

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

These days affirmative action is a hot political issue in the United States, and a great number of books on the concept have appeared in recent years. However, most books – even many of the scholarly works on the subject – are primarily contributions to a political debate and tend to fall into either the pro- or the counter-category. Therefore it is refreshing to find a book that defies such simple classification.

Paul D. Moreno's book focuses on the formative years of affirmative action, a period not thought of as such even by many scholars in the field. Moreno shows how the change from color-blind to color-conscious public policy in this area – which is frequently analyzed today and dated to the late 1960s and early 1970s – has a long tradition in the struggle against unfair employment practices, at least thirty years prior to Lyndon B. Johnson's famous Commencement Speech at Howard University, D.C., in 1965, in which he used his hobbled slave metaphor to highlight the need for affirmative action as an instrument to achieve equality 'not as a right and a theory, but equality as a fact and as a result'<sup>1</sup>

1 George E. Curry, ed., *The Affirmative Action Debate* (Reading, Ma.: Addison-Wesley Publishing Co., 1996), p. 18.

Moreno's book focuses on the period 1933–1972, from the introduction of FDR's New Deal to the end of the first Nixon period in the White House, which represents the formative years of affirmative action as a color-conscious political and legal tool. He demonstrates that this introductory phase of affirmative action was not a steady development from color-blindness to color consciousness, but a period characterized by pendulum swings between the two concepts. In fact, the efforts in the 1930s – mainly under the National Industrial Recovery Act (NIRA) and the National Labor Relations Act (NLRA) – were by and large color-conscious measures despite the fact that the New Deal as such was aimed at the problems of poverty rather than at those caused by race or ethnicity.

Moicno shows that the concept of 'disparate impact,' which was to gain the upper hand over the concept of 'disparate treatment' in legal analysis in the 1970s, had its genesis in the early 1930s. Whereas the former favors individual rights and merit-based personnel decisions, the latter is group-based, its proponents arguing that institutional racism was so pervasive as to render individual merit meaningless, offering group representation as the safest guarantee of individual rights. The New Negro Alliance (NNA), an organization established in 1933 by college-educated blacks dissatisfied with the performance of the traditional civil rights organizations, articulated – mainly through its organ the *New Negro Opinion* – a justification for race-conscious remedies for black unemployment.<sup>2</sup> Thus it foreshadowed Justice Harry Blackmun's declaration in the famous *Bakke* case, the first affirmative action case proper to appear before the US Supreme Court in 1978: 'In order to get beyond racism, we must take account of race. There is no other way. And in order to treat some people equally, we must treat them differently.'<sup>3</sup>

The NNA introduced nonviolent direct action as its main strategy. Assisted by a very competent law professor, William Rastie (who was later to become a federal judge and subsequently governor of the Virgin Islands), the NNA presented a sociological explanation of employment discrimination, thus foreshadowing the legal practices of the Warren Court of the 1950s. It made use of B. Franklin Frazier's profile of race and employment, illustrating the heavy concentration of blacks in the lower rungs of the occupational ladder. Campaigns centered on slogans like 'Don't buy where you can't work!' and combined boycotts with legal action. Although only moderately successful, these initiatives launched, for the first time, a nondiscrimination standard in employment.

Ironically, the first task of the new activist group was to deflect the negative effects of the NIRA with regard to black employment. Because the NIRA contained a minimum wage provision black workers found themselves replaced by white workers because white employers now could exercise their racial prejudices without paying for it. The NNA and other groups working against racial discrimination in employment now started demanding quotas and proportional hiring. And they met some positive response in the Roosevelt

2 W.E.B. Du Bois, the high-profile black leader and editor of the NAACP journal *The Crisis* from its foundation in 1910 until 1934, by 1933 had embraced the concept of 'segregation without discrimination' in recognition of the problems of color-blind integration efforts. Actually, this was the major issue that triggered his sortie from this bi-racial organization, which he had been so instrumental in founding.

3 *Regents of the University of California v. Bakke*, 438 U.S. 265 at 407 (1978).

Administration. Actually, the Public Works Administration (PWA) in 1935 specified that twelve per cent of the skilled labor payroll must go to Negro employees in its first federal housing project, in Atlanta. Other federal agencies followed the PWA lead, the Tennessee Valley Authority (TVA) being a case in point. Secretary of the Interior Harold Ickes himself was careful to have a proper proportion of blacks in the Civilian Conservation Corps, Armed Forces, and in his own office. The National Urban League argued for the view that the quotas imposed were to be considered minima, not maxima, and that unemployment rates among blacks rather than Census figures should determine the quotas.

A Philip Randolph's threat of a March on Washington, in 1941, marked the end of this phase of affirmative action, symbolically indicated by the establishment of the Fair Employment Practice Committee. Improved employment opportunities for blacks because of the war situation, combined with the general disrepute of racism caused by the propaganda and the deeds of the Nazis in Europe, produced a de-emphasis on race-consciousness in the USA as well. Color-blindness and nondiscrimination became American ideals, not only in the war industry but in society at large as well. Moreno claims that this overarching ideal held its sway until the early 1960s, when new strategies were developed based on the provisions of the Civil Rights Act of 1964.

The general growth of the economy – with expanding opportunities for employment also for minority groups – created a prosperity that seemed to ameliorate racial relations and labor conflicts, although there were times of tension, such as the postwar recession of 1946-47 and the big strikes in the early 1950s. However, the Cold War helped paper over deeper cleavages in American society in the first postwar decade. The push for equal rights for blacks was exerted mainly by the NAACP under the auspices of the 'separate but equal' doctrine, emphasizing the second word in the concept, demanding real equality, and by and large keeping the conflicts within the courts of law.

The main strength of Moreno's work is perhaps his detailed study of the Fair Employment Era – the postwar years down to the Civil Rights Era – mainly through a case study of New York. Moreno maps the efforts in the Fair Employment Practice Commission and the State Commission Against Discrimination and the impact of state laws against discrimination. While the FEPC relied on moral persuasion, conciliation, and voluntary compliance, the SCAD had more teeth to it, first and foremost its power to issue 'cease and desist' orders. One common criticism of the consequences of the SCAD efforts was that they made employers resort to quotas to shield themselves from accusations of discrimination. Furthermore, the SCAD relied on court decisions in cases involving jury selection, voting rights, and labor union membership cases. The analogy was troublesome when applied to employment situations because of job qualification requirements and the availability of competent applicants. Nonetheless, the SCAD efforts were quite successful in pursuing group solutions over focusing on individual complaints, with a concomitant emphasis on disparate impact rather than disparate treatment, paving the way for the adoption of color-consciousness in the affirmative action programs in the late 1960s.

Moreno also maps the activities and interplay of the large number of federal agencies that developed in the 1950s and 1960s to battle employment discrimination: the President's Committee on Fair Employment Practice, the President's Committee on Government Contract Compliance, the President's Committee on Government Contracts,

the President's Committee on Equal Employment Opportunity, and the Equal Employment Opportunity Commission. Moreno's book addresses direct action/affirmative action related to employment. In the latter half of the 1960s the field of education and other problematic areas were included as well. Moreno demonstrates how color-consciousness was reintroduced in programs under the Civil Rights Act of 1964 and the Equal Employment Opportunity Act of 1972, showing that by 1972 both Congress and the Supreme Court to a great extent had accepted 'disparate impact' as proof of employment discrimination, and that this was not as novel an idea as may have appeared to many contemporary observers. What happened later is a different story, but Moreno's book provides an interesting, informative, and scholarly backdrop for an evaluation of that development.