Discrimination, Equality, and Fairness in Employment

Social Policies and Affirmative/Positive Action Programs

The inequality of rights has no other source than the law of the strongest. Was there ever any domination that did not appear natural to those who professed it? We ought not to ordain that to be born a girl instead of a boy, any more than to be born black instead of white, shall dictate a person’s position through life.

—John Stuart Mill (1806–1873),
English philosopher and influential liberal thinker of the nineteenth century.

The International Bill of Human Rights, as well as the various national laws described in the previous chapter, is aimed at banning discrimination and assuring equal opportunities to people regardless of their gender, race, ethnicity, age, disability, or other characteristics that are not relevant to their job-related skills. These laws are negative in that they prohibit discrimination in employment. In the past several decades, a new category of protections has emerged—social policies that are positive in that they aim to change the rules and provide advantages to groups that have traditionally been discriminated against. These social policies go beyond assuring equal rights to correct past wrongs. They are grouped under titles such as “positive action” in Europe (e.g., Chater & Chater, 1992) or “affirmative action” in the United States (e.g., Soni,
Other countries that have later adopted similar policies have used one or the other of these terms (see for example, White, 2001; Sunstein, 1999). This chapter begins with a discussion of different types of discrimination to provide the context for these policies and then turns to the specific policies in various countries whose aim is to actively promote equality and fairness in employment. It concludes with the public and political debate over these policies and the challenges they pose for business practices.

**Discrimination and Equality in Employment**

Originally morally neutral in its meaning, the word *discrimination* has acquired a negative value, particularly in the context of employment. *Webster’s New World Dictionary* (1984), for example, reflects this duality by providing both meanings. The first two definitions are the morally neutral, and the last is the morally negative: “Discrimination: (1) the act of discriminating, or distinguishing differences; (2) the ability to make or perceive distinctions; perception; discernment; (3) a showing of partiality, or prejudice in treatment; specifically action or policies directed against the welfare of minority groups” (*Webster’s New World Dictionary*, 1984).

Discrimination in employment occurs when (a) individuals, institutions, or governments treat people differently because of personal characteristics like race, gender, or sexual orientation rather than their ability to perform their jobs and (b) these actions have a negative impact on access to jobs, promotions, or compensation.

There are several classifications of discriminatory acts that can help us in understanding the way discrimination is manifested in the workplace. First, discrimination can be overt or covert. *Overt* discrimination occurs as a result of an explicit policy or law that generates unequal treatment; *covert* discrimination is the result of an implicit side effect of another policy or decision. Second, discrimination can be individual or institutional. It is *individual* when a single manager or a coworker in conjunction with his or her individual prejudice performs the action or actions; it is *institutional* when it is performed as part of the organization’s common practices or policies. Finally, discrimination can be characterized by the motivation behind it and can be either *intentional* or *unintentional*. The following examples may help demonstrate these distinctions.

The first example comes from the July 1943 issue of *Mass Transportation* (see Box 3.1). Male supervisors of women in the workforce wrote these “Eleven Tips on Getting More Efficiency Out of Women Employees” during World
War II. It is clearly prejudicial: “Numerous properties say that women make excellent workers when they have their jobs cut out for them, but that they lack initiative in finding work themselves,” and derogatory, “You have to make some allowances for feminine psychology. A girl has more confidence and is more efficient if she can keep her hair tidied, apply fresh lipstick and wash her hands several times a day.” Though it seems laughable today, the “advice” given to managers in this piece was considered serious and meant to be helpful.

The discrimination in this example is overt—clearly the authors were not aware there was anything wrong with their attitude and didn’t make any attempt to hide their prejudice; it is institutionalized—this is not an act of a single manager but instructions given to all managers; and it is intentional—the intent of the authors was to treat women differently because women were perceived to possess inferior characteristics.

Box 3.1 Discrimination Categorization: Management Advice in 1943

The following is an excerpt from the July 1943 issue of Mass Transportation. This was written for male supervisors of women in the workforce during World War II (“Eleven Tips,” 1943).

Eleven Tips on Getting More Efficiency Out of Women Employees:

There’s no longer any question whether transit companies should hire women for jobs formerly held by men. The draft and manpower shortage has settled that point. The important things now are to select the most efficient women available and how to use them to the best advantage.

Here are eleven helpful tips on the subject from Western Properties:

1. Pick young married women. They usually have more of a sense of responsibility than their unmarried sisters, they’re less likely to be flirtatious, they need the work or they wouldn’t be doing it, they still have the pep and interest to work hard and to deal with the public efficiently.

2. When you have to use older women, try to get ones who have worked outside the home at some time in their lives. Older women who have never contacted the public have a hard time adapting themselves and are inclined to be cantankerous and fussy. It’s always well to impress upon older women the importance of friendliness and courtesy.

3. General experience indicates that “husky” girls—those who are just a little on the heavy side—are more even-tempered and efficient than their under-weight sisters.

4. Retain a physician to give each woman you hire a special physical examination—one covering female conditions. This step not only protects the property against the possibilities of lawsuit, but reveals whether the

(Continued)
The second example (see Box 3.2) is more recent and comes from the experiences of African American employees in the U.S.-based Xerox Company (Comer, 2002).

Box 3.2 Discrimination Categorization: Black Employees File a Discrimination Lawsuit Against Xerox

The Equal Employment Opportunity Commission (EEOC) found that Black employees suffered from discrimination and a racially hostile environment at Xerox Corporation’s Cincinnati facilities. Racist symbols such as swastikas and black dolls with nooses around their necks were
The findings about the Xerox work environment actions can be characterized as discrimination that is (a) covert—this was not a stated policy of the organization (in fact, based on the company’s statement, these actions seem to go against its stated policy); (b) institutionalized—these actions were not done by a single individual, nor as an isolated incident, but were widespread enough throughout the organization to constitute an unofficial subculture; and (c) intentional—the use of the racial slurs and the posting of offensive symbols were carried out with the intention of intimidating Black people and making them uncomfortable in the work environment.

Theoretical Perspectives of Discrimination and Affirmative Action

Affirmative or positive action policies originated from the notion that discrimination against whole groups that has been persistent, institutionalized, and long-term cannot be remedied simply by banning such actions. Although antidiscrimination legislation is essential, these policies emerged out of the recognition that such legislation may not be enough to create a work environment that provides equality of opportunities for all, and may actually cement past inequalities.

Affirmative or positive action policies have two goals: (a) righting past wrongs—compensating groups that have been disadvantaged in the past with better opportunities in the present; and (b) achieving social goals of increasing the representation of traditionally disadvantaged groups in more lucrative jobs as well as management and leadership positions. The rationale behind these policies is that they redress past discrimination by giving preference in hiring and promotion to members of groups that have been discriminated against in the past. Considering that for a long time these groups have had limited access
to education, high-paying and prestigious jobs, networks of influence, and promotion opportunities, they may continue to be deprived of these opportunities if not given such advantages until a more balanced representation can be achieved.

There are several theoretical paths explaining discrimination in employment and the need, or lack thereof, for affirmative action policies. “Neoclassical” economists assume that, in a competitive market, the “taste” for discrimination cannot be indulged because it would be too costly for employers (Becker, 1971). Employers would lose their competitive advantage if they do not utilize the wide range of skills and talents offered by women, members of minority groups, older adults, sexual minorities, and people with disabilities. If employers continue to discriminate against these groups, their productivity will be reduced, ultimately resulting in reduced income for employers. Strictly following this logic, there is no need for any policies that encourage employers to give equal opportunities to all because it is in their own economic best interest. The problem with this logic is that it assumes that discrimination is simply a “taste,” disregarding the fact that this behavior is embedded in deeply engrained prejudicial perceptions that color people’s evaluation of other people’s skills, abilities, and talents. In other words, if one is prejudiced, say, against older people, he or she will make a series of inaccurate and often prejudicial assumptions (they are slow, inaccurate in their work, lacking in technical skills, etc). Operating from a mind-set that affects perception of reality, an employer is not likely to objectively determine the prospective employee’s real qualifications—for example, a woman’s ability to manage an engineering team—and is less likely to hire her for a management job (Arrow, 1973). Decisions that are propelled by prejudices tend also to perpetuate them: the employer may never realize the potential economic loss for his or her business enterprise by not hiring that woman (e.g., her unique talents and her ability to better understand women customers). It has been suggested, therefore, that the economic process cannot be insulated from stereotypes held by employers and affecting their judgment (Bennington & Wein, 2000). Nevertheless, neoclassical economists generally argue for deregulating the labor market and removing legal and policy restrictions to allow employers to use pure economic principles in their employment decisions.

At the other end of the theoretical spectrum is the “equal opportunities” school that considers institutional and cultural factors as the cause of discrimination (McDonald & Potton, 1997). Groups that have traditionally been discriminated against suffer from three types of interconnected barriers that may perpetuate the discrimination against them. The first is stereotyping, which excludes them from lucrative and desirable jobs; the second is exclusion from positions of authority, which perpetuates their image of being incapable of doing certain jobs; and the third is lack of role models and mentors within
their groups who are in positions of power and influence and who can assist them in obtaining and retaining desirable jobs.

Unlike the neoclassical economists who believe that distributive justice will resolve on its own due to the forces of the market economy, equal opportunities theorists believe that the forces that have originally led to discrimination will also work to preserve it. For example, in the past—and to a somewhat lesser degree today—the dominant stereotype of women was that they could not handle the pressure of top management and such positions were entirely outside their reach (the infamous “glass ceiling”). As a result, for a long time there was no evidence to disprove this stereotype, and discrimination was perpetuated. Furthermore, because many positions are obtained through networking and many promotions are attained through mentorship and role modeling, there were no women available to support and mentor other women in their quest for management jobs.

The main argument of the equal opportunities school of thought is that ending discrimination does not create equal opportunities because women, Blacks, people with disabilities, and other groups that have been discriminated against do not have the same resources available to them as members of the dominant groups. The main argument against this school of thought is that preferential hiring is another form of discriminating.

Social Policies and Affirmative/Positive Action Programs

In contrast to the passive nondiscrimination dictated by the equal employment legislation described in the previous chapter, affirmative or positive action means that employers must act directly and aggressively to remove all barriers that prevent women and members of minority groups from having equal access to education, employment, and political processes. Although these policies do not equal quotas, some affirmative action plans may include quotas if courts find purposeful systemic discrimination in specific areas (Soni, 1999).

LEGAL ARRANGEMENTS FOR AFFIRMATIVE AND POSITIVE ACTION POLICIES

Despite the public debate about these programs and the challenges presented in several judicial systems, governments around the world continue to legislate for affirmative or positive action in employment in favor of designated groups (Hodges-Aeberhard, 1999). These programs operate under different legal arrangements. A review of select countries using the ILO’s NATLEX database revealed that 12 currently have affirmative action policies (see Table 3.1).
Affirmative Action Legislation Worldwide (Select Countries)

<table>
<thead>
<tr>
<th>COUNTRY/LEGISLATION (TARGETED GROUPS)</th>
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</thead>
<tbody>
<tr>
<td>Private employers with 100 or more employees and higher education institutions are required to create affirmative action programs. (women)</td>
</tr>
<tr>
<td>CANADA—Employment Equity Act (1995)</td>
</tr>
<tr>
<td>Employers are required to identify and eliminate employment barriers against persons in designated groups. As a part of that, employers are required to institute policies that ensure that designated groups are represented in the workforce. (not specified)</td>
</tr>
<tr>
<td>Employers are required to promote the rights of women through remedial and affirmative measures that promote their well-being, including maternity leave with full pay. (women)</td>
</tr>
<tr>
<td>FINLAND—Act respecting equality between women and men (1986)</td>
</tr>
<tr>
<td>Public authorities are required to actively promote gender equality by removing obstacles through training and education, as well as by placing men and women in work positions and creating equality in working conditions. (gender)</td>
</tr>
<tr>
<td>HUNGARY—Provisions respecting gender participation in governmental councils, administrations, delegations, etc.—implementation and reporting methods (No. 110 of 1996)</td>
</tr>
<tr>
<td>Requires a minimum of 40% representation of men and women in all public committees that are made up of at least four members. In committees with two or three members both genders must be represented. (gender)</td>
</tr>
<tr>
<td>Requires that every appropriate government appoint a percentage of vacancies of not less than 3% for persons or class of persons with disability. (persons with disabilities)</td>
</tr>
<tr>
<td>IRELAND—Northern Ireland’s Fair Employment Act (1989)</td>
</tr>
<tr>
<td>Requires that employers have workforce representation of the two religious communities, Protestants and Roman Catholics, equal to their proportions in the population at large through the establishment of Fair Employment Commission (FEC). (religion)</td>
</tr>
<tr>
<td>Requires that employers create affirmative action programs to promote employment and give preferential treatment (providing employment and removing employment barriers) to individuals in designated groups. Establishes an Employment Equity Commission. (women, disabled persons, and ethnic groups)</td>
</tr>
</tbody>
</table>
Specifically, countries such as South Africa, Namibia, India, the United States, and the European Union all have differing ways of operating and implementing affirmative action programs:

- South Africa and Namibia have both adopted legislation requiring employment equity through means that include affirmative action—the Employment Equity Act Bi, 55 of 1998 in South Africa and the Affirmative Action (Employment) Act No. 29 of 1998 in Namibia.

- In India, the 1998 Employment Equity Act specifies a commitment to implement affirmative action measures in order to ensure equitable representation by “designated groups” in all occupational categories and levels of the public workforce.

- The European Community passed the Equal Treatment Directive in 1976 but it was limited to equal pay and equal treatment and applied only to gender and not to race or any other groups. In 1984, a Council positive action recommendation was issued that suggested parallel action to be taken by governments to include industry and other bodies concerned in order to
counteract prejudicial effects on employment. Following the 1984 Council recommendation, several European Community members initiated positive action legislation and policies (specific examples are included in the next section). Article 13 of the Amsterdam Treaty declared the principle of equal treatment for the EU’s increasingly multiethnic community and the need to fight against racism and xenophobia. Adopted in June 2000, the European Council Directive (2000/43/EC) “implementing the principle of equal treatment between persons irrespective of racial or ethnic origin” placed far-reaching and specific demands on member states. It included the requirement to inform the Commission of measures taken by member states to implement the directive. It also stressed the need to promote “conditions for a socially inclusive labour market” in order to achieve the objectives of the EC Treaty.

The United States has a relatively long experience with affirmative action programs. The term “affirmative action” first appeared in President John Kennedy’s Executive Order 10925 of 1961. It reappeared 4 years later in 1965 when President Lyndon B. Johnson signed Executive Order 11246 requiring “employers doing business with the federal government to develop affirmative action plans to assure equal employment opportunities in their employment practices.”

PRINCIPLES OF AFFIRMATIVE ACTION AND POSITIVE ACTION PROGRAMS

Programs to actively encourage a more representative workforce, as well as the incentives governments give to complying with such requirements, vary greatly from one country to the next. There are, however, several principles that are common to all such programs (Chater & Chater, 1992). Typically, affirmative/positive action programs:

- Are intervention measures
- Cut across, and attempt to influence, the operation of free market mechanisms
- Aim to actively reverse past discrimination against specific groups
- Are intended as temporary actions, which will be withdrawn once the situation is rectified

The following discussion covers the three elements of these essential programs: (a) their specific goals and target population, (b) policies and activities covered by those programs, and (c) enforcement, incentives, and sanctions.

Specific goals and target population. In general, the goals of these programs are to provide better opportunities to population groups that have been discriminated against in the past and to increase their representation in public service
jobs and in management and leadership positions. In the United States, for example, the goal of affirmative action programs is to compensate for past discrimination and to correct current discrimination by ensuring equal employment to members of minority groups and women. Similarly, the goal of positive action programs in Europe is to compensate population groups that have been discriminated against in the past by providing them with a competitive advantage at present (Wrench, 2001).

The South African affirmative action measures were implemented in order to ensure equitable representation by “designated groups” in all occupational categories and levels of the workforce. “Designated groups” are defined as Black people (Africans, Coloureds, and Indians), women, and people with disabilities. It is important to note that although preferential treatment is meant only for “suitably qualified people,” the definition of such suitability is very broad and may be a product of formal qualifications, prior learning, relevant experience, or “capacity to acquire, within reasonable time, the ability to do the job.”

India, the largest democracy, has long been struggling with hierarchical social structures in the form of its traditional caste system (Sunstein, 1999). The 1998 Employment Equity Act specifies a commitment to implement affirmative action measures in order to ensure equitable representation by “designated groups” in all occupational categories and levels of the workforce. In an effort to make its society more equitable, India employs “reservations”—a system of quotas in the public service system, set aside for minorities. The target populations for preferential treatment include three groups: the Scheduled Castes (about 15% of the population), the Scheduled Tribes (about 7% of the population), and the Socially and Educationally Backward Classes (also called “Other Backward Classes” and constituting about 50% of the population).

When examining affirmative or positive action policies from an international perspective, it is clear that each country’s specific historical and cultural background dictates the nature of its policies. Two interesting examples illustrate this issue: The first example comes from India and South Africa. What distinguishes the affirmative action programs in both India and South Africa from most other national programs is that the target populations are not minorities but practically constitute a majority of the population. The second example comes from Norway. Although in most countries women are the focus of any gender-related affirmative action, in July 1998, Norway enacted Ordinance (No. 622 of 1998) Respecting Special Treatment of Men. This legislation creates special provisions for men in certain occupations, like childcare and education, in which they are not well represented. (Hodges-Aeberhard, 1999).

Policies and programs. Affirmative or positive action policies and programs are designed to increase the number of qualified applicants from designated
groups (depending on each country’s definition of these groups) in the workforce. They usually employ two main strategies:

The first strategy involves placing requirements on the composition of the public workforce. This is done through specifying recruitment and promotion strategies for actual increase in representation of the designated groups (popularly referred to as quotas). India’s “reservations” policy, which applies to public positions only, not to private employers, is a prime example of this approach. Under India’s reservations policy, the federal government has set aside a quota of federal and state government positions to improve the representation of designated groups that were discriminated against in the past (Sunstein, 1999). The quotas are designed to reflect these groups’ representation in the population (indicated earlier) and include 15% for the Scheduled Castes and 7.5% for the Scheduled Tribes. No specific quota was set aside for the Other Backward Classes, though a 1963 Supreme Court ruling indicated that all reservations together should not exceed 50% of the positions. The responsibility for implementing affirmative action in India belongs to “designated employers,” a term that includes all municipalities and most government organizations and larger organizations (defined either by the financial scope of their business or as having more than 50 employees). Each employer is required to conduct analyses of the employment barriers standing in the way of inclusion and promotion of the designated groups, prepare an employment equity plan, and report annually to the director general of the Department of Labour on the progress made in the implementation of such a plan. The employment equity plan has to state the objectives to be achieved each year, the affirmative action measures with timetables and strategies to be implemented to accomplish them, as well as procedures to accomplish the plan.

The second strategy involves encouraging private businesses to actively recruit and promote employees from the designated groups. Governments achieve this goal by providing businesses with incentives, like better access to government contracts. In the United States, for example, employers who initiate plans to ensure equal employment by actively recruiting minorities and women are given preferential access to government contracts. Similar public policies in some European countries, such as the United Kingdom’s positive action, originate from the same ideology—compensating population groups that have been discriminated against in the past by providing them with a competitive advantage at present (other things being equal). In Belgium, for example, following the EC recommendation, a royal decree was passed that made provisions for the signing of an accord between the government and individual employers. The positive action programs were piloted with RTT—the national television company—and since then there have been more than 50 conventions signed with private sector employers. In each case, assistance has been given from a team of state-funded experts operating to a common set of
positive action guidelines. In Italy, trade unions have introduced positive action into collective bargaining, and today many employment contracts contain positive action clauses (Chater & Chater, 1992).

An interesting case of positive action through legislation aimed at reducing religious discrimination is that of Northern Ireland’s Fair Employment Act of 1989 (see Box 3.3). The goal of that legislation was to make the workforce representation of the two religious communities, Protestants and Roman Catholics, equal to their proportions in the population at large. This was attempted by granting far-reaching enforcement powers to the Fair Employment Commission (FEC). Despite this forward-thinking legislation, it is clear that inequalities in employment are rooted in the complexities of the histories, identities, and cultures of the two communities and are not easily eradicated via legislation (Rea & Eastwood, 1992).

Box 3.3 Equal Employment Legislation and Religious Discrimination: The Case of Northern Ireland

Roman Catholics in Northern Ireland have suffered severe disadvantages in the labor market for a long time. Until 1989, Section 5 of the Government of Ireland Act 1920 was the only legal protection against religious discrimination for the citizens of Northern Ireland. It stated that the Northern Ireland Parliament was prohibited from making any law that would “give preference, privilege or advantage or impose any disability or disadvantage on account of religious belief or ecclesiastical status.” Following Northern Ireland’s civil rights movement of the 1960s and the surge in civil disorder, the governor of Northern Ireland appointed a commission headed by Lord Cameron to investigate the allegations of religious and political discrimination. The commission’s 1969 report confirmed that injustices in the areas of housing and public employment led to the surge of civil unrest. Several declarations followed with the eventual result of the 1976 Fair Employment (North Ireland) Act that outlawed job discrimination on grounds of religion and political opinion in both public and private employment. A decade later, however, it became clear to the government that the 1976 Act was having a minimal impact on Catholic disadvantages in employment.

Interestingly, strong pressure to change this situation came from a group of Irish American lobbyists who urged U.S companies with investments in Northern Ireland to increase the numbers of Roman Catholics in their workforces. Articulating their position, the group drew the
“MacBride Principles,” named after one of the original signatories and modeled after the Sullivan Principles that were developed earlier to guide companies operating in South Africa.

These actions, in addition to reports on the status of employment discrimination, convinced the government of the need to introduce new legislation. The eventual outcome was the Fair Employment (Northern Ireland) Act 1989. The aim of the new legislation was to assure that the proportions of the two religious communities in employment would be equal to their proportions in the population at large.

The 1989 law provides for close auditing of employers’ practices in achieving employment equality. It arms the Fair Employment Commission (FEC) with additional powers and resources. Specifically, it requires all employers of more than 10 people to monitor the religious composition of their workforce and to provide an annual report to the commission. Employers are also required to provide 3-year reviews of their recruitment, training, and promotion practices and policies. The penalties include not only fines for discrimination and failure to register and monitor but also exclusion from competing for government contracts and denial of any government grants.

Despite this far-reaching legislation, it is clear that the animosity between the religious groups runs deep and that segregation by religion in employment situations will remain a challenge in Northern Ireland for years to come.

SOURCE: Rea & Eastwood (1992)

**Enforcement—incentives and sanctions.** Some countries institute an official body that is responsible for evaluating compliance and enforcing the policies through sanctions or incentives. Sanctions include primarily monetary fines for organizations that do not comply with the policy. In South Africa, for example, the director general of the Department of Labour, who receives the employers’ progress reports, has the powers to make compliance demands on the designated employers. A Commission for Employment Equity with a chair and eight members is appointed by the minister of labour to render advice on these matters. Penalties can range from 500,000 to 900,000 rand (roughly US$74,397–US$133,915).

As a further example, Australia’s Affirmative Action (Equal Opportunity for Women in the Workplace) Act, introduced in 1986, requires that organizations with more than 100 employees have an affirmative action program in
place. Even though the legislation was enacted in 1986, some employers did not respond to the legislation until the 1990s. Additionally, many organizations are not covered within the Act (less than 44% of those in the private sector are covered), and many women are excluded if they work part-time, have temporary jobs, or are in the category of low-paid employees. As a part of Australia’s Affirmative Action Act, organizations are required to evaluate their employment statistics and human resources practices and to consult with women employee groups and with trade unions to develop an individualized affirmative action program. Organizations are also required to submit their reports and subsequent plans to the Affirmative Action Agency. Despite these aspects of the Act, the penalties for not complying with the requirement are limited and rarely enforced (Strachan & Jamieson, 1999).

The Public Debate Over Affirmative and Positive Action Policies

The public debate over positive/affirmative action policies has focused on social justice and economic principles. Proponents of these policies claim three main arguments: the first is compensatory justice—past injustices need to be undone and compensation should be given to those who were disadvantaged as a result of discriminatory traditions or intentional policies; the second is distributive justice—the social goods and wealth of a country should be distributed equally; and the third is social utility—everyone in a society has something important to contribute, and the common good is best served by everyone’s participation in the economic and social system. Opponents of these policies present arguments that can also be classified into three groups: first, reverse discrimination is another form of unfair practices that perpetuate discrimination, although it is now practiced on a different group; second, preferential policies go against the principles of individualism and interfere with the forces of a free market economy; and, third, preferential practices may result in poor services and products because incompetent or unsuitable people may be appointed to jobs. Further, even among proponents of strong social policies, there is uneasiness with policies that may amount to “quotas” and outright reverse discrimination because they undermine the real achievements of members of underrepresented groups and perpetuate the notion that members of these groups intrinsically lack the characteristics for success in employment and will always need special assistance. The controversy around affirmative and positive action is reflected in the numerous challenges it faced in courtrooms throughout the world. It is interesting to note that despite the diversity of countries and jurisdictions, courts have generally supported the concept as an acceptable tool in the struggle to eliminate discrimination in employment.
Affirmative or positive action programs have been challenged in the courts, mostly on grounds that they contradict a specific country’s equal rights assurances under its constitution or legislation. South Africa’s constitution presents a very interesting way of solving this dilemma. In banning unfair discrimination (see a comment earlier in the chapter), South Africa’s constitution implies that fair discrimination is permissible. Chapter 10 of the constitution states that public administration must be broadly representative of the South African people. It further notes that although objectivity and fairness must be applied, an important goal is redressing the imbalances of the past and achieving broad representation. The South African constitution, unlike that of the United States for example, sanctions affirmative action. These policies were challenged in the U.S. courts repeatedly over the years when the courts were asked to reconcile these preferential policies with the equality principle stated in the Fifth and Fourteenth Amendments to the U.S. Constitution. Early Supreme Court decisions affirm these policies, but from the 1980s on, as the Supreme Court’s composition became more conservative, the Court’s decisions were less and less supportive (see Box 3.4 for an example).

Box 3.4 Making the Case Against Affirmative Action: The U.S. Supreme Court’s Position

The City of Richmond adopted a plan that required city contractors to subcontract at least 30% of the dollar amount of the contract to minority business enterprises. The purpose of the plan was to promote wider participation by minority businesses in the construction of public projects. J. A. Croson Company, a non-minority-owned construction company, sued the city, arguing that the ordinance was unconstitutional. The district court determined in favor of the city and upheld the ordinance, but the appellate courts found it to be unconstitutional. The City of Richmond appealed to the United States Supreme Court and its ruling was in favor of J. A. Croson Company. The Supreme Court found that none of the evidence presented by the City of Richmond pointed to any identified discrimination in the construction industry. The court found that because the city had failed to demonstrate the need for remedial action in the awarding of its public construction contracts, its treatment of its citizens on a racial basis violated the Constitution’s equal protection clause.

The fate of affirmative action policies in the United States took a very interesting turn in the 1990s. In November 1996, the California voters approved Proposition 209, which amended the state’s constitution and stated

Neither the State of California nor any of its political subdivisions shall use race, sex, color, ethnicity or national origin as a criterion for either discriminating against, or granting preferential treatment to, any individual or group in the operation of the state’s system of public employment, public education, or public contracting.11

Proposition 209 was unsuccessfully challenged in the courts (it was upheld in the Ninth Circuit Court of Appeals, and the Supreme Court turned down a request to hear the case in November 1997, practically voiding all affirmative action initiatives). The state of Washington followed suit by passing a similar resolution in 1998, and other states are contemplating similar measures. President Clinton is known to have phrased the slogan “Don’t end, amend!” about affirmative action programs, but under his presidency no new initiatives were generated to institute such amendments. Therefore, unlike the state of affairs in South Africa, the tension between affirmative action and the equality principles in the U.S. Constitution may, eventually, lead to the demise of these programs unless the U.S government or legislature step in to provide new directions.

Summary and Conclusion

And while the law [of competition] may be sometimes hard for the individual, it is best for the race, because it ensures the survival of the fittest in every department.

—Andrew Carnegie, The Gospel of Wealth, 1889

Global affirmative or positive action programs aim to change rules and provide advantages to groups that have traditionally been discriminated against. They stand in contrast to the laws reviewed in the previous chapter because they encourage positive action (equal and even favorable treatment of certain groups) rather than prohibit negative treatment (discrimination) in employment. These types of policies go beyond assuring equal rights to correct past wrongs. Several principles of affirmative or positive action programs are common to all countries, although the program can greatly vary from one country to the next. Typically, affirmative or positive action programs provide measures for interventions; cut across, and attempt to influence, the operation of free-market mechanisms; aim to actively reverse past discrimination against specific groups; and offer temporary actions.
There are those who argue that business enterprises should not be burdened with concerns for people and society but be able to pursue single-mindedly their financial interests. It is argued that, in a perfectly competitive free market, the pursuit of profit will by itself ensure that the members of society are served in the most socially beneficial way. On the other hand, businesses operate in a social context, and they need to be ethical and abide by the rules of the host country. Understanding the legislation and social policies of the host country is important because it provides businesses with important knowledge of the value context for a specific country. From a practical perspective, businesses need to understand the legal context in order to practice legally and avoid lawsuits.

Although the legislation and public policies described in this chapter have been conceived with the good intentions of providing diverse groups with better opportunities, they have generated some unintended consequences that are not always positive for individuals and for the well-being of the nations. For example, affirmative action practices in South Africa have caused many Afrikaners (Whites) to leave the country. With not enough well-trained Black people to replace them, this “White flight” has had a negative impact on the South African economy. Another unintended side effect of these programs is the rush for people to classify themselves as members of a disadvantaged group in order to reap the benefits of preferential treatment (e.g., groups in India who are trying to be classified as “Backwards”). The backlash against these policies includes a call to dismantle the programs, a call that has been successful in some instances (e.g., California, see above).

Proponents of affirmative action programs are concerned that the recent trend to eliminate these programs may cause a sweeping reversal of these policies that will result in erosion of their achievements. They fear that without the sanctions and incentives of these programs, companies may no longer be proactive in recruiting and retaining women and minority workers, and the representation of these groups in the workforce will decrease. On the other hand, opponents believe that the combined effect of the legislation and public policies has already made enough of a difference, and that there is no need to continue with those programs. Their main concern is that if the programs drag on long enough, they will become an entitlement rather than a measure to remedy past inequalities. Both sides agree, however, that some form of time limit needs to be set on these programs. In the long run, the hope is that the impact of these programs—along with the existence of strong antidiscrimination—will result in a more egalitarian workplace that accurately represents the general population of each nation.
Notes

1. For a detailed discussion of discrimination categorizations, see Velasquez (1992), pp. 319–341.
2. The full text of these Acts is available in the ILO's national labour law database (NATLEX) on the Internet at http://natlex.ilo.org
3. Equal Treatment Directive 76/207/EEC, 1976. Article 1(2) and (3) state that “This Directive shall be without prejudice to provisions concerning the protection of women particularly as regards to pregnancy and maternity and this directive shall be without prejudice to measures that promote equal opportunity for men and women. In particular by removing existing inequalities which affect women’s opportunities in areas referred to in article 1(1) i.e., access to employment including promotion and to vocational training and as regards working conditions and social security.”
6. Exchange rate as of May 2004 as quoted at www.oanda.com/convert/classic
8. See, for example, a discussion of quotas for religious groups in Ireland in Rea and Eastwood (1992), pp. 31–39.