

**Employment Discrimination and Affirmative Action:
Are Affirmative Action Plans Helpful or Hurtful?**

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TABLE OF CONTENTS

| | Page |
|---|------|
| ACKNOWLEDGMENTS..... | ii |
| ABSTRACT..... | iv |
| INTRODUCTION | 1 |
| CHAPTER | |
| I. Title VII of the Civil Rights Act of 1964..... | 4 |
| II. Examples of Violations of the Civil Rights Act of 1964..... | 9 |
| III. Affirmative Action Plans and Reverse Discrimination Claims..... | 15 |
| IV. Affirmative Action Today..... | 30 |
| V. Reflection and Conclusion..... | 39 |
| BIBLIOGRAPHY..... | 46 |
| LIST OF COURT CASES..... | 49 |
| VITA..... | 50 |

Anthony R. Hanson

ABSTRACT

EMPLOYMENT DISCRIMINATION AND AFFIRMATIVE ACTION: ARE AFFIRMATIVE ACTION PLANS HELPFUL OR HURTFUL?

Thesis under the direction of Dr. Anthony Parent, Ph.D., Professor of History

Prior to 1964, employment discrimination in the United States was rampant. African Americans, females and other minorities were treated cruelly, creating an appalling work environment. A number of confrontational events occurred in the 1950's and 1960's that caused minority leaders to push for civil rights changes. To combat the deplorable working and living conditions which had developed in the United States, Congress passed the Civil Rights Act of 1964. Under Title VII of this legislation, Congress provided that employees could not be discriminated against on the basis of neutral factors such as race, religion, sex, national origin, or color in the American workplace. The goal was to treat all workers with respect and fairness.

Minority employees successfully started to pursue discrimination claims against employers who discriminated against minorities. In order to avoid lawsuits, many employers implemented affirmative action plans to employ and promote minorities and females. Preferential treatment of minorities under affirmative action plans then resulted in lawsuits by Caucasian males alleging reverse discrimination claims. Caucasian males claimed that affirmative action plans favoring minorities actually discriminated against white males on the basis of their race or color. The validity of affirmative action plans has been litigated for the past thirty years. This analysis examines the validity of affirmative action plans forty-five years after passage of the 1964 Act.

Employment Discrimination and Affirmative Action: Are Affirmative Action Plans Helpful or Hurtful?

Introduction

Minorities and females have been mistreated in the United States for centuries. From the time of slavery to present times, African Americans in particular have been treated cruelly. Racial segregation resulted in separate schools, parks, restaurants, and hospitals for blacks and whites. The segregated facilities for African Americans were generally inferior. Working conditions and salaries for minorities and women in the United States from the 1940's through the 1960's were unfair and demeaning (Bell 495).

Congress passed major legislation in the Civil Rights Act of 1964 in response to these unfair conditions in the United States. Title VII of this Act provided the legislation that it was unlawful for an employer to discriminate against any individual with respect to the individual's race, religion, sex, national origin, or color. The goal was to treat all workers with respect and fairness. Title VII has given African Americans, women, Latinos, and other minorities the ability to effectively object to unfair working conditions and to remove unfair prejudices in employment and the legal system. Example cases will be used to show how Title VII has changed work practices to better protect the rights of minorities and women. The clear goal of Title VII was to stop employment discrimination.¹

As a result of this Act, minorities began to successfully pursue discrimination claims against employers who refused to hire minorities. In order to avoid lawsuits and to increase the numbers of minorities in the workforce, many employers implemented

¹ Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. sec. 2000e.

affirmative action plans to hire and promote minorities and women. University admission plans which favored minorities paved the way for affirmative action plans in the workplace. When preferential university admission plans were upheld, this encouraged private employers to create additional affirmative action plans. The minority preferential admission program cases for education will be carefully analyzed since they heavily influenced the upholding of employment affirmative action plans (Friedman 395). Affirmative action plans moved to the realm of the awarding of federal and state contracts, benefiting minority businesses in an effort to mitigate the effects of prior discrimination. Affirmative action efforts in this area include setting aside a certain percentage of federal and state project contracts directly benefiting minority businesses.

Preferential treatment of minorities under affirmative action plans then resulted in lawsuits by Caucasian males alleging reverse discrimination. These suits claimed that affirmative action plans favoring minorities actually discriminated against Caucasian males on the basis of their race and color. The validity of affirmative action plans have been litigated for the past thirty years with many twists and turns within the legal system. In June of 2009, the United States Supreme Court decided a much anticipated affirmative action case which signals the court's current view of this important issue.

Are affirmative action plans still deemed necessary and lawful? There are multiple reasons why affirmative action plans are appropriate and multiple reasons why affirmative action plans are inappropriate. Many people feel that affirmative action plans give an unfair advantage to unqualified workers who obtain a job or promotion based on their race or color rather than their qualifications. Others feel that these plans are appropriate because they allow discriminated groups the opportunity to catch up to where

they would have been had employers not been biased against minorities in the past. Furthermore, if minorities are promoted and have successful careers, they will hopefully become role models for other minorities who will be motivated to succeed.

The purpose of this research paper is to examine employment discrimination in the United States, particularly the provisions of Title VII of the Civil Rights Act of 1964, and the affirmative action plans implemented by employers, universities, and governmental bodies. Developing an understanding of the conditions leading up to the Civil Rights Act is necessary to grasp the act and resulting litigation. An analysis of earlier and current affirmative action and anti-discrimination cases will provide a better understanding as to how appropriate affirmative action plans are today. With the Supreme Court being the final authority on affirmative action, the biggest issue the Court will face is determining when to end affirmative action. After analyzing the data, a conclusion will be made about the validity and future of affirmative action plans.

CHAPTER ONE

Title VII of the Civil Rights Act of 1964

Since their arrival in the seventeenth century, African Americans have been discriminated against, resulting in them becoming the major driving force behind civil rights for all minorities in the United States. Additionally, the women's rights movements of the nineteenth century aided racially based civil rights claims helping set the groundwork for an effective civil rights movement. Much like African Americans, women have struggled for rights and recognition since the founding of our country.

To better understand the reasoning behind the passing of the Civil Rights Act of 1964, it is important to acknowledge and understand the notion of "separate but equal" and how this theory became common practice in the United States, largely in the South. Dating back to the end of the Civil War, African Americans gained significant rights through the passing of the 13th, 14th, and 15th amendments to the Constitution. However, the gains made by African Americans during reconstruction in the South were diminished by the Supreme Court's ruling in the 1896 case; *Plessy v. Ferguson*.² The court legalized separate public facilities for whites and blacks, allowing the "separate but equal" notion to exist. However, the facilities in schools, restaurants, hospitals, and bathrooms were not equal, as blacks' facilities were inferior to those of their white counterparts (Rosenberg and Kendall 21). The *Plessy* case reinforced the ideology that African Americans were not entitled to equal facilities.

Furthermore, the segregation existing in the South expanded into the workplace, creating poor working conditions and inferior pay for African-American employees.

² 163 U.S. 537 (1896).

African-American workers faced many demeaning practices. For example, in South Carolina, black cotton mill workers were not allowed to look out the same window as whites. The restrooms for black employees did not have doors on the bathroom stalls while the white employees' restrooms were clean and well maintained. Separate water fountains were required for white and black employees throughout the South (Williams 13). Women have also struggled mightily for fairness in society³ and in the workplace. Women have continuously faced lesser wages and fewer promotion opportunities when compared to their male counterparts.

Employment conditions worsened after World War II for African Americans and women as soldiers returned home, flooding the workplace. A company in Buffalo, New York fired 9,000 female employees, with African American women being laid off at a five to one ratio as a result of discrimination. Discrimination in the workplace forced these women into applying for lesser paying jobs and most were denied unemployment benefits. "By November, 1945, the exodus of minority workers from wartime jobs had turned into a virtual rout, and discrimination was 'rapidly approaching pre-war levels,' according to columnist Ted Poston of the New York Post" (Riches 16-17).

In response to the despicable treatment toward minorities, a number of people stood up to seek better treatment and to end the cruel approach of segregation. Minorities used lawsuits, mass sit-ins, and boycotts to try to bring about change. After many years of frustration, in 1954, the United States Supreme Court decided the landmark case of *Brown v. Board of Education*.⁴ This decision held that segregated schools would never be equal, overturning the earlier decision in *Plessy v. Ferguson*, the first significant

³ Women received the right to vote in the United States 50 years after African American males obtained this right.

⁴ 347 U.S. 483 (1954).

victory in the fledgling attempt to bring about civil rights changes for minorities. There were a series of school desegregation incidents, with the most publicized event occurring in Little Rock, Arkansas in 1957, where large demonstrations tried to stop black students from attending a previously all white high school (Williams 92-93).

There were a number of additional civil right demonstrations and incidents that occurred in the United States which brought attention to the plight of minorities. In 1955, Rosa Parks refused to give up a seat on a bus in violation of a city ordinance in Montgomery, Alabama. In 1960, college students who refused to leave whites-only food counter staged a sit-in at Woolworths in Greensboro, North Carolina. In 1963, Martin Luther King delivered the famous "I have a dream" speech at a march on Washington, DC to an estimated 250,000 people. Tens of millions more watched the events unfold on television. The civil rights movement caught the attention of President John F. Kennedy, who made the passage of federal legislation a high priority. Although it came after President Kennedy's death, Congress passed the Civil Rights Act of 1964. Title VII of this Act was designed to stop employment discrimination (Riches 77-79).

It is important to understand the format of Title VII of the Civil Rights Act of 1964. This act prohibited employers from discriminating against employees on the basis of race, color, religion, sex, or national origin while hiring, firing, or making any decision affecting a term or condition of employment. Examples of terms or conditions of employment decisions include salary, leave benefits, insurance programs, pension plans, promotions, and training opportunities. The act applies only to employers who employ fifteen or more employees on payroll. The Equal Employment Opportunity Commission (EEOC) was created to administer Title VII. To pursue a claim under Title VII, an

employee must file a claim with the EEOC. The EEOC can then investigate the claim and pursue it on behalf of the employee or issue a right to sue letter to the employee. Since the EEOC is understaffed, a right to sue letter is typically issued to the employee, allowing the employee to initiate litigation against the employer on their own (Twomey 406-407).

Two theories are available to establish a violation of Title VII against an employer: disparate treatment and disparate impact. Disparate treatment is an intentionally discriminatory act where an employer directly uses race, color, national origin, sex, or religion as criteria for making employment decisions. For example, an employer refusing to hire any African-American employees would constitute disparate treatment. Disparate treatment can be demonstrated by either circumstantial evidence or by statistical evidence of discrimination against minorities. Statistical evidence that shows a lower percentage of workplace employees compared to the community population can establish a disparate treatment claim. For example, if only nine percent of the employees at the workplace are African American, but thirty-three percent of the local community is African American, this would give rise to a valid disparate treatment claim (Twomey 409-411).

The second legal theory which can be used under Title VII is disparate impact. Under this theory, if an employer implements a hiring criterion which looks neutral on the surface, but disqualifies a disproportionate group of applicants, he or she violates Title VII. This theory comes from the 1971 landmark case of *Griggs v. Duke Power Company*.⁵ In this case Griggs tried to apply for a job as a custodian at the Duke Power Company. Griggs could not meet the initial job criteria set forth for the job. The job

⁵ 401 U.S. 424 (1971).

required a high school diploma and a passing score on an IQ test. Griggs, an African-American applicant, did not graduate from high school, so he did not qualify for the job. Griggs sued claiming that the criterion set forth by the company was discriminatory under Title VII. The United States Supreme Court held in favor of Griggs in a controversial holding. The Court reasoned that the criteria for the job looked neutral on its face, but had the impact of disqualifying a disproportionate percentage of African Americans, because they did not graduate from high school at a rate even remotely close to whites. This requirement created a built-in advantage for Caucasians and a bar to hire for African Americans. The Supreme Court held that employers are free to set reasonable job criteria, as long as the criterion is related to job performance. The problem in the *Griggs* case was that a high school diploma and a passing IQ test score did not relate to performing a custodial job. Disparate impact cases became very powerful and very expensive for discriminating employers (Twomey 418-421).

Once the Civil Rights Act was passed it took time for employers and employees to gain an understanding of how the Civil Rights Act applied to the work place. Court decisions became very important as the decisions clarified the rights of employees.

CHAPTER TWO

Examples of Violations of the Civil Rights Act of 1964

Minorities in the United States, and specifically African Americans, gained a powerful tool to level the playing field between the majority and minorities through the passing of the Civil Rights Act of 1964. Breaking down biases and prejudices arguably started with the passage of Title VII. Developing a social conscience through the assistance of legislation is a slow process. To understand the impact of Title VII, it is helpful to examine representative cases involving discrimination claims based on race, sex, religion, and national origin. A sample case from each area gives an insight into this important area of the law.

An example of a race bias case is *Gregory v. Litton Systems Inc.*⁶, which took place in 1972. In this case Gregory applied for employment with Litton Systems as a sheet metal mechanic. Litton verified the references Gregory supplied and made an employment offer to Gregory who accepted the job offer. At the time that Litton made the job offer, it did not know that Gregory had been arrested fourteen different times in situations other than minor traffic incidents. Gregory was never convicted of any criminal offense even though he had been arrested many times. Litton required all new employees to fill out a form called a “Preliminary Security Information” form, which required a listing of all arrests. Gregory filled out the form and disclosed all of the information. When Litton realized that Gregory had been arrested fourteen times, Litton withdrew its employment offer. It is important to note that thirteen of the fourteen arrests were all nearly ten years old. The only reason that Litton revoked the job offer was

⁶ 472 F. 2d 631 (1972).

because of the arrest information provided by Gregory. Gregory sued, claiming a violation of Title VII. The court held in favor of Gregory stating as follows:

Negroes are arrested substantially more frequently than whites in proportion to their numbers. The evidence on this question was overwhelming and utterly convincing. For example, Negroes nationally comprise some 11% of the population and account for 27% of reported arrests and 45% of arrests reported as "suspicion arrests". Thus, any policy that disqualifies prospective employees because of having been arrested once, or more than once, discriminates in fact against Negro applicants. This discrimination exists even though such a policy is objectively and fairly applied as between applicants of various races. A substantial and disproportionately large number of Negroes are excluded from employment opportunities by Defendant's policy. The discrimination which is inherent in the use of Litton's said policy is not excused or justified by any business necessity. If Litton is permitted to continue obtaining information concerning the prior arrests of applicants for employment which did not result in convictions, the possible use of such information as an illegally discriminatory basis for rejection is so great and so likely, that, in order to effectuate the policies of the Civil Rights Act, Litton should be restrained from obtaining such information. However, Litton should be permitted to obtain and inspect information which is on the public record concerning the prosecution and trial of any prospective employee, even if the proceeding eventually resulted in an acquittal. Records of arrests which do not result in formal prosecution or trial, are not matters of public record. Certain legal propositions govern this case. The policy of Defendant under which Plaintiff was denied employment, the policy of excluding from employment persons who have suffered a number of arrests without any convictions, is unlawful under Title VII. It is unlawful because it has the foreseeable effect of denying black applicants an equal opportunity for employment. It is unlawful even if it appears, on its face, to be racially neutral and, in its implementation, has not been applied discriminatorily or unfairly as between applicants of different races.⁷

By handing down this ruling, the Court under Title VII effectively halted a racially biased and unfair employment action. Cases like this force employers to stop discriminatory actions and instill more trust in the American system by minorities.

In the area of sex discrimination, there are two lines of cases, the first being direct sex discrimination and the other being sexual harassment. In the case of *Hishon v. King*

⁷ *Gregory v. Litton*, 472 F. 2d 631 (1972).

*and Spalding*⁸ the actions of a prestigious law firm became the target of a Title VII sex discrimination lawsuit in 1984. Hishon worked for the law firm of King and Spalding as an associate attorney. Under the format adopted by the law firm, associate attorneys worked for the firm for six years and then were either promoted to partner status or let go. Hishon sought a promotion to partner and when she was not promoted by the firm she sued the firm for sex discrimination in violation of Title VII. At the time of the lawsuit no woman had ever made partner in the fifty year history of the firm. The law firm was set up as a partnership and as such, every partner was allowed to vote on Hishon's promotion to partner. The firm argued that the promotion to partner decision should not fall under Title VII, as it is a well established partnership doctrine that promotion to partner requires unanimous partner approval, taking this out of the realm of Title VII. The Supreme Court held that promotion to partner is a "term or condition of employment" under Title VII and applied to Hishon's situation. The case was sent back to the lower court so that Ms. Hishon would have the opportunity to prove in court that she had been denied the promotion because of sex discrimination. The case was settled out of court. As a result of this case, law firms amended their practice and implemented thorough annual evaluations to advise associate attorneys if they are on track to advance to partner status (Kamen A3). This case is extremely important in the realm of women's rights as it opened the door for women to advancement in such prestigious fields as law, medicine, accounting, and engineering.

An example of a religious discrimination claim arises in *Wilson v. U.S. West Communications*.⁹ In this case an employee, Christine Wilson, a Roman Catholic, made

⁸ 104 S.Ct. 2229 (1984).

⁹ 58 F. 3d 1337, (1995).

a religious vow to wear an anti-abortion button until abortion ended. On the button was a graphic color photo of a fetus. The employer alleged that the button was offensive and caused work disruptions. The employer offered three accommodations including covering the button while at work. Christine Wilson was ultimately fired for wearing the button uncovered. Wilson sued for religious discrimination under Title VII. The court denied Wilson's claim holding in favor of the company. The Court stated: "The employer did not violate Title VII by firing the employee; Title VII requires that an employer reasonably accommodate an employee's religious beliefs but does not require that the employer allow that employee to impose her or his religious views on others" (Cihon and Castagnera 121). The employer had argued that the button caused disruptions at work leading to a forty percent decline in productivity of her department since Wilson began wearing the button (Ruan 18). Employers are required to make reasonable accommodations for the religious preference of employees, but employers are not required to suffer a hardship to accommodate employees. In this case the court determined that the employer would suffer a hardship because of the negative impact on work productivity.

The most common cases involving national origin discrimination involve English-only speaking requirements by employers. Employers have been legally permitted to insist on English speaking capabilities if the employee is expected to interact with the public. Mexican-Americans are often frustrated by English speaking requirements since their common language is Spanish. The 1980 case of *Garcia v. Gloor*¹⁰ is an example of national origin discrimination case. In this case Garcia was a bilingual Mexican American who worked as a salesman at Gloor Lumber and Supply in Brownsville, Texas.

¹⁰ 618 F. 2d. 264 (1980).

His duties included stocking his department, selling lumber, hardware and supplies. He also assisted other salespersons. The employer had a rule prohibiting employees from speaking Spanish on the job unless they were communicating with Spanish speaking customers. Garcia had difficulty complying with the English-only rule because Spanish was his primary language and he only spoke Spanish when he was at home. The rule requiring English speaking was justified as it helped the employees learn English more fluently and because English speaking customers were uncomfortable around workers who conversed in Spanish. Garcia was fired after responding in Spanish to a Spanish-speaking co-worker's question about an item requested by a customer. A manager overheard the conversation and Garcia was discharged. Garcia claimed discrimination on the basis of national origin arguing:

...the English-only rule was discriminatory because it deprived those whose first language was not English of the ability to converse in the language most comfortable to them. This denied Spanish-speaking employees a privilege enjoyed by employees most comfortable speaking English. Garcia said this constituted discrimination on the basis of national origin because national origin determines language preference. Garcia further contended that there was no business necessity that required the rule; therefore Gloor's adoption of the rule was arbitrary. (Klaeren 349)

The court disagreed with Garcia holding that the English-only requirement did not unlawfully discriminate on the basis of national origin. It is important to note that Garcia was bilingual and therefore fully capable of abiding by the employer's English-only requirement. Garcia was permitted to speak Spanish at break time and when dealing with Spanish speaking customers. He was obliged to use English in serving English speaking customers and when in the public workspace. In the court's view this was not discriminatory. This case illustrates the fact that some claims of discrimination

commenced by workers are not successful under Title VII and employers are granted some leeway in running their business operations.

In summary, the passing of Title VII in the 1964 Civil Rights Act has transformed the American workplace in an important way. As revealed in the four sample cases above, discrimination in the workplace is closely scrutinized by the EEOC and the court system. The goal of Title VII to eliminate discrimination based on race, sex, religion, and national origin has not only increased equality for minorities in the workplace through court rulings, but has also influenced employer's initial strategies for hiring, firing, and the promotion of minorities in a manner that is more equal to the majority. Bringing about a fair system has been a slow and tedious process. In order to speed up the process of ending discrimination, affirmative action plans were implemented and were crucial to improving the position of minorities.

CHAPTER THREE

Affirmative Action Plans and Discrimination Claims

The effects of slavery on African-American citizens in the United States were devastating. From the late 1800's to the 1960's Jim Crow laws were enacted by state and local bodies mandating segregated schools and public facilities. These laws were particularly powerful in the South. In order to speed up the process of rectifying the effects of past discrimination, Title VII of the Civil Rights act was passed in 1964. Soon, however, it became clear that the mere passage of Title VII was not sufficient to create fairness in the workplace. Resistance to change, especially in the South, was strong and in response to the opposition to change, affirmative action was born.

Affirmative action plans are designed to advance qualified minorities and women in the workforce largely because they had been unfairly disadvantaged for hundreds of years. President Lyndon Johnson first presented his perspective on affirmative action in a 1965 speech at a commencement address at Howard University. Johnson stated, "You do not take a person who for years has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, 'You are free to compete with all the others, and still justly believe that you have been completely fair'." President Johnson did not just talk about affirmative action; he put it in motion. In 1965, he issued Executive Order 11246 mandating that any company who wished to do business with the federal government had to implement an affirmative action plan to employ a reasonable number of minorities and females. Even companies who did not appreciate diversity and a fair workplace felt compelled to comply with the affirmative action requirements because

federal government contracts were too lucrative to pass up (Cihon and Castagnera 200-201).

In addition to the Executive Order issued by President Johnson, there was a second incentive for employers to adopt affirmative action plans. There were several successful disparate impact lawsuits (such as the *Griggs* case mentioned above) that resulted in significant judgments. These lawsuits scared employers who had low numbers of minorities and females in their workforce. Many private employers voluntarily adopted affirmative action plans to hire and advance minorities and women in an effort to avoid these lawsuits.

There was significant opposition to affirmative action plans and it was only a matter of time until these plans were challenged in court. The challenges to the affirmative action plans were typically commenced by Caucasian males who resented the fact that they were passed over for jobs and promotions because of the preference for minorities and females under the affirmative action plans. These cases became known as “reverse discrimination” claims because the Caucasian males alleged they were discriminated against under the plans because they were Caucasian males. Further, the Caucasian males commonly alleged this was a form of discrimination that was intended to be eliminated under Title VII. A strict reading of Title VII provides that an employer cannot discriminate in the workplace on the basis of race or color. The Caucasian males felt their color precluded their hiring or promotion under the affirmative action plan.

At the same time that employers were implementing workplace affirmative action plans, universities were aggressively attempting to increase the number of minority and female students on campus. Special admission programs were adopted that opened slots

for underrepresented categories of students. The first major court case challenging affirmative action decided by the United States Supreme Court in 1978 was the case of *Regents of University of California v. Bakke*.¹¹ Although this case did not involve a workplace setting, the university admission cases have been crucial to the development of workplace affirmative action plans because the principles overlap with the workplace setting.

In the *Bakke* case, the medical school at the University of California at Davis had 100 seats available for a medical class. There were two tracks open for admission. One track had eighty-four seats for general admission. The second track set aside sixteen slots for minority and disadvantaged students. This was done because there were no African Americans, Mexican Americans, or Native Americans at the Davis medical school and the school wanted to increase the diversity of the medical student population. Allan Bakke, a Caucasian male applied for admission at the medical school, but was not admitted after two attempts. He later learned of the special admission program and that students admitted under the special admission program had scores lower than his. Bakke alleged reverse discrimination and asserted that he was wrongfully discriminated against because of his race or color. The Supreme Court held that the two track admission program was invalid because of the inflexible use of a quota type system. It is permissible to take race into account, but race cannot be the only determining factor. In addition to using race as a factor, other factors such as economics, ethnicity, and geography can be used to achieve a diverse student body. The Court stated:

In such an admission program, race or ethnic background may be deemed a 'plus' in a particular applicant's file, yet it does not insulate the individual from comparison with all other candidates for the available

¹¹ 438 U.S. 265 (1978).

seats. An admissions program operated in this way is flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant and to place them on the same footing for consideration, although not necessarily according them the same weight. This kind of program treats each applicant as an individual in the admissions process. His qualifications would have been weighted fairly and competitively, and he would have no basis to complain of unequal treatment...¹²

Because the affirmative action admission plan was not valid, Bakke was admitted to the medical school at Davis. University programs across the country closely examined the *Bakke* case and created admission programs which considered race, color, and national origin as admission criteria. The logic of the subsequent university admission cases have been consistently applied to employment affirmative action plans ever since the *Bakke* case was decided. This case is significant because the court approved the concept of voluntary affirmative action and allowed the use of race or ethnicity as a basis for different treatment (Bennett-Alexander and Hartman 169).

The *Bakke* case was the first step in understanding the impact of affirmative action on minorities and women. The next important Supreme Court case regarding affirmative action was *United Steel Workers of America, AFL-CIO v. Weber*¹³ decided in 1979. The *Weber* case involved a voluntary affirmative action plan that was adopted by the Kaiser Aluminum Company to eliminate racial imbalances in its workforce. There were significantly fewer African-American skilled workers in the workplace than living in the local community. Kaiser Aluminum adopted a plan to train production workers to move into the skilled worker jobs that had been previously filled by outside hires. When they moved to train production workers, the employer adopted an affirmative action plan to increase the number of minorities in the skilled worker category. Under the new plan,

¹² *Regents of University of California v. Bakke*, 438 U.S. 265 (1978).

¹³ 443 U.S. 193 (1979).

fifty percent of all new trainees were to be African American hires. The training slots were to be filled on the basis of seniority.

Brian Weber, a Caucasian male, was a production worker who wished to advance to a skilled worker position under the training plan. Weber was not selected for the training program despite having greater seniority than every African-American trainee selected. Weber sued, claiming that the affirmative action plan discriminated against him on the basis of race in violation of Title VII of the Civil Rights Act of 1964. Weber argued that Congress never intended that Title VII would allow the use of voluntary affirmative action plans to discriminate against Caucasian employees. He further alleged that a previous Supreme Court case in 1976 had held that neither Caucasian workers nor African-American workers could be discriminated against under Title VII¹⁴ and that the Kaiser plan discriminated against him because he was Caucasian. Weber's position appears logical, but the Court looked at Congress' intent in passing Title VII, noting the following quote from Senator Clark in debating the passage of Title VII. "The rate of Negro unemployment has gone up consistently as compared with white unemployment for the past fifteen years. This is a social malaise and a social situation which we should not tolerate. That is one of the principle reasons why the bill should pass."¹⁵ The Court felt that improving the position of African Americans was the driving thrust behind the passage of Title VII. A voluntary affirmative action plan like the one developed by the Kaiser Company was compatible with the goals of Title VII, such as eliminating the unfair patterns of segregation, unemployment, and racial discrimination. It is very important to recognize that the Supreme Court justified its position by noting that

¹⁴ *McDonald v. Sante Fe Trail Transportation*, 427 U.S. 273 (1976).

¹⁵ *United Steel Workers of America, AFL-CIO v. Weber*, 443 U.S. 193 (1979).

Caucasian workers' interests were not trampled. No Caucasian workers were fired to make room for African American workers, nor were Caucasian workers barred from being selected as a trainee since one-half of the trainees would be Caucasian. The Supreme Court stressed that the voluntary affirmative action plan was to be temporary and would no longer be necessary once the percentage of African-American skilled workers matched the community.

The *Bakke* and *Weber* cases moved affirmative action and race relations to the forefront of the media. These cases showed a willingness on the part of the Supreme Court to improve the position of minorities after years of hardship and discrimination. Employers and universities had a better understanding of what could and could not be done in dealing with minorities through the use of affirmative action plans.

The affirmative action pathway was further clarified in the 1986 case of *Wygant v. Jackson Board of Education*.¹⁶ The school board in Jackson, Michigan created a plan to increase the number of minority teachers in the community. There was significant racial tension in the community. A number of minority teachers were retained in the school system with the goal of securing minority role models for the students. The school board and the teachers union reached a collective bargaining agreement that set forth what would happen in the event that teacher layoffs would become necessary. The school board was concerned that if all of the recent hires were laid off, the minority teachers would no longer be employed with the school district. To avoid the unfortunate outcome of losing most of the minority teachers, the board entered into an agreement that protected the minority teachers from extensive layoffs. Layoffs became necessary and under the teacher and school board agreement, a number of more senior Caucasian

¹⁶ 476 U.S. 267 (1986).

teachers were laid off while lesser seniority minority teachers kept their job. The terminated Caucasian teachers sued the school board claiming that the layoffs violated Title VII and the equal protection clause of the constitution (Banks 127).

The Supreme Court upheld the concept of affirmative action plans once again, but held that the layoff agreement in this case violated the rights of the Caucasian teachers. The layoff of the Caucasian teachers forced them to bear too much of a burden for prior discrimination and the layoff plan was not sufficiently tailored to minimize the burden suffered by the majority status teachers. This case stands for the fact that affirmative action plans are valid, but must be well thought out and must minimize the impact on others to the extent possible (Powell 863).

Over the span of twelve years, the cases of *Bakke*, *Weber*, and *Wygant* all upheld the concept of affirmative action plans across a variety of settings. Although various aspects of particular affirmative action plans were invalidated, the court maintained the core concepts of affirmative action plans. The cases to date have been hesitant to validate the use of quotas, a fixed number or percentage of minority group members or women needed to meet the requirements of affirmative action within affirmative action plans. However, in 1987, the Supreme Court ordered the use of a strict quota to help facilitate affirmative action within the highway patrol department of Alabama in *United States v. Paradise*.¹⁷ This case involved a longstanding blatant refusal to stop discriminatory practices by the highway patrol department in Alabama.

In the *Paradise* case it was noted that for thirty-seven years prior to 1972 there had never been an African-American trooper in Alabama. Paradise was part of a class action lawsuit that challenged a quota hiring plan set up by the District Court in Alabama.

¹⁷ 480 U.S. 149 (1987).

Paradise alleged that the plan violated Title VII. In 1972, a district court ordered the state to hire one African-American trooper for every Caucasian trooper hired until African-American troopers constituted twenty-five percent of the police force. For years the police force delayed hiring the minority troopers in violation of the court's orders. In 1979, after little progress, the plan was changed to add a new promotion procedure. In 1983, the plaintiffs were back in court again asking for additional directives. The Court stated:

The District Court...noted that 12 years after it had condemned the racially discriminatory policies and practices of the department, the effects of those policies and practices remained pervasive and conspicuous at all ranks above the entry level position, the court held that for a period of time, at least 50 percent of the promotions to corporal should be awarded to black troopers if qualified black candidates are available; the court also imposed a 50 percent promotional quota in the upper ranks, only if there are qualified black candidates...¹⁸

The quota set up by the District Court was upheld by the United States Supreme Court. The drastic measures in this case were designed to remedy the present effects of past discrimination. The plan was deemed to be appropriate because there was a compelling government interest at stake in establishing a quota plan given the blatant prior discrimination and refusal to change by the trooper division. The plan was narrowly tailored in that it did not unduly burden the Caucasian troopers because they could still be hired and promoted under the court approved plan. The *Paradise* case sent a strong message that a blatant refusal to stop discriminatory practices can result in a quota plan to protect victims of discrimination (Rutherglen and Ortiz 467).

The next major cases decided by the Supreme Court regarding affirmative action moved to the new realm of government contracts and set-aside preferences for minority

¹⁸ *United States v. Paradise*, 480 U.S. 149 (1987).

operated businesses. After many cases upholding affirmative action plans, some with modifications, the first major blow to affirmative action plans came in 1989, when the Supreme Court issued its ruling in *City of Richmond v. Croson Company*.¹⁹ In 1983, the city of Richmond, Virginia approved a “set-aside” plan which required the city to award at least thirty percent of all city contracts to minority businesses. This plan was modeled after a federal set-aside plan approved in 1980 by the United States Supreme Court legitimizing minority set-aside programs for federally funded public works projects.²⁰ Under the city plan, minority businesses were defined as an enterprise with at least fifty-one percent ownership by African Americans, Spanish-speaking persons, Asians, Indians, Eskimos, or Aleuts. Also, the minority businesses could be from anywhere in the United States. The goal of this plan was to promote the involvement of minority contractors in the construction of public projects. Several years after the Richmond plan was adopted, the city called for bids to install new plumbing in the city jail. Croson, a non-minority company, submitted a bid on the project. Croson was denied the bid on the grounds that his company did not meet the set-aside requirements, namely it was not a minority company. Croson sued claiming the set-aside plan violated Title VII and the equal protection clause.

In a severe blow to affirmative action, the court invalidated the Richmond set-aside plan for minority businesses. The court felt that there was no direct evidence of previous race discrimination in awarding construction contracts nor was there any evidence that the city had ever discriminated against minority-owned contractors. The court held that the city did not demonstrate a compelling governmental interest in setting

¹⁹ 488 U.S. 469 (1989).

²⁰ *Fullilove v. Klutznick*, 488 U.S. 469 (1989).

aside contracts for minorities on the basis of race. Since the plan allowed the city to award contracts to minority businesses from across the country, the court felt that the city plan was not narrowly tailored to respond to specific instances of race discrimination in Richmond (Stoelting 1111).

The Washington Post critiqued the Supreme Court's ruling in the Richmond case and its decision to limit "the ability of state and local governments to reserve a fixed percentage of contracts for minority businesses without clear proof of past discrimination" (Kamen A1). After interviewing non-supporters and supporters of affirmative action, Washington Post staff writer Al Kamen stated:

Opponents of affirmative action saw the ruling in *City of Richmond v. J.A. Croson Co.* as a virtual death knell for set-aside programs at the state and local level. Several said it would be difficult for cities to establish the increased proof required under yesterday's ruling...Supporters of affirmative action saw the ruling as having the same effect. 'City leaders have to wonder,' said League of Cities executive director Alan Beals, 'about the extent to which they can design and implement local policies to help minority groups gain an opportunity to overcome the barriers of discrimination.' (A5)

As shown, many doubts about the future viability of affirmative action have arisen in response to the court's ruling. The ruling sparked a harsh dissent that a "deliberate and giant step backward" had been taken on affirmative action. Furthermore, Justice Thurgood Marshall said the court's decision "sounds a full-scale retreat from the court's longstanding solicitude to race-conscious remedial efforts..." (Kamen A5). As for opponents of affirmative action, the court's ruling brought great pleasure, since similar set-aside quotas would be outlawed under the holding of the court.

The negative perspective toward affirmative action espoused in *Croson* continued in the 1995 case of *Adarand Constructors, Inc. v. Peña*.²¹ In *Adarand*, the case centered on a “disadvantaged owned business” set-aside program. Under this program, the government provided monetary incentives for contractors who subcontracted ten percent of federal contracts with minority dominated subcontractors. A disadvantaged owned business was deemed to be a business in which fifty percent or more of a business is owned by disadvantaged individuals. In *Adarand*, a Caucasian managed construction company submitted the lowest bid on a guardrail contract with the federal government, but Adarand did not receive the award because the contract was awarded to a Latino-owned disadvantaged business. Adarand sued claiming his rights were violated by the government contract format. Adarand won the lawsuit and the affirmative action plan was invalidated. The Supreme Court followed the precedent set by *Croson* and applied a strict scrutiny test to the federal set-aside program. Under a strict scrutiny review, the plan must meet a compelling interest and set forth a plan which provides a narrow tailoring that fits the particular situation in a way that does not unfairly impact non-minority businesses. Charles Krauthammer of the Washington Post commented on the court’s rulings, stating:

Conservatives are cheered that *Adarand* created serious obstacles to racial preferences in federal contracting. Liberals are consoled that *Adarand* still provides constitutional cover for such preferences so long as the government can provide detailed evidence of past discrimination and prove that the racial set-asides are a ‘narrowly tailored,’ time-limited, last resort remedy. (A25)

This quote expresses overall views of not only the results of *Adarand*, but also the country’s mixed views on affirmative action as a whole at this point in time. Opponents

²¹ 515 U.S. 200 (1995).

of affirmative action felt the end was near. Meanwhile, supporters of affirmative action believed there was still hope that affirmative action would continue to remedy the effects of discrimination.

The 1995 decision in *Adarand* emphasizes that only narrow affirmative action plans will be lawful. On July 19, 1995, one month after *Adarand* was decided, President Clinton expressed his support for affirmative action in a speech based on a five-month review of government affirmative action programs, which created significant media coverage. President Clinton stated:

Let me be clear: Affirmative action has been good for America," Clinton said. "Affirmative action has not always been perfect, and affirmative action should not go on forever. It should be changed now to take care of those things that are wrong, and it should be retired when its job is done. I am resolved that that day will come. But the evidence suggests, indeed screams, that that day has not come. The job of ending discrimination in this country is not over. (Debenport 1A)

President Clinton issued a memo directing the heads of federal departments and agencies to review their programs and he set forth four guidelines. Programs must be dropped or changed if the programs create quotas, create preferences for unqualified individuals, create reverse discrimination, or if they continue after their goals have been achieved (Debenport 1A).

The Supreme Court decisions in *Croson* and *Adarand* placed affirmative action plans in a negative light. Strict scrutiny review was firmly entrenched in court decision language as well as a requirement that all plans be narrowly tailored and those factors seemed to indicate that affirmative action plans would be eliminated. Affirmative action in university admissions came up again in 2003, when the Supreme Court granted review of two University of Michigan admissions cases. These cases referred back to the *Bakke*

case, which started the concept of affirmative action plans, which I reviewed in Chapter 2, where the use of race as a factor in admission decisions was deemed appropriate. Justice Powell, in the *Bakke* case had stated that student body diversity was a compelling state interest that justified the use of race in university admission decisions. The question remained as to whether the use of race as a factor in university admissions would pass a strict scrutiny test which was not in place when *Bakke* was decided.

The Supreme Court agreed to decide two cases as companion cases to clarify the use of affirmative action in university admission policies. The two cases are *Gratz v. Bollinger*²² and *Grutter v. Bollinger*.²³ The first case involved the University of Michigan undergraduate admissions policy and the latter involved the school's law school admissions policy.

In *Gratz*, two Caucasian applicants to the University of Michigan were denied admission and sued the University claiming the admissions policy unlawfully discriminated against them. The admission program was set up with a point system in which applicants who scored at least 100 points out of a possible 150 were admitted. The categories for which points were awarded included high school grade point average, standardized test scores, quality of high school, strength of high school curriculum, in-state residency, alumni relationships, personal essay, and extracurricular activities. Members in underrepresented groups such as African Americans, Hispanics, and Native Americans were automatically awarded twenty points, while non-minority students with "extraordinary artistic talent" were awarded five points. In addition, applications could be "flagged" for individual consideration if the applicant showed characteristics that

²² 539 U.S. 244 (2003).

²³ 539 U.S. 306 (2003).

would enhance the diversity of the student body. The twenty point award for minorities and the fact that only “flagged” applications were being individually reviewed were the basis of the lawsuit by the Caucasian applicants. The Supreme Court held that the undergraduate admission plan was invalid because it was not narrowly tailored in that the twenty point award made race the determining factor rather than just an augmenting factor. The lack of a true individualized review invalidated the undergraduate admission policy (Rosenberg 535-536). The Court still maintained that race can be a factor in admission policies. Further clarification comes in the case of *Grutter v. Bollinger*.

In *Grutter*, a Caucasian in-state applicant was denied admission to law school and sued claiming race discrimination in the University of Michigan’s law school admission policy. The university had long sought to provide a racially and ethnically diverse law class setting. Rather than imposing a quota, the law school focused on academic ability and a flexible assessment of the overall talent and experience of the applicants to examine what each candidate would bring to the classroom. The university considered race as a “plus” factor that was considered with a number of other attributes. The university sought to enroll a critical mass of underrepresented students because of the diverse perspective they could bring to the classroom. The university evaluated each individual applicant on the basis of all of that student’s background and did not focus solely on race or ethnicity. The Supreme Court held that the law school admission policy was valid. The law school admission policy was designed to obtain adequate representation of minorities as opposed to requiring a specific number of minority students. However, the lack of a quota is not the sole reason as to why the Supreme Court upheld the law school’s admission policy.

Mere lack of a quota is no prima facie evidence that the admissions policy is constitutional. The program must analyze each applicant individually and must remain flexible. The individual's race cannot be the "defining feature" of an application. The admissions policy in *Grutter* met the test of individual review by allowing each applicant the opportunity to explain in a personal statement, letters of recommendation, and an essay how they would contribute to the diversity of the school. (Rosenberg 538)

The *Grutter* case clarified how race can properly be used in university admission decisions. The difference in the outcomes of *Gratz* and *Grutter* illustrates the importance of considering race as one of many factors as opposed to being a determining factor when admitting applicants. In *Gratz*, the application process improperly accounted for race, while in *Grutter*, the application process properly used race as a relevant factor in the admission decision.

Both of these Supreme Court decisions make clear that race is a crucial factor in providing a diverse environment in higher education. These cases also show that affirmative action is alive and well, even though many thought in light of *Adarand*, that affirmative action would fall in the two University of Michigan admission cases.

CHAPTER FOUR

Affirmative Action Today

When looking at affirmative action today, one of the key developments has occurred at the state level. Citizens in at least five states are unhappy with the basic concept of affirmative action plans. This dissatisfaction has led to the passage of citizen propositions to ban affirmative action. Currently there are four states which have passed state bans on the use of affirmative action plans involving the public sector: California (1996), Washington (1998), Michigan (2007), and Nebraska (2008). The ban in these states does not affect private entities such as private universities and private company employers. Also, the state of Florida has a legislative ban of affirmative action plans within public education. These measures have primarily impacted university affirmative action admission plans (Lewin A1).

California was the first state to ban affirmative action. In 1996, the citizens passed Proposition 209. Proposition 209 provides: “The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.”²⁴ A specific example of Proposition 209 affecting an affirmative action employment plan involves an affirmative action employment plan for community colleges. The Education Code in California provided for a preferential plan to increase the number of minorities and women within the community college system. The goal was to hire enough minorities and women so that the community college workforce reflected the community population. Proposition 209 struck down this plan

²⁴ Cal. Const. art. I, 31(a), (1997).

since it gave preferential treatment to minorities and women in hiring decisions (Hadley 115).

Interestingly, one of the key proponents of Proposition 209 was an African-American business man named Ward Connerly, a former Regent of the University of California University System. Connerly strongly believed that race should not be a factor in public sector situations, stating “if black and Hispanic students are rare at selected universities, the solution is better academic preparation, not special treatment in admissions. Every individual should have the same opportunity to compete. I don’t worry about the outcomes” (Lewin A1). After Proposition 209 passed, Connerly successfully pushed for citizen ballots to abolish affirmative action in Washington, Michigan, and Nebraska. In 2008 he suffered his first defeat when the state of Colorado refused to approve the ban.

Michigan’s ban of affirmative action is interesting in several respects. In 2003, the United States Supreme Court in *Grutter* (discussed above) approved the use of race as a permissible factor in admissions decisions. Many university admission programs across the United States adapted their admission programs to adopt a holistic review of applicants which could appropriately factor in race (Lewin A1). The 2007 ban of the use of affirmative action stops this practice in Michigan while it continues today in states that have not banned affirmative action plans.

Michigan and other states that have banned affirmative action plans have turned to alternative recruiting measures to try to attract minorities to obtain a diverse student population. Examples of alternative recruiting measures include: broadening the admission factors to consider such things as being multi-lingual, being the first in the

family to attend college, and overcoming obstacles including prejudices and discrimination. Also, universities have come up with additional recruiting strategies such as having minority students assist in recruiting efforts, partnering with low performing schools to improve their teaching techniques, increasing student scholarship opportunities, and increasing the use of remedial classes to bring low performers up to speed. The University of Michigan's President, Mary Sue Coleman is not pleased with the Michigan ban of affirmative action because alternative tactics are not nearly as effective as affirmative action plans in obtaining a diverse student body::

Since most of Michigan is overwhelmingly white, a plan guaranteeing admission to a percentage of top high school graduates would have little impact, and nothing short of affirmative action will maintain the University's racial diversity...Of course you want to look at family income, and being the first in the family to attend college and those kinds of factors, of course we do that, but it doesn't get us to a racially diverse student body. (Lewin A1)

The numbers out of Texas support her concern. When the University of Texas instituted an affirmative action plan after *Grutter*, their minority numbers rose to an all time high the next year, which illustrates the importance of having an affirmative action plan in place (Lewin A1).

Universities continue to seek and recruit minority students to campus because a diverse campus is still perceived as desirable. It is important to note that private universities are not covered by any state ban of affirmative action activities, so private schools will continue to provide stiff competition for state universities. Private universities are much more expensive, but these institutions typically have generous scholarship or financial aid programs making them attractive to minority applicants. Terry Hartle, Senior Vice President for Government and Public Affairs at the American

Council on Education emphasizes that public university officials are very concerned about state bans on affirmative action plans. The desirable goal of having a diverse student body is significantly more difficult to achieve for public universities despite the aforementioned strategies and tactics given the dramatic advantage private universities have by invoking lawful affirmative action plans. “Where minority students have a choice between selective public universities that cannot use affirmative action, and selective private universities with strong affirmative action programs, the private universities may seem like the more hospitable places, which would give them an advantage in drawing a diverse student body” (Lewin A1).

In addition to university admission plans facing state bans on affirmative action, it is important to note that the state bans have a huge impact in the business realm for minority and women based companies. In Michigan, the state ban of affirmative action negated a number of city and county set-aside contract provisions that specifically awarded contracts to woman and minority owned businesses. The elimination of the set-aside contract provisions may cause the termination of female-owned businesses that no longer receive valuable contracts. A study of the aftermath of the California ban showed that the number of female owned businesses involved in the construction industry dropped thirty-three percent over a four year period after the California ban went into effect. Michigan companies are bracing themselves for a similar potential downturn (Harrison 11). Although the extent of the negative impact is not measurable at this time, it is clear that revenues will be down significantly. “Because a lot of revenue comes from contracts that women get from cities and municipalities,” Michele Crockett, an attorney with a Detroit law firm states, “you may see a reduction in the amount of revenue they’re

bringing in, that will of course dictate whether they'll be able to stay in business or not” (Harrison 12).

While the states' bans of affirmative action are newsworthy, the most important current event regarding affirmative action once again involves the United States Supreme Court. On June 29, 2009, the Supreme Court decided the case of *Ricci v. DeStefano*,²⁵ where the court once again dealt with a reverse discrimination claim in the workplace. This case further clarified the current status of affirmative action.

In the *Ricci* case, a number of working firefighters in New Haven, Connecticut, were seeking promotions to the ranks of Captain and Lieutenant. Special examinations were developed for both positions by an outside contractor. There were seven vacancies for the Captain position. Forty-one firefighters applied for the vacancies and took the promotion examination. Twenty-five were Caucasian, eight were African American, and eight were Hispanic. Of the applicants who passed the examination, sixteen were Caucasian, three were African American, and three were Hispanic. The top nine performers were eligible for consideration for the promotion. Of the top nine, no African Americans were eligible and at most two Hispanics were eligible for promotion to Captain.

For the Lieutenant position there were eight vacancies. Seventy-seven firemen applied for the position and took the examination. Forty-three were Caucasian, nineteen were African American, and fifteen were Hispanic. Of the applicants who passed the examination, twenty-five were Caucasian, six were African American, and three were Hispanic. For the eight vacancies, none of the six passing African Americans or three passing Hispanics were eligible for promotion because of such low test scores. In

²⁵ 129 S. Ct. 2658 (2009).

summary, no African Americans were eligible for promotion to either position. At most two Hispanics were eligible for Captain, but none for the Lieutenant position.

The City decided not to certify the test results because the results had an adverse impact on African Americans and Hispanics. The City was fearful of a Title VII disparate impact lawsuit by the minorities who all failed the exam. By not certifying the test results, none of the firefighters were promoted to either position and all candidates were informed that there would be a new selection process for filling the vacancies. Seventeen Caucasian firefighters and one Hispanic firefighter who all scored well on the exam commenced a lawsuit against the City of New Haven, alleging reverse discrimination in violation of Title VII. In two lower court decisions the courts ruled in favor of the City on their decision to refuse to certify the exam and allow the promotions.

This case brought wide media attention. Commentators had criticized the city's action in that the city appeared to drop the exam results simply because they did not like the pass rate of minorities, rather than because the test was not a proper measure of performance. Commentators also suggested that the top performers should be promoted so that the most qualified personnel are in the highest level positions regardless of race. The same commentators questioned the fairness of not awarding Caucasian firefighter Frank Ricci a promotion despite scoring very well on the exam, after he sacrificed money and time to best prepare himself for the exam. Other commentators respond by saying that firefighter position statistics should match the community statistics, but they do not. Forty-three percent of New Haven is Caucasian and thirty-seven percent is African American. In the fire department, thirty-two percent of the entry level positions are held by African Americans while only fifteen percent of the supervisory positions are held by

African Americans. One commentator questioned the use of exams to fill positions stating: “an individual’s ability to answer a multiple choice exam does nothing but measure their ability to read and retain” (Liptak A1). In other words, he believes written tests do not measure a person’s ability to relate and lead others in the line of duty which is similar to the critique made in the *Griggs* case I mentioned in Chapter 1. He goes on to state, “young black and Latino kids have every right to see black and Latino officers on those fire trucks that are riding through their community. They have every right to look for a role model” (Liptak A5). Parties on both sides of this case can make valid points, which is why the Supreme Court case is so important in giving guidance on this sensitive aspect of affirmative action.

In a blow to affirmative action supporters, the Supreme Court overturned the two lower court decisions and held in favor of the white firefighters who sought to uphold their promotion. The Supreme Court held that the main reason that the City invalidated the promotion test was that the City was fearful of a disparate impact lawsuit by unsuccessful minority test takers. The mere existence of a potential lawsuit by a minority employee is not a sufficient reason to invalidate a promotion examination. By acting to avoid a disparate impact lawsuit by a minority, the City actually engaged in a disparate treatment discrimination action against the white firefighters which was not justified under the facts of the *Ricci* case. The Supreme Court stated that the City could invalidate a questionable exam if there is a “strong basis in evidence to believe it will be subject to disparate-impact liability”. In other words, the City could have invalidated the test results if the evidence clearly indicated that the minority employees would have been clearly successful in a disparate impact lawsuit. In the *Ricci* case, the Court felt there was

no clear evidence that the examination used was discriminatory toward the African-American and Hispanic applicants. Mere fear of a minority discrimination lawsuit was simply not enough to invalidate a promotion examination.

Although the Supreme Court decision in the *Ricci* case is a blow to supporters of affirmative action plans, it certainly not an end to affirmative action plans. The case creates an additional burden of proof for minority plaintiffs in that they will need to show that discriminatory employer exams must contain clear violations of minority employee rights, but affirmative action plans are still valid. Also, the court continues its recognition of disparate impact lawsuits by minorities.

Another reason why the concept of affirmative action has become so widely debated today is election in the United States of its first minority president. A monumental event in the history of the United States occurred on November 4, 2008, when Barack Obama was elected President. Electing an African American sent a signal to many that racial prejudices may be softening in the United States. Opponents of affirmative action were quick to seize on the question of necessity of affirmative action if the country is receptive to electing an African American president. The most powerful man in the country is an African American. President Obama's position on race relations, Title VII, affirmative action, and reverse discrimination is important to the development of the law under Title VII of the Civil Rights Act of 1964.

Early in his presidency, President Obama was faced with the task of nominating a person to the United States Supreme Court. President Obama nominated Sonia Sotomayor, a Hispanic judge. There was some opposition, but her nomination was approved. Justice Sotomayor was on the appeals panel when the lower court decided the

Ricci case. She supported the minority firefighters holding that the promotion examination was discriminatory toward minority employees. She received some negative press since the position she took in the *Ricci* case was overturned by the Supreme Court. It will be very interesting to follow her future votes on cases involving affirmative action. It is easy to speculate that she may be sensitive to the plight of minority employees given her background and decision in the *Ricci* case (Savage A3).

It appears that President Obama's personal perspective of affirmative action is evolving. When Obama was a state senator in Illinois, he fully supported race and gender-based hiring preferences through affirmative action. During the Presidential campaign, "...in his debate in Philadelphia with Hillary Clinton, he said in response to a question that his own privileged daughters do not deserve affirmative action preferences, and that working-class students of all colors do" (Kahlenberg par.7). That quote shows that Obama appears to have shifted his approach away from an aggressive affirmative action agenda. Furthermore, in an interview with ABC, Obama states, "I think that we should take into account white kids who have been disadvantaged and have grown up in poverty and shown them to have what it takes to succeed" (Lithwick 35). This comment leads one to believe that Obama may shift from race based affirmative action to backing a class-based affirmative action approach.

CHAPTER FIVE

Reflection and Conclusion

My interest in the topic of affirmative action stems from conversations and discussions with my fiancée, who is African American. We come from different backgrounds that have caused us to have completely different experiences and have shaped our different views on life. When dealing with race issues, she has opened my eyes and caused me to look at issues from a different perspective. Specifically, my interest in researching affirmative action stems from a very ignorant statement I made to her regarding race and affirmative action one day while watching an interview with future president, Barack Obama. I said, “we are about to have an African-American President. Clearly not much discrimination exists anymore, so we probably do not need affirmative action anymore.” She looked at me as if I were crazy and quickly listed ways in which discrimination was still present in our lives. After discussing the topics of discrimination and affirmative action, we both realized we were making general statements and did not have the proper knowledge and understanding of affirmative action and why it is such a highly controversial topic.

In this paper, I have researched the chronology of Title VII and the subsequent development of affirmative action. I set out to understand employment discrimination, why affirmative action was created in the United States, and to appreciate how it has evolved and transformed our country. Through this research, I am now able to form more educated opinions on the question of whether affirmative action has been helpful or hurtful for our country and where the country should go from here.

My analysis of Title VII has helped me to understand how Title VII has impacted and improved the lives of minorities and females. Clearly Title VII has brought about a fundamental fairness in the workplace that was sorely lacking before 1964. Much positive progress has been made in reducing degrading employment practices. My analysis of Supreme Court decisions has allowed me to follow the creation and progression of affirmative action. Through this analysis I have been able to understand more clearly the positives and negatives of affirmative action. After weighing the information regarding affirmative action, it is important to look at current statistics to see if minorities and women have made enough progress to phase out or eliminate affirmative action.

Significant progress has been made since 1964, especially for African Americans. Over half a million more African-American students are in college today than in the early 1990's. The number of adults with advanced degrees has nearly doubled in the past decade. Since 1989, the median income of black families has gone up sixteen percent. Since the passage of the No Child Left Behind Act, the black-white gap in tests scores has narrowed while African American's scores have improved significantly. The middle class of black America has grown to its highest level. In a study done by Warren Richey, staff writer of The Christian Science Monitor, an analysis was performed to show statistical changes regarding race after the twenty-five year anniversary of the *Bakke* case. Over the course of those twenty-five years, certain specialized professions have shown a significant increase in the percent of African Americans in those fields of occupation as reflected in the table below (Richey par. 9).

| Profession | 1978 Percent of Occupation African American | 25 Years Later Percent of Occupation African American |
|---------------------------------|--|--|
| Lawyers & Judges | 1.2 % | 5.1 % |
| Physicians | 2.0 % | 5.6 % |
| Engineers | 1.1 % | 5.5 % |
| College & University Professors | 2.6 % | 6.1 % |

The rise of the numbers of African Americans in the most prestigious occupations is encouraging. Despite the positive developments, many problems persist. One in three African American students drops out of high school. Most of the high school drop outs come from low income families. The murder rate among young African-American men has risen sharply as overall violent crime statistics have gone down significantly (Carter 10). In Richey's statistical analysis of the twenty-five year anniversary of *Bakke*, he found that in 1978, four times as many African-American families as Caucasian families lived below the poverty line and twenty-five years later this statistic remained unchanged. The unemployment rate in 1978 for African Americans was twice that of Caucasians and remains unchanged today. Also, the median income of an African-American family was only sixty percent of their Caucasian counterparts in 1978, meanwhile twenty-five years later, it has only grown to sixty-six percent of Caucasians family income (Richey par. 9). Data on wealth are also alarming. Whites own, on average, ten times more wealth than African Americans (Shapiro 62). These statistics demonstrate that a large gap still exists between African Americans and Caucasians. There is also a continuing salary gap between salaries of males and females. Recent surveys show that females continue to make far less than males in the United States. Most estimates indicate that females earn 76 cents for every dollar earned by their male counterparts (Lewis G2).

To further illustrate that we still have many problems, the state of Alabama to this day has a provision in its state constitution which states, “Separate schools shall be provided for white and colored children and no child of either race shall be permitted to attend a school of the other race” (Wickham par. 5). In 2004, the voters of Alabama refused to approve the deletion of this provision from the state constitution. There were 1.3 million votes cast and the measure was defeated by 1,850 votes (Wickham par. 6). This shocking recent event dramatically shows that much work is yet to be done in changing certain people’s narrow views in America and bring fairness to everyone.

So where does this leave us? To understand where we are and where we are going, it is important to understand that the United States Supreme Court has the final say on how affirmative action will impact society. In my review of the Supreme Court decisions, I feel that I can sense a path that is now clearer to me. In the early affirmative action cases in the 1970’s and 1980’s, such as the *Bakke* case and the *Weber* case, the Supreme Court set the tone that affirmative action is an appropriate approach to combat the institutional discrimination against minorities and women that has plagued our country. But subsequent cases such as the *Wygant* case and the *Adarand* case in the 1990’s showed that there are limits to the suffering majority status people should face to accommodate the position of minorities and that reverse discrimination is a legitimate sensitive issue that cannot be ignored. Just when it appeared that the United States Supreme Court was ready to almost eliminate affirmative action, the *Gratz* and *Grutter* cases of 2003 revived the concept of affirmative action, particularly in the university admission setting. By the ruling of the *Ricci* case, it appears to me that the United States Supreme Court is going to keep a narrow view of affirmative action with regard to

employment and set-aside contracts. However, it appears that the Supreme Court will remain more open to allowing racial preferences in university admission decisions.

As to my final position on affirmative action, I feel conflicted. Affirmative action has been in place for forty-five years. One side of me feels that it is time to base all decisions on ability and have all persons judged on the basis of their ability, with the most qualified person being employed and promoted. But through my analysis, I must conclude that it is not yet the time to eliminate affirmative action. When given the chance, minorities and women are more than capable of meeting the challenges in the workplace, university, classroom, and business. That is exactly what affirmative action has strived to do. Breaking down prejudices and providing opportunities paves the way to a colorblind and gender neutral society. We need to continue this work. The other crucial step is to improve the educational system in the United States so that minorities are adequately equipped to compete with everyone else before we eliminate all forms of affirmative action. Special attention needs to be given to schools serving low income rural and inner city populations, as success in school breeds success in the workplace.

Further, I strongly feel that in the future a long term movement to a class based affirmative action plan, rather than a racial affirmative action plan is the best course of action. Disadvantaged persons of any race or color should be the persons who benefit from an affirmative action plan, rather than benefiting just African-American persons for example. Many middle class and upper class minorities simply do not need the protections of affirmative action. Placing more middle class African Americans in elite schools will not help uplift the generations of African Americans who have been discriminated against and are left in poverty. More focused affirmative action together

with a plan to fund and improve inner city schools and poor rural schools are the best way to move to a world where poverty and hopelessness are eliminated. Until results show a narrowing of the wealth gap in the United States and decreasing of poverty, especially for minorities, affirmative action should continue. Affirmative action in my mind has been very helpful and it continues to move us toward becoming a better country.

So the next time you ask yourself if affirmative action is hurtful or helpful, think of Kimberle Crenshaw's analogy regarding an equal opportunity running race:

In an ideal race all runners start at the same point and the rightful rewards go to the best runners. But affirmative action is said to place some runners a half length or more ahead of non-preferred runners. In this context, both opponents and defenders of affirmative action tend to agree that this placement represents a preference for those who are placed ahead in the staggered start. They disagree, however, about whether such preferences are justified. For opponents, the head start is unfair, inefficient, divisive and counterproductive. In their view, the beneficiaries of affirmative action are tainted because they are given an unfair advantage. No matter how well they've run the race, their accomplishments cannot be credited or trusted. In this scenario, the non-preferred runners have every reason to be resentful because they have been forced to run in a rigged race and have likely lost their rightful place in the winner's box.

The defenders of affirmative action worry about the resentment and other costs associated with sustaining such exceptions to the fair race, but they argue that the benefits of a diverse set of winners' offsets these costs. While the two sides differ in their normative assessment of whether the head start is defensible or not, what they share is actually more telling; both tend to see the problem of affirmative action in terms of damaged runners unable to compete on their own. As long as affirmative action is framed in terms of damaged runners, there is little wonder that opposition to it will continue to be intense, and that support for it, even among some of its beneficiaries, will often be lukewarm.

But, there is an alternative back story that can be told, one that actually throws light on the conditions that affirmative action is designed to address. This alternative frame suggests that the problem affirmative action seeks to address is not damaged runners, but damaged lanes that make the race more difficult for some competitors to run than others. Rethinking affirmative action so as to account for the unequal conditions

of the lanes on the track, the debris that runners must avoid, the craters over which they must climb, the crevices that they must jump and the detours that they must maneuver--suggests that affirmative action is not about providing preferences at all. Rather it is about removing and neutralizing the obstacles and conditions that compromise the fair running of the race. Structural inequality, exclusionary institutional practices, trans-generational disadvantages and even unconscious biases are just a few of the conditions that crowd the lanes of would-be recipients of affirmative programs. These conditions are neither mysterious nor unverifiable. In fact, they can be empirically demonstrated with relative ease, as research from a variety of fields reveals. To attend to the elimination of such circumstances is hardly to promote reverse discrimination. It reflects only a matter of simple justice.

Thus, for affirmative action to be productively reframed, the pervasive and troubling disconnect between what is knowable about contemporary inequality has to be brought into mainstream discourse on affirmative action (131-132).

Affirmative action creates the opportunity to run a fair race. By expanding Title VII, affirmative action has been helpful in creating a more level playing field in employment and university admissions, and will hopefully continue to bring fairness to society. The next important step for society and our legal system will be deciding when to appropriately end affirmative action programs. When will the damaged lanes mentioned above be repaired, no longer needing affirmative action? I hope this happens in my lifetime.

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VITA

Anthony Randall Hanson was born on January 11, 1983 in Brainerd, Minnesota, but grew up in Wilmington, North Carolina. Anthony completed his undergraduate study at the University of North Carolina at Chapel Hill and graduated with a Bachelor of Arts degree in Management and Society in 2005. After graduation, Anthony moved to Winston-Salem, North Carolina to volunteer with the men's basketball coaching staff at Wake Forest University. In addition to working with the men's basketball team, he began work on his Masters of Arts in Liberal Studies in 2005. Anthony's interest in race relations, specifically Title VII and affirmative action stem from his inter-racial relationship with his fiancée, Jahmekya Hall, whom he has dated for 6 years. Through many race related discussions between Anthony (Caucasian) and Jahmekya (African American) the topic of affirmative action became a logical subject for his thesis. He became very interested in the history of the subject, which is one of the most important social issues facing society today.