

## **MODELING U.S. AND CANADIAN EQUALITY PROGRAMS**

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### **ABSTRACT**

Equality legislation and voluntary equality programs have been major issues for U.S. and Canadian employers, governments at all levels, and for human resource researchers since the 1960s. Many scholars have noted that work in this area has been complicated by confusion over the nature of the programs themselves. The extensive literature includes little discussion of a comprehensive framework for comparing and contrasting the myriad of definitions, programs, and policy choices. This article lays out a framework to assist those developing or revising legislation, organizations undertaking voluntary equality programs, and human resource researchers.

Equality legislation and voluntary equality programs have been major issues for employers, governments at all levels, and for human resource researchers in the United States and Canada since the 1960s. These programs have run the gamut from voluntary corporate programs to legislated compulsory programs. Although many pieces of legislation, judgments, articles in the business and popular presses, and scholarly articles have been devoted to the topic, significant confusion still exists over the nature of these programs, making the discussion difficult [1-5]. The discussion is further complicated by the intense passions inflamed by equality issues [3, 5-7].

A framework for analysis should be a step toward making the debate more productive and should provide a useful structure for legislative and corporate

policy initiatives. This article develops a framework built on earlier work and uses it to discuss the implications of the various equality models and to delineate major policy choices to be made [3, 8]. The goal is to facilitate discussion of the complex factors involved, not to discuss the state of the law. The model is, however, illustrated with current and historic Canadian and U.S. examples to help place these programs in perspective.

Terminology problems complicate the discussion of equality programs [3]. U.S., and particularly Canadian, scholars do not agree on the use of the terms “affirmative action” (AA) and “employment equity” (EE), two common examples of equality programs. Affirmative action is the older term, but many scholars regard it as ambiguous [3, 4, 9, 10]. The terms employment equity and affirmative action continue to be used interchangeably, but their use depends more on the country of origin than on the content of the program, since many U.S. AA programs look much like Canadian EE programs [11-17]. To sidestep the terminology issue, the term “equality programs” (EPs) is used here to denote the entire range of programs intended to address discrimination in employment. This includes voluntary programs, government policies, and legislation—whether they are labeled human rights, equal opportunity, employment equity, or affirmative action.

Regardless of the label, individual equality programs can be highly complex and differ from each other along several constructs. Programs must be compared, however, to increase our understanding of what each program attempts to accomplish. Making these comparisons is easier if researchers analyze them using a common set of dimensions. Our own work and our review of the literature suggest that four dimensions capture most of the differences among existing programs:

- Employer motivation to implement
- Equality criteria used to construct the program
- Demographic groups covered by the program
- External and internal comparators used (when required)

In the following sections we develop each of these four dimensions more fully.

### **EMPLOYERS’ MOTIVATION TO IMPLEMENT AN EQUALITY PROGRAM**

The starting point for differentiating among EPs is the employers’ motivation to implement such a program. Motivation for EPs may be placed on a continuum from voluntary to compulsory (Figure 1, vertical axis). At one extreme are compulsory programs imposed by legislation or court order. These are typified by current human rights acts in Canada at the federal and provincial levels and in the United States by federal EEOC legislation (Figure 1). These nonoptional programs set minimum standards for behavior and compel compliance through the threat of

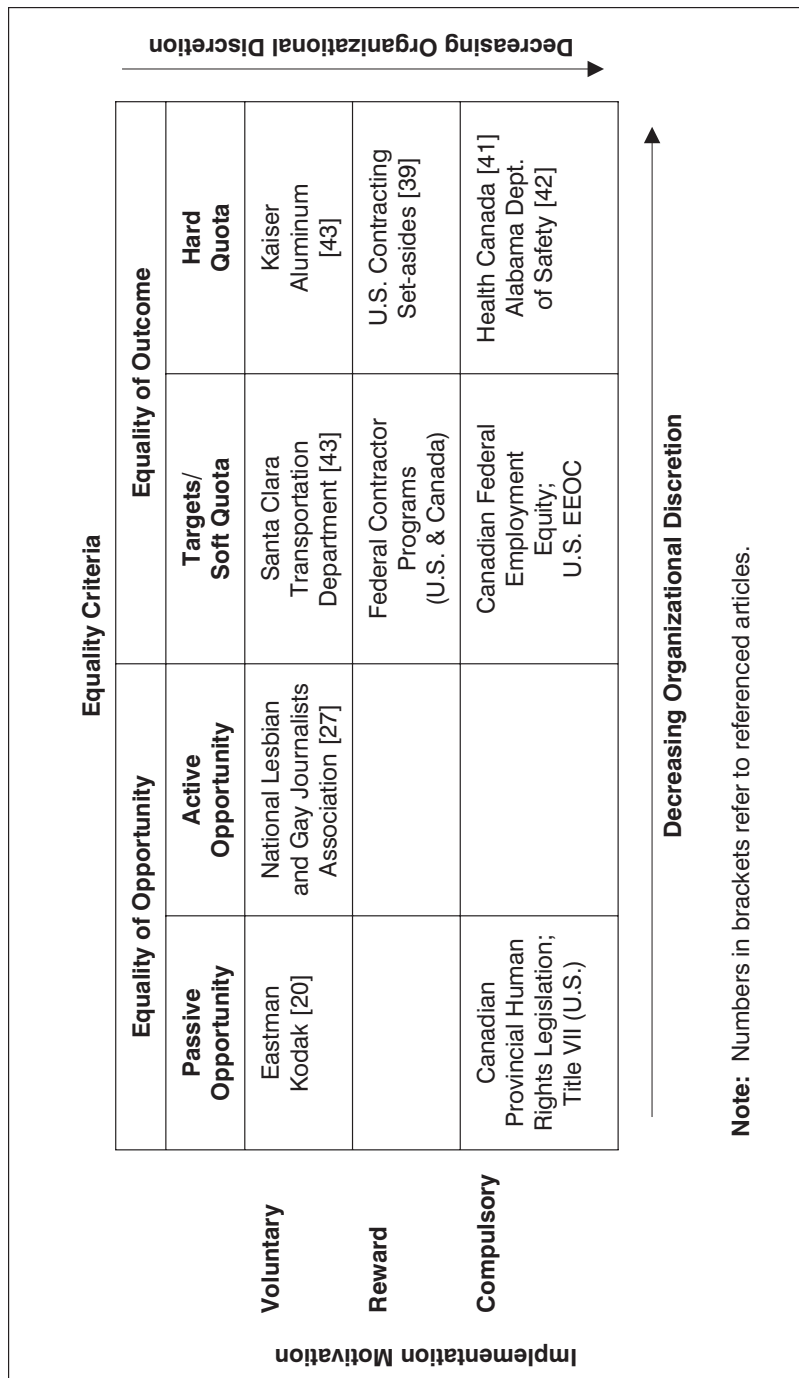


Figure 1. Equality programs model.

penalties. The defining attribute of compulsory programs is that action will (or may) be taken against employers who do not implement them.

At the other extreme are programs having neither rewards for implementation nor externally imposed penalties for employers who do not implement the program. These programs can be treated as voluntary, even if “imposed” by legislation, as were the federal EPs in the United States between 1945 and 1965 [2, 18]. Organizations in both Canada and the United States continue to undertake EPs on a voluntary basis. Not surprisingly, externally imposed voluntary programs have frequently proven ineffective. The lack of effectiveness of early voluntary government programs led to the inclusion of rewards and penalties in later government initiatives.

Nonetheless, some voluntary programs have been effective, particularly where employers expect economic benefits. Cox and Blake identified a number of advantages of a diverse workforce that could provide an incentive for undertaking voluntary programs [19]. For example, Eastman Kodak’s program (Figure 1) has provided homosexuals a policy of nondiscrimination in employment. Although Kodak’s program carries no external penalties or rewards for the organization, it has been effective because it is believed to have a positive effect on the organization’s workforce [20].

Between compulsory programs and voluntary programs are EPs that provide incentives or rewards for implementation rather than penalties for no implementation. The most common reward currently offered is the right to bid on government contracts. Examples include the American and Canadian federal contractors’ programs (Figure 1), which allow only those organizations in compliance with program requirements to bid on government contracts, but provide no other motivation. Contractors can choose not to comply with these programs if they do not wish to bid on government contracts.

There are significant advantages and disadvantages for each program motivation. The obvious advantage of compulsory programs is that the full power of the state can be employed to force implementation. This is a major reason for organizations to undertake EPs [15, 21]. This is understandable, because failure to comply can lead to lengthy legal battles and fines. Nonetheless, a major disadvantage of both compulsory and incentive-based programs is that organizations may not really be committed to such programs but rather superficially comply with an EP to satisfy the minimum requirements of the law [22]. This problem is exemplified by the finding that many employers in Ontario were merely going through the motions of pay equity and were generally uncommitted to the process, thereby reducing the program’s effectiveness [23].

Government pressure is lacking in self-imposed program, but such voluntary programs are much more likely to have support from senior management (thereby increasing the likelihood for success) and may go far beyond the scope of government-generated programs. Resource allocation depends on the perceived self-interest of the employers and, as previously mentioned, several convincing

arguments exist about the benefits of a diversified workforce [6, 19]. Government agencies could therefore improve program performance, both voluntary and legislated, through educational components that would inform organizations about the potential benefits of a diversified workforce [24].

Some EPs, although voluntary in the sense that they are not mandated by government fiat, may be less than voluntary. Pressure from external stakeholders, lobby groups, or unions may shape corporate policy, making them less than voluntary but not subject to government sanction. Public employers may be particularly sensitive to perceived fairness in employment and may take steps to protect their image by implementing an EP.

### EQUALITY CRITERIA

The second construct of the model is equality criteria. The following discussion is based on Seligman's earlier work [8], with the vocabulary changed to reflect current usage. Equality criteria can be divided into two broad categories, each of which is further subdivided into two subcategories as follows:

- Equality of Opportunity
  - Passive Opportunity
  - Active Opportunity
- Equality of Outcome
  - Target/Soft Quota
  - Hard Quota

These are laid out on the horizontal axis in Figure 1 and discussed in more detail below.

#### Equality-of-Opportunity Criteria

The major distinction between equality criteria is the difference between equality-of-opportunity and equality-of-outcome models. Both approaches attempt to address the problem of workplace discrimination by constraining the employer's range of action. Equality-of-opportunity models are less constraining than equality-of-outcome models, with the least constraining being the passive equality-of-opportunity model exemplified by Canadian provincial human rights legislation and Eastman Kodak's inclusion of homosexuals in its EP (Figure 1). These programs require only that hiring and promotion standards be clearly based on bona fide occupational requirements. Because the determination of legitimate occupational requirements is open to interpretation and occupational requirements have been found to circumvent regulations, courts and administrative tribunals have been the ultimate arbiters of whether an employment requirement was bona fide. They have occasionally ruled against seemingly "neutral" criteria [25, p. 107]. For example, the U.S. Supreme Court ruled that Duke Power could

not use educational and test qualifications to screen applicants for low-level custodial jobs because, by doing so, a higher proportion of minorities were disqualified. In addition, the screening devices had not been shown to be related to job performance [25, 26]. In other words the Duke selection criteria did not satisfy the passive equality-of-opportunity constraint.

The active equality-of-opportunity model is more constraining, in that it requires not only the use of bona fide occupational criteria but also an organization to diversify its applicant pool by recruiting (but not necessarily hiring) designated groups in an effort to increase their representation in its workforce. An example of such an effort occurs at the annual National Lesbian and Gay Journalists Association (NLGJA) convention [27] (Figure 1). Employers voluntarily attend this convention with the express purpose of recruiting homosexual journalists to diversify their workforces. The two models above can be characterized as equality-of-opportunity models because they address only the processes giving access to employment. They are concerned with removing discriminatory barriers in recruiting and/or hiring but are not directly concerned with the proportion of designated groups in a workforce [12, 28-30]. The key difference between them and equality-of-outcome models is that no internal workforce analysis is required to demonstrate compliance.

### **Equality-of-Outcome Criteria**

Targets and hard-quota models (Figure 1) are equality-of-outcome models because they deal with the extent to which the proportions of designated groups in the overall workforce, in specific job categories, or at certain ranks match a predetermined external measure [10, 12, 16, 28, 31-35]. Unlike the equality-of-opportunity models, they require the measurement of an organization's workforce composition and a comparison with an external measure. Hiring models that establish targets/soft quotas are more flexible than hard quotas, because failure to achieve such targets does not automatically mean failure to meet the EP requirements. For example, under the Canadian Federal Contractors Program, a reward-based program (Figure 1), employers are required to set targets. However, they can bid on contracts even if the targets are not achieved, if they can demonstrate that they are making a good faith effort to reach acceptable levels of minority employment [13].

Hard quotas are more rigidly enforced and thus inherently more constraining on the employer's range of action. An organization that fails to meet a hard quota is automatically in violation. An example of a hard quota would be the four-fifths rule in the United States, which requires that the selection rate of women and minorities in an organization's workforce be at least 80 percent of the selection rate of the nondesignated group [25, 36-38]. Hard quotas are also exemplified by U.S. state and local government "set-asides," in which fixed percentages of contracts are awarded to designated groups (Figure 1) [39]. Such demographically

based preferences have been, with only the rarest exception, been struck down by U.S. courts, and the Supreme Court “has never upheld an express racial preference” [40, p. 1165]. Hard quotas have, however, been historically imposed on organizations that failed to comply with less-constraining regulations in both the United States and Canada. Rulings against Health Canada [41] and the Alabama Department of Public Safety [42] (Figure 1) are examples of instances where hard-quota constraints were imposed on organizations judged not to have made sufficient progress toward eliminating discrimination under less intrusive regulations. Some organizations have voluntarily imposed hard-quota systems to increase the representation of underrepresented group. Kaiser Aluminum voluntarily imposed a hard-quota system on its promotion process, and the Santa Clara [Calif.] Transportation Agency developed a voluntary program with a non-quota goal of employing minorities and women in proportion to their labor force availability (Figure 1) [43].

### DEMOGRAPHIC COVERAGE

The third dimension of the schema consists of the demographic groups to be protected by the EP. EPs were designed to protect or encourage the employment of a variety of demographic groups. These are frequently specified in terms of race and gender but several other bases have also been used and consensus does not always exist about which groups should be included [39, 44-47]. In Canada and the United States, for example, EPs often specify protected individuals based on race, gender, disability, and religion [26, 48]. As clear as this seems, determining who is included in a protected group has proven to be less straightforward than might be expected [45, 49], and researchers have noted that definitions of designated groups may vary from jurisdiction to jurisdiction and from year to year [16, 50-53]. For example, while both Canada and the United States attempt to protect “Hispanics,” there is no agreement on who belongs in the category. Both the Canadian “Latin American” category and the U.S. “Hispanic” category include South Americans, but the U.S. category also includes Portuguese of pure European heritage [51, 54]. In some cases, organizations may find themselves trying to simultaneously comply with multiple programs with different definitions [55].

Demographic issues extend beyond the determination of who is eligible for protection. The number of demographic subgroups adds an additional layer of complexity to equality programs. This is seen in the contrast between the Canadian and American treatment of indigenous peoples. Canadian legislation has a single category for Aboriginal Peoples, whereas U.S. legislation places Native Americans, Pacific Islanders, and Alaskan Natives in separate categories. The aggregation issue can be critical with equality-of-outcome programs. Balancing the number and size of demographic groups is a substantial and difficult policy issue because both overaggregation (having too few large groups) and underaggregation (having too many small groups) can create problems. Overaggregation can result

in the underrepresentation or ghettoization of a subpopulation of a demographic or occupational group because a subgroup's underrepresentation can go unnoticed if the group is hidden within a larger category.

For example, in Canada in 1991, disabled men had a substantially higher unemployment rate than disabled women, but this is not reflected in the aggregated reports for the disabled, since all disabled are grouped into a single category [56]. Grouping together black women and men has frustrated American scholars studying differential gender effects of various EPs [57]. Underaggregation creates its own set of problems because of the difficulty in collecting and analyzing data with too few people in subcategories. The resulting smaller samples make it difficult to determine whether discrimination has occurred in any statistically meaningful fashion [36, 38, 58, 59]. Demographic issues can be expected to increase in complexity and importance because the number of demographic groups covered has increased over time in both countries. The related problem of determining the appropriate comparators could also become more complex.

## EXTERNAL AND INTERNAL COMPARATORS

Equality-of-outcome programs set targets or quotas for designated groups, thereby stating, or at least implying that comparators are needed to determine the appropriate level of representation, because comparison is clearly implicit in the concept of underrepresentation [5, 12, 22, 37, 39, 59-61]. The selection of comparators is perhaps the most complex and contentious topic in equality-of-outcome programs. This topic is dealt with here in three parts: external comparators, internal comparators, and methodological problems with the comparison process itself.

### External Comparators

External comparators are obtained from populations outside the employer's organization. Many different comparators have been advocated and employed over the last 40 years [49], including:

- the total population
- the adult population or the population within specified age limits (usually intended to approximate the working-age population or potential labor force)
- the labor force (those employed or actively seeking employment)
- the qualified labor force based on bona fide occupational requirements

Further, specialized, general-population comparators have been employed to encourage employment of specific groups. For example, the extended labor force is defined by Statistics Canada as the labor force plus women, visible minorities, and Aboriginal peoples who have worked anytime within the previous 17 months, and persons with disabilities who have worked anytime within the previous



five-and-a-half years [62]. Other potential external comparators are specific to individual employers or even to individual positions. Examples include:

- the pool of applicants for a position
- the pool of qualified applicants
- an employer's clientele or customer base
- work forces of an employer's competitors.

The choice of external comparator will generate varying political responses [63], each of which has advantages and disadvantages for employers and covered demographic groups and varying implications for labor markets. Although the last four groups have some intuitive appeal, they are highly subject to manipulation by organizations wishing to maintain workforce homogeneity and perpetuate existing workforce inequities. The method of recruiting, for example, can significantly affect both the pool of applicants and the pool of qualified applicants. Word-of-mouth recruiting is well-known to minimize the heterogeneity of the applicant pool. Recruiting from post-secondary institutions dominated by one demographic group can have the same effect.

Further, defining what constitutes "qualified" can be exceptionally difficult, and some would suggest that required qualifications can be manipulated to exclude certain groups. In some cases, the courts have found selection criteria to be discriminatory and, by implication, that some organizations are misspecifying criteria which, intentionally or unintentionally, improperly restrict the qualified applicant pool. The Duke Power case discussed above is one example of this. There are additional examples, many of them contentious, and one needs to look no further than the ongoing controversy surrounding appropriate selection criteria for female firefighters and minority police officers [64, 65]. Using the client or customer base as the external comparator suffers from similar problems of continued homogeneity. Previous discrimination in dealing with customers can translate into continuing discrimination in hiring. The same can be said for using competitors' workforces as a comparator, since previous industrywide discrimination can perpetuate continued discrimination.

General population/workforce external comparators overcome the disadvantages of specific comparators but suffer from shortcomings of different kinds. The effects of an EP are obviously sensitive to the specific, general-population, external comparator employed. The administration of general-population/workforce criteria is complicated by the fact that these criteria are dependent on the geographic area used to determine the comparison statistics [18, 37, 39, 60, 66]. Because there are different geographic labor markets for different jobs, the geographic areas of the external comparators are not the same for all jobs [39, 67], further increasing administrative difficulty.

Additional problems arise with total population, adult population, and labor-force comparators when the members of a protected group are less likely to possess bona fide qualifications for a job category. Although a protected group's

lack of qualifications may have resulted from previous discriminatory employment and educational limitations, it is difficult to meet targets or quotas if the qualified personnel are not available in the protected groups.

Targets or quotas not based on qualifications can also have a significant impact on the supply/demand characteristics of labor markets. Nonqualification-based targets can exert economic pressure to correct the effects of past discrimination but in extreme cases can make it difficult for an employer to meet targets or quotas within the pay structure applied to nondesignated employees. Targets or quotas based on the qualified labor force or applicant pool for positions requiring technical expertise and specific training that are underrepresented in the designated population, for example, would be more easily satisfied, and thus less constraining on an employer, than targets or quotas for positions based on the entire adult population and would reduce potential labor market distortions. Qualified labor force comparators do not, however, address the problem of systemic minority disincentives for acquiring qualifications and are also subject to the misspecification of qualifications discussed earlier. Clearly, no simple solution exists for the problem of selecting external comparators.

### **Internal Comparators**

External comparators are compared to internal comparators chosen to reflect designated group representation in the employer's organization. Internal comparators reflect some of the same geographic and qualification issues considered in the selection of external comparators. They have been based on an employer's:

- entire workforce
- workforce broken down by geographic region
- workforce broken down by job category
- workforce broken down by business division

The selection of internal comparators is further complicated by the need to decide whether the workforce is to be regarded as a stock or a flow in determining an organization's compliance with its target or quota [18, 37, 68, 69].

Parity studies may involve an examination of the workforce composition at a particular time, which means that the "stock" of employees is being considered. Other studies examine new hires, assignments, or promotions over time; these studies are concerned with "flows" [37, p. 194].

The choice between stock and flow measure can have major implications for human resource management, since it can be sensitive to job categories and organizational factors [18]. Altering the distribution of the workforce may be a long process for low-turnover job categories. Stock internal comparator targets may be especially difficult to achieve for downsizing organizations and organizations with rigid seniority rules governing layoffs and promotions. In

contrast, flow targets may be more easily achieved through normal turnover and job progression. For some job categories, however, it may be possible to alter the demographic composition of the entire work force very rapidly. Stock targets in low-skill and rapid-turnover positions, especially in rapidly expanding organizations, may be relatively easy to achieve [60].

The final two issues with internal comparators are the level of job category aggregation and the integrity of the data. Internal comparators may be narrowly defined as specific job categories, or many job categories may be aggregated to form a single comparator. This introduces problems similar to those arising from the aggregation of protected demographic groups. Larger aggregations may mask discrimination if members of protected groups are concentrated in less-desirable jobs hidden within larger aggregations [17, 68, 70]. On the other hand, too narrowly defined internal comparators can make it difficult to determine statistically whether discrimination has occurred because the categories are too small for meaningful analysis [36, 38, 58]. Another potential problem is that internal comparators are generally based on employers' records and thus dependent on the integrity of their data-collection process. Not surprisingly, employers' methods for deriving internal comparators have sometimes been controversial [17, 71]. For example, the Toronto-Dominion Bank was alleged to have changed its definition of disability to increase the reported representation of disabled persons within the organization [72].

### **Methodological Problems with the Comparison Process**

The final comparator issue is a technical, but by no means trivial, methodological problem central to the validity of the comparison process itself. Internal comparators are usually based on self-reported demographic information from a workforce [17, 50, 61, 73]. In contrast to the external comparators, much of this information is voluntary. For example, in both Canada and the United States, it is illegal to require potential employees to identify themselves as members of designated groups on employment applications, nor may they be forced to identify themselves after employment [48, 73, 74]. According to several scholars, many managers believe members of designated groups often fail to identify themselves as such; individuals have even "re-classified" themselves to gain the coverage of an EP [16, 21, 46, 50, 61, 73]. This introduces the "selection" problem discussed in Campbell and Stanley's classic monograph on validity [75]. If it occurs, the comparison with the nonvoluntary external standard is invalidated and, worse, the agencies evaluating compliance may not know it.

Even when the voluntary data are provided, contextual differences between completing census forms and filling out application and employment records may introduce additional validity issues. Identical questions can yield substantially different responses, and individuals have responded quite differently to the same

question in different contexts (e.g., replying to the census or applying for a job) [74]. Finally, minor variations in phrasing questions frequently occur between government records used to determine external comparators and personnel records used to calculate internal comparators. Such differences may invalidate the comparison [75]. Clearly, methodological problems with the comparison process itself may be unavoidable, but the problem can be mitigated to some extent. Eliminating inconsistencies such as requiring organizations to track their applicants' and employees' demographics while making it illegal for employers to require applicants or employees to indicate their demographic group. See Edwards for an example of steps to ensure that regulations do not conflict with one another [76]. Employers, in turn, should assiduously employ external definitions when complying with external programs.

## CONCLUSION

U.S. and Canadian legislators have, in many cases, taken similar general approaches to EPs, although the two countries may not target the same groups or use the same enforcement mechanism and administrative procedures. For example, the American Title VII's approach to EPs is very similar to provincial human rights legislation across Canada—passive but compulsory—and in both countries the courts have fashioned remedies requiring the employment of hard quotas. Similarly, the federal contractors programs in both the United States and Canada have used a target approach in assessing eligibility for bidding on government contracts. The approaches differ, in that the Canadian government has never attempted to impose set-asides (or hard quotas) for the provision of goods or services. One of the biggest differences between the two countries is that the courts have not struck down government policies and legislation in Canada in the same fashion as they have in the United States. Although there is litigation in Canada over the interpretation and implementation of EPs, the Supreme Court of Canada, unlike the U.S. Supreme Court, has supported group-oriented equality leading to greater stability in policy [77, 78].

Equality programs have been discussed by employers, governments, and human resource researchers for over a generation. This discussion has not been as productive as it might have been, in part, due to the lack of a framework for analysis and debate. This article presents a framework that should facilitate the discussion. It is clear from the discussion above that equality issues are extremely complex, even when analyzed along a single dimension at a time, so it is not surprising that many unresolved issues remain after more than a generation of debate. It is hoped that the systematic identification and delineation of the major decision areas along four constructs—employers' motivation, equality criteria, demographic coverage, and comparators—will be of value to scholars, governmental and organizational policy makers, and professional practitioners. This

framework should facilitate the continuing discussion of equality programs and allow for easier differentiation among programs.

The framework laid out makes potential problems in the development and administration of equality programs more apparent. To avert such problems, we suggest the following. 1) Governments should ensure consistency of definitions across jurisdictions, programs, and government departments and minimize jurisdictional conflicts. This minimizes the burden of record keeping, reporting, and developing internal compliance mechanisms. 2) Where programs are externally imposed on organizations, organizations should adopt the same definitions as the relevant regulatory bodies to maximize compliance. 3) Governments and their agencies should ensure that regulations do not conflict with one another by, for example, rationalizing the set of regulations requiring companies to track the breakdown of their applicant pools while making it illegal to require applicants to indicate membership in designated groups. Further, the inability to collect meaningful demographic information hinders an organization's ability to assess the quality of its recruiting and selection efforts with regard to equality programs. 4) Policy makers should ensure that designated groups are not under- or over-aggregated, particularly where targets or quotas are employed. 5) Governments should provide clear definitions of protected groups, along with relevant and comparable population data to guide organizations attempting to comply with targets or quotas, as well as courts and administrative bodies.

Consideration of these factors should make compliance easier for organizations. It may also allow them to apply more resources to programs that encourage organizational diversity rather than to activities dealing with compliance. This would lead to a more representative workforce—the policy objective of all equality programs—while reducing the administrative cost. Governments and their agencies could also play an important role in educating organizations and the broader community about the benefits of EPs [19]. Since it was found that government pressure was a factor in implementing equity programs for 96 percent of organizations and that many employers were uncommitted to EPs [15, 22], education could be the key to improving the quality of EPs. Governments could get organizations to buy into the process and thus minimize the disparity between policy and practice. Government-imposed programs are not enough; they must be coupled with an educational component to gain true organizational commitment if the needs of target groups are to be sufficiently addressed.

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