

Fifty Years of Affirmative Action in the United States: An Appraisal

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ABSTRAKT

Bakalářská práce popisuje vývoj afirmativní akce od doby jejího založení až po současnost. Hlavním cílem bakalářské práce je zhodnocení vývoje afirmativní akce, kromě toho také zjistit, zda by tento program měl stále pokračovat či naopak být zrušen. Na základě hlavních evidencí bylo zjištěno, že afirmativní akce je zastaralá a měla by být nahrazena novými předpisy. Zatímco se afirmativní akce v zaměstnání ukázala jako prospěšná s mnoha pozitivními ohlasy, ve vzdělávání tomu bylo naopak. Na základě evidencí bylo zjištěno, že by bylo lepší, kdyby afirmativní akce pro vzdělání byla zrušena, protože spíše ubližuje, než pomáhá.

Klíčová slova: Nejvyšší soud Spojených států amerických, Lyndon B. Johnson, afirmativní akce, zaměstnání, vzdělání, menšiny, ženy, diskriminace, rasa, pohlaví.

ABSTRACT

This bachelor's thesis describes the development of affirmative action from its establishment to the present day. The main aim is to appraise the development of affirmative action as in employment as well in education, and to determine if the program should be continued or abolished. The evidence suggests that although affirmative action worked well in the past, it is now obsolete and should be replaced by a new regulation. While affirmative action seems to be progressive in employment, in education it is not. For this reason, it would be better to abolish affirmative action in education, which rather harms than helps.

Keywords: the United States Supreme Court, Lyndon B. Johnson, affirmative action, employment, education, minorities, women, discrimination, race, gender.

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INTRODUCTION

The United States Affirmative Action Program, which has been federally mandated since 1961, attempts to break down barriers and open doors of opportunity to American minorities in employment as well in education. It does not guarantee equal results. Instead, it tries to overcome discrimination based on color and gender. As President Lyndon B. Johnson said in 1965, “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 just believe that you have been completely fair.” Despite this assertion, the American public has remained polarized on this issue because of preferential treatment, which harmed other participants.¹

Supporters of affirmative action appeal to the principle of compensatory justice, while opponents argue that recipients should be treated equally according to relevant criteria such as individual skills and qualifications, not gender or race.² Although, affirmative action has proven elastic and has been adapted to multiple societal changes, most evidence suggests that its preferential treatment of minorities has caused more harm than good.³ Johan Rabe said that affirmative action has a lack of clarity, which makes this program weaker. After more than fifty years of existence, the affirmative action needs to be reevaluated. As Rabe suggests, benefits should be modified according to the country’s changing conditions, and the criteria should be more objective.⁴

¹ “Affirmative Action,” The Leadership Conference on Civil and Human Rights, accessed January 19, 2015, <http://www.civilrights.org/resources/civilrights101/affirmaction.html>.

² Ibid.

³ “Affirmative Action: Twenty-Five Years of Controversy,” Santa Clara University, accessed January 20, 2015, <http://www.scu.edu/ethics/publications/iie/v5n2/affirmative.html>.

⁴ Johan Rabe, *Quality Affirmative Action and Justice* (Hamburg: Rabe, 2001), 110-356.

1 BACKGROUND

Affirmative action originated in 1960 during the Civil Rights Movement. One year later, President John F. Kennedy used the term “affirmative action” in Executive Order 10925, and since that time this term has influenced American society.⁵ Although affirmative action was established in the 1960s, its meaning and purpose date back much further. The affirmative action program wants to take responsibility for past inequality. The main goal is to remedy past discrimination in the present. Law professor Erwin Chemerinsky agrees, noting that this program is used as technique to remedy the long legacy of racism, slavery, and segregation in American society.⁶

1.1 The Civil War

The Civil War started because of differences between the North and the South.⁷ In 1860, the North was a manufacturing economy because of industrialization. It offered free labor and did not support slavery in its manufacturing processes. On the other hand, the South was predominantly agricultural and used slave labor.⁸ Some members of the national government wanted to prohibit slavery, which was predominantly in the South. Moreover, they wanted to prohibit slavery in the territories, which had not yet become states. In the same year, the first Republican president, Abraham Lincoln, was elected and he generally supported this idea. Nevertheless, this declaration did not appeal to states from the South, which formed a new nation, the Confederate States of America. Because Lincoln wanted the Border States (Maryland, Kentucky and Missouri) on his side, he emphasized that the conflict was over state’s rights vs. federal rights and not because of slavery. The war lasted four years, ending with a Northern victory and the end of slavery.⁹

In January 1863, Lincoln published the Emancipation Proclamation, which freed all slaves in rebel controlled territory. Although heavily critiqued for this action, the president

⁵ “Affirmative Action-Overview,” National Conference of State Legislatures, accessed February 26, 2015, <http://www.ncsl.org/research/education/affirmative-action-overview.aspx>.

⁶ Erwin Chemerinsky, “Making Sense of the Affirmative Action Debate,” *Ohio NUL - Review*, accessed February 26, 2015, http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2135&context=faculty_scholarship.

⁷ “A Brief Overview of the American Civil War,” Civil War Trust, accessed February 26, 2015, <http://www.civilwar.org/education/history/civil-war-overview/overview.html>.

⁸ “Industry and Economy during the Civil War,” National Park Service, accessed February 26, 2015, <http://www.nps.gov/resources/story.htm?id=251>.

firmly believed that this could lead to the total elimination of slavery. In 1865, Congress officially approved the Thirteenth Amendment to the Constitution, which forbade slavery.¹⁰ However, nobody knew what to do with the large amount of blacks who had no money, no education, and no property. In April 1865, President Lincoln was assassinated by a Southerner, and the problem fell to the next president, Andrew Johnson, who set out to reconstruct and restore the South to the Union. He did not succeed, but his successor, Ulysses S. Grant, oversaw the transformation of Southern society.¹¹

1.2 The Reconstruction Era

The Reconstruction Era lasted from 1865 to 1877, and the main purpose was to restructure the political, economic and legal system in the states which had seceded from the Union. The Freedmen's Bureau was established to help the Southerners transform into a society based on freedom. According to historian Eric Foner, the Reconstruction Era had several significant features that were important in the process of changing the Southern society, moreover in the transformation of black people into freed people. Foner noted that Reconstruction was made on the basis of blacks' participation during the Civil War, where their activeness and willingness forced the nation towards emancipation. After 1867, blacks were finally freed and integrated, and they actively participated in the Southern society.¹² In 1866, Congress passed the Fourteenth Amendment, which provided full citizenship for blacks and defined equal treatment and legal protection for all. Two years later, it was ratified by the states. Blacks started to create their own communities centered around churches, and looked for jobs and education. At this time the first segregated schools appeared.¹³ In 1870, Congress passed the Fifteenth Amendment, which gave black men the right to vote. Such steps are considered as the most fundamental and revolutionary developments during the Reconstruction Era.¹⁴

⁹ Jürgen Heideking and Christof Mauch, *Dějiny USA*, trans. Jana Kvešková (Praha: Grada, 2012), 143-146.

¹⁰ *Ibid.*, 149-153.

¹¹ George M. Fredrickson, *The Black Image in the White Mind* (Middletown: Wesleyan University Press, 1987), 169; Randall, *The Civil War and Reconstruction*, 387, 527.

¹² Eric Foner, *Reconstruction: America's Unfinished Revolution 1863-1877* (New York: Harper and Row, 1988), xxiv-xxv.

¹³ Heideking and Mauch, *Dějiny USA*, 154-159.

¹⁴ Foner, *Reconstruction*, 77-78.

Reconstruction's political and economic agenda gave blacks autonomy and freedom. However, they had no land, were not educated and did not earn much money, thereby making them second class citizens. The Southern society had to adopt new systems of labor, and whites had to start cooperating with blacks, who tried to integrate into the new society. However, a problem appeared especially between race and class in relation to land and labor. As a Washington newspaper stated in 1868, "It is impossible to separate the question of color from the question of labor, for the reason that the majority of laborers...throughout the Southern States are colored people, and nearly all the colored people are at present laborers." According to Foner, the main problem was that white farmers wanted to control their labor force while blacks desired economic and social independence.¹⁵

At the end of the Reconstruction Era in 1877, the Southern states were redeemed, meaning that blacks became virtual slaves yet again. Black southern men had gained the right to vote during Reconstruction, but generally lost it during the Gilded Age in the 1880s. Women never obtained the right.¹⁶

1.3 Segregation

Even though the U.S. Congress established the "equal protection" law, many white Southern residents did not agree and could not change their strong feelings against blacks. Historian Terry H. Anderson quoted a white woman who said, "If anything would make me kill my children it would be the possibility that niggers might sometime eat at the same table and associate with them as equals." The Southerners were biased against blacks, and Anderson noted that the Southerners wanted to be superior and did not see blacks as human beings. In their minds, even the most educated black was not equal to the most illiterate white. Therefore in 1876, the Southern states decided to pass Jim Crow laws that established racial segregation.¹⁷ Historian C. Vann Woodward noted that racial segregation referred back to slavery times, and whites still wanted to keep them in a subordinate

¹⁵ Ibid., xxvi.

¹⁶ J. G. Randall, *The Civil War and Reconstruction* (Boston: D. C. Heath and Company, 1961), 379-384.

¹⁷ Terry H. Anderson, *The Pursuit of Fairness: A History of Affirmative Action* (New York: Oxford University Press, 2004), 2-3.

position. Segregation was just another name for white supremacy, which had spread throughout the states.¹⁸

Segregation of blacks occurred in schools, hospitals, jails, public transportation and public places. Moreover, blacks were completely forbidden to use some hotels or restaurants. They were separated from whites by signs that read “White only” or “Colored only” and black spaces were most often of inferior quality.¹⁹ The segregation and rules were different in each state; however the main purpose was the same: keeping distance between blacks and whites. In Atlanta, black witnesses could not swear on the same Bible as whites. In North Carolina and Florida, students had separate textbooks at schools, while in Kentucky blacks had to live on different sides of the street.²⁰ In 1877, Georgia passed a poll tax for every black man who wanted to vote. These discriminatory devices were soon adopted by all the Southern states. Furthermore, only blacks who could read or write had the right to vote, further reducing their eligibility.²¹

In 1896, the Supreme Court decided in the case of *Plessy v. Ferguson*, that Plessy violated a Louisiana law that forbade blacks from using a white-only railway. Plessy had argued that the law violated his Fourteenth Amendment right to equal protection under the law. However, the Court upheld the guilty verdict, thereby legalizing racial segregation and the doctrine “separate but equal” in all public places. Anderson notes that “the facilities were separate but never equal.”²²

In 1909, the National Association for the Advancement of Colored People (NAACP) was established, which fought for racial equality for blacks. This organization tried to persuade Congress to enact a law, which would allow protection for blacks from racial discrimination. The organization tried to attack Jim Crow laws in the field of education and tried to abolish segregation. It was not until 1954 that they were successful. In the legal case known as *Brown v. Board of Education*, NAACP lawyer Thurgood Marshall argued against segregation in public schools. Marshall pointed out that separate school systems for blacks violated the “equal protection clause of the Fourteenth Amendment to the U.S.

¹⁸ C. Vann Woodward, *The Strange Career of Jim Crow* (New York: Oxford University Press, 2002), 11-17.

¹⁹ *Ibid.*, 98.

²⁰ Anderson, *The Pursuit of Fairness*, 3.

²¹ Heideking and Mauch, *Dějiny USA*, 182-184.

²² Anderson, *The Pursuit of Fairness*, 3-4.

Constitution.” Social scientist Kenneth B. Clark argued that these systems made black children feel inferior and should not be legally valid. Such strong evidence prompted the Supreme Court to conclude that the doctrine “separate but equal” had no place in the field of public education. Since then education has been integrated.²³

During this time, women also achieved legal satisfaction. Alice Paul, the leader of the National American Woman Suffrage Association (NAWSA) was demonstrating with others in 1917 in front of the White House. She and her fellow demonstrators were arrested, but they continued to demonstrate in the jail. In 1916, President Wilson supported a democratic program, which suggested that each state would decide on its own voting rights. The president began cooperating with the NAWSA, and in 1919, Congress passed the Nineteen Amendment, which guarantees American women the right to vote. This act was ratified on August 18, 1920, ending a struggle that dated back to 1848.²⁴

1.4 “New Deal” - The Great Depression

In October 1929, the Wall Street stock market crashed and the global economy plunged into the Great Depression, fueled by serious weaknesses in the economy. Almost thirteen million people lost their jobs, and many lived in horrible conditions.²⁵ In Atlanta appeared the slogan, “No Jobs for Niggers, Until Every White Man Has a Job!”²⁶

In 1932, Franklin D. Roosevelt was elected president of the United States, and in 1933, with the help of Congress, he established a socioeconomic program called the New Deal, which tried to produce jobs during hard economic times.²⁷ It was the first time when the president and Congress supported equal job opportunities in federal employment and legalized it with the Unemployment Relief Act, which stated that “no discrimination shall be made on account of race, color, or creed.”²⁸ Interior Secretary Harold L. Ickes, then

²³ “History of Brown v. Board of Education,” United States Courts, accessed February 26, 2015, <http://www.uscourts.gov/educational-resources/get-involved/federal-court-activities/brown-board-education-re-enactment/history.aspx>.

²⁴ George B. Tindall and David E. Shi, *Dějiny státu USA*, trans. Alena Faltýšková, et al., (Praha: Nakladatelství Lidové noviny, 1994), 530-531.

²⁵ “The Wall Street Crash and Depression,” BBC, accessed February 24, 2015, <http://www.bbc.co.uk/schools/gcsebitesize/history/mwh/usa/walldepressionrev1.shtml>.

²⁶ Anderson, *The Pursuit of Fairness*, 10.

²⁷ “What Was the Great Depression and Why Did It Start in the USA,” South African History Online, accessed February 24, 2015, <http://www.sahistory.org.za/article/great-depression-usa-grade-11>.

²⁸ Anderson, *The Pursuit of Fairness*, 11.

banned discrimination in the Public Works Administration, a precursor to affirmative action.²⁹

1.5 World War II - Social Consequences

The Second World War significantly improved women's social position. Historian George B. Tindall and David E. Shi noted that the biggest improvement was in the workforce where more than two hundred thousand women entered the women's military corps, and over six million got new jobs. This was a radical change in American society because women were supposed to stay at home and perform traditional household chores. Many negative responses appeared against working women after the war, but they did not want to give up. Tindall and Shi also mentioned that not just women benefited from war opportunities, but also blacks.³⁰

During the war, blacks entered the military. However, most of them served in segregated companies. The biggest change happened in 1940, when officers' schools became desegregated. Because of this decision, more blacks became aviation officers and many of them were honored for valor in combat. However, the war industry was against equal rights in the army. Therefore in 1941, Philip Randolph organized a protest demanding the end of discrimination in the war industry. The government negotiated with Randolph and agreed to end discrimination in the defense sector. On the basis of this agreement, each contract contained an anti-discrimination clause. Tindall and Shi noted that since that time, more than two million blacks have worked in the military and in the navy.³¹

1.6 The Great Society Program

In 1961, John F. Kennedy became president and established law and order in civil rights. He proclaimed on television that citizens would never be truly free until all citizens would.³² Kennedy submitted Executive Order 10925 to government contractors, which banned racial discrimination in all public institutions and presented the term Affirmative Action, which should ensure that "applicants are employed, and the employees are treated

²⁹ Ibid., 14.

³⁰ Tindall and Shi, *Dějiny státu USA*, 608-609.

³¹ Ibid., 609-611.

³² Heideking and Mauch, *Dějiny*, 313-315.

during employment, without regard to their race, creed, color, or national origin.”³³ However, before Congress could approve the law, Kennedy was assassinated. Thereafter, his legal and political measures for civil rights were forwarded by the new president, Lyndon B. Johnson, as Kennedy’s last will.³⁴ Later in 1967, Executive Order 10925 was amended by Executive Order 11246, which also included gender and the requirement that federal contractors have to follow affirmative action policies in order to provide equal opportunities for minorities.³⁵

Among victims of discrimination were not just blacks, but also Jews, Hispanics, Asians, Indians, and women. As Heideking and Mauch described, these groups felt historically discriminated against, and strongly connected with blacks. Because Congress still hesitated with the Civil Rights Act, which was previously prepared by Kennedy, black people joined the Civil Rights Movement in large numbers. Dr. Martin Luther King, Jr., is considered the father of the Civil Rights Movement.³⁶ He announced that “the black revolution is much more than a struggle for the rights of Negroes. It is forcing America to face all its interrelated flaws - racism, poverty, militarism, and materialism.” He explained it as “exposing evils that are rooted deeply in the whole structure of our society...radical reconstruction of society is the real issue to be faced.”³⁷ According to Heideking and Mauch, many people were fascinated by him and his speeches, and whites also started to fight for Civil Rights. Finally in summer 1964, Johnson persuaded Congress to pass the Civil Rights Act, and called this period “the Great Society” because of these reforms. This law and the Great Society program brought huge progress in race relations and the most far-reaching legislation since Reconstruction. It outlawed segregation in public places, banned discriminatory practices in employment, improved education and promoted equality.³⁸ The Great Society program was designed to improve the quality of American life. From the program came many others institutions such as the U.S. Equal Employment Opportunity Commission, which banned discrimination in the workplace. Related to this is

³³ “A Brief History of Affirmative Action,” Office of Equal Opportunity and Diversity, accessed March 13, 2015, <http://www.oeod.uci.edu/aa.html>.

³⁴ Heideking and Mauch, *Dějiny USA*, 315-321.

³⁵ University of California Irvine, “A Brief History of Affirmative Action.”

³⁶ Heideking and Mauch, *Dějiny USA*, 321-323.

³⁷ Jacquelyn D. Hall, “The Long Civil Rights Movement and the Political Uses of the Past,” *Journal of American History* 91, no. 4 (2005): 1233-1263, accessed March 13, 2015, doi: 10.2307/3660172.

³⁸ Heideking and Mauch, *Dějiny USA*, 321-323.

Title VII from the Civil Rights Act, which banned discrimination, based on color, sex, race, and national origin in the workplace.³⁹ Under Johnson's leadership, Congress enacted Medicare, which was an insurance program for the elderly, and Medicaid, which provided health care assistance to the poor. Johnson led the "War on Poverty" and provided federal aid for elementary and secondary schools and other funds for children from low-income families, which was ratified as the Elementary and Secondary Education Act. He created the Model Cities Program, which helped to provide cleaner, safer living conditions for low-income families and also public transportations. Besides, Congress passed the Higher Education Act, the aim of which was to improve the overall educational system by providing student's loans and scholarships. Later in 1965, all these issues were supported by clause twenty four, which banned tax collections for elections, and Congress then passed the Voting Rights Act. Since that time, many blacks have become politically active.⁴⁰ Johnson further stated that application of affirmative action programs helps to achieve equal opportunity, mostly in the field of employment and higher education for minorities.⁴¹

³⁹ "Equal Employment Opportunity Commission," Legal Information Institute, accessed March 13, 2015, https://www.law.cornell.edu/wex/equal_employment_opportunity_commission.

⁴⁰ Heideking and Mauch, *Dějiny USA*, 322-324.

⁴¹ "Affirmative Action-Background," Civil Rights, accessed March 13, 2015, <http://www.civilrights.org/resources/civilrights101/affirmaction.html>.

2 DEFINITION OF AFFIRMATIVE ACTION AND COURT RULINGS

In 1961, President John F. Kennedy issued Executive Order 10925 and introduced for the first time the term affirmative action, stating that “the contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin.”⁴² Since then, the definition has repeatedly changed, due to various policy initiatives and court rulings.⁴³ Meanwhile the first notion of affirmative action was conceived as an active expansion of opportunities especially for non-whites and women. Thereafter in 1965, President Lyndon B. Johnson changed the definition with Executive Order 11246, which states that “employees are treated...without regard to their race, creed, color, or national origin by those organizations receiving federal contracts and subcontracts.”⁴⁴ In the following two years, Johnson included in this order opportunities for women.⁴⁵ Thus, affirmative action became landmark federal actions designed to stop religious, racial and ethnic discrimination.⁴⁶ Nowadays, affirmative action is rather defined as positive discrimination, which should help minorities, including women, in areas of employment and education. The main reason is historical “unfair treatment,” and affirmative action is meant to remedy this consequence.⁴⁷

2.1 Regents of the University of California v. Bakke, 1978

The legal case known as Regents of the University of California v. Bakke was the first court case focusing on affirmative action in educational institutions.⁴⁸ This university needed to increase the representation of minority students in the medical school, and it

⁴² “Affirmative Action,” Legal Information Institute, accessed February 16, 2015, http://www.law.cornell.edu/wex/affirmative_action.

⁴³ Harry Holzer and David Neumark, “Assessing Affirmative Action,” *Journal of Economic Literature* 38, no. 7323 (2000): 483 - 568, accessed January 22, 2015, doi: 10.3386/w7323.

⁴⁴ Paul Burstein, *Equal Employment Opportunity: Labor Market Discrimination and Public Policy* (New York: Aldine de Gruyter, 1994), 373-375.

⁴⁵ “A Brief History of Affirmative Action,” Office of Equal Opportunity and Diversity, accessed February 19, 2015, <http://www.oeod.uci.edu/aa.html>.

⁴⁶ “History of Executive Order 11246,” United States Department of Labor, accessed February 19, 2015, http://www.dol.gov/ofccp/about/History_EO11246.htm.

⁴⁷ “Affirmative Action,” *Stanford Encyclopedia of Philosophy*, accessed February 19, 2015, <http://plato.stanford.edu/archives/win2011/entries/affirmative-action/>.

⁴⁸ “The Bakke Case and Affirmative Action,” PBS, accessed January 22, 2015, http://www.pbs.org/wgbh/amex/eyesonthepize/story/22_bakke.html.

therefore adopted an admissions program especially for disadvantaged minorities. The program was based on a 2.5 grade point average, which all white applicants needed. If they did not have it, they were automatically rejected. However minority applicants with a grade point average below 2.5 were still accepted.⁴⁹

At that time, Allan Bakke, a white man, had twice applied for admission to the University of California Medical School at Davis. In 1973, his admission was denied, prompting him to apply for admission again the following year. Despite excellent results, his application was again rejected. Bakke protested against the special admissions program, which was operating under racial and ethnic quotas, and sued the University of California alleging that the policy of the medical school violated Title VI of the Civil Rights Act of 1964, and the Fourteenth Amendment's Equal Protection Clause. The court found that the special program operated as a racial quota and noted that applicants were classified by race.⁵⁰ Therefore, the court declared the program unlawful and noted that it violated the constitutional rights of nonminority students.⁵¹ The case then went to the California Supreme Court, which also found in Bakke's favor, stating that "no applicant may be rejected because of his race, in favor of another who is less qualified."⁵² Robert A. Sedler noted that the California Supreme Court made strict scrutiny and concluded that the special admissions program broke the laws in order to achieve their racial objectives. In the end, the Supreme Court noted that the university's special program violated the Equal Protection Clause, and Bakke won.⁵³

The University of California designed these quotas on the grounds of past discrimination against racial minorities. Justice Lewis F. Powell concluded from the evidence that affirmative action in the medical school would be constitutional,⁵⁴ however, the racial quotas did not meet requirements, therefore violating the Constitution's Equal Protection Clause, which forbids a state from denying "to any person within its jurisdiction

⁴⁹ Robert Allen Sedler, "Racial Preference, Reality and the Constitution: Bakke v. Regents of the University of California," *Santa Clara Law Review* 17, no. 2 (1977): 332-333, accessed January 22, 2015, <http://digitalcommons.law.scu.edu/lawreview/vol17/iss2/3/>.

⁵⁰ Find Law, "University of California Regents v. Bakke 438 U.S. 265 (1978)," accessed January 22, 2015, <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=438&invol=265>.

⁵¹ "Regents of the University of California v. Bakke (No. 7811)," Legal Information Institution, accessed February 21, 2015, <http://www.law.cornell.edu/supremecourt/text/438/265>.

⁵² Find Law, "University of California Regents v. Bakke 438 U.S. 265 (1978)."

⁵³ Cornell University Law School, "Regents of the University of California v. Bakke (No. 7811)."

⁵⁴ Ibid.

the equal protection of the laws.” Moreover, the court ruled that the medical school's quota system “must be rejected as racially invalid” under the Equal Protection Clause.⁵⁵ Nevertheless, a few years later, Justice Powell recognized diversity as a compelling educational interest, and in the post-Bakke era, schools adopted this diversity theory and continued in using racial preferences for the main purpose of advancing racial justice.⁵⁶

2.2 United Steelworkers of America v. Weber, 1979

The contradiction in affirmative action policies in employment was caused by an on-the-job training program agreement between the United Steelworkers of America and the Kaiser Aluminum and Chemical Corporation. This program included an affirmative action plan designed to correct an absence of blacks in Kaiser’s craft workforce.⁵⁷ The main purpose of this program was to train unskilled workers, making them more eligible for promotions. These craft trainees were selected on the basis of seniority, and 50 percent of the appointments were reserved for black workers. Although Brian Weber and his white colleagues had greater seniority than some black workers, their bids for admission were rejected in favor of younger black employees. Thereafter, Weber who did not obtain a position in the program, alleged that the affirmative action plan discriminated against him and his white colleagues and sued the company for violation of Title VII of the Civil Rights Act of 1964, which states that discrimination cannot be made against any individual due to race, religion or gender in hiring, moreover in the selection of apprentices for training programs.⁵⁸ Weber claimed that it was a quota, which tried to achieve a balanced workforce on the basis of discrimination against whites. Weber argued that this kind of policy would rather lead to greater racial hostility towards blacks.⁵⁹

However, the court disagreed and noted that the purpose of this program was to bring employment opportunities to minorities, and this purpose could use race-conscious

⁵⁵ “Regents of University of California v. Bakke (1978),” PBS, accessed January 22, 2015, http://www.pbs.org/wnet/supremecourt/rights/landmark_regents.html.

⁵⁶ Elizabeth S. Anderson, “Integration, Affirmative Action, and Strict Scrutiny,” *New York University Law Review* 77, no. 5 (2002): 1217.

⁵⁷ Albert G. Mosley and Nicholas Capaldi, *Affirmative Action: Social Justice or Unfair Preference?* (Lanham: Rowman, 1996), 10-12.

⁵⁸ “Steelworker v. Weber,” JUSTIA, accessed January 23, 2015, <https://supreme.justia.com/cases/federal/us/443/193/case.html>.

⁵⁹ Mosley and Capaldi, *Affirmative Action*, 10-12.

policies.⁶⁰ Kaiser Corporation argued that the USWA plan did not involve state funds; therefore this case did not violate Title VII of the Civil Rights Act of 1964. According to Kaiser, this plan was adopted voluntarily with the main purpose to eliminate traditional patterns of racial segregation. Thereafter, the court concluded that “Title VII of the Civil Rights Act allowed the private sector voluntarily to apply a compensatory racial preference in employment.”⁶¹ According to Justice Brennan, nobody should attempt to block a program which is designed as a “remedy” for discrimination, and the program was held lawful because it was not trying to replace white workers with blacks. On the other hand, Justice Harry Blackmun concurred that Title VII should not be considered as a way to perpetuate discrimination. This case exploited sentiment, leading Ronald Reagan to oppose affirmative action in his presidential campaign. After he took office in 1981, he appointed executives who were hostile towards affirmative action and cut the budgets of the EEOC and the Office of Federal Contract Compliance, so as to curtail their ability to pursue cases of overt discrimination.⁶²

2.3 Fullilove v. Klutznick, 1980

This case concerns a business program called set-asides. This was a program under the Public Works Employment Act of 1977, enacted by Congress, which stated that 10 percent of four billion dollars in public works must be funding for minority business enterprises (MBEs).⁶³ The term Minority Business Enterprise represents a business where at least 50 percent of the stock is owned by minority group members. White petitioners of several companies filed suit, alleging that this program caused economic injury in their companies, and that MBE benefits violated the Equal Protection Clause of the Fourteenth Amendment.⁶⁴ They asserted that this program had a negative economic impact on them.

However, according to Supreme Court Chief Justice Burger, the MBE provision of the Public Work Employment Act of 1977 did not violate the Constitution and noted that it was narrowly tailored to meet the goal to remedy past discrimination. He concluded that preferential treatment of minorities was constitutional in this instance, and the program was

⁶⁰ Ibid.

⁶¹ JUSTIA, “Steelworker v. Weber.”

⁶² Mosley and Capaldi, *Affirmative Action*, 12.

⁶³ Ibid., 10.

upheld as constitutional.⁶⁵ On the other hand, Justices Stewart, Rehnquist, and Stevens dissented, arguing that the MBE benefit was provided to minorities who had not been hurt by past discrimination. Therefore, they considered it as not narrowly tailored and claimed that “remedies should be limited to specific individuals.”⁶⁶

2.4 Hopwood v. State of Texas, 1996

This case is considered as the beginning of the revolution in the admission systems of schools.⁶⁷ Even though one of the nation's leading law schools, the University of Texas, consistently ranks in the top twenty, it discriminated in favor of racial preference, the beneficiaries of which were mainly blacks and Hispanics. Those beneficiaries were treated differently than other applicants. The University of Texas offered full admission for blacks (100 percent), 90 percent for Hispanics and just 6 percent for whites. Their main purpose was to increase the enrollment of certain classes of minority students, however because of a preferential admissions program it rather led to discrimination in favor of minorities.⁶⁸

Several white applicants with high grades were denied admission, while minority candidates with worse grade point averages were admitted.⁶⁹ This led some white applicants to file a class action lawsuit against the University of Texas for violation of the Equal Protection Clause of the Fourteenth Amendment, which prohibits “discrimination between individuals on the basis of race.”⁷⁰ The court, presided over by Judge Sam Sparks, had to apply strict scrutiny and held that the law school's affirmative action program was lawful, as the university used its program “to remedy the long history of pervasive racial discrimination.”⁷¹

⁶⁴ “Fullilove v. Klutznick,” Teaching American History, accessed January 28, 2015, <http://teachingamericanhistory.org/library/document/fullilove-v-klutznick-448-u-s-448/>.

⁶⁵ “Fullilove v. Klutznick,” Legal Information Institute, accessed January 30, 2015, <http://www.law.cornell.edu/supremecourt/text/448/448>.

⁶⁶ Mosley and Capaldi, *Affirmative Action*, 10.

⁶⁷ “Hopwood v. Texas,” CIR, accessed January 2, 2015, <https://www.cir-usa.org/cases/hopwood-v-texas/>.

⁶⁸ Harvard University’s Justice with Michael Sandel “Hopwood v. State (1996),” accessed February 2, 2015, <http://www.justiceharvard.org/resources/hopwood-v-state-1996/>.

⁶⁹ Laura C. Scanlan, “Hopwood v. Texas: A Backward Look at Affirmative Action in Education,” *New York University Law Review* 71, no. 6 (1996), 1580-1584, accessed February 21, 2015, <http://www.nyulawreview.org/sites/default/files/pdf/NYULawReview-71-6-Scanlan.pdf>.

⁷⁰ Harvard University’s Justice with Michael Sandel, “Hopwood v. State (1996).”

⁷¹ Scanlan, “Hopwood v. Texas: A Backward Look at Affirmative Action in Education.”

Thereafter, plaintiffs appealed the case to the United States Court of Appeals for the Fifth Circuit, where the court reversed the district court's decision and held that "the University of Texas School of Law may not use race as a factor in deciding which applicants to admit in order to achieve a diverse student body." The court concluded that the university's admission policy was unconstitutional.⁷² Moreover, to support its decision, the court noted that "any consideration of race for the purpose of achieving a diverse student body is not a compelling interest under the Fourteenth Amendment."⁷³

This ruling is important for the future of affirmative action, for it could "jeopardize affirmative action programs at universities across the country." The Hopwood case prevents racial preferential treatment in university admissions, and has led to a series of new assaults on affirmative action.⁷⁴ Because the U.S. Supreme Court denied hearing the case, the status of affirmative action in higher education became weak.⁷⁵ However, the Supreme Court abrogated Hopwood's verdict in the case *Grutter v. Bollinger* (2003), determining that race may be a factor in admissions.⁷⁶

2.5 Gratz v. Bollinger; Grutter v. Bollinger, 2003

In June 2003, the United States Supreme Court made important decisions on affirmative action connected with higher education. Although two cases presented similar issues, the final rulings were different.⁷⁷ While the Supreme Court upheld the case of *Grutter* as constitutional, the case of *Gratz* was found to be unconstitutional. The main reason *Gratz* was deemed unconstitutional was that the university did not provide a sufficiently individual consideration of candidates' total qualifications in an effort to promote diversity.⁷⁸ In 2003, the decision ruled that promoting diversity in higher education can be

⁷² "Conclusions of Law from *Hopwood v. Texas*," Tarlton Law Library, accessed February 2, 2015, <http://tarltonguides.law.utexas.edu/content.php?pid=98968&sid=742951>.

⁷³ Scanlan, "Hopwood v. Texas: A Backward Look at Affirmative Action in Education."

⁷⁴ "Law School Affirmative Action in Doubt: 5th Circuit Ruling Strikes Down University of Texas Admissions Preferences," CIR, accessed February 2, 2015, <https://www.cir-usa.org/1996/05/law-school-affirmative-action-in-doubt-5th-circuit-ruling-strikes-down-university-of-texas-admissions-preferences/>.

⁷⁵ Scanlan, "Hopwood v. Texas: A Backward Look at Affirmative Action in Education."

⁷⁶ "*Gratz v. Bollinger; Grutter v. Bollinger*," CIR, accessed February 2, 2015, <https://www.cir-usa.org/cases/gratz-v-bollinger-grutter-v-bollinger/>.

⁷⁷ "Split Ruling on Affirmative Action," NPR, accessed February 2, 2015, <http://www.npr.org/news/specials/michigan/>.

⁷⁸ "*Grutter v. Bollinger: Joint Statement of Constitutional Law Scholars*," The Civil Rights Project, accessed February 2, 2015, <http://civilrightsproject.ucla.edu/legal-developments/court-decisions/joint-statement-of-constitutional-law-scholars/>.

lawful only if the admissions policies are carefully designed with individual reviews of all applicants.⁷⁹

2.5.1 Gratz v. Bollinger

Jennifer Gratz, who applied for admission in 1995, and Patrick Hamacher who applied in 1997, both white, sued the University of Michigan for entrance into a program designed for underrepresented racial or ethnic minority groups. Minority applicants were automatically awarded twenty points of the one hundred needed to guarantee admission. Although the petitioners were well qualified their admissions were denied. Thereby, they alleged that the program violated the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act.⁸⁰

The university admitted that it used this admission program to achieve greater student diversity. The district court agreed with this program and noted that the program is narrowly tailored.⁸¹ Thereafter, the case went to the Supreme Court where Chief Justice William Rehnquist, speaking for the court, noted that the university's admissions program was unconstitutional because it used racial preferences as a predominant factor in undergraduate admissions, therefore violating the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964.⁸² The court argued that adding points to minorities' scores is not narrowly tailored for achieving educational diversity.⁸³

2.5.2 Grutter v. Bollinger

Barbara Grutter's admission to the University of Michigan Law School was denied in favor of ethnic minorities with lower admissions scores. Grutter sued the university with the statement that she was a "victim of illegal discrimination," and alleged that the university

⁷⁹ Ibid.

⁸⁰ "Gratz v. Bollinger," JUSTIA, accessed February 2, 2015, <https://supreme.justia.com/cases/federal/us/539/244/case.html>.

⁸¹ "Gratz v. Bollinger (02-516) 539 U.S. 244 (2003) Reversed in Part and Remanded," Legal Information Institute, accessed February 22, 2015, <http://www.law.cornell.edu/supct/html/02-516.ZS.html>.

⁸² "Gratz v. Bollinger," OYEZ, accessed February 2, 2015, http://www.oyez.org/cases/2000-2009/2002/2002_02_516.

⁸³ Cornell University Law School, "Gratz v. Bollinger (02-516) 539 U.S. 244 (2003) Reversed in Part and Remanded."

violated the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964.⁸⁴ According to the law school, their program was trying to achieve diversity among its student body.⁸⁵

The district court found the university's actions to be unconstitutional and stated that the university's admission program was unlawful because they used race classification.⁸⁶ The sixth circuit court of appeals overturned this decision, noting that the program, which provided a "points" system for admission, was not a quota. Appealed again to the Supreme Court, Justice Sandra Day O'Connor ruled that "the Law School's educational judgment ... that diversity is essential to its educational mission is one to which we defer."⁸⁷ The court argued that the law school also accepted nonminority applicants who had lower grades than underrepresented minority applicants whose admission on the other hand were denied.⁸⁸ The court held that law school's admissions process was narrowly tailored, therefore was constitutional enough, and did not use the quota system.⁸⁹ Justice O'Connor argued that the program passed constitutional muster because it ensured the presence of racial minorities, moreover it did not harm non-minority applicants.⁹⁰

2.6 Fisher v. University of Texas, 2008

The legal case Fisher vs. University of Texas happened in 2008 when the university denied admission to a white applicant. In 1997, the Texas legislature passed a law that required the University of Texas to admit just those students who ranked in the top 10 percent of their previous high school classes. Later, the new policy admitted all in-state students who ranked in the top 10 percent. Moreover, the university started to consider race as a factor in admission. Therefore, when white applicant Abigail N. Fisher applied for undergraduate admission to this university, her admission was denied because she did not belong among the top 10 percent of her class. Therefore, she had to compete for admission with others

⁸⁴ NPR, "Split Ruling on Affirmative Action."

⁸⁵ JUSTIA, "Grutter v. Bollinger."

⁸⁶ "Grutter v. Bollinger," Legal Information Institute, accessed February 22, 2015, <http://www.law.cornell.edu/supct/html/02-241.ZS.html>.

⁸⁷ Jody Feder, "Affirmative Action and Diversity in Public Education: Legal Developments," *Congressional Research* (2012): 9-11, accessed February 22, 2015,

http://www.law.umaryland.edu/marshall/crsreports/crsdocuments/RL30410_10182012.pdf.

⁸⁸ JUSTIA, "Grutter v. Bollinger."

⁸⁹ NPR, "Split Ruling on Affirmative Action."

⁹⁰ JUSTIA, "Grutter v. Bollinger."

who did not belong among the top 10 percent of in-state applicants.⁹¹ Among this “group” of applicants were minorities. Although Fisher had better results, her admission was denied. Shortly afterwards, Fisher sued the university, arguing that they violated her Fourteenth Amendment rights. She argued that her rejection was in favor of minority applicants who had lower grade point averages.

On the other hand, the university argued that its admission policy program was narrowly tailored, and moreover was essentially identical to the one upheld in the Grutter case. The university stated that this program is beneficial for the entire university because it creates a diverse student body.⁹² The district court found in favor of the University of Texas, and so did the United States Court of Appeals for the Fifth Circuit. However, Fisher did not agree and appealed her case to the Supreme Court, which agreed to hear it. The Supreme Court noted that the judgment from the court of appeals and the district court was incorrect because they did not provide a standard strict scrutiny through which they would determine whether the policies are “precisely tailored to serve a compelling governmental interest.” Justice Clarence Thomas noted that the lower courts did not properly verify the case and did not sufficiently apply strict scrutiny. Furthermore, he emphasized that the Equal Protection Clause of the Fourteenth Amendment strictly prohibits using race as a factor for admission in higher education. At the end, the Supreme Court found the actions of the university to be unconstitutional.⁹³ This conclusion has led to a reexamination of Grutter case, because the principle was the same but the ruling was different. According to the Legal Information Institute, “it will have far-reaching implications for university admissions policies...in schools throughout the United States.”⁹⁴

⁹¹ “Fisher v. University of Texas,” OYEZ, accessed February 22, 2015, http://www.oyez.org/cases/2010-2019/2012/2012_11_345.

⁹² “Fisher v. University of Texas at Austin,” Legal Information Institute, accessed February 22, 2015, <https://www.law.cornell.edu/supct/cert/11-345>.

⁹³ OYEZ, “Fisher v. University of Texas.”

⁹⁴ Cornell University Law School, “Fisher v. University of Texas at Austin.”

3 AFFIRMATIVE ACTION IN EMPLOYMENT

Affirmative action in employment represents one of the most controversial interventions in the labor market since the abolition of slavery. This program should remedy past discrimination and increase employment opportunities for minorities including women. Federal contractors agreed, and stopped discrimination against applicants for employment or employees because of race or gender, and consolidated the Equal Employment Opportunity and Affirmative Action guidelines under the Executive Order 11246, in 1965. As Jonathan S. Leonard described, federal contractors cling to affirmative action to ensure the reduction of evidence of discrimination. Therefore, they developed Affirmative Action Plans (APPs), which included goals and timetables for correcting deficiencies in female and minority employment.⁹⁵

There are two obligations - to not discriminate, and to take affirmative action. This program appeared to be effective in increasing minority employment, but minorities were most often hired into low, unskilled positions. Leonard explains that the meaning and effect of obligations are not well understood, because in many cases, affirmative action is developing rather into “quotas” than equal treatment. In the 1970s, Undersecretary of Labor Laurence H. Silberman wrote, “We wish to create a generalized, firm, but gentle pressure to balance the residue of discrimination...Our use of numerical standards in pursuit of equal opportunity has led ineluctably to the very quotas, guaranteeing equal results that we initially wished to avoid.”⁹⁶

According to the Pew Research Center from 2007, about 70 percent of Americans support the affirmative action program for employment, and try to help minorities get better jobs. On the other hand, almost 63 percent of Americans are strictly against set-asides, quotas, and “reverse discrimination,” as showed research from the Roper Center for

⁹⁵ Jonathan S. Leonard, “The Impact of Affirmative Action Regulation and Equal Employment Law on Black Employment,” *Journal of Economic Perspective* 4, no. 4 (1990): 47-48, accessed March 25, 2015, <http://www.jstor.org/discover/10.2307/1942721?uid=3737856&uid=2482280253&uid=2&uid=3&uid=60&sid=21106024012411>.

⁹⁶ *Ibid.*

Public Opinion in 1995.⁹⁷ Faye J. Crosby and Alison M. Konrad said that “goals and timetables are needed, but quotas are forbidden.”⁹⁸

3.1 Development of Affirmative Action in Employment

The general definition of affirmative action in employment was based on Executive Order 11246, ratified by Lyndon B. Johnson in 1965, with the purpose to increase diversity. According to Affirmative Action Plans (AAPs) and Executive Order 11246, all organizations who earn more than fifty thousand dollars, and do business with the federal government or employ more than fifty people, must develop and deploy an affirmative action plan. Crosby and Konrad explain that the protective clause for workers, which is under Executive Order 11246, concerns both gender and ethnicity. For the organization that creates an affirmative action program for the first time, federal aid is available as is the help of the Office of the Federal Contract Compliance Programs (OFCCP). On this basis, the employer is able to analyze and determine the number of classified women or ethnic minorities in the workplace.⁹⁹ According to Alexandra Kalev et al., six studies, which used Equal Employment Opportunity Commission (EEOC) data for periods of four to six years between 1966 and 1980, proved that more blacks were employed and employment grew quickly rather among contractors than among non-contractors. Jonathan S. Leonard noted that the impact of the contractor compliance program was huge, and it brought demand for highly-skilled black males. Therefore, possibilities for blacks as white-collar workers increased. On the other hand, some unskilled black males were still demanded for inferior jobs. This was considered a big success for affirmative action in employment.¹⁰⁰

On the basis of this evidence, Leonard argues that blacks should not have difficulties over the years to find or hold jobs. According to Richard B. Freeman’s research from 1981, the employment and unemployment ratios of blacks relative to whites had greatly improved over the previous two decades. Because of this, the contract program is considered as positive. However, white women who also belong to the minority group were neglected,

⁹⁷ “Ten Myths about Affirmative Action,” Understanding Prejudice, accessed March 25, 2015, <http://www.understandingprejudice.org/readroom/articles/affirm.htm>.

⁹⁸ Faye J. Crosby and Alison M. Konrad, “Affirmative Action in Employment,” *Diversity Factor* 10, no. 2 (2002): 5-9, accessed March 25, 2015, <http://homepages.se.edu/cvonbergen/files/2012/12/Affirmative-action-in-employment1.doc>.

⁹⁹ Ibid.

and the contractor focused rather on black women than on white women.¹⁰¹ Leonard pointed out that the research proved that between 1974 and 1980, affirmative action was successful in promoting the employment of black women and minorities, however, less so among white women. His research also shows that the employment of minorities has been increasing rapidly in both white-collar and blue-collar sectors. Leonard concluded that the economic positions of minorities have improved, and the affirmative action program played a significant role in this.¹⁰²

3.2 Consequence of Affirmative Action in Employment Nowadays

According to Roosevelt R. Thomas, Jr., nowadays the U.S. work force consists mostly of minorities including women and immigrants. His research shows that whites in comparison with blacks make up only 15 percent of the increase in the workforce over the following year. Preferential treatment for minorities' admission is not necessary, said Thomas, but the focus should be on building their potential and skills, which they can use in higher positions such as middle-management and leadership. Thomas described the American workforce, especially businesses, as a full workplace with progressive people including minorities whose performances are very good. Affirmative action has played an important role for employment. Recruiting a minority is not a big problem nowadays if the applicant has the necessary skills and enthusiasm for work. According to Thomas, affirmative action still plays an important role in many companies. However, some employers still doubt minorities not because of color or gender, but because of education.¹⁰³ Justice Clarence Thomas noted that it is true. Employers doubt minorities' education because they think that they gain the education through preferential treatment. As he described, he also had a problem to find a job because of affirmative action in education, which does not represent such an advantage as affirmative action in employment does.¹⁰⁴

¹⁰⁰ Leonard, "The Impact of Affirmative Action Regulation and Equal Employment Law on Black Employment," 53.

¹⁰¹ Ibid.

¹⁰² Jonathan S. Leonard, "The Impact of Affirmative Action on Employment," *Journal of Labor Economic* 2, no. 4 (1984): 459-460, accessed April 4, 2015, doi: 10.3386/w1310.

¹⁰³ Roosevelt R. Thomas, Jr., "From Affirmative Action to Affirming Diversity," *Harvard Business Review Magazine*, accessed March 25, 2015, <https://hbr.org/1990/03/from-affirmative-action-to-affirming-diversity>.

¹⁰⁴ "How Clarence Thomas Grew to Hate Affirmative Action," *Business Insider*, accessed April 4, 2015, <http://www.businessinsider.com/how-clarence-thomas-grew-to-hate-affirmative-action-2013-10>.

During more than fifty years of existing affirmative action, employers have found a positive correlation and have started actively involving minorities, including women, in positions usually set aside white men.¹⁰⁵ Studies by Faye J. Crosby and Cheryl VanDeVeer reveal that companies using affirmative action have had good outcomes. For instance, companies which considered affirmative action in recruitment were 20 percent more likely to have hired blacks and 10 percent more likely to have hired women than companies that did not practice affirmative action.¹⁰⁶ Because of affirmative action programs in employment, many companies expanded diversity and reported that a diverse workforce leads to higher performance and productivity. Also, the Glass Ceiling Commission stated that these companies that are involved in affirmative action programs, and hire and promote minorities, have higher annual returns than those with intact glass ceilings. On the basis of surveys, large companies support the use of affirmative action programs because it has proven effective.¹⁰⁷

Studies show that affirmative action prevents employment discrimination, and especially women are provided inroads into nontraditional jobs such as industries, banking and management. Americans believed that minorities hired under affirmative action are less qualified than others, but it is not true because the purpose of affirmative action is not to hire unqualified workers, but qualified in the same or similar level as whites. Opponents do not realize that it would be illegal to hire less a qualified person over more qualified ones just because of race or gender. Studies show that more than three thousand minority workers who were hired in entry-level jobs in a cross-section of firms in Atlanta, Detroit, Boston, and Los Angeles did not differ from white workers. Since the early 1980s, the U.S. business has supported affirmative action. In 1996, survey showed that 94 percent of CEOs said that this program had improved their hiring process, 53 percent that it had improved productivity, and positive responses were seen in the jump in stock prices for firms, which embraced affirmative action.¹⁰⁸

¹⁰⁵ “Affirmative Action in Employment,” NC State: Equal Opportunity and Equity, accessed March 30, 2015, <http://oied.ncsu.edu/equity/affirmative-action-in-employment/>.

¹⁰⁶ Faye J. Crosby and Cheryl VanDeVeer, *Sex, Race, and Merit: Debating Affirmative Action in Education and Employment* (Ann Arbor: University of Michigan Press, 2000), 103.

¹⁰⁷ “Affirmative Action and What It Means for Women,” National Women’s Law Center, accessed March 31, 2015, <http://www.nwlc.org/resource/affirmative-action-and-what-it-means-women>.

¹⁰⁸ Crosby and VanDeVeer, *Sex, Race, and Merit*, 104-112.

In most companies affirmative action is considered good for their company as well for American society. In March 24, 2014, changes were announced to the regulations including prohibitions from discrimination against individuals with disabilities (IWDs), and Vietnam veterans through the Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA).¹⁰⁹ Also a new recruitment program called the national Workforce Recruitment Program (WRP) was developed, and its purpose is to connect private and federal sectors of employers with post graduate and motivated students who want to work. Here belong also students with some disabilities who can prove their abilities in the workplace through a permanent job or summer job.¹¹⁰

This is proof that affirmative action still works in the employment field and should be only renewed. In 2012, about 36 percent of the workforce was comprised of non-white people, and according to Census Bureau projections, by 2050, one in two workers should be non-white. Moreover, a *Forbes* survey showed that 85 percent of business respondents said that diversity is important for their businesses, and that diversity drives innovation and supports creativeness.¹¹¹

¹⁰⁹ "Equal Employment Opportunity/Affirmative Action FAQ," UC San Diego - Faculty and Staff, accessed April 3, 2015, <http://blink.ucsd.edu/HR/policies/affirmative/faq.html>.

¹¹⁰ "Affirmative Action," University of California Riverside, accessed April 3, 2015, <http://affirmativeaction.ucr.edu/>.

¹¹¹ "10 Reasons Affirmative Action Still Matters Today," Alternet, accessed April 3, 2015, <http://www.alternet.org/10-reasons-affirmative-action-still-matters-today>.

4 AFFIRMATIVE ACTION IN EDUCATION

As affirmative action was established for increasing the number of minorities in employment, as well this program was adopted among educational institutions. The affirmative action program for women and minorities includes grants as well graduate fellowships. The purpose is to help minorities to reach and move into fields where they want to be and where they were discouraged before, such as engineering, physical sciences, medicine, etc. For women is included a special program that gives them encouragement to study in non-traditional fields and in addition helps them with preparation.¹¹² Educational institutions are allowed to use race and gender for making admission decisions, but it must be narrowly tailored to its purpose and any slack between affirmative action theory and practice is strictly prohibited. Schools that discriminated in the past must compensate for this mistake and promote diversity.¹¹³ Considerable controversy has appeared in using different scores for admissions of white and minority students. Thus, the results, despite the efforts to establish equal opportunity, are still insufficient because the gaps in education between white and black students still remain.¹¹⁴

Besides, according to Michele S. Moses, affirmative action has emerged rather as the most contentious race program in education policies in the United States, because many Americans believe that they are affected personally by this policy.¹¹⁵ Jody Feder noted that because of admission programs which use different score evaluations, more white students are denied, despite their higher qualifications.¹¹⁶ Criticism of affirmative action policy in education related to admission programs is increasing. Moses explained that it violates the “idea of equal rights for all.” He pointed to Guy L. Steele and other critics’ statements, which show that educational institutions take ethnicity and race into consideration during the admissions process. Meanwhile, they do not realize that it is discrimination against

¹¹² National Women’s Law Center, “Affirmative Action and What It Means for Women.”

¹¹³ Elizabeth S. Anderson, “Integration, Affirmative Action, and Strict Scrutiny,” *New York University Law Review* 77, no. 5 (November, 2002): 1217, accessed April 3, 2015, <http://www.nyulawreview.org/sites/default/files/pdf/NYULawReview-77-5-Anderson.pdf>.

¹¹⁴ Michele S. Moses, “Affirmative Action and the Creation of More Favorable Context of Choice,” *Americna Educational Research Journal* 38, no. 1 (2001): 4.

¹¹⁵ Ibid.

¹¹⁶ Jody Feder, “Affirmative Action and Diversity in Public Education: Legal Developments,” *Congressional Research* (2012), 13-14.

white students and in some cases also against white women. “The old sin is reaffirmed in a new guise,” said Steele about affirmative action policies in education.¹¹⁷

4.1 Development of Affirmative Action in Education

The first step for educational modification came in the early 1960s, when Chief Justice Warren E. Burger contended with the intractable problem of racial segregation in public schools. Under the Equal Protection Clause segregation ended, and federal desegregation orders required drastic reconfiguration of school attendance. In 1964, Johnson legalized his Great Society and War on Poverty programs. Moses explained that the main purpose was to help low-income people reach education as well employment and other benefits such as health care. The Civil Rights Act of 1961 was the most important development for affirmative action policy, especially Titles VI and VII. Title VI stated that there must not be “discrimination under any federally assisted activity,” whereas Title VII ordered no discrimination according to “race, color, religion, sex, or national origin.” This order seems to be rather focusing on employment, but later Title VI was also applied to school admissions. Thereby, if any educational institutions that received financial assistance from the government did not comply with the federal requirements, then they would risk losing their financial aid. Affirmative action in higher education and its admission programs can slightly differ from each other. However, the main aim of the admission policy is to take “an applicant’s race, ethnicity, and sex into account” during admission, and this rule should be the same everywhere. All the educational institutions must take into consideration this qualification factor for making selection decisions.¹¹⁸

According to Moses, the development of affirmative action in education seems to be not very popular among Americans. Moreover, it involves contradictions nationwide. Also students supported the policy and protested against affirmative action programs. In 1995, President Bill Clinton stated that affirmative action is good but needs reform. “When affirmative action is done right,” he said, “it is flexible, it is fair, and it works.” Nevertheless, under his presidency, affirmative action faced the strongest attack.¹¹⁹

¹¹⁷ Michele S. Moses, “Affirmative Action and the Creation of More Favorable Context of Choice,” 8.

¹¹⁸ Ibid., 4-7.

¹¹⁹ Ibid.

Affirmative action in the education field seems unstable because, in 1996, California enacted Proposition 209, which prohibited affirmative action in college and university admissions. In Texas that same year, a court decision stemming from the legal case known as *Hopwood v. Texas*, prohibited racial preferences in state higher education. These situations provide clear evidence that affirmative action is redefining itself.¹²⁰

4.2 Pursuit of Fairness - Affirmative Action in Education Nowadays

Using racial preferences in educational institutions has generated much debate and disagreements. Many white students believe that affirmative action in education prejudices fair educational opportunities through racial and gender based selection. Some students protested against preferential treatment, and some of them were arrested. For instance, students of the University of California in Los Angeles were arrested because they took over an academic building and refused to vacate it. They strongly demanded banning affirmative action and stopping compliance with this program.¹²¹

Creating educational opportunities for women and non-whites in colleges, law schools, and medical schools has had negative consequences. Affirmative action in education faced many court rulings, among the most controversial being *Fisher v. University of Texas*. “I’m hoping that they’ll completely take race out of the issue in terms of admissions,” said Fisher, “and that everyone will be able to get into any school that they want no matter what race they are but solely based on their merit.” Even Gail Heriot, a member of the U.S. Commission on Civil Rights, stated that “affirmative action is backfiring badly.”¹²² According to the Pew Research Center in April 22, 2014, the Supreme Court upheld Michigan's ban on affirmative action in its admission programs after the case known as *Gratz v. Bollinger*. It was based on the *Bakke* case, where California decided to enact a formal ban on racial and gender preferences and approved Proposition 209. This act

¹²⁰ Michael Boylan, “Affirmative Action: Strategies for the Future,” *Journal of Social Philosophy* 33, no. 1 (2002): 117-130, accessed March 30, 2015, doi: 10.1111/1467-9833.00127.

¹²¹ Moses, “Affirmative Action and the Creation of More Favorable Context of Choice,” 4-11.

¹²² “Affirmative Action: Good or Harmful?” CNN - In America, accessed April 3, 2015, <http://inamerica.blogs.cnn.com/2012/10/10/affirmative-action-good-or-harmful/>.

weakened affirmative action. Afterwards, seven other states have made similar prohibition.¹²³

The United States stopped supporting admission programs for higher education. Chief Justice John Roberts said that it is not right to take affirmative action to favor minorities over more qualified whites.¹²⁴ In 2003, Justice Sandra Day O'Connor stated, "We expect that twenty five years from now, the use of racial preferences will no longer be necessary to further the interest approved today." According to evidence from court rulings, affirmative action did not always help students as intended. In 1982, Clarence Thomas, the chairman of the EEOC, said that the "affirmative action program places students in programs above their abilities." He continued, "I watched the operation because I was in college too, and I watched the destruction of many kids as a result."¹²⁵

Critics argue that the affirmative action program has consequences on students because of the admissions program and then both whites and blacks suffer learningwise and careerwise. This is known as the mismatch theory. It does not suggest that minority students not attend elite universities, but it says that these minority students should not benefit from such elite schools if they entered them with academic qualifications below the median level in comparison to other students. Justice O'Connor thinks that affirmative action will last until 2028 or beyond. However, California National Longitudinal Bar Passage Study (NLBPS) thinks that it will last less because of previous negative evidences and its consequences. The biggest problem of affirmative action in education is the admission program. Nobody should deny opportunities to educated and well qualified applicants based on race or gender.¹²⁶

¹²³ "Supreme Court Says States Can Ban Affirmative Action; 8 Already Have," Pew Research Center, accessed April 3, 2015, <http://www.pewresearch.org/fact-tank/2014/04/22/supreme-court-says-states-can-ban-affirmative-action-8-already-have/>.

¹²⁴ Valerie Strauss, "Why We Still Need Affirmative Action For African Americans in College Admissions," *Washington Post*, July 3, 2014, accessed April 3, 2015, <http://www.washingtonpost.com/blogs/answer-sheet/wp/2014/07/03/why-we-still-need-affirmative-action-for-african-americans-in-college-admissions/>.

¹²⁵ Dan Slater, "Does Affirmative Action Do What It Should?" *New York Times*, March 16, 2013, accessed April 3, 2015, http://www.nytimes.com/2013/03/17/opinion/sunday/does-affirmative-action-do-what-it-should.html?_r=0.

¹²⁶ Ibid.

5 CONCLUSION

R. Roosevelt Thomas, Jr. said, “Sooner or later, affirmative action will die a natural death.”¹²⁷ The equal opportunities for gender, race, and ethnicity have represented different consequences for each field - employment and education. While employment gained more supporters, education did not. Equal opportunity should be for everyone, allowing society to achieve outcomes of equal value through their own choices.¹²⁸ However, according to Crosby and Konrad, affirmative action appears more costly than equal opportunity, and is more criticized than equal opportunity. They noted that affirmative action rather “undermines those whom they seek most directly to benefit by allowing other to question their merit.”¹²⁹

Justice Sandra Day O’Connor noted, “Affirmative action is still needed in America” but she also mentioned that in twenty five years, racial preferences treatment will no longer be needed.¹³⁰ It is said that affirmative action, which is based on the criteria of gender, race and ethnicity is losing political support. On the other hand, suggestions have been made that affirmative action should be only replaced with new forms that would be rather based on criteria related to poverty. Therefore, a new, better form of affirmative action would be better than the traditional one.¹³¹

According to James P. Sterba, even critics of affirmative action, like Louis Pojman and Thomas Sowell, defend affirmative action in employment. They said that affirmative action in employment should be preserved. Surveys showed that diversity in employment increased incomes, innovations and creativeness in companies. Some social scientists have discovered that some employers still tend to hire from their neighborhoods with small minority populations. Sowell said, "some firm continues to hire its current employees’

¹²⁷ Thomas, Jr., “From Affirmative Action to Affirming Diversity,” 5.

¹²⁸ Lesley A. Jacobs, “Review of Pursuing Equal Opportunities: The Theory and Practice of Egalitarian Justice,” *Economics and Philosophy* 21, no. 1 (2005): 155-161, accessed April 4, 2015, <http://personal.lse.ac.uk/voorhoev/Review%20of%20Pursuing%20Equal%20Opportunities%20by%20Lesley%20Jacobs.pdf>.

¹²⁹ Crosby and Konrad, “Affirmative Action in Employment,” 5-9.

¹³⁰ NPR, “Split Ruling on Affirmative Action.”

¹³¹ Mane Hajdin, “Affirmative Action, Old and New,” *Journal of Social Philosophy* 33, no. 1 (2002): 83-84.

friends and relatives through word of mouth referrals....Affirmative steps of some kind seem reasonable."¹³²

On the other hand, the future of affirmative action in education is cloudy and has already been cut back dramatically. In 2007, Chief Justice Roberts wrote, "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."¹³³ Court rulings show that affirmative action in education does not work because many women are discriminated against in favor of race even if they belong to minority groups. Therefore, the sense of affirmative action is negligible because it does not provide equal opportunities for all minorities as well as for whites.

For instance cases such as Jennifer Gratz or Abigail Fisher is great examples for showing that affirmative action does not work as it should. They are women, well qualified, but their applications were rejected in favor of race. Justice Clarence Thomas, who is an opponent of the program even though he is black, said that affirmative action includes racial discrimination and claimed that, it is as bad as segregation or slavery. He claimed that this "great program" later put him at a huge disadvantage because employers did not respect his degree. This explains why some workers are afraid to hire minorities. It is not because of race but because they think that minorities earned education just because of preferential treatment through affirmative action. This was the case with Thomas. He said, "Employers did not take me seriously because they thought I got special treatment" at law school.¹³⁴ Therefore, affirmative action in education should be banned. Surveys prove that it is more harmful than good. Many students suffer and cannot take opportunities they deserve, even white women who legally belong to the minority group. Preferential treatment in educational institutions will not help them in the workforce but rather harm them. Also Carl Cohen and James P. Sterba wrote that preferential treatment is bad for American society as a whole, especially for educational institutions, where preferential treatment has negative consequences. It should be stopped.¹³⁵

¹³² James P. Sterba, *Affirmative Action for the Future* (New York: Cornell University Press, 2009), 36-37.

¹³³ Adam Liptak, "Court Backs Michigan on Affirmative Action," *New York Times*, April 22, 2014, accessed April 4, 2015, http://www.nytimes.com/2014/04/23/us/supreme-court-michigan-affirmative-action-ban.html?_r=0.

¹³⁴ Business Insider, "How Clarence Thomas Grew To Hate Affirmative Action."

¹³⁵ Carl Cohen and James P. Sterba, *Affirmative Action and Racial Preference: A Debate* (New York: Oxford University Press, 2003), 180.

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