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Analysis of Affirmative Action Programs in Public Sector Employment

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ANALYSIS OF AFFIRMATIVE ACTION PROGRAMS IN PUBLIC SECTOR EMPLOYMENT

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ABSTRACT

The purpose of this study was to discuss the history of civil rights and executive order legislation with regard to public sector employment. The research questions addressed included: "When does an employer have the right to practice affirmative action in awarding preferential treatment in hiring and promotions?"; "Are prospective employers being discriminatory if they require prospective employees to take an examination, even though there is evidence that minorities usually score disproportionately lower than their white colleagues?"; and "Are termination policies based upon seniority acceptable, if the majority of the senior employees are non minority males?"

The major legal themes of sixteen federal cases were identified regarding public sector affirmative action policy development. Criteria necessary for analyzing the constitutionality of affirmative action policies with respect to the Fourteenth Amendment Equal Protection Clause and Title VII Civil Rights Act of 1964 was formulated for applicability within state, local, and federal agencies.

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non-minority males? The answers to these questions in addition to other insight is provided throughout this report.

Organization of Study

The study is divided into primary and secondary sections. The first chapter discusses the organization and research design of the study. The second chapter analyzes affirmative action programs from an historical perspective. It traces the Progressive movement of the mid 60s during the enactment of key civil rights legislation to the recent enactment of the Civil Rights Act of 1991. The third chapter discusses the two major themes common throughout sixteen federal cases with regard to the implementation and validity of affirmative action programs in public sector employment. The third chapter also summarizes the findings of the sixteen federal cases with regard to answering the questions concerning the issue of when does an employer have the right to legally practice affirmative action in awarding preferential treatment in making employment considerations regarding hiring and promotions?; are prospective employers being discriminatory if they require prospective employees to take an examination, even though there is evidence to support the fact that minorities usually score disproportionately lower than their white colleagues?; and are termination policies based upon seniority acceptable, if the predominant majority of the senior employees are non-minority males? The third chapter also summarizes the findings of the sixteen federal cases with regard to allegations of Equal Protection and Title VII violations. The fourth chapter discusses the conclusion and findings of the study.

Research Design

The study was conducted by utilizing both primary and secondary sources. The primary sources used were actual case statutes. The secondary sources used were law journals, publications, and computer databases. Initially, the search began by accessing the legal Lexis/Nexis database to acquire information regarding locating court cases pertaining to affirmative action. After finding the court citations, the cases were used to gain insight into locating constitutional issues that were common throughout the cases. Upon gaining this information, the United States Code Annotated was consulted to find the actual language of the Civil Rights Acts of 1866, the Civil Rights Act of 1964, and the Civil Rights Act of 1991. Next, the Loyola University Information Service (LUIS) database was accessed to gain additional information regarding locating legal journals and periodicals specifically related to affirmative action in public sector employment. The LUIS database provided a menu that supplied pertinent information and access capabilities to the Loyola Law (LLAW) database, which indices the legal periodicals covering criminal justice, law, and public policy issues. The 4 General Index (INDY) database, which provides an index to major scholarly business, humanities, social sciences, and science journals. Finally, the ProQuest Periodical Abstracts - Research I database was used to access other scholarly journals related to the issue of affirmative action. All of this information was combined and incorporated to provide the substance and factual basis of this report.

The sources were used to answer pertinent questions regarding legally sanctioned preferential treatment and racial classification used in employment

considerations, under the auspices of an employer's affirmative action plan. The research questions addressed included: when does an employer have the right to practice affirmative action in awarding preferential treatment when making employment considerations regarding in hiring and promotions?; are prospective employers being discriminatory if they require prospective employees to take an examination, even though there is evidence to support the fact that minorities usually score disproportionately lower than their white colleagues?; and are termination policies based upon seniority acceptable, if the predominant majority of the senior employees are non-minority males?

The two major legal themes of sixteen federal court cases were identified and discussed regarding public sector affirmative action policy development. Criteria necessary for analyzing the constitutionality of affirmative action policies with respect to the Fourteenth Amendment Equal Protection Clause and Title VII Civil Rights Act of 1964 was formulated for applicability within state, local, and federal agencies. All of the source material was incorporated into this report to provide substantial insight into tracing the history and application of affirmative action programs in public sector employment.

DEFINITION OF TERMS

1. Affirmative Action refers to specific steps, beyond terminating discriminatory practices, that are taken to promote equal opportunity and ensuring that discrimination does not reoccur in the workplace.[1]

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[1]Raymond Bron Taylor, "Affirmative Action at Work, Law, Politics, and Ethics," The University of Pittsburgh Press, 1991, 11.

2. Affirmative Action Employer refers to an employer that gives preferential treatment to members of a protected class of individuals, i.e. women, minorities, veterans, and disabled persons.[2]

3. Affirmative Action in Employment includes hiring and promoting protected class members on the basis of a formal affirmative action plan. The affirmative action plan is based upon proposed timetables and goals that have been established via aid of a utilization analysis of an organization's work force.[3]

4. Affirmative Action Goals refers to the elimination of non legal barriers in order to grant equal employment opportunities, including intentional discriminatory practices and non intentional, structural or systemic discrimination. [4]

5. Discrimination refers to an illegal or impermissible employment decision, practice or policy that takes into consideration one of the statutorily prohibited factors, e.g., race or gender under Title VII or age under the Age Discrimination in Employment Act (ADEA), or discrimination not considered job related and resulting in a disparate impact on members of a protected class.[5]

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[2]Raymond Bron Taylor, "Affirmative Action at Work, Law, Politics, and Ethics," 23.

[3]Raymond Bron Taylor, "Affirmative Action at Work, Law, Politics, and Ethics," 24.

[4]Raymond Bron Taylor, "Affirmative Action at Work, Law, Politics, and Ethics," 11.

[5]John A. Gray, "Preferential Affirmative Action in Employment," Labor Law Journal, Vol. 43, No. 1, January 1992, 25.

6. Equal Employment Opportunity refers to the legal obligations of statutorily mandated employers not to "discriminate" against members of a protected class.[6]

7. Equal Opportunity Principle refers to all people being given the right to equal access to whatever goods and services are needed to develop their natural talents, so that persons with equal natural talents have equal opportunities and resources to develop their talents and become competitive in a market economy.[7]

8. Ethical Distinction refers to the differentiation made between an organization's obligation to comply with established conduct standards and the aspiration to meet the goals of affirmative action plans.[8]

9. Ethical Question refers to the likelihood of particular legislation that was unethical, however legal, prior to the enactment of Civil Rights Act of 1964. This includes any legislation that denies opportunities to anyone solely based upon that person's racial persuasion. On the other side, the ethical question asks on what grounds is it ethical to deny employment to a qualified individual by granting employment or promotions on a competitive basis, simply because there is under representation by members of a protected class of individuals in a particular area or organization? [9]

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[6]John A. Gray, "Preferential Affirmative Action in Employment," Labor Law Journal, 25.

[7]Raymond Bron Taylor, "Affirmative Action at Work, Law, Politics, and Ethics," 11.

[8] Raymond Bron Taylor, "Affirmative Action at Work, Law, Politics, and Ethics," 25

10. Mandatory Affirmative Action refers to affirmative action required by federal and state laws.[10]

11. Mandatory Affirmative Action Requirement requires that an employer implement an affirmative action plan and make a good faith effort of implementation.[11]

12. Merit Principal refers to the preferential jobs and rewards that should be distributed on a meritorial basis in a social context characterized by equality of opportunity.[12]

13. Minority Business Enterprises refers to the inclusion of any business in the country which is owned and employed by at least 51% of a minority group representation that includes African Americans, Eskimos, Spanish-speaking, Indian, Oriental, or Aleut Citizens.[13]

14. Preferential Affirmative Action refers to any type of preferential treatment, albeit informal or formal, where an employment opportunity is given solely based upon a person's race, gender, veteran status, or disability. For example, choosing

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[9]Raymond Bron Taylor, "Affirmative Action at Work, Law, Politics, and Ethics," 24.

[10]Raymond Bron Taylor, "Affirmative Action at Work, Law, Politics, and Ethics," 24.

[11]Raymond Bron Taylor, "Affirmative Action at Work, Law, Politics, and Ethics," 25.

[12]Raymond Bron Taylor, "Affirmative Action at Work, Law, Politics, and Ethics," 7.

[13] City of Richmond v J.A. Croson Co., 488 U.S. 469 (1989) at 469.

one applicant over another because the selected candidate is a minority, Vietnam veteran, female, or handicapped.[14]

15. Pure Equality of Opportunity refers to the equal legal access combined with an uncompromising adherence to the idea that the best qualified individual should always be hired by employers.[15]

16. Remedial Affirmative Action refers to an employers efforts to assure equality of access to all employment opportunities for all qualified individuals, particularly the protected classes of people who have been traditionally overlooked or denied access to employment activities. This action is achieved by targeting recruiting activities or providing remedial training programs to minorities and other members of the protected classes.[16]

17. Reverse Discrimination refers to affirmative action that unfairly discriminates against a non-minority group by going beyond the limits prescribed by law.[17]

18. Set Asides refers to programs in which a certain percentage of governmental contracts are awarded to women and minority owned businesses.[18]

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[14]Raymond Bron Taylor, "Affirmative Action at Work, Law, Politics, and Ethics," 23.

[15]Raymond Bron Taylor, "Affirmative Action at Work, Law, Politics, and Ethics," 11.

[16]Raymond Bron Taylor, "Affirmative Action at Work, Law, Politics, and Ethics," 23.

[17]Raymond Bron Taylor, "Affirmative Action at Work, Law, Politics, and Ethics," 24.

19. Target Groups refers to classifications of people that are identified as having been negatively affected by discrimination, and therefore targeted for concern by affirmative action programs. This group includes any discrimination practices based upon race, color, sex, religion, and alienage.[19]

20. Utilization Analysis contrasts the racial and gender composition of an organization's work force, at all levels, with that of the qualified labor pool reasonably available to fill those positions. For example, if the percentage of minorities and women in the employer's work force is lower than that in the available labor pool, then there is a work force imbalance.[20]

21. Voluntary Affirmative Action refers to action plans that are voluntarily designed by individual organizations and meet federal and/or state regulations.[21]

The following chapter discusses the history of legislation and executive orders leading to affirmative action policies and programs. The third chapter provides an analysis of major themes of supreme court affirmative action legislation. The fourth chapter is the concluding chapter and discusses the findings of the study.

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[18]David Edmonds, "Race Against Positive Discrimination," New Statesman & Society, Vol. 5, No. 198, April 15, 1994, 22.

[19]David Edmonds, "Race Against Positive Discrimination," New Statesman & Society, 12.

[20]David Edmonds, "Race Against Positive Discrimination," New Statesman & Society, 24.

[21]David Edmonds, "Race Against Positive Discrimination," New Statesman & Society, 24.

CHAPTER 2

HISTORY OF LEGISLATION AND EXECUTIVE ORDERS LEADING TO AFFIRMATIVE ACTION PROGRAMS

Civil Rights Act of 1866

The Civil Rights Act of 1866 deals specifically with contracts.[1] The Act states:

> All persons ... shall have the same right ... to make and enforce contracts ... and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white persons.[2]

The Act was proceeded by the Fourteenth Amendment to the Constitution, which was ratified in 1868. Section 1 of the act guarantees to all citizens, "equal protection under the law, due process of all laws, and the right to life, liberty, and property."[3]

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[1]Civil Rights Act of 1866, 42 U.S.C. 1981-82 (1970).

[2]Bron Raymond Taylor, "Affirmative Action at Work, Law, Politics, and Ethics," The University of Pittsburgh Press, 1991, 19.

[3]Bron Raymond Taylor, "Affirmative Action at Work, Law, Politics, and Ethics," 19

Executive Order 10,925

Executive Order 10,925 was issued on June 9, 1961 in response to the final report of the Committee on Government Contracts to President Eisenhower, which was chaired by then Vice President Nixon. The report concluded that:

> (1) Overt discrimination in the sense that an employer actually refuses to hire solely because of race, religion, color or national origin is not as prevalent as is generally believed. To a greater degree, the indifference of employers to establishing a positive policy of non-discrimination hinders qualified applicants and employers from being hired and promoted on the basis of equality.
>
> The direct result of such indifference is that schools, training institutions, recruitment and referral sources follow the pattern set by industry. Employment sources do not normally supply job applicants regardless of race, color, religion, or national origin unless asked to do so by employers. Schools and other training sources frequently cannot fill non-discriminatory job orders from employers because training may take from one to six years or more.
>
> ...(2) There is no justification for discrimination in employment because of race, color, religion, or national origin in work performed by contractors paid by federal funds....[1]

The implications of the report regarding affirmative action seem to suggest that the patterns of historical racism and/or sexism prevalent in Corporate American institutions were advised to become less overt with absence of malice. Nixon's report emphasized that "indifference is hardly responsive to prohibitions that speak to intentional, malicious, misconduct." [2] The executive order also gave the President's

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[1]James Jones, Jr., "The Origins of Affirmative Action," University of Davis Law Review, Vol. 21, No. 2, Winter 1988, 395.

[2]James Jones, Jr., "The Origins of Affirmative Action," University of Davis Law Review, 396.

Committee authority to adopt rules and regulations and issue orders deemed appropriate and necessary to achieve the purposes of the order.

Originally, the program focused on the complaint process and voluntary accommodations. Executive Order 10,925 spawned the Plans for Progress Program. The Plans for Progress Program was enacted in response to the NAACP's announcement of its intentions to file a complaint against a federal contract granted to the Lockheed Corporation, which at the time was the second largest U.S. defense contractor. In order to avert the negative publicity, Lockheed in conjunction with the government agreed to make sweeping reforms and to act as the prototype for voluntary affirmative action plans. In response to the threat and possible enforcement of the suit, other companies consulted with committee representatives to develop voluntary affirmative action programs. The plans were far reaching in scope, committing the companies to anti discrimination practices in all aspects of human resources and development. Companies were required to confirm their intentions to take positive action to recruit and maintain minority employment, with special emphasis on training, educational development, and promotions. Companies were required to make pledges regarding the development of equal opportunity policies and recruitment sources, create detailed plans on the implementation of the proposals, and produce progress reports regularly to the President's Committee. The Plans for Progress Program was responsible for increasing minority representation in the total work force from 5.1% to 5.7%. The total African American

representation doubled. However, the representation was less than 1% among all of the companies participating in the program.[3]

Executive Order 10,925 required certain contractors to take "affirmative action" procedures to ensure that people did not suffer discrimination due to their race, creed, color, or national origin. Initially, this executive order pertained strictly to recruiting, initiating practices to eliminate prejudicial attitudes, and eliminating practices that could pose as barriers to the fair treatment of protected class members.[4] This was in contrast to previous efforts to ensure the enactment of civil rights measures. Prior to the enactment of this order, protective measures prohibited certain conduct based on a perceived undesirable status such as race, religion, sex, or national origin. This order stipulated that recipients of federal government contracts be required to eliminate past vestiges of racial discrimination by taking steps towards implementing affirmative action programs and prohibiting any form of discrimination based upon a person's race, color, religion, sex, or national origin.[5]

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[3]James Jones, Jr., "The Origins of Affirmative Action," University of Davis Law Review, 396-97.

[4]Robert K. Robinson, John Seydel, and Hugh J. Sloan, "Reverse Discrimination Employment Litigation: Defining the Limits of Preferential Promotion," Labor Law Journal, Vol. 46, No. 3, March 1995, 132.

[5]Leslie A. Nay and James E. Jones, Jr., "Equal Employment and Affirmative Action in Local Governments: A Profile," Law and Inequality, A Journal of Theory and Practice, The University of Minnesota Law School, Vol. VIII, No. 1, November 1989, 104.

Civil Rights Act of 1964

President Lyndon Johnson said, "You do not wipe away the scars of centuries by saying: Now you are free to do as you desire ... you do not take a person who, for years has been hobbled by chains and liberate him, bring him to the starting line of a race and then say, you are free to compete with all of the others." [6] This speech was given in 1965 by President Johnson at Howard University, a prestigious African American college. It is thought that this speech fueled the fire and initiated the fervor associated with affirmative action and civil rights legislation. Civil rights legislation provided the incentive to enact affirmative action programs designed to eliminate the vestiges of past racial discrimination practices imposed upon African Americans initially, and then incorporated to include all minorities and women.

During the 1960s, President Johnson's Civil Rights Act of 1964 legally prohibited racial discrimination in public education and employment. In 1965, the Voting Rights Act ended years of depriving Southern African Americans from exercising their right to vote in public elections. The Federal Housing Act of 1968 ensured that all people received public access and accommodation regardless of race or ethnicity. Theoretically, all of these advances towards eliminating past vestiges of racial/ethnic and gender discrimination practices with regard to voting, public accommodation access, public education and employment were eliminated with the passages of the above

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[6]David Edmonds, "Race Against Positive Discrimination," New Statesman & Society, Vol. 5, No. 198, April 15, 1994, 22.

mentioned acts. However, in reality this was not the case in everyday situations. African Americans were still located in the bottom rung of socioeconomic standings. During this time of legislative enactment, they trailed non-minorities in the areas that could make a difference socio-economically, such as employment opportunities, educational attainment, increased income, and increases in life expectancy rates. John F. Kennedy once said, "There is little value in a Negro's obtaining the right to be admitted to hotels and restaurants if he has no cash in his pockets and no job."[7] The frustration of the African American was evidenced in the riots held in 100 major cities, such as Los Angeles, New York, and Chicago. The frustration spilled over in the way of fire bombings and labor strikes, which didn't end until an accord was reached with regard to the adoption of improved economic conditions and benefits for minorities. Affirmative action programs were adopted to diffuse the frustration and to combat the lingering impact of legally sanctioned racist practices.[8]

Executive Order 11,246

Executive Order 11246, which was signed in 1965 helped to strengthen the enforcement of the Civil Rights Act of 1964. The Order required that federal contractors "take affirmative action to ensure that applicants are employed and that employees are

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[7]David Edmonds, "Race Against Positive Discrimination," New Statesman & Society, 22.

[8]David Edmonds, "Race Against Positive Discrimination," New Statesman & Society, 22.

treated during employment without regard to their race, color, sex, or national origin."[9] This is an effective tool for federal agencies, because if there is suspicion of discrimination practices operating within a company or educational facility, the agency is authorized to withdraw federal funding in the form of contracts.

The Act delegated full authority to the Secretary of Labor. The responsibilities included administering provisions relating to nondiscrimination in employment practices by government contractors and subcontractors. The Office of Federal Contract Compliance (OFCC) was established by the Secretary of Labor during this time to ensure implementation of the program goals. The spirit of voluntarianism changed to mandatory enforcement of anti-discrimination legislation and policies. The government began enforcing affirmative action development programs. The Plans for Progress Program merged with the National Alliance of Business program. The goal being to provide large numbers of full time employment positions for disadvantaged persons.[10]

The executive order stipulates that organizations granted federal contracts of $10,000 or more, are prohibited from discriminating against individuals in employment based upon race, color, religion, sex, or national origin. Contractors are required to take "affirmative action" to ensure equal employment of all applicants and that employment

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[9]David Edmonds, "Race Against Positive Discrimination," New Statesman & Society, 22.

[10]James Jones, Jr., "The Origins of Affirmative Action," University of Davis Law Review, 398.

considerations are made without regard to an applicant's race, sex, religion, color, or national origin.[11]

Companies that are recipients of federal contracts in excess of $50,000 are required to develop affirmative action plans which establish objectives and timetables for instituting increased minority and female representation to eliminate racial and/or gender imbalances in a manner reflective of the current local labor market.[12]

Title VII

Under Title VII of the Civil Rights Act of 1964, preferential gender and/or racial based treatment and racial and/or gender quotas are banned. Quotas are only required in instances where the courts have adjudged an organization guilty of perpetuating past discrimination practices.[13]

§703 (a)(1) of Title VII provides protection from employers who fail or refuse to employ, discharge, or discriminate against individuals with regard to compensation, terms, conditions, or employment consideration on the basis of the individual's race, color, sex, national origin, or religion.[14]

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[11]Harry E. Groves and Albert Broderick, "Affirmative Action Goals Under Title VII: Statute, Legislative History, and Policy," Thurgood Marshall Law Review, Vol. 11, No. 2, Spring 1986, 29.

[12]Harry E. Groves and Albert Broderick, "Affirmative Action Goals Under Title VII: Statute, Legislative History, and Policy," Thurgood Marshall Law Review, 29.

[13]Harry E. Groves and Albert Broderick, "Affirmative Action Goals Under Title VII: Statute, Legislative History, and Policy," Thurgood Marshall Law Review, 29.

[14]Theresa Johnson, "The Legal Use of Racial Quotas and Gender Preferences By Public and Private Employers," Labor Law Journal, Vol. 40, No. 7, July 1989, 420.

§703 (a)(2) of Title VII provides protection against employers who limit, classify, or segregate applicants or employee's in manners which would deprive or tend to deprive an individual of employment consideration or negatively impact the individual's employment status because of the individual's race, color, national origin, sex, or religion.[15]

Revisions were made in 1972 to Title VII of the Civil Rights Act of 1964. Most notably was the extension of Title VII's coverage applicability to state, local, and federal government.[16] In addition, an amendment to Title VII's remedial section was made, which included two additional clauses made to the statute. The revision reads: "such affirmative action as may be appropriate, which may include, but is not limited to... reinstatement or hiring of employees with or without back pay... or any other equitable relief as the court deems appropriate." [17] It has been found that the Supreme Court has not categorically denied nor affirmed a response to the question concerning whether §706 (g) grants license to affirmative action goal relief.[18]

Title VII established the Equal Employment Opportunity Commission (EEOC). The EEOC is a quasi-legislative, administrative, judicial body that does not have the

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[15]Theresa Johnson, "The Legal Use of Racial Quotas and Gender Preferences By Public and Private Employers," Labor Law Journal, 420.

[16]Civil Rights Act of 1964, Title VII, § 701 (a) and (b) and 707.

[17]Harry E. Groves and Albert Broderick, "Affirmative Action Goals Under Title VII: Statute, Legislative History, and Policy," Thurgood Marshall Law Review, 28

[18]Harry E. Groves and Albert Broderick, "Affirmative Action Goals Under Title VII: Statute, Legislative History, and Policy," Thurgood Marshall Law Review, 28.

authority to enforce its legislation and/or statutes. The Commissioners are authorized to conduct investigations and to advocate conciliation if there is probable cause to do so. Enforcement is carried out by plaintiffs or an attorney general, and occasionally by the United States Department of Justice when patterns or practice cases are involved. Title VII legal enforcement is provided in the federal district court system, however they have limited judicial review of final agency actions. Federal courts have expansive powers to issue orders after establishing the presence of illegal employment practices. §706 (g) of Title VII provides the court with the authority to "enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate." §706 (h) prohibits the limitations imposed by the Norris-La Guardia Act on federal courts sitting in equity from being read into Title VII.

The pattern or practice provision, §707 granted the Attorney General authority to bring action "requesting such relief, including an application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice, as he/she deems necessary to ensure the full enjoyment of the rights herein described."[19]

§708(g) of Title VII grants the court authority to enjoin the respondent from engaging in any unlawful practices and orders appropriate affirmative action remedies, but isn't restricted to reinstatement or hiring of employees, with or without restitution, or

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[19]Harry E. Groves and Albert Broderick, "Affirmative Action Goals Under Title VII: Statute, Legislative History, and Policy," Thurgood Marshall Law Review, 29.

any other appropriate equitable relief if found that the employer engaged or intentionally engaged in unlawful employment practices.[20]

Federal and state agencies have separate affirmative action objectives and requirements. The EEOC (Equal Employment Opportunity Commission) is a federal agency that was established to monitor and enforce compliance with the 1964 Civil Rights Act. The authority of the EEOC was enhanced in the 1972 Equal Employment Opportunity Act. This act broadened the powers of the commission to include monitoring of all companies with more than 15 employees. Initially, the threat of being charged with an EEOC infraction prompted a great number of companies to enact voluntary affirmative action programs. However, a EEOC suit can drag on within the federal court system for a number of years. They are also very difficult to prove, with the burden of proof being placed on the plaintiff. During the Reagan and Bush administrations 1980-1992, it was an unwritten rule that prosecution of civil rights discrimination suits were not significant, and received low priority ranking among more significant cases. This effectively opened the gates to corporate racial/ethnic and gender discrimination, without threat of recrimination.[21]

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[20]Harry E. Groves and Albert Broderick, "Affirmative Action Goals Under Title VII: Statute, Legislative History, and Policy," Thurgood Marshall Law Review, 29.

[21] David Edmonds, "Race Against Positive Discrimination," New Statesman & Society, 22

The Philadelphia Plan

During 1967-68, the Department of Labor developed the Philadelphia Plan in response to the OFCC's concern and growing frustration in its attempts to devise a method of promoting minority representation within the construction industry. However, it was found that the plan violated competitive bidding principles by requesting that the affirmative action requirements be determined after the contractors had let their bids. The Philadelphia Plan was revised and reissued during the Nixon administration. The goal of the plan was to stimulate the construction industry. However, the most famous aspect of the plan was that it provided the fundamental basis for establishing standards for affirmative action programs which are applicable to non construction employers. The Philadelphia Plan addressed three specific needs. First, there was a problem of labor unions excluding minorities from entrance into local unionization. Second, there was the problem of the refusal of labor unions to replace lost workers due to the creation of new jobs and attrition with workers trained under the auspices of the union apprenticeship programs. Third, the problem encountered when Philadelphia contractors refused to employ qualified minorities for available construction positions. [22]

Proponents of the Philadelphia Plan could not ignore the fact that even if the plan's goals were fully achieved, the representation of minorities on a construction project would have been lower than the total percentage of African American construction workers available in the labor market. The only requirement that the federal

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[22]James Jones, Jr., "The Origins of Affirmative Action", University of Davis Law Review, 399.

government stipulated was that the construction organization make a "good faith effort to achieve the goals." The plan prohibited employers from engaging in overt discriminatory practices. However, the plan did not establish a quota system to ensure parity in employment. The plan did not require employers to employ unqualified minorities or to discriminate against non-minorities in order to satisfy the requirements of the plan. The penalty for an employer who failed to meet the prescribed goals and timetables warranted an investigation into the manner in which the employer established the plan to achieve its goals. In order to establish presumptive compliance under the terms of the Philadelphia Plan, an employer is required to meet the goals and timetables established under the executive order. Provided that the employer did not have any formal accusations of discrimination lodged against the company, the government deems that the employer has satisfied all components in its obligation as a federal contractor.[23]

The Philadelphia Plan has been challenged in federal courts on the grounds of Title VII violation, violating the National Labor Relations Act, exceeding the scope of the Secretary of Labor's authority under the Philadelphia Plan, exceeding Presidential authority under the U.S. Constitution, and as a violation of the fifth and fourteenth amendments under the constitution. However, the Third Circuit court rejected all of the arguments presented against the Philadelphia Plan and established judicial authority legalizing the President's Executive Order Program. The decision of the court validated

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[23]Harry E. Groves and Albert Broderick, "Affirmative Action Goals Under Title VII: Statute, Legislative History, and Policy," Thurgood Marshall Law Review, 29.

the use of goals and timetables in establishing affirmative action programs to eliminate past vestiges of racism.[24]

Civil Rights Act of 1991

In 1989, the court decided in Patterson v McLean Credit Union to significantly narrow the scope of the application of the 1866 Act.[25] The decision contributed to the widely held belief among civil rights lobbyist that the court was reversing the advances of civil rights legislation. The decision of this case contributed to the urgency of the insistence of the Civil Right's lobbyist to enact new legislation strengthening anti discrimination legislation in the form of the Civil Rights Act of 1991. The Act was designed to ensure a broader interpretation of the 1866 Act and to be more inclusive than the Civil Rights Act of 1964.[26]

Specifically, the Act protects non-minorities in reverse discrimination actions. It mandates that all potentially affected parties are required to be afforded the opportunity of participation in the consent decree process. Title VII legislation prohibits employers from classifying employees in a manner which "would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee because of such individual's race."[27] However, employers are not prohibited

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[24]Harry E. Groves and Albert Broderick, "Affirmative Action Goals Under Title VII: Statute, Legislative History, and Policy," Thurgood Marshall Law Review, 29.

[25]Patterson v McLean Credit Union, 87 U.S. 107.

[26]Bron Raymond Taylor, "Affirmative Action at Work, Law, Politics, and Ethics", 17.

[27]42 U.S.C. §2000e-2.

from designing affirmative action plans that advance the purpose of Title VII intentions of breaking down racial barriers that promote segregation or eliminate employment discrimination.[28]

Race-conscious affirmative action plans, especially those initiated by the federal government are required to be subjected to a higher degree of scrutiny by the court system. This is done in order to ensure that "those employees not benefiting from the plan" do not have their individual interests infringed upon unduly by their employers.[29]

Civil Rights Issues Challenging Public Sector Employment

Interpretation of the Civil Rights Act of 1964 has been cumbersome and tenuous at best. The Supreme Court has had the arduous task of making the final decision as to the application of the law to various cases. Some of the questions that they are faced with concern the question of whether an employer is being discriminatory if it requires its prospective employees to take an examination, given the fact that African Americans fail the test in disproportionately greater numbers than non-minorities? Another question that they are faced with, concerns whether a firing policy based on seniority is acceptable if, due to past vestiges of racial and gender discrimination practices, the majority of the older employees are white? There is also the ethical question as to whether a racially imbalanced work force is prima facie[30] evidence of blatant discrimination?[31]

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[28]Robert K. Robinson, John Seydel, and Hugh J. Sloan, "Reverse Discrimination Employment Litigation: Defining the Limits of Preferential Promotion," Labor Law Journal, Vol. 46, No. 3, March 1995, 136.

[29]Johnson at 632.

Thirty years after the implementation of the first programs, affirmative action programs are being implemented in almost every segment of American society. This issue has become one of the most divisive and polarizing issues in American politics. The very notion of affirmative action and minority set aside programs have become a prominent part of the America work ethic. Affirmative action programs and other equal opportunity programs have been responsible for the integration of minorities and women with respect to educational and socio-economic strides that have helped to place these traditionally disadvantaged groups into the American mainstream.[32]

There was an innate problem associated with affirmative action. It was never clearly defined and was ambiguous in terms. It was initially intended to pacify African Americans, but was enlarged in scope to include all minorities, women, and the disadvantaged. Affirmative action protection encompasses almost every facet imaginable with regard to ensuring equal opportunity access. It includes employment, higher education, and set aside programs. Critics have deemed that affirmative action is "reverse discrimination" and just as prolific as discrimination because minorities receive favorable consideration on the basis of their race, irrespective of merit. However their adversaries contend that affirmative action programs serve to balance economic and

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[30]Literally means "matter of fact." Oran's Dictionary of Law.

[31]David Edmonds, "Race Against Positive Discrimination," New Statesman & Society, 23.

[32]David Edmonds, "Race Against Positive Discrimination," New Statesman & Society, 22.

educational distribution opportunities by providing incentive and training programs to traditionally disadvantaged members of American society.[33]

Polls consistently confirm the fact that non-minorities are anti-affirmative action proponents. More than 70% of whites believe that non-minorities are being deprived of employment opportunities because of racial quotas and set aside programs. The general consensus among non-minorities is the belief that a potential employer would employ a minority to fill a position based upon a racial quota mandated by either a affirmative action or voluntary affirmative action program. Conversely, an overwhelming majority of non-minorities support open housing programs in which minorities are given the opportunity to live in areas that they select to live. They also support the concept of integrated schools and facilities. However if the question posed mentions affirmative action programs and possible negative effects on non-minorities, then the support for education and employment opportunities becomes negative. This general attitude has far reaching implications on political agendas and platforms. Affirmative action has failed to attract popular support within the American mainstream. There is also a growing number of African American intelligentsia who question the wisdom of race targeted policies that are the bread and butter substinence of affirmative action programs. There is a growing sentiment that affirmative action programs have not aided minorities. Instead, it is felt that they have contributed to the break down within the African American families value system and strong work ethic.

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[33]David Edmonds, "Race Against Positive Discrimination," New Statesman & Society, 22.

One of the most outspoken advocates of decreased affirmative action programs is William Julius Wilson, of the University of Chicago. He advocates the imposition of race neutral measures to improve the plight of the poor.[34] This is viewed to be contradictory among non-minorities because affirmative action programs disproportionately benefit African Americans and are viewed as being politically correct to the majority population. Glenn Loury of Boston University is another African American anti-affirmative action advocate. He supports the contention that affirmative action programs significantly diminish African Americans from gaining the incentive to acquire educational and vocational skills, which would enable them to become more productive members of society.[35] Stephen Carter of Yale advocates the Pure Equality of Opportunity Principle. This is the perception among whites that a African American employee is the best possible candidate, rather than merely because of his race.[36] Another minority anti-affirmative action advocate, Shelby Steele believes that the race neutral policies narrows African American objectives. He believes that racial preferences emit the negative message that African Americans are more proud of their past suffering than in their present achievements.[37]

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[34]David Edmonds, "Race Against Positive Discrimination," New Statesman & Society, 22.

[35]David Edmonds, "Race Against Positive Discrimination," New Statesman & Society, 22.

[36]David Edmonds, "Race Against Positive Discrimination," New Statesman & Society, 22.

[37]David Edmonds, "Race Against Positive Discrimination," New Statesman & Society, 22.

Studies have shown that African Americans are three times more likely than whites to live below the poverty level. The unemployment rate for African Americans is twice that of the rate for whites. On average, African American men earn approximately 73% of a white males salary. African Americans also are placed at a disadvantage educationally. Even though graduation rates have increased since the 1970's, African American college enrollment has declined. African American faculty representation is approximately 3% of total academic staff in American colleges and universities. Overall, African Americans represent 12% of the total American population.[38]

The African American middle class population has profited from affirmative action programs. It has been found that 30% of the African American population consist of middle class African Americans. It has been reasoned that the increase in African American middle class representation can be attributed to significant inroads in education as a result of affirmative action policies and programs. This is in stark contrast to the fact that there has been virtually no measurable upward mobility among African Americans since 1975. This fact has fueled the debate that the only beneficiaries of the affirmative action programs have been African American middle class participants, not the disadvantaged African Americans, which were the original target group. On the other side, it is also argued that all African Americans suffer some aspect of racial discrimination, not just the economically or educationally disadvantaged.[39]

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[38]David Edmonds, "Race Against Positive Discrimination," New Statesman & Society, 22.

[39]David Edmonds, "Race Against Positive Discrimination," New Statesman & Society, 22.

The ongoing battle between the winners and losers in the affirmative action war is far from over. There have been tradeoffs due to the gains of affirmative action policies. There have been increases in minority and/or female representation in white and blue collar positions. The tradeoff has occurred among those minorities or females who have steady employment and those who are habitually unemployed. This is both true for African Americans who have college degrees and those without.[40]

Since the middle 1960's, there has been a significant increase in the number of African Americans employed in the public sector or in organizations with ties to the public sector. Conversely, there has been a significant decrease in minority representation among private sector employment. The reason for this shift is obvious. Federal contractors are experiencing strong pressure to increase the amount of their organization's minority and female representation in order to receive federal contracts and meet federal compliance guidelines. Private sector organizations are discouraged from recruiting minorities and females because of the growing belief that they are not cost effective. It is believed that minorities and females require extensive training and special treatment. The extensive training is due to under education. The special treatment is due to the possible threat of litigation due to Title VII or constitutional violations lodged by individual treated unfairly.[41] The consequence of the public sector

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[40]David Edmonds, "Race Against Positive Discrimination," New Statesman & Society, 22

[41]David Edmonds, "Race Against Positive Discrimination," New Statesman & Society, 22

embracement of minorities and females, is that government policy tends to have twice the impact on African Americans than it has on white employees.[42]

Preferential Treatment Issues Affecting Public Sector Employment

The answer to the question with regard to when an employer has the right to practice affirmative action in awarding preferential treatment in hiring and promotions has never been fully answered by the federal court system. It is an accepted rule of thumb to assume that an employer is required to practice affirmative action measures whenever the organization is a government contractor/subcontractor or whenever the court has ordered the organization to implement an affirmative action plan due to evidence of past discrimination practices currently impacting minorities.[43]

Provided that the organization seeks a governmental contract, it must satisfy the provisions set forth under the Civil Rights Act of 1964, Title VII, and the Equal Employment Opportunity Commission. The federal government requires contractors and subcontractors receiving government contracts to be affirmative action contractors. In effect, this requires contractors/subcontractors receiving contracts worth $10,000 or more to establish proof that they are affirmative action contractors. If the contract is estimated to be worth $50,000 or more, the contractor/subcontractor must submit a copy of their written affirmative action plan to the federal government. In order for the

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[42]David Edmonds, "Race Against Positive Discrimination," New Statesman & Society, 22

[43]John A. Gray, "Preferential Affirmative Action in Employment," Labor Law Journal, Vol. 43, No. 1, January 1992, 25-26

contractor/subcontractor to receive the award of a contract worth in excess of $1 million, the affirmative action plan must be approved by the Office of Federal Contract Compliance Programs (OFCCP). The OFCCP requires that in addition to the contracting unit, the entire business organization is required to practice affirmative action policy. The OFCCP also requires that the contractor/subcontractor must not have any implemented quota system or set aside programs. However, the contractor/subcontractor must have established timetables and goals for the total implementation of the affirmative action plan.

The OFCCP is a public enforcement agency, which is also a division of the Department of Labor. Executive Order 11,246 (race and gender); Vocational Rehabilitation Act of 1973 (physical and mental disabilities); and the Vietnam Era Veterans Readjustment Act of 1974 (Vietnam veterans) are the legal basis for requiring government contractors/subcontractors to have representational parity in their employment force.[44]

In 1989, the OFCCP reported that there were approximately 24 million employees working under the federal auspices of private contractors/subcontractors. However, the total work force at that time was 120 million. These figures are approximated because it does not reflect the number of employees of contractors/subcontractors employed at the state and local levels. It does not include the total number of employees employed by organizations stipulated by federal court order or

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[44]John A. Gray, "Preferential Affirmative Action in Employment," Labor Law Journal, 26.

consent decrees to increase minority and/or gender representation within their companies. Only federal courts are authorized to impose rigid quotas and timetables on organizations.[45]

All public and private sector employers covered by Title VII are required to be in full compliance with Title VII limitations. This includes organizations who have self imposed voluntary affirmative action programs, as well as those employers required to do so under mandatory affirmative action programs imposed by the federal courts.

In Weber v. USW & Kaiser Aluminum,[46] the case centers around the fact that the defendant, USW & Kaiser Aluminum adopted a voluntary affirmative action program as a condition of a collective bargaining agreement made between the union and management. The voluntary affirmative action plan established the goal of providing training opportunities to African Americans, regardless of the fact that they had less seniority than non-minorities. The plan also called for the organization to reserve 50 positions for African American employment.[47]

The Supreme Court held that the voluntary plan did not violate Title VII's prohibition against "discrimination on the basis of race." This was a landmark decision because USW & Kaiser Aluminum had no record of having any past discriminatory practices with regard to hiring and promoting African Americans. Even though the Court

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[45]John A. Gray, "Preferential Affirmative Action in Employment," Labor Law Journal, 26.

[46] Weber v. USW & Kaiser Aluminum, 443 U.S. S.Ct. 193 (1979).

[47]John A. Gray, "Preferential Affirmative Action in Employment," Labor Law Journal, 27.

did not mandate the voluntary affirmative action plan, the Court found that the employer "may lawfully discrimination on the basis of race without violating Title VII, so long as the employer's plan is within certain limits." The Court required that voluntary plans must have a remedial purpose, that it doesn't impact non-minority employment opportunities, and doesn't unnecessarily trammel the rights of non-minorities. This decision as well as the Johnson decision extended the protections and requirements to promotions and gender discrimination issues. There are four conditions that make or preclude a legally valid affirmative action plan:

> (1) The plan must have a remedial purpose, designed to eradicate a statistically significant imbalance in traditionally segregated job categories.
>
> (2) The plan must be temporary in duration, implemented in a manner that is done to attain, but not maintain parity within the work force.
>
> (3) The plan must not impede on non-minority and male employment opportunities.
>
> (4) The plan does not unnecessarily trammel the rights of others or necessitate the replacement of employees currently in place.[48]

Public sector employers must follow the guidelines set forth under Title VII, as well as the guidelines of the Equal Protection Clause, as defined under Wygant and Johnson as discussed later.

The Supreme Court held that government classification based on race are subject to the strictest scrutiny and must satisfy both of the requirements as set forth under the Strict Scrutiny Two Prong Standard. The standard requires that "the

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[48]John A. Gray, "Preferential Affirmative Action in Employment," Labor Law Journal, 26.

government must establish ... that there is an imbalance by comparing the racial composition of its work force with that of the reasonably available qualified labor pool; that the government's own past discriminatory practices created the imbalance; and that the plan is necessary to remedy the imbalance."[49] These requirements were established under the terms of the Wygant decision. This decision has come to be associated with the requirement that state and local governments are allowed to establish voluntary affirmative action plan within their jurisdiction, provided that the plan is designed specifically to remedy the present effects of the government's participation in contributing to the perpetuation of past discriminatory employment practices.

Under Croson legislation, state and local governments are prohibited from imposing minority set aside requirements on their contractors/subcontractors, except in instances in which the government is attempting to remedy "the present effects of either government's own identifiable past discriminatory practices" of contacting firms in the local industry.

Constitutional limits established under Wygant and Croson

(1) State and local governments affirmative action plans that utilize racial classifications for employment purposes are subject to strict scrutiny.

(2) State and local governments may not itself be a voluntary affirmative action employer, except in instances to remedy its own identifiable past discriminatory practices.

(3) Affirmative action lay-offs are not allowed.

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[49]John A. Gray, "Preferential Affirmative Action in Employment," Labor Law Journal, 28.

(4) State and local government MBE set asides are not allowed, except to remedy either government's own past discriminatory practices or those of the local industry, and then no more than necessary to remedy the identified discrimination.[50]

Interestingly enough, no court case has addressed the constitutionality of governmental requirements that stipulate that contractors be affirmative action employers. The Equal Protection Clause of the constitution allows local and state governments to require affirmative action employment practices of their own contractors only to serve a compelling governmental interest of remedying past vestiges of racial and gender discrimination.

Reverse discrimination suits question the methods used to create gender/racial parity among organizations with or without established affirmative action plans. They can be initiated either when an employer has an affirmative action plan in place, or whenever the employer does not have an established affirmative action plan. Provided that there is an established affirmative action plan, the employer is admitting in effect that racial or other criterion are acting as a determinant in making employment decisions. The employer defends his/her method of making employment decisions by alleging that the employment consideration was made pursuant to the voluntary affirmative action plan. The plaintiff has the arduous task of providing the burden of proof to establish the invalidity of the affirmative action plan. The plaintiff has the option of using one or more of the four Title VII limitations to support his/her contention. Provided that a public sector employer or independent contractor is party to the case, a defense is required to be

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[50]John A. Gray, "Preferential Affirmative Action in Employment," Labor Law Journal, 28.

made under the constitutional limits established under either the Wygant or Croson cases.[51]

If the employer does not have a formally established affirmative action plan, the Court has the option of requiring a modification to the McDonnell Douglass and Burdine prima facie requirement. For example, the Court may require the plaintiff to introduce evidence that supports the contention that race was a determining factor beyond the fact that a minority was employed for a position that a non-minority applied.[52]

The next chapter is the third chapter, which provides an analysis of the major themes common in supreme court affirmative action legislation.

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[51]John A. Gray, "Preferential Affirmative Action in Employment," Labor Law Journal, 29.

[52]John A. Gray, "Preferential Affirmative Action in Employment," Labor Law Journal, 29.

Table1 --- Differences between EEOC and Mandatory Affirmative Action

	EEOC	Mandatory
Employee Coverage	All employees with an established number of employees	Contractors and subcontractors
Factor Included	Includes more prohibited factors, such as age and religion.	Includes preferential treatment for minorities, women, handicapped, and veterans.
Legal Basis	Title VII, Americans with Disabilities Act (ADEA), etc.	Executive Order 11,246, Vocational Rehabilitation Act, and Vietnam Veterans Act.
Basis Legal Obligation	Prohibits discrimination on the basis of any one of the stated factors, and allows discrimination subject to certain conditions on the basis of race and gender.	Requires an employer to use "its best good faith efforts" to achieve representational parity.
Enforcement Mechanism	The EEOC and OFCCP issues a "right to sue" letter under EEOC laws.	There is no private cause of action, except to challenge the constitutionality of the action.

Source: Preferential Affirmative Action in Employment.[53]

[53]David Edmonds, "Race Against Positive Discrimination," New Statesman & Society, 30.

CHAPTER 3

ANALYSIS OF THE MAJOR THEMES OF SUPREME COURT AFFIRMATIVE ACTION LEGISLATION

This study has analyzed the decision of sixteen federal court cases. The conclusion found that the decision of the cases were primarily based upon the decision reached in City of Richmond v J.A. Croson[1] in 1989 with regard to equal protection clause challenges, and Johnson v Transportation Agency of Santa Clara County[2] in 1987 with regard to Title VII challenges. This study includes eight affirmative action cases alleging violation of the equal protection clause of the Fourteenth amendment; six affirmative action cases alleging violation of Title VII; and two cases that allege that an affirmative action plan was in violation of both the equal protection clause and Title VII.

Equal Protection Clause

The Fourteenth amendment Equal Protection Clause stipulates that States are prohibited from enforcing or creating legislation which denies an individual's rights as afforded by the U.S. Constitution. Analysis of a claim of an equal protection violation is

[1]City of Richmond v J.A. Croson, 488 U.S. 469.

[2]Johnson v Transportation Agency of Santa Clara County,107 S.Ct 1442 (1987).

compared with the conditions set forth in Richmond v. J.A. Croson Co.[3] These are known as the "Two Prong Strict Scrutiny" analysis. Under this standard, the preference given to minorities in affirmative action court decisions must be justified by a compelling governmental interest that is achieved only through narrowly tailored means. Court sanctioned preferential employment consideration must serve a compelling governmental interest of remedying past vestiges of racial and/or gender discrimination. The following eight cases concern the issue of Equal Protection Clause, Fourteenth amendment to the U.S. Constitution violations.

Richmond v J.A. Croson

The most significant aspect of this case is the Supreme Court determination that the strict scrutiny standard is applicable to any affirmative action plan that is based upon racial classifications. The strict scrutiny two prong test requires that racial classifications are only necessary in instances that are justified by a compelling governmental interest, and that the means used to achieve these goals are narrowly tailored to affect the compelling governmental interest.[4]

The Croson case centers around one principle of law: the constitutionality of the City's minority set aside program. Specifically, the challenge addresses the issue of

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[3]City of Richmond v J.A. Croson, 488 U.S. 469.

[4]Leslie A. Nay and James E. Jones, Jr., "Equal Employment and Affirmative Action in Local Governments: A Profile," Law and Inequality, A Journal of Theory and Practice, The University of Minnesota Law School, Vol. VII, No. 1, November 1989, 122.

whether the set aside program was in violation of the Fourteenth amendment's equal protection clause. The City of Richmond required that prime contractors awarded City construction contracts, subcontract at least 30% of the value of each contract to one or more Minority Business Enterprises. The plan was designed to be remedial in nature, however it was adopted after a public hearing concluded that there was no direct evidence of either past racial discriminatory practices regarding the letting of business contracts or evidence that prime contractors had discriminated against minority subcontractors. The adoption was based upon the allegation that there was wide spread racism occurring within the construction industry, and that less than 1% of total City contracts had been awarded to minority contractors within the last four years.[5]

In order to determine the constitutionality of the affirmative action plan, the Court analyzed the necessity of the set aside remedial measure. It was found that even though the general African American population of the City was 50%, only .67% of the prime contracts had been awarded to minority contractors within recent years. The City provided waivers to individual contractors who provided proof that sufficient minority contractors/subcontractors were either unwilling to participate in the plan or unavailable. The Court applied the Strict Scrutiny Two Prong test to determine the constitutionality of the program. The test is not dependent upon the racial composition of the people burdened by the racial classification. It assumes that the State is pursuing a remedial goal that is worthy of warranting the implementation of an affirmative action plan, and that the means designed to remedy past discrimination practices is compelling enough to

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[5]Croson at 477.

substantiate the fact that there is not possibility that the employer's motives for the racial classification was stereotypical or based upon racial prejudice.[6]

It was found that the City's plan violated both prongs of the test. The plan was not justified by a compelling governmental interest, because the record did not reveal any past evidence of racial discriminatory practices imposed upon minority contractors or subcontractors during the letting of contracts. The Court found that the City failed to demonstrate a compelling governmental interest that justified the enactment of the plan. The factual predicate supporting the plan did not establish the type of identifiable past discrimination in the City's construction industry that would warrant the race conscious relief under the terms of the Fourteenth Amendment's Equal Protection Clause.[7]

It failed the second prong of the test because the 30% set aside program was not narrowly tailored to accomplish a remedial purpose of remedying past discriminatory practices, which occurred solely on the basis of the contractors or subcontractor racial classification. The plan entitled African American, Oriental, or Hispanic entrepreneurs from virtually anywhere in the United States to be awarded absolute preference over nonminorities, based solely on the contractors or subcontractors race.[8] It was determined that the plan's waiver didn't inquire whether the particular Minority Business Enterprise

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[6]Croson at 472.

[7]Croson at 470.

[8]Croson at 470.

in question seeking racial preference classification had suffered from the effects of past discrimination practices employed by the City or prime contractors.[9]

Wygant v Board of Education

The Wygant case centers around two principles of law, the Strict Scrutiny Two Prong test and statistical disparity evidence. Specifically, the challenge addresses the issue of whether the Board of Education's layoff plan is in direct violation of the Fourteenth amendment, equal protection clause rights of the displaced non-minority teachers.

The collective bargaining agreement between the Board of Education and the teacher's union provided that if it became necessary to lay off teachers, those with the most seniority would be retained. However, the provision also stipulated that at no time would there be a greater percentage of minority personnel employed at the time of the lay off than minorities. n essence, this meant that during certain school years, non-minority teachers were laid off, while minority teachers with less seniority were retained.

The Court addressed the issue regarding voluntary adoption of affirmative action plans by public employers. The City and its union negotiated a collective bargaining agreement that established affirmative action provisions in hiring, however it also protected minority teachers from the effects of downsizing. The Court majority held that the provision regarding the layoffs was unconstitutional, in that it failed both prongs of the strict scrutiny standard test. The designated plan failed because it was not

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[9]Croson at 471.

narrowly tailored to address the remedial need and effects of past discrimination. It also failed because the Board of Education sought to maintain minority hiring levels that were irrelevant to remedying past employment discrimination practices.[10]

It was found that the layoff provision operated to the disadvantage of non-minorities, because it constituted a classification based upon race. The Court reasoned that in affirmative action cases, a employer's use of racial classification must be scrutinized for conflicts with constitutional rights.[11] It must meet the terms of the strict scrutiny two prong test. It must be justified by a compelling governmental interest and be narrowly tailored to meet the goals of remedying past employment discrimination practices.[12] However, the presence of societal discrimination alone is not sufficient evidence to justify a employer's use of racial classification. Convincing evidence of prior discrimination by the governmental entity involved is required before an employer is allowed limited use of racial classification for remedial purposes. The District Court found that the remedial measure was permissible under the equal protection clause as a remedy for past employment discrimination. It was believe that the presence of minority teaching faculty would aid in eradicating societal discrimination, by providing positive role models for minority students. However, the Supreme Court found that the "role model" theory suggested by the District Court would encourage the Board of Education to employ discriminatory hiring and lay off practices for periods longer than necessary to

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[10]James Jones, Jr., "The Origins of Affirmative Action," University of Davis Law Review, Vol. 21, No. 2, Winter 1988, 407.

[11]Wygant v Board of Education, 476 U.S. 267 (1986) at 273.

[12]Wygant at 274.

achieve a legitimate remedial purpose. The use of role models wasn't relative to the injustices cause by prior discriminatory employment practices. The acknowledgment that there had been pervasive societal discrimination was not sufficient evidence to justify the use of race conscious remedial action or imposition of a racially classified remedy.[13]

Provided that the layoff provisions purpose was to remedy prior discrimination practices, the constitutional validity required the District Court to make a factual determination that the Board of Education had a strong basis in evidence to support the contention that the implementation of the layoff provision was necessary.[14]

The Court requires proof of prior discriminatory history prior to allowing the restricted use of racial classification and other affirmative action remedial measures to be imposed as a remedy. There must be a relevant analysis of current and past case history used to prove discrimination by statistical disparity. The analysis must focus on disparities that demonstrate or evidence prior governmental discrimination.[15] In this case, it was reasoned that had the plaintiff provided statistical evidence as to the percentage of qualified minority teachers available in the relevant labor market to demonstrate that the Board's hiring practice of African American teachers over a period of time had equaled the percentage employed by the Board, the case would have probably been decided differently.[16] It was the opinion of the Court that the Board should have had convincing

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[13]Wygant at 267.

[14]Wygant at 267-68.

[15]Wygant at 267-68.

[16]Wygant at 275.

evidence to support the contention that an affirmative action program was warranted prior to implementing the program.[17] The layoff provision was not a governmental interest and was not narrowly framed to accomplish the goal of eradicating past discriminatory hiring and promotional practices within the department.

The Supreme Court found that other less intrusive alternatives were available to accomplish the goal of remedying prior employment discriminatory practices, such as the adoption of hiring objectives. Therefore, the layoff provision was not sufficiently narrowly tailored as a means of accomplishing a legitimate purpose.[18]

The Wygant decision reflects the Justice Department's assertion that affirmative action is restricted to granting remedial measures to a defined group of discrimination victims.[19] It was the opinion of the Court that the Board should have had convincing evidence that an affirmative action program was warranted, prior to implementing Federal Court program.[20] The layoff provision was a governmental interest and was not narrowly framed to accomplish the goal of eradicating past discriminatory hiring and promotional practices within the department.

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[17]Wygant at 267

[18]Wygant at 268

[19]James Jones, Jr., "The Origins of Affirmative Action", University of Davis Law Review, 409.

[20]Wygant at 277.

United States v Paradise

In 1972, it was found that the Alabama Department of Public Safety, herein after referred to as the "Department" had systematically excluded African Americans from employment as state troopers for over four decades. The National Association for the Advancement of Colored People (NAACP) brought action against the Department challenging the Department's long-standing practice of excluding African Americans from employment. The United States was joined as a party plaintiff, and Philip Paradise, Jr., intervened on behalf of a class of African American plaintiffs. The District Court issued an order imposing a hiring quota and requiring the Department to refrain from engaging in discrimination in its employment practices, including promotions. The Department was required to hire one African American trooper for each white trooper elevated in rank, until African Americans constituted approximately 25% of the state trooper force. The Court also required that the African Americans who were promoted were qualified to be promoted in rank. The Court required that the Department provide a copy of the test used in promotions and to furnish the Court a listing of the eligible candidates. This was known as the 1972 Order. The defendants appealed the decision, but the Fifth Circuit upheld the hiring requirement.[21]

The Court of Appeals held that the Department did not violate the rights of due process or equal protection of the white applicants who had higher eligibility rankings

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[21] United States v Paradise, 480 U.S. 149 (1987) at 149-50.

than the African Americans when the quota was implemented. The Department imposed the 1979 and 1981 decrees.

In 1981, the Department administered a test for the purpose of promoting candidates to the rank of corporal. The test was administered to 262 applicants, of whom 60 (23%) were African American. Only 5 (8.3%) of the African Americans scored in the top half of the promotion register, the highest ranking African American was numbered 80 on the promotion eligibility list. The United States inquired about the standing of the consent order. The Department indicate that there was an immediate need to make 8-10 corporal promotions and indicated that it would elevate 16-20 individuals before construction of a new promotion eligibility listing. [22]

Eleven years later, a motion to enforce the 1979 and 1981 decree was filed by the United States. The United States found that the Department's failure to produce a promotion plan in compliance with the decrees suggested the possibility that the Department was engaging in continued discrimination practices.[23] The District Court found that the Department failed to develop promotion procedures which didn't have an adverse affect on African Americans. The District Court ordered the Department to promote one African American trooper for each white trooper elevated in rank, provided that the African Americans promoted were qualified for the position. The deadline suggested that the Department was obligated to continue the program until the Department implemented an acceptable promotion procedure.

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[22]Paradise at 160.

[23]Paradise at 161.

After the U.S. filed the motion to enforce, four white applicants who sought promotion to corporal rank sought to intervene on behalf of a class composed of those white applicants who took the proposed corporal's examination and ranked between the numbers 1-79. The issue at question was whether the 1979 and 1981 decrees and the sought after relief proposed by the plaintiffs had an adverse affect on their constitutional rights.

The District Court entered an order in 1983 holding that the Department's selection procedure had an adverse affect on African American candidates for promotion. Consequently, the District Court set a deadline for submission of a promotion plan consisting of at least 15 qualified African American candidates to the rank of corporal in a manner that would not have an adverse racial impact on minorities.[24]

The District Court granted the plaintiffs motion to enforce the 1979 and 1981 decrees and designed another relief mechanism. The Court held that for a specific period, 50% of the corporal promotions would be given to qualified African Americans. The remedial relief was also designed to address the Department's delay in developing acceptable promotion procedures for all ranks.[25] The Court imposed a 50% promotion quota in the upper ranks, but maintained that promotions would occur only in cases where there were qualified African American candidates; if the rank was less than 25% African American, and provided that the Department had not developed and implemented an affirmative action promotion plan without adverse impact on

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[24]Paradise at 162.

[25]Paradise at 163.

nonminorities for the relevant rank.[26] The Department was ordered to submit a schedule to the Court for the development of promotion procedures for all ranks above that of the entry level.

In 1984, the Department promoted eight African Americans and eight whites to the position of corporal, pursuant to the District Court's order enforcing the consent decrees. The Department also submitted to the District Court found that the Department could promote up to 13 troopers utilizing the promotion procedure and suspended application of the one-for-one requirement for the promotion purpose. Later in the year, after approval of the promotion procedure for sergeant, the Court suspended application of the quota at the sergeant's rank.

The U.S. Supreme Court found that the race conscious relief ordered in this case violated the equal protection clause of the Fourteenth amendment, however it was found that the court system could constitutionally employ racial classifications essential to remedying unlawful discrimination based upon race or ethnicity. Remedying past or present racial discrimination is a justifiable state interest to warrant the remedial use of a carefully constructed affirmative action program.

On appeal, the Court of Appeals for the Eleventh Circuit affirmed the District Court's order. The Court of Appeals held that the relief at issue was designed to remedy the present effects of past discrimination. In addition, the relief awarded was found to be necessary to accomplish the objectives of remedying historical racial imbalances in the

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[26]Paradise at 163.

upper ranks of the Department. The United States Supreme Court affirmed the decision of the District Court.[27]

The case centers around the legal principles of the strict scrutiny two prong test and the appropriate use of race conscious remedies in affirmative action programs. The race conscious relief that was issued as a remedy, was considered to be justified by a compelling interest in remedying past discrimination practices that permeated entry level hiring and promotional practices. The Croson case decision was applied to this case. The enforcement order is supported by the strict scrutiny test, because it was narrowly tailored to meet the needs of a compelling governmental interest in eradicating past discriminatory practices and by the societal interest in complying with judgments of the federal courts. It has been decided that in determining whether race conscious remedies are appropriate, there are several factors that must be considered. Firs, there must be a decision as to the necessity of the relief and the efficacy of alternative remedies. Second, there must be a stated term concerning the flexibility and duration of the relief, including the availability of waiver provisions. Third, there must be a decision as to the relationship of the numerical goals to the relevant labor market. Fourth, the impact of the relief on the rights of third parties must be decided.[28]

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[27]Paradise at 165-66.

[28]Leslie A. Nay and James E. Jones, Jr., "Equal Employment and Affirmative Action in Local Governments: A Profile, " Law and Inequality, A Journal of Theory and Practice, The University of Minnesota Law School, 124-25.

After careful analysis of all of these provisions, the court found that the one to one promotion requirement was narrowly tailored to serve its purposes, both as applied to the initial set of promotions to the corporal rank and as a continuing contingent order with respect to the upper ranks.[29]

In this instance, it was found that over a period of four decades, the Department deliberately sought to systematically exclude African Americans from all positions including the upper ranks of the Department. This was found to be a flagrant violation of the Fourteenth Amendment. It was determined that the exclusion of African Americans from entry level positions precluded African Americans from eventually seeking promotions to upper ranking levels. This also resulted in a departmental hierarchy exclusively dominated by non-minorities. During the course of court proceedings, it was found that within 37 years, there had never been an African American trooper employed by the Department at any level.

The District Court found that the Department deliberately stalled the imposition of the Decree objectives and deliberately aided the discrimination practices that were already being perpetuated. It is also a fact that by 1983, the Department had only promoted four African American troopers, and that these promotions were made pursuant to the 1979 Decree, not by the voluntary affirmative action plan that was adopted by the Department. The Department continued to operate employment practices that excluded African Americans from promotion opportunities.[30]

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[29]Paradise at 171.

[30]Paradise at 169.

The purpose of the order was intended to eliminate the effects of the Department's "long term, open, and pervasive" discrimination, including the exclusion of African Americans from all upper levels of rank. The order was also designed to ensure expeditious compliance with the 1979 and 1981 decrees by inducing the Department to implement a promotion procedure schedule that would not have an adverse affect on African Americans. The court also needed to eliminate the effects of the Department's delay in producing the promotion procedure.[31]

It concluded that the imposed remedial action was effective, temporary, and flexible, because the program applied only to qualified African Americans, provided that they were available, and only in instances in which the department had a racial parity need to make promotions. The Court concluded that the City's affirmative action program was justified and narrowly tailored to meet the District Court's legitimate purpose.[32]

The Court found that the race conscious relief ordered by the District Court was justified by a compelling governmental interest in eradicating the Department's pervasive, systemic, and obstinate discriminatory exclusion of African Americans. The Department's deliberate employment discrimination has had a profound effect on the state trooper's upper echelon ranks, by excluding African Americans from competing for promotions on an equitable basis.

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[31]Paradise at 178.

[32]James Jones, Jr., "The Origins of Affirmative Action", University of Davis Law Review, 414.

The enforcement of the consent decree is supported by the societal interest of eradicating a persistent, and long standing history of resisting to abide by the terms of the order. Remedial relief was only imposed after the Department failed to abide by the 1979 and 1981 consent decrees.

The court mandated "one for one" promotional requirement was judged to be narrowly tailored to serve the purpose of eradicating racial discrimination in employment within the Department. This was true of both the initial corporal promotions and as a "continuing contingent" with respect to employment within the upper ranks of the Department.

The numerical relief ordered by the District Court was found to bear a proper relation to the percentage of nonminorities in the relevant work force. The District Court ordered 50% African American promotions until the ranks achieved 25% African American representation, whereas the relevant affirmative action labor pool constituted 25% representation. This figure represents an attempt to balance the rights and interests of all involved parties.

The "one for one" requirement did not impose an unacceptable burden on non-minority applicants. The remediation requirement has only been used on one occasion, and probably will not be repeated. It doesn't prohibit the employment advancement of nonminorities, and does not require the promotion of unqualified African Americans over

qualified non-minority applicants.[33] Therefore, the Court deemed the consent decree to be flexible, waivable, and temporary in application.[34]

Billish v City of Chicago

This case centers around the legal principles of the strict scrutiny two prong test and sufficient statistical disparity evidence necessary to fulfill the strict scrutiny standard. In 1973, the U.S. Department of Justice brought civil action against the City of Chicago, herein after referred to as the "City," alleging that the hiring and promotion practices of the Chicago Fire Department, herein after referred to as the "CFD", illegally discriminated against African Americans and Hispanics. At the time of the suit, African Americans and Hispanics comprised a total of less than 5% of the uniformed personnel in the CFD. The court entered a interlocutory injunction against the City on the Department of Justice's discriminatory hiring claims. The City entered into a consent decree in 1974. This established an interim 50% minority hiring ratio and a long range goal requiring the City to significantly increase the minority representation of the CFD in a manner directly reflecting the minority composition of the City. In 1978, minorities comprised approximately 9% of the CFD's uniformed personnel. In 1979, the District Court granted a motion to the Department of Justice and ordered that if the new 1979 hiring eligibility list was used for more than a two year period or 500 eligible names, 50% of all further hiring would be required to be comprised of minority candidates.

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[33]Paradise at 150-52.

[34]Paradise at 178.

In 1980, the Department of Justice formally informed the City of its intention to file a new suit challenging the proposed promotion examinations due to the possibility of it having a severe adverse impact against minority candidates.

In 1983, the Fire Commissioner ordered the preparation of a new set of promotion examinations for each of the fire department ranks. The examinations were given in descending rank order: engineer, lieutenant, captain, and battalion chief. In 1987, the Commissioner of Personnel informed the Fire Commissioner that the engineer and captain promotions were to be made on an affirmative action basis, with the goal of 20% of the persons promoted to the engineer rank should be African American, and an additional 5% of those promoted were to be of Hispanic origin.[35]

White firefighters brought action against the City and various parties. They alleged that their rights under the equal protection and due process clauses were violated by the City's failure to fill all vacancies before retiring its eligibility list and by its nonrank order promotion of minority fire fighters. In another action, white fire fighters and their local union brought action challenging the city's affirmative action policy regarding promotion.

The Billish action was brought by nine white firefighters who were next on the captain eligibility list when the Fire Commissioner lowered the cut off score to allow the two minority lieutenants to be promoted in 1987. The plaintiffs challenged the lowering of the cut off score and the subsequent promotions, as well as the Fire Commissioners refusal to promote others listed on the 1979 eligibility list. The Chicago Fire Fighters

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[35]Billish v City of Chicago, 962 F.2d 1269 (7th Cir. 1992) at 1276.

suit was brought by the Union and twenty two white firefighters and lieutenants who were passed over in the affirmative action engineer and captain promotions in 1987. The cases were consolidated. The plaintiffs sued for violation of their rights under the Equal Protection Clause. The Billish plaintiffs also asserted a violation of their due process rights. The Court of Appeals affirmed one case, and the other case was affirmed in part, reversed and remanded in part.[36]

The Court found that the affirmative action policy did not violate principles of equal protection; firefighters did not have protected property interest in rank order promotions; and the District Court applied incorrect standards in concluding that retirement of eligibility list and nonrank order promotion of minority fire fighters did not violate principles of equal protection.

The court applied the Strict Scrutiny Standard to determine whether it violated the Equal Protection Clause. The Strict Scrutiny Two Prong Test requires that there must be a compelling Governmental interest justifying any racial classification and a demonstration that the means selected to effectuate that objective are narrowly tailored to meet that goal.[37] Based upon all of the relevant evidence, it was held that the City's affirmative action plan didn't meet the strict scrutiny two prong test requirements. The court granted the City's motion for summary judgment.

The Court also decided that the plaintiffs did not have standing to contest the suit and dismissed certain plaintiffs for lack of standing. They found that the plaintiffs

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[36]Billish at 1269-70.

[37]Krupa v New Castle County, 732 F. Supp. 497 (D. Del. 1990) at 507.

did not suffer any direct injury from the non rank order promotions. The fourteen promoted individuals would not have been promoted, even if they were promoted in strict rank order. Therefore, the affirmative action plan was necessary.

It was also found that the measures taken to rectify the effects of past discrimination practices within a state or municipality have been recognized by the courts to serve as a compelling governmental interest. There must also be a strong basis in evidence for the affirmative action to support the remedial action. In this action, the plaintiffs bear the burden of proving that the City violated their rights.[38]

The litigation history of the CFD's past hiring and promotion practices corroborates evidence of past discrimination. There was also statistical evidence to support past discrimination. There was evidence of minority under representation by statistical analysis, which was sufficient to satisfy the constitutional requirement that the City be required to have a strong basis for believing that remedial action was required.[39] The City presented evidence that the difference between the expected percentage of minority engineers and the actual percentage of minority engineers was 8.7 standard deviations, and the difference between the expected percentage of minority captains and the actual percentage of minority captains was 3.96 standard deviations. The City's reliance on under representation statistics as part of the evidence lends support to the strong basis for concluding that remedial action was necessary. There was a compelling

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[38]Billish at 1281.

[39]Billish at 1284.

governmental interest and the affirmative action plan was narrowly tailored to meet the goals of the remedial plan.[40]

A due process claim has two components: there must be a protected property interest, and the plaintiff must have been deprived of that interest without due process of law. The court found that there was insufficient evidence to support the claim that there was an existence of a custom or practice by the City to fill vacancies for captain from the eligibility list in effect at the time of vacancy. There was insufficient evidence to create a genuine issue as to the existence of a property interest in rank order promotion.[41]

The Court of Appeals affirmed the District Court's grant of summary judgment on the due process claim. With respect to the equal protection claim, the court remanded the case to District Court as opposed to applying the Strict Scrutiny Standard. The Court of Appeals remanded the case to the District Court for further consideration.[42]

Vogel v City of Cincinnati

This case centers around three legal principles with regard to equal protection clause violation. They are the enforceability of a consent decree, legal standing required to challenge the enforceability of a consent decree, and the application of the strict scrutiny standard to the affirmative action plan.

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[40]Billish at 1284.

[41]Billish at 1300.

[42]Billish at 1302.

The Department of Justice on behalf of the United States commenced an action against the City of Cincinnati, herein after referred to as the "City," the Cincinnati Police Division and the Cincinnati Civil Service Commission. They alleged that they had engaged in firing and promoting practices that discriminated against minorities and women, which was in direct violation of Title VII. The collective bargaining representative of the Cincinnati police officers, the Fraternal Order of Police intervened in this action. After negotiations, a consent decree was issued.

The consent decree stated that in order to remedy the past discrimination practices, it established a long term goal of having the proportion of African American and female police officers directly reflect the approximate proportion of qualified African Americans and women in the city's work force. The decree also stated that it would terminate this plan as soon as the long term goal of equal employment was reached by the Cincinnati Police Division.[43]

According to the decree, a new procedure of hiring police recruits was implemented. The plan called for a revised set of minimum score qualifications in which candidates scoring at least 60% on the examination were placed on a Open Eligible List. The City afforded preference to qualified African American and women when needed to meet the interim goals of the consent decree. The decrees established the criteria in which the recruits would be composed of 34% African American and 23 % women.[44]

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[43]Vogel v City of Cincinnati, 959 F.2d 594 (6th Cir, 1994)at 596.

[44]Vogel at 597.

The plaintiff, a white male was not selected to become a member of the October 1989 recruiting class, however he was selected as a recruit several months later. The plaintiff commenced this action against the City seeking restitution of pay, retroactive seniority and other benefits for the period in which he was denied a position with the force due to the City's hiring policy. He contended that the City went beyond the terms of the consent decree by implementing a quota system type of hiring practice. He alleged that the hiring policy was not in accordance with the terms of the consent decree which stated, than none of the language of the decree should be interpreted as demanding that the City hire unnecessary personnel or unqualified employees for available positions or to satisfy quota requirements.[45] The plaintiff further contends that if the Police Department's hiring policy is authorized by the consent decree, then the consent decree is in direct violation of the equal protection clause of the Fourteenth Amendment.

The Court affirmed the summary judgment of the district court dismissing the plaintiffs' claim against the City. The Court concluded that a consent decree is a contract founded on the principle that there is an agreement reached between the parties. It should be designed to preserve the position for which the concerned parties bargained. The affirmative action plan is nor enforceable directly or in collateral proceedings by individuals who are not parties to the plan.[46] Consequently, the plan can only be challenged on the grounds that its substantive provision unlawfully infringed upon the

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[45]Vogel at 597.

[46]Vogel at 598.

rights of the party making the complaint.[47] In this instance, the plaintiffs sought to collaterally enforce the consent decree according to his personal interpretation of the decree. The plaintiff was not afforded the right and lacked legal standing to challenge the City's interpretation of the consent decree.

The plaintiff alleged that the consent decree violated the equal protection clause. In order to have standing to successfully make a challenge, the plaintiff must be aggrieved by the judicial action from which it appeals.[48] Since the plaintiff was denied employment as a result of the affirmative action policy adopted by the City pursuant to the consent decree, and was not a party to the consent decree, the Court granted the plaintiff legal standing to challenge the constitutionality of the decree as it applied to him.[49]

The City's affirmative action plan required only the hiring of qualified African Americans and women, it did not forbid non-minorities from employment. The plaintiff contended that the affirmative action plan required the selection of unqualified African Americans and women over qualified non-minorities. The City's adopted plan was considered to be a fair and reasonable policy of affirmative action. The City's affirmative action plan survived the strict scrutiny standard because there was strong statistical evidence to support the contention that a remedial action was necessary.[50] There was

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[47]Vogel at 598.

[48]Vogel at 599.

[49]Vogel at 599.

[50]Vogel at 599.

evidence of widespread statistical imbalance and disparity demonstrated in the past hiring practices of the City. This was true of both the hiring and promotional practices enacted for African Americans and women. Therefore, the Court found that the plan sought to eradicate the current effects of the City's prior discriminatory hiring practice, and found that the affirmative action plan was narrowly tailored to achieve the prescribed goals of the consent decree.[51]

California Regents v Bakke

This case centers around the legal principle of the strict scrutiny standard, racial classification, and the burden of proof required to substantiate racial classification. The relationship between the requirement of strict judicial scrutiny and violation of the equal protection clause of the Fourteenth amendment is contrasted.

The Medical School of the University of California at Davis, herein after referred to as a the "Medical School", had two admissions programs established for entering medical students. One was the regular admissions program and the other was the special admissions program, designed for disadvantaged and minority students. The terms of the regular admissions program required that the candidate's undergraduate grade point average be at least 2.5 or above on a scale of 4.0. Approximately one out of six candidates was granted an interview, which was rated on a scale of 1 to 100 by each of the committee members. The candidate's ratings were based upon summaries of the interviews, overall grade point averages, science course grade averages, MCAT (Medical

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[51] Vogel at 601.

College Admissions Test) scores, letters of recommendation, extracurricular activities, and other biological information pertinent to the applicant. After consideration of all of the material was completed, the admissions committed extended offers of admission to the candidates judged to be capable of successfully completing medical school. The special program was administered by a separate committee. The 1973 and 1974 medical school applications included a section on the application that requested the applicant to state whether he/she wanted to be considered a member of the "economically disadvantaged" or members of a "minority" group. The applicants were rated in a different manner than the regular candidates. However, the special admissions candidates did not have to meet the 2.5 grade point average criteria that the regular admission candidates had to satisfy.

During a four year period, 63 minority students were admitted to the medical school under the terms of the special program and 44 were admitted under the regular program. However, no white student who classified themselves as being "disadvantaged" was admitted to the special program.

A white student (Bakke) applied for admission the medical school on two occasions. He applied first in 1973 and again in 1974. The student scored 468 out of a possible score of 500 on the MCAT in 1973. He scored 549 out of a possible score of 600 in 1974. The reason that he was rejected in 1973 centered around the fact that the respondent applied late in the admissions process and no general applicants with scores less than 470 were accepted at the time that the respondent's application was processed and completed. During the 1973 submission, four special admissions slots were unfilled

at the time that the respondent's application was rejected. In 1974, Even though the respondent applied early in the admissions process, he was rejected for an undisclosed reason. It is also found that in neither year was his name placed on the discretionary waiting list, nor admitted to the special program.

The respondent filed this action after being rejected for the second time. He filed this action in state court for mandatory, injunctive, and declaratory relief to compel his admission to the Medical School of the University of California at Davis. The respondent alleged that the medical school's admission program operated to exclude him from admission consideration on the basis of his race and in violation of the respondent's equal protection clause of the Fourteenth Amendment, a provision of the California Constitution, and § 601 of Title VI of the Civil Rights Act of 1964.

The Trial Court found that the special admissions program acted as a racial quota system, because the students competing in the special program competed against each other as opposed to competing with all admissions candidates in both the regular and special admissions programs. The Trial Court also held that the admissions program operated as a quota system, because the candidates being considered in this program had 16 out of 100 admissions seats reserved specifically for them, It held that the special program violated the Federal and State Constitutions and Title VI because the petitioner (school) was prohibited from taking race into consideration in making admissions decisions. The California Supreme Court held that the school's admission process under the special program violated the Federal and State Constitutions and Title VI and ordered the admittance of the respondent to the medical school.

The United States Supreme Court affirmed the California Supreme Court decision and ordered the respondent's admission into the medical school and invalidated the petitioner's special admissions program. However, it reversed the California Supreme Court's decision with respect to special program admission. It prohibited the petitioner from taking race into consideration as a factor in its future admissions decisions.[52]

The court found that racial classification is inherently suspect, requiring strict judicial scrutiny.[53] The Strict Scrutiny Standard requires that there must be a "compelling governmental interest to justify any racial classification and a showing that the means selected to effectuate that objective be narrowly tailored to meet that goal.[54] The Court sympathized with the Medical School at the University of California at Davis's goal of achieving racial diversity on the campus. The Court even held that attempting to achieve racial diversity among the student body is sufficiently compelling to justify consideration of race in admissions decisions under some circumstances. The petitioner's (medical school's) special admissions program, which forecloses consideration to people similar to the respondent, is unnecessary to the achievement of this compelling goal. Therefore, it makes it invalid under the terms of the equal protection clause.[55]

The United States Supreme Court also rationed that the petitioner was unable to satisfy the burden of proof that was required to prove that the respondent would not have

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[52]California Regents v Bakke, 438 U.S. 265 (1978) at 265-66.

[53]Bakke at 267.

[54]Krupa at 507.

[55]Bakke at 267.

been considered for admission even if there had not been a special admissions program implemented by the medical school.[56]

Krupa v New Castle County

This case centers around the legal principles of the strict scrutiny two prong test, statistical disparity, and due process of law.

White police officers filed an employment discrimination claim challenging Delaware County's Police Department, herein after referred to as the "County," promotion of a African American police officer. The police department's policy dictated that after serving as a patrolman for 12 years, automatic promotion to the corporal level is automatically granted. The Delaware statute states that patrolmen are afforded the right to seek command position promotions. Promotions are based upon competitive competency and fitness examinations.[57]

The County and the Fraternal Order of Police, New Castle County Lodge No. 5 (the plaintiffs' collective bargaining agent) entered into an agreement inter alia, that a merit system be utilized by the County in accordance with the affirmative action plan. The County's objective was to impose equitable supervisory promotions to qualified women and/or minorities, provided that they possess a validated promotional tool to be utilized in making the promotion decisions.[58]

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[56]Bakke at 265-66.

[57]Krupa at 499.

[58]Krupa at 499.

§1183 (a)(1) of Title 9 of the Delaware Code provides, inter alia that it was illegal to either favor or discriminate against individuals applying for County positions on the basis of race, color, national origin, political, religious opinions, or affiliations.[59]

The affirmative action plan stated that when a sergeant's position became available, the only applicants to be considered for the County promotional consideration would be those applicants who were placed in the first band. It was also stipulated that even those applicants who were not in the first band would be considered qualified for the sergeant's position, provided that no one applied from a protected class group, who was also a member of the certified list of groups. Protected class members are defined as including minorities, physically challenged individuals, and women. If there were not any protected class members on the certified list, then the 3 highest ranking members of the protected class from a lower band would be added to the certification list. The Chief of Police had the discretion to select any one of those individuals on the certification list for the available position.

During the 1984 list, the plaintiffs applied for the sergeant position. There were six minorities eligible to take the examination. Eighty five people passed the exam. Band 1 did not include any members of the protected class. Consequently, protected class members from lower bands were added to the certification list. Two positions were given to white males scoring originally in Band 1. The third position was given to

[59]§1183 (a) (1) of Title 9 of the Delaware Code.

Officer Bryant, an African American man who had scored between the 45th and 69th percentile on the certification list and placed in the third band.[60]

The 14th Amendment Equal Protection Clause states that States are prohibited from enforcing or creating legislation denying equal protection of the laws under the constitution.[61] In this instance, the Strict Scrutiny Standard was applied to the County's affirmative action plan. This standard was applicable to affirmative action plans that were challenged regardless of whether the challengers were members of the protected class.[62] The standard requires that there must be a "compelling governmental interest to justify any racial classification and a showing that the means selected to effectuate that objective are narrowly tailored to meet that goal.[63]

There must be a constitutional showing justifying the County's affirmative action plan. Public employers are required to identify racial discrimination, public or private, with some specificity, before they are allowed to use race conscious remediation. Due to the absence of evidence demonstrating prior discrimination in hiring by the County, they could not justify the promotion plan that was based upon raw general population statistical imbalance. There was no prior evidence of past governmental discrimination, therefore the plan was considered unconstitutional.[64]

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[60] Krupa at 499.

[61] U.S. Constitution amend. XIV, § 1.

[62] Krupa at 497.

[63] Krupa at 507.

[64] Krupa at 511.

The plaintiffs were denied summary judgment on §1983 because it had already been determined that the plaintiffs' Equal Protection Clause rights under the Fourteenth amendment were violated. It was not necessary to prove that a violation of due process had occurred. The Court held that in instances where an alleged act of discrimination does not concern the impairment of [the making and enforcement of contracts] § 1981 provides no relief.[65]

The District Court granted the County's motion for summary judgment with respect to the plaintiff's claims under section 1981. The Court also granted the plaintiff's motion for summary judgment with respect to the equal protection clause violation. The Court held that the County's Plan was unconstitutional, because of the Equal Protection Clause violation, which is in violation of the Fourteenth Amendment to the Constitution. However, the County's motion for summary judgment on the plaintiff's section 1983 was denied.[66]

Jansen v City of Cincinnati

This case centers around the enforcement of a consent decree and evidence supporting the strict scrutiny test requirements. These are necessary when deciding the constitutionality of an affirmative action plan.

The facts of the case surround the issue of white firefighter candidates filing action claiming that their constitutional rights were violated when the city continued to

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[65]Krupa at 519.

[66]Krupa at 520-21.

use the provision set forth in a consent decree to assure that a certain percentage of minority representation was achieved. The consent decree set forth various measures to be taken by the City of Cincinnati, herein after referred to as the "City," for the purpose of integrating minorities into the fire department. The consent decree mandated the pursuance of an overall work force composed of 18% minority representation.[67]

The Rule of Three does not guarantee employment to candidates ranking highest on the eligibility list, however it does guarantee employment consideration. The plaintiffs contend that because they scored higher than any of the minorities appointed, that they should have been hired by the fire department. The plaintiff's sought restitution relief in the form of immediate job placement and back pay starting from the day of the alleged discrimination. [68]

The United States District Court for the Southern District of Ohio dissolved the hiring provision in the decree. Upon appeal, the U.S. Court of Appeals vacated the decision and remanded the case to the District Court.

The Court found that the dual lists did not abridge the plaintiff's constitutional rights, because each of the minorities that were placed on the eligible list was qualified to be hired by the fire department. They had successfully completed each of the five evaluation components. Therefore, the Court found that the dual lists were constitutional.[69]

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[67]Jansen v City of Cincinnati, 977 F.2d 238 (6th Cir. 1992)at 239.

[68]Jansen at 241.

[69]Jansen at 241.

The Court found that the continued effectiveness of the consent decree depended upon whether the Department had operated in good faith with the desegregation decree since its inception, and whether the vestiges of past discrimination had been eliminated to the fullest extent possible.[70] The Court of Appeals found that the numerical goals established within the consent decree helped to strengthen the overall objectives of the decree. The Appeals Court found that the District Court erred when it neglected past claims of discrimination. It failed to determine whether the vestiges of past discrimination had been eliminated to the fullest extent possible.[71] The Court felt that the goals of the consent decree had not been met and should remain in effect until they were satisfied.

The next six cases concern the issue of Civil Rights Act of 1964 Title VII violations.

Title VII

A Title VII violation is a violation of the constitutional rights afforded to U.S. citizens under the Civil Rights Act of 1964. Under Title VII, preferential gender and/or racial based treatment and racial and/or gender quotas are banned. Quotas are only required in instances where the courts have judged an organization guilty of perpetuating past discrimination practices.[72]

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[70]Jansen at 244.

[71]Jansen at 246.

[72]Harry E. Groves and Albert Broderick, "Affirmative Action Goals Under Title VII: Statute, Legislative History, and Policy," Thurgood Marshall Law Review, 29.

Under Title VII, an affirmative action plan must be justified by the existence of a "manifest imbalance" in a traditionally segregated job category.[73] Once this imbalance is demonstrated, the court is required to consider whether the rights of the person discriminated against are "unnecessarily trammeled" by the affirmative action plan.[74] The normal method of establishing an intentional discrimination claim under Title VII, consists of providing initial proof of a prima facie case and corresponding evidence to support the burden of proof provided by the plaintiff.[75] However, in instances in which the plaintiff provides direct evidence of discrimination, however, strict adherence to the McDonnell Douglass test is not required. [76] The Supreme Court has approved of the general analytical outline of McDonnell Douglass to the extent that it requires the employer to demonstrate a nondiscriminatory rationale, such as the existence of an affirmative action plan, as the basis for supporting a facially discriminatory decision.[77] The following six cases outline affirmative action cases alleging violation of Title VII of the Civil Rights Act of 1964.

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[73]Johnson v Transportation Agency of Santa Clara, 107 S.Ct. 1442 (1987) at 1452.

[74]Johnson at 1455.

[75]McDonnell Douglass Corp. v. Green, 411 U.S.. 792, 802-04 (1981).

[76]Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985).

[77]Johnson at 616.

Johnson v Transportation Agency Santa Clara County

This is the case that is held in comparison when deciding whether an affirmative action plan is in violation of Title VII. The Supreme Court decided that judicial scrutiny is utilized in instances in which there is clarification needed to determine whether an affirmative action plan is remedial or motivated by unfounded notions of racial inferiority or racial politics.[78] In making this determination, the Court developed a two prong test to judge the validity of the plan. The test stipulates that (1) the racial classification used in drafting the plan must be justified by a compelling governmental interest; and (2) the means chosen by the State must be narrowly tailored to remedy the current effects of past vestiges of racial discrimination.[79] The legal principles involved are the strict scrutiny two prong test and manifest imbalance.

The Court concluded that there must be substantial evidence to support the State's determination that remedial measures are appropriate and that other alternative measures have been explored.[80] In making this determination, evidence of gross statistical imbalances with regard to minority or gender representation is sufficient to satisfy a Title VII prima facie requirement.[81]

In this case, the Transportation Agency of Santa Clara County, herein after referred to as the "Agency," established an affirmative action plan designed to remedy

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[78]Jansen at 244.

[79]Jansen at 246.

[80]Vogel at 599.

[81]Hazelwood School District v U.S., 433 U.S. 299.

past segregation practices with regard to hiring and promoting minorities and females. This was a voluntary affirmative action plan. The plan provided inter alia, that in deciding on promotions for traditionally segregated positions that have significantly been underrepresented by women, the Agency was authorized to consider the sex of a qualified applicant for the position. The plan did not have a scope detailing the specific number of minorities and/or females positions to be set aside. However the plan required that short-range goals be established and annually adjusted for a more accurate guide reflecting employment decisions. The Agency announced the position vacancy of road dispatcher. When this announcement was made, none of the positions listed under the job categorization of "Skilled Craft Worker" was held by a woman. During the review process, two qualified candidates were considered for the position. One was a male and the other considered was a female. Both were considered well qualified for the position. The female notified the County's Affirmative Action Office because she believed that her employment consideration would have received unfavorable reviews.

The Affirmative Action Office responded by contacting the Agency Affirmative Action Coordinator, whom the Agency's plan held responsible for keeping the Director abreast of affirmative action opportunities for the Agency to accomplish under its plan's objectives. During this time, the Agency did not have any women employed in any Skilled Craft position, and had never employed a woman as a road dispatcher. The Affirmative Action Coordinator recommended to the Director of the Agency to promote the female candidate. The female candidate was promoted to the position of road dispatcher.

The petitioner, a male employee who was passed over for promotion in favor of the female employee brought Title VII action against the Agency. He filed a complaint with the Equal Employment Opportunity Commission alleging that he had been denied the promotion on the basis of sex in violation of Title VII.

The Court found that the petitioner bore the burden of establishing the invalidity of the Agency's Affirmative Action Plan. After the plaintiff had established a prima facie case that either racial and/or gender classifications had been taken into account in an employer's employment decision, the burden shifted to the employer [defendant] to bear the burden of articulating a nondiscriminatory rationale for its decision.[82] The existence of the affirmative action plan provided the rationale basis for the satisfaction of the burden of proof requirement.

The consideration of the sex of the applicants for the specific job is considered to be justified if a "manifest imbalance" exists that reflects the under representation of women in job categories that are traditionally segregated. In determining whether an imbalance exists that would justify the consideration of sex or race, a statistical comparison of the employer's labor force percentage of minorities or women with the percentage of minorities and/or women available in the area labor market or general population is appropriate in analyzing jobs that require special training.[83] However, in this case the comparison involved a job that required special training. The comparison

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[82]Johnson at 1448.

[83]Johnson at 1452.

must be made between those in the labor force who possess the relevant qualifications sought for the position with those employed by the employer.

The requirement that the "manifest imbalance" relates to a traditionally segregated job category assures that racial and/or gender preferential treatment factors will be taken into account in a manner consistent with Title VII's purpose of eliminating the effects of employment discrimination, and that the interests of non-minority or male employees not benefiting from the plan would not be unduly infringed upon.[84] In this case, the plan directed that annual short-term goals be formulated to provide a more realistic indication of the degree to which sex should be taken into account in filling the position in question.

The affirmative action plan stipulated that the established goals for each division should not be construed as quota requirements to be achieved.[85] However the plan authorized that consideration be given to affirmative action concerns when evaluating the quality of applicants. The Agency's plan had the express intention of attaining a balanced work force, but not maintaining it in perpetuity. The Agency's plan required that women compete with all qualified candidates, not simply other women. No applicant was automatically excluded from consideration, because all candidates were weighed against those of the other candidates. There was substantial evidence to support the fact that the Agency sought to take a moderate step towards eliminating the imbalance in its female and minority work force. This was considered to be a realistic

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[84]Johnson at 1452.

[85]Johnson at 1455

approach towards guidance for employment decisions, while providing minimal intrusion on the legitimate expectations of other employees. The Agency did not earmark any positions, because sex was only one of the criteria that was taken into account in evaluating qualified applicants for positions. The Agency had no intention of maintaining a system whose work force composition was dictated by rigid numerical standards.[86]

The decision to promote the female candidate for the position was not dictated by the sole factor of her gender. The decision to promote her was made pursuant to an affirmative action plan that represented a moderate, flexible, case-by-case approach to effectuating a gradual improvement in the representation of minorities and women in the Agency's work force. The plan was fully consistent with Title VII, because it contains all of the contribution that voluntary employer action can make in eliminating the vestiges of discrimination in the workplace.[87] Even though race is considered as a classification necessitating the application of the strict scrutiny standard, gender is not considered suspect. Gender violations are judged by using a intermediate constitutional standard.[88]

Firefighters v Stotts

The legal principle involved in this case concerns a bona fide seniority plan, the enforcement of a consent decree, and the scope of judicial authority.

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[86]Johnson at 1457.

[87]Johnson at 1457.

[88]Johnson at 1457.

The respondent in this case was an African American member of the Memphis Tennessee Fire Department, herein after referred to as the "Department." The respondent and another petitioner charged that the Department and certain other city officials engaged in practices of making hiring and promotion decisions on the basis of race in violation of inter alia, Title VII of the Civil Rights Act of 1964.[89] A consent decree was entered with the purpose of remedying the Department's minority hiring and promotion practices, as it related to African American employees.

The District Court entered and approved an order preliminary enjoining the Department from abiding by its seniority system in making the determination as to who would be laid off as a result of financial constraints, since the proposed cuts would have a racially discriminatory effect and the seniority system was not a bona fide system.

The Department presented a modified layoff plan, which was directed at protecting African American employees, which was court approved. Layoffs pursuant to the modified plan were then enacted. The result of this action caused white employees with more seniority than African American employees to be laid off, whereas the alternative seniority system would have called for the layoffs of African American employees with less seniority. The Court of Appeals affirmed the decision and held that even though the District Court erred in holding that the seniority system was not a bona

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[89]Chicago Firefighters, 736 F.Supp. at 929.

fide one, it had properly acted in modifying the consent decree. However, the Supreme Court reversed the court decision.[90]

The Supreme Court held that the case was not moot provided that the parties involved have a concrete interest in the outcome of the litigation.[91] The Court believed that a month's salary was not a negligible item for those affected by the injunction, and the loss of a month's competitive seniority might determine who gets future promotions, and who is laid off if there are future staff reductions.

The Department's plan was considered a bona fide plan. The City was not at fault for following the seniority plan expressed in its agreement with the union. The Court of Appeals proposed a settlement theory, advocating that the strong policy favoring voluntary settlement of Title VII actions permitted consent decrees that encroached on seniority systems.[92] However the Supreme Court held that this theory was inapplicable when there wasn't a settlement with respect to the disputed issue. The approved decree didn't award competitive seniority to the minority system.

The District Court enjoined the City of Memphis from applying a seniority policy in a manner that would decrease the percentage of African Americans employed by the Memphis Fire Department. The Sixth Circuit Court of Appeals affirmed the decision, concluding that the injunction was an appropriate remedy for enforcing the

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[90]Inter alia literally means "among other things." Oran's Dictionary of the Law, Daniel Oran, J.D., 1983.

[91]Powell v McCormack, 395 U.S. 486 (1986) at 496-98.

[92]McCormack at 496-98.

consent decree. The Court concluded that the District Court's injunction was invalid regardless of the intent to enforce the terms of the consent decree.[93]

According to the majority Supreme Court opinion, the primary issue concerned whether the District Court exceeded its judicial authority when it issued a preliminary injunction that required white employees to be laid off when other applicable seniority systems would have called for the layoff of less senior African American employees.[94] The Court majority dissented with the Court of Appeals assessment that the consent decree modification was within the judicial authority of the District Court. The Court concluded that the City of Memphis didn't consent to be enjoined from making layoffs which decreased the percentage of African American employees. The modification altered the application of the seniority system and was held to be outside of the jurisdictional authority of the Court. Although the consent decree in this case didn't include retroactive seniority, the Court placed a lot of emphasis on the fact that there was no evidence that any African Americans protected from layoffs had been victims of discrimination. Therefore, there was no award of competitive seniority made to any of them. The Court perceived the modification to be an infringement on the vested seniority rights of non-minority firefighters. The Court majority considered a requirement of discriminatory proof by the plaintiffs, being consistent with Title VII's

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[93]James Jones, Jr., "The Origins of Affirmative Action", University of Davis Law Review, 411.

[94]Louise Jackson Williams, "Last Hired, First Fired - Rights Without Remedies: Firefighters v Stotts", Detroit College of Law Review, Vol. 1, No. 215, 1985, 230.

"make whole" provision, regardless of the fact that the plaintiffs didn't request make whole relief in the consent decree.[95]

Surprisingly, the Court decision did not mention methods of enforcing the consent decree or how it would effect the plaintiffs rights under the decree. Three Justices dissented in their court opinion, considering the issue to be moot because the issue was no longer controversial or in question. They concluded that the Court should have considered the issue of whether the fire department's proposed layoffs violated the terms of the consent decree. The justices considered the focus of addressing the wrong issue to be a fundamental procedural error.[96]

Gonzales v Police Department, City of San Jose

This case involves the legal principles of consent decree enforcement and statistical disparity evidence.

The plaintiff-appellant, an Hispanic police officer appealed a judgment denying his claim of racial discrimination. He sued under Title VII of the Civil Rights Act of 1964. The plaintiff had been employed by the Police Department of the City of San Jose, herein after referred to as the "Department." During the course of the officer's twelve year tenure, the plaintiff had received over thirty written commendations, had varied work assignments, and had passed both the oral and written examinations qualifying him

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[95]Louise Jackson Williams, "Last Hired, First Fired - Rights Without Remedies: Firefighters v Stotts", Detroit College of Law Review, 232.

[96]Louise Jackson Williams, "Last Hired, First Fired - Rights Without Remedies: Firefighters v Stotts", Detroit College of Law Review, 234.

for promotionability. The promotion list was effective for a two year period. The City of San Jose, California, herein after referred to as the "City," adopted an affirmative action plan to eradicate racial imbalances in employment.

The plaintiff was a member of the protected class and the provisions of the plan were in effect at the time that he sought promotion to the rank of sergeant. The Department on four separate occasions failed to promote the plaintiff. There is evidence to support the case that from 1980-1982, one out of eleven Hispanic officers was promoted to sergeant. There is also evidence to support the contention that the Department failed to comply with the requirement to notify the City's Affirmative Action Officer in writing in each instance in which it promoted a non-minority over the plaintiff. The District Court judge made no mention of the affirmative action plan, and relied upon promotion rates for Hispanics during the period after the appellant filed his complaint, which showed an increase in Hispanic representation when he rendered the court decision.[97]

The Court majority held that the District Court failed to take into account the fact that there was substantial evidence to support the fact that there were material, uncontroverted and repeated violations of San Jose's Affirmative Action Plan. Even though there was an affirmative action plan in place which required the City to notify the Affirmative Action Officer when positions became available, the City refused to comply with the requirement. The City continued to promote nonminorities over the plaintiff and failed to comply with the terms of the consent decree on four separate occasions.

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[97]Firefighters v Stotts, 104 S.Ct 2576 (1984) at 2576.

This was sufficient evidence to support the plaintiff's allegation that his rights under Title VII had been violated.

Gonzales discussed the City's reluctance to comply with the terms of the mandatory consent decree during his post trial brief, and also included a detailed discussion of the discrimination issue. However, the District Court failed to note this in the Court record. The Court found that even though there was substantial evidence to support the contention that there was an affirmative action plan violation, the failure to adhere to the terms of an affirmative action plan was not a per se prima facie violation of Title VII.[98]

Each time that the City failed to comply with the Title VII requirements, the Affirmative Action Officer became empowered to request that the Department change its promotion decision and to refer the matter to the City Manager if the Department refused to change its decision. There was no mention of the Department's violation within the testimony, supporting the contention that the District Court erred in not considering a highly relevant and probative aspect of the case.[99]

The District Court's second error concerned the fact that it relied on statistical evidence which supported the contention that the Police Department had a generally good record with regard to the promotion of Hispanics from June 1977 to March 1987. The problem with taking this evidence into account, is the fact that most of the evidence

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[98]Yatvin v Madison Metropolitan School Dist., 840 F.2d 412 at 415-16.

[99]Gonzales v Police Department, City of San Jose, California, 901 F.2d 758 (9th Cir. 1990) at 760.

the Court considered concerns a period after Gonzales filed his initial complaint, and is therefore considered irrelevant. Minority employees were promoted just prior to the trial, not during the time that the plaintiff experienced flagrant discrimination. This fact did not support the defendant, nor did it render the case moot. There was evidence to support the fact that such efforts as increasing the representation of an underrepresented group were deemed to be equivocal in purpose, motive, and permanence, and therefore taken into account when deciding upon the validity of the case.[100] Statistical evidence should not have been taken into consideration, and it was the opinion of the Court that the District Court erred when it relied upon the statistical findings of fact and conclusions of law. Consequently, the decision was vacated and the case was remanded to the District Court for reconsideration.[101]

Hammon v Barry

This case concerns the Title VII legal principles of legal standing to challenge the affirmative action plan and manifest imbalance of the racial composition of the workplace.

This is a challenge to an Affirmative Action Plan employed by a fire department. The U.S. District Court upheld race conscious hiring provisions and an

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[100]Gamble v Birmingham Southern Railroad Co., 514 F.2d 678, 683 (5th Cir. 1975) (quoting Johnson v Goodyear Tire & Rubber Co., 491 F.2d 1364, 1376-77 n. 36 (5th Cir. 1974)

[101]Gonzales at 760-62.

appeal was taken. The District of Columbia Fire Department hired African Americans for entry level positions on average 50% per year since 1969. Since 1981, an average of 75+ % of hired fire fighters have been African American. As of 1984, 37% of the fire fighting force was African American. The appellant alleges that the relevant labor force consists of persons between the ages of 20-28 years old, who were located within the boundaries of the District of Columbia, but not within the Washington metropolitan area.

The Court initially upheld race conscious hiring, noting the Johnson v Agency of Santa Clara case. Then the decision was reversed upon appeal. The United States Court of Appeals has denied the petition for rehearing, letting the appealed decision not to uphold race conscious hiring decision stand.[102]

The Court found that in instances where there is an alleged violation based upon the same set of facts, the statutory and constitutional issues are closely interwoven for review. Therefore, there is standing to challenge the constitutionality of the affirmative action plan's hiring provisions, with respect to Title VII and ancillary constitutional claims under the 5th and 14th amendment. The Attorney General is granted authority to bring suit providing there is justification to support the belief that individuals engaged in patterns of restricting another person's constitutional guarantees, secured by [Title VII], and that the practice is of a nature that is intended to deny the full exercise of the rights, the Attorney General may bring a civil action in an effort to request the relief that he/she

[102]Hammon v Barry, 826 F.2d 73 (1987) at 73.

deems appropriate to insure the full enjoyment of the individual's constitutional guarantees.[103]

Even though, there was an undisputed fact that the Department was officially segregated in the 1950's, as of 4/84, 37% of the District of Columbia firefighters were African American. It is irrelevant that the overwhelming majority of African American fire fighters hailed from the Washington Metropolitan area, as opposed to the inner city. There is no "manifest imbalance", because there is no suggestion that the Department acted in a discriminatory fashion by hiring from the entire metropolitan area. Hiring is based upon mandatory racial quotas imposed by the federal government, as opposed to select geographical areas.[104] It was irrelevant that the overwhelming majority of African American fire fighters hailed from the Washington Metropolitan area, as opposed to the inner city.

Local 93 v City of Cleveland

This case centers around the legal principle of enforcement of a voluntary affirmative action plan.

An association of African American and Hispanic fire fighters brought a class action suit against the City to redress alleged past and present discrimination practices by the city fire department in promotional practices. Due to failed negotiations regarding the adoption of a consent decree, the local 93 union intervened in the matter. The District

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[103]Hammon at 82.

[104]Hammon at 77.

Court for the Northern District of Ohio adopted the consent degree, and the labor union appealed the decision. The Court of Appeals affirmed the decision and a writ of certiori was requested by the local union.[105] The petition for certiori was granted by the United States Supreme Court.[106]

The Court found that the Title VII enforcement provision, which precludes the Court from entering an order requiring an employer to grant relief to an employee who suffered adverse job action if action was taken for any reason other than discrimination on account of race, color, religion, sex or national origin does not preclude entry of consent decree that may benefit individuals who are not actual victims of an employer's discriminatory practices.[107] The section was further clarified to be interpreted as meaning that employers may make employment considerations for any reason, except when such decisions violate the substantive provisions of Title VII.[108] Therefore, the extent of the limitations placed upon all of the parties and the federal court to ensure that the provisions are being met, did not restrict the employer or unions from entering into voluntary affirmative action plans ensuring the implementation of the consent decree. A consent is not an order within meaning of enforcement provision of Title VII, the limits

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[105]Writ of certiori literally means "To make sure." It is a writ from the Higher Court asking the lower court for the court record. Oran's Dictionary of the Law, Daniel Oran, J.D., 1983.

[106]Local 93 Int'l Assn. Firefighters v City of Cleveland, 106 S.Ct. 3063 (1986) at 3063.

[107]Local 93 at 3063.

[108]Local 93 at 3075.

of the agreement are found outside of the section. Intervening union's consent was not required to obtain court approval of a consent decree. An intervenor is allowed to present evidence and to have its objections made public, however, it does not have the authority to act as an impediment to the adoption of the consent decree merely by refusing to grant consent to the decree.[109]

The Department's plan was considered a bona fide plan. The City was not at fault for following the seniority plan expressed in its agreement with the union. The Court of Appeals proposed a settlement theory, that the strong policy favoring voluntary settlement of Title VII actions permitted consent decrees that encroached on seniority systems.[110] However, the Supreme Court held that this theory was inapplicable when there wasn't a settlement with respect to the disputed issue. The approved decree didn't award competitive seniority to the minority system. The Title VII enforcement provision which precluded the court from entering an order requiring an employer to grant relief to an employee who suffered adverse job action, provided that the action was taken for any reason other than discrimination on account of race, color, religion, sex or national origin does not preclude entry of a consent decree that may benefit individuals who are not actual victims of employer's discriminatory practices. [111]

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[109]Local 93 at 3079.

[110]Stotts at 2576.

[111]Local 93 at 3063.

Andrews v City of Johnstown

The legal principle involved is the enforcement of an affirmative action plan. The facts of the case found that upon recommendation made by the Department head to the Mayor of Johnstown, the City of Johnstown hired a white individual for the position of Enterprise Development Coordinator. The plaintiff provided proof that he had maintained a resume on file with the City's Affirmative Action Council Officer. The plaintiff met all of the qualification criteria, however the position was given to a lesser qualified white applicant. As pursuant to a policy adopted by the City of Johnstown, the plan required that the City's Affirmative Action Officer receive notification of job openings at least five days prior to any action being taken regarding appointments.

In this case, neither was the Affirmative Action Officer notified, nor was the position advertised in any local publication. The plaintiff received notice of the position availability after reading the appointment announcement notice that was placed in the local newspaper. The plaintiff argued that had he known about the availability of the position, he would have applied for the position. However, the City failed to follow its own plan in hiring for the position in question. The plaintiff filed a timely charge of discrimination with the EEOC, and the EEOC in turn rendered a right to sue letter to the defendant.[112]

The Court opinion held that the position was not within the classification of positions that would be ordinarily exempted because of it being a political appointment. The evidence did not support the claim that the position was a policy making position,

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[112]Andrews v City of Johnstown, 669 F. Supp. 127 (W.D. Pa. 1987) at 128.

therefore making it exempt under affirmative action. It was a ministerial position requiring the authorization of the Enterprise Development Area Initiative.[113]

Some cases challenge both the Equal Protection Clause of the Fourteenth amendment and Title VII of the Civil Rights Act of 1964.

Cases Involving Equal Protection Clause and Title VII Violation Allegations

The remaining two cases concern claims against the Fourteenth amendments Equal Protection Clause and Title VII of the Civil Rights Act of 1964. These cases specifically address the issue of the violation meeting the requirement of the Strict Scrutiny Two Prong test and manifest imbalance.

Analysis of a claim of an equal protection violation is made by utilizing the "Strict Scrutiny Two Prong" test. The standard stipulates that preference given to minorities in affirmative action court decisions must be justified by a compelling governmental interest that is achieved only through narrowly tailored means. Court sanctioned preferential employment consideration are required to serve a compelling governmental interest of remedying past vestiges of racial and/or gender discrimination.

Analysis of a Title VII claim requires that an affirmative action plan be justified by the existence of a "manifest imbalance" in a traditionally segregated job category.[114] Once this imbalance is demonstrated, the court is required to consider whether the rights of the person discriminated against were "unnecessarily trammeled" by implementation

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[113] Andrews at 129.

[114] Johnson at 1452.

of the affirmative action plan.[115] In order to establish an intentional discrimination claim under Title VII, the plaintiff must provide initial proof of a prima facie case and corresponding evidence to support the burden of proof.[116]

Cunico v Pueblo School District

This case involves both the equal protection clause challenge and a Title VII challenge. This case concerns the principles of law: Strict Scrutiny Two Prong Test and manifest imbalance.

The facts of this case state that the plaintiff, a white social worker was employed by the Colorado Board of Education, herein after referred to as the "Board." Her status during the 1981-82 school year was tenured. The plaintiff testified that she understood the term, "tenure" to imply that she had received jobs security within her position.

The Board found it necessary to reduce its work force due to financial difficulties during the 1981-82 school year. In order to minimize the amount of disruption of actual classrooms, the district initially decided to cancel all social worker contracts throughout the district. The Board modified the decision upon learning that state law required the retention of at least two social workers.

The Board developed a policy governing its reduction in force decisions, which included a written policy and appeal procedure. The policy also provided during such

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[115]Johnson at 1455.

[116]McDonnell Douglass Corp. v. Green, 411 U.S.. 792, 802-04 (1981).

reduction in force actions, the District would make a reasonable effort to maintain at least a percentage of minority teachers employed by the District. The contracts of the terminated teachers within each area were scheduled to be canceled according to the seniority of their probationary status, and then followed by the least tenured teachers.

Accordingly, all six social worker's contracts were canceled and each requested separate hearings. They retained the two most senior social workers. One of the social workers, a African American man objected to his contract cancellation, on grounds that he believed that the District had engaged in discriminatory practices by excluding African Americans from administrative level positions within the district. The Board accepted the hearing officers recommendations to retain the African American social worker and rescinded the termination of his contract.

The plaintiff brought discriminatory action after the school district decided to retain the less senior African American social worker, as well as the contract of a Hispanic social worker. The plaintiff was eventually rehired, but filed a complaint with the Equal Employment Opportunity Commission alleging discrimination. She exhausted her appeals and initiated a federal suit.

The District Court of Colorado entered judgment for the plaintiff, but reduced the plaintiffs' award. On appeal, the Court of Appeals held that: (1) the decision to rehire African American social workers after discharging two senior teachers was unjustified and constituted discriminatory action against plaintiff who had more seniority (2) back

pay was an appropriate remedial award, (3) appeal was not groundless at to justify objective bad faith while supporting award of appellate attorney fees to plaintiff.[117]

The Court found that there was no compelling governmental interest, therefore it failed the second prong of the strict scrutiny test. The action was unjustifiable. There must have been a "manifest imbalance" where the rights of an individual are unnecessarily trammeled by implementation of the affirmative action plan. The preference must be justified by a compelling governmental interest that is achieved only via narrowly tailored means. There was no evidence of past discriminatory practices. The threat of loss of federal funding is not considered to be a compelling interest. There was no statistical imbalance present to support the contention that this was evidentiary of past discrimination practices. The African American employee was retained solely because of an established racial criterion imposed by the Board.[118]

Ledoux v District of Columbia

The case centers around the legal principles of strict scrutiny and manifest imbalance. The case challenges both the equal protection clause of the Fourteenth amendment and Title VII.

The facts of the case state that non-minority and male employees who were denied promotions within the police department brought suit challenging the department's affirmative action plan in place designed to place special emphasis on the

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[117]Cunico v Pueblo School District No. 60, 917 F.2d 431 (10th Cir. 1990) at 431.

[118]Cunico at 436-440.

hiring and advancement of females and minorities in areas where there was an obvious imbalance in minority employment. Several hundred Grade II Detective positions became available, however none of the appellants were ultimately selected for this position. Believing that their failure to obtain promotions was related to illegal preferential treatment, they failed discrimination charges with the Equal Employment Opportunity Commission. They alleged inter alia ("among other things"),[119] that they were denied promotions in violation of Title VII and the due process clause of the Fifth amendment. After a bench trial, the District Court concluded that the challenged promotions pursuant to a voluntary affirmative action plan was valid and entered in favor of the appellees.[120]

The Court determined that the voluntary affirmative action plan must be justified as a remedial course of action and it must not unnecessarily trammel the legitimate interests of non-minority employees. The court can sanction under both Title VII and the Constitution, the authorization to give greater weight to a minority or female applicant who is qualified to do the job, which is the manifest imbalance. Because the voluntary affirmative action plan did not have an undue burden to achieve proportional representation by freezing that representation in perpetuity, by establishing a fixed quota system, therefore the plan is legitimate. The plans did not transgress any of the statutory limitations on the scope of voluntary plans. It doesn't call for layoffs; it doesn't totally

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[119]Oran's Dictionary of the Law, Daniel Oran, J.D., 1983.

[120]Ledoux v District of Columbia, 820 F.2d 1293 (D.C. Cir. 1987) at 1293.

exclude nonminorities from promotions; and it does not establish representation in perpetuity.

The Court of Appeals held that the appellant's did not adequately prove that the Department's Plan was invalid under Title VII, and that the District Court did properly dismiss the appellants' Title VII claims of reverse discrimination. The court remanded the case in order to determine the factual basis of whether the Department had a valid claim for believing that affirmative action was prudent and necessary to remedy the present effects of past discrimination within the Department. The ultimate burden of proof was placed on the appellant. They are required to demonstrate why the affirmative action plan was considered to be in violation of their rights afforded under both the Equal Protection Clause and Title VII.[121]

Summary

Case law regarding affirmative action has generally been organized around two types of violations: Fourteenth amendment, equal protection clause violations an Title VII violations. The major themes associated with the challenges are: strict scrutiny and manifest imbalance. The objective of race conscious affirmative action measures is to remedy the current effects of past vestiges of discrimination.[122] However, the level of proof necessary to substantiate an employer's use of race consideration in employment practice differs depending upon whether the challenge is invoked under the auspices of

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[121]Ledoux at 1306-07.

[122]U.S. Steelworkers of America v Weber, 443 U.S. 193, 199 (1979).

either an equal protection clause or Title VII violation. Title VII stipulations were adopted in Johnson v Transportation Agency of Santa Clara in 1987. In regard to Title VII, the affirmative action plan must be justified by the existence of a "manifest imbalance" in a job category traditionally segregated by the under representation of women and minorities.[123] Upon demonstration of the manifest imbalance through statistical evidence, the Court has the arduous task of considering whether the constitutional rights of the discriminatee are :unnecessarily trammeled" by the invocation of the affirmative action plan.[124]

In contrast, analysis of an equal protection clause violation is determined using the Strict Scrutiny Two Prong Test, which was adopted in 1989 in City of Richmond v Croson.[125] The Fourteenth amendment equal protection clause stipulates that States are prohibited from enforcing or creating any legislation which denies an individual's equal protection rights as afforded by the U.S. Constitution.[126]

The Court decided that judicial scrutiny is utilized in instances in which there is clarification needed to determine whether an affirmative action plan is remedial or motivated by unfounded notions of racial inferiority.[127] In making this determination, the Court developed a two prong test to judge the validity of the plan. The test stipulates that

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[123]Johnson at 1452.

[124]Johnson at 1452.

[125]Croson at 469.

[126]U.S. Constitution amend. XIV, § 1.

[127]Croson at 469.

(1) the racial classification used in drafting the plan must be justified by a compelling governmental interest; and (2) the means chosen by the State must be narrowly tailored to remedy the current effects of past vestiges of racial discrimination.[128]

There must be substantial evidence to support the State's determination that remedial measures were indeed appropriate and that other alternative measures were explored.[129] In making this determination, evidence of gross statistical imbalances with regard to minority or gender representation is sufficient to satisfy a Title VII prima facie requirement.[130] However, in an equal protection clause challenge, the affirmative action plan is required to concurrently satisfy both prongs of the Strict Scrutiny Two Prong test in order to survive judicial scrutiny.[131] In both instances, the Supreme Court determined that in deciding upon the issues of equal protection clause and/or Title VII violations, the ultimate burden of proof is placed upon the parties asserting the claim, the plaintiff.[132]

The next chapter, which is the fourth chapter is the concluding chapter and discusses the findings of the study.

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[128]Wygant at 274.

[129]Vogel at 599.

[130]Hazelwood at 299.

[131]Hazelwood at 299.

[132]Wygant at 267, 277-78.

CHAPTER 4

CONCLUSION

The scope of affirmative action legislation has never been clearly defined and has always been ambiguous both in language and in appropriate design. It was initially intended to pacify African Americans during the Civil Rights Movement of the 1960s, but was enlarged in scope to include all minorities, women, handicapped, war veterans, and the disadvantaged. Civil rights legislation and the enforcement of executive orders specifically address discriminatory issues involving employment, education, and housing. The purpose of Title VII of the Civil Rights Act of 1964 is to prohibit employment discrimination. Congress believed that an individual's livelihood, dignity, and self worth were directly related to the availability of equal employment opportunities afforded to the individual, regardless of race of gender. This Act constituted an acknowledgment that illegal discrimination existed and required remediation. The Act does not require quota implementation and preferential treatment for the purpose of correcting racial and/or gender imbalances. However, the implementation of quotas and preferential treatment are considered constitutional when they are required to remedy persistent discrimination practices within public sector employment. The Civil Right Act of 1991 supplements the Civil Rights Act of 1964, in that it protects nonminorities from having their constitutional rights guaranteed under both Title VII and the Fourteenth Amendment Equal Protection

Clause adversely impacted by the implementation of affirmative action plans. Specifically, the act protects non-minorities in reverse discrimination actions. It mandates that all potentially affected parties are required to be afforded the opportunity of participation in the consent decree process.

Affirmative action encompasses almost every facet imaginable with regard to ensuring equal opportunity access. It includes among other things, employment considerations, higher education, and set aside programs. Critics have deemed that affirmative action is "reverse discrimination" and just as prolific as discrimination because minorities receive favorable consideration on the basis of their race, irrespective of merit. However, affirmative action proponents contend that affirmative action programs serve to balance economic and educational distribution opportunities by providing incentives and training programs to traditionally disadvantaged members of American society. Affirmative action plans serve many purposes and are designed to address the specific needs that the protected class members face in trying to achieve economic parity. However, most plans address three specific questions.

The first question addressed within this study concerns the issue of when does an employer have the right to practice affirmative action in awarding preferential treatment in making employment considerations regarding hiring and promotions? The answer to the question with regard to when an employer has the right to practice affirmative action in awarding preferential treatment in hiring and promotions has never been fully answered by the federal court system. It is an accepted rule of thumb to assume that an employer is required to practice affirmative action measures whenever the

organization is a government contractor/subcontractor or whenever the court has ordered the organization to implement an affirmative action plan due to evidence of past discrimination practices currently impacting minorities.[1]

The second question concerns the issue of whether prospective employers are being discriminatory if they require prospective employees to take an examination, even though there is evidence to support the fact that minorities usually score disproportionately lower than their white colleagues? The answer to the question is that employers are not acting in a discriminatory manner provided that the testing satisfies the terms of the Strict Scrutiny Two Prong Standard. In Vogel v City of Cincinnati, it was determined that a governmental entity is authorized to afford preference to qualified minorities and women when needed to meet the interim goals of a consent decree.[2] However, the governmental agency is prohibited from hiring unnecessary personnel or unqualified employees for available positions or to satisfy quota requirements.[3] In this case, the requirement that an applicant for employment consideration be required to be qualified in skill adheres to the provisional requirements of valid consent decrees.[4] There are problems with this preferential treatment measure. In some cases, less qualified

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[1]John A. Gray, "Preferential Affirmative Action in Employment," Labor Law Journal, Vol. 43, No. 1, January 1992, 25-26

[2]Vogel v City of Cincinnati, 959 F.2d 594 (6th Cir, 1994) at 597.

[3]Vogel at 597.

[4]United States v Paradise, 480 U.S. 149 (1987), 150-52.

minorities are hired for positions that they are unqualified to possess, merely for the purpose of satisfying internal quotas.

This issue has been at the forefront of controversy, especially in regard to promotion examinations given to police and fire applicants. The issue in question is "race norming" a applicant's score to compensate for the perceived notion that women and minorities score disproportionately lower than non-minorities and Asians due to intellectual inferiority. The practice is known as "race norming," which requires adding extra points to adjust the scores of minority candidates to reflect a more favorable score. Race norming practices were implemented in the 1980's and have reportedly subjected hundreds of thousands of unsuspecting applicants to self imposed quota systems. This practice was prohibited with the passage of the 1991 Civil Rights Restoration Act. [5]

The City of Chicago's Police Department implemented a race norming practice in 1989. This practice resulted in the department adding extra points to adjust the scores of minority candidates sitting for the sergeant's examination. The City of Detroit used the practice of separating the scores of African American and white promotion candidates. The separated list was then tabulated and ranked from the highest to the lowest. The two lists were then compared according to rank order. The result of the norming techniques precipitated an increase in the hiring and promotion of minorities. Prior to the use of the race norming practice, there was a disproportionate amount of non-

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[5]Paul Glastris, "The Thin White Line," U.S. News & World Report, Vol. 117, No. 7, 15 August 1994, 53-54.

minorities present in upper ranking positions within the police department across the United States.[6]

Even though race norming is essentially banned, many government municipalities practice a new technique of race norming an applicant's standardized tests scores, by practicing a method commonly known as "banding." Banding involves concealing differences in academic performance by grouping wide ranges of scores together in a lump sum.[7] As a result of the Civil Rights Act of 1991, many police and fire department have dismantled their race norming practices with regard to hiring and promotions.

This problem of achieving racial and gender diversity has also proved to be problematic for the Clinton and Bush administrations. One of the most prolific being the imposition placed on cabinet secretaries and agency directors to utilize preselection criteria to select qualified minority and female candidates for departmental positions. In some instances, appointments were made despite the availability of better qualified applicants, who were neither minority nor female.[8]

The third question concerns the issue of whether termination policies based upon seniority are acceptable, if the predominant majority of the senior employees are non-minority males? The answer to the question is that termination policies based upon

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[6]Paul Glastris, "The Thin White Line," U.S. News & World Report, 53-54.

[7]Peter Brimelow and Leslie Spencer, "When Quotas Replace Merit, Everybody Suffers", Forbes, Vol. 151, No. 4, 15 February 1993, 82.

[8]Ruth Shalit, "Unwhite House," The New Republic, Vol. 208, No. 15, 12 April 1993, 12-14.

seniority are acceptable, provided that the seniority system meets all of the requirements established under Title VII. According to the majority Supreme Court opinion in Firefighters v Stotts, the primary issue concerned whether the District Court exceeded its judicial authority when it issued a preliminary injunction that required white employees to be laid off when other applicable seniority systems would have called for the layoff of less senior African American employees.[9] The Court concluded that the City of Memphis didn't consent to be enjoined from making layoffs, which decreased the percentage of African American employees. The modification altered the application of the seniority system and was held to be outside of the jurisdictional authority of the Court. Although the consent decree in this case didn't include retroactive seniority, the Court placed a lot of emphasis on the fact that there was no evidence that any African American protected from layoffs had been prior victims of discrimination. Therefore, there was no award of competitive seniority made to any of them. The Court perceived the modification to be an infringement on the vested seniority rights of non-minority firefighters. These questions are just the tip of the iceberg. There are many more questions which include, but are not limited to answering questions relating to discrimination allegations filed by the disabled, people alleging religiously infringement, and others.[10]

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[9]Louise Jackson Williams, "Last Hired, First Fired - Rights Without Remedies: Firefighters v Stotts", Detroit College of Law Review, Vol. 1, No. 215, 1985, 230.

[10]Louise Jackson Williams, "Last Hired, First Fired - Rights Without Remedies: Firefighters v Stotts", Detroit College of Law Review, 232.

Despite the courts efforts to encourage diversity within the workplace, discrimination still exists. The federal court system closely scrutinizes the evidence that an employer uses to justify the implementation of voluntary affirmative action programs. This is done in order to determine whether the plan is necessary and the remedial measures necessary to discourage the perpetuation of past discriminatory practices. The Supreme Court bases most of their decisions on the holding of both Croson and Johnson.

There are four conditions that preclude a legally valid affirmative action plan under terms of Title VII of the Civil Rights Act of 1964. First, the plan must have a remedial purpose, designed to eradicate a statistically significant imbalance in traditionally segregated job categories; secondly, the plan must be temporary in duration, implemented in a manner that is done to attain, but not maintain parity within the work force; third, the plan must not impede on non-minority and male opportunities; and fourth, the plan must not unnecessarily trammel the rights of others or necessitate the replacement of employees currently in place.

Public sector employers must follow the guidelines set forth under Title VII, as well as the guidelines of the Equal Protection Clause, as defined under Croson and Johnson. The Supreme Court held in Croson that government classification based on race are subject to strictest scrutiny and must satisfy the requirements as set forth under the Strict Scrutiny Two Prong Standard. The standard requires the government to establish that there is an imbalance by comparing the racial composition and/or gender of its work force with that of the local, qualified labor pool; that the government's own past discriminatory practices created the imbalance; and that the plan is necessary remedial

measure to remedy the imbalance. These requirements were established under the terms of the Wygant decision. This decision has come to be associated with the requirement that state and local governments are allowed to establish voluntary affirmative action plans within their jurisdiction, provided that the plans are designed specifically to remedy the present effects of the government's past discriminatory practices.

Under Croson legislation, state and local governments are prohibited from imposing minority set aside requirements on their contractors/subcontractors except in instances in which the government is attempting to remedy the present effects of past vestiges of the government's own identifiable past discriminatory practices of contracting to non-minority firms in the local industry. The Constitutional limits established under Wygant and Croson establish that first, state and local governments affirmative action plans that utilize racial classifications for employment purposes are subject to strict scrutiny; secondly, state and local government may not itself be a voluntary affirmative action employer, except to remedy its own identifiable past discriminatory practices; third, affirmative action lay-offs are not allowed; and fourth, state and local government MBE set asides are not allowed, except to remedy either government's own past discriminatory practices or those of the local industry, and then no more than necessary to remedy identifiable discrimination. Even though the voluntary affirmative action plans are judicially scrutinized, and the fact that there is an ever increasing resentment among both minorities and nonminorities regarding the implementation and the need of affirmative action plans, the court system continues to support the majority of the discrimination claims presented with regard to these policies. The imposition placed on

employers to establish goals and timetables for diversifying the workplace is one of the only viable means available to ensure that minorities and women are afforded equal access to opportunities that they may not have been privileged to had it not been for the implementation of these programs.

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