This chapter aims at uncovering some of the numerous attempts to conceal the specific nature of affirmative action made by those who were in a position to legitimize it. While they do not necessarily reflect an endorsement of the entire reasoning developed in the two preceding chapters, such attempts do suggest that some of its conclusions have been taken into account.

The Political and Administrative Origins of Affirmative Action: A Story of Calculated Ambiguity and Artificial Distinctions

When the agencies responsible for monitoring the implementation of employment antidiscrimination law began to move toward considering “equality of results” as their objective, there was still a deep-seated reluctance on their part to acknowledge this policy shift. For instance, in 1966 the new Equal Employment Opportunity Commission (EEOC) guidelines redefining the validity criteria for employment tests—and thus anticipating on the Griggs v. Duke Power Company Supreme Court decision¹—were not published as they should have been under the Administrative Procedures Act of 1946, on the pretense that these guidelines were only concerned with technicalities related to the enforcement of Title VII of the Civil Rights Act and did not involve an interpretation by the agency of the very substance of the law.²

Yet, in most cases the ongoing dissimulation pertained less to the existence of such administrative documents than to the exact nature of the requirements they imposed, with the remaining uncertainty leaving
plenty of leeway for the agency in charge of determining whether or not these requirements had been met. Thus, in January 1967, to a question about the conditions that an affirmative action program had to satisfy so that the would-be contractor whose employment practices were under scrutiny could be awarded the contract, the director of the Office of Federal Contract Compliance (OFCC), Edward Sylvester, replied that there was “no fixed and firm definition of affirmative action”: the policy would “vary from time to time, from day to day, from place to place”; while it did “not necessarily include preferential treatment,” it included “anything that you have to do to get results.” As he went on to explain,

Affirmative action is really designed to get employers to apply the same kind of imagination and ingenuity that they apply to any other phase of their operation. When there is a breakdown, or when something goes wrong in production, it is known fairly quickly and something is done about it in short order. We expect the same kind of attention and the same kind of focus of interest at all levels on the matter of equal employment opportunity.

By embracing a results-oriented approach while leaving it to the employer to identify the measures necessary for securing such results, the agency could thus protect itself against possible charges of infringement on Title VII of the Civil Rights Act of 1964, since that law, of course, also banned employment discrimination against whites. While that most convenient stance eventually had to be abandoned in November 1968, this happened only because the General Accounting Office rejected an early version of the Philadelphia Plan that still left the validity criteria for affirmative action programs that contractors were supposed to implement purposely vague. Only after a controversy over the originally implicit nature of the measures that the employers were asked to take did such a minimal clarification occur, with quantified “goals” as to the ethnорacial distribution of the workforce now being reluctantly provided.

Besides, once those “goals” were defined, the supporters of affirmative action attempted to deemphasize the departure from the Civil Rights Act that such a move entailed by constantly harkening back to the difference between “goals” and “quotas,” with a view to focusing resistance on the latter. This made sense, since as early as 1947 “quotas”—once applied by some Ivy League universities in order to restrict the number of Jewish students—that had been officially described by the Commission on Higher Education set up by President Truman as a typically un-American and undemocratic practice. That practice is still highly unpopular, as