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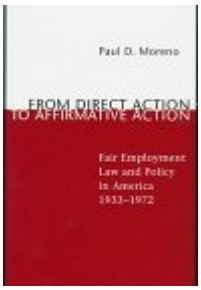
Paul D. Moreno. *From Direct Action to Affirmative Action: Fair Employment Law and Policy in America, 1933-1972.* Baton Rouge: Louisiana State University Press, 1997. 311 pp. $35.00, cloth, ISBN 978-0-8071-2138-2.



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From Direct Action to Affirmative Action: Fair Employment Law and Policy in America, 1933-1972 fills a void in the history of an idea which has both captured and divided America over the past quarter century. The idea is that proportional representation (more or less) of racial groups, particularly in the employment context, is desirable social policy. The work thus complements Andrew Kull's *The Color-Blind Constitution*.

Prior to the New Deal, Moreno argues, there was no affirmative action ideology of any significance. He finds "no support for benign racial classification" in the Reconstruction Era, which was dominated by the "effort to eradicate invidious racial classifications." For example, when the original version of the Freedman's Bureau Act of 1864 was limited to freedmen only, the Republicans who controlled Congress amended it to cover "refugees and freedmen" with "no distinction of color." Only racist opponents of equality under the law argued that the law created a "benign classification" favoring blacks. Indeed, many advocates of equal civil and political rights at that time embraced "social" discrimination against black Americans. From the end of Reconstruction to the New Deal, there was no significant discussion of affirmative action for blacks: both the Supreme Court and legislative bodies reiterated views that "reasonable racial classifications" disadvantaging blacks were perfectly legal.

Moreno's central thesis is that "The great depression, the maturation of civil rights organizations, and the New Deal's change in American principles of property rights and labor policy" precipitated a shift to "our modern concept" of proportional racial representation in employment. The early 1930s "Don't Buy Where You Can't Work" campaign is illustrative. Direct civil rights actions were mounted against employers having "token" black employees as well as those having totally segregated workforces. One early case (involving picketing to demand that Beck Shoe Company in New York hire blacks as 50 percent of their workforce) was commented upon with much ambivalence in Harvard, Columbia, and NYU law review pieces. The focus of the decision and the articles was whether "labor controversy" in the Norris LaGuardia Act included picketing for

proportional racial employment, not the merits or application of such an employment policy.

The central player in winning this issue, ultimately with the U.S. Supreme Court, was lawyer (and later federal judge) William Hastie, who represented the *New Negro Alliance* in Washington D.C. In a nutshell, Hastie argued that "while in theory there can be segregation without unequal treatment," any negro who uses this theoretical possibility as a justification for segregation "is either dumb, or mentally dishonest." W.E.B. DuBois responded that the Alliance was "fighting segregation with segregation" without admitting it. In the Supreme Court, Hastie expanded his argument with a Brandeis brief which included disproportionate unemployment and welfare statistics for blacks in Washington, as well as underemployment statistics in particular lines of work compared to population statistics. As Moreno summarizes the argument, "the alliance tried to use social science not to combat segregation, but to insist that segregation truly be equal." The Supreme Court's 1938 ruling in New Negro Alliance held that injunctions could not be entered by federal courts because the "Don't Buy" picketing was a "labor dispute" under Norris-LaGuardia.

Within the Roosevelt Administration, Harold Ickes, as administrator of the Public Works Administration, settled on a plan requiring that the skilled labor payroll on PWA projects match the percentage of blacks in the occupational census. In response to Urban League criticisms that this was insufficient, Ickes' staff explained this was a minimum, not a maximum, and fended off efforts to tie quotas to unemployment levels rather than the 1930 occupational census. TVA and other New Deal agencies adopted similar quota systems, though they sometimes maintained officially that their policies were not to discriminate.

The economic boom and full employment brought on by World War II ended for a time further consideration of proportional racial representation in employment. Then, in 1947-48, a California case, *Hughes v. Superior Court*, brought the issue of proportional representation to the nation's attention. A split decision by the California Supreme Court upheld an injunction to stop picketing designed to urge an employer that discriminated against blacks to adopt proportional hiring policies. The majority held that "If Lucky [Stores] had yielded to the demands of [Hughes], its resultant hiring policy would have constituted, as to a proportion of its employees, the equivalent of both a closed shop and a closed union in favor of the negro race." Justice Roger Traynor's dissent countered: "Those racial groups against whom discrimination is practiced may seek economic equality either by demanding that hiring be done without reference to race or color, or by demanding a certain number of jobs for members of their group." "No law," argued Traynor, "prohibits Lucky from discriminating in favor of or against Negroes. It may legally adopt a policy of proportionate hiring." Hughes appealed to the U.S. Supreme Court. Justice Frankfurter's opinion, upholding the injunction, concluded that the California courts had legitimately distinguished picketing against discrimination (lawful) from picketing to compel discrimination (unlawful). It did not address the issue of proof of discrimination, ignoring both Hughes' claim that discrimination was proved by the disparity between the black population and the number of black employees, and Lucky's argument that its hiring of a few blacks showed nondiscrimination.

One of Moreno's most significant contributions to understanding the conversion from the "colorblind" to the "proportional representation" model in the fair employment field lies in two chapters concerning operation of the fair employment laws in New York from 1945 to 1965. During the first of these decades, the State Commission Against Discrimination pursued the former strategy almost exclusively. In the second decade, following Brown v. Board of Education (a case which involved significant tension between "color-blind legalism and color-conscious sociology"), New

York's state commission drew increasing criticism from civil rights groups for focusing on individual complaints and for requiring proof of intentional discrimination. Because black unemployment remained far higher than white unemployment, and black wages continued to trail the wages of whites, advocates began focusing on group rights, compensation for past discrimination, and a national approach to employment discrimination.

At the federal level, government contracting rules moved, between World War II and the early 1960s, from an equal treatment model of nondiscrimination to race-conscious proportionalism. Most of this change took the form of encouraging employers to engage in voluntary racial preferences, however, since the federal contracting regulations explicitly avoided supporting racial quotas. By the early 1960s, both civil rights groups and President Kennedy began to view Congress as the next stage for combating discrimination. The story of Title VII's enactment has often been told, and this book adds little to that drama. It does focus, however, more than most retellings, on the outcome of that drama: The impact of Title VII would depend on how the EEOC and the Justice Department defined their roles under the statute and how the courts received that definition. Civil rights groups feared that the statute protected individual rather than group rights, outlawed only discriminatory acts committed after its enactment, prohibited preferential treatment, and protected discriminatory seniority systems and ability tests. Their next step was to convince the EEOC and the Justice Department that the statute was not as restrictive as it appeared. This regulatory reshaping of statutory law included: EEOC's early focus on large national employers having few black employees; expansive use of class actions by EEOC and DOJ because "race discrimination is by definition class-based discrimination"; governmental efforts to narrow the seniority system defense; and EEOC guidelines attacking tests having a disparate impact.

Moreno agrees with other scholars that "Employment discrimination law and policy had been radically transformed in the five years following the Civil Rights Act of 1964...racial proportionalism was in a practical sense the measure and remedy of discrimination, including preferential treatment and quotas." What was left was for the courts to ratify this strategy of the agencies. This the Supreme Court did, unanimously, in ***Griggs v. Duke Power Company*** (1971). The Court's decision, though very much at odds with some of the language and legislative history of Title VII, was of overarching importance. Moreno writes: "For the next twenty years, the development of Title VII law would be based not on what Congress meant in Title VII but on what the Court meant in Griggs." By 1970, preferential treatment and quotas were publicly defensible in ways unacceptable only a decade earlier. Efforts by the Reagan Administration in the 1980s to reverse this trend were unsuccessful, and the Civil Rights Act of 1991 embedded proportionalism in the fabric of statutory law: "[T]he disparate-impact system, engineered by legal scholars, and ratified by the courts, in defiance of the statute under which they operated, in place for two decades by tacit consent of Congress and the president, at last gained popular consent."

All in all, Moreno's book ably chronicles the paradigm shift from the antidiscrimination norm to the racial proportionalism norm. However, Moreno's closing words concerning the eclipse of the American Creed of equal treatment is ironic, for he may have measured the 1991 high-water mark of the paradigm shift just as the waters of proportionalism began to recede. Interestingly, Moreno does not chronicle the passage and judicial validation of California's Proposition 209 (barring preferential treatment by race, gender, and other characteristics). Nor does he mention the Supreme Court's application of strict scrutiny standards to racial affirmative action programs in the Croson and Adarand cases. In short, the battle between these two paradigms continues, and

"popular consent" to proportionalism is far from being the final word on this controversial issue.

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