CHAPTER TEN
THE CONSTITUTIONAL DIMENSIONS OF AFFIRMATIVE ACTION IN THE USA

10.1 Overview

In the US, equality of opportunity in employment is regulated under a large number of federal, state and local statutes and by Executive Orders and federal regulations. Further, equal opportunity laws in the US differ from one state to another. This thesis focus is on affirmative action and employment equity and therefore narrows down the number of instruments that needs to be focused on. As already noted, there are at the federal level two principle instruments concerning employment equity and affirmative action. These are Title VII of the CRA of 1964 and President Johnson's EO 11246.[1] Of lesser importance but nonetheless relevant for the present purposes is Title VI of the CRA, concerning recipients of federal grant and subsidy, and section 1981 of Title 42 of the US Code[2] concerning discrimination in the making of contracts. Finally amendments to the 1964 CRA by the 1991 CRA will also be considered.

The US SC has addressed and struggled with the issue of affirmative action in employment and university admissions in a series of cases.[3] One such case is the *Bakke* decision. Starting with the decision in *Bakke* in 1978, the SC has handed down before 1990, ten decisions addressing the legitimacy of affirmative action. In these decisions the SC addressed the issue of the legitimacy of affirmative action in various different contexts, including public university admissions, employment hiring, promotions and layoffs and public works contracts. The Court has also scrutinised both race-based and gender-based affirmative action plans.

What is of importance here is that because the US Constitution does not provide for affirmative action, there is an absence of a majority view of the constitutionality of

---

1 EO 11246 as amended by EO 11375.

2 Title 42 of the US Code of 1866.

3 Amongst some of the affirmative action in employment cases decided by the Court are — *Martin v Wilks* (1989) 109 S. Ct. 2180; *Johnson v Transportation Agency, Santa Clara County, California* (1987) 480 US 616. See in this regard Turner R The Past and Future of Affirmative Action (1990) at 71 (Turner).

affirmative action in employment practices. This chapter examines the various opinions on affirmative action in employment and the test that was eventually decided upon in determining the constitutionality of affirmative action programmes. Prior to 1989, there was no authoritative decision regarding the level of scrutiny that was applicable to race conscious affirmative action measures taken by governmental bodies. Further, there still remains much controversy around whether and when affirmative action plans are constitutional in terms of the Equal Protection Clause of the Fourteenth Amendment. Title VII mandates affirmative action in two ways — by voluntary action on the part of employers and as part of court-ordered remedies for egregious discrimination. An essential element of Title VII was voluntarism.[4]

10.2 The Supreme Court Affirmative Action Cases

(10.2.1) The Bakke Case

Before turning to the SC affirmative action in employment decisions, the courts important decision in *Regents of the University of California v Bakke* will be discussed.[5] Discrimination in education was the target of the original breakthrough civil rights cases. Indeed, because education is the gateway to opportunity, education has consistently been a central focus of civil rights efforts. The 1978 *Bakke* case set the parameters of educational affirmative action and governmental preferential policies.

Bakke involved an affirmative action programme adopted by the University of California at its Davis Medical School. In this case the plaintiff challenged the University of California's special admissions programme, which was designed to ensure the admission of a specified number of black and other minority applicants. Under that programme, sixteen of the one-hundred places, i.e., sixteen percent, in the medical class were set aside to be filled with minority applicants. All minority and non-minority candidates would compete on an equal basis for the remaining eighty-four places.[6]

Alan Bakke, a white applicant to the medical school, was rejected. In both 1973 and 1974, when Bakke applied, "applicants were admitted under the special programme with grade

---

4 US CFR 1985 §605.

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

6 *Ibid* at 276, 289 and 305.

point averages, MCAT scores, and benchmark scores significantly lower than his". Bakke alleged that the special admissions programme violated his rights under the equal protection clause, as he had been rejected because of his race.[7] There were several purposes for the Davis's special admissions programme, some were distributive and others were compensatory. One such purpose was to integrate the medical profession, which amounted to a distributive goal.

A second purpose was to counter discrimination, a broadly compensatory and perhaps also distributive goal. The third purpose, which was to increase the number of physicians willing to work in underserved areas, revealed a sensitivity to cultural differences and an awareness of the reality of segregated residential patterns.[8] The final purpose was to "obtain the educational benefits that flow from an ethnically diverse student body".[9] Bakke argued that through the use of such preferential policies the government was discriminating against whites.

A five-justice majority voted to invalidate the particular plan that was before the Court, while a different five justice majority voted to uphold the use of racial preferences in certain circumstances. Four Justices,[10] declined to reach the constitutional question, finding that the Davis plan violated Title VI of the CRA, which prohibits federally funded programmes from excluding or denying benefits to any persons on the grounds of race. These Justices, focusing solely on the statutory permissibility of the programme, asserted that federal law required strict neutrality.[11] In their opinion the Justices opined that Title VI and its legislative history required strict colour-blindness.[12] Justice Blackmun expressed the hope that the "time will come when an affirmative action programme is unnecessary …….. [and]…..we could reach

---

7 *Ibid* at 276-278.

8 Rosenfeld M Affirmative Action and Justice — A Philosophy and Constitutional Enquiry (1991) at162-163 (Rosenfeld).

9 *Regents of the University of California v Bakke* (1978) 438 US 265 at 306.

10 Which included Justices Stevens, Burger, Stewart and Rehnquist.

11 *Regents of the University of California v Bakke* (1978) 438 US 265 at 416.

12 *Ibid* at 418.

this stage within a decade at most".[13] After nearly two and a half decades of litigation the need for affirmative action is still highly controversial.

The *Bakke* case provides a prime example of the division that has characterised the Supreme Court's handling of affirmative action cases.[14] The fifth vote to validate the plan was provided by Justice Powell, who would have invalidated it on equal protection grounds.[15] Four Justices[16] believed that racial classifications designed to remedy disadvantages imposed upon minorities by past societal discrimination should be subjected to an intermediate level of scrutiny. They thought that such classification should be upheld where they advanced an important and articulated purpose, did not stigmatise any group, and did not force politically under-represented groups to bear the burden of remedial action.[17] Although the Brennan opinion referred to the need for appropriate judicial, legislative or administrative findings, it appears that informal findings concerning the need to address problems relating to societal discrimination would be sufficient.[18] Since the four Justices joining the Brennan opinion viewed the Davis programme as having satisfied the constitutional test, they voted to uphold its constitutionality.[19] The fifth vote to uphold the use of racial classifications in affirmative[20] action programmes was again provided by Justice Powell.

Although Justice Powell thought that racial preferences were constitutionally permissible in appropriate circumstances, he found that the Davis plan did not satisfy the constitutional standards. According to Justice Powell, the Davis dual admissions programme violated Bakke's equal protection rights. He found it unacceptable that, because of his race, Bakke was completely forbidden from competing for admission to any of the sixteen medical school

---

13 *Ibid* at 403.

14 Rosenfeld *op cit* 8 at 68.

15 Rosenfeld *op cit* 8 at 305-320.

16 Justices Brennan, White, Marshall and Blackman.

17 Rosenfeld *op cit* 8 at 355-362.

18 *Regents of the University of California v Bakke* (1978) 438 US 265 at 325 and 362-369. Brennan seems to have equated the findings requirement with the requirement that there be an "articulated purpose of remedying the effects of past societal discrimination".

19 *Ibid* at 324-326.

20 *Ibid* at 287-320.

places set aside for minority applicants. In Justice Powell's view, Bakke was an innocent individual and was being asked, because of his race, to bear the burden of redressing group grievances that were not of his making.[21]

Emphasising that the equal protection of individuals, not groups, is the concern of the Fourteenth Amendment, Justice Powell declared that Bakke could not be burdened for the benefit of a group unless this was necessary to accomplish a compelling state interest.[22] Further, absent prior discrimination by Davis involving some statutory or constitutional violation, Justice Powell was unwilling to find the requisite compelling state purpose. Justice Powell's opinion however, does not reject the use of racially based preferential treatment in state university admissions in the absence of wrongdoing by the entity providing affirmative action.[23] He argues that preferential treatment can be constitutional, if it is used to promote diversity among the student body and if it guarantees that each applicant, regardless of race, shall receive individual consideration with respect to each of the places that the state university has decided to allocate.[24]

Like the designers of the Philadelphia Plan, Justice Powell resisted fixed quotas. Schools could consider minority race as a factor favouring admission, but could not designate a set number of seats for minority students. Although Justice Powell's *Bakke* opinion rejected most of the justifications urged by the government in support of affirmative action, he did accept that a racially diverse student body would enrich the educational experience for all students. That reasoning is in line with Article 26 of the UDHR, which states that public education "shall be directed" "to promoting understanding, tolerance and friendship among all nations, racial or religious groups".

Although Justice Powell announced the Court's judgment, a majority of the Court did not support substantial portions of his opinion. On the questions of the constitutionality of the admissions programme, Powell was outvoted four to one. Powell was also the only Justice calling for a strict scrutiny analysis.

---

21 *Ibid* at 298.

22 *Ibid* at 299, 309-10.

23 Rosenfeld *op cit* 8 at 168.

24 Rosenfeld *op cit* 8 at 169.

The SC essentially decided that setting aside a specific number of places in the absence of proof of past discrimination was illegal, but that minority status could be used as a factor in admissions. The SC therefore disallowed the usage of the quota system. However, the desire to obtain a "diverse" student body was found to be a compelling goal in the educational context in Justice Powell's controlling opinion. The confusing aspect of this decision is that even though Justice Powell stated that the preference of any one group for no other reason than race or ethnic origin is discrimination for its own sake it permitted the admissions departments to award minority students a "plus" factor in order to ensure a "diverse student body". This meant that state-run universities could continue to use mechanisms similar to quotas in admissions policies and practices. Thus even though Bakke was admitted, the case itself discussed many of the issues which would arise in subsequent cases but did not definitively resolve the affirmative action issue.

The following cases looks at the judicial interpretation of Title VII and the Constitution, where the Court attempts to reach a decision on the constitutionality of affirmative action.

(10.2.2) Fullilove v Klutznick

Two years after the *Bakke* case, the court had to deal with the question of federal set-asides for minority contractors in public works projects. By a majority of six to three, the SC upheld the constitutionality of an affirmative action programme enacted by Congress to remedy past inequalities arising from the continuing effects of past discrimination. *Fullilove* involved a challenge to the minority set-aside provision of the Public Works Employment Act of 1977, enacted by Congress to alleviate national unemployment.[25] In upholding Congressional authority to enact affirmative action programmes, the court emphasised Congress's constitutional mandate to achieve "equality of economic opportunity".[26] The court however failed to provide a comprehensive theory of the constitutional scope of affirmative action.

---

[25] *Fullilove v Klutznick* (1980) 448 US at 456-57.

[26] *Ibid* at 490.

The decision in the *Fullilove* case reflected further divisions of opinion.[27] Three Justices[28] found it to be a proper exercise of congressional power.[29] Three others, headed by Justice Marshall, advocated a standard of review similar to what Brennan had asserted in *Bakke*.[30] He also advocated a colour-blind position by maintaining that "any official action that treats a person differently on account of his race or ethnic origin is inherently suspect".[31] Justices Stewart and Rehnquist articulated absolute opposition to all racial classifications,[32] and Justice Stevens expressed his general disfavour of them.[33]

Justice Stevens was willing to "assume that the wrong committed against the Negro class is both so serious and so pervasive that it would constitutionally justify an appropriate class-wide recovery measured by a sum certain for every member of the injured class".[34] Stevens, however found Congress's interest in support of "favoured access…….a plainly impermissible justification for this racial classification".[35] If one had to look at the historical realities of the construction industry as discussed in Part I of this thesis, it would seem that he was incorrect in opining that there was inadequate evidence of past discrimination against any particular minority.[36] Unlike Stewart and Rehnquist, Stevens indicated that preferential policies may be apt for "victims of unfair treatment in the past" or for groups less able to compete in the future.[37]

Even though the *Bakke* and *Fullilove* decisions established some degree of constitutional acceptance for remedial classifications it still left the constitutional outlines of affirmative

---

27 *Ibid*.

28 In an opinion written by Burger CJ.

29 *Fullilove v Klutznick* (1980) 448 US at 456-92.

30 *Ibid* at 517-22.

31 *Ibid* at 523.

32 *Ibid* at 522-32.

33 *Ibid* at 532-54.

34 *Ibid* at 537.

35 *Ibid* at 542.

36 *Ibid* at 538-41.

37 *Ibid* at 553.

action vague and uncertain. Further, the standards of review for justification also remained uncertain.

(10.2.3) The Weber Decision

The Supreme Courts' first affirmative action in employment decision is *United Steelworkers of America v Weber*.[38] The principle issue in this case was whether Title VII forbids a private employer from voluntarily adopting a racial quota to remedy its racial imbalance in its workforce.[39] Although the affirmative action in this case was characterised as being "voluntary", it was not so. Here the employer instituted the plan pursuant to a collective bargaining agreement with the union representing both its black and white employees.[40] Further, the employer had already been subject to prosecution for violations of federal laws in connection with its racially discriminatory practices at several of its plants other than the one involved in *Weber*.

In this case the majority concluded that the voluntarily adopted affirmative action plans "designed to eliminate conspicuous racial imbalance in traditionally segregated job categories"[41] did not violate Title VII.[42] In upholding the validity of the plan, Justice Brennan, writing for the majority, stated that, "[T]he purposes of the plan mirror those of the statute. Both were designed to break down old patterns of racial segregation and hierarchy. Both were structured to open employment opportunities for Negroes in occupations which had been traditionally closed to them."[43] Justice Brennan's opinion accordingly legitimates the racial quota involved in *Weber* on primarily distributive grounds. Justice Brennan makes it clear that Title VII permits the race conscious pursuit of equality of opportunity not of equality of result.[44]

---

38 *United Steelworkers of America v Weber* (1979) 443 US 193.

39 *Ibid* at 199-200.

40 *Ibid* at 198-199.

41 *Ibid* at 209.

42 *Ibid* at 210-213.

43 *Ibid* at 208.

44 Rosenfeld *op cit* 8 at 173.

Although the Court declined to draw a definitive line between permissible and impermissible voluntary affirmative action plans, its approval of certain features of the Kaiser-USWA plan indicated basic requirements for such initiatives. Thus a voluntary affirmative action plan must have a remedial purpose; must be temporary in duration and not intended to maintain a racial balance.[45] The plan must not also unnecessarily trammel on the interests of white employees by creating an absolute bar to their advancement.[46] The Court therefore answered in the negative the question on whether a private employer's voluntary affirmative action plan which granted preferential treatment to minority workers violated Title VII.

Even though throughout the 1980's a majority position had yet to evolve, at least two trends had evolved. Firstly, remedial classifications would draw out a stricter judicial attention and secondly, general societal discrimination, despite its reality and legacy, would not be a permissible reference point for race-conscious remedies.

(10.2.4) Affirmative Action and Layoffs — The Wygant and Stotts Decisions

Six of the seven affirmative action cases decided by the SC following *Fullilove* presented the issue of the validity of preferential treatment in the context of public employment. In four of these cases, the court upheld the affirmative action plan involved. However, in the *Stotts*[47] and *Wygants*[48] cases, which involved race-conscious preferences in the context of layoffs, the Court struck down the affirmative action plans before it.

In *Stotts* the issue was whether the aims of a remedial affirmative action plan could take precedence over the dictates of an established seniority system in the face of mandatory layoffs.[49] Although the constitutionality of the affirmative action plan was not at issue, the decision in *Stotts* sheds light on the issue of harm to the innocent third party and on the relation between the individual and the groups.

---

45 *United Steelworkers of America v Weber* (1979) 443 US 193 at 208.
Justice Brennan points out that the plan "is not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance".

46 *Ibid* at 208.

47 *Firefighters Local Union No. 1784 v Stotts* (1984) 467 US 561.

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

49 *Firefighters Local Union No. 1784 v Stotts* (1984) 467 US 561 at 566.

On an analysis of Title VII, Justice White, writing for the majority, opined that section 703(h) of Title VII permits the application of a seniority system absent the proof of discriminatory intent.[50] He stated that the city could not be faulted for following seniority as agreed to with and by the union. Citing the Courts 1977 decision in *Teamsters v US*[51] White stated that individual members of a plaintiff class may be awarded competitive seniority if they demonstrate that they have been actual victims of discrimination. He however further stated that each individual must prove that the discriminatory practice had an impact on him or her. He argued that the policy behind section 706(g) of Title VII[52] "…….is to provide make-whole relief only to those who have been actual victims of illegal discrimination……..."[53] He concluded, therefore, that a court was not authorised to give preferential treatment to non-victims.

The state of affirmative action in employment after *Stotts* was uncertain. The facts and context in which the case arose were unlike the facts and issues raised in *Weber*. *Weber* involved a voluntary affirmative action plan adopted by a private employer and union. *Stotts* involved a public employer and a decree entered without the consent or approval of a union. Not citing *Weber* the *Stotts* majority noted, but did not decide, the question of "whether the city, a public employer, could have taken this course without violating the law".[54]

With regard to how the Justices would decide on the issue of affirmative action, Burger CJ and Justice Rehnquist cast votes against the district court's affirmative action consent decree, while Justices Blackmun, Brennan and Marshall voted in favour of the decree. The *Stotts* decision offers another example of the different views of the Justices with respect to the availability of group-based or individual relief in Title VII litigation. While *Stotts* raised but did not resolve the issues of the relationship between the individual and the group and the problem of the innocent third party in layoff situations in the context of the Civil Rights Law, *Wygant* addresses these same issues in the context of the equal protection clause.

---

50 See §703(h), 42 USC §2000e-2(h).

51 *Teamsters v The US* 431 US 324 (1977).

52 See §706(g) of Title VII, 42 USC §2000e-5(g).

53 *Firefighters Local Union No. 1784 v Stotts* (1984) 467 US 561 at 580.

54 *Ibid* at 583.

(10.2.4.1) The Wygant Decision

Wygant arose out of the implementation of a layoff provision designed to maintain the percentage of minority teachers in the Jackson public school system.[55] *Wygant* mandated that a public employer could not use affirmative action in the layoff context to remedy societal discrimination or to provide role models for minority students. Although *Wygant* did not definitively resolve the question of whether societal discrimination alone can ever be a sufficiently compelling government interest to justify affirmative action,[56] Justice White's negative response to affirmative action withheld, in theory only, a majority status of a rejection of that theory.[57]

The SC ruled against the school board, maintaining that the injury suffered by non-minorities affected could not justify the benefits to minorities stating that —

> "We have previously expressed concern over the burden that a preferential-layoffs scheme imposes on innocent parties. In cases involving valid hiring goals, the burden to be borne by innocent individuals is diffused to a considerable extent among society generally. Though hiring goals may burden some innocent individuals, they simply do not impose the same kind of injury that layoffs impose. Denial of a future employment opportunity is not as intrusive as loss of an existing job."[58]

It should be noted that the court did not bar the use of affirmative action in certain circumstances, such as hiring. Thus, under *Wygant*, a public employer could constitutionally engage in some form of affirmative action which granted preferential treatment to minorities. Moreover, it was still possible after *Wygant* that a majority of the Court would consider educational and additional factors, other than past discrimination, as a valid constitutional predicate for race-conscious affirmative action.[59]

In another five to four decision, the SC reversed the decision of the lower court and found that the layoff provision was unconstitutional. Once again there was no majority agreement

---

55 *Wygant v Jackson Board of Education* (1986) 476 US 267 at 270.

56 See Selig Affirmative Action in Employment — The Legacy of a Supreme Court Majority IND. LJ (1987) No. 63 301 at 345 (Selig).

57 *Ibid*.

58 *Wygant v Jackson Board of Education* (1986) 476 US 267 at 270.

59 Selig *op cit* 56 at 346.

on any single opinion. The numerous opinions filed in *Stotts* and *Wygants*, provides insights concerning the many difficulties surrounding the constitutionality of affirmative action layoff plans. Nevertheless these two cases leave the core questions raised by affirmative action unresolved. In particular, they fail to provide clear and consistent constitutional limits concerning the relationship between the individual and the group, and relating to the restrictions on placing burdens on innocent third parties.

The ruling in the *Stotts* and *Wygant* cases were noted by many commentators as evidence of a hardening of the highest court against civil rights and affirmative action initiatives.

(10.2.5) The Sheet Metal Workers Case

The decision in the *Sheet Metal Workers v EEOC*[60] however, concluded that §706(g) does not prohibit race-conscious relief which benefits non-victims, and which may be ordered by the courts in certain circumstances. In addition to the *Sheet Metal Workers'* plurality, Justices Powell and White agreed that §706(g) does not preclude relief for non-victims in all circumstances.[61]

The Equal Protection Clause has in some instances been interpreted to uphold affirmative action programmes in situations where the programme is necessary to remedy past discrimination. In effect a quota system as imposed by the various district courts was upheld.

(10.2.6) The Paradise Case

For example, in the *Paradise*[62] case the Court addressed the issue of whether a one-black-for-one-white promotion requirement ordered by a court was permissible under the Equal Protection Clause of the Fourteenth Amendment.[63] The *Paradise* Courts holding that the one-for-one promotion requirement was constitutional. In July 1970, a federal court found that the State of Alabama Department of Public Safety systematically discriminated against blacks in hiring in "the thirty-seven year history of the patrol there has never been a black trooper". The court ordered that the state reform its hiring practices to end "pervasive,

---

60 *Sheet Metal Workers v EEOC* (1986) 478 US 421.

61 *Ibid* at 515.

62 *U S v Paradise* (1987) 480 US 147.

63 *Ibid* at 153.

systematic, and obstinate discriminatory exclusion of blacks". Twelve years and several lawsuits later, the department still had not promoted any blacks above entry level nor had they implemented a racially fair hiring system. In response to this non-action, the court ordered specific racial quotas to correct the situation. For every white hired or promoted, one black would also be hired or promoted until at least twenty-five percent of the upper ranks of the department were composed of blacks.

This use of numerical quotas was challenged. The SC, however, upheld the use of strict quotas in this case as one of the only means of combating the department's overt and defiant racism. The court held that the programme was understandable and defensible given the long standing discrimination by the Alabama Department of Public Safety Against African Americans.[64] However, the five to four votes revealed that the dissenting justices were only one vote short of a majority which would not hold such a requirement constitutional, even where there was no dispute that the employer had violated the Constitution by engaging in flagrant and abhorrent discrimination. The dissenting justices would require express evaluation and consideration of alternatives prior to the imposition of a race-conscious quota.[65]

Further, according to the Court's majority in *Paradise* the burden imposed by the promotion quota on innocent white troopers was constitutionally permissible.[66] Justice Stevens argues that although the white troopers were innocent in the sense that they were not personally responsible for the institution and implementation of the department's racially discriminatory and exclusionary practices, they nevertheless benefited from the prolonged absence of real competition from black candidates for promotion.[67]

---

64 *Ibid* at 170.

65 *Ibid* at 196.

66 *Ibid* at 193. Justice Stevens opines that "though innocent the white troopers were the beneficiaries of the past illegal conduct of the department".

67 *Ibid* at 193.

(10.2.7) The Johnson v Santa Clara Case

An additional and significant affirmative action in employment case decided by the US SC in 1987 was the *Johnson v Santa Clara* case.[68] In this case, the SC considered the question of whether the county transportation agency violated Title VII by taking into account the sex of an applicant for a promotion.[69] In the majority opinion, Justice Brennan wrote that the assessment of the legality of an affirmative action plan must be guided by *Weber* and stated that "we must determine whether the effect of the plan on males and non-minorities is comparable to the effect of the plan in *Weber*".[70]

The *Johnson* case, in re-affirming *Weber* went beyond the type of voluntary affirmative action contained in the Steelworkers-Kaiser collective bargaining agreement and endorsed affirmative action which was not linked to traditional job segregation in the *Weber* sense. The discrimination and intentionally exclusionary practices addressed in *Weber* were so well established that the Court took judicial notice of the exclusion of African Americans from craft positions.

Johnson did not present that factual scenario. Instead the Court concluded that the underutilisation of women as reflected in the work force was constituted sufficient evidence for the agency's voluntary affirmative action plan. Evidence of specific discrimination in the past was not an issue. However, the Court noted that the under-representation stemmed from the fact that women were not traditionally employed in road dispatcher jobs and did not seek employment in such positions. The *Johnson* case makes an important contribution to the jurisprudence of affirmative action in general. A majority of the Court approved the voluntary institution of a gender-based affirmative action plan by a public employer who has not engaged in first order discrimination.

10.3 Constitutional Turning Points — The Rehnquist Court and the CRA of 1991

Between 1986 and 1991 the SC made nine rulings which in varying degrees narrowed the reach of anti-discrimination law and practice including affirmative action. In the 1988-89 terms, there were seven rulings which attempted to rein in anti-discrimination and affirmative

---

68 *Johmson v Transport Agency, Santa Clara, California* (1989) 480 US 616.

69 *Ibid* at 619.

70 *Ibid* at 631.

action practices.[71] Due to these various decisions there was a civil rights backlash and an immediate attempt to reinstate what the SC had struck down, in the form of a new Civil Rights Bill designed to close the loopholes opened up by the Court.[72] A discussion of a few of the most significant rulings now follows.

(10.3.1) The Croson Case

In its 1989 decision in *City of Richmond v JA Croson Co*,[73] a majority on the SC for the first time had settled on a single standard to determine the constitutionality of affirmative action based on race. Although this case is not an employment case, the Courts rulings on certain aspects of affirmative action and preferential treatment of minorities are directly relevant to the constitutionality of affirmative action in the employment context.

The object of contention in the *Richmond* case was a set-aside law approve by the local City Council. It was patterned after an affirmative action programme pioneered by Mayor Maynard Jackson in Atlanta in 1975 an closely followed the language of Parren Mitchell's set–aside law amendment in the 1977 Public Works Employment Act as upheld by the SC in the *Fullilove* decision. The Richmond law required that ten percent of any federal money allocated to the city or state for public works projects be used to purchase goods and services from minority-owned businesses.

A majority of the SC demanded and applied the strict scrutiny standard of review to an affirmative action programme designed to benefit minorities. Justice O'Connor opines that strict scrutiny must be applied and stated —

> "Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are "benign" or "remedial" and what classifications are, in fact, motivated by illegitimate notions of racial inferiority or simple racial politics. Indeed, the purpose of strict scrutiny is to "smoke out" illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen "fit" this compelling

---

71 See Edwards J When race Counts — The Morality of Racial Preference in Britain and American (1995) at 122 for a discussion on these cases.

72 This was vetoed by President Bush and re-introduced in 1991 with amendments.

73 *City of Richmond v J A Croson Co.* (1989) 109 S. Ct. 706.

goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype."[74]

"Strict scrutiny" meant that affirmative action programmes must fulfil a "compelling governmental interest", and must be "narrowly tailored" to fit the particular situation. This means that a law or practice that discriminates on the basis of race, national origin, alien status, or some other fundamental right such as freedom of speech or religion will be examined very closely by the courts. The government must show that it has a "compelling interest", an extremely important reason, for treating people differently on one of these bases. It also must show that the government action was the least restrictive means to achieving its purpose and is narrowly tailored to advance this compelling interest. The majority found that the Richmond set-aside programmes did not pass such scrutiny.

Justice O'Connor thus reaffirmed the *Wygant* plurality's view[75] that "the standard of review under the Equal Protection Clause is not dependant on the race of those burdened or benefited by a particular classification".[76] Therefore, according to the *Croson* case, it would appear that those employers and other entities formulating affirmative action plans and initiatives must prepare these measures to withstand harsh and sceptical judicial examination.[77]

(10.3.2) Attack on Affirmative Action in Court

(10.3.2.1) Hopwood v *University of Texas Law School* [78]

The *Hopwood* case had marked a startling departure in affirmative action law. In this case Cheryl Hopwood and three other white law school applicants at the University of Texas challenged the school's affirmative action programme, asserting that they were rejected because of unfair preferences toward less qualified minority applicants. As a result, the fifth US Court of Appeals suspended the university's affirmative action admissions programme and ruled that the 1978 *Bakke* decision was invalid. While *Bakke* rejected racial quotas it maintained that race could serve as a factor in admissions. In addition to remedying past

---

74 *Ibid* at 721.

75 *Wygant v Jackson Board of Education* (1986) 476 US 267 at 279-280.

76 *City of Richmond v J.A. Croson Co.* (1989) 109 S.Ct. 706 at 721.

77 Turner *op cit* 3 at 60.

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

discrimination, *Bakke* maintained that the inclusion of minority students would create a diverse student body, and that was beneficial to the educational environment as a whole. Hopwood, however, rejected the legitimacy of diversity as a goal, asserting that "educational diversity is not recognised as a compelling state interest".

The court held that the University of Texas Law School violated the law by using an affirmative action programme that relied, even in part, on race as an admission criterion. The court went further and suggested that Justice Powell's decision in *Bakke* was no longer controlling law (due to the growth of anti-affirmative-action SC decisions over the last decade), and that, with *Bakke* essentially overruled, diversity was no longer a sufficiently compelling justification for race-based affirmative action.

However, the June 23, 2003, SC ruling in *Grutter v Bollinger*[79] invalidates *Hopwood*. In 2003, the SC considered two affirmative action cases from the state of Michigan.

(10.3.2.2) Affirmative Action Today

In *Gratz v Bollinger*[80] a federal judge ruled that the use of race as a factor in admissions at the University of Michigan was constitutional. In this case, in 1995, Jennifer Gratz applied to the University of Michigan's College of Literature, Science and the Arts with an adjusted GPA of 3.8 and ACT score of twenty-five. In 1997, Patrick Hamacher applied to the University with an adjusted GPA of 3.0, and an ACT score of twenty-eight. Both were denied admission and attended other schools. The University admits that it uses race as a factor in making admissions decisions because it serves a "compelling interest in achieving diversity among its student body".

In addition, the University has a policy to admit virtually all qualified applicants who are members of one of three select racial minority groups; African Americans, Hispanics, and Native Americans; that are considered to be "under-represented" on the campus. Concluding that diversity was a compelling interest, the District Court held that the admissions policies for the years 1995 to 1998 were not narrowly tailored, but that the policies in effect in the years 1999 and 2000 were narrowly tailored. After the decision in *Grutter*, Gratz and

---

79 *Grutter v Bollinger* (2003) 539 US Docket No. 02-241; (2003) 123 S. Ct. 2411.

80 *Ibid.*

Hamacher petitioned the US SC pursuant to Rule 11 for a *writ of certiorari* before judgment, which was granted.

The question before the court was whether the University of Michigan's use of racial preferences in undergraduate admissions violates the Equal Protection Clause of the Fourteenth Amendment or Title VI of the CRA. The University argued that just as preference is granted to children of alumni, scholarship athletes and others groups for reasons deemed beneficial to the university, so too does the affirmative action programme serve "a compelling interest" by providing educational benefits derived from a diverse student body.

The Court held that the University of Michigan's use of racial preferences in undergraduate admissions violates both the Equal Protection Clause and Title VI. While rejecting the argument that diversity cannot constitute a compelling state interest, the Court reasoned that the automatic distribution of twenty points, or one-fifth of the points needed to guarantee admission, to every single "underrepresented minority" applicant solely because of race was not narrowly tailored and did not provide the individualised consideration Justice Powell contemplated in *Regents of the University of California v Bakke*.[81] Rehnquist CJ wrote that —

> "…….because the University's use of race in its current freshman admissions policy is not narrowly tailored to achieve respondents' asserted compelling interest in diversity, the admissions policy violates the Equal Protection Clause."

In other words, the undergraduate affirmative action programme at Michigan looked too much like an automatic preference or quota, just based on the status of the applicant as a minority. The result was different when the Court turned to the affirmative action policy of Michigan's Law School. Justice O' Connor, writing for the majority stated that —

> "…..[T]oday we endorse Justice Powell's view that student body diversity is a compelling state interest that can justify the use of race in university admissions."[82]

---

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

82 *Gratz v Bollinger* (2003) 123 S.Ct. 2411 at 2337.

(10.3.2.3) The Grutter Case

In *Grutter v Bollinger*,[83] a case similar to the University of Michigan undergraduate lawsuit, a different judge drew an opposite conclusion, invalidating the law school's policy and ruling that "intellectual diversity bears no obvious or necessary relationship to racial diversity". However, on May 14, 2002, the decision was reversed on appeal. The court ruled that the admissions policy was in fact, constitutional.

In the most important affirmative action decision since the 1978 *Bakke* case, the SC in a 5-4 opinion delivered by Justice Sandra Day O'Connor, the Court held that the Equal Protection Clause does not prohibit the Law School's narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body. The Court reasoned that, because the Law School conducts a highly individualised review of each applicant, no acceptance or rejection is based automatically on a variable such as race and that this process ensures that all factors that may contribute to diversity are meaningfully considered alongside race. Justice O'Connor wrote —

> "In the context of its individualised inquiry into the possible diversity contributions of all applicants, the Law School's race-conscious admissions programme does not unduly harm non-minority applicants."

The SC, however, ruled (6-3) that the more formulaic approach of the University of Michigan's undergraduate admissions programme, which uses a point system that rates students and awards additional points to minorities, had to be modified. The undergraduate programme, unlike the law school's, does not provide the "individualised consideration" of applicants deemed necessary in previous SC decisions on affirmative action. The Court held that this policy did not violate the Equal Protection Clause, and thus was constitutional. The Court ruled that student-body diversity is a compelling state interest that can justify using race in university admissions and that that the law school's admissions programme bears the hallmarks of a narrowly tailored plan.

These cases remove the uncertainty about the continued vitality of Justice Powell's reasoning in *Bakke*. It is now clear that the fostering of student body diversity is a goal that will be considered to be sufficiently compelling to satisfy the first prong of "strict scrutiny" analysis.

---

[83] *Grutter v Bollinger* (2003) 539 US Docket No. 02-241.

As stated in a report prepared for the Harvard Civil Rights Project a few weeks after the SC issued its decisions in *Grutter* and *Gratz* —

> "[T]he Supreme Court's decisions … allow selective colleges and universities throughout the country to employ race in admissions. The decisions reject the absolute race-blind approach to higher education admissions advanced by the *Grutter* and *Gratz* plaintiffs and by the US government and others as *amici curiae*. The Court's decisions also effectively overrule major portions of the 1996 ruling of the US Court of Appeals for the Fifth Circuit in *Hopwood v Texas*, and will allow colleges and universities in the states of Texas, Louisiana, and Mississippi to use race-conscious admissions policies designed to advance diversity. State universities in California, Washington, and Florida are still prohibited under their state laws from employing race-conscious admissions policies; however, private universities in those states can employ properly designed race-conscious policies consistent with their obligations under Title VI of the Civil Rights Act of 1964 and other federal laws."[84]

The Michigan cases have shown the SC decisively upholding the right of affirmative action in higher education. The SC ruled that although affirmative action was no longer justified as a way of redressing past oppression and injustice, it promoted a "compelling state interest" in diversity at all levels of society.

10.4 Analysing the Supreme Courts Decisions

During the past two decades the Court has become sceptical of race-based affirmative action practiced or ordered by government actors. The court has stated that "……..in the history of this Court and this country, few questions have been more divisive than those arising from governmental action taken on the basis of race".[85] As can be seen from the above-discussed cases, State and local attempts to remedy societal discrimination have not survived Court scrutiny. This is despite evidence that substantiated persistent racial discrimination in education and employment. That is, attempts to remedy these societal discriminations have not been constitutionally allowed even though the courts have stated that the remedial use of race could be made when there is an appropriate finding of past or present discrimination that had been made by judicial, legislative or an administrative agency.

---

84 The Civil Rights Project Reaffirming Diversity — A Legal Analysis of the University of Michigan Affirmative Action Cases (July 2003).

85 *Fullilove v Klutznick* (1980) 448 US 448 at 516 (concurring opinion of Powell J) and *DeFunis v Odegaard* (1974) 416 US 312 at 350 (dissenting opinion of Brennan J).

The recent Supreme Court decisions (especially *Adarand v Pena*) will have the effect of significantly reducing the scope of acceptable federal government affirmative action programmes. In that case, the Court applied to federal actions the standard already binding on states and localities, i.e., programmes must serve a "compelling" interest and must be "narrowly tailored".[86]

Affirmative action plans must rest upon a sufficient showing or predicate of past discrimination which must go beyond the effects of societal discrimination.[87] The Courts have held that affirmative action programmes must do more than provide role models to or for minorities.[88] The Courts have also held that under Title VII, a *prima facie* showing of unlawful discrimination is not required. Under the US Constitution, statistics which are sufficient to establish a *prima facie* case may be required.

Unlike SA, where voluntary affirmative action measures are encouraged, in the US the voluntary use of racial classifications was declared impermissible. The courts have held that even though the goal of having a diverse student body was constitutionally permissible, racial quotas were not the least onerous or least intrusive methods to achieve the goal of having a diverse student body. Quotas were therefore not allowed.

Affirmative action plans that have a specific duration are preferred. Courts are more likely to uphold temporary measures which results in preferential treatment than long-term plans. The limited duration of the challenged plan has been favourably cited as a basis for affirmative action plans.[89] This is consistent with the holding discussed above that affirmative action programmes or plans must be remedial in nature. This does not however render plans that have an absence of a set time fatal. The use of short-term goals and good-faith effort are the key. Further, the Supreme Court's decisions make it clear that affirmative action plans calling for the termination or layoff of white or male employees are not favoured.[90]

---

86 *Adarand Constructors Inc. v Peña* (1995) 515 US 200.

87 *U S v Paradise* (1987) 480 US 147.

88 *Gratz v Bollinger* (2003) 123 S.Ct. 2411 at 2337.

89 See for example the *Weber* and *Johnson* cases.

90 *Firefighters Local Union No. 1784 v Stotts* (1984) 467 US 561.

Affirmative action is supposed to be a means to an end, namely inclusiveness without regard to non-performance-related criteria such as race. Universities can partially protect itself against legal attack it specifically recites that the affirmative action programme is not indefinite in duration and it regularly reviews the programme, adjusts its operations, and evaluates its efficacy.

Under the Fourteenth Amendment to the US Constitution and Title VI of the 1964 CRA, universities are prohibited from discriminating on the basis of race, colour, or national origin in the operation of their programmes and activities. In a series of decisions over the past thirty years, the SC has placed a heavy burden on institutions whose affirmative action programmes are challenged. Such programmes, the Court has ruled, are inherently suspect because of their reliance on racial characteristics as decisional determinants; and, because they are inherently suspect, courts will subject them to a very demanding standard of proof, the so-called "strict scrutiny" standard, when they are challenged on constitutional or Title VI grounds.

Starting with *Bakke* in 1978 the courts have recognised only two justifications for affirmative action programmes that are suitably compelling to satisfy the first prong of the two-part "strict scrutiny" test —

(i) Remedying the present effects of past discrimination (the so-called "remedial justification") — If unlawful discrimination against an identified minority group actually occurred (for example, if the institution had a written policy excluding members of a particular race from applying), then a remedial affirmative action program serves the compelling institutional interest in removing the lingering vestiges of past discrimination; and

(ii) Diversity — An affirmative action programme serves a compelling purpose if it is designed to foster racial diversity in the student body.

With regard to remedying the effects of past discrimination, the Supreme Court's holding in *City of Richmond v J A Croson Co*[91] was that if a university establishes its former participation in a systematic program of racial exclusion by making "some showing of prior discrimination" then the university may legally take "affirmative steps to dismantle such a

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

system". However, that standard comes with a warning. The courts are required to make "searching judicial inquiry into the justification for such race-based measures... [and to] identify that discrimination... with some specificity before they may use race-conscious relief".[92]

With regard to diversity, the starting point for analysis is Justice Powell's detailed treatment of the issue in *Bakke*. He argues that "[t]he attainment of a diverse student body is clearly a constitutionally permissible goal for an institution of higher education". Quoting from two of the Court's landmark decisions on academic freedom, Justice Powell observed that —

> "[I]t is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation.....The atmosphere of speculation, experiment and creation — so essential to the quality of higher education — is widely believed to be promoted by a diverse student body. ... [I]t is not too much to say that the nation's future depends upon leaders trained through wide exposure to the ideas and mores of students as diverse as this Nation of many peoples."[93]

The second part of the two-part "strict scrutiny" standard requires the university to prove that its affirmative action programme has been designed and implemented in the narrowest way possible consistent with the compelling purposes the programme is designed to serve. The programme cannot be broader, more encompassing, or more ambitious than the minimum required in achieving its goal; otherwise, the legal rights of innocent third parties may be trammelled upon. The first part of the two-part "strict scrutiny" test, articulating the "compelling institutional interest" served by affirmative action, focuses on the objectives of affirmative action. The second part, whether the programme is "narrowly tailored" or not, focuses on the fundamental details of specific affirmative action programmes.

It has been held that the diversity rationale is effectively the only rationale a college or university can use to satisfy the first prong of strict scrutiny, and, at least prior to the University of Michigan decisions, the diversity rationale was hanging by a thread, endorsed by only one SC Justice in the *Bakke* case.

---

92 *City of Richmond v J A Croson Co* (1989) 488 US 469 at 492-93.

93 *Regents of the University of California v Bakke* (1978) 438 US 265 at 311-313, quoting *Sweezy v New Hampshire* (1957) 354 US 234 at 263 and *Keyishian v Board of Regents* (1967) 385 US 589 at 603.

With regard to race in University admissions, the courts have held that race can be one of the many factors taken into account. The Court has stated in the *Gratz* case that it is not convinced that recent SC precedent has established, as a matter of law, that the consideration of race in an attempt to attain the educational benefits that flow from a racially and ethnically diverse student body in the context of higher education can never constitute a compelling interest under strict scrutiny. To that end, this Court agreed with Judge Wiener's concurring opinion in *Hopwood* that applicable SC precedent has never held that —

> "Squarely and unequivocally either that remedying the effects of past discrimination is the only compelling state interest that can ever justify racial classification, or conversely that achieving diversity in the student body of a public graduate or professional school can never be a compelling governmental interest."[94]

In practice, the courts have looked very carefully at any law that discriminates on the basis of race. As the Court explained in *Grutter v Bollinger* "Because the Fourteenth Amendment "protect[s] persons, not groups," all governmental action based on race, a group classification long recognised as in most circumstances irrelevant and therefore prohibited, should be subjected to detailed judicial inquiry to ensure that the personal right to equal protection of the laws has not been infringed".[95] It follows from that principle that government may treat people differently because of their race but only for the most compelling of reasons.

The courts over the years held that the US Constitution is colour-blind. It has argued that justice demanded equality without regard to colour and special treatment for the minorities meant recognising colour just when the forward movement of history was turning towards obliteration of colour as a factor in the areas of life and that the equalitarian guarantees of the Constitution accrued to the individuals and not to groups.

These competing arguments against and in favour of benign racial discrimination reached their climax in the case of *Regents of University of California v Allan Bakke* and later in the *United Steel Workers of America v Weber*. Interestingly however, neither *Bakke* nor the *Weber* case has decided finally the question of the constitutionality of the racial quota system.

---

94 *Hopwood v University of Texas Law School* (1996) 518 US at 964 (Wiener J concurring).

95 *Adarand Constructors Inc. v Peña* (1995) 515 US 200 at 227.

These and the other cases however, have brought into focus the entire range of issues involved in preferential treatment policies in the USA.

Further, for affirmative action to survive scrutiny, Judges want "compelling evidence", in the words of the court in *Wessman v Gittens*,[96] not "rank speculation". The bar has been effectively raised. The onus is now on the institutional defenders of affirmative action to prove to sceptical judges, that diversity is essential to the achievement of higher education's mission.

An analysis of discrimination law in the US can be summarised as follows —

- Objectives such as enhancing "diversity" and the "inclusion" or addressing of general "societal discrimination" do not qualify as compelling;
- A specific showing of particular discrimination, going beyond simple statistical disparities among racial and ethnic groups, must be made; and
- Even when a compelling interest is found, race-based methods may be used only after race-neutral methods are considered and found wanting, only to the extent needed to remedy the identified discrimination, only when the plaintiffs seeking a racial preference have themselves suffered from past discrimination, and only if undue burdens on non- beneficiaries (such as layoffs) are avoided.[97]

The US is not alone in attempting to redress historical inequalities and the denial of basic human rights. India, for example, has undertaken affirmative action initiatives in favour of backward classes and castes. These initiatives are both older and more extensive than any programme undertaken in the US. India's 1950 Constitution commits itself to affirmative action and the reservation of seats for members of India's lowest social castes in both the House of the People and the state legislative assemblies.[98] Further, in 1951 India amended its

---

96 In *Wessman v Gittens* (1998) 160 F. 3d 790 (1st Cir.) at 800.

97 The Affirmative Action Debate at http://www.puaf.umd.edu/IPPP/1QQ.HTM last visited 08/06/05.

98 Article 15(4) now provides that —
"nothing in [the constitution's anti-discrimination articles] shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens".

constitution to expressly permit affirmative action in education and other contexts. Herein lies the problem with affirmative action in the US. There is no constitutional basis for it.

Another problem that one sees from the above discussion is that in both India and SA, the reservation system or affirmative action programmes have been or are the product of a national constitution building process which was fundamentally majoritarian and fundamentally democratic. Whereas in the US, unfortunately, affirmative action programmes have never until recently been subjected to the rigors of democratic debate and vote and it is submitted that the USA is only now feeling the negative effects of this, at least in California. A constitutionally mandated affirmative action is required for preferential treatments to stand the test of time.

The following chapter looks at the Indian Supreme Courts approach to affirmative action.