of New York continued to use lead paint in schools in the area until 1980, leading one well-known pediatrician to warn city officials in 1987 that schools in Mott Haven were "dangerously loaded with lead." While there once had been 30 rat exterminators employed by the city, now only 2 cover the entire South Bronx area in which Mott Haven is located. It is not unheard of, therefore, for infants to be attacked by rats in their cribs. Further, perhaps because of a waste incinerator located in the neighborhood or because of the

472 Ibid., p. 76.
473 Ibid., p. 61.
475 Ibid., p. 172.
476 Ibid., p. 156.
477 Ibid., p. 114.
high levels of anxiety they experience, there is an inordinately high number of children suffering from severe asthma. The rate of hospital admissions for asthma statewide in New York is 1.8 per 1,000 people, while in Mott Haven the rate is 6.9 per 1,000 people.\textsuperscript{478}

How are we to disentangle which of these disadvantages have been caused by past discrimination, by present racial animus or by wider trends in the economy which leave already vulnerable groups more vulnerable? Disputes about whether a particular policy is motivated by prejudice may be endless. Did the city of New York choose to build a waste incinerator in Mott Haven because this area was objectively the best location for the facility, or was the decision motivated by racial animus? As Alfred Blumrosen and his colleagues at the EEOC stated in the 1960s and as Canadian law recognizes, few perpetrators of racial discrimination will admit to it. Therefore, conceiving of ameliorative programs \textit{solely} as remedies for discrimination may leave us with weak justifications for action. It seems that the justification for such programs must be based not only on knowledge of past discrimination, but also on the goal of ameliorating disadvantage. It is important to recall that Canadian law does not require that affirmative action be justified according to precise findings of discrimination. Rather, as Justice Dickson noted, it is often necessary to look to past patterns of discrimination to devise strategies for the future, but the root of the enterprise is not to compensate past discrimination but to ameliorate present disadvantage.\textsuperscript{479}

\textit{Affirmative action does not help the truly disadvantaged: differences within the African-American community}

The enormity of the problems faced by poor African-Americans has led many commentators to question the usefulness of affirmative action as presently conceived, which focuses on finding and punishing intentional discrimination in workplaces. Stephen Carter, for example, calls affirmative action "racial justice on the cheap." The continued focus on it as the most important means of enhancing employment opportunities for African-Americans, he

\textsuperscript{478}\textit{Ibid}, p. 171.

\textsuperscript{479} See my p. 182.
contends, leaves less room for discussion and implementation of more comprehensive and costly measures such as better educational resources and basic medical care for poor African-American children.\footnote{480} Richard Rodriguez, an African-American academic, offers an admittedly limited but nevertheless telling commentary on the relevance of affirmative action to inner-city residents. He reports that only 1 in 13 African-American inner-city teenagers he interviewed had even heard of the concept of affirmative action.\footnote{481}

William Julius Wilson has noted that affirmative action does not help the truly disadvantaged, because there are very few jobs in the neighborhoods in which these individuals live, and residents often do not have the skills to compete for the employment opportunities that do exist. Those concerned with the plight of poor African-Americans, he suggests, must see the limitations of affirmative action conceived solely as a response to past racial discrimination. He points out that more advantaged African-Americans:

\begin{quote}
reap disproportionate benefits from policies of preferential treatment based solely on race. I say this because minority individuals from the most advantaged families are likely to be disproportionately represented among the minority members most qualified for preferred positions - such as higher paying jobs, college admissions, promotions, and so forth. \textit{Accordingly, if policies of preferential treatment for such positions are conceived not in terms of actual disadvantages suffered by individuals but rather in terms of race or ethnic group membership, then these policies will further enhance the opportunities of the more advantaged without addressing the problems of the truly disadvantaged}.\footnote{482}
\end{quote}

Wilson has been severely criticized for his call for diminished emphasis on traditional affirmative action measures.\footnote{483} Critics respond that affirmative action was never meant to address issues of class, that its purpose was to help black Americans to combat past and present racial discrimination. They often articulate the understanding of affirmative action


\footnote{481}"Affirmative action a strategy for Alabama in the 60s, not California in the 90s," \textit{Pacific News Service}, August 18, 1995.

\footnote{482}\textit{The Truly Disadvantaged}, p. 115. (my emphasis)

expressed by the American Supreme Court and argue that the goal of affirmative action is to remedy racial discrimination. For example, one scholar argues:

Keeping in mind that affirmative action was designed to redress the effects of past and present discrimination, not to combat indigence, it ought not matter whether the beneficiaries are "privileged." That is, regardless of one's socio-economic background, racism and its effects are always present and damaging.484

While it is true that in the United States racism and its effects are present and damaging, it does not follow that its impact has damaged all African-Americans in the same way. For this reason I agree with Wilson that in order for ameliorative programs to be effective, they have to address the actual disadvantages faced by individuals. The legal argument for affirmative action I will present below recognizes difference, in this case it recognizes that there are significant differences within the African-American community and promotes discussion of the different dimensions and natures of the disadvantages faced by members of this group. As Iris Marion Young reminds us, we must not "reduce the members of [any given group] to a set of common attributes."485 The individuals Wilson calls the truly disadvantaged require different programs than the more conventional affirmative action programs from which middle and upper-class black individuals will best benefit.

How could American lawmakers respond to concerns that affirmative action as presently conceived is unable to address the deep inequalities within American society? I will propose that they adopt an understanding of affirmative action which takes into consideration the many complex dimensions of disadvantage. The traditional American legal conception of affirmative action, which focuses on the effects of past and present racial discrimination in discrete workforces, provides a limited portrait of the nature of the disadvantages experienced by poor inner-city African-Americans. The disadvantaged person in the standard American affirmative


485 Iris Marion Young, Together in Difference, p. 159. Randall Kennedy expresses a similar sentiment when he points out that "racial groups are not monolithic," that "social divisions generate radical differences in interests and consciousnesses within groups." See Harvard Law Review, 102 (1989), p. 1745.
action court case is either a qualified racial minority candidate who has been denied a position or a promotion because of an employer's bigotry or because of an inequity embedded in an employment system that is the result of past discrimination. But this scenario does not include the individuals Wilson describes. These individuals never appear in the America's legal narrative of affirmative action because a multitude of factors keeps them from competing for the jobs which are the focus of affirmative action decisions. My goal is to broaden the focus of the concerns in American law's discourse of affirmative action.

An important criticism which may be leveled at the understanding of affirmative action as ameliorating disadvantage is that it leaves lawmakers with no principled way to distinguish among deserving groups. The advantage of relying on the touchstone of past racial discrimination. some might say. is that at least it provides us with a principle upon which to justify the programs: affirmative action is a response to centuries of state-sponsored racial inequality or to present workplace discrimination. As I have tried to explain. however, relying solely on the concept of past discrimination is not helpful because it is too difficult to determine with precision all the complex and often subtle ways that discrimination has served to disadvantages certain groups.

A revised understanding of the justification for affirmative action requires new ideas about how to construct programs and expands the debate about affirmative action beyond the bounds of its present limits. The truly disadvantaged do not suffer merely because they are African-American, but rather because they are African-American. poor. unskilled. isolated. reside in inadequate housing. receive sub-standard medical care. live with constant violence. and so forth. One thoughtful commentator. Daniel Farber. has noted that legal scholars have to this point.

invested their energies in the single question of whether race is a valid consideration in hiring employees. admitting students. or drawing electoral districts. Framing the question so narrowly diverts attention from what happens before and after affirmative action. For instance. the debate on affirmative action in hiring overlooks the crucial question of whether African-Americans can get the education they need to enter the relevant employment pool. Advocates for consideration of racial factors in college admissions. on the other hand. seem to think the problem has been solved when the proper proportion of African-Americans gain admittance. without attending
to the high attrition rates of African-American college students. As both examples illustrate, we need to broaden our focus if we want a society in which no racial group is permanently relegated to the bottom.486

An approach to affirmative action which sees both the fact of past discrimination and its divergent effects upon African-Americans provides both a justification for action and a guide as to how to proceed.

In examining the needs of communities inhabited by poor African-Americans, it is clear that a major factor inhibiting equal economic opportunity is quite simply a lack of jobs. Another problem is the fact that residents often lack the skills necessary to apply for the jobs that do exist. In the following section I will justify two types of affirmative action programs that could be employed to address these problems. In the first type of programs the government would provide subsidies to businesses to encourage them to set up operations in poor urban areas. The second type of program is similar to what is traditionally thought of as affirmative action. In it, the state would offer funding to enable these same companies who had set up operations in disadvantaged areas to train residents of those areas for the jobs that would become available. The justifications underlying both types of programs are similar. What follows is a fictional American Supreme Court decision in favor of these two programs as a way to explaining their purposes and justifications. Because the second type of affirmative action program I mentioned above is similar to the one the Court contemplated in United Steelworkers of America v. Weber, I will call this case Weber II and imagine that it was written by Justice Brennan.

Re-imagining Affirmative Action - Weber II\(^{487}\)

Today this Court reaches the question of whether a plan devised by Congress to ameliorate the disadvantages faced by residents in a poor urban neighborhood accords with the requirements of Title VII of the Civil Act of 1964 which guarantees equal opportunities to all individuals. Kaiser Aluminum received a subsidy from the federal government to locate one of its plants in Mott Haven, a predominantly African-American ghetto area in New York. Further, Kaiser received funding to set up training programs to prepare residents for the skilled craftworker positions which would soon be available in the plant. Weber, a job applicant who was not chosen for the training program and who was not a resident of the area, brought a suit arguing that his right to equal opportunity had been infringed because candidates for the training program had not been chosen on the basis of qualifications alone. This case is known as *Weber II*.

In order to come to a conclusion in this case, we need to carefully reconsider the Court's treatment of the concept of equal opportunity. As I asserted in *United Steelworkers of America v. Weber*, the primary concern of Congress in establishing Title VII of the Civil Rights Act of 1964 was the plight of black workers in the economy.\(^{488}\) Therefore, as I said then and will repeat now, some form of preferential treatment, or borrowing a phrase from the Canadian Supreme Court, *special programs* are appropriate to improve the employment conditions of members of this group.

Indeed, it is often helpful for the Court to examine the arguments expressed by Justices in other countries, especially those who have legal traditions similar to our own.\(^{489}\) Canada is a

---

\(^{487}\) While the arguments expressed in this hypothetical case may seem to go beyond the confines of the arguments made in the Canadian setting, I argue that they make explicit assumptions implicit in those arguments.

\(^{488}\) *Weber*, p. 2744.

\(^{489}\) Mary Ann Glendon tells us that comparative legal analysis is especially helpful when applied to a problem our own legal systems has not handled very well. It often provides "a deepened understanding of the problem and...a source of inspiration," as well as help in finding "our own path through the forest." See *Abortion and Divorce in Western Law* (Cambridge, MA: Harvard University Press, 1987), p. 1.
country which has a similar culture to that of the United States, but its lawmakers seem to have been able to reach more consensus on the issue of affirmative action. I believe we can partially attribute this to the fact that lawmakers have, until very recently, expressed a more satisfactory understanding of equal opportunity in their affirmative action law than have American lawmakers. They describe affirmative action as programs designed to ameliorate the conditions of disadvantage of certain groups and equal opportunity as equal access to opportunities which enable all individuals to fully develop their potential. While our contemporary legal debates about affirmative action contain a much more limited understanding of equal opportunity, a look into our own past reveals a richer version of equal opportunity. Figures as revered as John Adams and Abraham Lincoln considered true liberty to include the opportunity to develop one's intellectual, moral and physical capabilities to become a full human being. Surely the aspirations implicit in this vision, and even in that of the supporters of the Civil Rights Act, cannot be attained if we limit our definition of equal opportunity to formal equal opportunity and accept all the assumptions accompanying it. The present economic status of residents of segregated inner-city neighborhoods stands sharply against these aspirations.

I should note here that some Canadian lawmakers have recently begun to adopt American formulations of affirmative action which has led them to find ameliorative programs illegal.\textsuperscript{490} In Ontario for example, Premier Harris vowed before the election in 1995 that if elected he would dismantle the province's employment equity law, saying: "Rather than trying to dictate equality of results for each group, the role of government is to dictate equality of opportunity." Harris was elected and did dismantle the law. His adoption of American-style formulations seems to me to highlight the similarities between the American and Canadian cultures and the flux within each culture between contending understandings of the concept of equal opportunity. This fact demonstrates further the cultural similarities between Canada and the United States.

America's tradition of liberal democracy offers us a richer version of equal opportunity than presented in the last thirty years' affirmative action law. In this understanding of equal opportunity, equality retains its meaning as equal political and legal rights, but it also includes access to conditions favourable to the development of human potential. The state has a positive role in advancing equal opportunity, and rather than merely providing protection for individuals against unwanted intrusions, is actually involved in removing obstacles to equality. It takes an active role in assuring the full social and economic participation of all individuals in the community.

In United Steelworkers of America v. Weber, I defined affirmative action as remedy for past discrimination in discrete workforces. Canadian law offers a different vision of affirmative action in which real equal opportunity requires the state not merely to remedy discrimination but to ameliorate disadvantage. Justice McIntyre of the Canadian Court, in an important equality case, noted that "a law which treats all identically and which provides equality of treatment between "A" and "B" might well cause inequality for "C" depending on differences in personal characteristics and situations."491 The key to attaining equal opportunity is gauging the impact of laws on groups and individuals. This in turn requires an analysis of the status of the group in the political, social and legal contexts in which particular decisions are made. Undertaking this type of analysis may be too onerous for the members of this Court, but we may rely on the investigations of members of Congress. Our task is not to devise the programs aimed at ameliorating disadvantage, but rather to judge whether those programs established by Congress accord with equal opportunity.

The recent attempts of Congress to devise strategies to address disadvantage in the United States should be applauded. In passing two statutes which have been at the center of a Supreme Court case, Congress has shown that it is capable of creating innovative affirmative action programs and that it is aware of the various dimensions of disadvantage and the fact that disadvantage is not always a permanent conditions for individuals and groups. For example.

the recent case of Adarand Constructors, Inc. v. Pena dealt with two federal programs designed to provide assistance to disadvantaged business enterprises (DBEs). The first piece of legislation declared it to be “the policy of the United States that small business concerns owned and controlled by socially and economically disadvantaged individuals...shall have the maximum practicable opportunity to participate in the performance of contracts let by any Federal agency.” While being a member of a minority race gives rise to a presumption of social and economic disadvantage under the statute, the presumption is rebuttable. In other words, the program excludes individuals who are not socially or economically disadvantaged. In the words of Justice Stevens, the programs is “designed to overcome the social and economic disadvantages that are often associated with racial characteristics. If, in a particular case, these disadvantages are not present, the presumption can be rebutted.” Of interest, too, is that non-minority owners can make a case for social and economic disadvantage.

Similarly, the program provides for periodic review of the status of DBEs to monitor whether they still qualify for disadvantaged status. Describing this aspect of the legislation, Justice Stevens noted that the review procedure indicates the statute's intention “that after their presumed disadvantages have been overcome, firms will ‘graduate’ into a status in which they will be able to compete for business...on an equal basis.” Unfortunately, the majority on the Court remanded the case to lower court and asked for a determination as to whether the programs constituted classification on the basis of race. But the existence of the programs, and the fact that Justices Stevens and Ginsberg supported them, indicates that the idea of affirmative action as ameliorating disadvantage is not completely foreign to American law.

---


493 Adarand, p. 2102.


495 Justice O’Connor’s majority decision argued that if the statute did categorize on the basis of race, the Court of Appeals must apply strict scrutiny to this categorization.
Returning to the case at hand, I have relied on legislative reports provided by Congress and amicus briefs, and it is clear to me that the residents of the area in question are disadvantaged. Unemployment rates, average incomes, level of education, and so forth all point to this fact. Furthermore, it is clear that these disadvantages are related to past state-sponsored discrimination. The fact of past discrimination requires the state to act and the level of disadvantage faced by members of this group requires the state to act immediately. The situation is urgent. As I have stated, the pursuit of equal opportunity often requires the state to actively remove obstacles to achievement. In this case the state has chosen to subsidize a corporation to encourage it to locate in a ghetto area and to provide training for unskilled applicants. This is a legitimate state goal. There is a direct nexus between the problems faced by the area residents, high levels of joblessness, and the program in question, which aims to provide jobs and to prepare residents for those jobs.

But what of the other applicants, those who did not gain entrance to the training program because of the preference given to neighborhood residents? Have their rights to equal opportunity been infringed? It is necessary to point out that the dominant version of equal opportunity implicit in American affirmative action law to this point, by describing the programs as remedy for past discrimination, has seen them as exceptions to the ideal of equal treatment. Owen Fiss pointed out many years ago that this approach to affirmative action provides judges with the illusion of value neutrality - judges depart from the ideal of treating all individuals and groups in the same manner only to perform the technocratic function of rectifying past unequal treatment. But Canadian law offers a more realistic jurisprudence in the form of the insight that all laws benefit some individuals and groups and burden others so that the goal of equal treatment leaves the pursuit of equal opportunity formal and abstract. The question in Canadian law is not whether laws treat individuals and groups differently, but rather whether some laws too heavily burden members of groups. American Justices have

acknowledged their concern with law's differential impact upon individuals and groups. For example, in one case involving veterans' preferences, Justice Stewart noted: "Most laws classify, and many affect certain groups unevenly." 497 The case dealt with the question of whether the law which granted the preferences to veterans was invalid because it had a disproportionately negative impact on women, given that most veterans were not women. The Court allowed the program because of its advantages "'in spite of' its adverse effects upon an identifiable group." 498

A crucial question in this case is whether the burden on non-residents of the depressed community in question is too great. In United Steelworkers of America v. Weber I expressed concern for the burdens experienced by white workers given the in-plant training program which reserved 50% of its openings for African-American workers. I concluded that the program did not overly burden the white workers in question because it did not create an absolute bar to their advancement; half of those trained each year would be white. In this case, similar consideration has to be given to the burdens placed on non-target groups members, many of whom may themselves face a number of disadvantages. This program, however, is directed toward addressing the specific problem of joblessness in one particular neighborhood. For the program to improve conditions in that neighborhood, residents have to have preference in this particular program. This is not to say that this particular neighborhood is to be the only beneficiary of special programs now and in the future. But it is to say that the government had made these individuals a priority in this particular case.

Enabling residents of this area to obtain job skills and well-paying, steady employment will have widespread consequences. The program addresses the problem of negative stereotyping by allowing members of the community to demonstrate their abilities, so that other employers may be encouraged to set up operations in the area. Furthermore, with an increased number of people in the community earning decent incomes, there will be a need for more

498 Ibid, p. 2296.
services such as food and clothing stores, which in turn will generate more employment. With more people able to buy their own homes and pay property taxes, schools will receive more funding and therefore provide better educations for the community's children. These sorts of developments stemming from the program, can only improve the conditions of all residents in the area.

Some may say that affirmative action grants a group right. However, we should not consider affirmative action to be a group right based on race but a way to ameliorate disadvantages and to enable all individuals to equally participate in society. Real examples of group right are the official languages and minority education language provisions in Sections 16 to 23 of the Canadian Charter of Rights and Freedoms and the aboriginal and treaty rights in Sections 25 and 35 of the Constitution Act of 1982. The arguments for these sections rest on historical assertions about group practices and ways of life. The arguments for affirmative action are not based on similar claims. My argument for affirmative action is based on the different circumstances faced by "the truly disadvantaged," but these do not include pleas to preserve the distinctive way of life of members of this group. Rather, my arguments for affirmative action concern the disadvantaged status of this group and focus on ways to integrate them fully into workforces. This justification for affirmative action works on the premise that the truly disadvantaged, because of past discrimination, have suffered and continue to suffer disproportionate burdens, and that for this reason they require programs targeted toward their particular needs. But, the composition of the groups who require special programs will change over time; in the 1960s and 1970s, the priority the government placed on restructuring workforces in order to eliminate the effects of past racial discrimination was appropriate, although not sufficient, to combat the circumstances faced by all African-Americans. Now we need to consider the differences within the black community. And we look forward to the day when "the truly disadvantaged" are no longer disadvantaged and therefore no longer require

---

special programs. As Canadian Supreme Court Justice Wilson has remarked, the range of disadvantaged groups will change over time so that the pursuit of equal opportunity requires flexibility. In this way, the approach to affirmative action I advocate recognizes group differences but is mainly concerned with the fulfillment of individual potential.

Therefore, I call for lawmakers to cease employing the unhelpful "equality of opportunity versus equality of result" formulation because it misrepresents the nature of real equal opportunity. It is important to examine "results," that is, the actual conditions under which people live in order to gauge whether equal opportunity really exist. It seems to me that we need to be careful about the language we use to describe affirmative action so that we do not fall into the habit of using what has become the standard and unhelpful American formulation of affirmative action as "preferential treatment in violation of equal opportunity." Rather, affirmative action consists of special programs targeted toward ameliorating the conditions of disadvantage experienced by certain groups. Equality cannot be achieved by treating all individuals in the same way. The state has a large role to play in creating equal opportunities by removing barriers to achievement. This allows members of disadvantaged groups to develop their talents and abilities, moving us closer to a meritocracy. Presently, members of certain groups are not treated fairly; affirmative action is a way to bring about fairness.

In the United States, a country in which the concept of equal opportunity has been so central, it is somewhat tragic that participants in the contemporary affirmative action debate express such a limited version of this ideal. My hope is that the arguments I have presented in this case brings us closer to what we really aspire to when we call the United States the land of equal opportunity.

---

500 Andrews, p. 152.
BIBLIOGRAPHY


**NEWSPAPERS AND MAGAZINES**

*The Congressional Quarterly Weekly*

*Fortune Magazine*

*The Globe and Mail*

*New York Times*

*Status of Women News*

**LEGISLATIVE DEBATES**

*Congressional Record*

*Hearings, Committee on Justice and Legal Affairs*

*Hearings of Subcommittee No. 5, House Judiciary Committee*

*House of Commons Debates*

**INTERVIEWS**


Elizabeth McAllister, August 10, 1994.

**AMERICAN CASES - Supreme Court**


Local 28 of Sheet Metal Workers v. EEOC 106 S.Ct. 3019 (1986).

AMERICAN CASES - Lower Courts
Jenkins v. United Gas Co., 400 F. 2d 28 (5th Cir. 1968).
Weiner v. Cuyahoga Community College District, 249 N.E. 2nd 90 (Supreme Court of Ohio 1969).

CANADIAN CASES - Supreme Court

Harrison v. UBC, [1990] 3 SCR 452.


Canadian Cases - Lower Courts and Human Rights Tribunals

R. Willocks, [1995] 22 OR (3rd) 552.
