

PEOPLE'S DEMOCRATIC REPUBLIC OF ALGERIA
MINISTRY OF HIGHER EDUCATION AND SCIENTIFIC RESEARCH
UNIVERSITY OF M'SILA
FACULTY OF LETTERS AND FOREIGN LANGUAGES

FACULTY OF LETTERS AND LANGUAGES

DEPARTMENT OF ENGLISH LANGUAGE

N°:.....



DOMAIN: FOREIGN LANGUAGES

STREAM: ENGLISH LANGUAGE

OPTION: LITERATURE & CIVILIZATION

**AFFIRMATIVE ACTION: THE
TROJAN HORSE IN THE
AMERICAN LEGISLATIVE
STRUCTURE**

A thesis submitted in fulfillment of the requirements for the Degree of Master in

Civilization

Candidates

Mr. Ali ZITOUNI

Mr. Omrane NOUIBAT

Supervisor

Mr. Youcef BENNAA

Board of Examiners

Dr. Abou Bakr HAMMOUDI	University of M'sila	Chairperson
Mr. Youcef BENNAA	University of M'sila	Supervisor
Dr. Mohammed SNOUSSI	University of M'sila	Examiner

2020/2021

DEDICATION

This work is dedicated to our families, friends, and all of our loved ones.

ACKNOWLEDGMENTS

First of all, all praise is due to the Almighty Allah for blessing us with strength, and patience, without which, we would have been unable to fulfill this work.

We would like to thank our thesis advisor Mr. Bennaou Youcef for his guidance, strong support and valuable remarks that he provided throughout the various phases of conducting this study.

We would also like to express our gratitude to the jury members Dr. Hammoudi Abou Bakr, and Dr. Snoussi Mohammed for dedicating the time needed to evaluate this research and provide us with helpful remarks.

Last but not least, we would like to thank the academic and administrative staff of the Department of English for all of their efforts to ensure a successful learning experience.

DECLARATION

We hereby declare that this thesis entitled “Affirmative Action: the Trojan Horse in the American Legislative Structure”, is our own work and that all sources we quoted from have been acknowledged by mean of referencing.

ABSTRACT

The following study aims to highlight and explore in greater depth the rationale behind the societal and legislative backlash against Affirmative Action in the United States. The very nature of the topic justifies the need for a blended approach: the descriptive as well as the analytical. The descriptive level in the study is used to provide a better understanding of the socio-historical context of Affirmative Action and also to highlight the underlying rationale behind adopting a radical policy as such in order to ensue justice for minorities and women, whereas the analytical approach, in turn, is used to cross-examine the strengths and weaknesses of the policy vis-à-vis the various liberal theories and the rulings in some of the key ad hoc Supreme Court cases. The assessment of various pertinent studies and related literary works revealed that the application of Affirmative Action in the United States is facing an existential threat due to the fact that its popularity is declining among the new generation of Americans who apparently hold different perceptions of equality and justice, in addition to the fact that it has greatly lost the unconditional political and Judicial support that it previously had amid the 1960s.

Keywords: Affirmative Action, Backlash, minorities, Women, Equality, Justice

TABLE OF CONTENTS

DEDICATION	I
ACKNOWLEDGMENTS.....	II
DECLARATION	III
ABSTRACT.....	IV
GENERAL INTRODUCTION.....	1
CHAPTER ONE: AN OVERVIEW ABOUT AFFIRMATIVE ACTION.....	3
Introduction.....	3
Affirmative Action: what does it mean?	4
1 – The Duality: Affirmative Action and Discrimination.....	4
1.1 - Types of Discrimination	5
1.1.1 - Gender Based Discrimination.....	5
1.1.2 - Race Based Discrimination	6
1.1.3 - Religion Based Discrimination.....	6
1.1.4 - Class Based Discrimination.....	6
1.2 - Forms of Discrimination.....	7
1.2.1 - Systematic Discrimination.....	7
1.2.2 - Systemic Discrimination.....	8
2 – The Duality: Affirmative Action and Justice.....	8
2.1 - Macro Justice and Micro Justice	9
2.2 - Affirmative Action and the Notion of Retributive Justice	10
2.3 - Affirmative Action and the Notion of Distributive Justice	11
2.4 - Affirmative Action and the Notion of Restorative Justice	12
3 – The Mechanisms of Affirmative Action: how does it work?	13
3.1 - Affirmative Action in Higher Education	13
3.2 - Affirmative Action in the Field of Employment	15
4 – Affirmative Action around the World.....	16
4.1 - Affirmative Action in Canada	17
4.2 - Affirmative Action in Malaysia.....	18
4.3 - Affirmative Action in Australia.....	19
4.4 - Affirmative Action in India	20
Conclusion	21
CHAPTER TWO: AFFIRMATIVE ACTION AND THE CONSTITUTION.....	23
Introduction.....	23

1 – The Legislative History of Affirmative Action	24
1.1 -The Freedmen’s Bureau.....	24
1.2 - The Executive Order 10925.....	25
1.3 - The Executive Order 11246.....	26
1.4 -The Executive Order 11365.....	28
1.5 - Title VI and VII of the Civil Rights Act of 1964	29
2 – The Institutional Incorporation of Affirmative Action in the Federal Framework.....	30
2.1 -The Equal Employment Opportunities Commission.....	30
2.2 - The Minority Business Development Agency.....	31
2.3 - The Office of Federal Contracts Compliance Programs	33
3 – The Constitutional Challenges of Affirmative Action.....	34
3.1 -Affirmative Action under the lens of the Supreme Court	36
3.1.1 - Affirmative Action and the Strict Scrutiny Test.....	37
3.2 - Key Cases and Lawsuits	37
3.2.1 - Adarand Constructors, inc. v. Pena	37
3.2.2 - Marco DeFunis Jr. v. Odegaard.....	39
3.2.3 - Regents of the University of California v.Bakke	39
3.2.4 - Grutter v. Bollinger.....	41
3.2.5 - Gratz v. Bollinger	42
4 – The State Referendum on Affirmative Action.....	43
4.1 - The California Civil Rights Initiative: Proposition 209	44
4.2 - The Michigan Civil Rights Initiative: Proposition 2	45
4.3 - The Nebraska Civil Rights initiative: Initiative 424.....	46
5 - The Limits of Affirmative Action	47
5.1 - The Conformity of Affirmative Action with the International Laws	47
5.2 - Title 29 CFR of the EEOC	48
5.3 - Title 41 of the OFCCP.....	48
Conclusion:	49
CHAPTER THREE: AFFIRMATIVE ACTION IN THE POLITICAL SPECTRUM.51	
Introduction.....	51
1 – Affirmative Action in the Classical Liberalism Perspective.....	51
2 – Affirmative Action in the Neo-liberalism Perspective	53
3 – Affirmative Action in the Egalitarian Liberalism Perspective	55
4 – Affirmative Action in the Communitarian Liberalism Perspective.....	57
5 – Affirmative Action in the Political Liberalism Perspective.....	60

Conclusion:	62
GENERAL CONCLUSION.....	63
BIBLIOGRAPHY

LIST OF ACRONYMS AND ABRIVIATIONS

CFR: CODE OF FEDERAL REGULATIONS

EEOC: EQUAL EMPLOYMENT OPPORTUNITIES COMISSION

LGBT: LESBIEN, GAY, BISEXUAL, AND TRANSGENDER

MBDA: MINORITY BUSINESS DEVOLOPMENT AGENCY

MBDE: MINORITY BUSINESS DEVOLOPMENT ENTERPRISE

OCCP: OFICE OF CONTRACTS COMPLIANCE PROGRAMS

OFCCP: OFFICE OF FEDERAL CONTRACTS COMPLIANCE PROGRAMS

OMBE: OFFICE OF MINORITY BUSINESS ENTERPRISE

PCEEEOC: PRESIDENT'S COMMITTEE ON EQUAL EMPLOYMENT OPPORTUNITY
COMISSION

SAT: SCHOLASTIC APTITUDE TEST

US: UNITED STATES

GENERAL INTRODUCTION

Elliott Larsen once said: *“Affirmative action is the attempt to deal with the malignant racism by instituting benign racism,”* (Eloise), in other words, affirmative action is the lesser of two evils, it is benign, yet still it is a form of racism. This stark condemnation of the unintended consequences of Affirmative Action is a clear sign of the backlash against the prolonged application of the policy in the United States. The phrase “Affirmative Action” was first introduced by John F Kennedy, the 35th president of the United States, in 1961, when he, via the Executive Order 10925, demanded from contractors to take “affirmative action to ensure that applicants are treated equally without regard to race, color, religion, sex, or national origin.” ; however, it was first enacted in 1964, when president Lyndon B Johnson, at the time, issued the Executive Order 11246 that set the stage for subsequent amendments and executive orders to reshape the state’s new approach to fight discrimination through Affirmative Action. According to Harry Joseph Holzer, an American economist and the author of the book entitled: *“ Affirmative Action: What do we know?”* (38), Affirmative Action is a proactive initiative that seeks to alleviate the detrimental effects of past discrimination, which deters minorities and women from receiving equal treatment in comparison to their white male compatriots. The policy ; however, despite of being promoted as a means to fight discrimination and improve the status of minorities and women, has faced some serious challenges in the state as well as in the federal level which casts doubts on the entire policy and fuels the debates about the necessity of restoring the status quo ante.

The practice of discrimination has been also tackled in order to put the very implementation of Affirmative Action into perspective. Through depicting the various forms and types of discrimination throughout various historical stages and different geographical locations, the underlying logic behind the application of Affirmative Action will also be well

understood, which will provide a better understanding of the intended impact of the policy throughout the world in general, and in the United States in particular.

Affirmative Action was launched in the 1960s, in a climate of intense civic struggle amid what became later known as the Civil Rights movement. It was created first to terminate the practice of segregation, and then to narrow down the growing socio-economic inequalities between the seemingly heterogeneous components of the nation. The gradual implementation of the policy into the federal framework as well as to the enactment of the enabling legislation that made the creation of the ad hoc commissions and programs possible delayed the debates about the long term impact of the prolonged application of Affirmative Action

However, after sixty years of its implementation into the existing legislative framework , and as the policy continues to reshape the state's minorities and women related policies, the general population begun to question the quality of the impact brought about by Affirmative Action, which eventually led to a form of a societal backlash against the prolonged application of a policy that is accused of causing "reverse discrimination" instead of the elimination of the recurrent practice of discrimination. In the past two decades, the legislative backlash has successfully led to revoking Affirmative Action programs in higher education in numerous states which ; subsequently, opened the door for some serious discussions about.

CHAPTER ONE: AN OVERVIEW ABOUT AFFIRMATIVE ACTION

Introduction

Long before the tumultuous 1960s, Women, African Americans and various minorities felt and endured the throes and hardships of discrimination in the United States; however, though these discriminatory practices differ in form and in the degree to which they affect those who were discriminated against, they all by then induced one unprecedented wave of protests and riots that spread simultaneously all over the country. The impact of these demonstrations was threatening the very social fabric of the nation ; thereby, John, F Kennedy, under the pressure of the Civil Rights movement and activists from various sections of the American population , introduced a policy that he thought that it could help the government diffuse the situation. The policy was later referred to as “Affirmative Action“, and it was based upon the idea of predefined quotas reserved exclusively for the historically underrepresented groups which will presumably ensure a more diverse and educated workforce; however, it was not until September 24, 1965, when Lyndon B. Johnson signed the Executive Order 11246, when the policy finally became a part of the existing legislative body.

This chapter will attempt to shed light on the very practice of discrimination, in order to demonstrate the co-existence of numerous types and forms of discrimination. Also, through putting Affirmative Action under the lens of various theories of justice, it will check the strength of the rational for a radical policy as such from the point of view of each. The chapter will also offer a keen insight into the contributions that Affirmative Action policies have made in the fields which their impact make the most noticeable difference, and last, the chapter will tackle with greater depth the prior existence of a quasi-Affirmative Action plans

around the world, and how they were greatly influenced by the American version.

Affirmative Action: what does it mean?

In the absence of one universal definition of Affirmative Action, this latter has obtained various, and at times even contradictory definitions (Motileng 9). The rationale for each of which depends mainly on the ethnic, religious and even historical settings of the country in which, the policy is put into effect ; however, putting the exceptional case of South Africa aside (Motileng 27) , Affirmative Action, hence minorities and women are the population that is usually targeted, it is also widely defined through the goals it seeks to achieve ; thereby, for the purpose of this study, Affirmative Action can be defined as follows : it is a temporary proactive initiative that seeks to remedy the lingering effects of past, systemic and systematic, discrimination, to safeguard the rights and privileges of all members who fall under the description “ protected groups “, and last but not least, to propagate substantive equality among the aforementioned groups in significant areas of society (Lederer 23) . As of 2003 ; however, yet another goal of great significance to Affirmative Action has been added to the listed above, when the Supreme Court of the United States, after months of deliberation in the so-called (*Grutter v Bollinger*, 2003) , has declared the enhancement of diversity as a separate yet equally important goal of Affirmative Action which, according to the justices of the US Supreme Court, must be put at the pinnacle of the list of goals that this legal and societal framework seeks to achieve and that is due to the critical role that diversity have in terms of ensuring social cohesion in multicultural societies (Raines 845).

1 – The Duality: Affirmative Action and Discrimination

In order for Affirmative Action to function properly within the letter and the spirit of the national constitutions, the mise en place of a clear and concise definition of all forms and types of discrimination had been gradually embodied into the existing ad hoc legislation in

various states around the world. This section; thereby, seeks to provide a better understanding of the very practice that Affirmative Action was originally created to eliminate. To this end, the first part of the section will try to offer a keen insight into the various types of discrimination. The second part will seek to differentiate between the different forms of discrimination in an attempt to address common misconceptions.

1.1 - Types of Discrimination

In modern societies, anti discrimination laws had been widely regarded as one of the pillars upon which all national constitutions must be founded. This urge; thereby, to eradicate the long-standing discrimination was translated into the enactment of a set of acts and provisions that were designated for the sole purpose of eliminating the recurring practice of discrimination from the collective mindset of modern societies. Discriminatory behaviors ; however, unlike in the olden days when exclusion on basis of race, ethnicity or even gender was regarded as no different than any other socially acceptable practice , have evolved and took on more subtle manifestations . Henceforth, came the need for dismantling discrimination in order to analyze the distinct as well as the interrelated types of discrimination that are targeted by Affirmative Action.

1.1.1 - Gender Based Discrimination

Regardless of the countless cultural varieties among ancient and even contemporary societies, in most of which sexism has been remarkably omnipresent in the lives of all the people who form these societies; though, logically enough, in different forms and in different degrees. According to The European Institute for Gender Equality, sexism has been built around the fallacy of gender roles which then gave rise to gender stereotypes: the belief in the superiority of a given gender, mostly male, which make societies “patriarchal”, but there are few exceptions for societies in which women had a totally reversed status over the other

gender. This practice could be conscious or unconscious, and differs in the form from physical abuse to verbal, emotional abuse, and unconscious bias.

1.1.2 - Race Based Discrimination

Racism has been defined by the International Convention on the Elimination of All Forms of Racial Discrimination as: “Any distinction, exclusion, restriction or preference based on race, color, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life “. Racial discrimination; thereby, whether consciously or unconsciously, is the deeply-rooted belief in the superiority and inferiority of races that could lead into the systematic as well as the systematic exclusion of a certain group on basis of their race.

1.1.3 - Religion Based Discrimination

In order for them to enter into God’s promised heaven, fanatics, from all religious factions, had rendered this earth of his into the hell that they themselves were once so afraid of going to the whole time. In short, this sum up what religious-led violence had done in the past few centuries. This latter ; however, is merely an exacerbated form of exclusion on basis of religious beliefs for there are more subtle forms of this practice that range from offensive jokes to targeting other people’s religious beliefs through the so-called diversity programs (Bodson). In other words, religious based discrimination comprises all acts that aim at the exclusion of a particular group, often a minority, on the basis of a certain religious beliefs, whether this exclusion is explicit or implicit.

1.1.4 - Class Based Discrimination

Though it is no longer legal, nor apparent as in the olden ages, classism still has a tremendous impact on people’s lives. According to Adams Maurianne, the author of

“Reading in Diversity and Social Justice Classism” , classism can be defined as “The institutional, cultural, and individual set of practices and beliefs that assign differential value to people according to their socio-economic class; and an economic system which creates excessive inequality and causes basic human needs to go unmet “(10). In spite of the fact that this practice can manifest in all aspects of life, it is more occurring in the workplace, where employees are more likely to be hired, promoted or even fired accordingly (Hirsh and Cha 2001).

1.2 - Forms of Discrimination

In modern societies, and despite of the enactment of a concise set of provisions to safeguard the rights of minorities and women, discrimination is still apparent; however, this utter disregard of the laws that were put in place to prohibit discrimination differs in forms; thereby, the analysis of each of which, validates the hypothesis that suggests the existence of two distinguished patterns of discriminatory practices.

1.2.1 - Systematic Discrimination

Also known as “ individual discrimination “, due to the fact that it is the most basic form of discrimination as it is observable in the micro level. People that are actively engaged in acts that are referred to as “systematic discriminatory practices” are individuals who happen to exhibit a discriminatory behavior, whether consciously or unconsciously, or even embrace a discriminatory doctrine that is based on the exclusion of a particular group of people on the basis of their gender, race, ethnicity or even religion (Frances) . To address this form of discrimination, provisions were enacted to empower those who are discriminated against with the legal tools to file a complaint against the offenders or even to persecute the offenders before a court of law.

1.2.2 - Systemic Discrimination

Also known as “institutional discrimination”, unlike systematic discrimination, the perpetrators in this particular form are not individuals, but rather institutions. According to Carol Ages, systemic discrimination can be defined as: “Complex and interrelated policies, institutionalized practices, norms and values that perpetuate exclusionary structures and relationships of power and opportunity within organizations and labor markets “(22). The complex nature of systemic discrimination in comparison to systematic discrimination ; thereby , calls upon a different form of intervention to eliminate these deeply rooted practices that lead to the exclusion of a certain group on basis of gender, race ethnicity or even religion. To date, and according to many scholars and a number of governments, the use of Affirmative Action to address issues related to systemic discrimination is by far among the most revolutionary strategies that have been proven able to address discrimination on the macro level (Lederer 27).

2 – The Duality: Affirmative Action and Justice

Justice is a socially constructed concept; therefore, individuals perpetually construct a shifting meaning of justice as a natural response to the socio-political pressure exercised upon them by both: the state and society. Henceforth, this section attempts to capture the evolving essence of justice behind the implementation of Affirmative Action through the lenses of the various principles of justice. To this end, and In order to understand the different levels of the analysis, the first part of the section will be devoted to draw a clear distinction between Micro Justice and Macro Justice. The second section will delve deeper into the assessment of the fairness of Affirmative Action vis-à-vis the various principles of justice in terms of ensuing the distribution of resources, retribution for wrong doings , and the procedure that govern them both.

2.1 - Macro Justice and Micro Justice

The extension of the scope through which the percept of justice is perceived, is what distinguishes Macro Justice from Micro Justice. The former's main sphere of interest is toward the appropriateness of individual outcomes, while the latter focuses more on the fairness of the distribution of outcomes (Lillie 2). In this context, the foremost objections to Affirmative Action are made at the individual level: to opt for any type of justice but color-blind justice is not only a clear breach of title VI and VII of the US constitution, but it is also unethical as it seriously jeopardizes the social construction of individualistic virtues such as perseverance and meritoriousness. Moreover, there is the criterion dilemma: The pretext of the priority of race and gender has lead to a strict limitation of the criterion according to which certain individuals are entitled of this preferential treatment but not all the others. However, the complete abundance of the countless other individual disparities such as : age, ethnicity, religious beliefs, disability... etc, has rendered Affirmative Action ; though created in good faith, unpractical hence there is a quasi-infinite number of people who could legitimately claim preferential treatment under the pretext that they have undergone past discrimination on basis of any hypothetical criterion . On the macro level, the rational for Affirmative Action is much stronger, since the long-term effects of discrimination are clearly perceivable at the societal level. The principle of equity also tends to accentuate the need for the programs offered by the policy of Affirmative Action. Since the agenda of this latter is to offer proportional representation to minorities and women in all sectors of society which goes hand in hand with the maxims of equity. In support of this claim, the findings of the study conducted by (Jemmot and Tebbets) has shown, through the analysis of a wide sample of newspaper articles and televised coverage of the (Regents of the University of California v Bekke, 1978) that the pro-Bekke articles tended to shed more light on the micro level : addressing the case through questioning the very qualifications of the African American

applicant Whereas in the Anti-Bakke pieces, more emphasis was put on the macro level, through tackling what the two scholars coined “anchoring information“ : in a lieu of defending Bakke, the case was discussed in a much broader sense, putting the alleged systematic discrimination entrenched in the University of California at trial (35).

2.2 - Affirmative Action and the Notion of Retributive Justice

“If a man blinds the eye of another man, they shall blind his eye“, so ruled Hammurabi, the king of Babylonia, one of the early and most thriving civilizations in central-southern Mesopotamia. A man, who, through these simple words inscribed on a Stela found near the temple of Marduk, provided the first empirical evidence of the prior existence of what contemporary legalists label retributive justice (Frymer and Kensky 231). Indeed, this concept has evolved drastically ever since in order to keep up with the sophisticated theories of punishment that modern societies have developed over the past two millenniums but the governing principle remains the same: the allocation of punishment (Wood 549). In this context, and after the United States criminal justice system has formally shifted towards the retributive theory in the early 1970’s (Whitman), Retribution for the throes of past discrimination has become one of the major goals of Affirmative Action; however, it is also the most vulnerable argument used by the proponents of the policy (Nel 71).

In order for retribution to be morally justified, must penalize the guilty which is not the case with Affirmative Action, In contrast to the “sine qua non” of retributive justice, this latter through its adherence to the quotas system, deprives a given percentage of over qualified white men and women from their well-deserved jobs, educational opportunities...etc, and that in a sense, renders it responsible for the allocation of injustice rather than punishment because those who are discriminated against did not take any part of past discrimination (Fullinwider). The claim ; however, may be made under the pretext that

the programs of Affirmative Action do not bring punishment upon anybody to begin with, because these jobs, scholarships, and governmental contracts in question were not given to whites in the first place ; thereby, offering them to minorities and women would only help their future expectations in terms of having better jobs or educational opportunities ; however, it is this very argument that proves that Affirmative Action has deviated from being a means to achieve equal opportunities to one that only achieves equal outcomes.

2.3 - Affirmative Action and the Notion of Distributive Justice

Unlike retributive justice that seeks to remedy the effects of past wrongdoings, distributive justice is more concerned with the future impact of these wrongdoings (Deutsch 137). Under the lens of this theory the main focus is put on fixing the currently unjust situation rather than pursuing the sense of immediate gratification that retribution would bring upon the victims' conscience. Justice; thereby, according to the principles of distributive justice; refers to the fair allocation of goods and services to all members of any given society, and this fairness could be achieved only through these three principles: need, equity and equality (Moore 210). In this context, and in order to be in compliance with the sine qua non of distributive justice, the programs of Affirmative Action must be justified according to each and every principle of this multilateral model.

According to both principles; the principle of equity and that of need, Affirmative Action is more than justified. As the proponents of Affirmative Action can justly claim that those who start with little are more deserving than others ; thereby, women and other minorities who have been historically discriminated against have all the right to be given a preferential treatment in order to be on an equal playing field with the previously privileged white males; However, in terms of the third principle which is equality , the programs of Affirmative Action are more vulnerable, because in the eyes of its antagonists, these programs represent a

clear violation of the maxim of equality ; thereby, any preferential treatment that is given on basis other than merit, such as gender, race or ethnicity is nothing but “ reverse discrimination “. Hence, there is no such thing as “ reverse justice “, Affirmative Action, through dismissing merit from being the sole factor that should be taken into consideration in terms of ensuring the equality of opportunities, is a legalized form of institutionalized discrimination.

2.4 - Affirmative Action and the Notion of Restorative Justice

Unlike in many of the olden principles of justice, the indoctrination of contemporary practices of restorative justice is relatively novel which explains the shifting nature of its interpretation and subsequently its application. In fact, the prima facie engagement with restorative justice can be traced back to Kitchener, Ontario, Canada in 1974 (Zehr 59). Therefore, and, in spite of the absence of a universally agreed upon definition of restorative justice (Kelly 18), Tony Marshall, the chief of the United Kingdom Restorative Commission, has come up with a definition that managed to capture the very essence of its philosophy: “Restorative justice is a process whereby all parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offense and its implications for their future “.

In this context, the need for Affirmative Action is more justified in the restorative ideals than any of the previous principles. Minorities and women were the subject of exacerbated systemic and systematic discrimination that continue to persist even after its prohibition. So, in a sense, not only that the total reliance on the distributive or the retributive principles did not bear any fruit and it is only adding up to the existing inter-racial tensions that begun to pile since the 1960s , and deters women from gaining their full and undiminished rights . The need ; thereby, for Affirmative Action is indispensable because, hence the policy has already

gained the public's consent, it does on one hand incorporate the white-male majority, presumably the offenders, in the pursuit to achieve a form of societal reconciliation that would ultimately re-compensate minorities and women for the throes of past discrimination, and on the other hand, it does allow the white-male majority to take part in deciding how to rectify the situation for the overall good.

3 – The Mechanisms of Affirmative Action: how does it work?

Radical, is the sort of societal change that the framers of Affirmative Action policies aspired to achieve ; however, knowing that discrimination is in fact a complex practice, Affirmative Action policies has rallied a multilateral level of programs to address each of these societal abnormalities in all aspects of life. This section; thereby, in an attempt to demonstrate how diverse Affirmative Action related programs actually are, is divided into two parts. The first will tackle the impact of the policy in higher education, in order to analyze the validity of the pretext under which these policies have been implemented to this sector in the first place. The second section will explore whether the workforce has become really diverse throughout this proactive initiative or not.

3.1 - Affirmative Action in Higher Education

In the pre-civil era there were quasi-none, then amid the tumultuous 1960's, the once quasi-none had become few, these few; however, were all what the All-White society of higher education had to forgo in favor of Applicants from African American descent, because regardless of their academic achievements' records, ordinary African Americans were not to be admitted to college in the country (Titcomb). However, under the pressing societal pressure of the 1960's , and in order to diffuse the rising tension between the white majority and the blacks, the United States government was ought to introduce the quotas system into the public as well the private institutions of higher education.

The decision was merely symbolic, with the president Kennedy (1961-1963) ordering the national guard of Alabama to secure the safety of two African Americans students whilst in the campus of state's public university in response to the threats posed by the pro-segregation governor: George Wallace. It was not then until the early 1970's when the federal government, which was driven by the brisk spread of protests and strikes led by civil right activists and feminist groups, imposed elaborate requirements in order to promote the admissions of African Americans and female students.

The constitutionality of these requirements; however, was repeatedly challenged. The (*Definus v Washington Law School*, 1971) case was a landmark in the history of the application of the policy because it raised many serious questions about the risks of causing "reverse discrimination" whilst trying to eliminate discrimination. Though the case was later dismissed, the (*Bakke v. the Regents of the University of California*, 1978) came once again, to demonstrate the legitimate fears of white applicants who were systematically excluded because of the "quotas system"(Dong 29). The ruling of the Supreme Court ; however, though seemingly in favor of Affirmative Action, it did ban the use of quotas due to its violation of the Equal Protection Clause of the 14th amendment.

Critics of Affirmative Action has also claimed that through dismissing the economical factor from the admission process while upholding race, the policy is; subsequently, responsible for depriving a large proportion of underprivileged white students from getting admitted to college and; thereafter, denying them from the remote possibility of improving their economic status which can only be made possible via getting a college degree. Furthermore, the adoption of a color conscious system instead of a color-blind one in the admission process has significantly affected the intellectual abilities of the overall graduates due to the remarkable underperformance of the students who has been previously admitted on basis of race, gender or ethnicity rather than merit.

Currently, and in the same direction, ten states has successfully repealed the use of Affirmative Action in all the institutions of higher education that fall under the state jurisdiction ,namely California through the Proposition 209, Michigan through Proposition 2 and Nebraska through Initiative 424, which has inspired the remaining states to review the continuous application of the policy in college admissions as in the case of the State of Ohio, or even modify the existing programs to be class- based instead (Dong 39) which would enhance diversity in campus and allows the enrolment process to be more fair for all applicants.

3.2 - Affirmative Action in the Field of Employment

In the White man's world, the white collar jobs were reserved for the white males, this behavior; however, was far from being accused of being a discriminatory practice neither against any of the various minorities living in the United States, nor against women but it was rather a conservative approach that was born due to decades of social conditioning of occupational choices (Liss 275). Affirmative Action; therefore, came out of the necessity to force a radical change to the long standing deliberate exclusion on basis of gender, race and ethnicity. The impact of the policy was monumental due to its direct effects on all federal government workers, and about a 20 to 25 percent of America's workforce in the private sector (Holzer and Neumark 16). This impact was only made possible through the Executive order 11246, and subsequent amendments that expressly mandate the development of Affirmative Action plans of all private contractors who exceed a certain size, and also of all the private companies wishing to sign contracts with the federal government that exceed the amount of 50.000 dollars (Dilger 3). These plans, in order to be in compliance with the ad hoc legislative clauses that were put into effect, must be founded upon two components: self scrutiny and action (Kelly). The former requires the contractor to monitor the number of the overall employees and put it against the number of the qualified employees who do belong to

one of the “protected groups“. These groups , according to the Executive Order 11246, are formed according to two criteria : The first is gender ; thereby, women are considered as a protected group whereas, the second is ethnicity; thereby, according to this criteria there are four different ethnicities that are regarded as protected groups : African Americans, Asian Americans, Native Americans and Hispanic Americans. If the contractor, under any circumstances, is experiencing issues related to the development of the right Affirmative Action plan for his firm, the Office of Federal Contract Compliance Programs (OFCCP), if consulted, is to offer immediate assistance alongside the various specialized consulting firms that offer a wide range of options to promote equality among women and minorities.

4 – Affirmative Action around the World

In cosmopolitan societies, there are seemingly two main models to address social disparities: The French Model and the American Model. The former is a color-blind system thereby, it dismisses any reference to the visible ethnic, racial or linguistic minorities living in the state under the pretext that all are equal before law ; thereby, the deliberate abundance of racial, ethnic or even gender profiling will enable the state to grant all citizens equal treatment before the law. The American model ; however, in sharp contrast to the French Model, recognizes the societal heterogeneities and adopts Affirmative Action in order to remedy past discrimination and improve the status quo of minorities and women in the local communities. This socio-political framework; though it was created in the United States, has crossed the borders and became one of the main strategies used to target discrimination in distant countries around the world. This section; thereby, will be devoted to highlight the omnipresence of Affirmative Action in: Canada, India, Malaysia and Australia.

4.1 - Affirmative Action in Canada

Despite the fact that the Canadian Charter of Rights and Freedoms, particularly in s. 15 (1), ensures the right of equal treatment to all citizens regardless of their race, gender, ethnicity or religion, discrimination is recurrent in the country (Lederer 126) . In fact, in s. 15 (2), even the aforementioned Charter explicitly acknowledges the existence of discrimination and urges the government to take proactive measures to improve the lives of those who are discriminated against : Aboriginal people, women, people with disabilities and visible minorities (AGÓCS 151) ; however, in response to the widespread backlash against Affirmative Action that begun to unravel in the United States amid the 1980's, the authorities launched precipitance reforms : The term Affirmative Action , as judge Rosalie Abella, the chairman of the Royal Commission that was assigned to conduct an inquiry into Equality in Employment in 1983 , deemed it inaccurate for its immediate association with the American Model ; thereby, in compliance to the recommendations mentioned in the report issued in 1986 by the aforementioned Commission , the policy has been embodied into the federal framework under the constitutional nomenclature : “ the Employment Equity Act “ (Lederer 128). However, It was not a mere shift in the used terminology for this also implies narrowing down the scope of the policy in comparison to the American version which renders the Canadian model more concerned about improving the status of minorities and women in the workplace rather than in all aspects of public life. The second dimension of the reforms can be perceived in the development of the Ontario Employment Equity Act in the early 1990s, when the New Democratic Party government, under the leadership of Bob Rae, accepted the task of leading the fight against the backlash against the Employment Equity Act ; however, the antagonists of the legislation could ultimately restore The Merit Based Practices via the enactment of the “Job Quotas Repeal Act“ in 1992 (Bakan and Kobayashi

66), which represented a major victory for the New Progressive Conservatives, namely Mike Harris, who with the help of the mainstream media, continued to target the very constitutional foundations of the policy, which raised some serious questions about its future in Canada.

4.2 - Affirmative Action in Malaysia

Even before the British departure in 1957, a quasi-Affirmative Action policy has been adopted by the colonial government to mitigate the devastating impact of ethnic tension that used to occur between the various ethnicities cohabiting in Malaysia (Cole 24). After independence; however, the need for Affirmative Action was even more justified due to the fact that the serious frictions between the ethnic Chinese and the Malays had been exacerbated, mainly after the racial riots of May 1969 (Kua Kia Soong 34), which paved the way ahead of the country's second post colonial prime minister to introduce his plan of socio-economic reform in 1971, also known as: "the National Economic Policy" under the pretext that it is the wealth gap between the "Bumiputeras" – a name given to the aboriginal people that means "children of the soil" – and the ethnic Chinese that caused the country's most violent riots since independence (Torri 232).

So, in favor of the Malays, the policy was gradually embodied into the national constitution until the late 1991 when it finally became a complete part of the nation's existing legislative body; however, under a new name: The National Development Policy. Despite, the will of its creators, Affirmative Action in Malaysia did not yield a significant fruit (Sowell 68): On the national front, the United National Malays Organization, the main advocate for the Malaysian version of Affirmative Action, is often accused of misusing the funds received from the central government into the benefits of the governing elite which led to the underperformance of the policy in relation to improving the lives of the majority of the Malays in terms of the wealth gap that still exists between them and their compatriots from

the Chinese ethnicity (Sowell 58) . On the international front, the policy was scheduled to be terminated after twenty years from its creation ; however, the prolonged duration of its application seems to be immune from any political debate about its future despite its long-term impact on the country's commitments that causes the country substantial economic losses : Malaysia was barred from signing contracts to supply any of the American governmental agencies due to its prolonged implementation of the policy which also led to five failed rounds of talks with the United States about sealing a deal of free trade between the two countries (Rinehart 9).

4.3 - Affirmative Action in Australia

Despite the fact that some of the serious efforts of the consecutive Australian governments to rectify the situation can be traced back to the 1930's, the Aboriginal people, as well as women in Australia had suffered severely from the long-persisted gender and ethnic discriminatory practices throughout the country (Kramar 9). The late 1980s and the early 1990s were marked by a more direct governmental intervention to firmly promote the state's minorities political agenda which is based upon endorsing employment equity among the more disadvantaged groups in the hope of achieving full equality by the beginning of the new millennium.

The governmental endeavor can be clearly noticed through the set of programs that were developed and also their enabling legislation that was introduced by Hawke / Keating government in the name of Appropriate Action : The Public Service Reform Act of 1984, The Equal Opportunity for Women Act of 1986, and the establishment of the Affirmative Action Agency ; however, governmental initiatives to address the issue of social inequalities later shifted towards raising the people's consciousness about the plight of discrimination ; though this was often deemed as reluctant (Braithwaite and Bush 119) . Moreover; under the new

approach, and instead of enacting mandatory pieces of legislation to impose the programs that were closely related to Affirmative Action, the Australian government, mainly under the leadership of the prime minister Howard, relied heavily on the active yet voluntary participation of the private sector in terms of integrating the more disadvantaged groups into the labor market as in the case of the Australian Employment Covenant in 2008. The results of this joint effort to improve the status quo of the indigenous people of Australia as well as women ; though its long-term results are yet to be verified , has brought a promising expectations as it pertains the future of minorities and women in the country.

4.4 - Affirmative Action in India

Unlike in the United States, there has not been, nor will ever be any controversial debates over the constitutionality of the “reserved quotas“ in India. This goes mainly due to the fact that the class-conscious framers of the Indian constitution in 1947 expressly embodied the term “Scheduled Castes“ not only to recognize, but more importantly to legalize the state’s future programs that were developed to alleviate the underprivileged status of The Shudras, the serfs and laborers who currently represent 18% of the total population and have been historically referred to as the untouchables (Chandola 105) . Besides the Shudras, the ad hoc legislation also strives to improve the status of other “Backwards Classes“ which comprises “The Scheduled Castes“ and “Scheduled Tribes“ which when combined represent about 8% of the overall population. The policy ; however, despite being applied long before gaining independence from the British empire, is still evolving to meet all the disparities that a large multicultural society as such still has (Sowell 25).

This spirit of ongoing evolution can be clearly perceived in the process of stretching the reservation’s social markers to include other factors that have not been previously addressed. Among the new markers is gender, notably after passing the Women Reservation Bill in 2010

which imperatively reserves one third of seats in all the local legislative assemblies as well as of the lower house of the Indian Parliament, The Lok Sabha for women (Das 128). Furthermore, underrepresented religious group, mainly Muslims and Christians, is also another marker that is under the lens of the legislative body, it is backed by the efforts of the Andhra Pradesh's local government to pass the Act No 26 of 2007 which reserves four percent of the newly offered public offices for Muslims and Christians (Alam 220). Indeed, social disparities still exist in modern India despite of adopting the reservation system, but most studies have shown that it has decreased the wide gap between the upper and lower castes, which proves that even if it is not a panacea, it is essential in India's quest to create a classless society through social engineering.

Conclusion

In the beginning, discrimination on basis of race, ethnicity or gender has not been condemned, banned or even regarded as morally unjust ; however, as the social construction of justice evolved, the need for putting an end to this long-dated practice became the demand of the mainstream population, and ultimately laws and provisions were put in place to ensure the prohibition of all forms and types of discrimination ; however, though it became illegal, discrimination persisted and kept its omnipresence in the societies in which it previously existed ; thereby, novel strategies were introduced to mitigate the impact of discrimination on minorities and women, who were historically discriminated against. Among this strategies rose Affirmative Action which is, a pro-active initiative that seeks to establish a legal framework for the government to address the issues related to minorities and women in the United States. The policy was first introduced by J. F Kennedy; however, it was Johnson who signed the Executive Order 11246 which marked the official start of the policy. This latter, according to the Office of Federal Contract Compliance Programs (OFCCP) and the Office of Civil Rights, aims at improving the status of women and minorities in the workplace and in

the institutions of higher education in order to force a societal acceptance of those who were previously discriminated against in the United States as well as all multicultural societies as such. In fact, Affirmative Action, not long after its implementation by the United States government, embarked in a journey around the world to improve the status quo of minorities and women ; though, through a slightly different terminology, for it reached Canada, where it was enforced with the so-called Employment Equity Act, and India where it was introduced under the name : the Scheduled Castes, and the National Economic Policy in Malaysia, as well as with the Equal Employment Equity for women Act in Australia. The next chapter will take on the task of exploring the legislative roots of Affirmative Action in the United States, as well as the main constitutional challenges it faced since its apparition.

CHAPTER TWO: AFFIRMATIVE ACTION AND THE CONSTITUTION

Introduction

In post-bellum America, the United States government felt the urge to create an institutional framework to incorporate the newly emancipated slaves into the social fabric of the nation ; therefore, there have been several heated political debates about the government proposals in terms of the proper mechanisms to empower the once powerless slaves against the retaliation of the loyal subjects of the defeated confederacy , especially in the south where the white supremacists systematically abuse African Americans and tried feverishly to deprive them of their newly earned constitutional status as equal to their white peers ; however, the firm political will of president Abraham Lincoln, and Lyndon Johnson after him, enabled the passage of several historic pieces of legislation that paved the way ahead of even further pro-minorities policies to be introduced despite of the serious resistance from the conservative white establishment which ; though laid down the arms , it actively engaged in a counter legislative effort to achieve through politics what it could not achieve through the Civil War.

This chapter will shed light on the legislative history of Affirmative Action policies, in order to achieve a better understanding in regards to the evolving essence of this proactive initiative as well as to grasp the legal framework of the institutional mechanisms through which the policy is supposed to devise retribution for the throes of past discrimination. It will also present the counter arguments used against the implementation of the policy, all through analyzing the key constitutional challenges of Affirmative Action, and some of the main pertinent cases. And lastly, it will cover the unraveling backlash against Affirmative Action on both the federal and state level.

1 – The Legislative History of Affirmative Action

Away from the currently used terminology, the very essence of the main programs developed in the name of Affirmative Action had been omnipresent prior to the 1960s. This shift in the used terminology as well as in the scope of the policy ; however, goes mainly to the simple fact that Affirmative Action as all similar policies and their enabling legislation, has evolved drastically from its apparition to meet the pressing socio-economic pressures of the modern American society. This section ; thereby, seeks to capture the evolving nature of Affirmative Action through exploring with greater depth the main legislative decrees and provisions that paved the way for Affirmative Action to be the most effective weapon in the nation's long-standing war against discrimination.

1.1 -The Freedmen's Bureau

On March 3, 1865, Abraham Lincoln signed the Bill that established the Bureau of Refugees, freedmen and abandoned lands with General Otis Oliver Howard as his first-ever director (Burks 9); though the decision at the time was made in a short order, the debate about the proper mechanisms to reintegrate the newly freed slaves and the confiscated lands in the South was long-dated. In fact, the very foundations of the bureau were among the list of recommendations submitted by the American Freedmen's Inquiry Commission which was created in March 1863 for the sole purpose of investigating the proper measures to incorporate the recently emancipated slaves into the body of the nation.

The bureau was to oversee an array of programs that comprise a wide range of sectors of great significance to the newly freed slaves and refugees in post-bellum America. In the field of relief services, and over the 15th months that followed the Civil War, the bureau distributed more than 13 million rations of food to destitute freedmen and refugees (Bentley 76) ; however, after severe attacks from the more radical republicans, surprisingly enough, with

the blessing of Andrew Johnson who became the 17th president of the United States after the assassination of Abraham Lincoln, this form of aid was officially terminated by the fall of 1865 under the pretext that it encouraged idleness among the newly emancipated slaves and refugees (Bentley 169) . In the field of land redistribution, which was prompted by General Sherman special field Order No 15 that set aside all the confiscated lands from South Carolina to Florida for the freedmen, was thwarted by president Johnson's pardon that enabled the confederate to restore most of the confiscated land which led to the eviction of thousands of blacks and deprived them from the hope of being economically self-sufficient (Gladstone).

In the field of education, though the original bill restrict the activities of the bureau, the second bill enabled it to establish schools and hire well qualified superintendents and teachers to educate large segments of the black population ; however, with various problems related mostly to underfunding and raised hostility of white supremacists, mainly in the south, most of the bureau's schools were closed, and by July 1872, all the remaining schools and facilities of the bureau were finally closed due to the federal government's decision to officially terminate the Freedmen Bureau.

1.2 - The Executive Order 10925

On March 6, 1961, John F Kennedy signed the Executive Order 10925, which marked the first official use of the term: "Affirmative Action" in a legally binding document (Lederer 103) . The framers of the order, expressly, demanded from contractors "to take affirmative action to ensure that applicants are employed and that employees are treated during employment, without regard to their race, creed, color, or national origin". The executive order also created the President's Committee on Equal Employment Opportunity (PCEEO). The newly established body by then was first created to scrutinize and later to induce a

substantial impact in the hiring practices of the United States government and even in the private sector through encouraging contractors and subcontractors to hire a higher percentage of African Americans in order to gain advantage in signing contracts with the federal government (Tameshine 47).

The PCCEO was chaired by the vice president Lyndon B. Johnson and with the Secretary of Labor Arthur Goldberg as vice chairman, and as members there were: the Administrator of the National Aeronautics and Space Administration, the Secretaries of the Army, Navy and Air Force, the Secretary of Defense, the Secretary of Commerce, the Chairman of the Atomic Energy Commission, the Attorney General, the Administrator of the General Services and the Chairman of the Civil Service Commission. The PCEEEO, under the leadership of Lyndon B. Johnson, launched various initiatives to raise the ratio of employment of African Americans, and among those initiatives was the “Plans For Progress”, which was an equal employment opportunity agreement signed by the major thirty-one contractors with the Department of Defense that voluntarily agreed upon raising the presence of African Americans in their industrial base (The President’s Committee on Equal Employment Committee 108). As further amendments and Executive Orders followed the passage of the Executive Order 10925 , namely the Civil Rights Act of 1964 and the Executive order 11246, the jurisdictions of the PCEEEO were passed on to the newly created agencies and federal offices known as the OFCCP and the EEOC.

1.3 - The Executive Order 11246

On September 24, 1965, Lyndon B. Johnson signed the Executive Order 11246, which came to consolidate the previously issued anti-discrimination laws and provisions that were put in place to prohibit discrimination in the work-related processes , namely the Civil Rights Act of 1964 (Tameshine 49) . The importance of the executive order 11246 derived from the

fact that it transferred the responsibility of ensuring equal employment opportunities to the hands of the Secretary of Labor, which reflected the firm political will to introduce even more reforms to the existing ad hoc legislations. The sort of reforms that impose upon contractors with more than fifty employees who signed contracts that worth equal or more than 50,000 dollars to develop an Affirmative Action plan, and this requirement was introduced in order to improve the representation of minorities and women in the seemingly white males majority workforce (Leiter and Leiter 7).

The Executive Order 11246, unlike the Civil Rights Act of 1964, authorized the Office of Federal Contracts Compliance Programs to suspend, terminate and even review the eligibility of the contractors who violate the requirements stated in the Executive Order in question to compete for future contracts with the federal government (Deslippe 23) . On October 13, 1967, Lyndon B. Johnson signed the Executive Order 11375, which was an amendment of the Executive Order 11246, adding discrimination on basis of “sex“ to the list of the prohibited practices by the aforementioned Executive Order (Deslippe 22). Though the Civil Rights Act of 1964 expressly stated discrimination on basis of “sex“ among the prohibited discriminatory practices, numerous accounts has revealed that it was added right before the official draft of the bill (Bennaa 47), which makes the first amendment of the Executive Order 11246, the first official commitment granted by the United States government to the feminists’ cause amid the tumultuous 1960s. In the same direction, the second amendment to the Executive order 11246 was introduced in 2014, when President Barack Obama signed the Executive Order 13672. In which the term “ sex “ was replaced by “ gender identity “ in order to ban all forms of discrimination on basis of sexual orientation which was meant by then to reflect America’s firm commitment to the cause of the LGBT (Chambers).

1.4 -The Executive Order 11365

On July 28, 1965, Lyndon B. Johnson signed the Executive Order 11365, this latter by then established the National Advisory Commission on Civil Disorders, also known as Kerner Commission, after its chairman Otto Kerner Jr. the Commission was created to investigate the underlying reasons behind the civil unrest and the violent riots which spread all over the country since 1965, and also to recommend further measures for the government to take in order to prevent future similar incidents (Humanity in Action 11) . The finding of Kerner's Commission, published seven months after its creation, has declared that the deeply-rooted segregation mentality within the various institutions, whether on state or even federal level, is responsible for the unprecedented riots at the time (Alice) ; thereby, as a pre-emptive action, the commission urged the government to replace the previously followed policy of concentration which was based on the confinement of the poor African American communities within the most deprived inner parts of the city (The National Advisory Commission on Civil Disorders 118).

However, what it is remarkable is that the very creation of a Commission as such was a sign of change in black related issues from the white establishment in the United States. The change was also present in the final report because, for the first time, an appointment Committee expressly condemned the brutality of the police whilst trying to disperse the demonstrations (The National Advisory Commission on Civil Disorders 176) , and criticize the poor economical conditions in which African Americans, all along with various minorities, were living (The National Advisory Commission on Civil Disorders 136)which if not altered through some serious reforms in the existing employment policies, would lead to even more exacerbated forms of protests. The Executive Order 11365; thereby, set a precedent in terms of fostering a new approach to the long-dated racial tensions that continued to pile in the post Civil War era, and it is this precedent that later paved the way for

the enablement of the underrepresented minorities and women in terms of ensuring a more fair and equal employment opportunities for all Americans regardless of their origin, race, ethnicity or gender.

1.5 - Title VI and VII of the Civil Rights Act of 1964

In the 1960s, the Civil Rights movement, in its pursuit to vocalize the suffering of the long suppressed voice of African Americans, and put an end to the unjust segregation laws, has successfully led to the enactment of the most influential pieces of legislation in the history of the United States: Title VI and VII of the Civil Rights Act of 1964. Though they are seemingly alike , there is a significant difference between the two aforementioned acts which lays in the institutions entitled with the legal jurisdiction to enforce these acts, as well as in the type of protection they both offer to different people, and that leads to the question of “What Is The Difference Between Title VI And Title VII Of The Civil Rights Act? “.

Title VI of the Civil Rights act of 1964, which is more lenient in comparison to title VII, prohibits discrimination on basis of color, race or gender within the institutions, organizations or even societal programs that receive any form of aid from the federal government ; thereby, this legislation enables the agencies under which the assistance is offered to review or even terminate it accordingly ; however, it is the Department of Justice that has the right to proceed with a legal action under the recommendation of the federal agencies in question (Beckman 56) . Title VII of the Civil Rights Act of 1964, and similar to title VI , prohibits discrimination on basis of race, ethnicity, national origins and gender, mainly in the field of employment, education and voting; however, it entrusted the Equal Employment Opportunity Commission to oversee the enforcement of the act (Beckman 57).

In1972, the Equal Employment Opportunity Act amended the Civil Rights Act of 1964, and expanded its application to the states’ jurisdictions. Furthermore, and despite the fears of

undermining the momentum of the civic struggle undertaken by the African American community, the adding of the term “sex“ to the list of criteria on basis of which discrimination was banned has proven to be more than a lexical choice, especially after banning the use of “male only“ job notices, and the passage of the Pregnancy Discrimination Act of 1978 (Bennaa 48) . However, the Act ; though considered as a landmark in the field of Civil Rights, it did not contain any clause relating to the enablement of Affirmative Action, for it put the elimination of discrimination as its primary task (Deslippe 2) . This ; however, stands in sharp contrast to the sine qua non of Affirmative Action which focuses more on retribution in terms of enabling minorities and women, as well as offering them a preferential treatment rather than fighting discrimination.

2 – The Institutional Incorporation of Affirmative Action in the Federal Framework

In order for Affirmative Action to achieve the goals for which it was originally created, the gradual mise en œuvre of an array of agencies and offices within the various branches of the federal government had been more than necessary. These newly created institutions, all along with the enabling legislative provisions put in place to ensure the constitutionality of the establishment of institutions as such, are what enable Affirmative Action to function properly within the existing legislative body. This section; thereby, seeks to provide a detailed description of the various agencies and offices within the different branches of the federal government that are of great significance to the application of Affirmative Action.

2.1 -The Equal Employment Opportunities Commission

On July 2, 1965, and in compliance with the Civil Rights Act of 1964, a new federal agency known as The Equal Employment Opportunities Commission was established (Beckman 145). The essential aim of the agency at the time was to ensure the enforcement of the Civil Rights laws issued in the Civil Rights Act of 1964, and those related to

discrimination in the workplace stated in the Equal Pay Act of 1963 (Anderson 134); however, the once complete dependence on the aforementioned statutes had evolved drastically to include a wide variety of pertinent provisions. This evolution in the legislative instruments used by the EEOC has rendered it more able to deal with the rising challenges of discrimination in the workplace and to break free from the restrictions of its own bylaws.

Originally, the extent to which the EEOC could be involved in the conflict between the employee and the employer was so limited (Anderson 90); however, and after the enactment of the Equal Employment Opportunity Act of 1972, the agency could file a lawsuit on behalf of the employer who has been discriminated against in federal Court (Deslippe 34). The transfer of the authority of enforcing the Equal Pay Act of 1963 and the Age Discrimination Act of 1967 from the Department of Labor to the EEOC and Subsequent amendments to the EEO Act of 1972 also enabled the agency to take part in class-action suits against private employers, and lowered the coverage threshold to 15 members which was previously setup to be 25 under title VII of the Civil Rights Act (Rivers 461). In the 1990s, the EEOC had gained even more legislative victories after the enactment of the Americans with Disabilities Act of 1990 and the Civil Rights Act of 1991, which broadened its jurisdiction and allowed it to target discrimination in the workplace with more efficiency than ever before (Beckman 114).

In the present time, the EEOC has been entrusted with the responsibility of the evaluation and approval of all the Affirmative Action plans developed by each and every branch of the federal government, as well as offering guidance to other agencies and private firms in related issues.

2.2 - The Minority Business Development Agency

On March 5, 1969, Richard Nixon, and as a gesture of recognition for the importance role of minorities-owned businesses in the overall performance of the national economy ,

established the Office of Minority Business Enterprise and the Advisory Council for Minority Business via the Executive Order 11458 (Beckman 40). Few months after, and under the leadership of Thomas Roasner, the first director of the OMBE, the agency, in coordination with the US Census Bureau, launched its first and most ambitious plan to conduct a survey through which it could list all minorities-owned enterprises ; however, it was not until 1972 when the results of the first survey was finally published. According to the findings, 322000 businesses, at the time, were minorities-owned which represented 10.6 billion dollars with African Americans owning 163.000 of these businesses, and 100.000 for the Hispanics “The history of the MBDA“.

In 1971, Nixon appointed General Motor’s head of urban affairs , Abraham Venable , as the first minority head of the OMBE, and signed the Executive Order 11625 which broadened the extent to which the OMBE could interfere to help minorities-owned businesses, and this through enabling it to offer grants to public as well as private organizations “ Executive Orders “. In 1979, the OMBE was renamed the Minority Business Development Agency “The history of the MBDA “which reflected more the government’s commitment to the much smaller minorities-owned businesses. This commitment was translated through a presidential proclamation that made the first week of October the week of the Minorities Development Enterprise week, and via issuing the Executive Order 12432, which instructed the US Department of Commerce and the Small Business Administration to give aid and assistance to all the programs and plans developed by the MBDA to support and foster minorities-owned businesses “The history of the MBDA“. Currently, the expansion of the MBDA continues geographically through the establishment of more field offices in all the states, as well as structurally through expanding the scope of the agency to include other minorities especially after the creation of the Native American Entrepreneurship and Trade in 2005. The MBDA also continues its long-dated partnership with the US Census Bureau to keep track of

the rapidly evolving minorities-owned businesses.

2.3 - The Office of Federal Contracts Compliance Programs

In 1978, Jimmy Carter signed the Executive Order 12086, which created the Office of Federal Contracts Compliance Programs within the Department of Labor (Executive Order). The establishment of the OFCCP had been historically prompted by the Executive Order 8802 in 1941 which prohibited discrimination on basis of race or ethnicity by contractors wishing to sign federal contracts with the U.S Department of Defense (Halson 1). The first legislative step on the road towards the establishment of the OFCCP; however, could be traced back to 1951, when Harry S Truman signed the Executive Order 10308 which created the Anti-discrimination Committee on Government Contracts Compliance (Simmors 12).

The aforementioned Executive Order, all along with subsequent amendments signed by Dwight D Eisenhower in 1953, had paved the way for more structural reforms that took place in 1965, right after signing the Executive Order 11246 which transferred the responsibility of the OCCP to the Department of Labor (Halson 4) . Among these structural reforms comes the criterion of discrimination which was greatly expanded, first through the Executive Order 11375 that added gender discrimination to the list of the prohibited discriminatory practices (Bennaa 58) , and second, through the enactment of the Rehabilitation Act of 1973, and the Vietnam Era Veterans Readjustment Act of 1974 (“Vietnam Era Veterans’ Readjustment Assistance Act Of 1974, As Amended”) , which all together prohibit any sort of discrimination against veterans and the disabled. This expansion in the scope of the criterion eventually led to renaming the OCCP to the OFCCP in 1975 (Lederer 105), in order to reflect the federal jurisdiction that the once named “OCCP” has obtained after the enactment of the enabling legislation. Currently, the OFCCP ensures that contractors and subcontractors who are wishing to sign contracts with any branch of the federal government are abiding the fair

and equal opportunity laws that were put in place to eliminate discrimination on basis of race, gender, ethnicities, and disability.

3 – The Constitutional Challenges of Affirmative Action

Affirmative Action in Antidiscrimination law and policy underwent a substantial amount of constitutional challenges and turbulence ever since it first took effect and even till this day due to the shifty parameters attached to the variables of race and gender, and how the consideration of those factors in cases of admission and employment causes discrepancies and inconsistencies in terms of forming final verdicts by The Supreme Court.”Affirmative action often gives rise to controversy in American politics. Supporters argue that affirmative action is still needed to counteract continuing bias and prejudice against women and minorities. Opponents argue that these policies amount to discrimination against other minorities, such as Asian Americans, which entails favoring one group over another based upon racial preference rather than achievement, and many believe that the diversity of current American society suggests that affirmative action policies succeeded and are no longer required”. Said Douthat, Ross (June 15, 2009). "*Affirmative Action*". The New York Times).

Many scholars and justices saw that affirmative action grew hypocritical to its original meaning and purpose as it led to unintended consequences due to the blurry line between what is considered to be “narrowly tolerated” and unconstitutional by the Supreme Court. According to “Jeremy R. Green, *Affirmative Action: Challenges and Opportunities*” Opponents to affirmative action claim the following:

- (1) it violates the Equal Protection clause of the Fourteenth Amendment ("Equal Protection Clause" which guarantees a citizen's right to the equal use of public facilities without discrimination based on race;
- (2) it violates 42 U.S.C. § 1981 ("Section 1981") which ensures that all persons within the within the jurisdiction of the United States shall have the same

right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens; 3) it violates 42 U.S.C. § 1983 ("Section 1983") which creates a civil action against any person who deprives an individual of their civil rights under color of state law; and (4) it violates Title VI of the Civil Rights Act of 1964 ("Title VI") which prohibits race based discrimination by any organization receiving federal funds.(140/141)

According to “Menand, Louis. *The Changing Meaning of Affirmative Action.*” (The New Yorker, 13 Jan. 2020) the dilemma was described as follows:

The terrible paradox of the civil-rights movement is that outlawing racial discrimination made it harder to remediate its effects. Once we amended the Constitution and passed laws to protect people of color from being treated differently in ways that were harmful to them, the government had trouble enacting programs that treat people of color differently in ways that might be beneficial. We took race out of the equation only to realize that, if we truly wanted not just equality of opportunity for all Americans but equality of result, we needed to put it back in. Our name for this paradox is affirmative action.

There is also the argument of “Reverse Discrimination” (Reverse discrimination is a term for discrimination against members of a dominant or majority group, in favor of members of a minority or historically disadvantaged group) , Jennifer Pierce, the author of *Racing for Innocence: Whiteness, Gender, and the Backlash against Affirmative Action*, gave mention to one of the most dominant opponents of Affirmative Action, Frederick Lynch; a white sociologist, the author of *Invisible Victims: White Males and the Crisis of Affirmative Action*. Pierce spoke on the argument of “Reverse discrimination”. On page 23/24, Pierce says the

following:

Based on interview with thirty-two white men from around the United States who claimed to be victims of reverse discrimination, either through loss of promotions, job reassignments, or terminations (non complained of discrimination in hiring), Lynch Argued that affirmative action hurt white men.

The 2019 article By “Feingold, Jonathan P, *Hidden in Plain Sight: a More Compelling Case for Diversity*”, entails the following:

For four decades, the diversity rationale has offered a lifeline to affirmative action in higher education. Yet even after forty years, this critical feature of equal protection doctrine remains constitutionally insecure and politically fraught. Legal challenges persist, the Justice Department has launched a new assault on race-conscious admissions, and an impending shift on the Supreme Court could usher in an era of increased hostility toward the concept of diversity itself. The future of race-conscious admissions arguably hangs in the balance.

3.1 -Affirmative Action under the lens of the Supreme Court

Some U.S. Supreme Court decisions have allowed colleges and firms to consider race as long as it is “narrowly tailored” to promote diversity which later on became a controversial point as parameters became too tricky, unreliable, and unpractical to be used in an absolute manner .

The ruling on some affirmative action cases has not been consistent as key cases will later on show the discrepancies regarding the conclusions of some cases, as well as the clashing opinions voiced by Supreme Court Justices and political analysts divided between supporters and opponents.

3.1.1 - Affirmative Action and the Strict Scrutiny Test

Strict scrutiny is a form of judicial review that supreme courts use to determine the constitutionality of certain laws, It was introduced in Footnote 4 of the U.S. Supreme Court decision in *United States v. Carolene Products Co.* (1938), mainly invoked in an equal protection claim, infringement upon a fundamental right, and suspect classification, which includes race, national origin, religion, gender...etc, its use is mandatory since Affirmative Action programs constitute suspect classification, or preferential treatment based on race and other discriminatory criteria. It is regarded as the highest and most stringent standard of judicial review and In order to pass strict scrutiny, the legislature must have passed the law to further a "compelling governmental interest,"

3.2 - Key Cases and Lawsuits

Throughout history, various lawsuits with the claims of civil right infringements, unequal protection, and suspect classification had took place, and some of them are regarded as key cases due to their import contributions to the overall view and approach to affirmative action by the Supreme Court, and they are as follows:

3.2.1 - Adarand Constructors, inc. v. Peña

Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995) was a landmark United States Supreme Court case which held that racial classifications, imposed by the federal government, must be analyzed under a standard of "strict scrutiny," (*Adarand Constructors, Inc. v. Peña*, 1995) was as follows

Adarand, a contractor specializing in highway guardrail work, submitted the lowest bid as a subcontractor for part of a project funded by the United States Department of Transportation. Under the terms of the federal contract, the prime contractor would receive additional compensation if it hired small

businesses controlled by "socially and economically disadvantaged individuals." [The clause declared that "the contractor shall presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities...." Federal law requires such a subcontracting clause in most federal agency contracts]. Another subcontractor, Gonzales Construction Company, was awarded the work. It was certified as a minority business; Adarand was not. The prime contractor would have accepted Adarand's bid had it not been for the additional payment for hiring Gonzales.

The case posed the question of "Is the presumption of disadvantage based on race alone, and consequent allocation of favored treatment, a discriminatory practice that violates the equal protection principle embodied in the Due Process Clause of the Fifth Amendment?" and the conclusion was as follows:

Yes. Overruling *Metro Broadcasting* (497 US 547), the Court held that all racial classifications, whether imposed by federal, state, or local authorities, must pass strict scrutiny review. In other words, they "must serve a compelling government interest, and must be narrowly tailored to further that interest." The Court added that compensation programs which are truly based on disadvantage, rather than race, would be evaluated under lower equal protection standards. However, since race is not a sufficient condition for a presumption of disadvantage and the award of favored treatment, all race-based classifications must be judged under the strict scrutiny standard. Moreover, even proof of past injury does not in itself establish the suffering of present or future injury. The Court remanded for a determination of whether the Transportation Department's program satisfied strict scrutiny.

3.2.2 - Marco DeFunis Jr. v. Odegaard

DeFunis v. Odegaard, 416 U.S. 312 (1974) “ARGUED Feb 26, 1974 DECIDED Apr 23, 1974”, was a United States Supreme Court case in which the Court held that the case had become moot (subject to debate, dispute, or uncertainty) and so declined to render a decision on the merits. (*DeFunis v. Odegaard*, 1974) was as follows:

DeFunis was denied admission to the University of Washington Law School despite test scores that were higher than some of the minorities admitted. DeFunis then successfully asked a trial court to require the school to admit him. On appeal, the Washington Supreme Court reversed, upholding the school's decision to deny DeFunis admission. The U.S. Supreme Court considered the case as DeFunis was entering his final year of school.

With that came this question: “Was the case in question moot and therefore outside the scope of judicial review?” and the conclusion of the case was as follows:

In a 5-4 per curiam opinion (a ruling issued by an appellate court of multiple judges in which the decision rendered is made by the court (or at least, a majority of the court) acting collectively (and typically, though not necessarily, unanimously), the Court held that because the University of Washington Law School had agreed to allow DeFunis to enroll and to earn a diploma, the case in question was moot. DeFunis would be able to complete his legal studies irrespective of any Supreme Court decision. The controversy between parties had thus "clearly ceased to be 'definite and concrete' and no longer 'touch[ed] the legal relations of parties having adverse legal interests.'"

3.2.3 - Regents of the University of California v. Bakke

Regents of the University of California v. Bakke, 438 U.S. 265 (1978) “ARGUED Oct

12, 1977 DECIDED Jun 26, 1978”, was an interesting case to say the least, it was a landmark decision by the Supreme Court of the United States. (*Regents of the University of California v. Bakke*, 1978) was as follows:

Allan Bakke, a thirty-five-year-old white man, had twice applied for admission to the University of California Medical School at Davis. He was rejected both times. The school reserved sixteen places in each entering class of one hundred for "qualified" minorities, as part of the university's affirmative action program, in an effort to redress longstanding, unfair minority exclusions from the medical profession. Bakke's qualifications (college GPA and test scores) exceeded those of any of the minority students admitted in the two years Bakke's applications were rejected. Bakke contended, first in the California courts, then in the Supreme Court, that he was excluded from admission solely on the basis of race.

The question raised was this: “Did the University of California violate the Fourteenth Amendment's equal protection clause, and the Civil Rights Act of 1964, by practicing an affirmative action policy that resulted in the repeated rejection of Bakes’ application for admission to its medical school?” and the conclusion was as follows:

No and yes. There was no single majority opinion. Four of the justices contended that any racial quota system supported by government violated the Civil Rights Act of 1964. Justice Lewis F. Powell, Jr., agreed, casting the deciding vote ordering the medical school to admit Bakke. However, in his opinion, Powell argued that the rigid use of racial quotas as employed at the school violated the Equal Protection Clause of the Fourteenth Amendment. The remaining four justices held that the use of race as a criterion in admissions decisions in higher education was constitutionally permissible. Powell joined that opinion as well, contending that the use of race was

permissible as one of several admission criteria. So, the Court managed to minimize white opposition to the goal of equality (by finding for Bakke) while extending gains for racial minorities through affirmative action.

3.2.4 - Grutter v. Bollinger

Grutter v. Bollinger - 539 U.S. 306 (2003) “ARGUED Apr 1, 2003 DECIDED Jun 23, 2003” was a case that dealt with the claim that the University of Michigan and Law School use of racial preferences in student admissions violates the Equal Protection Clause of the Fourteenth Amendment. The lawsuit was filed by Barbara Grutter, a white resident of Michigan who applied for admission to the University of Michigan and was denied admission. The Law School admits that it uses race as a factor in making admission decisions because it serves a "compelling interest in achieving diversity among its student body." The lawsuit raised the question of; does the University of Michigan's use of racial preferences in undergraduate admissions violate the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964? (*Grutter v. Bollinger*, 2003) was as follows:

In a 5-4 opinion delivered by Justice Sandra Day O'Connor, the Court held that the Equal Protection Clause does not prohibit the Law School's narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body. The Court reasoned that, because the Law School conducts highly individualized review of each applicant, no acceptance or rejection is based automatically on a variable such as race and that this process ensures that all factors that may contribute to diversity are meaningfully considered alongside race. Justice O'Connor wrote, "In the context of its individualized inquiry into the possible diversity contributions of all applicants, the Law School's race-conscious admissions program does not unduly harm nonminority applicants."

3.2.5 - Gratz v. Bollinger

Gratz v. Bollinger, 539 U.S. 244 (2003) “ARGUED Apr 1, 2003 DECIDED Jun 23, 2003”, was a United States Supreme Court case regarding the University of Michigan undergraduate affirmative action admissions policy. (*Gratz v. Bollinger*, 2003) was as follows:

In 1995, Jennifer Gratz and Patrick Hamacher both applied for admission to the University of Michigan’ College of Literature, Science, and the Arts (LSA) as residents of the state of Michigan. Both are of Caucasian descent. Both were denied admission and told that, although they were qualified, they were not competitive enough applicants to be admitted on first review. In October 1997, Gratz and Hamacher filed a class action suit against the University, the LSA, Lee Bollinger, and James Duderstadt. They argued that the admission procedure discriminated against certain racial and ethnic groups in violation of the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964.

Chief Justice William H. Rehnquist delivered the opinion for the 6-3 majority. The Court held that the OUA’s (Office of Undergraduate Admissions) policies were not sufficiently narrowly tailored to meet the strict scrutiny standard. Because the policy did not provide individual consideration, but rather resulted in the admission of nearly every applicant of “underrepresented minority” status, it was not narrowly tailored in the manner required by previous jurisprudence on the issue. In her concurring opinion, Justice Sandra Day O’Connor wrote that the record showed that the only individualized consideration in the admissions process came through the Admissions Review Committee. Because the

Committee played only a small part in the overall admissions process, it was not sufficient to satisfy the strict scrutiny standard. Justice Clarence Thomas wrote a separate concurring opinion in which he argued that the Equal Protection Clause prohibits any racial discrimination for the purposes of higher education admission.

4 – The State Referendum on Affirmative Action

Throughout history, ten states in the US have banned affirmative action since it first took effect: California (1996), Texas (1996), Washington (1998), Florida (1999), Michigan (2006), Nebraska (2008), Arizona (2010), New Hampshire (2012), Oklahoma (2012), and Idaho (2020). However, Texas's ban with *Hopwood v. Texas* was reversed by (*Grutter v. Bollinger*, 2003), leaving nine states that currently ban the policy. Furthermore, those states in combination equal up to more than 29% of all U.S. high school students. Amid the bans, the after effect was a significant drop in regards to the enrollment rates of minorities.

In 2019, referendum 88 on affirmative action was on the ballot in Washington State, voters were asked whether minority status should be considered as a contributing factor in state employment, contracting and admission to public colleges. Referendum 88 contained Initiative 1000 that was set to amend 1998's Initiative 200 (entails that state government is prohibited from discriminating against or giving preferential treatment to individuals or groups based on race, sex, color, ethnicity, or national origin in public in public employment, public education, or public contracting. The Referendum was rejected by 50.4% of voters with a margin of just over 13,000 votes. (O'Sullivan, Joseph. "*With the Loss of Referendum 88, Affirmative-Action Advocates Wonder What's next. Inslee Offers Some Answers.*" The Seattle Times, 28 Dec. 2019)

4.1 - The California Civil Rights Initiative: Proposition 209

Proposition 209 (also known as the California Civil Rights Initiative or CCRI) is a California ballot proposition which, upon approval in November 1996, amended the state constitution to prohibit state governmental institutions from considering race, sex, or ethnicity, specifically in the areas of public employment, public contracting, and public education. Modeled on the Civil Rights Act of 1964, the California Civil Rights Initiative was authored by two California academics, Glynn Custred and Tom Wood. It was the first electoral test of affirmative action policies in North America. It passed with 55% in favor to 45% opposed. Proposition 209 underwent various legal challenges, On November 27, 1996; U.S. District Court Judge Thelton Henderson blocked enforcement of the proposition. A three-judge panel of the 9th Circuit Court of Appeals subsequently overturned that ruling. Proposition 209 has been the subject of many lawsuits in state courts since its passage but has withstood legal scrutiny over the years. On August 2, 2010, the Supreme Court of California found for the second time that Proposition 209 was constitutional. The ruling, by a 6-1 majority, followed a unanimous affirmation in 2000 of the constitutionality of (Proposition 209) by the same court. On April 2, 2012, the 9th U.S. Circuit Court of Appeals rejected the latest challenge to Proposition 209. The three-judge panel concluded that it was bound by a 9th Circuit ruling in 1997 upholding the constitutionality of the affirmative action ban. Ninth Circuit Judge A. Wallace Tashima disagreed in part with the ruling, saying he believes the court "wrongly decided" the issue in 1997.

Proposition 209 had a noticeable impact on enrollment, graduation, and income. According to UC Office of the President, "Proposition 209 instigated a dramatic change in UC admissions policy, with URG [under represented group] enrollment at the Berkeley and UCLA campuses immediately falling by more than 60 percent and systemwide URG enrollment falling by at least 12 percent." The same report concluded that "Prop 209 led URG

applicants to cascade out of UC into measurably less-advantageous universities, which combined with declines in degree attainment and STEM persistence to lower each URG applicant's wages by about 5 percent between ages 23 and 35."

4.2 - The Michigan Civil Rights Initiative: Proposition 2

The Michigan Civil Rights initiative was influenced by, and modeled after The California Civil Rights initiative. Michigan Proposal 2, the Affirmative Action Initiative, was an initiated constitutional amendment on the November 7, 2006 ballot in Michigan, where it was approved but later overturned by the U.S. 6th Court of Appeals. Then, on April 22, 2014, that ruling was overturned and the amendment was upheld by a ruling of the U.S. Supreme Court ("CNN," "*Michigan's ban on affirmative action upheld by Supreme Court,*" April 22, 2014). According to Michigan law, the proposal became law on December 22, 2006, but was legally challenged. Furthermore, the article by "Adler, Jonathan (2014-04-22). "*Supreme Court upholds Michigan civil rights initiative*". The Washington Post, entails the following:

...the U.S. Supreme Court decided *Schuette v. Coalition to Defend Affirmative Action, Integration and Immigration Rights and Fight for Equality By Any Means Necessary*, concluding 6-2 that a Michigan ballot initiative providing that the state, including state educational institutions, may not "discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education or public contracting." The U.S. Court of Appeals for the Sixth Circuit, sitting en banc, had concluded that this amendment, as applied to public universities, violated the Equal Protection Clause of the Fourteenth Amendment.

Six justices voted to uphold the constitutionality of Michigan's ballot initiative, albeit on different grounds. Justice Anthony Kennedy, joined by Chief Justice John Roberts and Justice

Samuel Alito, concluded that the Constitution does not preclude states from deciding whether to allow racial preferences through a ballot initiative. Justice Antonin Scalia, joined by Justice Clarence Thomas, went further, suggesting that the cases upon which the U.S. Court of Appeals for the Sixth Circuit had relied should be overruled. Justice Stephen Breyer joined the result, but only insofar as it applied to the use of racial preferences to increase diversity in educational institutions. Justice Sonia Sotomayor, joined by Justice Ruth Bader Ginsburg, dissented. Justice Elena Kagan was recused.

4.3 - The Nebraska Civil Rights initiative: Initiative 424

Nebraska Measure 424, the Affirmative Action Initiative, was on the ballot in Nebraska on November 4, 2008. According to “BlackPast, B. (2012, November 03). (2008) *Nebraska Civil Rights Initiative*” also known as Initiative 424, entails the following:

A Constitutional amendment to prohibit the state from discriminating against, or granting preferential treatment to any individual or group on the basis of race, sex, color, ethnicity, or national origin in public employment, public education or public contracting; to apply the amendment only to action after the amendment’s effective date; to allow bona fide qualifications based on sex that are reasonably necessary; to exempt any court order or consent decree that is in force as of the effective date of this amendment; to provide an exception for certain federal programs; to define state for purposes of the amendment; to provide for remedies; to make the amendment self-executing; to make provision in the event of conflict with federal law or the United States Constitution; and to provide for severability.

According to “LEE , MELISSA. “*Affirmative-Action Ban Passes by Wide Margin*” The results of the ballot were as follows:

Nebraska voters overwhelmingly approved a ban on race- and gender-based affirmative action Tuesday, signaling the likely demise of many public hiring, admissions and scholarship programs that give a leg up to under-represented groups.

The wide margin of (57.56% to 42.44%) victory for the ban, known as Initiative 424, indicates the prospect of ending racial and gender preferences “struck a chord” with Nebraskans, said Ward Connerly, head of the American Civil Rights Institute. That’s the California-based group that has spearheaded similar bans in three other states.

5 - The Limits of Affirmative Action

It is rather normal and expected for any policy to have limitations, and Affirmative Action is no different. In the case of (*Gtarz v.Bollinger*, 2003), Justice Sandra Day O'Connor noted that sometime in the future, perhaps twenty-five years hence, racial affirmative action would no longer be necessary in order to promote diversity. It implied that affirmative action should not be allowed permanent status and that eventually a "colorblind" policy should be implemented and that same view was echoed by Justice Thomas in his dissent.

American conservative, political analyst, blogger, author and New York Times columnist Ross Douthat in a New York Times article "*Race in 2028*" said "Affirmative action has always been understandable, but never ideal. It congratulates its practitioners on their virtue, condescends to its beneficiaries, and corrodes the racial attitudes of its victims." which alludes to the idea of stigma and reverse discrimination.

5.1 - The Conformity of Affirmative Action with the International Laws

Law regarding racial quotas and affirmative action varies widely from nation to nation based on historical, social, religious, and political characteristics, causing each of them to adopt, apply, and adjust accordingly.

In some countries that have laws on racial equality, affirmative action is rendered illegal due to unequal treatment of races. This approach of equal treatment is sometimes described as being "color blind", in hopes that it is effective against discrimination without engaging in reverse discrimination. All of that led to the creation of certain provisions, initiatives, and propositions in attempt to set clear guidelines to tame the changing meaning of affirmative action to a point where it becomes fixed and undebatable.

5.2 - Title 29 CFR of the EEOC

According to Van Loo, Rory (2018-08-01). "*Regulatory Monitors: Policing Firms in the Compliance Era*" The U.S. Equal Employment Opportunity Commission (EEOC) is a federal agency that was established via the Civil Rights Act of 1964 to administer and enforce civil rights laws against workplace discrimination. The EEOC investigates discrimination complaints based on an individual's race, color, national origin, religion, sex, age, disability, sexual orientation, gender identity, genetic information, and retaliation for reporting, participating in, and/or opposing a discriminatory practice.

CFR Title 29 of the EEOC came to address affirmative action in relation to labor. It is one of fifty titles comprising the United States Code of Federal Regulations (CFR), containing the principal set of rules and regulations issued by federal agencies regarding labor, in attempt to achieve equal protection/employment opportunities by eliminating the consideration of race as the only deciding factor during the processes of reviewing job applications.

5.3 - Title 41 of the OFCCP

The Office of Federal Contract Compliance Programs (OFCCP) is part of the U.S. Department of Labor. OFCCP is responsible for ensuring that employers doing business with the Federal government comply with the laws and regulations requiring nondiscrimination. This mission is based on the underlying principle that employment opportunities generated by

Federal dollars should be available to all Americans on an equitable and fair basis.

Title 41 of the Code of Federal Regulations ("CFR"), titled Public Contracts and Property Management, is the portion of the CFR that governs federal government public contracts within the United States. CFR Title 41 Chapter 60: Public Contracts and Property Management entails that contractors and subcontractors are prohibited from discriminating against applicants or employees because they inquire about, discuss, or disclose their compensation or that of others, subject to certain limitations.

Conclusion:

The long legislative history of Affirmative Action is a vast ground to cover, but what is most important is the steps of its turbulent growth. The first half of this chapter shows how Affirmative Action was implemented into the societal framework (higher education and employment) and how the general public reacted to its application. Due to the controversial history of Affirmative Action, it was mandatory to dive deeper into the legislative side of Affirmative Action and the numerous constitutional challenges it faced on both the state and federal level by tracing what gave rise to the policy, the stages that shaped it, and the ramifications. With the societal aspect, comes the federal aspect, which includes the institutional implementation of Affirmative Action into the Federal framework of the government, and with that comes the existence of certain commissions, programs, and agencies such as (EEOC, OFCCP, and MBDA) in attempt to safeguard the original purpose of Affirmative Action as well as achieving efficiency and practicality. Moreover, the second half of this chapter showcases the constitutional challenges of Affirmative Action under the lens of the Supreme Court, as well as the Strict Scrutiny measure that was created for the sole purpose of testing the legality of race, gender...etc use in affirmative action cases in attempt to tame the loose parameters when forming a verdict. Throughout history, various lawsuits

with the claims of civil right infringements, unequal protection, and suspect classification had took place, some cases such as (*Adarand Constructors, inc. v. Pena*, 1995), (*Marco DeFunis Jr. v. Odegaard*, 1974), (*Regents of the University of California v. Bakke*, 1978), (*Grutter. v. Bollinger*, 2003) and (*Gratz. v. Bollinger*, 2003) are regarded as key cases due to their import contributions to the overall view and approach to affirmative action. Furthermore, due to the controversial nature of Affirmative Action, propositions, initiatives, and provisions such as (Proposition: 209, Proposition: 2, and Initiative: 424) came in play, the public took initiative and the state referendum on affirmative action across the nation resulted to ten US states banning affirmative action ever since it took place. However, Texas's ban with *Hopwood v. Texas* was reversed in 2003 due to the case of (*Grutter. v. Bollinger*, 2003) leaving nine states that currently ban the policy. Last but not least, the creation of “Title 29 of the EEOC” and “Title 41 CFR of the OFCCP”, as well as the fact that limits on affirmative action and its conformity with the international laws tend to vary from one nation to another. Furthermore, the next chapter will tackle the policy that is Affirmative Action in the political spectrum.

CHAPTER THREE: AFFIRMATIVE ACTION IN THE POLITICAL SPECTRUM

Introduction

Besides the ongoing legislative debate about the prolonged application of Affirmative Action and its long term impact on the nation's obligations under the international law, there has been yet another debate about it ; however, the other perspective entails the compliance of the "sine qua nons" of Affirmative Action with the core values of the various theories of justice and equality, mainly the liberal theories that are more concerned about the fair allocation of resources and punishment in society, and the proper means to achieve it . These liberal theories ; though, they share some common ground in terms of adhering to the government's intervention to rectify any unjust situation through politics, they differ in their perception of justice and equality in a given society ; thereby, they each construct a different point of view to Affirmative Action.

This chapter will shed light on the various liberal theories in order to provide a better understanding of the ideals and values of each of which vis-à-vis the government's proper role in terms of ensuing social justice and equality for all citizens. It will also provide a comparative analysis to the past and present rationale behind the adoption of Affirmative Action policies with reference to the compatibility of both rationales with the core values of the different liberal theories in order to provide a comprehensive explanation of the unintended consequences of Affirmative Action that led to the backlash against most of its policies in the United States.

1 – Affirmative Action in the Classical Liberalism Perspective

Classical liberalists like John Lock and Montesquieu, have more faith in the so-called individualistic societies rather than the conformity of the pluralistic ones, for in the latter the

best interest of society as a whole is put before that of the smaller entities; thereby, individuals, which are the smallest nucleotide of society, are ought to forfeit some of their liberties and freedom for the well being of their community (Jason 4). This ; however, according to the core values of liberal classism, is the first step towards the establishment of an autocracy because the liberties free will of individual are sacred, and the proper role of the government is to preserve and secure these very rights and not to confiscate them under the pretext of the greater good.

In this context, Affirmative Action policies are not justified under the ideals of Classical Liberalism; to these programs they are nothing but coercive measures taken by the state to force a predefined societal change. Indeed, there has been a “noble pretext“, under which these measures were taken, namely to achieve substantive justice for minorities and women; however, this race or even gender conscious justice is nothing but a form of reverse discrimination that punishes the white male majority for the sort of discriminatory practices that they themselves did not engage in (Lawrence 946). Those measures render Affirmative Action policies a clear violation of the individual liberties of a large segment of the American population, and an unjustified intervention on the part of the United States government in the public life.

Moreover, Affirmative Action policies requires contractors and subcontractors to develop an Affirmative Action plan in order to ensure diversity in the workplace, namely through the requirements of the Office of Federal Contracts Compliance Programs, and this sort of exigencies that impose upon employers to hire a certain group of employees but not the others seem to negate the very principle of free choice, and deprives the white males from the sort of rights that are granted and guaranteed under Title VII of United States constitution. The preferential treatment given to minorities and women was also extended into the field of higher education, where the “protected groups “get to be admitted to college though they

have a less scores on their SAT's in comparison to the white males' which fuels the raising feeling of inequality, and cast doubt on the actual goals of Affirmative Action (Lawrence 932).

Furthermore, classical liberalism adhere to the notion of an autonomous society, for in a decentralized society as such, the government ; though remains omnipresent, has little authority to intervene in the public life, where individuals can truly be free from all forms of governmental oppression imposed upon them in the name of the overall good (Jason 61). Affirmative Action policies; however, according to the core values of classical Liberalism, they represent a clear deviation from what the proper role of a democratically-elected government should be because through the empowerment of minorities and women, the United States government had seized the individual's right to decide for themselves the sort of societal and legislative change needed to rectify the existing socio-economic disparities among different members of society. Though there is a general consensus that minorities and women have been in fact the victims of detrimental discrimination, the creation of Affirmative Action policies was merely the work of the political establishment that sought to remedy the impact of past discrimination via reverse discrimination, which raises some serious concerns about the precedent set by the successive United States governments in terms of upholding race and gender conscious justice over color blind justice which is a clear violation of the spirit and letter of the American constitution.

2 – Affirmative Action in the Neo-liberalism Perspective

Similar to the ideals of Classical Liberalism, Neo-liberalism adheres to a minimal government, and embraces the principles of the free market economy in which the private sector is the one responsible for the creation, transformation, and distribution of wealth. Whereas the role of the state is only to accommodate these operations through ensuring they

are in compliance with the ad hoc legislative provisions put in place to guarantee transparency and fair trade between all economic actors (Davies 210). Neo-liberalism ; however, in contrast to classical liberalism, has been gradually implemented into the deeply rooted political and economic traditions of the Western World in general, and in the United States in particular, namely through the economic reforms executed by Ronald Reagan amid the 1980s (Tingle 299).

The United States government, in conformity with the core values of Neo-liberalism, actively engaged in the process of privatization of many industries and institutions previously owned by the state (Tingle 300). This process of intense privatization; however, implies the deregulation of the economy and this was only made possible through two main policies; (1) through gradually dismantling the existing programs that served as a safety net for the less fortunate citizens of the state in order to minimize public funding and offer new opportunities of investments for the companies of the private sector; (2) the government sought to revise the existing legislative decrees and provisions related to the hiring practices which was put in place to ensure the integration of minorities and women in order to give private companies the liberty to choose their employees the way they see fits.

In this context, Affirmative Action policies were put in place to enforce a certain hiring practice within the public and private sector alike in order to enhance diversity in the workplace through the empowerment of minorities and women by giving them equal opportunities as those given to their white male compatriots. This kind of preferential treatment ; however, is rejected almost by all the core values of Neo-liberalism because it shackles the private companies and forces upon them this sort of mandatory options of labor that may not be in the best interest of these aforementioned companies (Torres 44) . Furthermore, the Neo-liberalist approach towards the socio-economic disparities in society is very basic, for it suggests the adoption of color blind justice rather than retributive justice.

Henceforth, this kind of justice implies the complete neutrality of the state which would eventually lead to social cohesion, and this is justified by the existence of a set of provisions that prohibit discrimination which render Affirmative Action policies a form of bias on the part of the government against a certain group of citizens.

Moreover, Affirmative Action policy is a form of governmental intervention to engineer diversity in various areas of society. This intervention; however, stands in sharp contrast to the ideals of Neo-liberalism. This latter favors a minimal government intervention and; subsequently, the aforementioned programs are a stark deviation from the proper role of a democratically-elected government that seriously jeopardizes the economic model of the free market. Furthermore, the United States government, and in order to ensure that Affirmative Action policies are well placed within the legislative and executive body, has created a wide range of intergovernmental agencies and federal offices within the federal government. Subsequently, the overexpansion of the administrative body required a large amount of tax payers money which called upon enacting even new taxes on the profits to be generated from the revenues of the companies working in the private sector, and this measure is against the core values of Neo-liberalism, that is to say that the proliferation of corporate taxes and the over expansion of government spending render Affirmative Action policies incompatible with the ideals of Neo-liberalism.

3 – Affirmative Action in the Egalitarian Liberalism Perspective

Unlike the political theory of liberalism which is based upon the assertion of the individuals' liberties and the belief that their autonomous will, above all else, is what sets the pace for the society in which they all live collectively (Sandel and Rawls 1765). Moreover, Egalitarianism considers equality among the most essential goals at which all public policies should aim; subsequently, the mitigation of the socio-economic inequalities within any given

society deserves to be put at the pinnacle of the local government's priorities regardless of which modern political theory this government favors (Afolayn 3).

Egalitarians, throughout the various phases of evolution that egalitarianism has been forced to finally merge with Liberalism, criticizing the unjust allocation of resources in modern societies which has enormously widened the gap of economical disparities between different members of society. In contemporary societies, the allocation of resources is based upon a democratic free market, one in which the distribution of resources relies exclusively on the people's free choice to obtain services and goods according to their predefined needs and wishes. Therefore, the socio-economic status of individuals depends on the position in which these individuals could find themselves in. "The free market system" (Lederer 59), which in a sense has little to do with how much they contribute to the overall growth of their society, but rather at times on mere luck.

The so-called "Egalitarian luck" ; thereby, refers to the sort of distinction that should be drawn between the results that stem from people's own conscious choices, and those that are inflicted upon them by external factors that stem from brute luck (Albertsen 8) . The former, due to the simple fact that people should assume responsibility for their own decisions, does not imply any societal intervention to mitigate the negative impacts of these previously taken decisions. The latter ; however, and because those upon whom the negative impact is expected to occur, did not willingly choose to be in that unfortunate situation, they accordingly deserve to be assisted in order to eliminate this involuntary disadvantage.

In this context, Affirmative Action plans were devised in order to achieve equality through the re-allocation of some resources to the historically disadvantaged groups: Employment, opportunities, Educational prospects... etc. The underlying reasons for the long suffering of these disadvantaged groups were race, gender, country of origin or gender ; thereby, none of the above is a result of their own conscious choices but rather the result of brute luck which

according to the egalitarian perception , renders them eligible to receive any form of aid to remedy the impact of the long-dated past discrimination. Subsequently, the programs of Affirmative Action are more than justified in the egalitarian liberalism perspective.

However, in its core, Egalitarianism is a theory based upon correcting the socio-economic inequalities between all members of any given multicultural society. The plans of Affirmative Action; however, in the way to rectify the unfortunate situation in which minorities and women found themselves in, has instead caused reverse discrimination unintentionally. The claim that could be made is that Affirmative Action is only temporary ; thereby, the moment minorities and women restore a marginally acceptable societal balance that enables them to live in an equal society that ensures fair and equal opportunities for all individuals regardless of their race, gender or ethnicity, the programs and concept of Affirmative Action as such could be terminated ; however, this could be true only if there is a proper metric to measure the exact amount of societal changes that Affirmative Action has induced since its creation. The absence of a metric as such renders it almost impossible to decide whether to proceed or to put an end to the policy on the ground that it has successfully created an equal enough society. Furthermore, the timetable for the implementation of Affirmative Action remains vague for there is no time restriction on the application of the policy which in fact renders it permanent ; thereby, responsible for the redistribution of injustice among new categories of the general population.

4 – Affirmative Action in the Communitarian Liberalism Perspective

Under the communitarian perspective, the emphasis is put on the relationship that links society with individuals, while stressing the responsibilities and commitments of individuals towards the larger communities in which they all live (Lederer 65). Subsequently, there are four main values of communitarianism; (1) people are heavily dependent on the community

in each and every aspect of their everyday life; (2) the importance of solidarity in maintaining the social fabric of contemporary societies; (3) the positive notion that comes out of the sense of belonging to different communities; (4) the important role of the duality: rights and duties (Bellah 53).

In this context, communitarianism does not only accept, but also welcomes the existence of multicultural societies, for in a more diverse environment where the principle values of communitarianism could really be tested. Minorities and women in multicultural societies, which is the most diverse environment there is, are often regarded as proud of their own racial or gender identity and also consciously aware of the serious challenges that they have to face together because of this very pride of their identity, which boosts the spirit of solidarity among individuals within the much smaller communities in order to be able to rise up to the level of the threats and challenges posed by the larger community (Narveson and Dimock 101).

However, the stereotypes and the deeply rooted discrimination mentality within the collective mindset of the mainstream in the larger community tend to reject a voluntary societal acceptance for the integration of minorities and women, which prevents the occurrence of any form of social cohesion in the broader community. Therefore, the need for Affirmative Action to force a radical change that allows the once excluded components to be integrated within the much larger community is not only justified, but rather recommended in multicultural societies (Closius 600) . The rationale behind the creation of such programs is to offer more opportunities to the historically underprivileged minorities and women which will lead to their overall independence on a much larger societal scale while maintaining their sense of belonging to their small communities (Lederer 65), and that is what the teaching of Communitarian Liberalism is all about.

However, in the pursuit to integrate minorities and women into the much larger

community through the development of various plans in the name of Affirmative Action, Communitarian Liberalism tends to contradict some of its own principles, according to the communitarianism core values, the assessment of any policy must be based upon how much does this policy actually contribute to the well-being of the broader community. However; the programs of Affirmative Action were created to deal with the rising socio-economic pressures of the 1960s, and at the time they were more than justified, but after more than sixty years of its creation, the numerous constitutional challenges of the policy all along with the cases filed against the continuous implementation of the policy clearly demonstrates that it had become a source of social and political polarization ; thereby, since it ceased to unify the community and rather to caused even more division within the much smaller communities , let alone within larger communities, the need for Affirmative Action is no longer justified under the ideals of the Communitarian Liberalism, and resultantly the termination of the policy for the overall well-being of the broader community is essential.

Furthermore, while addressing the legitimate concerns related to the underrepresentation of minorities and women through Affirmative Action, this latter dismissed the subsequent consequences of enabling some smaller segments of the larger community at the expense of others. If asked, the claim that could be made is that the majority within the white male majority itself would support the policy because of their compassion and recognition of the long suffering of minorities and women from the effects of past discrimination ; however, this claim is misleading at best due to the fact that there is no empirical data to back such a claim, and also because Affirmative Action from the very beginning was a mere creation of the leading political establishment at the time rather than a form of a spontaneous societal reconciliation that gained the general public consent in a joint effort to melt the seemingly heterogeneous components of society into one homogeneous multicultural community.

5 – Affirmative Action in the Political Liberalism Perspective

In an attempt to find solutions to some of the urging problems of modern constitutional democracies, John B. Rawls, an American moral and political philosopher, founded political liberalism (Doppelt 259). He strongly advocated a purely political construction of justice which according to him is the only means possible to meet the aspirations of all people in multicultural pluralist societies (Young 3). Political liberalism ; thereby, attempts to bridge the gap between the various philosophical, religious and even ideological doctrines, although they seemingly stand in sharp contrast to one another, in isolation they make perfect sense to different sets of people (Lederer 51) . The challenge; however, rises from the ability of political liberalism to accommodate the conflicting ideas about the common good in the same community (Lederer 52), therefore, and in order to reach a common conception of justice in the eyes of all of these opposing doctrines, John Rawls suggested what he coined “the original position“. In this hypothetical position, all citizens are kept behind a “veil of ignorance“ ; thereby, they are all unaware of their true identity once asked about their points of view about a mutually agreeable definition of justice (Rawls 118) , in other words, they lack the sufficient background information about their gender, ethnicity, race, nationality or country of origin , that ignorance leads all participants to rely on their own objective reasoning in order to draw a just world in which discrimination on all basis is condemned due to the simple fact that they are driven by their fear of being discriminated against, people would ultimately choose justice in the broader sense of the term to ensure that they themselves are not going to be subjected to any type of discrimination rather than to indulge in their own subjective construction of justice (Rawls 109).

In this context, and under the veil of ignorance, people would accept the application of Affirmative Action as a means to remedy the impact of detrimental past discrimination ; thereby, according to the ideals of political liberalism, the implementation of the policy is

justified by public reasoning (Rawls 130) , which in contemporary democratic societies, gives both the legal as well as the moral legitimacy of all state's prompted policies ; however, gaining the general public consent in a given spatiotemporal circumstances does not necessarily imply its continuous indefinite support in another .In fact, policies related to minorities are put in place are not to address the future, but rather the immediate socio-economic inequalities of the targeted population , but since these inequalities are continuously changing according to the amount of impact that these very policies have induced, the need to re-adjust the goals and mechanisms of such policies is essential to maintain the public approval for such policies, or otherwise they would risk being rejected by the same public reasoning that previously allowed them to exist.

Despite of being the core subject of numerous heated debates in Congress; Affirmative Action; however, has not been subjected to any temporal restrictions or any fundamental amendments to its core principles. All the programs and plans developed to meet the requirements of the policy are no longer relevant to the realities of minorities and women in the United States. Statistics has shown a steep rise in the employment rate of minorities and women in the past few decades (Leonard 445). College admissions have also been greatly affected by Affirmative Action; thereafter, diversity in higher education is achieved. Subsequently, the continuous application of Affirmative Action is going to be regarded as nothing but pure reverse discrimination; thereby, putting the same concept of the veil of ignorance developed by John Rawls, people would react differently due to the fact that the once regarded as a means to alleviate the long-term inequalities has become a discriminatory practice that is responsible for spreading injustice rather than achieving equality. Therefore, according to the ideals of John Rawls, namely public reasoning, Affirmative Action has deviated from the goals it was initially created to achieve; thereby, it is no longer justified under the core principles of political liberalism.

Conclusion:

There have been numerous political theories that tried to address the raising issues related to equality and justice in contemporary societies. However, liberalism remains by far amongst the landmark political theories that delved deeper into the various notions of justice and equality in aspiration to create a fairer society for all, regardless of the racial, gender or even ethnic differences that may exist in these so-called multicultural societies. Moreover, Political Liberalism stands for the delicate equilibrium that should be made between the individual rights and the state authority over these rights. There is; however, a variety of perspectives in the liberal camp in terms of the proper means to achieve full justice.

In this context, Affirmative Action policies were justified at first by the core values of Communitarian Liberalism due to the positive impact it had in terms of enhancing the sense of belonging for both : the larger community and the smaller communities from which minorities and women originally came from alike ; however, as the prolonged application of Affirmative Action brought legitimate fears about the possibility of being responsible for reverse discrimination, the policy ended by losing the support of the communitarian liberalists due to the fact that it became a source of social upheavals. Similarly, Affirmative Action lost the support of the Egalitarian Liberalism, because under Rawls's veil of ignorance, the principle of equality is far more superior to the principle of difference, which calls upon the immediate termination of Affirmative Action policies. Furthermore, Affirmative Action policies are no longer justified by the core values of Classical liberalism and Neo-liberalism alike, because it is regarded as unjustified government intervention in people's lives and a violation of their right to be completely free from all forms of socio-economic oppression.

GENERAL CONCLUSION

Throughout the long history of its application, Affirmative Action has been the subject of a heated debate at the state as well as the federal level. This paper was concerned with the legislative history of Affirmative Action policies, and with the underlying rationale behind the societal and legislative backlash against it. The present research paper addresses the numerous legislative and constitutional challenges to the prolonged application of Affirmative Action in order to provide a comprehensive explanation of the unintended consequences of the policy which could put the backlash against it into perspective.

The main focus of the research has been the study of the underlying rationale behind the societal and legislative backlash against Affirmative Action according to two main parameters. The first one was the conformity of Affirmative Action policies with the existing ad hoc legislative body and how the indoctrination of such policies is often regarded as an infringement of the “sine-qua-nons” of justice and equality, which subsequently stands in sharp contrast to the intentions of the framers of the American constitution who were none other than the founding fathers of the United States themselves. The second one was the compliance of Affirmative Action policies with the ideals of the various liberal and moral theories. The aim was to provide a comprehensive explanation of the root causes behind the long lasted backlash against the prolonged application of Affirmative Action policies in the United States.

The study has concluded that the underlying rationale behind the gradual implementation of Affirmative Action policies into the federal framework was on compliance with the governing principles of most of the moral and liberal theories ; however, the original goal behind the creation of Affirmative Action was to tip the balance of employment opportunities in favor of minorities and women, but over the years it deviated from its original goal to

become more concerned about evening the outcomes rather than opportunities which violates the ideals of the various liberal and moral theories that previously justify its very existence. This; subsequently, stem the tide of its popularity and raised the popularity of the backlash against it in the past few decades. The second conclusion is that, in the long term, the very constitutionality of Affirmative Action policies is conditioned by the immediate creation of a proper metric to gauge the real impact induced by Affirmative Action policies on minorities and women, as well as on the white male majority throughout the history of its application. This mechanism, along with the enabling legislation, should be authorized according to the results obtained from the analysis of the gathered data to create a law-abiding timetable for the official termination of Affirmative Action in order to comply with the state's obligations under the international law. This paper admits to the need for further studies and research about the advantages and shortcomings of social engineering in the United States, due to the fact that the presence of the empirical data from an investigation as such would dictate the proper policies to deal with the existing socio-economic disparities in the country.

Despite the fact that the present study requires more time and even more resources that are of great significance to the application of Affirmative Action, it did offer a comprehensive explanation of an intricate topic that continues to reshape the United State's minorities and women related policies till this day, despite of the long lasted backlash against its core ideals.

BIBLIOGRAPHY

"Adarand Constructors, Inc. v. Peña." Oyez, www.oyez.org/cases/1994/93-1841 Accessed 1 May. 2021.

"Adler, Jonathan (2014-04-22). "Supreme Court upholds Michigan civil rights initiative". The Washington Post <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/04/22/supreme-court-upholds-michigan-civil-rights-initiative/>

"Alice, George." "The 1968 Kerner Commission Got It Right, But Nobody Listened". Smithsonian Magazine, 2018, <https://www.smithsonianmag.com/smithsonian-institution/1968-kerne-commission-got-it-right-nobody-listened-180968318/>.

"BlackPast, B". (2012, November 03). (2008) Nebraska Civil Rights Initiative 424. <https://www.blackpast.org/african-american-history/nebraska-civil-rights-initiative-424-2008/>

"Bodson, Michael". "Training | RFBF". Religiousfreedomandbusiness.Org, 2021, <https://religiousfreedomandbusiness.org/training>.

"Chambers, Candee". "What You Need To Know About Executive Order 13672". Directemployers Association, 2021, <https://directemployers.org/2015/03/27/what-you-need-to-know-about-executive-order-13672-recap-of-ofccps-webinars/>.

"DeFunis v. Odegaard." Oyez, www.oyez.org/cases/1973/73-235 Accessed 2 May. 2021.

"Douthat, Ross" (June 15, 2009). "Affirmative Action". The New York Times <https://www.nytimes.com/2009/07/20/opinion/20douthat.html>

"Eloise, Rogers". "Column: Affirmative Action Policy Is Outdated, Offensive". Cbsnews.Com, 2008, <https://www.cbsnews.com/news/column-affirmative-action-policy-is-outdated-offensive/>.

"Executive Orders". National Archives, 2021, <https://www.archives.gov/federal-register/codification/executive-order/12086.html>.

"Executive Orders". National Archives, 2021, <https://www.archives.gov/federal-register/codification/executive-order/11625.html>.

"Frances, Henry". "Forms of Racism — Alberta Civil Liberties Research Centre". Alberta Civil Liberties Research Centre, 2021, <http://www.aclrc.com/forms-of-racism>.

“Fullinwider, Robert”. “Affirmative Action (Stanford Encyclopedia Of Philosophy)”. Plato.Stanford.Edu, 2021, <https://plato.stanford.edu/entries/affirmative-action/>.

"Gratz v. Bollinger." Oyez, www.oyez.org/cases/2002/02-516 Accessed 4 May. 2021.

“Grutter v. Bollinger.” Oyez, www.oyez.org/cases/2002/02-241 Accessed 4 May. 2021.

“Gladstone, Williams”. “Image 3 Of William A. Gladstone Afro-American Military Collection: Special Field Orders, No. 15, Headquarters, Military Division Of The Mississippi, By Major General W. T. Sherman, Re “Young And Able Bodied Negroes Must Be Encouraged To Enlist,” Mentions Bounties Paid And Locations For Settlement Of Freed Negr”. The Library Of Congress, 2021, <https://www.loc.gov/resource/mss83434.256/?sp=3&r=-0.006,-0.047,1,1.372,0>.

“Jeremy R. Green”, Affirmative Action: Challenges and Opportunities, 2004 BYU Educ. & L.J. 139 (2004). Available at: <https://digitalcommons.law.byu.edu/elj/vol2004/iss1/5>

“Kelly, Daniel”. “New Executive Order Demands Federal Contractors And Grantees Scrutinize All Diversity Workforce Training | Lexology”. Lexology.Com, 2020, <https://www.lexology.com/library/detail.aspx?g=9e67b156-e3be-46cd-a2b0-1c666b87d520>.

“LEE , MELISSA”. “Affirmative-Action Ban Passes by Wide Margin.” JournalStar.com, 4 Nov. 2008, https://journalstar.com/news/local/govt-and-politics/affirmative-action-ban-passes-by-wide-margin/article_84f294c6-75eb-5141-b169-ec92a6319ea.html

“Marshall, Tony”. “Restorative Justice”. Google Books, 2021, https://books.google.com/books/about/Restorative_Justice.html?id=8QqgAAAACAAJ.

“Maurianne, Adams”. “Classism | CSHA”. CSHA, 2021, <https://www.csha.org/classism/>.

“Menand, Louis”. “The Changing Meaning of Affirmative Action.” The New Yorker, 13 Jan. 2020 <https://www.newyorker.com/magazine/2020/01/20/have-we-outgrown-the-need-for-affirmative-action>

“O’Sullivan, Joseph”. “With the Loss of Referendum 88, Affirmative-Action Advocates Wonder What’s next. Inslee Offers Some Answers.” The Seattle Times, 28 Dec. 2019 <https://www.seattletimes.com/seattle-news/politics/with-the-loss-of-referendum-88-affirmative-action-advocates-wonder-whats-next/>

"Regents of the University of California v. BaFkke." Oyez, www.oyez.org/cases/1979/76-811 Accessed 3 May. 2021.

“The History of the MBDA”. Minority Business Development Agency, 2021, <https://www.mbda.gov/about/history>.

“Titcomb, Caldwell”. “Key Events in Black Higher Education”. The Journal Of Blacks In Higher Education, 2021, <https://www.jbhe.com/chronology/>

“Vietnam Era Veterans’ Readjustment Assistance Act of 1974, As Amended”. US Department Of Labor, <https://www.dol.gov/agencies/ofccp/vevraa/as-amended#>. Accessed 4 May 2021.

“What Is Sexism?”. European Institute For Gender Equality, 2021, <https://eige.europa.eu/publications/sexism-at-work-handbook/part-1-understand/what-sexism>.

“What Is The Difference Between Title VI And Title VII Of The Civil Rights Act? | Swartz-Swidler”. Swartz-Swidler, 2019, <https://swartz-legal.com/what-is-the-difference-between-title-vi-and-title-vii-of-the-civil-rights-act/>

Adams, Maurianne. Readings In Diversity And Social Justice. Routledge, 2010.

Afolayn, Adeshina. “Egalitarianism”. Encyclopedia Of Global Bioethics, 2015, p. 3., Accessed 6 May 2021.

Agócs, Carol, and Carol Agocs. “Affirmative Action, Canadian Style: A Reconnaissance”. Canadian Public Policy / Analyse De Politiques, vol 12, no. 1, 1986, p. 151. JSTOR, doi:10.2307/3550725

Agócs, Carol. Workplace Equality. Kluwer Law International, 2002, p. 22.

Alam, Mohd. Sanjeer. “Affirmative Action for Muslims? Arguments, Contentions And Alternatives”. Studies in Indian Politics, vol 2, no. 2, 2014, pp. 215-229. SAGE Publications, doi:10.1177/2321023014551877.

Albertsen, Andreas. "The Luck Egalitarianism Of G.A. Cohen - A Reply To David Miller". SATS, vol 18, no. 1, 2017, p. 8. Walter De GruyterGmbH, doi:10.1515/sats-2017-0008.

Anderson, Terry H. The Pursuit of Fairness. Oxford University Press, 2004, p. 134.

Bakan, Abigail, and Audrey Kobayashi. “Employment Equity Legislation In Ontario: A Case Study In The Politics Of Backlash”. Atlantis, vol 29, 2011, p. 66., Accessed 5 May 2021.

Beckman, James A. Controversies in Affirmative Action. 2014, p. 56.

Bellah, R., 1989. Comment: [Twenty Years after Bellah: Whatever Happened to American Civil Religion?]. Sociological Analysis, 50(2), p.53.

Bennaa, Youcef. "THE GENDER PAY GAP IN THE United States: A HISTORY OF INEQUALITY AND STRUGGLE FOR WOMEN". University Of AbouBekr Belkayed, 2016.

Braithwaite, Valerie, and Janine Bush. "Affirmative Action In Australia : A Consensus-Based Dialogue Approach". The Johns Hopkins University Press, vol 3, 1998, p. 119., Accessed 30 Apr 2021.

Burks, William. "THE FREEDMEN'S BUREAU, POLITICS, AND STABILITY OPERATIONS DURING RECONSTRUCTION IN THE South". Fort Leavenworth, Kansas, 2009.

Chandola, M., 1992. Affirmative Action in India and the United States: the Untouchable and Black Experience. *Indiana International & Comparative Law Review*, 3(1), pp.101-134

Cole, Arby. "The Malaysian " Vision 2020 " National Development Plan : Problems In Sabah". University Of York, 1998.

Das, Shubhamitra. "WOMEN AND EMPOWERMENT : PREDICAMENT OR AFFIRMATIVE ACTION". *The Indian Journal Of Political Science*, vol 68, 2007, p. 128., Accessed 28 Apr 2021.

Davies, W., 2014. Neoliberalism: A Bibliographic Review. *Theory, Culture & Society*, 31(7-8), p.210.

Deslippe, Dennis. *Protesting Affirmative Action*. Johns Hopkins University Press, 2014, p. 23.

Deutsch, Morton. "Equity, Equality and Need: What Determines Which Value Will Be Used As The Basis Of Distributive Justice". *Journal Of Social Issues*, vol 3, 1975, p. 137., Accessed 2 May 2021.

Dilger, Robert. "SBA'S "8(A) Program": Overview, History, And Current Issues". Congressional Research Service, 2020, p. 3., Accessed 1 May 2021

Dong, Jingyi. "The Implementation of Affirmative Action In Higher Education In The Context Of American Liberal Tradition And Equal Individual Rights". Oslo, 2008.

Doppelt, Gerald. *Rawl's System of Justice: A Critique from the Left*. 3rd ed., Wiley, 1981, p. 259.

Feingold, Jonathan P. (2019): *Hidden in Plain Sight: A More Compelling Case for Diversity*

Frymer-Kensky, Tikva. "Tit For Tat: The Principle Of Equal Retribution In Near Eastern And Biblical Law". *The Biblical Archaeologist*, vol 43, no. 4, 1980, p. 231. University Of Chicago Press, doi: 10.2307/3209797.

Hanson, Gregory. "The Affirmative Action Requirement Of Executive Order 11246 And Its Effect On Government Contractors, Unions And Minority Workers". *Montana Law Review*, vol 32, no. 2, 1971, p. 1., Accessed 4 May 2021.

Hirsh, C. Elizabeth, and Youngjoo Cha. "Understanding Employment Discrimination: A Multilevel Approach". *Sociology Compass*, vol 2, no. 6, 2008. Wiley, doi:10.1111/j.1751-9020.2008.00157.x.

Holzer, Harry J., and David Neumark. "Holzer, Harry J., And Neumark, David (2006). Affirmative Action: What Do We Know? *The Journal Of Policy Analysis And Management*, 26(2), 463-490.". *Journal Of Policy Analysis And Management*, vol 26, no. 1, 2006, p. 16. Wiley, doi:10.1002/pam.20241.

Humanity in Action. *The Kerner Report: 50 Years Later*. Humanity in Action Press, Detroit, 2018, pp. 7-19. Accessed 4 May 2021.

Jason, G., 2015. Eamonn Butler, *Classical Liberalism: A Primer*. The Institute of Economic Affairs, p.4.

Jemmot, John, and Ruth Tebbets. "Applying Social Cognition: A Content Analysis of The Bakke Case". *Sage Journal*, 1980, p. 35., Accessed 2 May 2021.

Jennifer Pierce, *Racing for Innocence: Whiteness, Gender, and the Backlash against Affirmative Action*

Kelly, Richards. "Rewriting History: Towards A Genealogy Of Restorative Justice". University Of Western Sydney, 2006.

Kramar, Robin. *Equal Employment Opportunity in Australia*. School Of Industrial Relations And Organizational Behaviour, University Of New South Wales, 1992, p. 9.

Kua Kia Soong. "Racial Conflict In Malaysia: Against the Official History". *Race & Class*, vol 49, no. 3, 2008, pp. 33-5. SAGE Publications, doi:10.1177/0306396807085900.

Lawrence, C., 2001. *Two Views of the River: A Critique of the Liberal Defense of Affirmative Action*. *Columbia Law Review*, 101(4), p.932.

Leiter, William M, and Samuel Leiter. *Affirmative Action In Antidiscrimination Law And Policy*. State University of New York Press, 2011, p. 7.

Leonard, Jonathan. "The Impact of Affirmative Action On Employment". Chicago Journals, vol 2, 1984, p. 445., Accessed 30 Apr 2021.

Lillie, Christine. "MICRO AND MACRO JUSTICE IN THE CONTEXT OF TRUTH AND RECONCILIATION COMMISSIONS". University Of Massachusetts Amherst, 2006.

Liss, Francis. "The Social Conditioning of Occupational Choices". The International Journal Of Sociology, vol 3, no. 1, 1973, p. 275., Accessed 1 May 2021.

Moore, Dahlia. "Entitlement And Justice Evaluations: Who Should Get More, and Why". Social Psychology Quarterly, vol 54, no. 3, 1991, p. 210. SAGE Publications, doi:10.2307/2786651.

Motileng, Barnard. "Affirmative Action: The Experience Of People In Middle Management Positions". University Of Pretoria, 2004.

Narveson, Jan, and Susan Dimock. Liberalism: New Essays on Liberal Themes. Springer Science Business Media Dordrecht, 2000, p. 101.

Nel, Erin. "Affirmative Action: A Jurisprudential and Legal Critique". Stellenbosch University, 2011.

Raines, Douglas. "Grutter V. Bollinger's Strict Scrutiny Dichotomy: Diversity Is A Compelling State Interest, But The University Of Michigan Law Schools Admissions Plan Is Not Narrowly Tailored". Maquette Law Review, vol 89, 2006, p. 845., Accessed 3 May 2021.

Rawls, John. A Theory of Justice. The Belknap Press Of Harvard University Press, 1971.

Rinehart, Ian. Malaysia: Background and US Relations. Congressional Research Service, Washington, 2015, p. 9. Accessed 29 Apr 2021.

Rivers, Richard R. "In America, What You Do Is What You Are: The Equal Employment Opportunity Act Of 1972". Catholic University Law Review, vol 22, 1973, p. 461., Accessed 3 May 2021.

Ross Douthat, "Race in 2028" , New York Times

Sandel, Michael J., and John Rawls. "Political Liberalism". Harvard Law Review, vol 107, no. 7, 1994, p. 1765. JSTOR, doi: 10.2307/1341828.

Simmors, Keaston. "The American Social Contract and the Political Power of Procurement: An Historical Account of African-American Equal Employment Rights in U.S. Federal Procurement". University Of Pennsylvania, 2019.

Spearritt, Katie, and Duncan Smith. "Glenda Strachan, Erica French and John Burgess (Eds) Managing Diversity in Australia: Theory and Practice". *Journal of Industrial Relations*, vol 54, no. 1, 2012, p. 7. SAGE Publications

Tameshine, Deane. "Affirmative Action: A Comparative Study". University Of South Africa, 2005.

The National Advisory Commission on Civil Disorders. *The Report Of The National Advisory Commission On Civil Disorders*. Washington, D. C, 1968, pp. 152-155. Accessed 4 May 2021.

The President's Committee on Equal Employment Committee. *Report of the President's Committee on Equal Employment Committee*. Washington, D. C, 1963, p. 108. Accessed 3 May 2021.

Tingle, M., 1998. *Privatization and the Reagan administration: Ideology and Application*. *Yale Law and Policy Review*, 6, p.300.

TORII, TAKASHI. "THE MECHANISM FOR STATE-LED CREATION OF MALAYSIA's MIDDLE CLASSES". *The Developing Economies*, vol 41, no. 2, 2003, p. 232. Wiley, doi:10.1111/j.1746-1049.2003.tb00939.x.

Torres, G., 2014. Neoliberalism and affirmative action. *Cultural Dynamics*, 27(1), p.44.

Van Loo, Rory (2018-08-01). "Regulatory Monitors: Policing Firms in the Compliance Era"

Wood, David. "Retributive and Corrective Justice, Criminal and Private Law". *Scandinavian Studies Of Law*, vol 48, 2005, p. 549., Accessed 2 May 2021.

Young, Shaun P. *Political Liberalism*. State University Of New York Press, 2004, p. 3.

Zehr, Howard. *The Little Book Of Restorative Justice*. Skyhorse Publishing Company Incorporated, 2015, p. 59.

ملخص

تهدف الدراسة الحالية إلى تسليط الضوء على الأسباب الكامنة وراء رد الفعل المجتمعي و التشريعي العنيف على استمرار تطبيق سياسة التمييز الإيجابي في الولايات المتحدة الأمريكية . طبيعة الدراسة تقتضي الاعتماد على المنهجين: الوصفي و التحليلي في نفس الوقت ، فالمنهج الوصفي في الدراسة هو الأنسب لوضع السياسة في حيزها التاريخي و المجتمعي الصحيح و كذا لإبراز الدوافع التي حذت إلى إتباع سياسة متطرفة كهذه في المقام الأول، أما المنهج التحليلي فتم استخدامه لمقارنة مدى توافق و اختلاف السياسة مع مبادئ النظريات الليبرالية على اختلافها و كذا لاستنباط مواضع القوة و الضعف في السياسة عبر دراسة الأحكام الصادرة من قبل المحكمة العليا الأمريكية في قضايا ذات صلة بسياسة التمييز الإيجابي. الإطلاع على الدراسات و البحوث السابقة في المجال كشف أن سياسة التمييز الإيجابي أضحت تواجه خطرا وجوديا في الوقت الراهن نظرا لتراجع شعبيتها ضمن الجيل الجديد من الأمريكيين و الذي يتبنى على ما يبدو مفاهيم مختلفة عن المساواة و العدالة، وكذا لتراجع المؤسسات السياسية و القضائية في البلاد عن تقديم دعمها اللامشروط للسياسة كما كان عليه الحال في الستينات.

كلمات مفتاحية: التمييز الإيجابي، الأقليات، النساء، المساواة، العدالة، رد الفعل العنيف