
CHAPTER THREE

SETTING THE STAGE FOR AFFIRMATIVE ACTION IN THE UNITED STATES OF AMERICA

3.1 The USA — An Overview

To understand the current debate over affirmative action in the USA, all of America's racial history, from colonial times, through slavery, Reconstruction, the Jim Crow era, the civil rights era to the present day must be analysed. The reason for this is that it has been suggested that sometimes a misunderstanding of the history of affirmative action is the principle reason that most white people have difficulty in seeing their historical and current privilege.¹ The current scope of affirmative action programmes is best understood as an effort to remedy oppression of racial and ethnic minorities and of women.²

However, broader discrimination against persons because of their race, ethnic background, religion and gender has also been widespread. Some affirmative action programmes began before the promulgation of various civil rights statutes in the 1950's and 1960's, but affirmative action measures did not truly take hold until it became clear that anti-discrimination statutes alone were not enough to break long standing patterns of discrimination. This chapter is a study of equal employment opportunity, with specific emphasis on the development of affirmative action in the USA. It examines the development of public policies designed to eradicate and overcome the effects of economic discrimination.

Economic discrimination has been an inherent feature of race relations in the US since the first blacks arrived in the Northern American colonies in 1619.³ It was widespread in

¹ Rubio Philip A History of Affirmative Action — 1619-200 (2001) (Phillip).

² Cornel West Race Matters (1993) at 4 (West).

³ Turner R The Past and Future of Affirmative Action — A Guide and Analysis for Human Resource Professionals and Corporate Counsel (1990) (Turner).

the North and the South and, as late as the 1960's, relegated blacks to a vastly inferior position within the US economy. The desire for equal employment opportunity was a major feature of the civil rights movement. In the US there is a long history of federal action, and inaction, in the area of racial discrimination. The study of America's civil rights law must be looked at against the background of its history, "since no other national history holds such tremendous lessons, for the American people themselves, and for the rest of mankind".⁴ A study of American history raises many questions but chief amongst this is whether or not a nation can rise above the injustices of its origins and, by its moral purpose and performance, atone for them?⁵ What follows is an overview of the history of US legislation; attempts to incorporate equality into various legislations and major court cases that helped shaped public opinion and laws regarding equal treatment.

3.2 Slavery

It has been argued that legal racist practices were shaped by slavery and that enslavement powerfully reinforced prejudices.⁶ Like the system of apartheid that needed to be justified, white slave owners needed to justify and defend their forms of exploitation and so they claimed that blacks were morally and intellectually inferior to whites.⁷ Slavery, thus justified and rationalised, laid the foundations upon which prejudices and legally encoded racism were built.⁸

Central to the reason for affirmative action is the history of political, economic and cultural discrimination against blacks practised in the US. Is also a legacy of colonial practices that began with the European settlement of the Americas.⁹ America, Britain

⁴ West *op cit* 2 at 4.

⁵ Johnson Paul A History of the American People (1997).

⁶ Smelser Neil J *et al* (ed) America Becoming — Racial Trends and their consequences (2000) V(1) (Smelser).

⁷ Fredrickson G White Supremacy (1981) at Chapter 2.

⁸ It was these prejudices that led to the enactment of the Jim Crow legislation.

⁹ Little J W Affirmative Action — Legal Basis and Risks in the United States and South Africa (1994) Stellenbosch Law Review V(5) No.3 at 262-75 (Little).

and a few other European countries participated in the trade of slaves. However, even though slavery was later abolished in most of Europe it continued in the States. Under slavery, blacks were generally confined to agricultural and domestic work.¹⁰

In the 1970's the US was divided geographically into slave and non-slave regions as an anti-slavery movement had begun in the North and it led to the enactment of the Northwest Ordinance in 1787.¹¹ This measure prohibited the introduction of slavery into territories north of the Ohio River. By 1787, slavery had been abolished in some Northern states and populations of black freedmen, as they were called, began to establish themselves there.¹² The clash between slavery in the South and anti-slavery sentiment in the North caused a lot of internal tensions in the US. It was about this time that the first SC decision on the issue of slavery was decided. The case of *Dred Scott v Sandford*¹³ was seen as a disaster by abolitionists. In this case the SC held that a slave was property and not a citizen of the USA.¹⁴

The *Dred Scott* case reaffirmed the view of the legal status of black slaves; they were less than fully human and were mere property.¹⁵ This case could be seen to have fuelled the American Civil War that followed.¹⁶ After the Civil War ended in 1865, the

¹⁰ Hill H Black Labour and the American Legal System (1977) (Hill).

¹¹ The Germantown Protest Against Slavery 1688 is the first known public objection to slaveholding and the slave trade in the British mainland colonies of North America. See Rose Nicholas W A Documentary History of Slavery in North America (1976).

¹² By reference to South African history, these things were occurring in the USA at about the time the British first occupied the Cape in 1795.

¹³ *Dred Scott v Sandford* 15 L Ed 691.

¹⁴ In this case the facts were as follows — A black slave in Missouri claimed that as a citizen of the USA, he had become entitled to his freedom when his master took him on a journey to non-slave territories and to the free state of Illinois. It was decided by the court that Scott, was a mere chattel, being taken by his master to a place where slavery was prohibited gave him no just claim to manumission.

¹⁵ Also see *State v Mann* (1829) 2 Dev. 263 (NC).

¹⁶ The American Civil War from 1860-1865 tested whether or not secession was possible.

Congress of the US proposed a number of anti-slavery amendments to the Constitution of the US.¹⁷ It framed and recommended to the states three constitutional amendments¹⁸ to end slavery, extend the rights of citizenship to the freed Negro slaves, and guarantee their voting rights.¹⁹

Despite the adoption of the Thirteenth, Fourteenth and Fifteenth Amendments to the Constitution of the US, the successful transition of blacks from a status of slavery to a status of equal enjoyment of political, economic, educational, and social rights were an impossibility.²⁰ Due to the past of the blacks, they were for the most part uneducated, poor and politically powerless and more laws were then passed to keep them there.²¹

Not long thereafter the supreme House of Lords nullified most of the enforcement legislation expressly authorised by the Thirteenth, Fourteenth, and Fifteenth Amendments.²² The next major judicial failure occurred in 1896 with the decision of

¹⁷ The Constitution of the USA. The Thirteenth Amendment to the Constitution was ratified in 1865, thereby abolishing and prohibiting slavery throughout the United States. The Fourteenth Amendment was ratified in 1868, guaranteeing to all citizens of the US, which now included the freed black slaves, the equal protection of the laws of all the states. The Fifteenth Amendment was ratified in 1870, assuring that the freed blacks had full voting rights. The Fifteenth Amendment mandated that the right to vote could not be abridged on account of “race, color, or any previous condition of servitude”.

¹⁸ The three Amendments were the Thirteenth, Fourteenth, and Fifteenth Amendments.

¹⁹ The Fourteenth Amendment repudiated the *Dred Scott* decision and guaranteed the rights of American citizens to the freed slaves.

²⁰ Section 1 to the Thirteenth Amendment of the US Constitution stated that “neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction”.

²¹ For example, Mississippi passed an amendment to the Mississippi State Constitution in 1890 to deny to blacks the right to vote. These American so-called apartheid laws were worse than private bigotry because they partially recreated the state-approved subservience that the Civil War had fought to end. Ransom Roger L and Sutch R One Kind Of Freedom — The Economic Consequences of Emancipation (1977) at 4-7.

²² Carr K Robert Federal Protection of Civil Rights — Quest for a Sword (1947) at 45 (Carr).

*Plessy v Ferguson*²³. In this case the US SC upheld a statute that required or allowed for railroad companies to provide two sets of passenger cars: one for blacks and the other for whites. To the Equal Protection clause of the Fourteenth Amendment the court gave the following meaning²⁴ —

“....we cannot say that a law which authorises or even requires the separation of the two races in public conveyances is unreasonable.....”²⁵

This meant that laws could be enacted that separated citizens by race in schools, transportation, public accommodation etc., as long as the services provided for one race were equal to those provided for the other.²⁶ The Declaration of Independence itself perpetuated the view that black slaves were less than all men in their creation.²⁷ Indeed ex-president Abraham Lincoln said that “all men are created equal, except Negroes”.²⁸

Two months after the ratification of the Fifteenth Amendment,²⁹ the same Congress passed the 1870 Enforcement Act.³⁰ The essence of the Act could be found in Sections 3, 4, 5, and 6 which outlawed the most obvious abuses and made provisions for penalties.

²³ *Plessy v Ferguson* (1896) 163 US 537.

²⁴ With the exception of a dissenting judge who did not adopt, what became known as the “separate but equal rule”.

²⁵ Little *op cit* 9 at 273.

²⁶ *Swann v Charlotte-Mecklenburg Board of Education* (1971) 402 US 1267 (SC).

²⁷ The Declaration of Independence July 4, 1776.

²⁸ Basler (ed) *Collected Works of A Lincoln II* (1953) at 323.

²⁹ The Fifteenth Amendment had only two Sections —
1. The right of citizens of the United States to vote shall not be denied or abridged by the United states or by any State on account of race, color, or any previous condition of servitude
2. The Congress shall have power to enforce this article by appropriate legislation.

³⁰ Between 1870 and 1871 Congress passed the Enforcement Acts. These were criminal codes that protected blacks’ right to vote, to hold office, serve on juries and to receive equal protection of laws. If the states failed to act, the laws allowed the federal government to intervene. The target of the acts was the Klu Klux Klan, whose members were murdering many blacks and some whites because they voted, held office, or were involved with schools. See Carr *op cit* 22 at 47.

In various cases the SC nullified all four of those Sections.³¹ Shortly thereafter the Court nullified the Fifteenth Amendment.³²

3.3 The Jim Crow System

A culture of separate and seemingly equal treatment was thus condoned and became known as Jim Crowism in the South. Jim Crow laws, in US history, were statutes enacted by Southern states and municipalities, beginning in the 1880's, that legalised segregation between blacks and whites.³³ The SC ruling in 1896 in *Plessy v Ferguson*³⁴ that separated facilities for whites and blacks were a constitutional encouragement for the passing of discriminatory laws. This decision erased gains made by blacks during the Reconstruction era.³⁵ White economic benefits from racism were a powerful part of the incentives for Jim Crow laws and apartheid, with racism, shaped industrialisation and urbanisation.³⁶

3.4 African Americans and Hispanic Americans

During this period of racism and segregation the Southern industry adopted a “rigid colour line”.³⁷ This restricted the African Americans to low-paying, less-skilled, “Negro jobs”.³⁸ For Hispanic Americans, employment opportunities remained seriously

³¹ For example see the decisions in *U S v Reese* (1875) 92 US 214 and *James v Bowman* (1903) 190 US 127.

³² *Blyew v US* (1871) 80 US 581.

³³ *University of California Regents v Bakke* (1978) 438 US 265.

³⁴ *Plessy v Ferguson* (1896) 163 US 537.

³⁵ Railways and streetcars, public waiting rooms, restaurants, boarding houses, theatres and public parks were segregated; separate schools, hospitals and other public institutions, generally of inferior quality, were designated for blacks. See Woodward CV *The Strange Career of Jim Crow* (1996).

³⁶ Smelser *op cit* 6 at 306.

³⁷ Degler C *Neither Black Nor White* (1971).

³⁸ Quote from Dewery Donald *Negro Employment in Southern Industry August* (1952) 60 *The Journal of Political Economy* at 280 (Dewery) and see Blumrosen Alfred *Black Employment and the Law* (1971) at 167 (Blumrosen).

restricted into the 1970's and whole industries and categories of employment were dominated by white males.³⁹ Asian Americans and Hispanic Americans were legally banned from attending some public schools.⁴⁰ The civil rights movement saw victories with *Brown v Board of Education*⁴¹ and other cases which struck down segregation. The Civil Rights Act of 1964 and the Voting Rights Act of 1965 also played a role in striking down segregation.

The following paragraphs look at the segregation practices in specific industries. Each industry developed a unique system of segregation, depending upon the nature and type of work that was done. This information will give the reader a broader knowledge of the extent of discriminatory practices in the employment sector. It is hoped that if one is aware of the scope of discriminatory practices then it would be easier to understand the need for affirmative action policies.

3.5 Segregation in the Industries

(3.5.1) *The Construction Industry*

If one looked at the construction trades for example, by 1865 black workers had attained a foothold in the construction trade but after the war the black skilled workers were replaced by whites. This was largely due to the emergence of “modern” construction crafts, for example, electricians and plumbers, in the Jim Crow era.⁴² Black construction workers were excluded from these occupations and confined to the less skilled “trowel trades”, such as plasterers, bricklayers and unskilled labourers.

³⁹ Weiss J Robert *We Want Jobs — A History of Affirmative Action* (1997) edited by Graham Hodges (Weis).

⁴⁰ *Swann v Charlotte-Mecklenburg Board of Education* (1971) 402 US 1267.

⁴¹ *Brown v The Board of Education* (1954) 347 US 483.

⁴² Du Bois W *Black Reconstruction in America* (1992).

(3.5.2) The Textile Industry

In the textile industry, slaves had been active in the production of textiles before the civil war, and most were displaced from the industry after the war. Although African Americans continued to be well represented among unskilled construction workers, as late as 1940 they constituted only two percent of the entire textile labour force.⁴³

(3.5.3) The Tobacco Industry

The tobacco industry, which had also relied heavily on slave labour, continued to hire African Americans after the war. However, they were segregated physically as well as occupationally in less skilled and lower paying departments. Separate lines of progression and separate union locals, reinforced this system.⁴⁴

(3.5.4) The Pulp and Paper Industry

The pulp and paper industry had evolved similarly to the tobacco industry. As with the tobacco industry, the paper industry and unions finalised these arrangements through separate lines of progression and segregated union locals.⁴⁵

Economic discrimination permeated all southern industries and formed one element of a larger network of racial oppression.⁴⁶ These discriminatory job patterns together with a desire to escape the oppressive environment of the South led to a large scale migration to the North.⁴⁷ Southerners justified slavery as an economic necessity and argued that American slavery was consistent with natural law because the system was racially

⁴³ Kruman W Mark *Labour History* (1975) V(16) Winter at 38 (Kruman).

⁴⁴ Northrup R Herbert *The Negro In The Tobacco Industry* (1970) (The Tobacco Industry).

⁴⁵ Northrup R Herbert *The Negro In The Paper Industry* (1969) (The Paper Industry).

⁴⁶ Weis *op cit* 39 pg 5.

⁴⁷ *The Paper Industry op cit* 45 at 32-34.

based.⁴⁸ Southerners argued that as blacks were racially inferior, enslaving them was not only legitimate but a positive good for both blacks and whites.⁴⁹

(3.5.4.1) *The Migration*

In the late nineteenth century the blacks of the South migrated to the Northern cities. Although African Americans achieved a great deal of political freedom in the North, economic discrimination was as much a reality there as it was in the South.⁵⁰ Here too the African Americans had to settle for employment as domestic and service workers as they were excluded from the most desirable occupations. In industrial cities such as Detroit, Chicago, Cleveland and Pittsburgh, black workers were confined to semi-skilled and unskilled occupations.⁵¹

(3.5.5) *The Automobile Industry*

Due to the African Americans being employed to occupy less skilled, lower paying positions a large number of them entered the meat packaging and automobile industries. Even here they were employed in an unskilled or custodial capacity.⁵²

(3.5.6) *The Steel Industry*

The steel industry was both a major employer of black labour and a major perpetrator of racial discrimination. The steel industry confined blacks to unskilled blast furnace jobs, which Negroes were thought to be qualified to perform.⁵³ Preferential treatment

⁴⁸ Thomas R R Cobb *An enquiry into the Law of Negro Slavery* (1858).

⁴⁹ Smelser *op cit* 6.

⁵⁰ Kruman *op cit* 43.

⁵¹ Dewery *op cit* 38.

⁵² See the book by Harris W *The Harder We Run — Black Workers Since the Civil War* (1982). A notable exception to this was Henry Ford's River Rouge plant, which hired blacks for most blue-collared jobs, including supervisory positions. However, even Ford refused to hire African Americans in plants located outside Detroit, except as janitors.

⁵³ For more information see the book by Rowan L Richard *The Negro in the Steel Industry* Philadelphia (1968).

accorded to white workers and separate lines of progression contributed to the practices of discriminatory hiring and promotions. Therefore by the 1960's, African Americans contributed more than twenty-five percent of the unskilled workers on the steel industry but less than one tenth of the one percent of the white-collar workers.⁵⁴

The existence of discriminatory job patterns throughout the nation indicated that the Northern and southern employers shared the same attitudes with regard to the minority hiring process. Given the relative absence of vocational and educational opportunities for blacks, African American employers and job candidates sometimes possessed inferior job skills and training. The nation's racial hiring patterns however, revealed a persistent denial of opportunity to all but a handful of African Americans, regardless of qualifications.

(3.5.7) Government Employment

Government employment exhibited many of the same discriminatory practices as private businesses.⁵⁵ The Federal Government hired African Americans throughout the twentieth century but generally excluded them from the higher policymaking levels. A similar pattern emerged in state and local governments, where African Americans were over represented in "common labourer and service worker" positions.⁵⁶ Both federal and state governments assigned minority personnel most often to social welfare departments whose clientele included many "disadvantaged" persons.⁵⁷ African Americans seldom found employment in agencies that dealt with financial or administrative affairs or in law

⁵⁴ This situation prompted one federal judge to characterise one Bethlehem Steel plant as a "microcosm of classic job discrimination in the North". See the case of *United States v Bethlehem Steel Corporation* 446 F.2d 655.

⁵⁵ The effects of these discriminatory practices were still felt long after discrimination on the basis of race was outlawed. For example see the case of *Fullilove v Klutznick* (1976) 448 US 448.

⁵⁶ For more information see the Report of the US Commission on Civil Rights "For All the People....by All the People" (1969).

⁵⁷ For more information see the Report of the US Commission on Civil Rights Hearings before the Subcommittee on Civil and Constitutional Rights of the Judiciary House of Representatives (1978).

enforcement agencies, including the Justice Department and local police and fire departments.⁵⁸

(3.5.8) Organised Labour

Organised labour was both a major proponent of civil rights law and a major practitioner of racial discrimination.⁵⁹

3.6 Time-line of Affirmative Action Milestones

Affirmative action finds its roots as a product of efforts dating back to the 1950's and 1960's to remedy this discrimination practised against women and ethnic minorities in employment.

Prior to Franklin D Roosevelt's New Deal Programme,⁶⁰ African Americans wielded little political power and were unable to secure any meaningful concessions from a succession of administrations. The New Deal Programme was controversial because it provided, amongst other things, for the well-being of every citizen.⁶¹ Black political influence, however, was limited by the continued disfranchisement of southern blacks. Prior to 1960 therefore, federal civil rights activists were largely token and artificial. Not until the racial situation exploded during the 1960's did the government give a high priority to civil rights issues. However attempts had been made earlier on in the century to resolve the issues of race consciousness.

⁵⁸ For more information see the Report of the US Commission on Civil Rights Report on the EEO Action Programmes at the Department of Justice (1978).

⁵⁹ Hill *op cit* 128 at 376.

⁶⁰ The New Deal Programme was as a result of the Great Depression of the early 1930's. See Rauch Basil (ed) Franklin D Roosevelt: Selected Speeches, Messages, Press Conferences, and Letters (1957).

⁶¹ Smelser *op cit* 6 at 14.

In 1863, President Abraham Lincoln issued an executive order, the Emancipation Proclamation,⁶² which mandated the freedom of slaves in areas under the control of the federacy.⁶³ Thereafter, the Federal Constitution was amended to address the issue of racial discrimination and the status and rights of the legally emancipated African Americans. The Thirteenth Amendment provides, *inter alia* that, “neither slavery nor servitudeshall exist within the United States, or any place subject to their jurisdiction”.⁶⁴ The Fourteenth Amendment provides for the equal protection of all its citizens⁶⁵ and the Fifteenth Amendment provides for the right, notwithstanding a person’s race, colour or previous condition of servitude.⁶⁶ During the same time period, Congress passed the Freedman’s Bureau Act which makes for the provision of making available land, building and funds for the “education of freed people”.⁶⁷

Further in 1865, Congress enacted the Civil Rights Act.⁶⁸ This Act, which was the first public accommodations act, provided that all citizens were “entitled to the full and equal enjoyment of the accommodations, advantages, facilities and privileges” of public places and places of public amusement.⁶⁹ However, this Act was declared to be unconstitutional by the US SC in the Civil Rights Cases.⁷⁰

⁶² Proclamation of January 1, 1863 V(12) No. 17 Stat. 173.

⁶³ Bell D Race, Racism and American Law (1980) V(6) 2ed.

⁶⁴ US Constitution Amendment XIII.

⁶⁵ US Constitution Amendment XIV.

⁶⁶ US Constitution Amendment XV.

⁶⁷ See Generally Act of July 16, 1866 ch 200 14 stat. 173.

⁶⁸ The Civil Rights Act of 1866 (The CRA).

⁶⁹ Chapter 114, sections 3-5 Stat. 336, 337 1875.

⁷⁰ 109 US 3 1883. Concluding that Congress had no power under the Thirteenth or Fourteenth Amendments to enact the 1875 Act, the Court held that the Fourteenth Amendment did not authorise Congress to create a code of municipal law for the regulation of private rights and so the attempt at a country that recognises civil rights was totally ignored.

The following pages look at various attempts by a succession of Presidents to overcome prejudices and racism in the country and to bring civil rights within the scope of the law.

3.7 Executive Orders

(i) President Theodore Roosevelt (1901-1909)

Theodore Roosevelt took the view that the President as a “steward of the people” should take whatever action necessary for the public good unless expressly forbidden by law or the Constitution.⁷¹ In 1912 Roosevelt’s Progressive Party refused to seat southern black delegates.⁷² The demise of the Progressive movement during WWI and the Republican ascendancy of 1921 offered little relief to African Americans.

(ii) Warren G Harding (1921-1923)

Warren Harding, who won the vote of the American people in 1920, opposed in theory, economic and political discussion, but not social segregation, and made no significant efforts to implement these views.⁷³

Apart from the Great Migration which relocated millions of blacks from the South to the North, the final element responsible for the re-channelling of the African American political activity was the Depression itself.⁷⁴ The very extent of black unemployment was one of the reasons that blacks received some benefit from the New Deal Programmes, even if this was not a major objective of the Roosevelt administration.⁷⁵ The New Deal, especially in its initial phases, achieved few civil rights successes. The most significant civil rights progress occurred within the Department of Interior. It was here that the first federal “affirmative action” programme (although the phrase was never

⁷¹ Freidel Frank Burt *The Presidents of the United States of America* (2001) (Friedel).

⁷² Kane Joseph Nathan *et al* *Facts About the Presidents* (2001) 7ed.

⁷³ See Murray K Robert *The Harding Era — Warren G Harding and His Administration* (1969).

⁷⁴ Unemployment among urban blacks exceeded fifty percent.

⁷⁵ See the book by Leuchtenberg E William *Franklin D Roosevelt and the New Deal* (1963).

used) for African Americans was developed in conjunction with the PWA.⁷⁶ The programme was designed specifically for the sectors of the economy in which African American labour was already concentrated. Job training and upgrading of skills were not part of this programme and therefore was not very successful.

(iii) Executive Orders 9980 and 9981

Despite mounting pressure for a national FEPC law during the Truman and Eisenhower years, both administrations resorted to executive orders to solve issues of civil rights. Truman's first concrete act regarding equal employment opportunity was his issuing of EO 9980 on July 26, 1948. Truman's Order created a Fair Employment Board within the Civil Service Commission to ensure "fair employment throughout the Federal establishment, without discrimination because of race, colour, religion or national origin".⁷⁷ That same day, Truman issued EO 9981, which outlawed segregation in the armed forces.⁷⁸ This board could investigate charges of discrimination and suggest remedies, but it had no enforcement powers. A second executive order of December 3, 1951, created the Committee on Government Contract Compliance to determine whether government contractors were observing policies of non-discrimination. Truman's orders expired when he left office in January 1953.

(iv) Executive Order 10479

Succeeding Truman was Dwight Eisenhower who issued EO 10479. This order created the PCGC to "receive complaints of alleged violations of non-discrimination to

⁷⁶ Created in 1933 by Title II of the National Industrial Recovery Act, the PWA was designed to relieve unemployment through massive construction projects for housing, schools, courthouses, hospitals and other public buildings, but was not as radical as it appeared.

⁷⁷ Congressional Digest Civil Rights and FEPC (March 1964) V(43).

⁷⁸ The order requires that there be "equality of treatment and opportunity for all persons in the armed services without regard to race, color, religion or national origin".

provisions of government contracts”.⁷⁹ However, like Roosevelt’s FEPC, the PCGC lacked enforcement powers and was not as effective as promised.

3.8 The Passing of Civil Rights Legislation

Due to various promises of equal treatment being made and broken, the black protest movement that grew throughout the 1950's took a turn in the 1960's dramatically transforming racial politics in the US. The emphasis on civil rights throughout the 1960 presidential election reflected the growing public acknowledgement of the gravity of the racial issue in the US.

(i) President J F Kennedy and Executive Order 10952

The actual term affirmative action emerged first in labour law in the 1935 National Labour Relations Act (Wagner Act). The Wagner Act did not become firmly associated with Civil Rights legislation enforcement until 1961 in President Kennedy’s Executive Order 10952. The term “affirmative action” was first utilised in public policy in this Order. In March 1961 the EO 10952 created the EEOC⁸⁰, which required federal contractors to take affirmative action to ensure that race, creed, colour, or national origin did not play a part in their treatment of job applicants or employees.⁸¹ Departing from previous presidential directives, this Order granted the EEOC authority to impose sanctions for violations of the EO. President Kennedy regarded this enforcement authority as a new “determination to end job discrimination once and for all”.⁸²

Affirmative action was therefore instituted to ensure that applicants for positions would be judged without any consideration of their race, religion, or national origin. Kennedy’s executive order represented considerable progress over the Civil Rights Acts passed in

⁷⁹ Hubbard W Gary Affirmative Action The Law and Politics of Equality (1978) at 109 (Hubbard).

⁸⁰ The EOC mandates that projects which are financed with federal funds “take affirmative action” to ensure that hiring and employment practices are free of racial bias.

⁸¹ West’s Encyclopaedia of American Law (1998) V(9) (Encyclopaedia of American Law).

⁸² Freidel *op cit* 71.

1957 and 1960. Unlike the latter, EO 10925 had a real effect in reducing discrimination in at least one area which was government contracting.⁸³

Unlike the previous orders, EO 10925 empowered government agencies to cancel contracts with unions and businesses that violated equal employment opportunity provisions (something that the NAACP had been demanding since the 1940's).⁸⁴ In addition, the order contained the following statement — “...the contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, colour or national origin”.⁸⁵ Thus EO 10925 became the first federal rights initiative to employ the phrase “affirmative action”.

The concept of affirmative action was not formally defined in the EO but it stated that affirmative action was the obligation of the employer, and not a power delegated to the courts.⁸⁶ In this respect, Kennedy’s order reflected the conclusion of the PCGC that employers must go beyond passive non-discrimination in their equal opportunity efforts. Further, the order failed to define “affirmative action” or to state specific affirmative action requirements of employers. This vague wording constituted a major obstacle to effective enforcement throughout the life of the PCEEO. However if one was not clear on what affirmative action was, it was clear on what it was not. Affirmative action in 1961 did not refer to hiring goals or targets and it was stated that quotas were wrong and that no one in government had ever proposed them.⁸⁷ The EO failed to address many of the concerns of the NAACP and other civil rights organisations regarding discrimination in public accommodation, housing, government employment and private sector

⁸³ Encyclopaedia of American Law *op cit* 81 at 19.

⁸⁴ Memorandum to Nominating Committee (1943, December 29) NAACP Papers in Board of Directors Folder.

⁸⁵ Hubbard *op cit* 79 at 110-111.

⁸⁶ Jones J The Origins of Affirmative Action (1988) UCCLR.

⁸⁷ Willard W Wirtz quoted in Weekly News Digest (1963, November 18) at 2.

employment in firms that did not have contracts with federal government.⁸⁸ Due to white-initiated violence in the South, Kennedy proposed Civil Rights legislation and was opposed by Congress. The Civil Rights bill was eventually passed after the assassination of Kennedy.

3.9 The Civil Rights Act

The most important civil rights legislation since Reconstruction and similar to the executive order that preceded it was the Civil Rights Act of 1964,⁸⁹ signed by President Lyndon Johnson in 1964.

(i) President Lyndon Johnson and Executive Order 11246

While the language of Title VII of the Civil Rights Act was strong it should be noted that the Act did not prohibit preferential treatment, rather the Act simply did not require it of employers. As a result of this, President Johnson⁹⁰ found himself in the position whereby he could pursue stronger affirmative action policies in the future. Johnson set the stage for more aggressive, result-oriented policies. In an address at the Howard University in June 1965, President Johnson said the following about affirmative action —

“You do not take a man, who for years, has been hobbled by chains, liberate him, bring him to the starting line of a race saying, ‘You are free to compete with all the others,’ and still believe you have been fair. This is the next and more profound stage of the battle for civil rights. We seek not just freedom of opportunity, not just legal equity, but human ability; not just equality as a right and theory, but equality as a right and result.”⁹¹

⁸⁸ Hodges Graham *The Civil Rights Era: Origins and Development of National Policy* (1990).

⁸⁹ The CRA of 1964 42 USC @ 2000e *et seq.*

⁹⁰ Lyndon Baines Johnson took the oath of office for presidency after the assassination of elected President JF Kennedy in Dallas on November 22, 1963.

⁹¹ Smelser *op cit* 6.

EO 11246,⁹² was introduced on September 24, 1965 by President Johnson as a method of redressing discrimination that had persisted in spite of civil rights laws and constitutional guarantees. The above speech is important, not only because it outlined the intentions behind the shift from weak affirmative action to more proactive policies, but also because the justifications offered in it continues to be utilised in today's debates over affirmative action.

To give effect to Title VII of the 1964 Civil Rights Act, President Johnson issued EO 11246. This order, as amended, bars discrimination on the basis of race, colour, sex or national origin by certain federal government contractors.⁹³ This Order and its implementing regulations require federal government agencies to include in contracts with businesses an equal opportunity clause, which commits those firms to treat job applicants and employees without regard to their status or membership in the aforementioned groups.⁹⁴ In addition the Order required government contractors to take affirmative action to ensure that the non- discrimination goal is met.

Government contractors are also required to prepare and comply with affirmative action programmes for handicapped individuals under the Rehabilitation Act of 1973,⁹⁵ and for veterans of the Vietnam era under the Vietnam-Era Veterans' Readjustment Assistance Act of 1974.⁹⁶ The reach and coverage of the Order is broad. Apart from governments and educational institutions, one-half of all employees are employed by businesses which file annual statements with the EEOC which set forth the sex, race and ethnic distribution

⁹² EO 11246 3 CFR 339-348 1964-1965 Comp. The Order is reprinted in the Affirmative Action Compliance Manual (BNA) at pp 101-104, as amended by Executive Order 11375 (1967, October 13), and Executive Order 12086 (effective 1978, October 8).

⁹³ In 1967 he added gender to the list of categories.

⁹⁴ See generally CCH Guidebook to Fair Employment Practices (1989).

⁹⁵ 29 USC sections 701 *et seq.*

⁹⁶ 38 USC Sections 2021 *et seq.*

in the occupational classifications of their work forces. Approximately seventy-five percent of employees described in those reports are employed by federal contractors.⁹⁷

Insisting that affirmative action programmes served to achieve “not just equality as a right and a theory but equality as a fact and equality as a result” President Johnson emphasised the need to see social reality as a means of measuring whether opportunity was real rather than simply in name only. This order, preserving the non discrimination requirements, abolished the PCEEEO and replaced it with the OFCC, located within the Department of Labour. Thus, the order invested authority for enforcing non discrimination by government contractors in the secretary of labour, as opposed to the vice president in the Eisenhower and Kennedy orders. It also empowered him to cancel contracts, to debar businesses from future contracts, and to recommend cases to the Justice Department for prosecution in the event of non-compliance. To promote fair employment within the government itself, the order further required all federal agency heads to establish an equal employment opportunity effort within their agencies, to be supervised by the Civil Service Commission. Finally the Plans for the Progress programme was continued as a separate entity.⁹⁸

EO 11246 was more specific regarding the requirements for contractors and the penalties for non compliance than was Kennedy’s order. Unfortunately, the new order, like the previous one failed to define “affirmative action” or to provide precise criteria with which to evaluate compliance. The order did however specify that affirmative action be extended to “employment, upgrading, demotion or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship”.⁹⁹ It neglected to indicate, however, how affirmative action was to be applied in these areas. This failure to define affirmative action created severe enforcement difficulties for the OFCC as well as for the affected

⁹⁷ Welch F in Shulman and Darity W (ed) *Affirmative Action and Discrimination* (1989).

⁹⁸ EO 11246 (30) FR. 12319 (EO 11246).

⁹⁹ EO 11246 section 202 (1).

contractors and unions.¹⁰⁰ Finally in prohibiting discrimination due to “race, creed, color, or national origin”, the order omitted any reference to “sex” — unlike Title VII — a deficiency that was not rectified until a subsequent executive order was issued in 1967.¹⁰¹

In summary then, the Johnson years witnessed a major transformation in the civil rights movement in general and the struggle for economic opportunity in particular. Civil rights activists had won many of their immediate objectives, including the passage of major civil rights legislation, increased voting rights, and the abolition of the most blatant forms of social segregation. These developments, coupled with the assassinations of such grass-roots leaders as Martin Luther King, Jr., and Malcolm X, helped redirect the movement away from large-scale public protests and toward legal and governmental channels. At the same time, both civil rights groups and government agencies began to embrace a more expansive view of the types of measures needed to overcome the effects of centuries of discrimination.

(ii) President Richard Nixon and the Philadelphia Order

Richard Nixon assumed office in 1969 whereby he transformed affirmative action into a gender and race-conscious national priority and initiated the Philadelphia Order. Following findings of discrimination in the Philadelphia construction industry, Nixon developed the idea of using goals and timetables to measure hiring and promotion progress. In his Philadelphia Plan, and later through more generalised plans developed by his Departments of Labour and Justice he stressed the unacceptability of mindless quotas, but goals and timetables, he insisted, were an entirely different and “proper means to implement the nation’s commitment to equal employment opportunity”.¹⁰² The

¹⁰⁰ Johnson quoted in Public Papers of the President Lyndon B Johnson (1966) V (2) 1965ed at 787.

¹⁰¹ EO 11246 section 101.

¹⁰² Gerald P López, Enid Colson & Courtney Schaberg An Affirmative Action Manual — Understanding What It Is, Analysing The Attacks Against It, Articulating The Arguments In Support Of It (1996) (Gerald P López).

Philadelphia Order was the most forceful plan thus far to guarantee fair hiring practices in construction jobs.¹⁰³

(iii) President Gerald R Ford

While Gerald R Ford was the president, the Rehabilitation Act¹⁰⁴ and the Vietnam Era Veterans Readjustment Act¹⁰⁵ were enacted. These Acts guaranteed that federal contractors had affirmative action programmes established for recruiting and hiring people with disabilities and Vietnam veterans. The Age Discrimination Act¹⁰⁶ was also passed during Ford's presidency. This act barred discrimination in hiring or firing of older persons.

(iv) President Ronald Reagan

Ronald Reagan became president in 1981. He and his supporters were generally opposed to the stronger forms of affirmative action. Some of those in the Reagan administration wanted the president to rescind Johnson's EO 11246.¹⁰⁷ The administration did initially argue for a particular understanding of when courts should order or allow relief in discrimination cases. This understanding is sometimes called "victim specific". It allows that only the specific victims of proven discrimination by a particular employer must be given relief or compensation by that employer, but this was later rejected by the SC case of *Griggs*.¹⁰⁸ After much legislation and many supreme court decisions, affirmative action continues to be controversial.

¹⁰³ Smelser *op cit* 6.

¹⁰⁴ The Rehabilitation Act of 1973.

¹⁰⁵ The Vietnam Era Veterans Readjustment Act of 1974.

¹⁰⁶ The Age Discrimination Act of 1975.

¹⁰⁷ See the book by Wright Esmond *The American Dream — From Reconstruction to Reagan* (1996) for more information.

¹⁰⁸ *Griggs v Duke Power* (1971) 401 US 424. This was an important affirmative action case. It set a high standard for employers and aroused a good deal of criticism. Prior to 1965, Duke Power had hired only whites in jobs outside its labour department except labour required a high school degree. When the 1964 Civil Rights law went into effect, the company established a high school degree requirement for anyone transferring from

The history of affirmative action programmes in the US can be summarised by stating that it has its roots and support in two major political parties. National laws dating back to the Nixon and Kennedy Administrations applied with equal force to California, and some branches of the state’s public and private sectors — state agencies, local governments, large corporations, and small businesses — began adopting their own individual programs. However efforts were more or less piecemeal until February 1, 1974 when then Governor Reagan formalised California’s own state-wide affirmative action programme.¹⁰⁹

It is important to note that the legislative and judicial history of affirmative action and discrimination is directly linked to and tied to the civil rights movement. The civil rights movement in the US was a political, legal, and social struggle by black Americans to gain full citizenship rights and to achieve racial equality. The civil rights movement was first and foremost a challenge to segregation. During the civil rights movement, individuals and organisations challenged segregation and discrimination with a variety of activities, including protest marches, boycotts, and refusal to abide by segregation laws. The following tables summarises some important moments in American history.

3.10 The Civil Rights Time Line — Milestones in the Civil Rights Movement

DATE	EVENT
May 17, 1954	The SC rules on the landmark case <i>Brown v Board of Education</i> ¹¹⁰ of Topeka Kansas, unanimously agreeing that segregation in public schools is unconstitutional. The ruling paves the way for large-scale desegregation. It is a victory for NAACP attorney Thurgood Marshall, who will later return to the SC as the nation’s first black justice. ¹¹¹

Labour to another department. Later it allowed persons without the degree to transfer if they scored satisfactorily on two general aptitude tests.

¹⁰⁹ Gerald P López *op cit* 102.

¹¹⁰ *Brown v Board of Education* (1954) 347 US 483.

December 1, 1955	NAACP member Rosa Parks refuses to give up her seat at the front of the bus to a white passenger, defying a southern custom of the time. In response to her arrest the Montgomery black community launches a bus boycott, which will last for more than a year, until the buses are desegregated. ¹¹²
December 21, 1956	As newly elected president of the Montgomery Improvement Association (MIA), Reverend Martin Luther King, Junior, is instrumental in leading the boycott. ¹¹³
September 1957	In Little Rock, Arkansas, the formerly all-white Central High School learns that integration is easier said than done. Nine black students are blocked from entering the school by crowds organized by Governor Orval Faibus. ¹¹⁴
February 1, 1960	In Greensboro NC, Four black students from North Carolina Agricultural and Technical College begin a sit-in at a segregated Woolworth's lunch counter. Although they are refused service, they are allowed to stay at the counter. The event triggers many similar non-violent protests throughout the south. ¹¹⁵

¹¹¹ Intercultural Development Research Association Racism — History of Affirmative Action IDRA Newsletter (February 1996) (IDRA Newsletter).

¹¹² See the book by Parks Rosa — My Story (1992).

¹¹³ See for more details the book by Wright Esmond The American Dream — From reconstruction to Reagan (1996).

¹¹⁴ President Eisenhower sends federal troops and the National Guard to intervene on behalf of the students. See Bates Daisy The Long Shadow of Little Rock — A Memoir (1962) at 49.

¹¹⁵ See the book by Patterson Caleb P The Negro in Tennessee, 1780-1865 (1922).

April 1960	The Student Non-violent Coordinating Committee (SNCC) is founded at Shaw University, providing young blacks a more organized place in the civil rights movement. The SNCC later grows into a more radical organisation, especially under the leadership of Stokely Carmichael. ¹¹⁶
May 4, 1961	The Congress of Racial Equality (CORE) begins sending student volunteers on bus trips to test the implementation of new laws prohibiting segregation in interstate travel facilities. One of the first two groups of “freedom riders”, as they are called, encounters its first problem two weeks later, when a mob in Alabama sets the riders’ bus on fire. The programme continues, and by the end of the summer 1,000 volunteers, black and white, had participated. ¹¹⁷
June 12, 1963	In Jackson Mississippi, NAACP field secretary, 37-year-old Medgar Evers, is murdered outside his home. Byron De La Beckwith is tried twice in 1964, both trials resulting in hung juries. Thirty years later he is convicted for murdering Evers. ¹¹⁸
August 28, 1963	(Washington, DC) About 250,000 people join the March on Washington. Congregating at the Lincoln Memorial, participants listen as Reverend King delivers his famous “I Have a Dream” speech.
July, 2 1964	President Johnson signs the Civil Rights Act of 1964, making segregation in public facilities and discrimination in employment illegal. ¹¹⁹

¹¹⁶ A leader of the Student Non-violent Coordinating Committee (SNCC) and later the Black Panthers, Carmichael coined the phrase “Black Power” and in this speech discussed the relationships between language, identity, and power.

¹¹⁷ See the book by Willams Juan Eyes on the Prize — Americas Civil Rights Years 1954 — 1965 (1988).

¹¹⁸ See Reed Massengill Portrait of a Racist — The Man Who Killed Medgar Evers? (1994).

¹¹⁹ IDRA Newsletter *op cit* 111.

3.11 Summary of Important Judicial Events and Other Important Dates in the History of Affirmative Action

It should be noted that even though some of the cases mentioned below do not directly relate to affirmative action, it is important in that they have a bearing on affirmative action programmes in general.

DATE	EVENT
1971	The first SC case on affirmative action, <i>Griggs v Duke Power Company</i> , prohibited employers from practices that discriminate against blacks and restricted the use of test scores and educational requirements shown to be irrelevant to job performance. ¹²⁰
1975	In <i>Albermarle Paper Co. v Moody</i> ¹²¹ , the job relatedness of Albermarle’s testing programme had not been demonstrated. It was decided that non discriminatory alternatives to testing can be used by companies in an effort to bring blacks into their workforce. ¹²²
1976	Contrarily, the SC ruled in <i>Washington v Davis</i> ¹²³ that a valid test may

¹²⁰ *Griggs v Duke Power Co.* (1971) 401 US 424.

¹²¹ *Albermarle Paper Co. v Moody* (1975) 422 US 405. The issue here was related to disparate impact. The court stated that even where an employer is not motivated by discriminatory intent, Title VII prohibits the employer from using a facially neutral employment practice that has an unjustified adverse impact on members of a protected class. The court went on to state that Title VII “proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. . . . [G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as ‘built-in headwinds’ for minority groups and are unrelated to measuring job capability”. At 431-31 of the judgment.

¹²² Chemerinsky E Race and Supreme Court Trial (1995) 31 at 86-88.

¹²³ *Washington v Davis* (1976) 426 US 229. In this case, after the applications of two blacks were rejected by the District of Columbia Police Department, the two men filed suit against Mayor Walter E. Washington. The men alleged that the Department’s recruiting procedures, including a written personnel test, discriminated against racial minorities. They claimed that the test was unrelated to job performance and excluded a disproportionate number of black applicants. The question was whether or not the recruiting procedures violated the Equal Protection Clause of the Fourteenth Amendment? In a 7:2 decision, the Court held that the procedures and written personnel test did not constitute racial discrimination under the Equal Protection Clause. The Court

	be used to predict training performance, regardless of its ability to predict later job performance. A valid test was considered sufficiently job related even if more blacks than whites failed the test.
1978	A quota system was declared illegal in the SC case <i>Regents of the University of California v Bakke</i> . ¹²⁴ It was also decided that colleges and universities could consider an applicant's race as a factor in determining admission in order to achieve a diverse student body.
1979	Private employers were permitted to use racial preferences in hiring and promotions (voluntary affirmative action plans) as a means to correct past discrimination. ¹²⁵
1980	The SC ruled in <i>Fullilove v Klutznick</i> ¹²⁶ that minority set asides or the limited use of quotas was appropriate for remedying past discrimination.
1981	Employers were no longer required to maintain affirmative action programmes or hire according to racial quotas under the Reagan administration. ¹²⁷
1982	The SC decision in <i>State of Connecticut v Teal</i> stated that a bottom-line demonstration of no disparate impact does not shield an organisation

found that the Clause was designed to prevent official discrimination on the basis of race; laws or other official acts that had racially disproportionate impacts did not automatically become constitutional violations. The Court reasoned that the DC Police Department's procedures did not have discriminatory intent and were racially neutral measures of employment qualification.

¹²⁴ *Regents of the University of California v Bakke* (1978) 438 US 265. In this case the SC ruled that racial quotas in hiring and promotions are constitutional and an important way of ending discrimination in a case initiated by the Bell Telephone System.

¹²⁵ *Kaiser Aluminium Company and United Steelworkers of America v Weber* (1979) 443 US 193.

¹²⁶ *Fullilove v Klutznick* (1976) 448 US 448.

¹²⁷ Supreme Court Leaves Intact Lower Court Ruling Outlawing Affirmative Action July (1996) News and Observer.

	from an investigation of the disparate impact of each of the components of the selection system. ¹²⁸
1986	In <i>Wygant v Jackson (Mich.) Board of Education</i> ¹²⁹ racial preferences were ruled permissible in the context of hiring, as long as there was a history of discrimination. Also, laying off of senior white teachers to protect the jobs of newly hired black teachers was deemed unconstitutional.
1987	The ruling in <i>Johnson v Transportation Agency of Santa Clara County</i> upheld the favouring of women and minorities over better-qualified men and whites as a way to improve balance in the workplace. ¹³⁰
1989	The SC in <i>City of Richmond v J A Croson Co</i> struck down Richmond's minority contracting programme as unconstitutional, requiring that a

¹²⁸ *State of Connecticut v Teal* (1982) 457 US 40-464. Here the respondent black employees of a Connecticut state agency were promoted provisionally to supervisors. To attain permanent status as supervisors, they had to participate in a selection process that required, as a first step, a passing score on a written examination. Subsequently, an examination was given to 48 black and 259 white candidates. Fifty-four percent of the black candidates passed, this being approximately sixty-eight percent of the passing rate for the white candidates. Respondent black employees failed the examination and were thus excluded from further consideration for permanent supervisory positions. They then brought an action in Federal District Court against petitioners (the State of Connecticut and certain state agencies and officials), alleging that petitioners had violated Title VII of the CRA of 1964 by requiring, as an absolute condition for consideration for promotion, that applicants pass a written test that disproportionately excluded blacks and was not job related. In the meantime, before trial, petitioners made promotions from the eligibility list, the overall result being that 22.9 percent of the black candidates were promoted but only thirteen and a half percent of the white candidates. Petitioners urged that this "bottom-line" result, more favourable to blacks than to whites, was a complete defence to the suit. The District Court agreed and entered judgment for petitioners, holding that the "bottom line" percentages precluded the finding of a Title VII violation and that petitioners were not required to demonstrate that the promotional examination was job related. The Court of Appeals reversed, holding that the District Court erred in ruling that the examination results alone were insufficient to support a prima facie case of disparate impact in violation of Title VII.

It was held that the petitioners' non-discriminatory "bottom line" does not preclude respondents from establishing a prima facie case nor does it provide petitioners with a defence to such a case. At 445-456 of the judgment.

¹²⁹ *Wygant v Jackson (Mich.) Board of Education* (1986) 476 US 267.

¹³⁰ *Johnson v Transportation Agency, Santa Clara County* (1987) 480 US 616.

	state or local affirmative action program be supported by a “compelling interest” and be narrowly tailored to ensure that the program furthers that interest. ¹³¹
1990	The difference between strict scrutiny and intermediate scrutiny was made salient in the Supreme Court case of <i>Metro Broadcasting, Inc v Federal Communications Commission</i> . ¹³² A preference for minority-owned businesses in broadcasting licensing was approved.
1991	The effects of the Rehnquist Court rulings in 1989 were reversed, providing new protections for minorities and women, when President Bush signed the Civil Rights Act of 1991. ¹³³ Congress passed a new Civil Rights Act that stated work forces do not have to match the statistical population make-up of a community.
1995	<p>Strict scrutiny in achieving a compelling government purpose, became the criterion in <i>Adarand Constructors, Inc v Pena</i>.¹³⁴</p> <p>The University of California voted to end preferential policies in admissions at all University of California campuses.¹³⁵</p> <p>The Glass Ceiling Commission released a report on the endurance of barriers that deny women and minorities access to decision-making positions and issued a recommendation “that corporate America use affirmative action as a tool ensuring that all qualified individuals have equal access and opportunity to compete based on ability and merit”.¹³⁶</p>

¹³¹ *City of Richmond v J A Croson Co* (1989) 488 US 469.

¹³² *Metro Broadcasting, Inc v Federal Communications Commission* (1987) 480 US 616.

¹³³ Lemann N Taking Affirmative Action Apart (1995, June 11) The New York Times Magazine at 36.

¹³⁴ *Adarand Constructors, Inc v Pena* (1995) 515 US 200.

¹³⁵ Weiss *op cit* 39.

1996	<p>Race-based admissions practices at the University of Texas law school were struck down in <i>Hopwood v State of Texas</i>.¹³⁷</p> <p>California voters chose to eliminate language that granted preferential treatment to minorities and women by initiative, Proposition 209.¹³⁸ California’s Proposition 209 was passed by a narrow margin in the November election. Proposition 209 abolished all public-sector affirmative action programmes in the state in employment, education and contracting.¹³⁹</p>
1997	<p>The SC refused to hear the case of Proposition 209. This granted the state the right to abolish race and gender based preferences in state institutions.¹⁴⁰</p> <p>In response to <i>Hopwood</i>, the Texas legislature passed the Texas Ten Percent Plan, which ensures that the top ten percent of students at all high schools in Texas have guaranteed admission to the University of Texas and Texas A&M system.¹⁴¹</p>

¹³⁶ Reports and Recommendations of the Glass Ceiling Commission — A Solid Investment — Making Full Use of the Nation’s Human Capital (November 1995) The Glass Ceiling Commission.

¹³⁷ *Hopwood v State of Texas* (1996) 518 US 1033.

¹³⁸ Section 31 is added to Article I of the California Constitution as follows —
Section 31 states that —
(a) The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

¹³⁹ Clause (c) of Proposition 209 permits gender discrimination that is “reasonably necessary” to the “normal operation” of public education, employment and contracting.

¹⁴⁰ The Washington Post Supreme Court Will Not Block California’s Proposition 209 By Joan Biskupic (1997, September 5) V(117) No. 39.

¹⁴¹ Orfield G and Miller E (ed) Chilling Admissions — The Affirmative Action Crisis and the Search for Alternatives (1998).

1998	Voters in Washington passed Initiative 200 banning affirmative action in higher education, public contracting, and hiring. ¹⁴²
2000	<p>Many Circuit Courts throughout the country heard cases regarding affirmative action in higher education, including the 5th Circuit in Texas (<i>Hopwood</i>) and the 6th Circuit in Michigan (<i>Grutter</i> and <i>Gratz</i>).¹⁴³ The same District Court in Michigan made two different rulings regarding affirmative action in Michigan, with one judge deciding that the undergraduate programme was constitutional while another judge found the law school programme unconstitutional.</p> <p>The Florida legislature passed “One Florida” Plan, banning affirmative action. The programme also included the Talented Twenty Percent Plan that guarantees the top twenty percent admission to the University of Florida system. In February 2000 Florida banned race as factor in college admissions. Florida legislature approves education component of Governor Bush’s “One Florida” initiative, which ends admission programmes based on affirmative action in all the state’s colleges and universities.¹⁴⁴</p>

What these cases and the civil rights events show is that although there were many victories for civil rights in general, these judicial and legislative victories were not enough to overcome long entrenched patterns of discrimination. Something more than judicial pronouncements was needed. Various reasons can be attributed to these failures. Amongst others, these measures frequently focussed only on issues of formal rights; such as the right to vote; and were particularly susceptible to judicial or statutory resolutions.

¹⁴² Initiative 200 ordered public agencies to stop giving preferential treatment on the basis of race, sex, color, ethnicity or national origin. It effectively ended affirmative action by state and local governments in hiring, contracting and school admissions. Washington State Initiative 200 is roughly modelled after California’s Proposition 209, which is designed to eliminate “preferences” in state and municipal hiring and recruitment to the state university system.

¹⁴⁴ California Civil Rights Initiative, Proposition 209 on the November 1996 ballot, which was passed on November 5th by fifty-four percent of California voters.

Further, proving that one has been discriminated against involved direct evidence and often involved the giving of evidence that proves overt bias and bigotry. This approach does not take into account situations where discriminatory practices are more subtle and yet are just as effective in achieving its goals of racial discrimination or other forms of discrimination.

So, even though there were gains in the civil rights movements, private and public institutions were often not open to change and relying on voluntary efforts alone to eliminate discrimination could not be depended upon to achieve equality. Like the situation in SA, more than just reliance on people's good nature was required to ensure the elimination of unfair discrimination and the achievement of employment equity in the US. In SA and the US, it has been shown how the codification of racial domination served to preserve and gradually strengthen a racially defined loyalty to the respective countries.¹⁴⁵ It is obvious by looking at these histories of the systematic and legalistic ways in which apartheid and racism was developed into social policy, nothing less than a mandatory set of laws would be required to eliminate discrimination in any form. Modern affirmative action was then established, as policymakers sought for a way to address continuing problems of discrimination. Simply put, affirmative action was therefore established as part of a society's efforts to address continuing problems of discrimination.

Now that the histories behind anti-discrimination legislation in SA and the USA have been explored in some detail, Chapter Four of this thesis will look at a history of the domination of people in India. The rationale for this is to show the reader how preferential treatment, which is being given to the weaker sections of society, can be justified in terms of its specific history. This history will further look at how subservience and discrimination of the Indian people began. It will look at whether or not, like SA and the USA, there is a rational and legal basis for the discriminatory

¹⁴⁵ Smelser *op cit* 6.

practices as practised by the people in India and how India justifies its' discrimination of the people.