
CHAPTER 5
THE APPLICATION OF AFFIRMATIVE ACTION IN THE
UNITED STATES OF AMERICA

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1 INTRODUCTION

As pointed out above, many similarities exist between the US and South Africa for the purposes of a comparison of affirmative action between the two countries.¹ But, there are also substantial differences between the two countries, the main ones being that the US officially endorses the notion of equality of opportunity, that minorities are affirmed in the US, and that large-scale immigration into the US has occurred over many centuries.²

The purpose of this chapter is sixfold: (a) to give a brief historical overview which explains the US approach to equality and the need for affirmative action; (b) to set out the legislative framework within which US equality laws operate; (c) to analyse the US position as to whether past personal discrimination is required as a prerequisite for be-

1 See chapter 1 par 4 above.

2 *Ibid.*

nefitting from affirmative action, or whether group membership suffices (conducted against the background of the various notions of equality³ and the standard of proof for past discrimination); (d) to describe the deficiencies of categorisation; (e) to establish the meaning of the concepts 'qualified', 'unqualified' and 'merit' in the affirmative action context; and (f) to determine whether citizenship is required in order to benefit from affirmative action. Throughout this chapter, the South African and US positions are compared.

US legislation and case law are considered. The focus is on employment law, but case law falling outside this context is also considered, as many cases relating to, for example, education and the distribution of government contracts initially played (and still play) an important role in developing the content of, and limitations to, affirmative action, and have consequently influenced (and still influence) affirmative action in employment law.

2 HISTORICAL OVERVIEW

2.1 Introduction

The roots of affirmative action in the US can be traced to the colonial and post-colonial periods of the country. Originally, the US territory was inhabited by Indian natives.⁴

3 See chapter 2 par 3.1 above.

4 Goldman & White 'United States of America' 17-18; 101-102; Barker *Civil Liberties* 660; Makielski 'America's Minorities' 452-4. Also called 'American Indians' or 'Native Americans'. This group has a unique history dissimilar to that of blacks in South Africa (but similar to the Khoikhoi or Khoisan people) (see chapter 3 par 2.1 above). US federal policy on Indian natives has taken many forms – from regarding them as a sovereign nation, to relocating them, to attempting to exterminate or assimilate them, and, since 1968, to encouraging tribal self-determination on Indian reservations (Barker *Civil Liberties* 675-7; Makielski 'America's Minorities' 452). The last-mentioned approach is similar to the South African government's homeland approach adopted in respect of blacks from 1940 to 1980.

2.2 Colonialism and slavery

These native people were displaced when British colonisers invaded the North American continent or the New World.⁵ The Mexican people (commonly called chicanos and living just south of the continent) were also conquered and dispossessed.⁶ New England colonies were formed on the continent⁷ and colonists imported black slaves (mainly from Africa) and indentured Asian labour into the US in the early 1600s.⁸ Slavery was justified on the basis that Negroes and other people of colour were regarded as being morally and intellectually inferior to whites.⁹

2.3 Independence from the British

In time, the colonists began to resent the supremacy of the British Parliament and demanded that they be represented in Parliament.¹⁰ Eventually, taxes imposed by the British triggered the American War of Independence.¹¹ With the American Declaration of

5 Goldman & White 'United States of America' 101-2; Gassama, Chang & Oaki 'Citizenship and its Discontents' 221; Barker *Civil Liberties* 677; 704; Makielski 'America's Minorities' 452.

6 Gassama, Chang & Aoki 'Citizenship and its Discontents' 221; Weiss 'We Want Jobs' 3; Makielski 'America's Minorities' 444; Liddle 'Affirmative Action' 846. In later years, the US government authorised the temporary entry of large numbers of Mexican workers (termed 'wetbacks' because of their reputation for swimming across the Rio Grande to the US) who provided a source of cheap labour in the rural areas of the American South-West where they took on minimum-pay jobs not wanted by the natives. Mexicans in the US have been recognised as a 'class' deprived of most of their legal rights. Although not enslaved, these 'wetbacks' have been exploited. Their economic equivalent in South Africa is to be found among the migratory workers on the mines who come from neighbouring countries and have been used on a large scale, but have not been allowed to acquire residency or citizenship rights (Glaser & Possony *Victims of Politics* 336-7).

7 Bekink *South African Constitutional Law* 51; Wiechers *Staatsreg* 171-98.

8 See Little 'Affirmative Action' 264; Goldman & White 'United States of America' 101-2. See also http://www.international.metropolis.net/events/rotterdam/papers/20_Nieuwboer.htm at 1.

9 See Boxill 'Dignity and Slavery' 102-17 who discusses how slavery mocks the human dignity of people by denying them human rights.

10 Bekink *South African Constitutional Law* 51; Wiechers *Staatsreg* 175; Makielski 'America's Minorities' 449.

11 Little 'Affirmative Action' 265.

Independence,¹² some colonies became independent from British rule. Colonies that were not part of this process continued to fall under the domain of the British, eventually constituting the territory of Canada.¹³ The Declaration stated:¹⁴

‘We hold these truths to be self-evident, that all men are created *equal*, that they are endowed by their Creator with certain inalienable rights, that among these are life, liberty and pursuit of happiness’ (own emphasis).

Notwithstanding this, slavery did not come to an end after the Declaration of Independence. In particular, it continued in the southern states, as differences of opinion existed between the southern and northern American states as to when slaves should be freed.¹⁵

3 LEGISLATIVE FRAMEWORK

3.1 Introduction

After independence, a federal government came into existence.

3.2 Constitution

American colonists adopted a constitutional document¹⁶ (hereafter the ‘Constitution’) based on an idea of a limited, rights-based government.¹⁷ The federal

12 Drafted by Thomas Jefferson and signed by patriots – many of whom were owners – on 4 July 1776.

13 See chapter 6 par 2.3 below.

14 Paragraph 2.

15 Little ‘Affirmative Action’ 265.

16 Drawn up by the Constitutional Convention of 1787 in Philadelphia and ratified by the various states from 1787 to 1790.

17 Henkin ‘Human Dignity’ 213.

government that was envisaged was not to be the primary government or a complete government: governance was basically left to the states and rights had to be protected only as against state governments.¹⁸ The Constitution did not provide for the right to equality.

3.2.1 Early case law¹⁹

3.2.1.1 Dred Scott case

The first Supreme Court decision on slavery after independence was that handed down in *Dred Scott v Sandford*²⁰ (*Dred Scott*). It was held that no person of African descent, whether freeman or slave, was part of the people of the US²¹ and could be a US citizen by birth.²² A slave was the property of his master, could be bought and sold, and could be treated as an ordinary article of merchandise and traffic.²³

After this decision, the differences between the southern and northern states intensified. Some of the southern states segregated and established the Confederate States of America.²⁴ It was clear at that stage that the Supreme Court would not end slavery and that a constitutional amendment was needed.²⁵ The American Civil War²⁶ followed and brought about the defeat of the Confederacy,²⁷ with the seceding states being restored to the US. Soon thereafter, all slaves in the southern states were freed by the Emancipation Proclamation.²⁸

18 *Op cit* 213-4.

19 The facts of cases will be indicated briefly and only where they add to a better understanding of the issue concerned.

20 60 US 393 (1857).

21 At 407-11.

22 At 407; 410.

23 At 407-8.

24 Little 'Affirmative Action' 265.

25 McWhirter *End of Affirmative Action* 18.

26 1860-1865.

27 Little 'Affirmative Action' 265.

28 Of 1863.

3.2.2 Amendments to the Constitution

3.2.2.1 Thirteenth Amendment to the Constitution

Subsequently, the Thirteenth Amendment²⁹ to the US Constitution outlawed slavery. Slavery however continued in practice and excluded black people from the white community.

3.2.2.2 Fourteenth Amendment to the Constitution

The concept of equality became part of the Constitution of the US only after the American Civil War and with the addition of the Fourteenth Amendment.³⁰ This Amendment was specifically aimed at 'the amelioration of the condition of the freedmen'.³¹ Section 1 of the Amendment, also known as the equal protection clause, reads as follows:

'All persons born or naturalized in the United States ... are citizens of the United States and of the state wherein they reside ... [no state] shall ... deprive any person of life, liberty or property, *without due process of law*,³² nor deny to any person within its jurisdiction the *equal protection of the laws*' (own emphasis).

It appears that the words, 'all persons' and 'any person', contained in the Fourteenth

29 Ratified in 1865.

30 Ratified in 1868 and initially applicable only to the states. The Fifth Amendment, ratified in 1791, similarly provides for a due process of law clause to protect federal rights. Shortly after the introduction of the Fourteenth Amendment, the Fifteenth Amendment of 1870 provided that the right to vote could not be withheld from someone on the basis of race or colour, or because the person had previously been a slave.

31 Liddle 'Affirmative Action' 841.

32 The court interpreted the concept 'due process of law' as requiring not only conformity to traditional legal process, but as permitting only procedures that are consistent with 'principles of liberty and justice', with 'fundamental fairness', with 'ordered liberty' and with measures that do not 'shock the conscience'; or rational, reasonable law, not arbitrary law, and law serving the legitimate purpose of government (Henkin 'Human Dignity' 221).

Amendment protect individual US citizenship and liberty. In other words, an individual-based notion was followed. The Fourteenth Amendment does not explicitly prohibit discrimination, nor does it list protected grounds or classes. The constitutional jurisprudence of discrimination was thus developed by case law.³³ The US Constitution makes no express provision for the right to dignity³⁴ and the facets of this right have come to be protected under the rubric of other specifically enumerated rights.³⁵

After the introduction of the Fourteenth Amendment, the courts contributed to the constitutional protection of human dignity by giving 'liberty' a broad meaning and by providing the basis for both procedural and substantive protection against deprivation of such liberty.³⁶ 'Liberty' was interpreted as being tantamount to 'autonomy'.³⁷

In consequence of the amendments to the Constitution, Congress during the late 1860s and 1870s further adopted a series of civil rights laws with the purpose of enforcing civil rights throughout the US.³⁸ For example, the Civil Rights Act of 1866 held that 'all persons born in the United States, and not subject to any foreign power, are hereby declared to be citizens of the United States, without distinction of color'.³⁹ Negroes were elected to government office in some of the southern states for a short period, but, in time,

33 Kentridge 'Equality' 14-6.

34 Differing from South Africa, where human dignity has been recognised as a core value and a fundamental right in the Bill of Rights and plays a very significant role in interpreting equality (see chapter 3 par 3.5.1.2(b) above).

35 Leibowitz & Spitz 'Human Dignity' 17-1. Recognition of human dignity lies at the heart of the Eighth Amendment's prohibition against cruel and unusual punishment. But, for a long time, the courts took a narrow view of the concept of human dignity which the states had to promote and tolerated official segregation. Even in recent years it has been suggested that continuing refinement of US society's idea of human dignity is necessary, as it is 'underdeveloped' and 'not in pace with contemporary international conceptions of human dignity' (Henkin 'Human Dignity' 227-8).

36 Henkin 'Human Dignity' 221.

37 Leibowitz & Spitz 'Human Dignity' 17-1. See, for example, *Meyer v Nebraska* 262 US 390, 43 S Ct 1678 (1965) where it was found that liberty does not merely denote freedom from bodily restraint, but also the right of the individual to contract, engage in the common occupations of life, acquire knowledge, marry, establish a home, and, generally, to enjoy those privileges long recognised as essential to the orderly pursuit of happiness.

38 Goldman & White 'United States of America' 309-17; Little 'Affirmative Action' 266.

39 Chapter 31. Only with the Voting Rights Act of 1965 was full political citizenship extended to blacks (Graham 1 903; Yinger 'Discrimination Against American Blacks' 54; Makielski 'America's Minorities' 449-50; 456).

white rebels again took over their positions of power in politics.⁴⁰ Whites replaced Negroes and some patently discriminatory laws were again passed in the south and, to a lesser extent, in the northern states during the 1880s and 1890s. These laws, commonly called 'Jim Crow' laws, limited the rights of Negroes to vote or to mingle with whites in restaurants, theatres and on railroad cars.⁴¹ But, in practice, slaves began integrating with white American society by taking on the language, religion, dress, values and names of their masters.⁴²

3.2.3 *Separate but equal*

3.2.3.1 *Plessy case*

The next important Supreme Court decision on equality was handed down in *Plessy v Ferguson*⁴³ (*Plessy*). This case considered whether legislation by the state of Louisiana, which provided for separate, but equal, railway carriages for Negroes and whites, was reasonable. It was argued that the Louisiana statute violated the equal protection clause of the Fourteenth Amendment. The Supreme Court considered various factors, including usages, customs, traditions and the promotion of comfort, public peace and order in coming to a finding.⁴⁴ The majority of the court found that the statute was reasonable by virtue of the doctrine of 'separate but equal'. It held, very restrictively and deferentially, that the Fourteenth Amendment did not prevent states from passing laws that required the separation of races in schools, railways and other instances.⁴⁵

40 Little 'Affirmative Action' 266.

41 McWhirter *End of Affirmative Action* 21.

42 Little 'Affirmative Action' 264.

43 163 US 537 (1896).

44 At 550.

45 At 544; 546-8; 550-1. The court brushed off the plaintiff's argument that the enforced separation of the two races stamped the coloured race with a 'badge of inferiority' as follows: 'If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it ... Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences ... If one race be inferior to the other socially, the

' ... as a conflict with the 14th Amendment is concerned, the case reduces itself to the question whether the statute of Louisiana is a *reasonable* regulation, and with respect to this there must necessarily be a large discretion on the part of the legislature ... we cannot say that a law which authorises or even requires the separation of the two races in public conveyances is unreasonable' (own emphasis).

In a dissenting opinion, Harlan J emphasised the historical context of race-based segregation and held it to be connected to oppression, and inherently subordinating.⁴⁶ He argued as follows:⁴⁷

'The white race deems itself to be the dominant race in this country ... But in view of the Constitution, in the eye of the law, there is in this country *no superior, dominant, ruling class of citizens. There is no caste here.* Our Constitution is color-blind and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are *equal before the law.* The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved ... In my opinion, the judgement this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the *Dred Scott* case' (own emphasis).

Evaluation of early case law

Early case law held out little promise for equality in American society. On the contrary, the inequality then existing between black and white was perpetuated by the Supreme Court on the basis of 'separate but equal' facilities and practices, a policy similar to that adopted in South Africa in the late 1940s.

Constitution of the United States cannot put them upon the same plane'.

46 At 555-7. See Gotanda 'Color-blind Constitutionalism' 39.

47 At 559.

3.3 Equality gains support

3.3.1 *World War II*

Only during World War II, when many white soldiers went to war, did the economy have to fall back on blacks and women, and only then did they gain some bargaining power in the workplace.⁴⁸ Also, after the war, racial discrimination in employment was prohibited by the states by way of Fair Employment Practices Committees and Jim Crowism was unable to reassert itself.⁴⁹ Moreover, after the war, racial discrimination was prohibited by liberal law makers, and national origin as a ground of non-discrimination was included in statutes.⁵⁰

3.3.2 *Brown case*

The notion of 'separate but equal' was rejected in *Brown v Board of Education*⁵¹ (*Brown*). In this case, assistance was sought to allow Negro children to gain admission to public schools in their communities on a non-segregated basis. The Supreme Court held that segregation of children in public schools on the basis of race deprived Negro children of equal educational opportunities. If Negro children were educationally separated from

48 Little 'Affirmative Action' 26; www.international.metropolis.net/events/rotterdam/papers/20_Nieuwboer.htm 1.

49 Little 'Affirmative Action' 269-70; Weiss 'We Want Jobs' 12; Graham 2 134.

50 Graham 1 902. For example, the Fair Employment Practice Committee established in 1941 by President Roosevelt in terms of Executive Order No 8802 of 1941 protected employees against job discrimination on the basis of race, creed, colour or national origin; President Kennedy's Executive Order No 10925 of 1961 directed government contractors to take affirmative action to ensure that applicants were employed and that employees were treated during employment without regard to their race, creed, colour or national origin; President Johnson's similar Executive Order No 11246 of 1965; New York's State Law Against Discrimination of 1945 protected employees against discrimination on the grounds of race, creed, colour or national origin; the Civil Rights Act of 1964 sought to bring about equal opportunity through the elimination of discrimination on the grounds of race, colour, religion, national origin and sex in employment (Title VII) (see par 3.5 below).

51 347 US 483 (1954).

whites, a sense of inferiority would be cultivated.⁵² Also, it held that separate educational facilities were 'inherently' unequal. Thus, the 'separate but equal' doctrine had no place in education and was in conflict with the equal protection clause of the Fourteenth Amendment.⁵³ This decision brought an end to separate but equal practices in public education. The effect of this judgment however also filtered through into areas such as employment.

3.4 Affirmative action needed

In the years that followed, many discriminatory laws were overturned by the courts.⁵⁴ But, in time, it became clear that black people were ill-prepared to compete. The former slaves were poor, were badly educated and had no political power. They were unable to attain equal enjoyment of political, economic, educational and social rights.⁵⁵

There was thus a need to go further than merely eliminating barriers to equal opportunity.⁵⁶ Additional measures, namely affirmative action measures, were needed to put blacks in a situation that they would have been in had there been no history of discrimination on economic, cultural, educational and political levels. The situation was therefore similar to that in South Africa, the difference being that the latter legalised affirmative action only much later in the 1990s.⁵⁷

3.5 Civil Rights Act of 1964

3.5.1 Introduction

52 At 494.

53 *Ibid.* A year later, the court issued a decree to this effect and cautioned that racial segregation must be ended with 'all deliberate speed' (*Brown v Board of Education* 349 US 294 (1955) at 301).

54 Little 'Affirmative Action' 270; Gotanda 'Color-blind Constitutionalism' 47.

55 Little 'Affirmative Action' 266; Weiss 'We Want Jobs' 3-21.

56 Little 'Affirmative Action' 266; Little 'Affirmative Action' 842.

57 See chapter 3 par 3.5.2 above.

It was almost a century after the introduction of the Fourteenth Amendment that affirmative action programmes in the US were legalised by Title VII of the Civil Rights Act. The Civil Rights Act was passed in response to the nationwide civil rights movement and represented a watershed in the struggle for economic justice in the US.⁵⁸ The statute applied to private employers only, but was later amended to include public employers.⁵⁹ Title VII provides for both non-discrimination and affirmative action as a remedy.

3.5.2 Non-discrimination

Title VII was the first comprehensive legislative measure against discrimination in the workplace.⁶⁰ Its equal opportunity clause states:⁶¹

‘It shall be an unlawful employment practice for an employer –

- (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin;⁶²

or

- (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.’⁶³

58 See Weiss ‘We Want Jobs’ 70.

59 Public employers must therefore comply with both Title VII and the Constitution.

60 www.international.metropolis.net/events/rotterdam/papers/20_Nieuwboer.htm 1. Title VII applies to employers (state, local and federal) whose business affects inter-state commerce and who employ 15 or more employees for each work day of at least 20 weeks during a year. It applies to the private sector, unions and employment agencies. Title VII exempts higher education, religious institutions and Native American reservations, but the education exemption was subsequently abolished.

61 Sections 703(a)(1); 703(a)(2).

62 Citizenship as a ground on which discrimination is prohibited, is not listed.

63 Section 703(b) similarly states that it is an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, or to classify or refer for employment any individual on the above bases; s 703(c) prohibits discrimination in respect of trade union membership and other discriminatory practices by trade unions; s 703(d)

Title VII introduced the ‘effects’ approach to discrimination. In other words, the effects and outcome of an employer’s conduct can constitute discrimination.⁶⁴ The notion of intent is not included. Title VII seeks *equal opportunity* by eliminating discrimination on the grounds of race, colour, religion, national origin and sex. It protects *both genders and all races, and minorities and non-minorities*. In other words, all white people and males of any origin are protected. It does not refer to any group as such, or classify any group for protection against discrimination. It protects the individual’s right against discrimination.⁶⁵

3.5.3 Affirmative action as a remedy

What is very important is that, although Title VII does not impose affirmative action duties on employers as such, it authorises courts, in section 706(g), and upon a finding that a respondent has intentionally⁶⁶ engaged in an unlawful employment practice, to⁶⁷

‘(1) ... enjoin the respondent from engaging in such unlawful employment practice, and *order such affirmative action as may be appropriate*, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay ... or *any other equitable relief* as the court deems appropriate ...’ (own emphasis).

Further, Title VII provides:⁶⁸

prohibits discrimination in apprenticeship and training.

64 Chabursky ‘Employment Equity Act’ 311.

65 Because Title VII protects whites and males, the question that arises is whether an employer’s decision to prefer a female or minority applicant because of such person’s sex or race violates Title VII by discriminating against white males. This will be discussed below.

66 Intention was added to limit the scope of the Act (www.international.metropolis.net/events/rotterdam/papers/20_Nieuwboer.htm 1). Intention to discriminate is not a requirement in South African law (see chapter 3 par 3.5.1.3 above). The US position is therefore different with regard to intent in the context of discrimination.

67 Section 706(g)(2)(A) of Title VII further provides: ‘No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or suspended or discharged for *any reason other than discrimination* on account of race, color, religion, sex, or national origin ...’ (own emphasis).

68 Section 703(j) of Title VII.

'[N]othing contained in this Title shall be interpreted to *require any employer* to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group *on account of an imbalance which may exist with respect to the total number or percentage of persons employed by any employer ... in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area*' (own emphasis).

A literal interpretation of this section would therefore imply that affirmative action cannot be compelled, but, in time, the courts confirmed that this was indeed lawful.⁶⁹

Title VII however provides that it is not an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions or privileges of employment, pursuant to (*inter alia*) bona fide seniority of employees, merit or incentive systems, as long as such differences are not the result of an intention to discriminate on the grounds of race, colour, religion, sex or national origin.⁷⁰ The merit principle was thus built in. Further, employers could, as a result, get away with discriminatory practices on the basis that there was no intention to discriminate on the grounds mentioned.

Title VII further specifies that it is not an unlawful employment practice for an employer to conduct, and to act upon the results of, any professionally developed ability test, as long as the test, its administration or the action flowing from the results is not designed, intended or used to discriminate on the grounds mentioned.⁷¹ Testing was therefore also built in.

69 Weiss 'We Want Jobs' 71 (see also par 4.1.3 below). In later years, the Civil Rights Act was amended to eliminate some of the shortcomings of the 1964 Act: (a) the Civil Rights Act of 1972 made the federal government the overseer of every hiring and promotion decision made by the states and local governments. It also statutorily confirmed several lower court decisions that had interpreted Title VII to mean that affirmative action steps could be taken by the courts to remedy discrimination; (b) the Civil Rights Act of 1978 prohibited discrimination on the basis of pregnancy; (c) the Civil Rights Act of 1991 reversed certain Supreme Court rulings that appeared to limit affirmative action and strengthened and restored the 1964 Act.

70 Section 703(h) of Title VII.

71 *Ibid.*

Title VII also established the Equal Employment Opportunity Commission (EEOC),⁷² an independent federal agency that administers various equal employment opportunity laws.

Evaluation of Title VII

Title VII prohibits discrimination in employment, but does not impose any statutory duty on the employer to implement affirmative action. However, as part of the remedies, the courts are empowered to order affirmative action in terms of section 706(g)(1).

3.6 Affirmative action for the aged, disabled, war veterans and disabled veterans

Other laws amplify or overlap Title VII, or have borrowed certain principles in order to protect other groups of people. For example, the Age Discrimination in Employment Act,⁷³ the Equal Employment Opportunity Act,⁷⁴ the Rehabilitation Act,⁷⁵ the Vietnam Era

72 Section 705 of Title VII. It carries out enforcement, education and technical assistance activities through various field offices. The EEOC has been assigned wide-ranging powers to investigate and resolve an alleged unlawful employment practice by informal methods of conference, conciliation and persuasion (in other words, methods short of litigation), and to recommend criminal proceedings and civil actions. The EEOC may, however, not impose remedies, as this is the task of the courts. The EEOC provides oversight and coordination in respect of all federal equal employment opportunity regulations, practices and policies.

73 Of 1967. This Act promotes the employment of persons of 40 years of age and older based on 'ability' rather than age, and prohibits arbitrary age discrimination. It provides special rules for some age-specific practices, such as bona fide executives, firefighters, police and elected or appointed officials. It covers private, state/local and federal entities, unions and employment agencies which have 20 or more employees. It does not provide for affirmative action as such. This Act prohibits discrimination on the basis of age in programmes and activities receiving federal financial assistance. Note that, like the South African EEA, this Act focuses on 'ability'.

74 Of 1972. It amended Title VII and extended its coverage to include both the public and private sectors, educational institutions, labour organisations and employment agencies. It expanded the powers of the EEOC to bring enforcement actions in the US courts. It provided that discrimination charges may be filed by organisations on behalf of aggrieved individuals, as well as by employees themselves.

75 Of 1973. It provides that all federal agencies give full consideration to the hiring, placement and advancement of 'qualified' persons with a mental or physical disability. It also requires employers to take reasonable measures to accommodate disabled persons and restricts the use of pre-employment and employment criteria that screen out persons with disabilities (s 501). No disabled

Veterans' Readjustment Assistance Act⁷⁶ and the Americans with Disabilities Act⁷⁷ prohibit discrimination and require that all individuals have equal opportunities for employment.

person may be excluded from participation in, be denied the benefits of or be subjected to discrimination under any programme or activity receiving federal financial assistance solely by reason of the handicap and by being 'otherwise qualified' (s 504). Note that, unlike the South African EEA, the Act applies to 'qualified' people.

76 Of 1974. It prohibits discrimination and requires affirmative action in all personnel practices for veterans who have served on active duty in the US and who comply with certain criteria, *inter alia* that the person must be 'qualified' or 'capable of performing a particular job' with reasonable accommodation of the disability. An affirmative action programme is required of all firms that have non-exempt government contracts or subcontracts of \$25 000 or more.

77 Of 1990. It provides for equal employment opportunity and non-discrimination in respect of 'qualified' individuals with disabilities in the private sector, and in state and local governments. It does not provide for affirmative action as such. Note that, unlike the South African EEA, only 'qualified' people may benefit under this Act.

3.7 Executive Orders⁷⁸

Subsequent to the introduction of Title VII, President Lyndon B Johnson's Executive Order (EO) No 11246⁷⁹ embodied the basic principles of Title VII and built on it in its 'equal opportunity' clause.⁸⁰ The Order has a dual purpose. First, it prohibits discrimination in hiring and employment decisions of non-exempt (federal) government contractors and subcontractors on the basis of race, creed, colour and national origin. Secondly, it requires contractors and subcontractors with a federal contract⁸¹ to take affirmative action in favour of 'qualified' minority group members and women to ensure equal employment opportunity.⁸² However, the Order does not define affirmative action or how it is to be applied. This is done by the Office of Contract Compliance Programs (OFCCP).⁸³

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- 78 An executive order is an order issued by the President that has the same force and effect as a statute. ILO Recommendation 111 emphasises that governments can do more for the promotion of equality than concern themselves merely with employment under their direct control. It urges member states to promote the non-discrimination principle by making the awarding of contracts conditional on observance of this principle. This could then benefit many employees, as private firms working under public contract often employ a substantial proportion of the total labour force (as in the US). Executive orders are an example of this (ILO Survey Equality in Employment and Occupation (1988) 37).
- 79 Issued in 1965. Executive Order 11246 is the end product of a series of orders issued by Presidents Roosevelt, Truman, Eisenhower, Kennedy and of subsequent 'surgical' revisions by Presidents Johnson, Nixon and Carter (Gutman *EEO Law* 234; Goldman & White 'United States of America' 334-5; *Graham* 2 134ff). Executive Order 10925 of 1961, the forerunner of Executive Order 11246, used the term 'affirmative action' first. This first EO required federal contractors to take affirmative action to ensure equal *employment opportunity*. Affirmative action as such was however not defined. Although a committee, sanctions and penalties were created, these were found to be ineffective. Unresolved disputes had to be referred to the Department of Justice for prosecution. However, no case was ever prosecuted under this system.
- 80 Section 202(1) of EO 11246 reads as follows: 'The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to race, color, religion, sex or national origin'.
- 81 Currently, contracts of \$50 000 or more and employers with 50 or more employees; thus basically bigger contracts and employers for federal government employment or government agencies, federal government contracts and subcontracts (supply and service) and construction contracts (Parts I; II; III of EO 11246). Specific goals in respect of women have also been established.
- 82 It specifies that affirmative action is *inter alia* extended to employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; lay-off or termination; rates of pay, or other forms of compensation, and selection for training, including apprenticeship (s 202(1) of EO 11246).
- 83 See par 3.7.1 below.

Sanctions and remedies for non-compliance are provided for. The Department of Labor⁸⁴ is empowered to issue regulations to enable federal agencies to impose such sanctions and penalties.

Executive Order 11375⁸⁵ added sex as a ground on which a person may not be discriminated against. Executive Order 11478⁸⁶ provided for protection for federal agency employees and strengthened equal employment opportunity programmes in the federal government for all persons, added religion as a basis for non-discrimination, provided for affirmative action on the grounds of age and disability, and promoted a continuing affirmative action programme in each executive department and agency. Executive Order 12086⁸⁷ contained Reorganization Plan 1, which transferred all sanctioning powers to the Department of Labor. The Secretary of Labor subsequently transferred all these powers to the OFCCP.

3.7.1 Office of Contract Compliance Programs

Nowadays, the Department of Labor administers EO 11246 through its Employment Standards Administration Office, which, in turn, undertakes such administration through the OFCCP.⁸⁸ The OFCCP requires each contractor to include an equal opportunity clause in

84 The role of the Department of Labor with regard to equal employment opportunity laws is limited. It deals with litigation against public entities and is involved in private-sector EEOC cases that reach the US Supreme Court. The department liaises with the EEOC, OFCCP and other agencies when drafting regulations. It may prosecute employers who provide agencies with false or misleading information.

85 Of 1967, s 202(1). (Executive Order 11114 of 1963 made provision for construction contracts. A slightly different approach to affirmative action is followed for the construction industry owing to the fluid and temporary nature of the industry. OFCCP itself establishes goals for each contractor and specifies the affirmative action measures that must be undertaken by each contractor. The regulations mainly explain the good faith efforts and steps on the part of contractors to increase the utilisation of minorities and women in the skilled trades).

86 Of 1969.

87 Of 1978.

88 The main purpose of the OFCCP is to obtain voluntary compliance from federal contractors and to resolve disputes. It may also impose remedies (unlike the EEOC) on contractors before court action is instituted. The OFCCP's jurisdiction covers approximately 26 million of the total civilian work force (<http://www.dol.gov/eh/Afra/ofccp/ofwedo.htm> 1). The OFCCP regulations played, and still play, a very important role in establishing affirmative action in the US. These regulations form

its contract with the government in terms of the equal employment opportunity clause of EO 11246.⁸⁹ In terms of the OFCCP's regulations, affirmative action programmes under the contract compliance programme constitute a 'management tool' designed to ensure equal employment opportunity. A central premise underlying affirmative action is that, in the absence of discrimination and over time, a contractor's work force will generally reflect the gender, racial and ethnic profiles of the labour pools from which the contractor recruits and selects.⁹⁰ Affirmative action programmes comprise a diagnostic component which includes a number of quantitative analyses designed to evaluate the composition of the work force of the contractor and to compare it with the composition of *relevant labour pools*.⁹¹ If women and minorities are not being employed at a rate to be expected given their availability in the relevant labour pool, the contractor's affirmative action programme will include specific practical steps designed to address this *underutilisation*.⁹² A contractor is required to engage in self-analysis for the purpose of discovering any barriers to equal employment opportunity and to set goals and timetables to end such underutilisation.⁹³ Further, an affirmative action programme includes those policies, practices and procedures that the contractor implements to ensure that all *qualified*⁹⁴ applicants and

the basis for affirmative action in many sectors at state and federal level. The regulations have been refined over a period of 40 years. The OFCCP drafts regulations, investigates complaints of discrimination, conducts compliance reviews and imposes sanctions and penalties for non-compliance with EO 11246. No other government agency conducts comparable, systemic reviews of employers' employment practices designed to eradicate discrimination. No provision is made for private lawsuits by employees. Instead, these must be by way of various fair employment practice laws, Title VII or other similar laws. However, employees may file complaints with the OFCCP, which may then be investigated. Generally, the OFCCP regulations have more teeth than the Civil Rights Act and its powers of administration and enforcement exceed those of the EEOC.

89 See par 3.7 above.

90 41 CFR 60-2.10(a)(1).

91 *Ibid.* Other than in South Africa where ss 42(a)(i); 42(a)(ii) of the EEA provide for equitable representation in relation to the demographic profile of the economically active population, nationally and regionally, as the pool from which the employer may reasonably be expected to promote or appoint 'suitably qualified' people.

92 *Ibid.* As part of its affirmative action programme, a contractor must monitor and examine its employment decisions and compensation systems in order to evaluate the impact of such systems on women and minorities (41 CFR 60-2.10(a)(2)).

93 41 CFR 60-2.10(a).

94 Unlike South Africa where provision is made for 'suitably qualified' people (see chapter 3 par 3.5.2.3(c)(iii); chapter 4 par 2.2 above).

employees enjoy equal opportunities as regards recruitment, selection, advancement and every other term and privilege associated with employment.⁹⁵

The concept 'underutilisation' has been interpreted as having fewer minorities and women in a particular job group than would reasonably be expected from their availability in the relevant labour force.⁹⁶ Availability is a matter of the proportion of minorities and women in the relevant labour pool. According to some authors, there is underutilisation if the disparity is *statistically significant*.⁹⁷ Another defines it as requiring a *significant difference* which cannot otherwise be accounted for.⁹⁸

The contract compliance clause makes equal employment opportunity and affirmative action compulsory and thus integral elements of a contractor's agreement with the government. Failure to comply with the non-discrimination or affirmative action provisions constitutes a violation of the contract.⁹⁹

It has been held that, like Executive Orders, the OFCCP basically constitutes a systemic response to discrimination in the US.¹⁰⁰

3.8 Definitions for minority groups

Under the Executive Orders and Title VII, officials drafted definitions and reporting forms in order to implement affirmative action for blacks, the main target group for

95 41 CFR 60-2.10(a)(3).

96 41 CFR 60-2.10(a); 60-2.11(b). See Gutman *EEO Law* 239; Fullinwider *Reverse Discrimination Controversy* 162.

97 Schlei & Grossman *Employment Discrimination* 779-80.

98 Bennet-Alexander & Pincus *Employment Law* 119. The relevant labour force varies according to job groups. It is generally related to the immediate labour area. In highly paid and highly skilled jobs, however, the recruiting area goes beyond the immediate labour area. Other factors that are taken into account as part of the availability analysis are the unemployment rates of programme beneficiaries and their availability for training, promotion or transfer, the existence of training resources, and the extent to which the employer can offer training so as to enhance employment opportunities for programme beneficiaries.

99 29 CFR 60-1.27.

100 Chabursky 'Employment Equity Act' 321.

affirmative action.¹⁰¹ Records show almost no discussion of why other minority groups in the US were included as beneficiaries of affirmative action. The answers as to why, when and how these groups were included (or later excluded) have been obtained from reports and archival documents of officials who did not have to answer to voters for their decisions.¹⁰²

However, the process of deciding who to include under affirmative action measures began much earlier in 1941 when anti-discrimination measures were initiated under President Roosevelt.¹⁰³ Initially, the grounds of race, colour, religion and national origin were used to police anti-discrimination. No reference to any particular group was found – not even to blacks, the prime group behind the civil rights movement.¹⁰⁴ The emphasis was on religious discrimination. By 1946, under President Truman, the Civil Rights Commission emphasised discrimination against blacks, but also described discrimination against other groups: (a) the World War II evacuation and internment of Japanese Americans; (b) citizenship limitations imposed on the Chinese and Japanese; (c) voting restrictions on Indian Americans; and (d) school segregation and jury restrictions in respect of Mexican Americans.¹⁰⁵

In time, the Civil Rights Commission moved away from religious discrimination towards an emphasis on colour. Groups whose colour made them more easily identifiable were set apart from the dominant majority, much more so than was the case with Caucasian minorities.¹⁰⁶

In their efforts to obtain information about employment patterns to support the work of the OFCCP, officials designed reporting forms for government contractors to reveal their

101 Graham 2 133.

102 *Op cit* 133-4. It has been pointed out that the civil servants and officials who shaped these outcomes had no idea that they were sorting out a process which, by the end of the twentieth century, would grant preference as regards jobs, government contracts and university admissions to government-designated official minorities, including approximately 26 million immigrants from Latin America and Asia who came to the US after 1965.

103 *Op cit* 134 (see fn 50 above).

104 *Op cit* 134-5.

105 *Op cit* 135. It also mentioned incidents of past bias against whites, for example against Jews in particular, and against Italians during World War II.

106 *Op cit* 135-6. Further hearings and reports by the Civil Rights Commission in the late 1950s continued this shift.

work force composition by race, ethnicity and sex.¹⁰⁷ Only in the 1960s was a group-based notion used, with contractors being required to count their employees as 'Negro', 'other minority' and 'total' employees.¹⁰⁸ For contractors with large numbers of employees, the forms stated that the contractor could furnish employment statistics for groups including 'Spanish-Americans, Orientals, Indians, Jews, Puerto-Ricans, etc'.¹⁰⁹ What is important, however, is that contractors were not provided with definitions to guide them in counting these groups.¹¹⁰

Once minority groups began being mentioned by name on the forms, ethnic groups other than those listed started lobbying for their inclusion. Mexicans, Japanese and Orientals were added as categories on the forms in 1962.¹¹¹ By 1965, an 'official' list existed of minorities that employers were required to count and report on. Five ethnic categories were listed at that stage, namely 'Negro', 'Spanish-American', 'Oriental', 'American Indian' and 'White' (although the last-mentioned category was not regarded as a minority).

When the EEOC was established in terms of the Civil Rights Act in 1965, it used this list as the basis for its own form, the EEO-1.¹¹² When riots occurred and officials had to speed up black job recruitment by devising race-conscious affirmative action programmes, the list of four official minorities was used.¹¹³ In this process, officials focused

107 At this stage, religion was not used, as it was held that it was an attribute that was barred to government inquiry by the First Amendment to the Constitution. Jews were, however, still included in the forms. Since employment records presumably did not list the employees' religious affiliation, it was unclear how a contractor's visual inspection might identify Jewish workers.

108 Graham 2 136.

109 *Ibid.*

110 It was unclear how a contractor should define Spanish-Americans, or how a distinction should be made between Spanish-Americans and Puerto Ricans. Presumably, employers were given latitude in this regard.

111 Graham 1 903; Goldman & White 'United States of America' 330-2. Orientals/Asians were included under anti-discrimination laws, but rather abstractly, as discrimination against them had diminished since World War II and there was no significant Asian civil rights movement. American Indians were added, but without any lobbying. Jews were removed from the form, as some black organisations had objected to them, and Jews did not contest the matter.

112 Graham 2 137 (see par 3.5 above).

113 *Ibid.* Although individual ethnic groups lobbied officials to include their groups, no records exist of civil rights leaders addressing the issue of which groups to include in form EEO-1. No hearings or

on underutilisation of minority groups in workplaces as an enforcement model and not on non-discrimination.¹¹⁴ By the 1970s, the EEOC had developed the 'disparate impact' (indirect discrimination) theory of discrimination and the courts upheld this. Officials of the Department of Labor followed the same approach.¹¹⁵ The department used the EEOC's form EEO-1 and duplicated the minority groupings. Subsequently, the Small Business Administration (SBA) also adopted this concept of official minorities, and the Public Works Employment Act (PWEA) in turn relied on the SBA.¹¹⁶

Large-scale immigration into the US played a role in extending the list of minorities for purposes of affirmative action.¹¹⁷ Affirmative action for women also developed as a result of a move away from the traditionally patriarchal society during the late 1970s.¹¹⁸

Moreover, in the 1970s, because members of minority groups had been given priority in the workplace and in schools, regardless of their individual social, educational or economic status, other minorities began to press for inclusion under affirmative action.¹¹⁹ And, once added, these groups fought to stay in the favoured category. The reasons why they were added have however remained obscure.

3.9 Public Works Employment Act of 1977

Still in the employment context, but extending beyond the individual

records of discussions are to be found involving contract compliance committees, the EEOC and women's organisations.

114 *Op cit* 138.

115 *Ibid.*

116 See par 3.9 below.

117 McCrudden 2 369-70; Skerry 'Immigration and the Affirmative Action State' 102-3; Graham 1 903; 906; 908. For example, Hispanic Americans (the largest immigrant group) organised themselves into rights organisations and demanded that they benefit from affirmative action policies. A further example is found in the 1980s when Hispanics reorganised and again demanded preference, this time to reflect the new demographics in Los Angeles where they then constituted 40 percent of that city's population.

118 McCrudden 2 369.

119 Glaser & Possony *Victims of Politics* 325; McCrudden 2 369. For example, Portuguese Americans, who resided in large numbers in Massachusetts and Rhode Island, secured privileges under affirmative action. Italian Americans also exerted pressure for their inclusion under affirmative action.

employer/employee situation, federal government later provided for rebuttable presumptions as regards beneficiaries of affirmative action. The Public Works Employment Act (PWEA) authorised state and local authorities to implement affirmative action plans. This Act built on the Small Business Act,¹²⁰ which had been subjected to severe criticism over the years.¹²¹ The PWEA has been designed to assist in the ongoing

120 Of 1953. As part of the federal Disadvantaged Business Enterprise (DBE) programme, this Act initially set out to 'aid, counsel, assist, and protect the interest of small business concerns in order to preserve free competitive enterprise', regardless of race or ethnicity. In 1967, after urban riots by blacks (see par 3.8 above), this policy was changed to establish set-asides for small businesses 'owned and controlled by socially and economically disadvantaged individuals'. These concepts were not defined and were thus unclear. Prime contractors were not required to hire DBEs, but received incentive payments if they did. The SBA required an applicant to identify with the disadvantages of his or her racial group generally, and that such disadvantages must have 'personally affected' the applicant's ability to enter into 'mainstream' business. Membership of a group on its own was not conclusive proof that an individual had been socially disadvantaged: the social or economic disadvantage of group members had to be determined on a case-by-case basis. In 1973, the SBA listed five groups presumed to be socially or economically disadvantaged (in terms of the EEOC's list) (see par 3.8 above). These were 'Black Americans, Hispanic Americans, Native Americans, Asian Americans, and other minorities'. No hearings were held, no formal findings were made, and no explanation was given as to why these particular groups had been included. In 1978, Congress provided a statutory basis for the SBA and broadened the ambit of the programme (s 8(a)). 'Socially and economically disadvantaged individuals' were defined to be those 'that have been subject to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities'. 'Economically disadvantaged individuals' were those socially disadvantaged individuals whose ability to compete in the free enterprise system had been impaired owing to diminished capital and credit opportunities as compared with others in the same business area who were not socially disadvantaged. Asian Americans were however omitted from the list of presumptively minority groups, but the following year Asian Pacific Americans (a broader group) were included as a result of active lobbying by Asian American groups. During the 1980s, further groups from India, Tonga, Sri Lanka, Indonesia, Nepal and Bhutan successfully petitioned the SBA for presumptive eligibility. Hasidic Jews, women, disabled veterans, Iranians and Afghans were, however, rejected (see fn 121 below). Again, Congress did this without formal hearings (Graham 1 905; Graham 2 138-9; 144-5; 148-9; La Noue & Sullivan 2 453-4).

121 Criticism centred on the fact that no consistent application regarding procedural or substantive standards could be discerned for including and excluding groups under the ambit of the Act. For example, the requirement that there must be evidence of 'long-term' prejudice and discrimination in American society was used to exclude Iranians, but was not applied to other new immigrant groups such as Asian Americans or Asian Pacific Islanders. Similarly, the application of the standard that groups not be too narrow and not represent only an individual nation, which was used against the Iranians, was inconsistent, in that, when the SBA expanded eligibility throughout most parts of Asia, it did so for particular countries such as Burma and Japan. The Tongans were found to be too small to warrant determination of minority-group status, but, in 1989, they were admitted together with people from the Marshall Islands and Micronesia. Women were not included, as the SBA did not want to extend beyond 'traditional minority groups', although there was substantial evidence of cultural discrimination against them in business. Hasidic Jews were excluded from participation on ostensibly constitutional grounds (although they were eligible under other plans of the Department of Commerce), despite the existence of clear discrimination against them. It was

efforts to deliver on the old promise of equality of economic opportunity.¹²² It contains a 'minority business enterprise' (MBE) provision which requires that at least 10 percent of every grant for any local public works project should be expended on MBEs.¹²³ An MBE is defined to mean a business, at least 50 percent of which is owned by minority group members who have been socially and economically disadvantaged. 'Minority group members' are defined to include¹²⁴

'[c]itizens¹²⁵ of the US who are Blacks, Spanish-speaking, Orientals, Indians, Eskimo's or Aleuts' (own emphasis).

'Socially and economically disadvantaged individuals' are defined as those¹²⁶

'that have been subject to racial or ethnic prejudice or cultural bias because of their identity as a *member of a group* without regard to their individual qualities' (own emphasis).

found that the SBA programme used criteria arbitrarily, with some groups being excluded as lacking evidence of long-term prejudice and discrimination in American society, while other groups with the same characteristics were admitted. Even as early as 1969, census data showed that, despite severe historic discrimination in the US against Japanese and Chinese Americans, they were economically successful. Government reports on the SBA programme made no reference to the citizenship or immigration status of participants. Census data on foreign-born residents showed, in 1996, that 16 million out of a total of 24,6 million foreign-born residents were non-citizens, yet they remained eligible for minority preferences under affirmative action programmes. Despite congressional admonitions that the SBA beneficiaries should not be defined strictly on racial grounds, 99 percent of all s 8(a) benefits went to businesses owned by members of 'people of colour' that the SBA had designated as presumptively socially and economically disadvantaged. This has led to a situation inconsistent with both the historical record and contemporary evidence of discrimination in the US. Tongans and Sri Lankans were included despite the fact that there was no history of discrimination owing to their fairly recent arrival in the US. On the other hand, groups such as Hasidic Jews and women, who have suffered from discrimination for hundreds of years, were excluded. By refusing to apply an empirical test of current socioeconomic status, the SBA was left with no principled basis for including Asian Indians and excluding Iranians, both recent immigration groups. And, because of the broader patterns of immigration that the SBA has not considered, Asian and Hispanic American businesses have been growing much faster and have received more benefits under s 8(a) than black Americans. The original motivation for the SBA programme has therefore been eroded (Graham 1 905-6; Graham 2 139-49; La Noue & Sullivan 2 461-3).

122 *Fullilove v Klutznick (Fullilove)* 100 S Ct 2758 (1980) at 2767.

123 Section 103(f)(2) of the PWEA.

124 *Ibid.*

125 Unlike Executive Orders and Title VII, which do not require citizenship in order to benefit.

126 With reference to the SBA (see fn 121 above).

'Economically disadvantaged individuals' are defined with reference to the SBA¹²⁷ as those

'socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged'.

However, the PWEA does not provide for blanket benefits for minority group members. It provides for a complaint procedure whereby two presumptions can be rebutted during the administrative process. These are: (a) the present effects of past discrimination have impaired the competitive position of businesses owned by minority groups; and (b) affirmative efforts to eliminate barriers to minority-firm access will ensure that contracts with available,¹²⁸ qualified,¹²⁹ bona fide¹³⁰ minority business enterprises will be concluded.

The purpose of the rebuttable presumptions is to provide reasonable assurance that the application of the programme will accomplish the remedial objective contemplated by Congress and that any misapplication of the racial and ethnic criteria can be remedied. In other words, it can be shown that some groups have not actually suffered from past discrimination, or that they are not still suffering from the effects of past discrimination. If it can be shown that a member of a specific disadvantaged group has not in fact been impaired by the effects of prior discrimination, such a person cannot benefit from the MBE clause. The Act also provides for a waiver procedure. In terms of this procedure, should it

127 See fn 121 above.

128 Economic Development Administration Guidelines 2-7, in terms of which the PWEA must be interpreted. An MBE is 'available' if the project is located in the market area of the MBE and the MBE can perform project services or supply materials at the time they are needed. The relevant market area depends on the kind of services or supplies which are needed.

129 *Ibid.* An MBE is 'qualified' if it can perform the services or supply the materials that are needed. Grantees and prime contractors are expected to use MBEs with less experience than available non-minority enterprises and should expect to provide technical assistance to MBEs as needed.

130 *Ibid.* An MBE is 'bona fide' if the minority group ownership interest is real and continuing and not created solely to meet the 10 percent MBE requirements.

be shown that, despite an effort being made, the level of MBEs cannot be achieved because there are not sufficient, relevant, qualified MBEs whose market areas include the project location, the contract may be given to another non-MBE bidder. This will be possible only in exceptional circumstances where significant efforts have been made to locate and enlist MBEs.

Evaluation of legislative framework

It can be stated that equal employment opportunity law in the US is a branch of labour law that focuses on workplace discrimination based on race, colour, religion, sex, national origin, age and disability.¹³¹ In this regard, Title VII of the Civil Rights Act is the most comprehensive law, protecting five of these seven classes, namely race, colour, religion, sex and national origin. Title VII protects both genders and all races in federal, state and local government, as well as in the private sector. The Executive Orders protect, in a more limited way, minorities and women and place a positive duty on employers to implement affirmative action programmes.¹³² It is noteworthy that no groups are mentioned in any of the laws discussed, but that certain minority groups were designated by officials.¹³³

In the US, therefore, a combination of programmes has been developed through legislation, executive regulation and administrative enactments in order to lay the basis for affirmative action. In practice, affirmative action assumes three forms in the US: (a) voluntary affirmative action taken by employers;¹³⁴ (b) a remedy in a discrimination case ordered by the court to prevent or settle lawsuits; or (c) part of an employer's responsibility as a contractor or subcontractor with the government under the OFCCP regulations.¹³⁵ In addition to anti-discrimination laws such as Title VII and the Executive Orders, a wider

131 Gutman *EEO Law* 1.

132 Specific legislation covers age, war veterans and disability (see par 3.6 above).

133 See par 3.8 above.

134 In terms of Title VII and as confirmed by *United States Steelworkers v Weber* (*Weber*) 99 S Ct 2721 (1979) at 2729.

135 Gutman *EEO Law* 233; Bennet-Alexander & Pincus *Employment Law* 140; Farber 'Affirmative Action' 979.

range of programmes has been introduced. For instance, the PWEA sets aside federal (and state) contract dollars for certain groups, with the aim of creating greater equality between races in particular.¹³⁶ Such preferential treatment is accorded to small businesses owned and controlled by socially and economically disadvantaged individuals and women.¹³⁷

4 BENEFICIARIES OF AFFIRMATIVE ACTION

4.1 Disadvantage

4.1.1 Introduction

Title VII, as pointed out above, protects both genders and all races.¹³⁸ It does not name any particular group – not even black Americans, the prime group intended to benefit from affirmative action.¹³⁹ In contrast to this, it has been pointed out that the beneficiaries of affirmative action in terms of Executive Order 11246 are more limited.¹⁴⁰ They are *minorities* and *women*. Minorities are defined in Form EEO-1 in terms of *race only* to mean:¹⁴¹

‘Blacks, Hispanics, American Indian or Alaskan Native and Asian or Pacific Islander’.

‘Black’ is defined as

136 McCrudden 2 369; Farber ‘Affirmative Action’ 979.

137 McCrudden 2 369.

138 See pars 3.5.2; *Evaluation of Title VII* above.

139 Graham 2 135.

140 See par 3.6 above.

141 See EEOC Standard Form 100 s 4 of the Appendix. ‘White’ is defined to mean ‘all persons having origins in any of the original peoples of Europe, North Africa or the Middle East’. See Brest & Oshige ‘Affirmative Action’ 877-97 for a general description of these groups. See par 3.6 above for the various acts protecting other classes of people, namely the aged, war veterans and the disabled.

'(not of Hispanic origin) all persons having origins in any of the Black racial groups of Africa'.

'Hispanic' means

'all persons of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish culture or origin, regardless of race'.

'Asian or Pacific Islander' means

'all persons having origins in any of the original peoples of the Far East, Southeast Asia, the Indian Subcontinent or the Pacific Islands. This area includes China, India, Japan, Korea, the Philippine Islands and Samoa'.

'American Indian or Alaskan native' means

'all persons having origins in any of the original peoples of North America, and who maintain cultural identification through tribal affiliation or community recognition'.

'Coloureds' as such are not included as a minority group. The situation therefore differs from that in South Africa where 'coloureds' are included under the generic, designated group, 'black people'. Disability in the US is covered by separate legislation, while in South Africa it is covered under the EEA.¹⁴²

4.1.2 Identifying beneficiaries

Racial or ethnic information required to complete forms and reports in the workplace must be obtained either by: (a) a visual survey of employees by supervisors or people to whom the employees report for instructions; or (b) from post-employment records on the identity of the workers.¹⁴³ Eliciting information by direct enquiry from the employee is not

142 See chapter 3 par 3.5.2.3(c)(iii) above.

143 EEOC Standard Form 100 s 4 of the Appendix.

encouraged. In practice, however, self-identification is used.¹⁴⁴

For purposes of reporting, an employee may be included in the group to which he or she 'appears to belong, identifies with, or is regarded in the community as belonging'.¹⁴⁵ No person may be counted in more than one race/ethnic group.¹⁴⁶ It is recommended that records be kept separately from the employee's personnel file or other records available to those responsible for personnel decisions. Such individual records are confidential, as laid down by section 709(e) of Title VII, but this does not apply to contracts under the OFCCP and EO 11246.¹⁴⁷ Conducting visual surveys and keeping records on race/ethnicity are legal in all jurisdictions and under all federal and state laws.¹⁴⁸ Such racial/ethnic designations are not, however, scientific definitions of anthropological origins.¹⁴⁹

4.1.3 Case law

4.1.3.1 Introduction

In the analysis of case law that follows the focus will be on US Supreme Court decisions that have interpreted the concept of affirmative action and its beneficiaries.¹⁵⁰ Any reference hereafter to 'Supreme Court' or 'court' refers to the US Supreme Court. State supreme courts¹⁵¹ and other courts will be mentioned by name. The main focus is on

144 Banton *Discrimination* 78.

145 EEOC Standard Form 100 s 6 of the Appendix.

146 *Ibid.*

147 *Ibid.*

148 *Ibid.*

149 *Ibid.*

150 The Supreme Court has final authority with respect to the legal interpretation of the Federal Constitution and other federal laws (see fn 151 below for the interaction between federal and state laws).

151 Many states have their own anti-discrimination laws which closely mirror federal legislation. Some states extend their laws to protect grounds, such as sexual orientation, not protected by federal legislation. State laws also cover small employers who are not covered by federal law (Goldman & White 'United States of America' 309-12). The interaction and conflicting decisions between

majority decisions, but minority or dissenting views of particular importance will be referred to.¹⁵² It has often been found that the dissenting opinion in one case becomes the majority position in a subsequent case. Also, a plurality of opinions is often found, none of which constitute a majority opinion, and with wide gaps even between opinions concurring in the result.¹⁵³

Generally, cases have been brought before the court by non-minority members (white males), unions representing white workers – alleging the infringement of their Fourteenth Amendment and Title VII rights – or by unsuccessful non-minority bidders for

federal and state courts are worth noting. It has been observed that state constitutions have through most of American history held the guarantees of the federal Bill of Rights to be inapplicable to the actions of state governments (*Barker Civil Liberties* 15-9). Also, state constitutions include bills of rights, but state courts have done little to extend constitutional protection to civil liberties. When, after World War I, the US Supreme Court began placing greater emphasis on civil liberties, and the state courts started playing a bigger role, this was mostly restricted to enforcing federal and not state constitutional protections. The US Supreme Court gradually applied certain provisions of the federal Bill of Rights to states through the use of the equal protection clause of the Fourteenth Amendment. Litigants sued in state as well as federal courts. The actual issue revolved around whether the specific guarantees of the Bill of Rights were applied narrowly or broadly as restrictions on the states. Most cases were now framed as federal constitutional violations, rather than as state constitutional claims, the reason being that the US Supreme Court had begun to display a sympathetic attitude towards civil liberties and, owing to incorporation, a national ruling would automatically apply to all states. In contrast, achieving the same goal in the states (particularly in the southern state courts) would require litigation in each state, a far more costly and uncertain route. From the mid-sixties, the focus moved again from the US Supreme Court to state courts owing to the fact that states were assigned more policy-making responsibilities. Much of the battle over civil liberties shifted to a contest over state laws, both statutory and constitutional. In 1983, the US Supreme Court held that it lacked the authority to review state court decisions that were clearly based on state law (*Michigan v Long* 463 US 1032 (1983)). It held that, without a plain statement by the state court describing 'the adequate and independent state ground' on which it based its judgment, it would assume that the state court's finding rested on its interpretation of federal law, which could be subjected to US Supreme Court review. In other words, state court interpretation of rights under state constitutions was immune from federal review, but interpretations under the US Constitution were not. Hereafter, litigants brought more of their claims under state constitutions, but they did not limit themselves totally. State judges further tended to rely predominantly on federal laws when given a choice. The US Constitution, however, takes precedence over state constitutions and states cannot restrict civil liberties beyond what the federal government guarantees. They are, however, free to extend same beyond what the federal government guarantees. In this regard, *Barker Civil Liberties* 19 fn 22 refers to Brennan's J's view that the federal Bill of Rights should be used as a floor, rather than a ceiling.

152 A lack of majority decisions is often encountered. As a result, no single set of standards has evolved in the US (Peirce 'Progressive Interpretation of Subsection 15(2)' 269).

153 *Op cit* 267 for similar criticism that US case law cannot be rationalised and that, in some instances, programmes validated by the court are only distinguishable on technical grounds from those that have been invalidated. This may be attributable to the fact that the US Supreme Court is a political instrument with politics having played a large part in the development of judicial theories of equality and in how to accommodate affirmative action (see also chapter 1 fn 90 above).

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local or federal contracts.

In the discussion that follows, case law under mainly Title VII, the Fourteenth Amendment¹⁵⁴ and the MBE clause of the PWEA will be covered. Generally, a plaintiff may sue a public employer for discrimination under either the Fourteenth Amendment or Title VII, but may sue a private employer only under Title VII.¹⁵⁵ To be constitutional, an affirmative action plan must pass the test of strict scrutiny.¹⁵⁶ It will be seen in the discussion below that, for a public employer, this entails that a compelling interest must be shown and that the affirmative action plan must be narrowly tailored. Proving a compelling interest requires that there must be strong evidence of past discrimination that needs to be rectified in respect of a specific group, as well as of individual discrimination. Title VII challenges are subjected to a less demanding standard which requires a 'manifest imbalance' in a traditionally segregated job category and a remedy that does not unnecessarily trammel the rights of non-minorities or seek to maintain a balanced workforce by way of permanent measures.¹⁵⁷

4.1.3.2 *Past personal disadvantage*

The same debate that took place in South Africa as to whether actual past disadvantage or mere membership of a targeted group must exist and be shown before a person can benefit from affirmative action, also took place in the US. But, there, it happened in the context of the *purpose* and *design* of affirmative action programmes.

154 There is no equivalent of the equality clause in the South African Constitution (ss 9(1); 9(2)) in the US Constitution, where equality issues are dealt with in terms of the Fourteenth and the Fifth Amendments. It will be seen below that the court has largely adopted an anti-discrimination approach to equality, which renders affirmative action an exceptional measure that the states must support as a justifiable breach of equality rights (*op cit* 266).

155 Byrne 'Toward a Colorblind Constitution' 624 (see par 3.8 fn 59 above).

156 No limitations clause exists. Therefore, the Supreme Court has developed three standards of scrutiny: rational basis (for federal classifications), strict scrutiny (for state classifications) and intermediate scrutiny (for gender classifications by the state and federal government) (McCrudden 2 371; Bennett-Alexander & Pincus *Employment Law* 119; Dworkin 2 412-26).

157 Byrne 'Toward a Colorblind Constitution' 624. In 1989, however, the court decided that *all* racial classifications should serve a compelling interest and be subject to strict scrutiny (see *Adarand Constructors v Pena* (*Adarand*) 115 S Ct 2097 (1995)) (see pars 4.1.3.5(a); 4.3.4.3(a)(iii) below for a discussion of this case).

(a) *Bakke case*

The case of *Regents of the University of California v Bakke*¹⁵⁸ (*Bakke*) (the first case on affirmative action to actually reach the Supreme Court) illustrates the controversy that arises when preference is given based on historic discrimination rather than *past personal* discrimination. The case came before the court as a review application. The issue before the court was a challenge to the special admissions programme of the Davis Medical School of the University of California (petitioner) that was designed to ensure the admission of a specified number of students from certain minority groups. The programme set aside 16 out of 100 seats for the entering class exclusively for racial minority applicants defined as Black, Native, Hispanic and Asian Americans. The respondent, Bakke (a white male with scores higher than those of any of the students admitted under the programme and who had twice been denied admission), alleged that the admissions plan was based on improper racial considerations, operated as a racial and ethnic quota, and denied him a place in medical school. He argued that the programme excluded him because of his race and that he was consequently being discriminated against. The plan, he argued, violated Title VII and his Fourteenth Amendment right to equal treatment under the law. He asked that the programme be declared illegal and invalid, and for an injunction directing his admission to the school.

The court produced six separate opinions, none of which was a majority opinion. Powell J (opinion of the court) interpreted equal protection as requiring that the same protection be given to every person regardless of race.¹⁵⁹ This implies equality of *treatment*, or formal equality.¹⁶⁰ He held that the guarantees under the Fourteenth Amendment extended to 'all persons' and that the rights established were thus personal rights.¹⁶¹ The court further held that racial and ethnic distinctions 'of any sort' were

158 98 S Ct 2733 (1978).

159 At 2747.

160 See chapter 2 par 3.1.2 above.

161 At 2747-8. Powell J applied strict scrutiny even though the discrimination related to whites rather than a 'discrete and insular minority' (as originally termed in *United States v Carolene Products Co (Carolene)* 304 US 144 (1938) (*Carolene*)(at 2748).

inherently suspect and called for the most exacting scrutiny.¹⁶² It stated:¹⁶³

‘Courts may be asked to validate burdens imposed upon individual members of a particular group in order to advance the group’s general interest ... *Nothing in the Constitution supports the notion that individuals may be asked to suffer otherwise impermissible burdens in order to enhance the societal standing of their ethnic groups* ... [p]referential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having *no relationship to individual worth*’ (own emphasis).

The liberal individualistic notion of equal protection was emphasised.¹⁶⁴

‘...[i]t is the *individual* who is entitled to judicial protections against classifications based upon his racial or ethnic background because such distinctions impinge upon *personal* rights, rather than the *individual only because of his membership in a particular group* ...’ (own emphasis).

The court focused its equal protection analysis on the *remedial* and *diversity* justifications for affirmative action programmes. It held that an affirmative action programme might be constitutional if properly created. To determine constitutionality, Powell J reasoned that the plan should be reviewed under the strict scrutiny test, with government having to prove that the classification was necessary to serve a ‘compelling’ governmental interest and was ‘narrowly tailored’ to satisfy that interest.¹⁶⁵

The court considered the purposes of the special admissions programme, which were: (a) to reduce the historic deficit of traditionally disfavoured minorities in medical schools and in the medical profession; (b) to counter the effects of societal discrimination; (c) to increase the number of physicians who would practice in underserved communities;

162 At 2748.

163 At 2752-3. Powell J went to great lengths to explain that the meaning of the equal protection clause should not be linked to transitory considerations, but should hold true from one generation to the next: ‘[t]he court’s role is to discern “principles sufficiently absolute to give them roots throughout the community and continuity over significant periods of time, and to lift them above the level of the pragmatic political judgements of a particular time and place”’.

164 At 2753. See also Fried ‘Two Concepts of Equality’ 108-9.

165 At 2757.

and (d) to obtain educational benefits that flow from an ethnically diverse body.¹⁶⁶

Powell J referred, with approval, to the *Brown* case supra where ‘wrongs worked by specific instances of racial discrimination’ were redressed by the courts. With this approach in mind, he could not find any evidence that three of the four purposes of the special admissions plan would actually be achieved by the programme. Although the state certainly had a legitimate and substantial interest in ameliorating or eliminating the disabling effects of discrimination (in other words, it was constitutionally justified), Powell J considered the remedying of the effects of ‘societal discrimination’ in this instance to be insufficient, as he viewed it as¹⁶⁷

‘an *amorphous* concept of injury that may be *ageless in its reach into the past*’ (own emphasis).

He sought to limit the use of affirmative action to remedying explicit ‘judicial, legislative or administrative findings of specific constitutional or statutory violations’.¹⁶⁸ Only the diversity purpose in higher education as a ‘compelling interest’ was approved.¹⁶⁹

It was held that race could be taken into account in an admission programme, but only as a ‘plus’ where there was a compelling state interest furthered by doing so, such as *remedying* past discrimination. Race could, however, *not* be the *only* criterion for admission.¹⁷⁰ The fatal flaw of the plan was thus to disregard the individual’s rights as guaranteed by the Fourteenth Amendment.¹⁷¹ Although these rights were held not to be

166 At 2757-61.

167 At 2757-8.

168 At 2757. However, Brennan J, White J, Marshall J (concurring in the judgment and dissenting in part) accepted the post hoc declarations by the medical school, without any particularised findings of discrimination, to establish the remedial purpose of the admissions plan (at 2776-7; 2784-5; 2788-9).

169 At 2759-61.

170 At 2762. This is similar to the position in South Africa where race to a large extent determines the designated groups, but not on its own. The EEA also holds that affirmative action candidates must be ‘suitably qualified’ (see chapter 3 par 3.5.2.3(c)(iii); chapter 4 par 2.2 above).

171 At 2763. In the sense that the plan totally excluded certain applicants from a specific percentage of the seats in an entering class, independent of their qualifications, quantitative and extra-curricular accomplishments, and their potential to contribute to educational diversity. In other words, if you were not a Negro, Asian or chicano, you could not compete for the special admission

absolute, the court stated that an individual was entitled to a demonstration that the challenged classification was necessary to promote a 'substantial state interest' when a state's distribution of benefits '[hinged] on ancestry or the color of a person's skin'.¹⁷² This view thus emphasised historical discrimination based on judicial, legislative or administrative findings of specific constitutional or statutory violations.¹⁷³ It was found that the admissions plan violated the Fourteenth Amendment and was therefore invalid. An injunction directing that *Bakke* be admitted to the school was accordingly granted.¹⁷⁴

The court also touched on the problem of which groups to prefer in cases of affirmative action. Powell J indicated his unwillingness to enter into the debate on the evidence required to show past discrimination and to judge the prejudice and harm suffered by minority groups.¹⁷⁵

'The concepts of "majority" and "minority" necessarily reflect *temporary arrangements and political judgements*. ... the white "majority" itself is composed of various minority groups, most of which can lay claim to a history of prior discrimination at the hands of the state and private individuals. Not all of these groups can receive preferential treatment and corresponding judicial tolerance of distinctions drawn in terms of race and nationality, for then the only "majority" left would be a new minority of white Anglo-Saxon Protestants' (own emphasis).

Powell J was uncomfortable that there was 'no principled basis' for deciding which groups would merit 'heightened judicial solicitude' and which would not.¹⁷⁶ He was critical of the fact that courts could be asked to evaluate the extent of the prejudice and harm suffered by various minority groups. Those whose societal injury was thought to exceed some 'arbitrary level' of tolerability would then be entitled to preferential

seats. The preferred applicants however had the opportunity to compete for every seat in the class.

172 *Ibid.*

173 At 2757.

174 At 2763-4.

175 At 2751-2.

176 At 2752.

classifications 'at the expense of individuals belonging to other groups'. He continued:¹⁷⁷

'As these preferences began to have their desired effect, and the consequences of past discrimination were undone, *new judicial rankings would be necessary*' (own emphasis).

He held that the kind of variable sociological and political analysis necessary to produce such rankings simply did *not* lie within the judicial competence – even if they otherwise were 'politically feasible and socially desirable'.¹⁷⁸

He criticised the admission plan for its under-inclusiveness, that is for including only certain groups. He questioned the fact that the university was unable to explain its selection of only four favoured groups – Negroes, Mexicans, American Indians and Asians – for preferential treatment. The inclusion of the last group was found to be especially curious in the light of the substantial number of Asians admitted through the regular admissions process.¹⁷⁹

Blackmun J (dissenting) held an opposite viewpoint. He accepted that the Fourteenth Amendment rights were personal, that racial and ethnic distinctions (where they were stereotypes) were inherently suspect and called for strict scrutiny, and that the Fourteenth Amendment had been expanded beyond its original 1868 concept and was recognised as having reached a point where it embraced 'a broader principle'.¹⁸⁰

Blackmun J emphasised that it would be impossible to have a racially neutral and successful affirmative action programme.¹⁸¹ Therefore,¹⁸²

'in order to get *beyond racism*, we must *first take account of race*. There is no other way' (own emphasis).

177 *Ibid.*

178 *Ibid.*

179 At 2758 fn 45.

180 At 2806.

181 At 2807.

182 *Ibid.*

He stated that the court could not – and dare not – let the equal protection clause perpetuate racial supremacy. Thus, in order to¹⁸³

[t]reat some persons *equally*, we must treat them *differently*' (own emphasis).

This view represents substantive equality or a group-based approach.¹⁸⁴ It sees groups as having a status independent of, and even superior to, that of the individual.¹⁸⁵ Although he expressed the hope that the time would come when affirmative action would be unnecessary and would merely be a 'relic' of the past, he acknowledged that, in the context of the *Brown* case (decided almost a century before, at that stage), that hope was a slim one.¹⁸⁶

In a somewhat similar dissenting opinion, Marshall J held that it was unnecessary in twentieth-century America to have individual Negroes demonstrate that they had been actual victims of racial discrimination. He found 'ample' support that a university could employ race-conscious measures to remedy past societal discrimination, without the need to show that those benefited had actually been discriminated against.¹⁸⁷

'the racism in our society has been *so pervasive that none, regardless of wealth or position, has managed to escape its impact*. The experience of Negroes in America has been different *in kind*, not just in degree, from that of *other ethnic groups*. It is not merely the history of slavery alone but also that *a whole people were marked as inferior by the law*. And that mark has endured' (own emphasis).

The dissenters, Marshall, White, Blackmun and Brennan JJ, basically agreed that

183 *Ibid.* Blackmun J emphasised the 'breadth', 'flexibility' and 'ever-present modernity' which were basic to US constitutional law.

184 See chapter 2 par 3.1.3 above.

185 At 2807. See Fried 'Two Concepts of Equality' 109. Marshall J (at 2797-805) and Brennan J (2765-794) also followed the group-based conception of equality.

186 At 2805-6. He was optimistic that, at some time beyond any period that some would claim was only 'transitional inequality', the US would reach a stage of maturity where affirmative action was no longer necessary. 'Then persons will be regarded as persons, and discrimination of the type we address today will be an ugly feature of history that is instructive but that is behind us'.

187 At 2804.

evidence of broad 'societal discrimination' could justify the use of affirmative action.¹⁸⁸ However, they did not define the concept 'societal discrimination'.

(b) *Weber* case

Following on *Bakke*, *United States Steelworkers v Weber*¹⁸⁹ (*Weber*) interpreted the design of a voluntary affirmative action programme in depth. The majority made it clear that Title VII permitted equality of opportunity, while the dissenters' approach was that of equality of treatment.

The majority upheld the affirmative action plan (under which the beneficiaries were not necessarily chosen from among those who had actually been victimised) under Title VII and laid down specific criteria by which the design of affirmative action programmes would be judged for the next twenty years or so. First, the legitimate expectations of whites should not be trammelled unnecessarily. No white person could be dismissed in order to be replaced by a black person, and there should not be an absolute bar to the advancement of white employees.¹⁹⁰ Secondly, the plan must be temporary, with either a specified date or goal which would terminate the plan. The plan must only continue for as long as necessary to correct the problem.¹⁹¹ Thirdly, the plan must be flexible and could not be used to maintain a fixed percentage of minority employees, but only to eliminate 'manifest racial imbalances' in a traditionally segregated workplace or job category (thus differing from *Bakke* supra). Such an imbalance would end when the percentage of black skilled workers in the employer's work force approximated the percentage of blacks in the *local* labour force.¹⁹²

188 At 2765-805.

189 99 S Ct 2721 (1979). *Weber* filed a Title VII challenge to a voluntary affirmative action plan by a private employer. The employer required prior craft experience for skilled jobs. However, the unions that taught these crafts traditionally excluded blacks. To correct this pattern of discrimination by the union, the employer implemented in-house training and, in its affirmative action plan, temporarily reserved 50 percent of all new training slots for blacks. *Weber* sued when several slots were subsequently awarded to black employees with less seniority than he himself had. The majority upheld the plan.

190 At 2731.

191 *Ibid.*

192 *Ibid.*

(c) *Stotts* case

Later cases explicitly held that affirmative action was *not* available to individuals who had *not actually* been illegally discriminated against. For example, in *Firefighters Local Union No. 1784 v Stotts*¹⁹³ (*Stotts*), the Supreme Court had to decide on the legality of an affirmative action plan under Title VII (the purpose of which was to remedy past discriminatory hiring and promotion practices) which was in conflict with a bona fide seniority system.¹⁹⁴ The (white) union challenged the lay-offs on the basis that blacks with less seniority than whites should be laid off.

The majority followed a formal approach to equality, emphasising 'victim specificity'.¹⁹⁵ They held that an affirmative action plan could not take precedence over a legitimate seniority system. It was made clear that each individual had to prove that the discriminatory practice had an impact on him personally.¹⁹⁶ But, even when an individual showed that the discriminatory practice had a impact on him, he would not automatically be entitled to be awarded a position similar to that wrongfully denied in the past if the only way to make such a position available were to have an innocent, non-minority employee laid off.¹⁹⁷

The majority held that this was consistent with the policy behind Title VII, which limited the court's actions in awarding relief to those individuals who proved that they had been *actual victims*.¹⁹⁸ This policy, the court held, was repeatedly expressed by the proponents of the Civil Rights Act during the congressional debates.¹⁹⁹

193 104 S Ct 2576 (1984). As was held in the first case on affirmative action in South Africa (see chapter 4 par 2.1.3.1(a) above).

194 Section 703(h) of Title VII protects bona fide seniority systems (see par 3.5 above).

195 See Giampetro & Kubasek 'Individualism in America' 179.

196 At 2588.

197 *Ibid.*

198 *Ibid.*

199 At 2588-9. An interpretative memorandum relating to the Civil Rights Bill entered into the Congressional Record made it clear that a court was not authorised to give preferential treatment to non-victims. Further similar assurances were provided by supporters of the Bill throughout the legislative process. After the Bill was passed, Senate sponsors also published such memoranda.

But, again, Blackmun J (dissenting) raised the issue that an affirmative action plan was more *group-based* than individual-based, as its purpose was to provide a remedy for the discriminated-against 'group as a whole', rather than for any of the individual members of the group.²⁰⁰ He stated that the discrimination sought to be alleviated by race-conscious relief was the 'class-wide' effects of past discrimination, rather than discrimination against its individual members. The distinguishing feature of race-conscious relief was that no individual member of the disadvantaged class had a *right* to claim relief, and individual beneficiaries need *not* show that they themselves had been victims of discrimination.²⁰¹

4.1.3.3 *Group membership*

Subsequent to *Stotts*, the Supreme Court however changed the requirement of actual past discrimination and found in two instances that beneficiaries need *not* show actual past discrimination.

(a) *City of Cleveland case*

In *Local No 93 International Association of Firefighters v City of Cleveland*²⁰² (*City of Cleveland*), the validity of a consent decree requiring race-conscious promotion quotas and numerical goals under Title VII was questioned. The applicant union, Local 93 (representing white workers), brought the action based on the fact that members of the *Vanguards* (a union representative of blacks), who were not *actual* victims of discrimination, would benefit from the plan concerned.

A majority upheld the right of the city to agree on an affirmative action plan (which was remedial in nature) with the *Vanguards* and to incorporate that plan into a consent decree. Title VII, it was held, should not be construed too narrowly and might benefit

200 At 2606.

201 *Ibid.*

202 106 S Ct 3036 (1986).

individuals who were *not* the actual victims of a defendant's discriminatory practices.²⁰³

Two judges among the minority held that no relief could be granted to non-victims under 'any circumstances'.²⁰⁴ Another judge held that relief might be granted to non-victims if there was an 'egregious violation', and where the relief did not involve quotas.²⁰⁵

(b) *Local 28 case*

Similarly, in *Local 28 of Sheet Metal Workers v EEOC*²⁰⁶ (*Local 28*), the Supreme Court held that actual discrimination against the individual need not be shown, as long as the affirmative action plan met the appropriate requirements (as set out in *Weber supra*)²⁰⁷ and the person fitted into the category of employees that the plan was designed to benefit. The (white) union argued that the affirmative action programme exceeded the scope of remedies available under Title VII because the court had extended the remedy to individual blacks and Hispanics who, the union argued, were not identified as actual victims of unlawful discrimination.

The court stressed the fact that the affirmative action plan at issue was designed to provide collective and not individual relief. While no individual was entitled to relief, beneficiaries need not show that they themselves were victims of discrimination.²⁰⁸ Brennan J (for the majority) examined the history of Title VII afresh and came to a radically different conclusion from that in *Stotts supra*.²⁰⁹ He held that the language of section 706(g) plainly expressed Congress' intent to vest courts with a 'broad discretion' to award

203 At 3071. Similar to the view put forward by Blackmun J in *Stotts* 104 S Ct 2576 (1984) (see par 4.1.3.2(c) above).

204 At 3082-5.

205 At 3081. The minority also emphasised the fact that the preferential plan did not: (a) require the hiring of unqualified blacks; (b) the termination of the employment of white employees; and (c) impose any unsurmountable impediments to the promotion of non-minorities. The court recognised the 'merit' principle.

206 106 S Ct 3019 (1986).

207 99 S Ct 2721 (1979) (see par 4.1.3.2(b) above).

208 At 3071.

209 104 S Ct 2576 (1984) (see par 4.1.3.2(c) above).

'appropriate' equitable relief to remedy unlawful discrimination.²¹⁰ With regard to the union's argument that the last sentence of section 706(g) prohibited a court from ordering an employer or union to take affirmative action to eliminate discrimination which might 'incidentally' benefit individuals who were not actual victims, he rejected such argument.²¹¹ He held that, on face value, the last sentence addressed only the situation where a plaintiff demonstrates that a union or an employer has engaged in unlawful discrimination, but the union or employer shows that a particular individual would have been refused admission, even in the absence of discrimination, for example because that individual was unqualified.²¹² In these circumstances, he held, the section confirmed that a court could not order the union or employer to admit the *unqualified* individual.²¹³

The court confirmed that the availability of race-conscious affirmative action relief under section 706(g) as a remedy for a violation of Title VII also furthered the broad purposes underlying the statute. Congress, the court held, had enacted Title VII based on its (Congress') determination that racial minorities were subject to pervasive and systemic discrimination in employment.²¹⁴ The crux was to open up employment opportunities for Negroes in occupations which had been traditionally closed to them. It was to this problem that Title VII's prohibition against racial discrimination in employment was primarily addressed. Title VII was designed to achieve equality of *employment opportunities* and to remove barriers that had operated in the past to fa-

210 At 3034.

211 *Ibid.*

212 At 3035.

213 *Ibid.*

214 *Ibid.*

your white employees over other employees.²¹⁵ An approach of equality of opportunity was thus followed.²¹⁶

It was explained that, in most cases, the court need only order an employer to stop engaging in discriminatory practices and award make-whole relief to the individuals victimised by the practices concerned. However, in some instances, the court held, it might be necessary to require affirmative action steps to end discrimination effectively. Where an employer or union had engaged in ‘particular longstanding or egregious discrimination’, affirmative action to hire and admit qualified minorities was applicable as the ‘only effective way’ to ensure the full enjoyment of the rights protected by Title VII.²¹⁷

Further, where the union or employer formally ceased to engage in discrimination, informal mechanisms might obstruct equal employment opportunities. An employer’s reputation for discrimination, for example, might discourage minorities from seeking employment. In these circumstances, affirmative action might be the only means to assure equality of employment opportunities and to eliminate those discriminatory practices and decisions fostering racially stratified job environments to the disadvantage of minority citizens. In this sense, the court thus supported the remedial aspect of affirmative action.

The court’s examination of the legislative history of Title VII indicated that, when examined ‘in context’, Congress did not intend to limit relief under section 706(g) to actual victims of discrimination only.²¹⁸ Rather, the court found, the relevant statements were intended largely to reassure opponents of the Civil Rights Bill that it would not require employers or unions to use racial quotas or to grant preferential treatment to racial minorities in order to avoid being charged with unlawful discrimination.²¹⁹

(c) *Johnson case*

215 *Ibid.*

216 See chapter 2 par 3.1.4 above.

217 *Ibid.* A reference to the merit principle.

218 At 3038 (in contrast to *Stotts* 104 S Ct 2576 (1984) (see par 4.1.3.2(c) above).

219 At 3039. The minority had similar views to those held in the *City of Cleveland* 106 S Ct 3036 (1986) (see par 4.1.3.3(a) above).

Affirmative action for women under Title VII was approved by the court in *Johnson v Transportation Agency of Santa Clara County*²²⁰ (*Johnson*), but subject to the less demanding test of intermediate scrutiny. Although not addressed specifically, it appears that the court assumed that group membership was sufficient in order to benefit from affirmative action. This case was brought by Johnson (a white male), who had been refused promotion in favour of a white female with a slightly lower rating than he himself had obtained. He alleged that sex was the 'determining factor' in the selection. Brennan J (opinion of the court) stated that the existence of a 'manifest imbalance in a traditionally segregated job category' was sufficient to justify the appointment and promotion of women as a way of correcting such imbalances (similar to *Weber* supra²²¹). An employer justifying an affirmative action plan therefore need not point to its own prior discriminatory practices, but only to a 'conspicuous imbalance' in 'traditionally segregated job categories'.²²²

In determining whether an imbalance actually existed, a comparison of the percentage of minorities or women in the employer's work force with the percentage in the labour market area or general population was appropriate in analysing jobs requiring no special expertise.²²³ However, where a job required special training, the comparison should be with those in the labour force who possessed the relevant qualifications.²²⁴ The court did not specify exactly how great a disparity must exist, other than to hold that it need not be big enough to support a prima facie case.²²⁵ This was so because the court did not regard the constraints of Title VII and the Fourteenth Amendment on voluntary affirmative action plans as being identical. Application of a prima facie case in Title VII cases would

220 480 US 616 (1987).

221 99 S Ct 2721 (1979) (see par 4.1.3.2(b) above).

222 At 1449-51.

223 At 1452. The court relied on *Teamsters v United States* 431 (*Teamsters*) US 324 (1977) where a comparison between the percentage of blacks in the employer's work force and in the general population was found to be proper in determining the extent of imbalance in truck-driving jobs, and on *Weber* 99 S Ct 2721 (1979) (see par 4.1.3.2(b) above).

224 *Ibid.*

225 *Ibid.*

discourage employers from implementing voluntary affirmative action plans.²²⁶ In some instances, it held, the manifest imbalance might be sufficiently egregious to establish a prima facie case. However, as long as there was a manifest imbalance, an employer could adopt an affirmative action plan, even where the disparity was not so striking, without being required to introduce non-statistical evidence of past discrimination that would be demanded by the prima facie standard.²²⁷ The court held that when there was sufficient evidence to meet the more stringent prima facie standard, be it statistical, non-statistical, or a combination of the two, the employer was of course free to adopt an affirmative action plan.²²⁸

O'Connor J (concurring in the judgment, but having a separate opinion) held that the proper enquiry into an affirmative action plan under Title VII was 'no different' from that under the equal protection clause of the Fourteenth Amendment. An employer must have a 'firm basis' for believing that remedial action was necessary.²²⁹ This could only be so where there was²³⁰

'statistical disparity sufficient to support a prima facie claim under Title VII by the beneficiaries of the affirmative action plan of a pattern or practice claim of discrimination'.

4.1.3.4 *Strong evidence of past discrimination*

(a) *Wygant case*

Although it is clear when perusing further case law that the basics of *Bakke*, *Weber*,

226 *Ibid.* Title VII was intended to be a 'catalyst' for employer efforts to eliminate discrimination. A corporation was hardly likely to adopt an affirmative action plan if it had to compile evidence that could be used to subject it to a Title VII suit (at 1452-3).

227 At 1453 fn 11. As required for disparate impact in *Teamsters* 431 US 324 at 329 (1977) where statistics in pattern and practice were supplemented by testimony regarding employment practices.

228 *Ibid.*

229 At 1461.

230 *Ibid.* O'Connor felt strongly that such an approach would provide the assurance that white employees' interests would be protected.

City of Cleveland, Local 28 and *Johnson* supra did not change significantly, it does appear that support by the judiciary for affirmative action waned and that stronger proof of discrimination was required as the case law developed in the late 1980s. The case of *Wygant v Jackson Board of Education*²³¹ (*Wygant*) illustrates this well.

In *Wygant*, ‘generalised societal discrimination’ in an entire industry was held to provide ‘no guidance’ for a legislative body to determine the precise scope of the injury it sought to remedy.²³² The opinion in *Bakke* supra that societal discrimination was ‘too amorphous’ as a basis for imposing a racially classified remedy, and was ‘insufficient’ and ‘overexpansive’, was confirmed. The court held that ‘sufficient evidence’ of past discrimination was needed to justify the conclusion that there had been prior discrimination,²³³ as well as a ‘factual determination’²³⁴ that the employer had a ‘strong basis’ in evidence for its conclusion that remedial action was necessary. These concepts were not explained. O’Connor J (concurring in part and in the judgment) held that, although there was no need for ‘contemporaneous’ findings of actual discrimination, a ‘firm basis’ for believing that remedial action was required, was necessary.²³⁵

(b) *Fullilove* case

Subsequently, the court relaxed its requirement relating to the showing of past discrimination. In *Fullilove*,²³⁶ the MBE clause of the PWEA and, specifically, the question as to which groups should be included in affirmative action programmes, came under scrutiny. In this case, associations of contractors and subcontractors sought an injunction

231 106 S Ct 1842 (1986). In the context of the Fourteenth Amendment where non-minority teachers with greater seniority challenged preferential protection for black teachers with less seniority in lay-offs.

232 At 1847. The argument that the preference could be justified as a minority ‘role model’ was rejected because the court believed that such a justification had no ‘stopping point’.

233 At 1848-9.

234 At 1849.

235 At 1853. Her opinion here was similar to the opinion she held in *Johnson* supra 480 US 616 (1987).

236 488 US 448 (1980).

to prevent the enforcement of the MBE clause.

Burger CJ (opinion of the court) – in a very lenient way (and in contrast to *Wygant supra*²³⁷) – held that the MBE programme requiring that 10 percent of certain federal construction grants be awarded to MBEs, was valid. Recognising that racial classifications warranted 'close examination' and that Congress should receive 'appropriate deference', the court established a two-pronged test. First, it stated, it must be determined whether the objectives were within Congress' power. If so, the court had to decide whether racial classifications were a constitutional means for meeting these objectives and thus complied with equal protection.

With regard to the first part of the test, it was found that the MBE provision was within Congress' spending power. The purpose of the plan was held to be that of remedying 'historical discrimination' in terms of access to federal funds.²³⁸ Although the PWEA did not cite any preambulatory findings on prior discrimination, it was found that Congress had an 'abundant' historical basis from which it could conclude that traditional procurement practices could perpetuate the effects of prior discrimination in the construction industry.²³⁹ Accordingly, it was held that Congress had 'reasonably' determined that the prospective elimination of these barriers to minority-firm access to public contracting opportunities generated by the PWEA was appropriate to ensure that these businesses were not denied an equal opportunity to participate in federal grants to state and local governments.²⁴⁰ With regard to the second part of the test, the court found that the MBE programme did not impermissibly burden non-minorities: it was neither over- nor under-inclusive, because it was open to all disadvantaged minorities and did not assist firms based on racial criteria unsupported by competitive criteria or identifiable acts of prior discrimination. Furthermore, the importance of the waiver provisions, the rebuttable presumptions and the limited duration of the programme further contributed to its non-burdensome nature.²⁴¹

237 106 S Ct 1842 (1986) (see par 4.1.3.4(a) above).

238 At 2777.

239 At 2774-5.

240 At 2775.

241 At 2765-73.

The court did not follow the strict or intermediate scrutiny tests, but held that the MBE programme could indeed pass either of these tests. The majority held that the programme did not violate the equal protection principles in the Due Process Clause of the Fifth Amendment.

Stevens J (dissenting) stated that the reasons for any race classification must be 'clearly identified' in order to justify the need and basis for such a classification,²⁴² and that there must be the 'most exact' connection between justification and classification.²⁴³ The mere inclusion of certain minority groups in the PWEA was thus insufficient. He criticised the programme for its under-inclusiveness and could not find 'one word' in the remainder of the PWEA, or in the legislative history, that explained why the particular definition for beneficiaries was favoured over any other.²⁴⁴

'The statutory definition of the preferred class includes "citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos and Aleuts". *All aliens and all non-members of the racial class are excluded. No economic, social, geographical or historical criteria are relevant for exclusion or inclusion*' (own emphasis).

Evaluation of Fullilove case

Fullilove liberally endorsed the MBE clause. Thereafter, similar MBE programmes spread in city and state governments.²⁴⁵ Nevertheless, it was the first case in years that gave a clear indication, albeit in the dissenting judgment, that specific evidence of past economic, social, geographical or historical discrimination was required to justify an affirmative action programme.

242 At 2804.

243 At 2805.

244 At 2804-5.

245 Graham 1 905.

(c) *Croson* case

Only 10 years later in *City of Richmond v Croson*²⁴⁶ (*Croson*) was the endorsement of the court curtailed. In this case, the unsuccessful (sole) bidder for construction work challenged the city council's affirmative action plan on the basis that it denied certain citizens the opportunity to compete for 30 percent of contracts, based solely on race, and that strict scrutiny had to be applied, which required a firm evidentiary base for concluding that the under-representation of minorities was a product of past discrimination.²⁴⁷ The plan required city contractors to subcontract at least 30 percent of the dollar amount of any contract to minority-owned firms in the local construction industry. The city council claimed that its plan was remedial and had been adopted for the purpose of promoting wider participation (or diversity) by minority businesses in public construction projects. It did not however provide any specific evidence as to past discrimination against minorities in the construction industry in the area of Richmond. The plan was accordingly struck down.

The issue as to what evidence would suffice to justify affirmative action was decided on a totally different basis from that in *Fullilove* supra.²⁴⁸ O'Connor J (opinion of the court) held that, while there was no doubt that the history of discrimination in the US had contributed to a lack of opportunities for black people, this observation 'standing alone' could not justify a rigid racial quota in the awarding of contracts in the area of Richmond, Virginia.²⁴⁹ The court fell back on *Bakke* supra and held that an 'amorphous claim of past discrimination', or a 'generalised claim of past discrimination' in a particular industry, could not justify the use of a racial quota.²⁵⁰ She held that it was 'sheer speculation' as to how many minority firms there were in the area of Richmond, absent past societal discrimination.²⁵¹ The court further held that injuries based on statistical generalisations

246 488 US 469 (1989).

247 At 710-1.

248 488 US 448 (1980) (see par 4.1.3.4(b) above).

249 At 724.

250 *Ibid.* Moreover, Congress had made national findings of 'societal discrimination' in various fields and all a state or local government was required to do was to locate a relevant report to enact a set-aside programme (at 727).

251 *Ibid.*

could not be defined as ‘identified discrimination’.²⁵² Numerical disparity was thus insufficient. It was held that there might be many reasons, other than the continuing effects of past discrimination, why a particular race was under-represented in a particular industry. Accordingly, the discrimination must be specified with some ‘specificity’ before race-conscious remedies could be used.²⁵³ The court found that none of the facts presented by the City of Richmond to justify the plan could in fact constitute an adequate basis for the 30 percent quota.²⁵⁴

Further, the plan was not narrowly tailored to rectify only the effects of the council’s ‘own’ *direct* or *passive* discrimination.²⁵⁵ In addition, the 30 percent quota could not in any realistic sense be tied to any injury suffered by anyone – thus there was no ‘strong basis’ of evidence for the city council’s conclusion that remedial action was necessary.²⁵⁶ This was not defined, except to state that²⁵⁷

252. At 724-5.

253. At 727.

254. At 725. These were: (a) the relevant ordinance had declared itself remedial; (b) proponents of the plan had stated that there had been past discrimination in the construction industry, based on the fact that minority businesses received 0,67 percent of prime contracts while minorities constituted 50 percent of the city’s population; (c) there were very few minority contractors in local and state contractors’ associations; and (d) in 1977, Congress had made a determination that the effects of past discrimination had stifled minority participation in the construction industry nationally.

255. At 729-30. She argued that the gross over-inclusiveness of Richmond’s plan thus strongly impugned the city’s claim of remedial motivation.

256. At 725; 730. She criticised the District Court’s emphasis on the fact that the council had labelled the plan as ‘remedial’ and held this to be of little or no weight. She found that the set-aside seemed to rest on the unsupported assumption that white prime contractors would not subcontract minority firms (at 724; 730) (referring to *Wygant* supra 106 S Ct 1842 (1986) at 1848-9 where it was held that, before affirmative action is embarked on by a public employer, there must be ‘convincing’ evidence that remedial action is warranted and that there must be ‘sufficient’ evidence to justify the conclusion that there was prior discrimination). A sufficient statistical imbalance would satisfy this ‘firm-basis’ requirement for a Title VII prima facie case (at 651). She held that ‘proper findings’ on evidence of past discrimination were necessary to define both the scope of the injury and the extent of the remedy necessary to cure its effects. Also, such findings would assure all citizens that a deviation from the norm of equal treatment of all racial groups was a *temporary* matter and a measure taken in the service of equality itself (at 730-1).

257. At 725. Farber ‘Affirmative Action’ 1008-9 holds that, although *Croson* seemingly moved towards requiring justification of the use of racial preferences by way of a prima facie case of past discrimination, it cannot be read as adopting such a standard: proof of identified discrimination that must at least ‘approach’ a prima facie case does not *equal* a prima facie case.

'[t]here is nothing *approaching a prima facie case of a constitutional or statutory violation* by anyone in the Richmond construction *industry*' (own emphasis).

Reliance on 'nationwide' discrimination in the construction industry was held to have little value in trying to prove discrimination in the specific area of Richmond.²⁵⁸

'There is absolutely no evidence of past discrimination against Spanish-speaking, Oriental, Indian, Eskimos, or Aleut persons in any aspect of the Richmond construction industry ... it may well be that Richmond has never had an Aleut or Eskimo citizen. The *random inclusion of racial groups that, as a practical matter, may never have suffered from discrimination in the construction industry in Richmond suggests that perhaps the city's purpose was not in fact to remedy past discrimination*' (own emphasis).

The city therefore failed to demonstrate a 'compelling interest' in making available public contracting opportunities on the basis of race. It was held that to accept Richmond's claim that past societal discrimination 'alone' could serve as the basis for

258 At 727-8. She criticised the dissenting opinion regarding 'evidence' in *Fullilove* supra 488 US 448 (1980) (see par 4.1.3.4(b) above), as she believed it could justify a preference of any duration or size (at 728).

rigid racial preferences would be to ‘open the door’ to competing claims for ‘remedial relief for every disadvantaged group’.²⁵⁹

‘The dream of a Nation of equal citizens in a society where race is irrelevant to personal opportunity and achievement would be lost in a mosaic of inherently *unmeasurable* claims of past wrongs. “Courts would be asked to evaluate the extent of the prejudice and consequent harm suffered by various minority groups. Those whose societal injury is thought to exceed some *arbitrary* level of tolerability then would be entitled to preferential classifications” (quoting from *Bakke*) (own emphasis).

For the first time, a majority embraced strict scrutiny.²⁶⁰ Stevens J (concurring in part and in the judgment) repeated his opinion as in *Fullilove* supra.²⁶¹

Marshall, Brennan and Blackmun JJ (dissenting) found the majority’s ‘second-guessing’ of the council’s evidence and views of past discrimination ironical.²⁶² It was opined that the decision marked a ‘deliberate and giant step backward’ in the court’s affirmative action jurisprudence, and that it would discourage or prevent governmental entities from acting to rectify past discrimination.²⁶³

259 At 728.

260 *Ibid.*

261 At 734 (see par 4.1.3.4(b) above).

262 At 741. They argued that, as much as any municipality in the US, the City of Richmond knew what racial discrimination was – a century of decisions had richly documented the city’s disgraceful history of public and private racial discrimination. Scalia J (concurring in the judgment) mooted race-neutral programmes aimed at the ‘disadvantaged as such’ (at 739-40). Such race-neutral programmes, he argued, would have a disproportionately beneficial impact on blacks, although not operating on the basis of race, and would be the only ones which accorded with the spirit and the letter of the Constitution. In essence, he argued that the specifics of past discrimination should be addressed in non-racial terms to victims as such, and not to members of a group – he thus emphasised the victim specificity. This was on the basis that it was not blacks who were discriminated against, but individual men and women ‘created equal’ who were discriminated against (at 740). Gotanda ‘Color-blind Constitutionalism’ 50 criticises this approach of helping individual blacks (without taking into account any historical connection between harm and race discrimination), as it does not take into account the group-based notion of systemic discrimination. This, the author argues, would not address the very problem to which it is directed – namely the concentration of black poverty and political powerlessness.

263 At 741.

Evaluation of Croson case

Croson thus overturned *Fullilove* supra and insisted on evidence of past discrimination approaching a prima facie case for a particular group in the particular area and industry where affirmative action was implemented.

After *Croson*, the MBE programme in Richmond was limited to African-Americans, as they were found to be the only group that had actually been discriminated against.²⁶⁴ Native American-owned firms were dropped from MBE programmes all over the US because, it was argued, their numbers were too small for statistical analysis, or in order to gain political support.²⁶⁵ Further, as a result of *Croson*, state and local governments were required to conduct self-studies to determine whether there was strong evidence that their selection of employees and contractors was discriminatory.²⁶⁶ If such evidence was found, they were then required to check whether the affirmative action programmes were narrowly tailored to remedy the particular discrimination concerned.²⁶⁷ An increase in lawsuits by white contractors followed. Several state and local affirmative action plans were in fact struck down on the basis of *Croson*, and cities and agencies suspended the use of set-asides in anticipation of further lawsuits prompted by *Croson*.²⁶⁸

264 La Noue & Sullivan 1 917.

265 *Ibid.*

266 Oppenheimer 'Understanding Affirmative Action' 943.

267 *Ibid.* These studies have almost never pointed to specific instances of discrimination in the awarding of prime contracts, let alone 'the patterns of deliberate exclusion' *Croson* required if race conscious remedies were to be employed. Nor have many examples of discrimination in the awarding of subcontracts by prime contractors been discovered. Such studies are therefore increasingly attempting to demonstrate that discrimination in the broader economic environment keeps minorities and women from forming businesses in the first place (La Noue & Sullivan 1 919). Since *Croson*, minority contracting in Richmond – a city whose population comprises about 70 percent African-Americans – went from 35 percent to 1 percent, thus reverting to its pre-affirmative action levels (Hartman *Business Ethics* 489).

268 Farber 'Affirmative Action' 975-6.

4.1.3.5 *Post-Croson*

(a) *Adarand case*

In *Adarand Constructors v Pena*²⁶⁹ (*Adarand*), the court finally laid down the strict scrutiny test for *all* government-sponsored affirmative action plans, whether mandated by Congress or not. O'Connor J (for the majority) emphasised the individualised notion of equality. She held that both the Fifth and the Fourteenth Amendments protect 'persons' (*individuals*) and not groups.²⁷⁰ It therefore followed from this principle that all governmental action based on race – a group classification long recognised as 'in most circumstances irrelevant and therefore prohibited' – should be subjected to strict scrutiny 'to ensure that the personal right to equal protection of the laws' has not been infringed.²⁷¹ She refrained from deciding the constitutional merits of the programme and remanded the case for further consideration to the district court for proceedings consistent with the finding.²⁷²

Evaluation of Adarand case

Observers perceived *Adarand* as placing all affirmative action programmes in constitutional jeopardy, because it was believed that many affirmative action programmes

269 115 S Ct 2097 (1995). In this case, *Adarand Constructors* (owned by a white male, and which submitted the lowest bid) was not awarded part of a project for building a federal highway. *Gonzales Construction*, certified as a small business controlled by 'socially and economically disadvantaged individuals' under the SBA, got the award. *Adarand* claimed that the SBA's practice of giving prime federal contractors a financial incentive to hire subcontractors from 'socially and economically disadvantaged individuals', and particularly the use of race-based (rebuttable) presumptions (in favour of Black, Hispanic, Asian Pacific, Subcontinent Asia and Native Americans, and other members of groups designated from time to time) in identifying such individuals, violated the due process clause of the Fifth Amendment, and was thus unconstitutional (see also par 4.3.4.3(a)(iii) below).

270 At 2112-3.

271 *Ibid.*

272 On remand, the district court struck down the programme under strict scrutiny (*Adarand v Pena* District Court (1997) at 1580 as cited by *La Noue & Sullivan* 1 925).

would not be able to stand up to strict scrutiny.²⁷³ It was, however, also pointed out that many uncertainties remained after *Adarand*.²⁷⁴ Government argued that affirmative action must be 'mended but not ended' and instructed all federal bodies to review their affirmative action policies in the light of *Adarand*.²⁷⁵ It was announced that government contracts would be reformed so that they specifically targeted contractors from deprived areas, even if they were white.²⁷⁶ During this time, California ended affirmative action in public employment, education and contracting.²⁷⁷ Similar prohibitions were introduced in other states.²⁷⁸

(b) *Grutz* and *Grutter* cases

Recently, two cases, *Jennifer Grutz & Patrick Hamacher v Lee Bollinger*²⁷⁹ (*Grutz*) and *Barbara Grutter v Lee Bollinger*²⁸⁰ (*Grutter*) confirmed that diversity is a compelling interest, without relying on the remedial aspect of affirmative action at all. In these cases, the admissions policies of the University of California, which allowed for the race and ethnicity of certain minority groups to be taken into account, were reviewed. **Many**

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- 273 Barker *Civil Liberties* 519; Oppenheimer 'Understanding Affirmative Action' 943; McCrudden 2 376; Powell 'Blinded by Color' 236.
- 274 Interpretative Memorandum by the US Department of Justice, 28 June 1995. For example: (a) the detailed requirements of strict scrutiny were unclear; (b) it was unclear what would constitute sufficient evidence of discrimination to justify affirmative action as a remedial tool; and (c) it was not clear whether other goals such as diversity could justify affirmative action.
- 275 No programmes were however suspended or revoked. Instead, government set four more principles for any affirmative action programme to be eliminated or reformed if it: (a) created a quota; (b) created preferences for unqualified individuals; (c) created reverse discrimination; and (d) continued after its purpose had been achieved. Government also held that there would be a crackdown on fraud in awarding contracts (McCrudden 2 374-5; Weiss 'We Want Jobs' 242-3; Curry *Affirmative Action* 277; Schuck 2 52-3).
- 276 McCrudden 2 375.
- 277 Graham 2 195. It held that the state was prohibited from discriminating against or granting any preferential treatment to any individual or group on the basis of race, sex, colour, ethnicity or national origin in the operation of public employment, education and contracting (Constitution of California, s 1, § 31(a)) (also see par 5.4 below).
- 278 McCrudden 2 374. These have been held to appeal to the individual and meritocratic strand of American beliefs (Dworkin 2 386).
- 279 123 S Ct 2411 (2003).
- 280 123 S Ct 2325 (2003).

prominent businesses, universities, law schools, education groups, military leaders, academics, members of the legal profession, politicians and union federations filed amicus curiae briefs in support of the university's admissions programmes. The supporting briefs seem to amount to a broad endorsement of affirmative action policies by leading sectors of society.²⁸¹ With regard to business and employment, it was argued that a consideration of race and ethnicity grows naturally out of the needs of the professions and of American business. Because the US population is so diverse, and because of the increasingly global reach of American business, the skills and training needed to succeed in business today demand exposure to widely diverse people, cultures and viewpoints. Such a work force, it was argued, is important to companies' continued success in the global marketplace.²⁸²

In the first-mentioned case, *Grutz*, the court held that the admissions policy of the literature, science and arts college, which 'mechanically' and in a 'predetermined' way awarded 20 points to every minimally qualified African-, Hispanic and Native American, though serving the compelling interest of attaining a diverse student body, was not narrowly tailored and was therefore in violation of the Fourteenth Amendment.²⁸³

In contrast, the special admissions programme of the law school in the second case, *Grutter*, which used race as a 'plus' factor for students of colour, was found to serve the compelling interest of attaining a diverse student body, to be narrowly tailored, and not in violation of the Fourteenth Amendment. This admissions programme allowed race as only 'one factor' in the pool of possible means to achieve diversity (similar to *Bakke supra*). The court held that this process allowed for a flexible, highly individualised, holistic review of each application. It ensured that consideration was given to 'all qualities', 'qualifications', 'experience' and ways in which an applicant might contribute to a diverse educational

281 <http://www.nytimes.com/2003/02/18/education/1SAFFI.html> 1-2. In essence, the briefs argue that consideration of race and ethnicity in an individualised admissions process serves compelling interests, that strict scrutiny is satisfied by properly designed admissions policies that consider race and ethnicity, and that such a process is fully capable of satisfying the narrow tailoring requirement.

282 It appears that businesses were mainly concerned with their ability to recruit women and minority applicants. If affirmative action policies in colleges and professional schools are undercut, considerable pressure will be put on companies to compete for a very small number of minorities.

283 At 2426-7; 2430.

environment.²⁸⁴ The plan thus allowed for both 'merit' and diversity.²⁸⁵

Rehnquist CJ, Scalia, Kennedy and Thomas JJ (dissenting) differed fiercely from the opinion of the court in *Grutter* and held that diversity was merely the 'current rationale' of convenience to justify an affirmative action policy.²⁸⁶ Though this case was decided only in the context of admissions to university, it is an open question whether diversity will be upheld in the context of employment.²⁸⁷

Evaluation of disadvantage

Under the Fourteenth Amendment, the Supreme Court has held that race-based classifications by public employers pursuant to an affirmative action plan must satisfy strict scrutiny. In contrast, more flexibility is allowed for private employers in designing affirmative action plans under Title VII.²⁸⁸ For the latter, affirmative action has had to fulfil three requirements before the plan can be held to be lawful, namely: (a) a remedial purpose to correct a 'manifest imbalance' in a traditionally segregated job category; (b) the affirmative action plan must not unnecessarily trammel the interests of non-minority members; and (c) such a plan must be temporary. The standard in respect of a 'manifest imbalance' requires that an employer justifying an affirmative action plan need not point to its *own* prior discriminatory practices, but only to a 'conspicuous imbalance' in 'traditionally segregated job categories'.²⁸⁹ It has not been determined what the exact standard of statistical imbalance must be to sustain an affirmative action plan, other than to hold that it need *not* be big enough to support a prima facie case.²⁹⁰ With regard to past personal

284 At 2343.

285 At 2340-2.

286 At 2373.

287 See White 'Affirmative Action' 269-74; 278 who holds that the challenge would be to identify a diversity rationale that could 'co-exist' with Title VII's goal of eliminating intentional discrimination, even when good business reasons to discriminate were present.

288 Byrne 'Toward a Colorblind Constitution' 661.

289 At 1449-51.

290 The court did not regard the constraints of Title VII and the Fourteenth Amendment on voluntary affirmative action plans as being identical. As long as there was a manifest imbalance, an employer

discrimination or membership of a group in order to benefit from affirmative action, though, initially, the focus was on past personal discrimination,²⁹¹ mere group membership has been required since the 1980s.²⁹²

For public employers, additional requirements have been set: (a) a ‘compelling interest’ must be shown for a race-based affirmative action plan; and (b) the plan must be narrowly tailored to achieve such a ‘compelling interest’. To prove a compelling interest, an employer must produce evidence of its *own* past discrimination against a particular group in a particular area and industry, ‘approaching a prima facie case’. This implies strong evidence of discrimination against a specific group, as well as against an individual as a member of such a group.²⁹³ Currently, compelling interests include rectifying past racial discrimination, and diversity. The latter, however, has been accepted only in the context of admissions to universities. It is thus unclear at present whether it will hold true for the workplace as well, though it is submitted that this is likely to be the case.

With regard to actual past discrimination or group membership in order to benefit from affirmative action, the broad spectrum of cases from *Bakke* to *Croson* illustrates that, although remedying past discrimination has been accepted as a constitutionally permissible goal, it was not easily agreed on what showing of past discrimination was sufficient to support that goal. The court has inconsistently held a showing of ‘societal discrimination’ to be ‘amorphous’ and ‘insufficient’ in some decisions, but ‘sufficient’ in

could adopt an affirmative action plan even where the disparity was not so striking, without being required to introduce non-statistical evidence of past discrimination that would be demanded by the prima facie standard. The court held that when there was sufficient evidence to meet the prima facie standard, be it statistical, non-statistical, or a combination of the two, the employer could, of course, adopt an affirmative action plan (see par 4.1.3.3.(c) above). O’Connor J, however, disagreed with this and held that the proper enquiry into an affirmative action plan under Title VII was no different from that under the Fourteenth Amendment, where an employer must have a ‘firm basis’ for believing that remedial action is necessary. In essence, then, though it has been mooted that the standard for challenges under Title VII and the Fourteenth Amendment should be the same, this is not yet the case.

291 See par 4.1.3.2 above. This is similar to the situation in South Africa where the first case insisted on actual past discrimination experienced by an individual member of a designated group.

292 See par 4.1.3.3 above. This, again, is similar to the situation in South Africa where it has been held (though only shortly after implementing affirmative action) that group membership, and not actual disadvantage, must be shown in order for a person to benefit from affirmative action (see chapter 4 par 2.1.3.2 above).

293 See pars 4.1.3.4(a); 4.1.3.4(c) above.

others. However, in *Croson* supra, it was finally decided that general ‘societal discrimination’ was not sufficient, and that evidence of particular discrimination against a group, as well as an individual as a member of such a group, in a particular area and industry, ‘approaching a prima facie case’, was needed.²⁹⁴ Moreover, under the PWEA, provision has been made for rebuttable presumptions to exclude groups, or a member of a group, not actually disadvantaged as a result of particular past discrimination.²⁹⁵

It is submitted that the current use of group membership, as well as individual discrimination under a Fourteenth Amendment challenge, makes sense against the background of the notion of equality of opportunity that is officially endorsed by the US, and which focuses on groups – but only up to a certain point, after which the focus returns to the individual.²⁹⁶ In this regard, it should be remembered that affirmative action has been operative for 40 years in the US and a substantial number of minorities and women have in fact been reached by its benefits.

It is further submitted that this scenario is not desirable in the South African context where a majority has to be affirmed, and where substantive equality – a group-based notion – is the goal. Evidence of past discrimination in South Africa has been amply documented and, currently, no additional proof is required from members of the designated groups.²⁹⁷ A standard for proving past discrimination has thus not been an issue.

It should be pointed out that the US has completed the full circle, starting off with affirmative action as a remedial measure to compensate for past discrimination against black people, but, at this stage, upholding affirmative action for diversity reasons.²⁹⁸ It has, however, been pointed out that diversity is merely the ‘current rationale’ of convenience to justify an affirmative action policy.²⁹⁹ Moving from one justification to another like this may be explained against the background of large-scale immigration into the US over centuries,

294 *Ibid.*

295 *Ibid.*

296 See chapter 2 par 3.1.4 above.

297 See chapter 4 pars 2.1.1; *Evaluation of disadvantage* above.

298 Gutman *EEO Law* 231; Goldman & White ‘United States of America’ 330-2; *Grutter* 123 S Ct 2325 (2003) at 2330.

299 See par 4.1.3.5(b) above.

and, in particular, of millions of immigrants since the late 1980s who (unlike immigrants after World War II who were mostly European) have been mostly Asian and Latin American.³⁰⁰

Although it has been held that diversity is not a substitute for affirmative action, it does seem that it has in fact overtaken affirmative action in the US.³⁰¹

4.1.4 *Deficiencies of categorisation*

Criticism similar to that found in South Africa has been levelled at affirmative action categories.³⁰² Some of these criticisms are that the categories are under-inclusive,³⁰³ that they are over-inclusive,³⁰⁴ and, related to the latter, that better-off people within the categories are benefited while those most in need are not.³⁰⁵ This argument has however been refuted by Kennedy³⁰⁶ who argues that, even if affirmative action frequently aids those blacks who need it least, the argument is unpersuasive as an objection to affirmative action: (a) because it ignores the large extent to which affirmative action has opened up opportunities for blue-collar, black workers; (b) because it assumes that affirmative action should be provided only to the most deprived strata of the black community, or to those who can best document their victimisation (while, in many circumstances, affirmative action has developed from the premise that special aid should be given to strategically important sectors of the black community – for example those with the threshold ability to become

300 Bennet-Alexander & Pincus *Employment Law* 136-7 (see par 4.3.2 below).

301 Agócs & Burr 'Managing Diversity' 43. It appears strange that diversity is now accepted in the US, a country which has for centuries viewed itself as a 'melting-pot' and requiring individuals to assimilate as the price of acceptance (see par 4.3.2 below).

302 See chapter 4 par 2.1.4 above.

303 See, for example, *Adarand v Peña District Court* (1997) at 1580 as cited by La Noue & Sullivan 1 925 where it was held that the statutes and regulations governing the SBA and DBE programmes were *over-inclusive* in that they presume that *all* those in the named minority groups are economically, and in some acts and regulations, socially disadvantaged. 'The presumption is *false*, as is its *corollary*, namely that the majority (Caucasians), as well as members of other (unlisted) minority groups are *not* socially and/or economically disadvantaged' (own emphasis).

304 La Noue & Sullivan 1 73-4; Schuck 2 78 (also see chapter 1 par 2.2.3 above).

305 Bacchi *Politics of Affirmative Action* 27.

306 Kennedy 1 62.

integrated in the professions); and (c) because the fact that the black middle class has primarily benefited indicates only the necessity for additional social intervention to address unmet needs in those sectors of the black community left untouched by affirmative action.³⁰⁷ Weiss similarly counters this argument by labelling it as merely a 'popular view' used during presidential elections.³⁰⁸ He states that affirmative action has in fact benefited African-Americans across different classes and sectors.

The above illustrates that disadvantaged people display degrees of disadvantage. For example, enormous cultural and economic differences exist among Asian Americans of Laotian, Indian, Japanese and Pacific Islander ancestry which were not taken into account when creating the categories.³⁰⁹ These people immigrated from many different parts, at different times and under very different circumstances.³¹⁰ The over-inclusiveness of the categories can therefore be said to 'mask' differences within the category.

Still on degrees of disadvantage, it has been argued that affirmative action should be limited to African-Americans owing to the severe degree of oppression under law experienced as a result of slavery.³¹¹ This group is most deserving of affirmative action because it was historically the most oppressed, and because the equal protec-

307 See also Graham 2 166-7; 169.

308 Weiss 'We Want Jobs' 246.

309 La Noue & Sullivan 1 917.

310 *Ibid*; La Noue & Sullivan 2 440. It has been held, however, that Hispanic Americans, namely people from Spain, Argentina, Cuba and Mexico, are perhaps more similar than those in the Asian American category, but that they also have important cultural differences.

311 Higginbotham 'Affirmative Action' 215; Graham 2 132; Delgado 1 69-70 n4. Schuck 1 27 points out that this would minimise some objections to affirmative action, but would be tricky to implement and would still violate the non-discrimination and merit principles. See also Brest & Oshige 'Affirmative Action' 899-900 who argue that African-Americans are the 'paradigmatic group' for affirmative action.

tion clause of the Fourteenth Amendment was designed primarily to protect freed black slaves. In this regard, it has been held that³¹²

‘there was never a *comparable historical justification* for including others as designated beneficiary groups because of ethnicity’ (own emphasis).

Yet, affirmative action for descendants of black slaves and Native Americans constitutes a shrinking share of affirmative action’s beneficiaries.³¹³ Also, for political reasons, preferential treatment has been extended beyond the original descendants of black slaves to blacks from the Caribbean and elsewhere.³¹⁴ Census and other reliable data illustrate that prejudice and covert discrimination against African-Americans, relative to Native, Hispanic and Asian Americans, continue,³¹⁵ and that present negative effects of past discrimination are the most prevalent for the former.³¹⁶

Another criticism that has been levelled at affirmative action categories is that they are more of a bureaucratic convenience (for the majority) than a demographic reality.³¹⁷ It has been argued that: (a) the original construction of the affirmative action group categories took place in the recesses of bureaucracies when regulations and reporting forms were developed; (b) debates did not take place in public and records about these decisions are limited; (c) once the bureaucracies had fixed the group categories, these

312 Graham 2 132; Brest & Oshige ‘Affirmative Action’ 899-900. Similarly, Liddle ‘Affirmative Action’ 840 argues that race-based preferential treatment for other minorities can be justified only if the potential beneficiaries show a history of discrimination in the US similar to the experiences by African-Americans.

313 Schuck 1 26.

314 *Ibid.*

315 Brest & Oshige ‘Affirmative Action’ 877-900.

316 Higginbotham ‘Affirmative Action’ 215; Schuck 2 78. The latter points out that affirmative action should further be limited to non-immigrant blacks (that is, those who descended from African-American slaves), but that affirmative action programmes seldom, if ever, make this distinction. Also, the growing political influence of Hispanics who want preference in similar terms will make such change less likely. The rapidly growing Spanish-origin population is expected to numerically pass the black population by about 2005. Distinguishing between blacks in this way might also be administratively unworkable.

317 La Noue & Sullivan 1 914; 923-4; Graham 2 1. Very importantly, also, La Noue & Sullivan point to the fact that recent research shows that *discrimination* does not necessarily explain all discrepancies in social and economic outcomes in the US community and suggest that different sociological research be conducted to provide better insight.

were not only replicated in all federal affirmative action programmes, but the categories also appeared in hundreds of state, local and private programmes as well; and (d) no independent examination took place to see whether the federally defined groups fitted any theory of social justice or equity.³¹⁸ Bureaucrats making decisions, coupled with self-identification of potential beneficiaries, led to affirmative action being applied to people it was never intended to benefit – in particular, recent immigrants.³¹⁹

The point about bureaucratic convenience is illustrated by examples of affirmative action plans in Dade County, Florida. Here, such plans were used to advantage Hispanics, often in ways that disadvantaged the older, less prosperous black population, although many Hispanics were former Cuban refugees who were middle-class and had no history of disadvantage in the US.³²⁰ Also, the MBE programme in Richmond, Virginia, included Hispanics, Asian Americans, Native Americans, Eskimos and Aleuts, despite the fact that the 1987 census recorded no firms owned by Eskimos and Aleuts in the Richmond Metropolitan Statistical Area and very few firms owned by Asian Americans and Hispanics. Very interestingly, Herbert Hammerman (the then chief of the reports unit of the EEOC) recalls arguing against the inclusion of Asian and Native Americans in the forms, because there was no statistical evidence of discrimination against the first-mentioned as a group, and because Native Americans living on reservations were excluded from Title VII.³²¹ Further, changes in immigration patterns and in the socioeconomic status of groups, as well as in particular local conditions, often caused national generalisations about groups that should benefit from affirmative action to be incorrect or irrelevant.³²² In the same vein, centuries of interracial marriage render the original categories meaningless.³²³ Generally,

318 See par 3.8 above.

319 Graham 2 1.

320 Glazer 'Affirmative Action Stalemate' 105.

321 La Noue & Sullivan 1 914; La Noue & Sullivan 2 440-1; Graham 2 143-4. The latter author points out that though recognised that both Asians and Indians were small groups, nobody was prepared to 'take the political heat' for removing any group from the list.

322 La Noue & Sullivan 1 914; Farley 'Multicultural America' 40.

323 Schuck 1 26-7; Hernandez 'Multiracial Matrix' 1112; Farley 'Multicultural America' 40; Graham 2 172-3; 177; 192-3; 197; Schuck 2; 14. In the 2000 census, 7 million Americans indicated that they considered themselves multiracial and wished to be identified as such (if they had to be racially identified at all). Also, 25 percent of those in the US who describe themselves as both black and

no criticism has been voiced in South Africa with regard to the issue of bureaucratic convenience. It appears that the designated groups have been based on the figures contained in the ILO Country Review,³²⁴ and such figures have never been contested.

Two further points of criticism have been raised regarding the process of identifying and defining official minorities. These are that it was a 'closed' process of policy making.³²⁵ In this regard, it has been argued that a democratic model of policy making should have been focused on elected officials holding public hearings, debating policy goals, arguing the strengths and weaknesses of alternative means, casting their votes on the record, and being held accountable by voters. Instead, the whole process was devoid of public testimony and even of public awareness.³²⁶ The other is that the agencies responsible for defining the targeted groups did not have to, and did not in fact, provide any rationale justifying the racial and ethnic categories. Dealing with inherited notions of race that had been abandoned in science and social science, they drew up questionnaires that reflected certain assumptions.³²⁷ An implicit assumption was that minority-group membership entailed a presumption of disadvantage in American society. Other attributes such as socioeconomic success, wealth, income and educational achievement carried no

white consider themselves white, as do almost half of the Asian whites and more than 80 percent of Native (Indian) whites. Most Hispanics identify themselves as white (La Noue & Sullivan 2 440). Farley 'Multicultural America' 40 speculates that, in the light of the census forms which provided for 126 distinct racial groups, it may be possible that the US will eventually decide that it is futile to measure race to legislate for so many groups, and that this may lead to a reformulation of the concept of race, or even to its disappearance. In this regard, the American Anthropological Association (noting that scientists who sequenced the human genome had announced in 2000 that the DNA of human beings was 99,9 percent alike, regardless of race) has in fact recommended eliminating the term 'race' in the 2010 census (Graham 2 194).

324 See chapter 3 pars 3.4.4; 3.5.2.1 above.

325 Graham 2 139-40.

326 *Op cit* 140. It has been held that, although there are areas of policy making that may arguably be shielded from open forums (such as national security and defence), the civil rights of Americans are surely not such an issue (see also par 3.8 above).

327 *Op cit* 141. Questions like the following were not asked: (a) what is a race; (b) are Spanish Americans a race; (c) should a list of minorities suffering discrimination in the US include Jews, Catholics, Mormons and Jehovah's Witnesses; (d) who are Portuguese Americans and Spanish Americans?; (e) are people from the Middle East or North Africa 'white'; and (f) how should categorisation of racially or ethnically mixed ancestry take place? Or, if asked – it was held – there were no answers to these. Thus, it was easier to adjust lists in a pragmatic way, downsizing the official minorities to four by 1965 (see par 3.8 above). By that time, the new EEO-1 form confirmed a number of assumptions about American society that officials, shielded from public debate, took for granted.

weight. Minority status, in effect, trumped socioeconomic status.³²⁸ Another implicit assumption was that all minority-group members were equally disadvantaged. There was thus no understanding that civil rights remedies could differ for blacks, Hispanics, Asians or American Indians, and the histories for the different groups were equated.³²⁹ A further assumption was that a line of separation existed between minorities and all other Americans. Lastly, the decisions made by officials privileged the rights claims of blacks. This was crucial, yet, paradoxically, it gave blacks no legal advantage over other minorities.³³⁰

Race-neutral bases have been mooted to determine the beneficiaries of affirmative action.³³¹ Simply stated, it is argued that race is a poor proxy for the conditions that affirmative action is supposed to remedy, and that it is steadily becoming an even cruder and more misleading proxy as multicultural Americans increase and as intra-group differentiations proliferate.³³² It is held that, at some point, the arbitrariness of the traditional race-as-proxy for egregious discrimination becomes so unmistakable and insupportable that it must fail the strict scrutiny test for the constitutionality of race-based preferences. It has been mooted that race-neutral criteria could be based on economic or other disadvantages, such as poverty. Not only would this limit preferences to those in the current groups most in need of help, but it could also be extended to low-income whites, the disabled and others who are not now favoured by affirmative action. Because blacks are disproportionately poor, so the argument goes, they would disproportionately benefit without incurring the hostility that comes with race-based preferences. It has been held that most Americans are, after all, morally more inclined to assist people on the basis of their economic need than on the basis of their skin colour, language, region of origin, or gender.³³³

328 *Ibid.*

329 *Ibid.*

330 *Ibid.*

331 Schuck 2 80.

332 *Op cit* 95.

333 *Op cit* 80.

Despite the advantages indicated in respect of class-based preferences, Schuck however holds that these preferences would be neither administrable nor advantageous to many blacks. This is basically so because: (a) in reality, more whites than blacks are poor in the US,³³⁴ and (b) determining economic need may be difficult, just as it has proved to be with the administration of need-based social welfare programmes.³³⁵ The author argues that, rather than amending the categories of affirmative action beneficiaries, more rigorous proof of actual discrimination-based disadvantage should be demonstrated before affirmative action can be upheld as a requirement (as the Supreme Court in any event required in *Croson*).

4.2 The concepts 'qualified', 'unqualified' and 'merit'

4.2.1 Introduction

Attention now turns to an analysis of the US position with regard to the concepts 'qualified', 'unqualified' and 'merit' as used in affirmative action. US legislation, the OFCCP regulations and selected academic opinion will be considered.³³⁶

Generally, individual merit is highly regarded in the US, and said to be an ideal embraced by most workers.³³⁷ Meritocracy implies that one should be rewarded because

334 *Ibid.*

335 *Op cit* 81. The author points out that, for all the arbitrariness and over-breadth of existing affirmative action categories, they are 'far more' objective and administrable than a need-based programme would be. He holds that it is far easier and less contestable for a bureaucrat to accurately detect one's skin colour, language, ethnicity and gender than to make the kinds of empirical and normative judgements necessary to determine the extent, and even more controversially, the causes of one's economic need. Morally, he holds, it matters to most people whether another's poverty is due, for example, to discrimination or drug abuse. Some targeting proposals would, then, in terms of this approach, focus on place and not on race, allocating government contracts to companies located in economically distressed areas rather than on their owner's race. Schuck cautions, however, that an economic development programme for distressed areas has little or nothing to do with the rationales for affirmative action, and has often been shown to be problematic in its own right.

336 Though case law has touched on the concept of merit, it was only in passing (see, in this regard, McGinley 'Affirmative Action' 1030-5).

337 Goldman & White 'United States of America' 172; Little 'Affirmative Action' 274; Giampetro & Kubasek 'Individualism in America' 193-4; Freeman 'Equality of Opportunity' 363-9; Kallen *Ethnicity* 244.

of one's actions or achievements, not because of affiliation, or inherited characteristics such as race or gender.³³⁸ But opponents of affirmative action argue that affirmative action is inconsistent with meritocracy, because 'unqualified' or 'less qualified' people are appointed over better qualified white men on the basis of race and gender³³⁹ (that is characteristics or traits *unrelated* to job performance), thereby leading to reduced standards.

4.2.2 Legislation

As seen above, Title VII of the Civil Rights Act paved the way for non-discrimination and affirmative action.³⁴⁰ It was pointed out above that Title VII has built in the merit principle.³⁴¹ Testing as a tool to establish a person's merit has also been built in.³⁴²

In view of the uncertainty as to whether Title VII has embraced the merit concept in the affirmative action context, the legislative history of Title VII of the Civil Rights Act has been investigated. According to McGinley,³⁴³ Title VII reveals a tension between the values

338 Woo 'Reaffirming Merit' 514; Giampetro & Kubasek 'Individualism in America' 193-4; Freeman 'Equality of Opportunity' 363-4.

339 Woo 'Reaffirming Merit' 14; Murray 'Merit-Teaching' 1074; Delgado 2 142; Spann 2 9 notes 70 and 71. See also Scalia J (dissenting) in *Johnson* 480 US 616 (1987) who bemoaned the plight of better qualified white males from the lower middle class who lose positions to less qualified women. See, generally, for example, McGinley 'Affirmative Action'; Selmi 'Testing for Equality'; Roithmayr 'Deconstructing the Distinction'; Sturm & Guinier 'Affirmative Action'; Morrison 'Colorblindness'; Fallon 1; Fallon 2; Oppenheimer 'Understanding Affirmative Action'; Woo 'Reaffirming Merit'; Murray 'Merit-Teaching'; Eastland 'Affirmative Action'; Spann 1; Miller 'Affirmative Action' (see also par 4.2.4.2 below). Though many of these articles have been written in the context of university admissions, the principles may be applied in the employment setting.

340 See par 3.5 above.

341 Section 703(a)(1) of Title VII (see par 3.5.2 above). It states that it is not an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to (*inter alia*) merit or incentive systems, as long as such differences are not the result of an intention to discriminate on the grounds of race, colour, religion, sex or national origin.

342 *Ibid.* It specifies that it is not an unlawful employment practice for an employer to administer any professionally developed ability test, and to act upon the results of such test, as long as the test, its administration or the action flowing from the results is not designed, intended or used to discriminate on the grounds mentioned above (see par 3.5.3 above).

343 'Affirmative Action' 1011.

of 'equality' and 'liberty'.

Research indicates that the legislative debate around Title VII revealed a definition of equality as *equal treatment*, defined by opponents and proponents of the Civil Rights Bill as the use of merit as a criterion for hiring. Their reasoning appears to be that a bill promoting equality would require merit hiring, or, at the very least, would prohibit the government from requiring preferential treatment of any individual based on group identity. Opponents of the Bill voiced fears that the Bill would require employers to ignore competence and experience, to use quotas, to base employment decisions on race only, and to establish a not-too-subtle system of racism-in-reverse. They feared that this would most probably encourage employers to bend over backwards to avoid discrimination against minorities and women, resulting in discrimination against whites – also, that it might bar the use of qualification tests based on verbal skills and prohibit employers from hiring or promoting people on the basis of merit or performance.³⁴⁴

These arguments were shown to rest on the inaccurate assumption that, before the passage of Title VII, the norm was that employers had traditionally made hiring decisions on the basis of merit. It was argued convincingly that this premise was false: (a) women and persons of colour were virtually excluded from the labour pool from which many employers hired at that stage; (b) the prevalence of nepotism and cronyism in hiring decisions belied the notion that employers were hiring the most qualified candidate for the job; and (c) African-Americans were assumed to be inferior to whites and could therefore not compete with them on the basis of merit.³⁴⁵

Opponents of the Civil Rights Bill also made strong libertarian arguments which contradicted their merit-based arguments. They held that the Bill contradicted the employer's (constitutional) First Amendment right of association to hire and fire whoever the employer wished. This, of course, was in conflict with the merit argument, because it advocated permitting an employer to favour less qualified individuals over more qualified

344 *Op cit* 1012. See, in particular, fns 49-52. The author states that these arguments closely mirror those made by opponents of affirmative action today. It appears that those opposed to using race or gender as a factor in hiring decisions, typically focus on merit.

345 *Op cit* 1012-3.

ones on account of the employer's 'tastes'.³⁴⁶

Proponents of the Bill attacked the equality arguments of the opponents on the basis that the Bill: (a) in fact granted equality to persons of all races; (b) would not give a higher right to employment to people on the basis of race and gender, and that nobody would be required to hire incompetent help because of, for example, race; (c) was designed to utilise, to the fullest, the potential work force and to permit every worker to hold the best job for which he or she was qualified; and, (d) would not require quotas.

The libertarian arguments were attacked by taking the moral high ground – not by denying that the Bill would limit the employer's perceived right to hire and fire, but by disputing that such a right did in fact exist. It was argued that no one had a constitutional right to discriminate against another because of race or national origin.³⁴⁷ This moral argument, together with the proponents' assurances that the Bill did not require anti-merit hiring, led to the Bill being passed.

Two possible interferences can be drawn from the legislative history. One could infer that Title VII is actually a merit-based statute, at least for persons of colour and white women. If this is true, Title VII does not require preferential treatment (at least for the intended beneficiaries of the Bill), but rather guarantees a non-arbitrary, merit-based selection system.³⁴⁸ The other possible inference is that employers are free to deny employment opportunities for any reason, so long as they do not make consciously discriminatory decisions. This interpretation would permit employers to make decisions for arbitrary reasons, or for no reason whatsoever, even when such decisions adversely affect persons of colour and white women. This interpretation would, of course, reduce the Bill's protection to an empty shell and not act as a deterrent to discriminatory behaviour.³⁴⁹

It has thus been argued that the merit principle should be reaffirmed as an important,

346 *Op cit* 1013.

347 *Op cit* 1013-4.

348 *Op cit* 1014-5. This inference is supported by Fiss 'heory of Fair Employment Laws' 241. He points out that, although the merit principle is to a certain extent self-enforcing, the need for laws exists because other factors, such as employer control over hiring, tastes for discrimination, mistakes and lack of information, limit the principle.

349 *Op cit* 1015.

enduring value that guides 'interpretation' of civil rights laws.³⁵⁰ This should be done for at least the original intended beneficiaries of Title VII – African-Americans and other people of colour and diverse national origin, and women. But, it has been argued that employers should also be required to take a more careful look at their decision-making processes and re-evaluate their definitions of merit in order to broaden the scope of experience and differing perspectives in the workplace.³⁵¹

4.2.3 Regulations

The OFCCP regulations emphasise the merit principle. Under these regulations, and as part of its affirmative action programme, a contractor has to see to it that all people, regardless of race, colour, religion or national origin, have equal access to positions, limited only by their 'ability' to do the job.³⁵² 'Ability' is, however, not defined. As part of contractors' quantitative analyses in order to develop affirmative action programmes,³⁵³ references in the organisational programme, job group analysis, placement of incumbents in job groups, determining availability, and comparing incumbency with availability and placement goals, refer to 'qualifications', 'ability' and 'merit', but, similarly, the concepts are not defined.³⁵⁴ The regulations also provide for voluntary affirmative action, the goal of

350 *Op cit* 1017.

351 *Ibid.* To the extent that merit alone would not distinguish between qualified candidates, it is suggested that the law should encourage employers to err on the side of the original intended beneficiaries of affirmative action, namely people of colour and women (see also par 4.1.3.5(b) above where it is stated that diversity has been upheld as a compelling interest in the educational context).

352 41 CFR 60-3.17(1).

353 41 CFR 60-3.14B(3) (see also par 3.7.1 above).

354 Examples in this regard are: (a) the job group analysis establishes the representation of minorities and women in the work force with the estimated availability of minorities and women 'qualified' to be employed (41 CFR 60-2.12(a)); (b) availability is an estimate of the number of 'qualified' minorities or women available for employment in a given job group (41 CFR 60-2.14(a)); (c) a placement goal may not be used to supersede selection on 'merit' (41 CFR 60-2.16(e)(4)); and (d) it is not required that a person who 'lacks qualifications' to perform the job successfully must be hired, or that a 'less qualified' person must be hired in preference to a 'more qualified' one (41 CFR 60-2.16(f) as authorised by 41 CFR 60-1.5(a)(6)). An exception is, however, made where a contractor publicly announces a preference for American Indians – to be reflected in its placement goals – living on or near an Indian reservation.

which is the achievement of equal employment opportunity for all 'qualified' persons.³⁵⁵ Again, references are made to 'ability', 'basically qualified' people, etcetera, but the concepts are not defined.³⁵⁶

4.2.4 Academic opinion

4.2.4.1 Introduction

In the discussion that follows, an attempt will be made to give some examples of the debate in the US which South Africa may usefully consider. The writings mainly point out that: (a) the meaning of merit is not clear, even after years of use of the concept; and (b) merit should be used in the affirmative action context in a broader way than the traditional idea of merit.

4.2.4.2 Different approaches to merit

In an attempt to define the 'merit principle', McCrudden³⁵⁷ provides an insightful analysis. A 'closed' or a more 'open-ended' approach to the concept is possible.³⁵⁸ An example of the first-mentioned would be that where it is said that a person's race can never be used as merit, because it is objectionable to award benefits, or burdens, on the basis of a person's race. An example of the latter would be an approach pertaining to the assessment of *relevance*, which may change over time and according to the type of job. In other words, a connection has to be made between a mode of treatment, or an outcome

355 41 CFR 60-3.17(4).

356 For example: (a) affirmative steps may in design and execution be race, colour, sex, or ethnic conscious and include *inter alia* the establishment of goals and timetables for specific job classifications, all of which should take account of the availability of 'basically qualified' persons in the relevant job market (41 CFR 60-3.17(3)(a)); (b) selection under an affirmative action plan should be based on the 'ability' of the applicants to do the work (41 CFR 60-3.17.4); and (c) a plan may not require the selection of the 'unqualified', or the 'unneeded' (*ibid*).

357 McCrudden 1.

358 *Op cit* 554.

(that is, getting a job), and a particular feature of a particular person.

Five different *models* of merit are considered in an attempt to define the concept: (a) merit as the absence of intentional discrimination, cronyism or political favouritism; (b) merit as general, common-sense merit: in other words, society should generally value the qualities sought to accomplish the end pursued; (c) merit as strict job-relatedness: that is, a tighter fit between means and ends; (d) merit as the capacity to produce particular job-related results; and (e) merit as the capacity to produce beneficial results for the organisation.³⁵⁹

It has been conceded that these models can neither come together to form a coherent concept, as they are mutually incompatible, nor can any one of them stand alone to form a satisfying conception of merit by itself.³⁶⁰ Also, none of these models identifies the *weight* to be accorded to merit, or its *status* in relation to other concepts.³⁶¹

Five arguments giving merit some normative *weight* are considered.³⁶² These include: (a) merit as desert, (b) merit as a necessary underpinning of non-discrimination, (c) merit as productivity, (d) merit as qualification, and (e) merit as legitimate expectation. These arguments can be reduced to two contrasting approaches. On the one hand, the merit principle is seen to give rise to a strong desert-based claim, and thus to a strong *moral* obligation that the 'best qualified' candidate should be awarded the job. On the other hand, the merit principle is seen as being essentially justified on utilitarian grounds. This approach does not provide a strong moral right, but implies that the only requirement is an obligation to give serious consideration to candidates who rank better under the concept of merit as identified – an obligation which is itself capable of being overridden if in conflict with certain other values.³⁶³

There is therefore no real answer, or no correct, core conception of merit.³⁶⁴ Disputes about merit can therefore not be resolved by analysis of the concept of merit

359 *Op cit* 543-67.

360 *Op cit* 567.

361 *Op cit* 575.

362 *Op cit* 571-4.

363 *Op cit* 568-75.

364 *Op cit* 577.

itself. Rather, different conceptions of merit introduce different values external to merit in order to define them.³⁶⁵ The wide variety of such values and their conflicting nature explain why merit is contested.³⁶⁶

‘... the adoption of one or other conception of merit (or a decision on the appropriate weight to attach to it) is usually made in the light of other goals and values which are separate from merit itself: how should we view *effort* as opposed to *productivity*; how should we *balance* the interests of the *individual* and the interests of the *organization*; what does distributive justice require; should we be seeking a colour-blind society, or embrace diversity?’ (own emphasis).

Since different people have different answers to these questions, different conceptions of merit will be adopted. The debate surrounding merit in reality then seems to be a series of debates about these other values, and not about merit itself.³⁶⁷

In conclusion, if there are five basic conceptions of merit, and (at least two) different weightings are possible for each (as discussed above), it can be concluded that a person might be using a merit argument in one of at least 10 different senses. It has been suggested that the various elements which underpin the concept of merit should be separated where necessary in an effort to lead to a more focused debate and to better policy formulation.³⁶⁸ McCrudden suggests that crucial debates which would appear likely to draw on merit arguments can quite easily be resolved without reference to the concept at all.³⁶⁹ Those who wish to, or must (the civil service), adopt the rhetoric of merit should be pressed to identify which model of merit they are using or defending, why that model is preferable to the other models, what status they attach to the particular merit concept they are advancing, why that status is being attached, and how they intend to deal with the problems to which their chosen conception of the merit principle appears to give rise.³⁷⁰

365 *Ibid.*

366 *Op cit* 577-8.

367 *Op cit* 575.

368 *Op cit* 578-9.

369 *Op cit* 579.

370 *Ibid.*

4.2.4.3 A broader meaning for merit

The Civil Rights Act was passed when standardised tests were gaining increasing approval for measuring ability and achievement.³⁷¹ 'Merit' became increasingly defined as the score that a person obtained on a test.³⁷² People with lower test scores were 'less qualified' and people with higher scores were 'better qualified'. Heavy reliance was placed on test scores to predict job applicants' and students' future performance well beyond the tests' abilities to predict.³⁷³

What is also important is that there are indications that these tests are culturally biased against people of colour.³⁷⁴ And even if this is not so, the argument goes,

371 McGinley 'Affirmative Action' 1040-2; Sturm & Guinier 'Affirmative Action' 953-4;1034-5.

372 It has been argued that the notion that merit is disregarded in affirmative action has been reinforced by a narrower definition of merit brought about by tests designed to measure merit (McGinley 'Affirmative Action' 1040-2). A host of other factors also contributed to the perpetuation of the concept that merit is not considered in affirmative action (1042-8). First, the notion of the inferiority of African-Americans in judicial opinion and legislation enforced by the courts until after the Civil War. See, for example, *Dred Scott* 60 US 393 (1875) (par 3.2.1.1 above) which held that a slave was the property of his master and not a US citizen. Another example is *Plessy* 163 US 537 (1896) (par 3.2.3.1 above) which introduced the doctrine of 'separate but equal'. A second notion is the phenomenon of 'invisible privilege'. 'Privileges' mean characteristics of those who are privileged, and who define the societal norm to which all people are expected to conform. People who are privileged can also rely on their privilege to avoid objecting to the oppression of other groups. This almost always makes the privilege invisible to its holder. This notion maintains inequality and reinforces white power and privilege. Thirdly, colour blindness (as mooted by Harlan J in *Plessy* 163 US 537 (1896) (par 3.2.3.1 above), although rooted in an aversion to race discrimination, fails to recognise that discrimination based on race or gender can be understood only in the historical context of power and subordination. The principle of colour blindness, although well-meaning, reinforces the hidden differences in power between whites and blacks and re-establishes white privilege as the dominant norm. See Murray 'Merit-Teaching' 1112-3 who supports these views.

373 McGinley 'Affirmative Action' 1041; Woo 'Reaffirming Merit' 517-8. The latter holds that such standardised tests can also be methodologically biased in favour of good test-takers. Delgado 2 144 similarly argues that, if tests are used as a predictor of grades or later job performance, this only indicates that such a narrow test picks people who thrive in particular types of environment, namely those that rely on the test to do the selection for them. See also Schuck 1 26; Freeman 'Equality of Opportunity' 363-9 regarding test-taking ability.

374 McGinley 'Affirmative Action' 1042; Woo 'Reaffirming Merit' 517-8; Freeman 'Equality of Opportunity' 381-2; Benoit 'Color Blind' 378; Sturm & Guinier 'Affirmative Action' 954 fn 8; Delgado 2 143-4; Davis 2 366. See also Roithmayr 'Deconstructing the Distinction' 1473-74 who convincingly argues that merit standards necessarily embody race-conscious social preferences existing at the time the standards were developed; Kennedy 2 748-52 argues against 'blind' meritocratic judgement and emphasises the cultural context in which any meritocratic evaluation of legal scholarship must be made; Paul 'Legal Semiotics' 1828 who argues that judgement on

indications are that test scores correlate heavily with socioeconomic class and therefore discriminate indirectly against people of colour.³⁷⁵ This is so because the current conception of merit in the US – that it is colour- and gender-blind, numerical, quantifiable, neutral and transparently fair – has been formed in exclusion of people of colour, women and sexual minorities.³⁷⁶

Also, standardised tests are incomplete.³⁷⁷ While they measure a certain level of training, they do not measure progress or potential. It is argued that a person who starts from behind and makes significant progress has demonstrated talent and merit.³⁷⁸ Such progress, it is argued, can be more revealing of intelligence and ability than numerical indicia tests of present achievement alone.³⁷⁹

In essence, then, it is argued that broader recognition of merit beyond tests, grades and statistics to include race as a factor of a person's social and cultural history as a starting point, is necessary.³⁸⁰ Merit should further encompass the goals and purpose of the institution in question. For example, in a university setting, an understanding of diverse cultures, a history of overcoming obstacles, fluency in a second language, and an ability to perceive society from a distinct reference point, are all valuable attributes which should affect the decision whether a person is qualified or has the necessary 'merit' for admission.³⁸¹

It is argued that racial disadvantage as a factor must deserve recognition as merit.³⁸² While race and gender may not be determinative of individual worth, they can be

merit is, by definition, 'context-dependent'; Murray 'Merit-Teaching' 1112-3 who argues for a more expansive meaning of merit which is contextualised, 'racialised' and 'gendered'.

375 McGinley 'Affirmative Action' 1036.

376 Murray 'Merit-Teaching' 1057.

377 Woo 'Reaffirming Merit' 518.

378 *Ibid.*

379 *Ibid.*

380 *Op cit* 1041-2; 1057; Woo 'Reaffirming Merit' 519-20.

381 McGinley 'Affirmative Action' 1041. This is supported by Woo 'Reaffirming Merit' 518-9 who holds that merit should not be seen in the abstract. It must always be understood in the context of the purposes an institution may define and pursue. So, what counts as merit in an applicant depends on what qualities the particular institution deems relevant to its own character and social purposes.

382 Woo 'Reaffirming Merit' 518.

a 'starting point' in assessing a person's history and development, which must be taken into account in any measurement of individual merit. Statistics alone, it is argued, do not say much about the character and worth of people who must face societal obstacles such as racial or gender discrimination.³⁸³ In this regard, it has been held that discrimination on the basis of race is a societal obstacle, and overcoming such obstacle is evidence of inherent potential, character and progress – in other words, of individual merit.³⁸⁴ This would then be consistent with the traditional American focus on individual effort rather than on group reward.³⁸⁵

In terms of this view of merit, then, it is argued that present-day, race-based affirmative action *is* merit-based because it takes into account societal obstacles that may otherwise skew objective criteria of individual merit.³⁸⁶ And, if lower-scoring minority applicants can be recognised as 'meritorious' in this way, then the use of diver-

383 *Ibid.*

384 *Ibid.*

385 Woo 'Reaffirming Merit' 516; 520. The author argues that the arguments in favour of affirmative action have failed to convince opponents of the concept, partly because the *group* has been seen as more important than the *individual*. It is emphasised that, in American thinking, merit has to do with individuals: one should be rewarded because of one's actions or achievements, not because of affiliation (see par 4.2.1 above). In the context of affirmative action, the individualism which underlies American society has thus not been recognised. It has been held that both the public and the courts have resisted broad-based group remedies, because redistribution on the basis of a collective wrong seems to be inconsistent with the individualism that underlies American society (see also Schuck 2 91). It has been pointed out that this broadened concept of merit may also support the concept of diversity (Woo 'Reaffirming Merit' 519).

386 Woo 'Reaffirming Merit' 520.

sity to fill a class with representative groups, it has been argued, may not be so objectionable.³⁸⁷

Evaluation of the concepts 'qualified' 'unqualified' and 'merit'

The above discussion illustrates that the merit principle is often used in laws and regulations, but in an undefined manner. It has been pointed out that merit may be used in many different senses. In this regard, it has been stressed that those who wish to, or must (the civil service), adopt the rhetoric of merit must identify which model of merit they are using or defending, and why that model is preferable to the other models.

According to prevailing opinion, however, merit in the US will most probably continue to play a role used as a justification for employment equality approaches and as a background constraint on the use of certain methods of pursuing employment equality.³⁸⁸ With regard to the last-mentioned, it has been suggested that the merit principle should not be used as shorthand for objections to particular types of affirmative action, unless considerable time and effort are expended in explaining and justifying the particular conception of merit adopted.³⁸⁹

With regard to tests, it was seen that indications are that they are culturally biased against people of colour and may, as such, be open to challenge. Accordingly, calls have been made to include broader recognition of merit beyond tests, grades and statistics to include race and 'overcoming obstacles' as factors of a person's social and cultural history in affirmative action appointments and promotions. It is submitted that this would be similar

387 *Ibid.* It has been pointed out that admissions officers at tertiary institutions are filling classes with diverse and 'meritorious' applicants of different racial groups, in much the same way as they choose among qualified applicants on the basis of geography. As to the question of how tests will be implemented under this broader concept of merit, it has been held that 'alternative' evaluation systems beyond numerical indicia can be developed. For example: (a) the applicant's self-identification with a certain disadvantaged group; and (b) an essay may be requested outlining the applicant's experience in facing and overcoming societal obstacles. The latter will have to be screened for consistency and veracity. The abolition of standardised tests is thus not advocated, but that other factors should be accorded equal weight (*op cit* 521).

388 McCrudden 1 579.

389 *Ibid.*

to the position in South Africa, where the 'modified' concept of merit, namely 'suitably qualified', is used in the affirmative action context.

In contrast to the American experience, South Africa is in its infancy with regard to implementing and applying affirmative action, with little being done as far as the interpretation and meaning of the concept 'suitably qualified' are concerned.³⁹⁰ What can be learnt from the US in this regard is that this concept should be made clear to avoid a never-ending debate on the actual meaning of the concept.

4.3 Citizenship

4.3.1 Introduction

Affirmative action legislation in the US generally does not require citizenship as a requirement to benefit.³⁹¹ The exception is the MBE clause of the PWEA, but this has in any event been disregarded in practice.³⁹²

The aim in this part of the study is to show that two main themes have contributed to citizenship being disregarded in the affirmative action context: (a) large-scale immigration from all over the world; and (b) the consistent interpretation that 'citizenship' or 'alienage' as a basis for excluding or classifying people is a 'suspect class' and, consequently, unfairly discriminatory and unjustifiable under the equal protection clause of the Fourteenth Amendment.

4.3.2 Large-scale immigration

The US has a long-standing immigration tradition.³⁹³ In this regard, it has been held

390 As used in s 20(3) of the EEA (see chapter 3 par 3.5.2.3(c)(iii); chapter 4 par 2.2.2 above).

391 Neither Title VII nor the Executive Orders require citizenship in order to benefit from affirmative action.

392 Graham 1 902; Dannenmaier 'Affirmative Action' 26 (see also fn 465 below).

393 ILO Working Paper International Migration 10.

that all Americans are immigrants, or children of immigrants.³⁹⁴ America's approach to immigration has been described as one of *assimilating* migrant cultures as the price of acceptance.³⁹⁵ In this regard, the country has been described as a 'melting pot'.³⁹⁶ In other words, America's legal values cherish 'sameness'.³⁹⁷

Initial immigration into the US was encouraged mainly in an endeavour to sustain the industrial revolution.³⁹⁸ Early immigration policy preferred whites, with entry restricted for Negroes and Asians.³⁹⁹ Quotas for white people were imposed only in 1921.⁴⁰⁰ From then on, up to the mid-1960s, immigration was curtailed, with most of the new entrants being from north-western European countries.⁴⁰¹ In the 1960s, the Immigration and Naturalisation Reform and Control Act⁴⁰² (IRCA) increased the annual number of immigrants again, and from a wide variety of source countries.⁴⁰³ In particular, a large wave of immigration was experienced from the late 1980s, which (unlike immigration after World War II, which was 90 percent European) was 90 percent Asian and Latin American.⁴⁰⁴

The IRCA had two main aims. The first was to control the flow of illegal aliens who

394 *Ibid.*

395 ILO Working Paper International Migration 12.

396 Bennett-Alexander & Pincus *Employment Law* 302; Goldman & White 'United States of America' 101-2.

397 Abella 'Seeking Equality' 7; 21; Blanpain *International Encyclopedia* 33-7; Greschner 'Canadian Equality Rights' 67; ILO Working Paper International Migration 11-2. Note, however, that diversity has recently been accepted as a justification for affirmative action in the educational context (see par 4.1.3.5(b) above).

398 Goldman & White 'United States of America' 28.

399 *Op cit* 28-9.

400 Goldman & White 'United States of America' 28-9; La Noue & Sullivan 2 440.

401 Goldman & White 'United States of America' 28-9.

402 Of 1965. Before the advent of the IRCA, very few restrictions were applied to employers hiring illegal aliens. As later substituted by the Immigration Act of 1990, and subsequently the US Code, Title 8 Aliens and Nationality chapter 12 Immigration and Nationality Subchapter I, II and III (see par 4.3.3 below). The Immigration Act redefined quotas for immigration for relatives, employment and diversity; it increased quotas for job-based immigration; and extended protection to seasonal agricultural workers (Bennett-Alexander & Pincus *Employment Law* 562). See also Graham 1 903.

403 Goldman & White 'United States of America' 28-9; Skerry 'Immigration and the Affirmative Action State' 86; Graham 1 900.

404 Bennet-Alexander & Pincus *Employment Law* 136-7.

were found in large numbers in the US. This it did by regulating immigration through employment-related reporting and administration, and by outlawing discrimination against US citizens and legal aliens.⁴⁰⁵ Secondly, owing to the fact that millions of illegal aliens were resident in the US, the IRCA provided for an amnesty period during which such aliens who had illegally entered the US prior to 1 January 1982, and who had continuously resided therein since then, could convert from illegal to legal, documented status.⁴⁰⁶ This was a special step designed to accommodate and integrate the large numbers of immigrants who de facto, but illegally, settled in the territory. The IRCA further established worldwide quotas for immigrants, with categories of special quotas for, for example, reuniting family members and special employment opportunities.⁴⁰⁷

Of considerable importance was the fact that it also provided for protection against discrimination on the basis of citizenship. The IRCA held it to be an unfair immigration-related employment practice to discriminate against any individual (other than an unauthorised alien) with respect to the hiring and recruitment of the individual for employment, because of citizenship status, or an intention to become a citizen.⁴⁰⁸

Today, Title 8 Subchapter II – Aliens and Nationality of the US Code (Subchapter II of Title 8) – regulates immigration. On the one hand, it holds that the civil rights of legal immigrants must be protected.⁴⁰⁹ On the other, it makes explicit provision for the hiring and recruitment of an individual who is a citizen of the US over another individual who is an

405 Section 274A(a) of the IRCA. It was unlawful for employers to hire, or recruit for employment, an alien knowing that the alien was unauthorised, or without verification of the person's status. Employers were thus required to check the status of prospective employees prior to employment. In this way, the IRCA condoned discrimination against illegal aliens in recruitment (Bennett-Alexander & Pincus *Employment Law* 562; 617).

406 As of 2000, about 80 percent of immigrants who had been in the US for more than 30 years, became naturalised American citizens. Of those in the country for between 10 and 20 years, about 39 percent became citizens (Goldman & White 'United States of America' 28-9).

407 Goldman & White 'United States of America' 28-9; Bennett-Alexander & Pincus *Employment Law* 562; 617.

408 Section 274(B)(a)(1)(B) of the IRCA. Similar provision was made for discrimination on the basis of national origin (s 274(B)(a)(1)(A) of the IRCA). The last-mentioned proscription overlaps with Title VII (ss 703(a)(1) and 704(b)), but covers more employers, because the IRCA requires an employer to have four or more employees in its employ to fall under the ambit of the Act. It is therefore possible that an employer can discriminate on the basis of citizenship against authorised aliens who do not intend to become citizens (Goldman & White 'United States of America' 344-7).

409 Section 1101 of Subchapter I of Title 8.

alien, if the two individuals are equally qualified.⁴¹⁰ Subchapter II of Title 8 (similar to the IRCA) further provides for worldwide quotas and for special quotas for reuniting family members and for employment-based immigration. Immigration is generally restricted to family-sponsored, employment-sponsored and diversity immigrants.⁴¹¹ Provision is, however, made for a certain percentage of 'priority workers' with extraordinary abilities which will substantially benefit the US,⁴¹² for outstanding professors and researchers,⁴¹³ and for certain multinational executives and managers.⁴¹⁴ Provision is also made for members of professions who hold advanced degrees or have exceptional ability, and for skilled workers in fields where qualified workers are not available in the US.⁴¹⁵ Subchapter II of Title 8 (similar to the IRCA) provides that it is an unfair immigration-related employment practice to discriminate against any individual with respect to the hiring and recruitment of the individual for employment because of the national origin or citizenship, or intention to become a citizen, of a 'protected individual'. A 'protected individual' is defined as⁴¹⁶

'a citizen or national of the US, an alien⁴¹⁷ who is lawfully admitted for permanent residence,⁴¹⁸ and

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- 410 Section 1324b.(a)(2) and (4) of Subchapter II of Title 8. Specific provision is made for government officials to be US citizens (s 1543).
- 411 Section 1151(a) of Subchapter II of Title 8.
- 412 Section 1153(1)(A) of Subchapter II of Title 8.
- 413 Section 1153(1)(B) of Subchapter II of Title 8.
- 414 Section 1153(1)(C) of Subchapter II of Title 8.
- 415 Section 1153(3)(A) of Subchapter II of Title 8. The Secretary of Labor must certify to the Secretary of State and the Attorney-General that there are not sufficient workers who are able, willing, qualified (or equally qualified) and available at the time and at the place where the need for such workers is and that the employment of such aliens will not adversely affect the wage and working conditions of workers in the US similarly employed (s 1182(a)(5)).
- 416 Section 1324b(a)(3) of Subchapter II of Title 8.
- 417 Section 1101(a) of Subchapter I of Title 8. An alien is defined as 'any person not a citizen or national of the United States'.
- 418 Sections 1255; 1255a.(b) of Subchapter II of Title 8. Permanent residence will be granted if the application is made within two years after temporary residence has been granted; the person has been continuously resident since temporary residence was granted; the applicant has not been convicted of any felony or of three or more misdemeanours in the US; the applicant demonstrates that he or she meets the minimum requirements for understanding ordinary English and has a knowledge and understanding of the history and government of the US, or is satisfactorily pursuing a course to this effect.

a *temporary resident*⁴¹⁹ or a refugee⁴²⁰ but does not include an alien who fails to apply for naturalisation within six months of the date the alien first became eligible to apply for naturalisation' (own emphasis).⁴²¹

Citizens, permanent residents and temporary residents are all allowed to obtain jobs and are protected against discrimination on the basis of citizenship in this process. All these classes of people may thus potentially benefit from affirmative action once in the workplace.

Generally, however, immigrants to the US aggressively pursue citizenship and large numbers have obtained US citizenship.⁴²² In 1997, for example, the percentage of immigrants who were not US citizens was below 3,5 percent.⁴²³

Against the background of large-scale immigration, 'interest-group liberalism' took root and spread in the US in the 1970s (in contrast to the mid-sixties, when equal treatment for everybody was prevalent).⁴²⁴ This resulted in additional groups benefiting from affirmative action – mostly the organised, advantaged and affluent groups of immigrants, and not African-Americans, for whom it was originally intended.⁴²⁵ It appears that self-identification of beneficiaries of affirmative action may also have contributed to this

419 Section 1254(a) to (i) of Subchapter II of Title 8. Provision is made for special agricultural workers to obtain temporary residence while performing seasonal work (s 1160).

420 See Subchapter II. A limit is placed on the number of refugees allowed to enter, but exceptions are allowed based on humanitarian reasons, or in the national interest (s 1157).

421 This will, however, not apply to a person who employs three or less people, or to an individual who is covered under section 703 of Title VII, or, because of citizenship status which is required to comply with law, regulation, executive order or federal, state or local government contract, or which the Attorney-General determines to be essential for an employer to do business with an agency or department of federal, state or local government (s 1324b.(a)(2)). An employer can therefore discriminate, on the basis of citizenship, against authorised aliens who are not intending to become citizens.

422 Graham 2 184.

423 *Ibid.* For immigrants from Cuba, the Dominican Republic, El Salvador, China, India, Korea, the Philippines and Vietnam. In contrast, immigrants from Mexico had a non-citizenship rate exceeding 35 percent at that stage. The Mexican government has encouraged dual citizenship, seeking to export surplus labour to the US, import migrant earnings and retain the loyalty of Mexican-born immigrants to the US and their children.

424 *Ibid.*

425 Graham 1 903-4; Graham 2 165; 170; Schuck 2 65.

phenomenon.⁴²⁶ It has been suggested that, in essence, the granting of minority preferences to non-citizens under affirmative action was a strategy to appeal to minority voters.⁴²⁷

But, by the early 1990s, when unemployment increased in the US, the media began reporting information on recently arrived immigrants benefiting from affirmative action and this resulted in a public outcry.⁴²⁸ In response, civil rights leaders, anxious to protect affirmative action from criticism, avoided discussing the issue of immigrants benefiting from affirmative action, as did immigrant rights leaders.⁴²⁹ Government officials responsible for affirmative action programmes merely confirmed that agency guidelines on eligibility for affirmative action viewed immigration status as *irrelevant* to affirmative action eligibility.⁴³⁰

The inclusion of immigrants under affirmative action policies was explained as a 'historical accident for which there is no possible justification'.⁴³¹ It was nevertheless pointed out that it was absurd to grant preferences to (particularly) recently arrived immigrants as a remedy for historical discrimination. Major studies on immigration,

426 See par 4.1.4 above.

427 Graham 1 905.

428 See Dannenmaier 'Affirmative Action' 27ff; Graham 2 154-5; Graham 1 899. For example: (a) the Fanjul brothers in Miami – multimillionaire businessmen who obtained large MBE contracts in Florida – fled the Cuban revolution in the 1960s, but retained their Cuban citizenship to avoid taxes in the US; (b) the Rodriguez brothers – Portuguese immigrants and owners of large construction companies in Washington – obtained 60 percent of the MBE contracts during the period 1986-1990; (c) a black US businessman in Ohio sued to prevent the implementation of the MBE programme for Asian Indians, but lost when it was ruled that Asian Indians were entitled to the same privileges as blacks under affirmative action; (d) many minority faculty members at the University of Michigan who had been recruited under affirmative action were found to be foreign-born; (e) an Israeli immigrant – with a Hispanic surname and who formed a partnership with a Mexican citizen – obtained a multimillion dollar contract as they were the only 'minorities' in the Tennessee area; and (f) 14 of the top 25 recipients of MBEs in 1995 were of Asian descent.

429 Graham 2 131.

430 *Ibid*; Liddle 'Affirmative Action' 848.

431 See Graham 1 899-902; Graham 2 132-64 for an explanation as to how immigration and affirmative action policies were developed in isolation from each other during the 1980s to 1990s: (a) the factions supporting the two movements were historically different and different goals were sought; (b) opposing roles for government played a role; (d) the instruments of policy implementation in the two fields were different; and (d) scholars and lawyers in immigration and affirmative action rarely crossed policy-domain boundaries.

however, did not address or discuss these issues.⁴³²

With regard to recent⁴³³ immigrants, it has been argued that they have not been in the US long enough (and, no discrimination faced in their native country can justify violating the equal protection rights of US citizens) to have experienced the degree of discrimination, or to have been affected by such discrimination, in the way that long-time African-American residents have.⁴³⁴ Such recent immigrants, it has been argued, are not likely to have been significantly affected, either directly (by discrimination faced personally in the US) or indirectly (by discrimination faced by their ancestors), to an extent comparable with the situation of African-Americans. They then not only take jobs from those whom affirmative action is supposed to benefit, but also from deserving whites and other minorities.⁴³⁵

Excluding recent immigrants from affirmative action raises two issues. First, like immigrants, there are long-time citizens who, though members of groups historically discriminated against in the US, have not lived a significant part of their lives in an area of the country where, historically, the most overt and insidious discrimination occurred. This argument, based on geographical differences, presumes that the adverse effects of past societal discrimination result only when members of the disadvantaged groups, or their ancestors, have been subjected to the most pervasive discriminatory practices and laws. However, it ignores 'unconscious' racial discrimination which affects everybody in a society afflicted for so long by systemic racial discrimination.⁴³⁶ In this regard, Marshall J in *Bakke* argued that, with regard to African-Americans, 'no one' has managed to escape the impact

432 Graham 1 890; Schuck 2 52-3. Examples in this regard are: (a) the Clinton Administration conducted a study on affirmative action in 1995, but did not mention immigration participation in affirmative action programmes; (b) the US Commission on Immigration Reform of 1997 did not mention it either; and (c) no data existed connecting immigration and affirmative action.

433 Liddle 'Affirmative Action' 848. 'Recent' has been explained as referring to the situation where someone has come to the US, but has not yet spent a significant amount of time or portion of his or her life in the country. Whether this period of time should be six months, one year or 10 years, or one-tenth, one-third or one-half of a lifetime has not been addressed.

434 *Ibid.* The author, however, makes out a case for Mexican Americans possibly being entitled to affirmative action owing to systematic past discrimination against them in the US.

435 *Op cit* 856.

436 *Ibid.*

of historical discrimination in the US.⁴³⁷ Thus, it has been argued, whereas recent immigrants have most likely been affected very little, if at all, by past discrimination, those living in the US for a significant period of time (and, even more so, those whose ancestors have lived in the US), regardless of the location in the country, have been 'somewhat' residually affected by past discrimination.⁴³⁸

Secondly, excluding recent immigrants involves determining how long a person must have lived in the country in order to be considered 'sufficiently affected' by past discrimination to qualify as a beneficiary of affirmative action. It has been held that, no matter when recent immigrants came to the country, their possible entitlement to the benefits of affirmative action cannot be based on the residual effects of past societal discrimination against their ancestors.⁴³⁹ Further, recent immigrants who came to the US after the Civil Rights Act was implemented are less likely to have been personally subjected to pervasive discriminatory practices and laws that were in place prior to that time.⁴⁴⁰ However, it has been pointed out that⁴⁴¹

'this society did not become "colorblind" overnight upon passage of the 1964 Act, nor did all opportunities suddenly become available to everyone at that time'.

Accordingly, it has been recommended that the line regarding immigrant eligibility for affirmative action benefits be drawn well after 1964. Exactly where to draw this line, it has been suggested, should be left to the politicians.⁴⁴²

Evaluation of large-scale immigration

It seems that, owing to the large numbers of immigrants settling in the US, the scope

437 At 2804.

438 Liddle 'Affirmative Action' 856.

439 *Op cit* 856-6.

440 *Op cit* 856-7.

441 *Op cit* 857.

442 *Ibid.*

and application of affirmative action policies have been influenced. Remedies originally intended for African-Americans were extended to members of minority groups who came to the US as immigrants, irrespective of whether citizenship had been acquired,⁴⁴³ and independent of the time spent in the US, or the actual disadvantage suffered by them. It was also seen that special steps were taken to enable illegal immigrants to convert to legal status. It appears that, although criticism was levelled at the fact that affirmative action benefited immigrants, the issue was never driven to a point where a clear policy decision was made on how to deal with this issue. Accordingly, the practice of granting affirmative action benefits to immigrants has literally overtaken the law.

4.3.3 US citizenship

The original US constitutional text merely gave Congress the broad power 'to establish a uniform Rule of Naturalization'.⁴⁴⁴ In giving effect to the Fourteenth Amendment's designation to establish a uniform rule of naturalisation, Congress made laws to regulate the acquisition and loss of citizenship. Although blacks were initially excluded from citizenship, amendments were made to enable them to obtain citizenship after the abolition of slavery.⁴⁴⁵

The Fourteenth Amendment confirmed the tradition of *ius soli* in terms of which citizenship derives from birth in the territory. It thus accelerated the spread of citizenship to immigrant populations and reduced distinctions between citizens and non-citizens.⁴⁴⁶ The concept of citizenship used holds, at its core – similar to the situation in South Africa – that all people lawfully and permanently residing in the US are entitled to be full members of the country. Currently, Subchapter III – Nationality and Naturalization Title 8 Aliens and Nationality (Subchapter III of Title 8) – regulates citizenship. Citizenship may be obtained

443 Not to mention the distinction on the basis of the various ways in which citizenship may have been acquired, as has been argued in the South African situation (see chapter 4 par 2.3.5 above).

444 Section 8, clause 4 of the Constitution.

445 See the Emancipation Proclamation of 1863; Thirteenth Amendment of 1865 (see par 3.2.2.1 above).

446 Graham 1 902; Glaser & Possony *Victims of Politics* 126-7; 130; Schuck & Smith *Citizenship* 9-41.

in one of three ways (as has been the case for many centuries), namely by birth,⁴⁴⁷ by collective naturalisation,⁴⁴⁸ and by (ordinary) naturalisation, which is fairly similar to the position in South Africa.⁴⁴⁹ Applicants for naturalisation must show that they have resided in the US for a continuous period of at least five years after permanent residence was granted.⁴⁵⁰ People who have made extraordinary contributions to national security or intelligence activities may be granted naturalisation without complying with the general requirements,⁴⁵¹ but must demonstrate their good moral character.⁴⁵² US citizens may lose⁴⁵³ or renounce their citizenship voluntarily,⁴⁵⁴ or it may be revoked.⁴⁵⁵ It appears that, as in South Africa, no meaningful distinction is made between the different classes of citizens on the basis of the various ways of obtaining citizenship.⁴⁵⁶

Evaluation of US citizenship

With regard to blacks, though they were initially excluded from citizenship, this was rectified relatively early in the history of the US. With regard to immigrants, it was seen that special steps were taken to enable them to obtain citizenship, and that they in fact aggressively pursued citizenship. It appears that the issue of citizenship is thus not as sensitive as in South Africa. This is understandable if viewed against the background of large-scale

447 Section 1401(a) of Subchapter III Title 8.

448 Section 1401(c)-(h) of Subchapter III Title 8 (which is different from the situation in South Africa where the notion of collective naturalisation is not used, but understandably so because the country did not experience the large-scale immigration of the US).

449 Sections 1421-1459 of Subchapter III of Title 8.

450 Section 1427(a) of Subchapter III of Title 8, with certain periods of absence allowed (s 1427(b)).

451 Section 1427(f) of Subchapter III Title 8.

452 Sections 1427(d) and (e) of Subchapter III Title 8.

453 Section 1435 of Subchapter III Title 8.

454 Sections 1481; 1483 of Subchapter III Title 8.

455 Section 1451 of Subchapter III Title 8.

456 With the exception that specific provision is made for the restriction of welfare benefits for newly legalised aliens (ss 1255a(h); 1611 of Subchapter II of Title 8) and for aliens (s 1612 Subchapter II of Title 8). Permanent residents are granted privileges, in that they may qualify for public assistance in some instances (s 1254a(f) Subchapter II of Title 8).

immigration, and because citizens, permanent residents and temporary residents may all obtain jobs and, in the process, are protected against discrimination on the basis of citizenship. In any event, immigrants aggressively pursue citizenship and large numbers have in fact obtained US citizenship.⁴⁵⁷

4.3.4 A matter of interpretation

4.3.4.1 Introduction

The fact that citizenship is not required in order to benefit from affirmative action can further be explained by the way in which the equal protection clause of the Fourteenth Amendment has been interpreted through the centuries.⁴⁵⁸ The Fourteenth Amendment does not provide a list of protected classes. But, its language is explicit in the sense that it extends to all people in the American community, that is, citizens and non-citizens.⁴⁵⁹ In this regard, it has been held that the guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of colour.⁴⁶⁰ If both are not accorded the same protection, then it is not equal.⁴⁶¹ Thus, it seems that the rights created by the Fourteenth Amendment are guaranteed to the individual, and that the rights established are personal rights.⁴⁶²

Initially, the equal protection clause was used as an anti-racial discrimination measure in the context of state classifications.⁴⁶³ In this regard, a state had to justify the use of a race classification under *strict* scrutiny. In time, it was also used to protect non-citizens

457 See pars 4.3.2; 4.3.3 above.

458 Case law found in the broader societal context will be scrutinised and the principles thereof will then be applied to affirmative action.

459 See, for example, *Runyon v McCrary* 96 S Ct 2586 (1976); *Bakke* 98 S Ct 2733 (1978) at 2748.

460 *Bakke* 98 S Ct 2733 (1978) at 2748.

461 *Ibid.*

462 See *Shelley v Kraemer (Kraemer)* 68 S Ct 836 (1948) at 846; *State of Missouri ex rel. Gaines v Canada et al* 59 S Ct 232 (1938); *McCabe v Atchison T. & S. F. R. Co.* 35 S Ct 69 (1914) at 71.

463 See, for example, *Brown* 347 US 483 (1954) par 3.3.2 above.

in various areas of the law.⁴⁶⁴ The decisions on classifications based on race laid the basis for judging classifications based on alienage or citizenship.⁴⁶⁵ In contrast to state classifications, Congress had to show a *rational* basis for treating non-citizens differently from citizens under the Fifth Amendment's due process clause. In time, however, these were also subjected to strict scrutiny.

4.3.4.2 State classifications

(a) Early case law: alienage not justifiable

(i) *Strauder case*

In a very early case, *Strauder v West Virginia*⁴⁶⁶ (*Strauder*), and in the context of a West Virginia statute which did not allow the selection of jurors to include any person of race or colour, the court held that the Fourteenth Amendment was one of a series of constitutional provisions having a common purpose, namely to secure for the Negro race, then recently emancipated from slavery, all the civil rights that the superior white race enjoyed.⁴⁶⁷ It held that the true spirit and meaning of the Fourteenth Amendment could not be understood without keeping in mind the history of the times when the Amendment was adopted, and the general objects it sought to accomplish.⁴⁶⁸ At the time it was incorporated, it was anticipated that state laws might be enacted or enforced to perpetuate the distinctions and habitual discrimination against people of colour. It held that people of colour especially needed protection against unfriendly action in the *states* where they were

464 Such as serving as a juror, performing politically sensitive jobs, protecting a state's own citizens in employment against non-citizens, keeping curfew orders during wartime and restricting welfare benefits (see pars 4.3.4.2(a)(i); 4.3.4.2(ii); 4.3.4.2(b); 4.3.4.2(c) below).

465 A narrow exception has, however, been recognised, namely that non-citizens may be excluded from certain jobs with political significance (see par 4.3.4.2(d) below).

466 25 L Ed 664 (1880).

467 At 665.

468 *Ibid.*

resident.⁴⁶⁹ The Fourteenth Amendment not only granted citizenship to people of colour, but it denied to any state the power to withhold from them the equal protection of the laws. Moreover, it authorised Congress to enforce its provisions by appropriate legislation.⁴⁷⁰

'The 14th Amendment makes no attempt to enumerate the rights it is designed to protect. It speaks in general terms, and those are as comprehensive as possible. Its language is prohibitory; but every prohibition implies the existence of rights and immunities, prominent among which is an immunity from inequality of legal protection, either for life, liberty or property. Any state that denies this immunity to a colored man is in conflict with the Constitution.'

The court in *Strauder* found the West Virginia statute, which did not allow for naturalised Celtic Irishmen to be elected as jurors because of their colour (though citizens of the US and in other respects fully qualified), to be discriminatory.⁴⁷¹

(ii) *Yick Wo case*

The decision in *Strauder* was followed in *Yick Wo v Hopkins*⁴⁷² (*Yick Wo*). Here, the municipal building ordinances of the city of San Francisco pertaining to the carrying on of laundry businesses located outside buildings of brick or stone were found to be discriminatory, illegal and in violation of the Fourteenth Amendment. The petitioners in this instance – Chinese nationals – were aliens in the US. The court held that the provisions of the Fourteenth Amendment were not confined to the protection of citizens. The provisions, it stated, were universal in their application, applying to all people within the territorial jurisdiction without regard to any differences of race, colour or nationality. In addition, the equal protection of the laws was a pledge of the protection of equal laws.⁴⁷³ The issues in

469 *Ibid.* Thus the Fourteenth Amendment was designed particularly to ensure that the coloured race could enjoy all the civil rights that, under the law, were enjoyed by the white people, and to give them the protection of the federal government in that enjoyment whenever it should be denied by the states.

470 At 666.

471 At 666.

472 6 S Ct 1064 (1886).

473 At 1071.

the case were, it was held, to be treated as involving the rights of 'every citizen' of the US, and equally with those of aliens such as the Chinese petitioners. No reason, except the will of the supervisors (which appeared to be hostile to the race and nationality of the petitioners) was offered as to why the petitioners could not carry on with their occupation on which they depended for their livelihood.⁴⁷⁴

(iii) Raich case

In another early case, *Truax v Raich*⁴⁷⁵ (*Raich*), the argument that the employment of aliens, unless restrained, was a peril to the public welfare was found to be invalid under the Fourteenth Amendment. The court confirmed that 'any person' within the US jurisdiction included aliens.⁴⁷⁶ It could not uphold the argument that the employer had to dismiss the employee on the basis of the power of the state to make reasonable classifications in legislation to promote the health, safety, morals and welfare of those within its jurisdiction.⁴⁷⁷ It held that the legislation did not make it possible for the state to deny to lawful inhabitants, because of their race or nationality, the ordinary means of earning a livelihood. The right to work for a living in the common occupations of the community was found to be of the 'very essence' of the personal freedom and opportunity which the

474 At 1073.

475 36 S Ct 7 (1915). Here, the provisions of an Arizona state act were scrutinised. It protected citizens of the US in their employment against non-citizens and thus required every employer with more than five workers to employ not less than 80 percent of people qualified to vote, or native-born citizens of the US. In essence, the court found that the dismissal of the complainant, an Austrian resident alien (on the basis of the statute in order to bring the alien quota of employees within the prescribed limit), denied the complainant the equal protection of the laws and was unconstitutional under the Fourteenth Amendment (at 8). It relied on *Yick Wo* supra in this regard. The complainant had been admitted to the US under the federal law and, being a lawful inhabitant of Arizona, was therefore entitled under the Fourteenth Amendment to the equal protection of its laws. To deny to aliens the opportunity of earning a livelihood when lawfully admitted to the state would, it was stated, be tantamount to the right to deny them entrance and abode, for, in ordinary cases, they cannot live where they cannot work (*ibid*). If such a policy were permitted, the practical result would be that those lawfully admitted to the country under the authority of the acts of Congress, would be segregated in those states that offered hospitality (*ibid*).

476 At 9-10.

477 *Ibid*.

Fourteenth Amendment sought to secure.⁴⁷⁸ It was further held that, although reasonable classifications must be consistent with the reasonable expectations of the state, this could not be conceived so broadly as to bring them into hostility with exclusive federal power which had exclusive authority to control immigration – that is, to admit or exclude aliens.⁴⁷⁹

(b) World War II: alienage justifiable

(i) *Hirabayashi and Korematsu cases*

During World War II, the Fourteenth Amendment was interpreted more strictly. In *Hirabayashi v United States*⁴⁸⁰ (*Hirabayashi*), the appellant, an American citizen of Japanese descent, was convicted of remaining in a military area contrary to military curfew orders.⁴⁸¹

This was one of the first cases in which it was held that racial distinctions should be recognised as being suspect.⁴⁸²

‘Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.’

Nevertheless, the court upheld the curfew order as a proper exercise of the power of government during wartime. It found the circumstances to afford a rational basis for the decision to keep the curfew orders.⁴⁸³ The court held that the threat was real and that the

478 *Ibid.*

479 At 11.

480 63 S Ct 1375 (1943).

481 Only citizens of Japanese ancestry residing in the particular area were required to abide by the curfew orders. These orders were aimed at curbing the dangers of espionage and sabotage against national defence material, premises and utilities threatened by Japanese attack.

482 At 1385.

483 At 1386.

curfew was not in violation of the Fifth Amendment.⁴⁸⁴ In effect, the court created two classes of citizens to justify discrimination between groups of US citizens on the basis of ancestry.⁴⁸⁵ In a case with similar facts, also during wartime, *Korematsu v United States*⁴⁸⁶ (*Korematsu*), the Supreme Court similarly, and for a last time, *upheld* a racial classification under the strict scrutiny test.

(c) Recent case law: alienage not justifiable

(i) *Hernandez case*

In *Hernandez v Texas*⁴⁸⁷ (*Hernandez*), the court confirmed the decision in *Strauder* for Mexican Americans in the context of service as a juror. The court held that the Fourteenth Amendment was not directed solely against discrimination based on differences between Negroes and whites, but that it extended to all people of colour and race.⁴⁸⁸

484 At 1386. The Fifth Amendment, it was stated, contains no equal protection clause and only restrains such discriminatory legislation by Congress as amounts to a denial of due process of law (at 1390). The adoption of the curfew was held to be a temporary measure taken on a group basis and the only practicable expedient that would be in the interest of public safety based on circumstances which indicated that a group of one national extraction might menace that safety more than others, and within the boundaries of war power (at 1388-9). Time was of the essence and it was not expedient to obtain evidence on the loyalty or otherwise of the appellant on an individual basis (at 1388).

485 It did, however, point out that, except under conditions of great emergency, a regulation of this kind applicable solely to citizens of a particular racial extraction would not be in accordance with the requirements of due process of law in the Fifth Amendment (at 1390).

486 65 S Ct 193 (1944). The court, on a similar basis to that in *Hirabayashi*, accepted the judgment of the military authorities to exclude, during wartime, certain people from certain areas (at 194-5).

487 74 S Ct 667 (1954). The petitioner alleged that the exclusion of Mexican Americans from service as jury members deprived him, as a member of the class, of the equal protection of the laws under the Fourteenth Amendment. The court upheld this.

488 At 670.

(ii) Richardson case

More recently, in *Graham v Richardson*⁴⁸⁹ (*Richardson*), the court treated race and alienage in exactly the same way and linked the two grounds. It struck down provisions in Philadelphia and Arizona state statutes which deprived non-citizens with less than 15 years of residency of welfare benefits. The states relied on a state's 'special public interest' to favour their own citizens over aliens in the distribution of limited resources.⁴⁹⁰ The court conceded that, in the past, it had upheld state statutes that treated citizens and non-citizens differently on the ground that such laws were necessary to protect the special interests of the state or its citizens.⁴⁹¹ But, now, it held:⁴⁹²

'Whatever may be the contemporary validity of the special public-interest doctrine in other contexts ... we conclude that a State's desire to preserve limited welfare benefits for its own citizens is inadequate to justify Pennsylvania's making non-citizens ineligible for public assistance, and Arizona's restricting benefits to citizens and longtime resident aliens. ... Since an alien as well as

489 91 S Ct 1848 (1971).

490 At 1852.

491 At 1852. The court referred to *Raich* 36 S Ct 7 (1915) where it was held that states may limit the regulation or distribution of the public domain or property or resources of the state to their citizens as against both aliens and the citizens of other states; *Crane v New York* 239 US 195 (1915) where the court confirmed that a state, in determining the use of its own money, may legitimately consult the welfare of its own citizens rather than that of aliens; *McCready v Virginia* 94 US 391 (1877) (state's resources); *Patson v Pennsylvania* 232 US 138 (1914) (state's resources); *Hauenstein v Lynham* 100 US 483 L Ed 628 (1880) (devolution of property to aliens); *Blythe v Hinckley* 180 US 333 21 S Ct 390 (1901) (devolution of property to aliens). It pointed out, however, that *Takahashi v Fish & Game Comm'n* (334 US 410 (1948), cast doubt on the continuing validity of the 'special public interest' doctrine in all contexts (at 1853). There the court held that California's purported ownership of fish in the ocean off its shores was not such a special public interest as would justify prohibiting aliens from making a living by fishing in those waters while permitting all others to do so (at 420). 'The Fourteenth Amendment and the laws adopted under its authority thus embody a general policy that all persons lawfully in this country shall abide "in any state" on an equality of legal privileges with all citizens under non-discriminatory laws' (at 1853).

492 At 1835. The court held, first: 'the special public interest doctrine was heavily grounded on the notion that "[w]hatever is a privilege, rather than a right, may be dependent upon citizenship." ... But this Court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterised as a "right" or as a "privilege."' Secondly: '[A] State has a valid interest in preserving the fiscal integrity of its programs. It may legitimately attempt to limit its expenditures, whether for public assistance, public education, or another program. But a State may not accomplish such a purpose by invidious distinctions between classes of its citizens. ... The saving of welfare costs cannot justify an otherwise invidious classification.'

a citizen is a “person” for equal protection purposes, a concern for fiscal integrity is no more compelling a justification for the questioned classification in these cases’

Although states were held to have a broad discretion to classify as long as the classification had a reasonable basis,⁴⁹³

‘classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny’.

The court argued that aliens (or non-citizens), like citizens, paid taxes and might be called into the armed forces. They might live within a state for many years, work in the state and contribute to the economic growth of the state.⁴⁹⁴ Thus aliens as a class were a prime example of ‘a discrete and insular minority ... for whom such heightened judicial solicitude is appropriate’. An ‘alienage’ classification could thus not ordinarily be used as a basis for allocating state-created advantages between citizens and aliens.⁴⁹⁵

(iii) Bakke case

In the late 1970s, in the case of *Bakke*,⁴⁹⁶ and in the context of the relevance of race for admission to medical school, the court upheld the special admissions programme under strict scrutiny and justified an expansive reading of the Fourteenth Amendment. It held that the perception of racial and ethnic distinctions was rooted in the US’s constitutional and demographic history. Initially, the court’s view of the Fourteenth Amendment was that its ‘one pervading purpose’ was ‘the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised dominion over

493 At 1852; 1854.

494 At 1854.

495 Schuck & Smith *Citizenship* 107 remark that the court in its refusal in the *Richardson* judgment to regard citizenship as a special status entitling its holder to special benefits thereby ‘devalued’ citizenship.

496 98 S Ct 2733 (1978) (see par 4.1.3.2(a) above for the facts).

him'.⁴⁹⁷ But, in time, the equal protection clause attained a genuine measure of vitality.⁴⁹⁸

'... [i]t was no longer possible to peg the guarantees of the Fourteenth Amendment to the struggle for equality of *one* racial minority. During the dormancy of the equal protection clause, the United States had become a *nation of minorities* ... Each had to struggle to overcome the prejudices not of a monolithic majority, but of a "majority" composed of various minority groups of whom it was said ... that a shared characteristic was a willingness to disadvantage other groups ... As the Nation filled with the stock of many lands, the reach of the clause was gradually extended to *all ethnic groups* seeking protection from official discrimination' (own emphasis).

The court held that, although many of the framers of the Fourteenth Amendment conceived its primary function as being one of 'bridging' the vast distance between members of the Negro race and the white majority, the Amendment itself had been framed in universal terms, without reference to colour, ethnic origin or condition of prior servitude.⁴⁹⁹ Also, legislation had specifically been broadened in 1870 to ensure that all people, not merely citizens, would enjoy equal rights under the law.⁵⁰⁰ It accordingly held

497 At 2748-9.

498 At 2749. See, for example, *Strauder* 25 L Ed 664 (1880) (Celtic Irishmen); *Yick Wo* 6 S Ct 1064 (1886) (Chinese nationals); *Raich* 36 S Ct 7 (1915) (Austrian resident aliens); *Korematsu* US 65 S Ct 193 (1944) (US citizens of Japanese ancestry); *Hernandez* 74 S Ct 667 (1954) (Mexican Americans), discussed in pars 4.3.4.2 (a); 4.3.4.2(b); 4.3.4.2(c) above.

499 At 2749-50. The court relied on the *Slaughter House cases* 16 Wall 21 Ed 394 (1873) where it was held that the Amendment should be construed 'liberally' in order to carry out the purpose of its framers.

500 At 2750. Indeed, the court held that it was not unlikely that, among the framers of the Act, there were many who would have applauded a reading of the equal protection clause that states a principle of universal application and is responsive to the racial, ethnic and cultural diversity of the US nation (at 2750). The court further held that, over the years, it had embarked upon the crucial mission of interpreting the equal employment protection clause with a view to assuring to all persons the protection of equal laws against the background of a nation confronting a legacy of slavery and racial discrimination (at 2750). See, for example, *Kraemer* 68 S Ct 836 (1948) in the context of rights of the individual to acquire, enjoy, own and dispose of property; *Brown* 347 US 483 (1954) in the context of separate, but equal, educational facilities for Negroes and whites; *Hills v Gautreaux* 96 S Ct 1538 (1976) in the context of selected family public housing sites in Chicago to avoid the placement of Negro families in white neighbourhoods. Distinctions between citizens solely because of their ancestry has been repudiated consistently as being 'odious to a free people whose institutions are founded upon the doctrine of equality' (at 2750). See, for example, *Loving v Virginia* 87 S Ct 1817 at 1823 (1967) (in the context of a statute adopted by the state of Virginia to prevent marriages between people solely on the basis of racial classifications), quoting *Hirabayashi* 63 S Ct 1375 at 1385. These findings have been supported by authors who have held that the equal protection clause of the Fourteenth Amendment is plainly capable of being applied

that racial and ethnic classifications were subject to strict examination.⁵⁰¹

(d) Political function: alienage justifiable

The principle enunciated in *Richardson supra*⁵⁰² that an ‘alienage’ classification cannot ordinarily be used as a basis for allocating state-created advantages between citizens and aliens has been modified to validate citizenship requirements for some professions in the area of state employment. Under the ‘political function’ doctrine, the court has recognised that a state might exclude non-citizens from occupying certain state government jobs to the extent that such positions ‘go to the heart of representative government’.⁵⁰³ Put otherwise, the ‘political function’ exception pertains to positions that are intimately related to the process of self-governance of the states.⁵⁰⁴ In cases where the restricted position satisfies this exception, discrimination against legal aliens is thus permitted.⁵⁰⁵ For example, in *Foley v Connelie*,⁵⁰⁶ a New York bar on the employment of non-citizens as state troopers was upheld. Similarly, in *Ambach v Norwick*,⁵⁰⁷ a refusal by New York state to employ resident, non-citizen school teachers who were eligible for citizenship, but who refused to seek naturalisation, was upheld as being rationally related to legitimate state interests. *Cabell v Chavez-Salido*⁵⁰⁸ upheld a Californian statute that all peace officers must be citizens or permanent residents, and that persons who were not

to ‘all subjects’ of state legislation (see Bickel ‘The Segregation Decision’ 60-1). It has been suggested that the Fourteenth Amendment indicates an ‘awareness’ on the part of the framers that it was a *constitution* they were writing, which led to a choice of language capable of growth (*op cit* 63).

501 At 2762-3. The court referred to *Hirabayashi* 63 S Ct 1375 (1944) at 1385; *Korematsu* 65 S Ct 193 (1944) at 194.

502 91 S Ct 1848 (1971).

503 Schuck & Smith *Citizenship* 107; Romero ‘Congruence Principle’ 434.

504 Bennett-Alexander & Pincus *Employment Law* 315.

505 *Ibid.*

506 435 US 291 (1978).

507 441 US 68 (1979).

508 454 US 432 (1982).

citizens or permanent residents could be properly excluded from performing such service. Political function was explained in *Bernal v Fainter*⁵⁰⁹ as focusing on whether the office holder would necessarily exercise broad discretionary power over the formulation or execution of public policies importantly affecting the citizen population – power that a self-governing community could properly entrust only to full-fledged members of that community. This was further explained *In re Griffiths*⁵¹⁰ to mean that the job must not involve direct participation ‘in the formulation, execution, or review of broad public policy’.

Evaluation of state classifications

From the discussion above it is clear that the guarantees of the Fourteenth Amendment apply to all people within the jurisdiction of the US, and not to citizens only. Although initially intended to equalise the position between white and Negro people, the Fourteenth Amendment has been interpreted over the years as including people of all races and national origin, independent of the citizenship or resident status of the person at issue.

From early on the courts have held that alienage classifications (similar to race) cannot be upheld, except during wartime. *Hirabayashi* and *Korematsu*, however, have generally been regarded as the products of ‘wartime hysteria’ and the findings have been widely discredited.⁵¹¹ Generally, in the span of time between *Yick Wo* and *Bakke*, the court expanded the equal protection rights of individual non-citizens as against the states by acknowledging immigrants’ enjoyment of this freedom and by holding that any state-sanctioned discrimination would be subject to strict judicial scrutiny.⁵¹²

Thus, the development of the Fourteenth Amendment’s equal protection

509 467 US 216 (1984) at 223-4.

510 413 US 717 (1973). Here, it was held that Connecticut state could not require citizenship for admission to the bar as this was in violation of the equal protection clause. The court accordingly ruled against the bar for denying a Dutch citizen access to the state bar exam.

511 Spann 1 1-8; Spann 2 77 fn 358. See also *Adarand* 115 S Ct 2097 (1995) at 2106, 2117 criticising the result in *Korematsu*. The court in *Adarand* held that *Korematsu* demonstrated that even the most rigid scrutiny can sometimes fail to detect an illegitimate racial classification (at 2117).

512 Romero ‘Congruence Principle’ 434.

jurisprudence has generally favoured the individual non-citizen over the state government.⁵¹³ In the area of state employment, the 'political function' doctrine has assisted states to a limited extent to exclude non-citizens from occupying certain state government jobs.

In terms of the principles of international law, which require that affirmative action measures must not be contrary to the non-discrimination principle,⁵¹⁴ race, minority status, sex, war veterans and disability (the targeted groups) as grounds on which to affirm people in America can be said to be 'sufficiently connected' or 'relevant' to the right in question, namely equality. The analogous argument to establish whether citizenship may be used as an additional criterion (over and above being a member of a targeted group) in order to benefit from affirmative action points to citizenship as a ground currently⁵¹⁵ not highly relevant to affirmative action in the US. Thus, it is correct *not* to use citizenship as a criterion in this context. It is submitted that the use of citizenship would, contrary to the position in South Africa, be unfairly discriminatory in the particular American context.⁵¹⁶

4.3.4.3 Congress' classifications

(a) Early and recent case law: alienage not justifiable

(i) *Chinese Exclusion case*

Congress' classifications on the basis of race and alienage have, unlike state classifications, been dealt with more deferentially and on the basis of the plenary power doctrine. In an early case, *The Chinese Exclusion case*,⁵¹⁷ the Supreme Court held that Congress had absolute power to exclude Chinese nationals from re-entry into the US

513 *Ibid.*

514 See chapter 2 pars 2.1.2.4(c)(i)A; 2.1.2.4(c)(i)B above.

515 Though initially it might have been perceived to be important.

516 See chapter 4 par 2.3 above.

517 130 US (1889) as cited by Romero 'Congruence Principle' 430.

because of the perceived economic and social threat from the growing number of 'unassimilable' Chinese people who immigrated to California during the gold rush of the late nineteenth century.⁵¹⁸

(ii) Matthews case

In a more recent case, *Matthews v Diaz*⁵¹⁹ (*Matthews*), the court upheld a federal alienage classification which denied medical care benefits to some non-citizens. Despite its earlier statement in *Richardson supra* that alienage classifications, like those based on race, were inherently suspect, the court relied on the plenary power doctrine and upheld Congress' power to regulate the relationship between the US and aliens in its territory.⁵²⁰ Instead of reviewing the legislation on the basis of strict scrutiny, the court in *Matthews* upheld the federal alienage classification because it 'reasonably furthered' a legitimate governmental interest which the court felt it lacked the expertise to review.⁵²¹

(iii) Fullilove, Croson and Adarand cases

Fullilove supra,⁵²² in the context of the MBE provision of the PWEA, held that Congress could mandate state and local government compliance with set-aside programmes under its section 5 power⁵²³ in order to enforce the Fourteenth Amendment. With regard to the constraint on Congress' power to employ race-conscious remedial relief, the court held that Congress had the most comprehensive remedial power and could, where it had declared certain conduct unlawful, authorise and induce state action to avoid

518 As cited by Romero 'Congruence Principle' 430-1.

519 426 US 67 (1976).

520 At 84-5.

521 At 82-3 (see Romero 'Congruence Principle' 436-7).

522 488 US 448 (1980). The majority held that the programme did not violate the equal protection principles in the due process clause (see par 4.1.3.4(b) above).

523 Section 5 holds that Congress has the power to enforce, by appropriate legislation, the provisions of the Fourteenth Amendment.

such conduct.⁵²⁴ Neither strict scrutiny nor rational scrutiny was applied in this case.

Fullilove was overturned in *Croson* supra where the court, for the first time, used strict scrutiny for Congress' classifications.⁵²⁵ Subsequently, in *Adarand*, the strict scrutiny test for race-based classifications for federal, state and local set-asides was confirmed.⁵²⁶ O'Connor J (for the court) defined this test to mean that, when a government regulation treats one race differently from another, the regulation must be strictly scrutinised to determine whether it meets a 'compelling governmental interest' which cannot be met by a less restrictive alternative.⁵²⁷ Moreover, it was held, the regulation had to be narrowly tailored to further that specific interest. The strict scrutiny test was adopted, it was stated, because of the persistence of racial practices and because of the lingering effects of racial discrimination against minority groups in the US—an 'unfortunate reality' which government was not disqualified from responding to.⁵²⁸

Evaluation of Congress' classifications

Although, initially, the plenary power doctrine received considerable support, Congress' classifications are currently also subjected to strict scrutiny.⁵²⁹ This is important because 'alienage' as a class, as used by federal government, may also be subjected to strict scrutiny in future. In other words, the MBE clause of the PWEA, which is intended for citizens only, may be struck down as being unconstitutional.

With regard to the principles of international law which require that affirmative action

524 At 719.

525 At 721.

526 At 2117.

527 *Ibid.* The compelling interest (focusing on the 'end' pursued) that the court was at that stage prepared to accept was remedying present effects of past discrimination: either the government's own discrimination or the discrimination by private actors within its jurisdiction. The primary question in this context is whether those benefiting are the actual victims of discrimination, and whether the remedy is narrowly tailored. The 'narrowly tailored' requirement (focusing on the 'means') is concerned with how government is seeking to meet the objective of racial or ethnic classification (McCrudden 2 372).

528 *Ibid.*

529 Romero 'Congruence Principle' 431.

measures must not be contrary to the non-discrimination principle, the same arguments are made for Congress' classifications as for state classifications above.⁵³⁰

5 CONCLUSIONS

5.1 Introduction

As in the previous chapter, only brief concluding remarks are made here, as the various issues have been dealt with comprehensively in the evaluatory paragraphs under each issue.⁵³¹ In this chapter, it was attempted to provide a historical and legislative overview explaining the US's approach to equality and affirmative action. A comparison with American law is important for South Africa, as the two countries share a common history of colonialism and slavery – and subsequent discrimination – directly related to the current inequalities found in their societies. Moreover, the US has substantial experience of affirmative action which may help South Africa (which is in its infancy as regards affirmative action) to structure its debate.

The discussion in this chapter further focused on the same issues that were discussed with regard to South Africa, namely whether actual disadvantage or group membership of a targeted group is required for beneficiaries of affirmative action, whether evidence of past discrimination must be presented, and, if so, the extent and type of evidence, deficiencies of categorisation, the role of merit in affirmative action, and the use of citizenship in the application of affirmative action.

530 See chapter 2 pars 2.1.2.4(c)(i)A; 2.1.2.4(c)(i)B; par *Evaluation of state classifications* above.

531 See pars *Evaluation of disadvantage*; *Evaluation of the concepts 'qualified', 'unqualified' and 'merit'*; *Evaluation of large-scale immigration*; *Evaluation of US citizenship*; *Evaluation of state classifications*; *Evaluation of Congress' classifications* above.

5.2 Disadvantage

5.2.1 *Past personal disadvantage or group membership*

Early indications in the US were that equality was interpreted in a formal and restrictive way, similar to the situation in South Africa.⁵³² In the mid-1960s, however, legislation was enacted to provide for affirmative action. Under Title VII of the Civil Rights Act, an affirmative action plan by private employers has to fulfil three requirements to be held to be lawful. These are: (a) a remedial purpose to correct a 'manifest imbalance' in a traditionally segregated job category; (b) the plan must not unnecessarily trammel the interests of non-minority members; and (c) such a plan must be temporary. An employer justifying an affirmative action plan need not point to its *own* prior discriminatory practices. With regard to past personal discrimination or membership of a group in order to benefit from affirmative action, past personal discrimination was initially required, but, since the 1980s, mere group membership has sufficed.⁵³³

In contrast, race-based classifications pursuant to an affirmative action plan under the Fourteenth Amendment by public employers, must satisfy strict scrutiny.⁵³⁴ This means that: (a) a 'compelling interest' must be shown; and (b) the plan must be narrowly tailored to achieve such an interest. To prove a compelling interest, an employer must provide evidence of its *own* past discrimination against a particular group (and against an individual as a member of such a group) in a particular area and industry, 'approaching a prima facie case'. Moreover, under the MBE clause of the PWEA, provision has been made for rebuttable presumptions to exclude groups, or a member of a group, not actually disadvantaged under particular past discrimination. Currently, compelling interests include rectifying past racial discrimination and diversity. The latter, however, has been accepted only in the context of admissions to universities and not explicitly for the workplace.

This, it was submitted, makes sense if viewed against the background of the notion

532 See chapter 3 par 3.1,1; pars 3.2.1; 3.2.3 above.

533 See pars 4.1.3.2; 4.1.3.3; *Evaluation of disadvantage* above.

534 See pars 4.1.3.4(c); *Evaluation of disadvantage* above.

of equality of opportunity (which focuses on groups, but only up to a certain point, whereafter the focus returns to the individual) and the period of 40 years during which affirmative action has been applied in the country. Large numbers of people from the targeted groups have in fact benefited from affirmative action measures at this stage.

It was submitted that this scenario is not desirable in the South African context where a majority has to be affirmed, and where substantive equality (a group-based notion) is the goal. Evidence of past discrimination in South Africa has been amply documented and, no evidence of an employer's own past discrimination is required to justify affirmative action. Members of the designated groups are assumed to have been disadvantaged under past discrimination.⁵³⁵ A standard for proving past discrimination has thus not been an issue.

5.2.2 Deficiencies of categorisation

It was seen above that criticism has been levelled at affirmative action categories.⁵³⁶ Mainly five issues are covered by such criticisms, namely those of over-inclusiveness, the fact that those least in need of affirmative action in the various groups benefit, under-inclusiveness, the fact that degrees of disadvantage are not taken into account within and between the groups, and the closed process employed by officials (not accountable to voters) for defining the benefiting categories. While the first four issues giving rise to criticism are similar to those found in South Africa,⁵³⁷ the last is unique to the US. It appears that no concrete steps have been taken in practice to address these deficiencies.

Criticism regarding the use of race as a basis for categorisation has been borne out by the large number of Americans who recently indicated that they considered themselves multiracial and wished to be identified as such (if they must be racially identified at all). It has been speculated that the US may eventually reformulate the concept of race, or allow it to disappear, and may use race-neutral methods for determining the

535 See chapter 4 pars 2.1.3.2; *Evaluation of disadvantage* above.

536 See par 4.1.4 above.

537 See chapter 4 par 2.1.4 above.

beneficiaries of affirmative action.

5.3 The concepts 'qualified', 'unqualified' and 'merit'

It was seen that the US uses the concept of merit 'proper' in affirmative action.⁵³⁸ It was, however, seen that the concept is not clear, even after years of use. Moreover, criticism had been levelled at tests which measure merit, namely that they are culturally biased and incomplete. Accordingly, calls have been made to adopt a broader concept of merit and to include factors such as race and the ability to overcome obstacles in affirmative action appointments and promotions. It was submitted that this is fairly similar to the position in South Africa where a 'modified' concept – 'suitably qualified' – is used to address the skills deficiencies experienced by members of the designated groups.

5.4 Citizenship

With regard to the issue of citizenship, it was seen that affirmative action for only citizens of the US has not materialised (and will not likely materialise in future).⁵³⁹ In the US, many non-citizens have benefited from affirmative action, and, in particular, under the PWEA (which, ironically, requires citizenship). This was explained on the basis of two themes. First, as a result of the large number of immigrants settling in the US (and self-identification for benefiting from affirmative action), affirmative action was extended to members of minority immigrant groups. This was done irrespective of whether or not citizenship had been obtained, and independent of the time spent in the US or the actual disadvantage suffered by them. Although criticism has been levelled at this, it appears that the issue has never been driven to a point where a clear policy decision has been made in this regard. And, it has not been addressed politically. In fact, it has been held that granting non-citizens preferences under affirmative action was intended to appeal to minority voters.

538 See par 4.2.1 above.

539 See pars 4.3.2; 4.3.3; 4.3.4 above.

It was however pointed out that allowing immigrants to benefit under affirmative action has created the anomalous result where affirmative action is used to remedy the effects of past discrimination in respect of people who have *not* suffered from discrimination in the US.⁵⁴⁰ The question that has arisen is whether these immigrants, who have come voluntarily to the US, deserve the same protection as black Americans, who were subjected to slavery and consequent historic discrimination. In essence, the inclusion of immigrants under affirmative action policies was explained to be a 'historical accident' for which there is no justification.⁵⁴¹ Some academic debate has however taken place to suggest that a cut-off date for immigrants to benefit from affirmative action, should be determined.

Secondly, the non-acceptance of citizenship status as a requirement in order to benefit from affirmative action was explained on the basis of the interpretation that exclusions or classifications of people in terms of alienage/citizenship in various areas of the law have, through the centuries, been regarded as discriminatory and unjustifiable under the Fourteenth Amendment.⁵⁴² Although initially intended to equalise the position between white and Negro people, this Amendment has in time been interpreted to include people of all races and national origin. It has further been interpreted to apply to the individual as a personal right, and to both citizens and non-citizens.

In conclusion, there have been calls to abolish affirmative action in the US, as well as calls for its continuation. With regard to the former, in California and Arizona, for example, affirmative action was ended by referenda.⁵⁴³ With regard to the latter, it has been held that there is still strong evidence of pervasive racism in all areas of American society.⁵⁴⁴ In particular, statistics relating to per capita income and poverty indicate

540 *Ibid.*

541 *Ibid.*

542 See par 4.3.4 above.

543 See par *Evaluation of Adarand case* above.

544 See, for example, Hepple 'Equality Laws' 604 (who holds that this is due to the lack of social change); Oppenheimer 'Understanding Affirmative Action' 997; McGinley 'Affirmative Action' 1048; Brest & Oshige 'Affirmative Action' 900; Benoit 'Color Blind' 399; Giampetro & Kubasek 'Individualism in America' 194; Fallon 1 1951; Bernhardt 'Affirmative Action' 36; Maxwell 'Racial Classifications' 279; Kennedy 2 756; Weiss 'We Want Jobs' 246; Hartman *Business Ethics* 488-9.

discrimination against minority groups and women.⁵⁴⁵ It seems that American society is aware of this continuing discrimination, as is borne out by the overwhelming support for affirmative action expressed by the US community in the amici curiae briefs filed in the *Grutz* and *Grutter* cases supra.⁵⁴⁶ However, support for affirmative action has been on the basis of diversity, which is different from the initial remedial purpose of rectifying past discrimination. Affirmative action in the US thus appears to have turned out to be a dynamic concept that has been adapted to the evolving needs of society. Or, as it has been put more cynically, diversity is just the 'current rationale' for justifying affirmative action.⁵⁴⁷

The above notwithstanding, the notion that affirmative action is temporary is widely held in America.⁵⁴⁸ In this regard, there has recently been talk of 25 years needed to achieve equality.⁵⁴⁹ On the one hand, it has been held that the public is justified in its concern regarding the indefinite continuation of a policy that raises difficult moral and political questions and which has always been rationalised as a temporary remedy.⁵⁵⁰ On the other, it has been held that the political reality is that, once affirmative action measures have been established, they are difficult to dismantle.⁵⁵¹

Having set out the American position with regard to the beneficiaries of affirmative action, attention now turns to Canada, the second country used as a comparator in considering the South African position.

545 Goldman & White 'United States of America' 34-5; 37-8; 40-2.

546 See par 4.1.3.5(b) above.

547 *Ibid.*

548 Schuck 2 83-4; Little 'Affirmative Action' 274; *Bakke* 98 S Ct 2733 (1978) at 2751-2; *Weber* 99 S Ct 2721 (1979) at 2731; *Crosby* 488 US 469 (1989) at 730-1.

549 *Grutter* 123 S Ct 2325 (2003) at 2346.

550 Schuck 2 84.

551 *Ibid.*