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Footprints Through the Courts: Comparing Judicial Responses to Affirmative Action Litigation in South Africa and the United States

Katherine C. Naff and Ockert Dupper

In South Africa and the United States, affirmative action has been used as a means for achieving equality following decades of discrimination and segregation. It has also served as a means for achieving a representative bureaucracy reflecting the demographics of the nation. In both countries, such measures have been the subject of considerable litigation, with the highest court ultimately ruling on what is permissible under the Constitution. This paper addresses similarities and differences in terms of how the courts in the two countries have approached that jurisprudence. It further discusses the implications of the two lines of litigation for employing affirmative action as a means for achieving a representative bureaucracy.

1. Introduction

Since 1994, affirmative action has been an essential instrument by South African policymakers to achieve a government that reflects the demographics of the population. As in the United States, the courts have had a role in defining the parameters of affirmative action policy. This paper provides an analysis of significant court decisions and legal developments in both countries. It assesses similarities and differences in their approaches to determining the constitutionality and legality of specific affirmative action measures.

Affirmative action can be defined as the consideration of race, ethnicity, and/or gender (and sometimes disability) in making decisions about the distribution of opportunities such as jobs, university admissions, and contracts. Such measures are usually implemented to counteract the adverse effects of existing or past discrimination. Affirmative action has been used in a wide variety of arenas including employment, housing, education, voting rights, and contracting.1 This paper will focus primarily on affirmative action in employment, particularly employment in the public sector.

The reason for this focus is the importance of a representative bureaucracy, which has long been recognized in the scholarly literature analyzing the role of a bureaucracy in a democracy. A bureaucracy that demographically represents the citizenry signals that

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diverse communities have access to its policymaking process, leading to a greater governmental legitimacy. Moreover, the extent to which diverse segments of society have the opportunity to hold important positions within the civil service ‘represents truths about the nature of the societies they administer and the values that dominate them’. Considerable research has supported the notion that, perhaps because of mutual values or experiences, bureaucrats show a greater receptivity to the needs and interests of those whose race and gender they share. So important was this concept for the new Republic of South Africa that the new post-apartheid Constitution (Act 108 of 1996) stated, as one of its principles, that ‘Public administration must be broadly representative of the South African people,… based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation.’ This objective was reiterated in subsequent legislation.

This paper begins by providing the historical and legal context for affirmative action in the United States and South Africa. That is followed by an analysis of the major issues that the courts have addressed since enactment of equal employment opportunity legislation and the implications for efforts to achieve a representative bureaucracy. It ends with a look at cross-cutting themes and the implications.

2. Historical and Legal Context

2.1. The United States

Affirmative action as a policy measure arose during the 1960s in response to the civil rights unrest. While African Americans had been granted freedom and the full rights of citizenship after the Civil War ended in 1865, discrimination continued to be rampant. It was clear that equal rights called for in constitutional amendments and subsequent legislation did not necessarily mean equal opportunities were forthcoming. The Supreme Court had a role in perpetuating segregation. Its 1896 decision in Plessy v. Ferguson is notorious for its reification of racial categories to achieve racial order. For decades, African Americans had access only to segregated and inferior education, employment,

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3 Krislov, 1967, 64.


5 163 US 537 (1896).

housing, and other facilities. Subsequently, other minority groups (e.g., Latinos, Asian/Pacific Islanders, and Native Americans) and women joined the demand for equality.

Limited efforts to end discrimination via statutory provisions and executive orders date back to the 1940s. However, as discrimination persisted into the 1960s, it was clear that the call for an end to discrimination and the provision of discrimination complaint processing mechanisms were not sufficient to level the playing field; more proactive measures were required.

Affirmative action is such a measure. The first use of the term was in an Executive Order (10952) signed by President Kennedy in 1961. It required contractors to 'take affirmative action to ensure that applicants are employed, and that employees are treated ... without regard to race, creed, color or national origin' (section 301(1)). It further directed the President's Committee on Equal Opportunity to ensure that US departments and agencies were considering 'affirmative steps' that could be taken to realize non-discrimination (section 201). These included the active recruitment of minority high school and college graduates, the provision of skills development programs, and the examination of qualification requirements to ensure they were job related.7

The passage of the Civil Rights Act of 1964 (or the Act)8 put non-discrimination on statutory grounds and established the Equal Employment Opportunity Commission (EEOC) to oversee its enforcement. Title VI of the Act bans discrimination by any program or activity receiving federal funds, and Title VII prohibits discrimination by employers on the basis of race, colour, religion, sex, or national origin. The Act was passed with considerable controversy, producing the longest filibuster in Senate history.9

Of specific relevance to this paper, section 701(j) of the Act specifies that the statute should not be interpreted to require any employer to 'grant preferential treatment' based on race, sex, and so forth, nor does the Act prohibit the use of such measures. It explicitly permits employers to use seniority or merit in hiring decisions and to use professionally developed ability tests (section 703(h)). In its section on enforcement (706(g)(1)), the statute gives the courts the authority to order remedies in the form of 'affirmative action' such as hiring or reinstatement and/or back pay. The courts have used this authority to order affirmative action to remedy the effects of clearly discriminatory practices. Not surprisingly given the statute’s controversy, the Act left enough unsaid to give the courts substantial latitude to interpret it.

The constitutional commitment to provide racial redress dates back to the close of the Civil War when African Americans were first granted the rights of full citizenship. Three amendments to the Constitution were passed following the war; the 14th has the greatest relevance here. Section 1 of that amendment states:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property,

without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

Section 5 gives Congress the right to enforce ‘by appropriate legislation’ the provisions of the amendment. The 14th amendment applies specifically to state (and by extension local) governments. The 5th Amendment to the Constitution has a similar due process clause, which has been interpreted to require equal protection by the federal government. Thus, it is important in evaluating the courts’ affirmative action jurisprudence to look at their interpretation of the term ‘equal protection’.

Affirmative action reaches the courts most often when a non-beneficiary charges that his or her right to equal opportunity and treatment was violated. Hundreds of such cases have been filed in state and federal courts. Many of the most significant issues have made their way through the appellate process to the US Supreme Court, which renders the final decision as to what is legal and constitutional. For that reason, this paper focuses strictly on the Supreme Court in its examination of American jurisprudence.

2.2. South Africa

The system of racial discrimination in South Africa was much deeper and broader than that in the United States. For decades, the country operated under a system of apartheid, a strict form of legal segregation. The system was designed to serve the interests of the Whites, who comprise only 10% of the population. The remainder is Black African (80%); ‘Coloured’, that is, of mixed race (9%); and Indian (5%). As a social and legal system, apartheid had a devastating effect on the social, economic, political, and cultural life of especially black South Africans. Despite its demise in the early 1990s, the apartheid has left an indelible mark on the country. For instance, a country review conducted by the International Labour Organization (ILO)\textsuperscript{10} found that South Africa had the highest levels of inequality of any country in the world for which the ILO had data. Ten years later, in 2002, the World Bank Group found that only Brazil had a higher level of inequality than South Africa as measured by the Gini coefficient.\textsuperscript{11} Statistics show that poverty is overwhelmingly concentrated in the African and Coloured populations\textsuperscript{12} and that this racial inequality is also reflected in unemployment figures.\textsuperscript{13} The latest annual

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\textsuperscript{11} The Gini coefficient is a summary statistic of income inequality that has a value between zero and one. The higher the number, the more inequality exists. According to the World Bank report, the Gini coefficient for South Africa is 0.60, and for Brazil, 0.607. See World Bank Group. 2002. World Development Indicators, as referred to in H. Bharat, Employment and Unemployment Trends in Post-Apartheid South Africa’, 2 (paper prepared for the South African Presidency 10-Year Cabinet Review Process, 2002).

\textsuperscript{12} Recent figures reveal that 62% of African households, 29% of Coloured households, and 11% of Indian households live below the poverty line, while just 4% of White households fall into this category. See L. Schlemmer. ‘A better life for all? Poverty trends in South Africa’, Focus 26 (2002), 21.

\textsuperscript{13} For example, the unemployment rate in September 2005 (the latest available figures) stood at 31.5% for Africans, 20.6% for Coloureds, 14% for Indians, and 3.6% for Whites. What also becomes clear when one examines the unemployment rates by sex is that, within each population group, unemployment rates are higher for women than for men. See Statistics South Africa. Labour Force Survey September 2005, xv (available at <www.statssa.gov.za>).
report issued by the Commission for Employment Equity reveals that 64.9% of all top management positions are currently occupied by Whites; 11.3%, by Africans; 6.2%, by Indians; 4.7%, by Coloureds; and 2.9%, by foreign nationals.\textsuperscript{14}

It is acknowledged that the situation will not be effectively normalized by a mere prohibition of unfair discrimination. As noted in the Explanatory Memorandum to the Employment Equity Bill that was passed in 1998:

Apartheid has left behind a legacy of inequality. In the labour market the disparity in the distribution of jobs, occupations and incomes reveals the effects of discrimination against black people, women and people with disabilities. These disparities are reinforced by social practices which perpetuate discrimination in employment against these disadvantaged groups, as well as by factors outside the labour market, such as the lack of education, housing, medical care and transport.

These disparities cannot be remedied simply by eliminating discrimination. Policies, programmes and positive action designed to redress the imbalances of the past are therefore needed.\textsuperscript{15} (emphasis added)

In South Africa, affirmative action forms part of a broad range of measures that are aimed at enhancing overall social and economic equality. As the Labour Market Commission explained:

[Affirmative action …] involves a systematic move towards promoting the employment and improving the labour market security of groups previously discriminated against, bolstered by the necessary education and training, and in co-ordination with extra-market reforms designed to reduce the degree of socio-economic disadvantage of the majority.\textsuperscript{16}

Similar to other constitutions, the South African Constitution confers the right to equal protection and benefit of the law and the right to non-discrimination. However, what separates the South African Constitution from most of its counterparts around the world is the explicit endorsement of restitutuory (or affirmative action) measures. Section 9(2) of the Constitution provides that in order to 'promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken', the Constitution, to cite the Constitutional Court, gives affirmative action, properly devised, 'a clear constitutional nod'. The Employment Equity Act of 1998 (EEA) gives effect to this Constitutional provision and seeks to regulate affirmative action measures in employment.

The EEA places an obligation on 'designated employers' (primarily employers who employ fifty or more employees) to implement 'affirmative action measures to redress the disadvantages in employment experienced by designated groups, in order to ensure their equitable representation in all occupational categories and levels in the workforce' (section 2). 'Designated groups' are defined as black people, women, and people with disabilities (section 1). 'Black people' are defined, in turn, as African, Coloured, or Indian.\textsuperscript{17}

\textsuperscript{16} Labour Market Commission, Restructuring the South African Labour Market, 1996, para. 434.
\textsuperscript{17} See section 1 EEA.
3. The Judicial Perspective on Affirmative Action

Affirmative action in its strongest form often evokes a charge of unfairness. This is because, critics argue, it amounts to a departure from the ideal that people should be judged as far as possible on the basis of individual characteristics that are relevant to the situation, rather than involuntary group membership. That is especially the case when it is based on seemingly arbitrary criteria such as skin colour or sex. As a consequence, courts in the United States and South Africa have been inundated with legal challenges against affirmative action over the past number of years. This means that these courts have had to confront the now familiar tension between the equal treatment principle and more distributive conceptions of equality. The role of courts then is to resolve the tension between the aim of ensuring equal treatment of all citizens regardless of certain characteristics such as race or sex and an aim of achieving a more equal distribution of welfare or resources among citizens. That may require, in some instances, different treatment on the grounds of those very same characteristics. How have the courts resolve this tension in these countries?

3.1. The United States

In the United States, judges make policy. In the area of affirmative action, this has amounted to, in some views, a ‘reinterpretation of statutory law that amounts to substantial alteration of the intent of Congress in enacting the law’. Therefore, one can only discern the current state of affirmative action policy by reviewing the latest judgments from the courts. An overarching theme that undergirds affirmative action policy in the United States is that there has rarely been a single court opinion. Rather, judicial pronouncements have been characterized by competing perspectives, with the Court’s ultimate decision representing a bare majority of justices. This can be seen in three ways:

- conflicting interpretations of what the Civil Rights Act and the Constitution’s equal protection clause mean for affirmative action,
- disagreement among justices and how these shape ultimate opinions, and
- the Court’s reversal of its own pronouncements about affirmative action.

This section of the paper will discuss each of these themes in turn.

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3.1.1. **Interpreting the Civil Rights Act and the Constitution**

The Supreme Court first became involved in interpreting the Civil Rights Act with the case *Griggs v. Duke Power* (hereinafter ‘*Griggs*’)[^20] in 1971. While the case did not involve affirmative action per se, it addressed the employers’ responsibilities in achieving the objectives of the Civil Rights Act. Therefore, some see 1971 as the time when the ‘war over affirmative action began’[^21].

Until the Civil Rights Act took effect in 1964, Duke Power had a policy that denied Blacks access to higher paying jobs. The day after the Act took effect, they changed that policy to one that required a high school diploma and certain scores on aptitude tests for those jobs. White and black employees were treated equally with respect to these requirements. But because they had less access to quality education, the outcome was that Blacks continued to be denied employment in any of the higher paying jobs. In its decision, the Court approved, notably without dissent, a ‘disparate impact’ analysis deriving from Title VII of the Act. In his opinion for the court, Justice Burger argued that Congress’ intent in the enactment of Title VII was to achieve equality of employment opportunities and that practices and procedures that ‘freeze the status quo’ were not to be maintained.[^22]

The ‘touchstone’, according to the Court, was business necessity. If the qualification requirement cannot be shown to be necessary for successful performance of the job, it is unlawful.

This decision then not only condemned unequal equal treatment but suggested unequal outcomes might be viewed with suspicion. Following this decision, the EEOC encouraged employers to take ‘affirmative action’ to ‘correct the effects of prior discriminatory practices’. Employers were directed to undertake an analysis of their workforce to determine if there is ‘disparate impact’.[^23] They were further required to develop affirmative action plans that included a ‘self-analysis’ and specified ‘reasonable action’ that would be taken to address any problem demonstrated in the self analysis (29 CFR 1608). One would have thought then that where employers took such action to address adverse impact, the Court would be in support of such measures. However, that was not to be the case. This is where the room for starkly differing interpretations of the Act becomes evident.

The first case in which the Supreme Court was asked to decide on the permissibility of an affirmative action program under Title VII of the Civil Rights Act was *United Steelworkers of America v. Weber* (hereinafter ‘*Weber*’).[^24] In this case, the issue was whether the statute prohibits an employer from voluntarily adopting affirmative action measures. The program in question was agreed to by the union and employer. It granted admissions

[^21]: Leiter & Leiter, 52.
[^23]: Disparate or adverse impact was defined by the Uniform Guidelines on Employee Selection (29 CFR 1607.4) as a situation where the selection rate for any race, sex, or ethnic group is less than four-fifths of the rate for the group with the highest rate of selection. If so, a prima facie case of discrimination would be established. The burden of proof then shifts to the employer to show that the selection practice is job-related (i.e., constitutes a ‘business necessity’).
to a training program based on seniority. But it included the proviso that 50% of places in the program would be reserved for African Americans until the proportion of African Americans in the skilled craft workforce equalled their representation in the local labour force. In other words, to ensure it had adequate people with the skills to perform the craftwork, the union offered training. In order to address the adverse impact that seniority as a qualification for the training program would have on African Americans, the employer and union developed this affirmative action plan.

While the Court majority approved of the plan, some of the justices were not at all ready to take that next step in further interpreting the Civil Rights Act. Just four justices joined Justice William J. Brennan in his opinion that because the Act did not expressly prohibit voluntary affirmative action programs, the intention of Congress was to permit their use. From their perspective, the plan in question was what Congress hoped to achieve: the defeat of old patterns of racial segregation and hierarchy and opening of employment opportunities for African Americans.25

Justices Warren E. Burger and William Rehnquist disagreed with this interpretation of the Act. Justice Burger’s dissenting opinion argued that such an affirmative action program clearly violated the plain language of the statute in that the program ‘unquestionably discriminates on the basis of race against individual employees seeking admission to on-the-job training programs’.26 Both sides of the debate quoted extensively from the statute’s expansive legislative history to support their points of view.

If the statute had such room for interpretation, one can imagine the opportunity for controversy presented by the Constitution’s equal protection provisions. This first became clear in the first affirmative action case to reach the Supreme Court, University of California Regents v. Bakke (hereinafter ‘Bakke’).27 This case actually addresses Title VI of the Act, which prohibits discrimination by entities receiving federal funds and pertained to the use of affirmative action in university admissions. However, it is important because the justices’ interpretation of the Constitution applies equally to Title VI and Title VII of the Act. The Constitution is relevant in this case because the employer was a State government entity and hence is regulated by the 14th Amendment.

At issue was the admissions policy of the University of California at Davis Medical Center, which set aside a specific number of seats for minorities. Alan Bakke, a White man, was denied admission, while some minority applicants with lower test scores were admitted. The case is notorious because there was very little upon which a majority of justices agreed.28 As was apparent in the Weber case the following year with respect to

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26 Ibid., 217.
28 To give the reader an idea of the differences in interpretation among the justices and the complexity of the final decision, this is how it worked out: ‘POWELL, J., announced the Court’s judgment and filed an opinion expressing his views of the case, in Parts I, III-A, and V-C of which WHITE, J., joined; and in Parts I and V-C of which BRENNAN, MARSHALL, and BLACKMUN, JJ., joined. BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ., filed an opinion concurring in the judgment in part and dissenting in part, post, 324. WHITE, J., post, 379, MARSHALL, J., post, 387, and BLACKMUN, J., post, 402, filed separate opinions. STEVENS, J., filed an opinion concurring in the judgment in part and dissenting in part, in which BURGER, C. J., and STEWART and REHNQUIST, J., joined, post, 408.’ (Regents v. Bakke).
Title VII, the justices differently interpreted Title VI. Some justices believed that Title VI forbids differential treatment based on race. Others found no evidence that ‘Congress intended to bar all race-conscious efforts to extend the benefits of federally financed programs to minorities who have been historically excluded from the full benefits of American life’.29

It stands to reason that opinions were equally divergent as to whether the University’s admissions program violated the equal protection clause of the Fourteenth Amendment. By this time, the Court had ruled that when government restricts ‘fundamental rights’ or contains ‘suspect classifications’ (such as race), it must meet a level of review called ‘strict scrutiny’. This has been defined by the courts as requiring the program to meet a compelling governmental interest and to be narrowly tailored to achieve that interest. All aspects of this standard are open to debate: what defines a fundamental right, what constitutes a ‘suspect classification’, what is weighty enough to be a compelling governmental interest, and when a program is ‘narrowly tailored’. Justice Brennan argued that in this case, there is no fundamental right to admission to a Medical School, and therefore, the focus on strict scrutiny was misplaced. Moreover, Whites are not a ‘suspect category’ because they have not experienced the history of discrimination or political powerlessness that members of minority groups have.30 But the admissions program did meet an important objective, in Justice Brennan’s view. It was designed to remedy the effects of past societal discrimination that had, in this case, resulted in a ‘substantial and chronic’ under-representation of minorities in the Medical School. Such race-conscious remedies, Justice Brennan opined, are in fact often required to achieve the important governmental objectives enshrined in the 14th Amendment. This meant that the measures should be subject only to an intermediate level of scrutiny, in his view, rather than strict. The level of scrutiny that affirmative action measures receive would be the subject of recurring debate among the justices.

Justice Louis F. Powell had a very different view. In setting aside a specific number of seats for minorities, the Medical School was imposing a burden on the Whites who otherwise may have been selected for those slots and that was unconstitutional.31 He did, however, approve of the flexible use of race as one criterion for admission, because he found that ‘[T]he atmosphere of speculation, experiment and creation – so essential to the quality of higher education – is widely believed to be promoted by a diverse student body’.32 Justice Powell found the Medical School’s interest in having a diverse student body to be compelling enough to meet the standard of strict scrutiny and so to be acceptable under the Fourteenth Amendment.

Four of the justices simply refused to address the program’s constitutionality, arguing that it could and should be decided on statutory grounds. They found the Medical Centre policy to be in violation of Title VI. It was Justice Powell’s view that ultimately

30 Ibid., 455.
31 Ibid., 298.
32 Ibid., 312.
prevailed: the university could not specify a number of seats for minorities but could consider race in evaluating candidates for admission.

An example of a case involving state action in the employment arena was *Wygant v. Jackson Board of Education* (hereinafter *Wygant*).\(^{33}\) In this case, the majority of justices voted to invalidate the affirmative action program. At issue was a collective bargaining agreement that modified the normal policy of layoffs based on seniority. The agreement sought to protect gains that had been made in minority hiring by ensuring that all of the minorities who tended to have less seniority were not laid off. Justice Thurgood Marshall confirmed that ‘Agreement upon a means for applying the Equal Protection Clause to an affirmative-action program has eluded this Court every time the issue has come before us.’\(^{34}\)

As in *Bakke*, Justice Marshall suggested that the test of strict scrutiny was too high a bar to set for a program designed to protect the gains made by minorities since the enactment of the Civil Rights Act.\(^{35}\) Five justices disagreed with Justice Marshall, however, arguing that the level of scrutiny should not change just because the program works against a group that has not been subject to discrimination.\(^{36}\) The provision, Justice Powell opined, does not meet that strict scrutiny test.

These cases illustrate the first theme of affirmative action in the American context: conflicting interpretations of the meaning of the Civil Rights Act and the Equal Protection Clause of the Constitution. A significant and unsettled issue yet to be resolved was the level of scrutiny to which affirmative action measures should be subject.

3.1.2. **Divergent Judicial Perspectives**

These examples also illustrate the second subtheme, and this is that the individual justices vary considerably in their thoughts about affirmative action, and so it really matters who those justices are.\(^{37}\) In some of these cases, as many as six of the nine justices have felt compelled to write separate opinions, whether they ultimately concurred in judgment or not. Certain justices such as Justices Rehnquist, Burger, Scalia, Kennedy, and Thomas have consistently opposed affirmative action programs. Others, including Justices Brennan, Marshall, Blackmun, and later Ginsburg, have dependably supported such programs. A third group, including Justices Powell, White, Stevens, and O’Connor, have taken a middle road, sometimes opposing and sometimes supporting affirmative action programs, depending on the circumstances.

That their views on the subject of affirmative action are deeply held is clear in some justices’ opinions. Some examples from the *Bakke* and *Wygant* decisions have already been noted. In *Bakke*, Justice Powell declared that equal protection must mean the same

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\(^{35}\) Ibid., 305.

\(^{36}\) Ibid., 273.

thing when applied to people of all different racial groups. Justice Blackmun responded that ‘in order to treat some persons equally, we must treat them differently’; otherwise, the Equal Protection Clause may perpetuate racial supremacy (at 406).

These sharply divergent viewpoints have become evident as the Court has wrestled with other thorny questions. These include the following:

(1) Must the Affirmative Action Program have been Developed in Response to Clear Findings of Discrimination by the Organization Implementing the Plan, or Can it Have been Developed in Response to the Lingering, Pernicious Effects of Societal Discrimination? A Closely Related Issue is Must those Who Benefit from the Program be Actual Victims of the Previous Discriminatory Practice, or do they Only Need to be Members of a Class (e.g., Blacks) that has been Subject to Discrimination?

For example, in Firefighters v. Stotts (hereinafter ‘Stotts’), the Supreme Court was asked to examine a plan that modified a seniority system for laying off fire fighters. The purpose of the modification, as in Wygant, was to reduce the adverse impact on African Americans who had only recently acquired their jobs, in this case as a result of a 1980 consent decree. Under that consent decree, a specific proportion of new hires and promotions were given to Blacks. Once layoffs were imposed, however, those African Americans stood to lose those positions because they were the ‘last hired’, and so, ‘first fired’.

Justice White argued that Congress intended to provide ‘make-whole relief only to those who have been actual victims of illegal discrimination’. Justice Blackmun, in his dissenting opinion joined by Justices Marshall and Brennan, found the opposite. The dissent’s view was that the purpose of race-conscious relief is to remedy the classwide effects of past discrimination, rather than discrimination against identified members of the class.

The same divergence in opinion surfaced in Sheet Metal Workers v. EEOC. Justice Brennan found a plan to increase Black membership in a union to 29% to be consistent with Title VII, contending that relief is applied to the class as a whole so that no specific individuals are entitled to relief, and beneficiaries need to show they were victims of discrimination.

Justices Rehnquist and Burger disagreed, however, believing that such a remedy could only be awarded to actual victims of the employer’s discriminatory practices.

(2) How Much of a Burden can be Imposed upon Whites in the Effort to Remedy Discrimination?
The short answer to this question is that while the Court has often approved of affirmative action plans that give minorities and women a leg up in terms of hiring or advancement

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40 Ibid., 613.
43 Ibid., 500.
(albeit with certain conditions attached), it has usually disapproved of plans that would result in a greater likelihood for Whites or men to lose their jobs.

The Court upheld a voluntary affirmative action program in *Weber*, in which Blacks were simply given a better chance of getting into a training program. Justice Brennan determined that the plan did not ‘unnecessarily trammel the interests of the white employees [by requiring] the discharge of white workers and their replacement with new black hires. Nor [did the plan create] an absolute bar to the advancement of white employees since half of those trained in the program would be white’.

The Court also approved a local government’s policy, which led to the promotion of a woman over a man who had received a higher score. But, as in *Weber*, there were limits. Justice Brennan repeated as one criterion for acceptability that the scheme does not ‘unnecessarily trammel the rights of male employees or create an absolute bar to their advancement’ as might a rigid quota system or earmarking of positions. The dissenting justices, of course, disagreed with the assertion that the plan was flexible enough to not place an undue burden on men. Rather, they viewed the plan as representing discrimination against men. Justice Anton Scalia wrote: ‘The Court today completes the process of converting [Title VII] from a guarantee that race or sex will not be the basis for employment determinations, to a guarantee that it often will.’

In the *Wygant* case referenced above, involving the layoff plan designed to retain a specific proportion of minority teachers, the Court invalidated the plan, making the following distinction: ‘In cases involving valid hiring goals’, Justice Powell explained:

the burden to be borne by innocent individuals is diffused to a considerable extent among society generally. Though hiring goals may burden some innocent individuals, they simply do not impose the same kind of injury that layoffs impose.

(3) Should the Court Defer to Congress as a Co-Equal Branch of Government?

In their debate over the interpretation of the Civil Rights Act, justices quoted extensively from the legislative history in order to support their view as to Congress’ intention. But suppose it is clear what Congress meant and its intention was to create an affirmative action program? Does that mean that it should be presumed to be within their constitutional authority to do so? Recall that section 5 of the Fourteenth Amendment gives Congress the right to enforce ‘by appropriate legislation’ the amendment’s provisions. The Constitution further gives Congress ‘the power to… provide for the… general Welfare of the United States’ (Article I, section 8). *Fullilove v. Klutznick* involved a provision of the Public Works Employment Act (PWEA) of 1977. The law required that at least 10% of federal funds granted for local public works projects be used by state and local governments to purchase services or supplies from minority-owned businesses.

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46 Ibid., 648.
47 *Wygant*, 282.
The requirement was considered necessary in order to disrupt an established pattern whereby minority businesses continued to account for a very small percentage of government contracting.

Chief Justice Burger, writing for the Court, suggested that while such a program ‘calls for close examination’, the Court should do so with ‘appropriate deference to the Congress’. After scrutinizing the program’s objectives and means for achieving those objectives, he concluded that the PWEA met constitutional muster. This view was controversial. Justice Potter Stewart, in his dissenting opinion joined only by Justice Rehnquist, found the provision to be unconstitutional despite the fact that it had been enacted by Congress: ‘If a law is unconstitutional, it is no less unconstitutional just because it is a product of the Congress of the United States’. Among other reasons, he argued, there is no evidence that Congress previously engaged in racial discrimination in disbursing federal contacting funds. Hence, there were no findings of specific discrimination that would justify an affirmative action program.

Similarly, in Metro Broadcasting v. Federal Communications Commission (hereinafter ‘Metro Broadcasting’), Congress sought to ensure continued ‘broadcast diversity’ by setting aside a specific number of broadcast licenses for minorities. The Court again found the program to be constitutional. Justice Brennan, writing for the Court, stated that ‘It is of overriding significance in these cases that the FCC’s minority ownership programs have been specifically approved – indeed, mandated – by Congress’. As such, it need only meet an intermediate form of scrutiny; that is, that the program meets important governmental objectives. Indeed, he noted, that in a case in the previous term, Richmond v. J.A. Croson Co., Justice Sandra Day O’Connor had remarked that while state and local governments could not mandate such programs in such circumstances, ‘Congress may identify and redress the effects of society-wide discrimination’ and that Congress ‘need not make specific findings of discrimination to engage in race-conscious relief’.

In her dissenting opinion in Metro Broadcasting, however, Justice O’Connor opined that congressional actions were not to be held to any lower equal protection standard than those of anyone else. So even individual justices can change their minds.

This brief analysis demonstrates the very different views of the justices who heard cases during this fourteen-year period. The nature of their rhetoric suggests that these differences extend beyond varying interpretations of an ambiguous Constitution and statute to broad philosophical divergences.

50 Ibid., 527.
51 [1990] 110 S Ct 2997.
54 Quoted in Metro Broadcasting, 3009.
3.1.3. *The Court Reverses Itself*

The final subtheme, and one for which the *Metro Broadcasting* decision stands as an example, is that the Court as a whole can, with the stroke of a pen, make a U turn, disapproving provisions they once sanctioned.

One decision where this is apparent was *Adarand v. Peña* (hereinafter ‘*Adarand*’)\(^{55}\) in which the Supreme Court reversed the position it took in *Metro Broadcasting* and invalidated a congressionally mandated affirmative action program. In her opinion for the Court, Justice O’Connor stated unequivocally that all affirmative action programs, regardless as to origin, must be shown to meet the test of strict scrutiny (that is, meet compelling governmental objectives and to be narrowly tailored to achieve that objective). The standard would not be lowered in the case of Congressionally mandated programs. Describing *Metro Broadcasting* as a ‘surprising turn’ in the Court’s jurisprudence, she characterized it as having undermined the principal that the Constitution protects individuals not groups and so would be overruled.\(^{56}\) *Adarand* has been seen as the final word on affirmative action in employment as well as contracting and sets a very high bar for all such programs to meet.

The Court’s about-face can be seen even more dramatically with respect to the ultimate fate of the *Griggs* case discussed earlier in this paper. Recall that in this case, the Supreme Court unanimously agreed\(^{57}\) on certain principles with respect to interpreting Congress’ intention in the Civil Rights Act (and these principles were confirmed by subsequent cases\(^{58}\)). The Court held that minorities could establish a prima facie case of discrimination by showing the adverse impact of an employment practice (later codified as a four-fifths rule). The burden of proof would then shift to the employer to show that the practice constituted a business necessity.

At issue in *Wards Cove Packing Co. v. Antonio*\(^{59}\) was a set of employment practices that non-White cannery workers alleged led to their concentration in lower paying jobs and access to only inferior facilities. The plaintiffs alleged that the racial stratification of the work force was caused by several of the companies’ hiring and promotion practices, including a rehire preference, a lack of objective hiring criteria, separate hiring channels, and a practice of not promoting from within.

Since adverse impact was demonstrated, the *Griggs* decision would have called for the burden of proof then to shift to the employer to show those practices constituted a business necessity. In this case, however, the Court ruled that the burden of proof remained with the plaintiff to show the specific employment practice that caused the imbalance. Moreover, the employer need only state the reasoning behind the use of the practice; it would then be up to the plaintiff to prove that the practice does not

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\(^{57}\) Justice Brennan did not participate in the decision, but given his subsequent opinions, there can be little doubt he would have concurred with the other justices.


represent a business necessity. Furthermore, the business necessity standard was relaxed so that the employer need only show that the ‘challenged practice serves, in a significant way, the legitimate employment goals of the employer … there is no requirement that the challenged practice be “essential” or “indispensable” to the employer’s business for it to pass muster’. So dramatic was the departure from established law, that Congress subsequently enacted language to reverse some of its more severe holdings.

What explains these examples of the Court turning their own decisions on their heads? The change is in the justices sitting on the High Court. As many of the more liberal justices retired during the 1980s, more conservative justices took their place. Each justice’s own beliefs and the way he or she decides to interpret the law and Constitution make a difference.

Thus, this brief review of some of the more significant Supreme Court opinions demonstrates the divergent perspectives of the justices and how their competing views have shaped the ebb and flow of affirmative action policy since enactment of the Civil Rights Act in 1964.

3.2. Implications for achieving a representative bureaucracy

In the Civil Service Reform Act of 1978, the Congress explicitly called for a ‘Federal workforce reflective of the nation’s diversity’ (5 USC section 2301[b][1]), an official acknowledgement of the need for a representative bureaucracy. All federal agencies were required to establish a Federal Equal Opportunity Recruitment Program (FEORP) and to undertake affirmative recruitment activities to correct the under-representation of women and minorities in mid- and higher-grade levels (5 USC section 7201). Federal, state, and local employers continue to be required to report regularly on representation of such characteristics as race and gender in their workforces. As noted earlier, in Weber and Johnson v. Santa Clara County (hereinafter ‘Johnson’), the Supreme Court upheld affirmative action programs undertaken voluntarily by a private entity and governmental jurisdiction, respectively. They did so because they (at least a slim majority) found such measures to be consistent with the Civil Rights Act (in neither case was the Constitutional issue raised). In his concurring opinion in Johnson, Justice Stevens noted that it is legitimate for an employer, private or public, to implement an affirmative action program for any number of ‘forward looking reasons’. These reasons include ‘improving services to Black constituencies averting tension over allocation of jobs in a community or increasing the diversity of the workforce, to name a few’.

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Moreover, recall that in *Regents v. Bakke*, Justice Powell had upheld the constitutionality of the medical school’s use of race as a factor in admissions decisions, citing the importance of diversity in medical school education. In fact, he found such an objective to be compelling enough to meet the test of strict scrutiny. In a more recent case, *Grutter v. Bollinger* (hereinafter ‘*Grutter*’), the Court upheld an affirmative action measure used by the University of Michigan Law School, also because the majority found diversity in education to be compelling. Outside of the realm of education, the Court upheld, in *Metro Broadcasting*, a statute, the goal of which was to enhance broadcast diversity, although important in that case was also that the Court was deferring to Congress as a co-equal branch of government.

Nevertheless, later developments have suggested that the adoption of an affirmative action program by a government entity would not now be approved by the Court. First, in her majority opinion in *Grutter*, Justice O’Connor was quite clear that her remarks only pertained to the benefits of achieving a diverse learning environment. Second, four years later, the Court struck down the consideration of race in making assignments to schools, arguing that the achievement of diversity in those schools does not meet the test of strict scrutiny. This shift in position of the court is at least partly attributable to the replacement of Justice O’Connor with the more conservative Justice Samuel Alito. (The latter decision was also written by a new justice, John G. Roberts, who replaced Justice Rehnquist as Chief Justice in 2005.)

Moreover, as noted above, in *Adarand v. Pena*, the Court made it clear that the standard by which any consideration of race in state action, whether federal, state, or local, would be strict scrutiny. That standard can only be met in cases where there is clear evidence of past discrimination by the employer in question. That federal employers should heed that decision was emphasized by then Acting Director of the Justice Department’s Office of Civil Rights who urged them to ‘really scrutinize each of [their] affirmative action policies and practices to make absolutely sure each is in conformity with the law’. In short, the Court has been steadily moving to the right with respect to affirmative action policy. It remains severely divided, but it is doubtful that pro-affirmative action justices, such as Justice Ginsburg, would be able to command enough votes to support any particular holding.

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67 Moreover, her approval of affirmative action in education was bounded. In a second decision handed down the same day, the Court invalidated a more rigid affirmative action measure used in undergraduate admissions by the University of Michigan (*Gratz v. Bollinger* [2003], No. 02-516).
68 *Parents Involved in Community Schools v. Seattle School District # 1* [2007], No. 05-908.
4. South Africa

The clear need to overcome the devastating consequences of apartheid has not shielded affirmative action from controversy in the new Republic of South Africa. Nor has the explicit constitutional and legislative endorsement of affirmative action secured it from legal challenge. The courts in this country, as in the United States, have laboured over how to resolve the tension between ensuring equal treatment of all citizens regardless of characteristics such as race and sex and achieving the equal distribution of resources.

Minister of Finance and another v. van Heerden (hereinafter ‘van Heerden’) \(^{71}\) is the first (and to date only) Constitutional Court decision directly pertaining to affirmative action. This case concerned a challenge to the Political Office Bearers Pension Fund established for Members of Parliament after the onset of democracy in 1994. Between 1994 and 1999, the rules of the Fund had provided an additional benefit to Members of Parliament who had entered the institution for the first time in 1994. This took the form of enhanced employer contributions calculated on a particular scale. These differentiated contributions were challenged by van Heerden, a member who served in the pre- and post-1994 parliaments, as constituting unfair discrimination. The Court had to decide whether the scheme was constitutionally permissible as a positive (or affirmative action) measure under section 9(2) of the Constitution.

The Court, without dissent, opted for contextual or ‘situation sensitive approach’ to resolving the issue. Aware that other countries have similarly confronted this difficult question, the Court stressed that the resolution is not an abstract one but one that is influenced by each country’s constitutional design, history, and social context. South African constitutional design, history, and social context enjoin courts to adopt an approach to equality that goes beyond equal treatment (also dubbed formal equality) to some understanding of social and economic equality between individuals or groups (also called substantive, remedial, or restitutionary equality). \(^{72}\)

This means that the Constitution views affirmative action measures not as in conflict with the right to equality but rather asserts (in section 9(2)) that such policies are necessary ‘[t]o promote the achievement of equality’. \(^{73}\) One result of this approach, according to the Court in van Heerden, is that affirmative action measures that fall properly within the ambit of section 9(2) do not attract a presumption of unfairness, which is the usual fate of a measure differentiating on one of the prohibited grounds of discrimination. \(^{74}\) As Justice Mosebenzi explains: ‘I cannot accept that our Constitution at once authorises measures aimed at redress of past inequality and disadvantage but also labels them as presumptively unfair’. \(^{75}\) In other words, it would be wrong to see them as ‘presumptively unfair’ if they are integral to our understanding of equality. This means that section 9(2)

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\(^{71}\) [2004] 11 BCLR 1125 (CC).

\(^{72}\) See, for example, National Coalition v. Minister of Justice [1999] 1 SA 6 (CC), paras 60-61.

\(^{73}\) Minister of Finance and another v. van Heerden (hereinafter ‘van Heerden’) [2004] 11 BCLR 1125 (CC), para. 30.

\(^{74}\) See Harken v. Lane NO & Others [1998] where it was held that differentiation on one of the sixteen specified grounds contained in the Constitution is presumed to amount to unfair discrimination.

\(^{75}\) van Heerden, para. 33.
provides a complete defence to a claim that positive measures constitute unfair discrimination. All that is required to succeed in this defence is to demonstrate compliance with the internal conditions established in section 9(2).

Before considering these internal criteria against which all positive measures must be measured, it may be apt to briefly consider the general approach adopted by the Court in determining whether a measure properly falls within the ambit of section 9(2). In setting out this approach, the court breaks new ground and establishes a template for the consideration of all future affirmative action claims, including, it is submitted, claims under the EEA. The general approach can be described as one of restraint and deference:

Courts must be reluctant to interfere with such measures, and exercise due restraint when tempted to interpose themselves as arbiters as to whether the measure could have been proceeded with in a better or less onerous way... Given our historical circumstances and the massive inequalities that plague our society, the balance when determining whether a measure promotes equality is fair will be heavily weighted in favour of opening up opportunities for the disadvantaged.76

The Labour Court recently confirmed and followed this approach: ‘Judicial restraint and deference is called for in recognition of the need for state action to redress past social injustices’.77 The level of scrutiny of positive measures is therefore lower than that which applies to unfair discrimination. In particular, there is less emphasis on the negative impact of the measure – which would generally be on an advantaged group – and more emphasis on the group that is to be advanced. Despite adopting a more relaxed level of scrutiny to affirmative action measures, the Court nevertheless made it clear that excesses will not be tolerated:

[If the measure at issue is manifestly overbalanced in ignoring or trampling on the interests of members of the advantaged section of the community, and gratuitously and flagrantly imposes disproportionate burdens on them, the courts have a duty to interfere.]78

4.1. Section 9(2): Internal Criteria

The three-fold enquiry to determine whether a measure falls properly within the ambit of section 9(2) of the Constitution established in the van Heerden decision provides a fitting vantage point from which to consider the approach of South African courts to the adjudication of affirmative action claims, including those under the EEA. The three internal requirements are, first, that the measure must target ‘persons or categories of persons who have been disadvantaged by unfair discrimination’; second, that the measure must be ‘designed to protect or advance’ such persons or categories of persons; and third

76 van Heerden, para. 152.
77 Alexandre v Provincial Administration of the Western Cape Department of Health (hereinafter ‘Alexandre’) [2005], 26 ILJ 765 (LC).
78 See supra n. 60.
and last, that the measure must ‘promote the achievement of equality’. Each of these will briefly be considered in turn.

4.1.1. Does the Measure Target Persons or Categories of Persons Who Have Been Disadvantaged by Unfair Discrimination?

The Constitution leaves the identity of the potential beneficiaries of affirmative action deliberately vague and open-ended, referring to ‘persons or categories of persons disadvantaged by unfair discrimination’ (section 9(2)). Implicit in the Constitutional provision is the recognition that disadvantage and inequality take on particularly complex forms in South Africa and that affirmative action measures may be tailored to a variety of groups, provided of course that they ‘have been disadvantaged by unfair discrimination’. In *van Heerden*, the Constitutional Court endorsed the broad sweep of section 9(2), stating that its purpose is to redress disadvantages based not only on race but also on gender and class and ‘other levels and forms of social differentiation and systemic under-privilege which still persist’.79 In other words, there is an acknowledgement that disadvantage not only follows the axis of race but that ‘(r)acial cleavages are cross-cut with rural-urban, gender, class, regional and cultural divides which complicate the nature of disadvantage and discrimination’.80

The EEA narrows down this provision in the following way. In section 15, the Act describes affirmative action measures as measures to ensure equal employment opportunities and equitable representation of ‘suitably qualified people from designated groups’. Recent regulations issued under the EEA also establish that designated groups members must be citizens of South Africa.81

This means that an intended beneficiary of affirmative action under the EEA has to meet three requirements. He or she must be:

- from a designated group,
- ‘suitably qualified’, and
- a citizen of South Africa.

The Act then provides four operative definitions, which tell us who the beneficiaries of affirmative action may be:

- ‘designated groups’ is defined to mean ‘black people, women, and people with disabilities’;
- ‘black people’ is defined to include Africans, Coloureds, and Indians (in terms of a recent High Court decision, the term also includes South African

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79 *van Heerden*, para. 27.
citizens of Chinese descent who were classified as Coloured in terms of Apartheid legislation); ‘people with disabilities’ is defined to mean ‘people who have a long-term physical or mental impairment that substantially limits their prospects of entry into, or advancement in, employment’; and a ‘suitably qualified person’ is defined in section 20 as a person who may be qualified for a job as a result of any one of, or any combination of that person’s:

- formal qualifications,
- prior learning,
- relevant experience, or
- capacity to acquire, within a reasonable time, the ability to do the job.

The particular criterion, namely, that a measure must target persons or groups defined by a particular ground of disadvantage, raises at least three important questions:

1. how to identify the persons or groups that form the basis of affirmative action measures;
2. whether, once identified, one has to show actual disadvantage, or whether membership of the affected class is sufficient in order to benefit from the measure;
3. whether the measure may legitimately differentiate between persons within a particular disadvantaged group.

(1) Identifying the Persons or Groups that Form the Basis of Affirmative Action Measures

As the operative definitions listed above make clear, the EEA (in section 1) has narrowed down the reference to ‘persons or groups of persons disadvantaged by unfair discrimination’ to black people, women, and people with disabilities. The EEA 55 of 1998 thus identifies three very distinct categories of disadvantage that warrant redress – race, gender, and disability. The Act therefore recognizes black people, women of all races, and people with disabilities as the potential beneficiaries of affirmative action in the workplace. The category ‘black’ is intended to encompass all those previously classified as African, Coloured and Indian, meaning that it reproduces what are in fact the same racial categories and divisions that underpinned apartheid. In a recent decision, the Transvaal Provincial Division of the High Court determined that people of Chinese descent, who were classified as Coloured in terms of the Population Registration Act, fall within the ambit of ‘black people’ in the EEA and the Broad-Based Black Economic Empowerment Act 53 of 2003.

82 See the Population Registration Act 30 of 1950, s. 1 (xv), (ix) and (iii).
Defenders of the renewed salience of racial identification in the project of transformation point to the fact that after decades of formal racial classifications, on the basis of which some of South Africa’s most fundamental social goods such as employment, land, housing, and education were distributed, it is only to be expected that these racial categories (African, Coloured, Indian, and White) will retain salience in South African society for some time to come. These ‘racial groups’ were, in effect, created by the original unjust practice of racial discrimination, and to deny that fact (by pursuing a policy of ‘colour blindness’) would be to deny a social reality – a reality that cannot morally be ignored as long as the wrongs that created these divisions have not yet been rectified.\(^84\) It should be pointed out that some commentators have alluded to the dangers inherent in replicating apartheid’s racial grid in the pursuit of affirmative action.\(^85\)

The EEA envisages, in contrast to the manner in which racial identification was determined under apartheid, that the authority to define membership in one of the designated racial groups should rest with the individual concerned. The *Code of Good Practice on the Integration of Employment Equity into Human Resource Policies and Practices*\(^86\) states the following:

> It is preferable for employees to define themselves to enable the employer to allocate then to a designated group. Only in the absence of an employee’s self-identification, can an employer rely on existing or historical data to determine the employee’s designated group status.\(^87\)

Presumably, in order for the policy to function effectively, it must preclude those previously advantaged from defining themselves African, Coloured, or Indian for expedient reasons. In the unlikely event of this happening, it would place the employer in the difficult (and it is submitted untenable) position of having to determine, on the basis of ‘existing or historical data’,\(^88\) the particular individual’s racial categorization. Official definitions of the different racial groups no longer exist in South African law.

(2) Must one Show Actual Disadvantage, or is Membership of the Affected Class Sufficient in Order to Benefit from Affirmative Action Measures?

One of the most common objections to affirmative action is that such policies are over-inclusive. By focusing attention on groups rather than individuals, individuals who are not ‘needy’ will in fact receive benefits at the expense of those who have been disadvantaged most by the effects of discrimination and thus are most in need of advancement.


\(^86\) Notice 1358 of 2005.

\(^87\) Part 5.3.10.

\(^88\) See supra n. 70.
under such a policy. As affirmative action usually works in practice, those who have suffered most under discrimination are seldom those who benefit from these policies. As one opponent of affirmative action notes:

Those who are most disadvantaged by injustice are so disadvantaged that they often cannot even begin to compete for the positions that beneficiaries of racial affirmative action obtain, those most likely to benefit are those who were either minimally disadvantaged or not disadvantaged at all (in the relevant ways) or those who, although once disadvantaged, have already been compensated. 89

If what we want is to truly advance those who have been disadvantaged, then, critics point out, the emphasis should be on the disadvantaged individuals of a deprived group, not the deprived group as such. But, they go on to say, the policies of affirmative action do not mandate or even recommend finding out whether individuals who benefit have actually been the victims of any injustice that could warrant redress.

The Court in *van Heerden* may have (at least for now) put that argument to rest. Although the majority emphasizes that ‘the beneficiaries must be shown to be disadvantaged’, this requirement relates to the identified group and not to each individual member of the group. The Court made it clear that a measure will not fail because it benefits persons who have not, in fact, been disadvantaged. It is sufficient, the Court said, that ‘an overwhelming majority’ have been so disadvantaged. 90

In her minority judgment, Justice Mokgoro provided the rationale for the group-based approach in instances where the targeted groups are defined with reference to the unfair discrimination suffered specifically under the policy of apartheid:

The approach of apartheid was to categorize people and attach consequences to those categories. No relevance was attached to the circumstances of individuals. Advantages or disadvantages were metered (sic) out according to one’s membership of a group. 91

The significance of this, she points out, is that ‘it is unnecessary for the state to show that each individual member of a group that was targeted by unfair discrimination was in fact individually discriminated against when enacting a measure under section 9(2)’. 92 Membership of the group is sufficient. This view has also found support in the High Court. In *Stoman v. Minister of Safety and Security and others* (hereinafter ‘*Stoman*’), 93 the Court confirmed that the intention of the legislature ‘could not have been to make [affirmative action] measures dependent on the individual circumstances of each particular case’. 94

89 D. Benetar, ‘Affirmative Action: Not the Way to Tackle Injustice’, Inaugural lecture, University of Cape Town, 11 Apr. 2007 – copy on file with the authors.
90 *van Heerden*, para. 40.
91 *van Heerden*, para. 85.
92 See supra n. 74.
94 *Stoman v. Minister of Safety and Security and others* (hereinafter ‘*Stoman*’) [2002], 3 SA 468, at 483J-484A.
(3) May affirmative action measures legitimately differentiate between persons within a particular disadvantaged group?

The final question to turn to under this heading is whether one can distinguish between persons within a particular disadvantaged group. In other words, can those implementing affirmative action measures classify members of the designated groups into categories of relative disadvantage vis-à-vis each other? Although the Constitutional Court has not yet answered this question, it flagged it as ‘a more difficult problem’ for future consideration. Lower courts and tribunals, however, have been confronted with the issue on a number of occasions. In each of these cases, the measure differentiated between Africans on the one hand and members of the other designated groups on the other.

For example, in Motala & Another v. University of Natal ([hereinafter ‘Motala’]),\textsuperscript{95} the applicant, a female of Indian descent, was refused admission to the Medical School of the University of Natal. The reason given was that the university had decided that only 40 Indian students would be admitted annually and that the requisite number had already been admitted. The university had adopted a policy to admit more African students to the faculty in order to redress the educational disadvantages they suffered under apartheid. The Court held that the measure preferring African students over other students who had also suffered disadvantage was lawful. Although Indian students were disadvantaged by apartheid, the Court wrote:

> the degree of disadvantage to which African pupils were subjected under the [apartheid] system of education was significantly greater than that suffered by their Indian counterparts.\textsuperscript{96}

This view also found favour with the Labour Court,\textsuperscript{97} the CCMA\textsuperscript{98} and a private arbitrator.\textsuperscript{99}

4.1.2. Is the Measure Designed to Protect or Advance such Persons or Categories of Persons?

The second condition placed on positive measures is that they should be ‘designed to protect or advance’ certain persons or groups. The Constitutional Court adopted a criterion of reasonableness to determine whether a measure was indeed ‘designed to protect or advance.’ The measures, the Court wrote, ‘must be reasonably capable of attaining the desired outcome’.\textsuperscript{100} In establishing the standard, the Court declined to endorse the more stringent approach followed in the High Court decision of PSA v. Minister of Justice,\textsuperscript{101} where the Court required a showing of a ‘causal connection between the

\textsuperscript{95} (1995) 3 BCLR 374 (D).

\textsuperscript{96} Motala & another v University of Natal (1995) 3 BCLR 374 (D), at 383 C-E.


\textsuperscript{99} Solidarity obo Christiaans and Eskom Holdings Ltd (2006) 27 ILJ 1291 (ARB) at 1036.

\textsuperscript{100} van Heerden, para. 41.

\textsuperscript{101} (1997) 3 SA 925 (T).
designed measures and the objectives’. All that is called for is that the measure should carry a ‘reasonable likelihood’ of meeting the end. To require the promoter of positive measures to establish ‘a precise prediction of a future outcome’ would render the measure ‘stillborn’. The criterion of reasonableness provides a degree of flexibility, meaning that the parameters of the requirement will still be established over time.

Although the precise parameters of the ‘reasonableness’ standard still need to be developed, the Court nevertheless indicated that measures that are ‘arbitrary, capricious or display naked preferences’ will not survive scrutiny. In addition, a measure taken for improper or corrupt motives, or seriously lacking in thought and organization, will suffer the same fate.

4.1.3. Does the Measure Promote the Achievement of Equality?

Finally, the purpose of the measure must fall within the overall purpose of achieving equality through protecting or advancing disadvantaged persons or groups. The Court noted that it is inevitable that the achievement of this goal may often come at a price for those who were previously advantaged. However, because the long-term constitutional goal of South African society is the establishment of a ‘non-racial, non-sexist society in which each person will be recognized and treated as a human being of equal worth and dignity’, the ‘price’ that the previously advantaged have to pay must be a reasonable one. The Court must ensure that the measure does not amount to ‘an abuse of power’ and that it does not impose ‘substantial and undue harm’ or ‘disproportionate burdens’ on those excluded from the measure. Ultimately, transformation must be carried out responsibly and its adverse impact minimized. Otherwise, courts have a duty to intervene.

4.2. Implications for achieving a representative bureaucracy

As noted, there is an arsenal available to South African government entities seeking to achieve a representative workforce. They are not just permitted to do so; they are required to do so by the Constitution and subsequent legislation. The Public Service Act, passed in June 1994 (No. 103 of 1994), states that:

In the making of any appointment or the filling of any post in the public service… the evaluation of persons shall be based on training, skills, competence, knowledge and the need to redress...
the imbalances of the past to achieve a public service broadly representative of the South African people, including representation according to race, gender and disability.

This same call was issued in many other official documents including several White Papers. The EEA states that one of its purposes is ‘to achieve a workforce broadly representative of our people’. Nevertheless, it should be clear from this paper that thorny issues have arisen and landed in the laps of the judicial system to resolve.

4.2.1. Relative Disadvantage

One thorny issue, already noted, is the extent to which one disadvantaged group can be given preference over another. As mentioned earlier, although the Constitutional Court has not yet confronted the issue, Justice Sachs indicated that the resolution of the question would require not only legal but also historical and social evidence.\(^{110}\) This means that should a measure be specifically targeted, for example, at black women rather than all women, or in the first instance at Africans rather than all black people, such measures may be lawful provided that ‘the definition of the group is justified with reference to the actual historic and current unfair discrimination suffered by the majority of that group in a particular context’\(^{111}\). It may be that in cases of relative disadvantage, the scrutiny of the group would need to be higher than the relatively relaxed standard for identifying disadvantaged groups established by the Constitutional Court. Mere assertions of relative disadvantage should not be allowed to survive judicial scrutiny. In *Motala*, for instance, the claim of the actual relative privilege of the majority of Indian over African scholars was supported with statistics, hence the Court’s reluctance to interfere with the measure. In cases where the relative disadvantage of Africans vis-à-vis other disadvantaged groups is asserted, there may be an additional reason for requiring some evidence to support the claim. The perception already exists among the other disadvantaged groups that although affirmative action is officially directed at all black people, it is perceived to mainly benefit those of African descent. Allowing these assertions of relative disadvantage in each and every case to go through unverified will not only solidify these perceptions but may arguably also lead to tensions between the different designated groups.\(^{112}\)

It is submitted that despite judicial endorsement of the differentiation between members of designated groups based on their relative disadvantage, the EEA provides no basis for the emphasis on ‘relative disadvantage’ as a criterion for differentiation among sections of the black population. The EEA expressly adopts the criterion of ‘equitable representation’ as the cornerstone for distinguishing between members of the designated groups (see section 2(b) EEA), meaning that the degree to which persons of particular racial or gender groups are underrepresented in a particular occupational category or level

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\(^{110}\) *van Heerden*, para. 149.


within a workplace should guide the actual implementation of affirmative action measures and not whether one group has been relatively more disadvantaged than another. Thus, another way of dealing with the question of ‘relative disadvantage’ is to look at the express goal of affirmative action under the EEA, namely, ‘the equitable representation of designated groups in all occupational categories and levels in the workforce’ (section 2(b) EEA). Because the notion of equitable representation of persons from designated groups is integral to the concept of affirmative action under the EEA, the degree to which persons of particular racial or gender groups are underrepresented in a particular occupational category or level within a workplace should determine the appropriateness of affirmative action. For example, if the facts show that African women are most severely underrepresented in a job category of an employer operating in the Western Cape, the employer will be justified in giving preference to female African applicants who are suitably qualified. Similarly, if Coloured men are underrepresented in certain job categories of an employer in the Limpopo Province, suitably qualified candidates from this group may receive preferential treatment over African men, who may already be sufficiently represented in that job category. This approach based on ‘representivity’ rather than one based on ‘degrees of disadvantage’ is more closely aligned with the purpose of the EEA and more sensitive to regional and industry peculiarities.

4.2.2. The Meaning of ‘Suitably Qualified’

In terms of the EEA, candidates from designated groups will have to meet two criteria before being considered for appointment or promotion under an employment equity plan. The first is membership of the designated group; the second, proof that they are suitably qualified. A suitably qualified person is defined as a person who may be qualified for a job as a result of any one of, or any combination of, that person’s formal qualifications, prior learning, relevant experience, or capacity to acquire, within a reasonable time, the ability to do the job (section 20(3) EEA). The definition of suitably qualified therefore indicates that membership in a designated group is a tie-breaking factor when two candidates are equally qualified (as is the case in the European Union as determined by the European Court of Justice). But it is also a consideration that may even outweigh other qualifications, provided the person in question has, in the view of the employer, the potential to ‘grow’ into the job within what is seen to be a reasonable period of time. We have argued elsewhere that despite the broad and seemingly open-ended definition of suitably qualified, employers should nevertheless employ the idea of a ‘threshold of performance’ that candidates for a certain position must attain. A strategy whereby it is enough simply to be a member of a group with some qualification may lead to a level of performance below this threshold and surely reinforce rather than change stereotypical and prejudicial views toward members of disadvantaged groups. The more general point

is that tokenism, that is to say appointing a black person or woman solely on the basis of race or sex, would be irrational.  
Indications are that the failure to take a threshold of performance into consideration may have occurred with some regularity in the public service. The transformation of the public service from one that was overwhelmingly White and male in 1994 to one that is today broadly reflective of national racial demographics is nothing short of remarkable and has far surpassed the pace of transformation in the private sector. However, many have argued that the accelerated drive to transform the public service has often led to the appointment of people who did not have the qualifications, experience, commitment, or culture of service needed to be productive and loyal public servants. In short, it has led in certain instances to the appointment of people who were not suitably qualified. It has led to a skills exodus and, most importantly, has impeded the state’s ability to spend revenue and deliver effective services, something that impacts most adversely on the poorest and most marginalized of the citizenry.  

As a general rule, courts will be reluctant to interfere with the manner in which employers define suitably qualified. However, when these criteria amount to ‘insurmountable obstacles’ for members of the disfavoured group, they have not survived judicial scrutiny. For example, in a decision regarding the appointment of regional magistrates, the High Court held that a formula allocating marks to applicants based on race and gender and resulting in the automatic exclusion of any White male in competition for a position with a black female, irrespective of qualifications, experience, or skills, amounts to an unacceptable barrier. In addition, courts have also been willing to investigate whether the criteria that comprise suitable qualifications have been applied properly. For example, in the case of *IMAWU v. Greater Louis Trichardt Transitional Local Council*, the Labour Court overturned the appointment of a person to the position of town treasurer in part because the employer failed to demonstrate that any of the criteria for the position were considered in making the appointment, including the potential to develop the ability to perform the work.

Efficiency considerations in the private sector are largely self-enforcing, with financial incentives compelling employers to define ‘merit’ in a manner that advances their own interests. Private employers will therefore, as a matter of self-interest, sail quite close to merit principles despite the relatively open-ended definition of suitably qualified contained in the EEA. However, because this mechanism is less salient in the public service, legislation has to step in to fill the void. In South Africa, the need to balance equality

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114 Stoman, at 482.
115 Blacks now hold 85% of positions in the national public service. Women hold 34%, and Black Africans, 74% of senior management positions in the national public service (Public Service Commission, 2008).
118 See *Du Preez v. Minister of Justice and Constitutional Development and others* [2006], 8 BLLR 767 (SE).
with efficiency considerations finds expression in the Constitution. The Constitution states that the public service must be both ‘broadly representative’ and ‘efficient’ and the police service must discharge its responsibilities ‘effectively’ (see section 195(1) and section 205(2)). To be sure, these two objectives (promotion of equality and efficiency) need not necessarily be in conflict. As the court pointed out in Stoman, a police service ‘could hardly be efficient if its composition is not… representative of the population or community it is supposed to serve’. 120 The argument is simple: only a police force representative of the community it serves will enjoy the trust, cooperation, and the support of that community needed to perform its functions effectively. This means that the appointment of a suitably qualified African male over a White female to the position of captain in a police station variously described as ‘an old apartheid style police station’ and a ‘bastion of White privilege’ can be justified on efficiency grounds. 121

However, there may be situations in which the goal of the achievement of equality will yield to efficiency considerations. For example, in Coetzer v. Minister of Safety and Security (hereinafter ‘Coetzer’), 122 the employer decided to keep positions in its explosives unit open rather than filling them with suitably qualified members of the non-designated group. The Court held that the balance between the imperatives of representivity and efficiency should be a rational one. 123 In this case, however, the employer had failed to embark on this balancing exercise, thereby ignoring the constitutional imperative that the police service maintain its efficiency.

The decision in Coetzer casts doubt on the lawfulness of what some studies indicate has become common practice in the public service, namely, the refusal to fill positions although qualified members of the non-favoured groups are available. 124 If one takes into consideration the fact that the public service is experiencing an alarmingly high rate of vacancies, especially at senior management level, this judgment takes on additional significance.

4.2.3. When Will Affirmative Action End?

When, if ever, will we be able to say that we have had enough affirmative action and that it should end? Opponents of affirmative action, who argue that legislation such as the EEA should contain a so-called sunset-clause stipulating that racial and other preferences will be abolished at a specified future date, have posed this question with regularity. Unless a specific cut-off date is established, they argue, affirmative action has

120 Stoman, 482.
121 See Fourie v Provincial Commissioner of the S4 Police Service (North West Province) & another [2004], 25 ILJ 1716 (LC), 1732 and 1735, where the court upheld the contention of the respondent that the appointment of a white women in an overwhelmingly white police station would not have promoted efficiency, while the appointment of an African male would because it would increase the legitimacy of the police in the eyes of the community that it is meant to serve.
123 Coetzer v Minister of Safety and Security [2003], 24 ILJ 163 (LC) at 173.
124 Bentley & Habib, 337.
the potential to become, at best, a permanent feature on the political landscape of the country and, at worst, an institutionalized racial spoils system.

It is widely acknowledged that affirmative action is a temporary measure with a specified goal or goals. Once these are achieved, the case for affirmative action is correspondingly weakened and continued efforts in the interest of affirmative action might well be regarded as discriminatory. The question of the duration of affirmative action programmes is therefore closely tied up with the justification that is offered for its existence. If the justification is purely backward-looking, namely, as a form of compensation for past discrimination, then a convincing argument may exist for establishing a specific expiration date for its demise. In van Heerden, for example, the purpose of the differentiated employer contributions to the pension scheme was indeed backward-looking, namely, to ameliorate past disadvantage and therefore had a finite lifespan of five years.

However, affirmative action in South Africa is justified not only as a remedial, backward-looking measure but also as a way of redressing existing inequality. This is a more amorphous goal, which makes the establishment of a specific expiration date difficult, if not impossible. What is important to note, however, is that this relatively open-ended goal is again given more specific meaning in the employment context. The EEA makes it clear that inequality in the employment context manifests itself in the under-representation of members of disadvantaged groups. The goal is therefore one based on more equitable representation, determined primarily with reference to the relevant regional, provincial, or national demographic data.\(^\text{125}\) Does this mean that once the workplace is more representative (however this may be defined by the employer), affirmative action should end?

This question yielded opposing answers in two recent decisions of the Labour Court. In Willemse v. Patela NO & Others,\(^\text{126}\) the Court held that where an employer had adopted a policy stating that once targets have been reached, ‘merit’ should be the only consideration for appointment, continued consideration of race and gender after the targets had been met were unfair.\(^\text{127}\) However, in the case of Alexandre v. Provincial Administration of the Western Cape Department of Health (hereinafter ‘Alexandre’),\(^\text{128}\) the Court expressed doubt that a policy committing an employer to end affirmative action once targets have been reached ‘advances the spirit and purpose of employment equity and the notion of substantive equality’.\(^\text{129}\) It is thus not for the employer to decide when to call an end to affirmative action, even if that decision may have been the result of agreement between the employer and employees.

The implication is that affirmative action measures may be used not only to attain equitable representation but also to maintain it once the targets set have been reached.

\(^{125}\) See Code of Good Practice on Preparation, Implementation and Monitoring of Employment Equity Plans 7.3.2(b).

\(^{126}\) [2007] 28 ILJ 428 (LC).

\(^{127}\) Willemse v. Patela NO & Others [2007] 28 ILJ 428 (LC) at para. 73.

\(^{128}\) [2005] 26 ILJ 765 (LC).

\(^{129}\) Alexandre, 777.
In the United States, on the other hand, the Supreme Court made it clear that an employer may only aim to ‘attain’ but never to ‘maintain’ a racial balance in the workforce. This reflects the narrow compensatory idea that employers may practice affirmative action only to compensate for their own past sins – a significant constraint on workplace affirmative action measures in the United States. This restrictive requirement is not part of South African law and, in our view, the Court in *Alexandre* appropriately cautioned against its incorporation. The possibility of experiencing what one American commentator calls a ‘re-segregation nightmare’ once an end to affirmative action is announced is a real possibility in South Africa given the extent to which inequality and disadvantage have solidified to become part of the very structure of society. To be sure, maintaining rather than attaining equitable representation will impact on the status of affirmative action. It may mean a supporting rather than a leading role, but a role nonetheless.

### 5. Cross-cutting Themes and Implications

In comparing the approaches taken by the two judicial systems, particularly the Supreme Court in the United States and the Constitutional Court in South Africa, it is important to review the similarities and differences in the historical and legal backdrop against which such measures were developed. In the United States, affirmative action was raised through executive orders and then finally in statute against the backdrop of continued prejudice and discrimination, especially against African Americans and women. However, most of these affirmative action cases have dealt with the effects of racial discrimination, and non-White groups represent a minority of the US population. In South Africa, it was the vast majority of the population that was subject to enforced segregation and discrimination, and the denial of equal rights was much more evident than in the United States. Hence, affirmative action measures are designed and implemented against a much starker racial landscape, which is in turn reflected in the importance given to them by law and the Constitution.

Moreover, while the 14th amendment enacted in the wake of the Civil War requires ‘equal protection’, there has been disagreement among US justices as to what ‘equal’ really means. For some justices, it includes instituting proactive measures to right the severe imbalance facing minorities, while for others, it can mean no less than treating everyone exactly the same. In South Africa, the Court has before it a Constitution that specifically allows for measures to protect and advance persons disadvantaged by unfair discrimination. Hence, the Constitutional Court easily resolved that whether measures will be considered ‘fair’ depends on the extent to which they open up opportunities for the previously disadvantaged and do so in a reasonable way.

It is this difference in the standard by which affirmative action measures are judged that most acutely highlights the differing approaches in the two countries. In the

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United States, despite disagreement among justices, at the end of the day, the court required affirmative action programs to meet a standard of strict scrutiny. The presumption is that the disadvantages faced by minorities and women are best addressed through programs that treat everyone equally. Any suggestion that minorities are to receive different consideration (let alone special consideration) from non-minorities can only be justified if the reason is compelling and the approach narrowly tailored. The Court will not necessarily even allow Congress to determine what constitutes a compelling interest. Most observers agree that this is a high bar indeed. Even Justice O’Connor in the Adarand decision (1995) cautioned that the standard should be ‘strict in theory, not fatal in fact.’ As has been shown, not all justices reviewing affirmative action measures over the last few decades have agreed that this is the proper method to assess such programs. Given the legacy of slavery and discrimination, justices such as Marshall and Blackmun have opined, the consideration of race meant to provide an advantage to minorities ought to be allowed if it meets an important governmental objective. Remedying the societal vestiges of discrimination is such an objective.

In South Africa, the Constitutional Court has issued but one judgment on affirmative action, one that was joined by all eleven justices. It calls for the standard of review to be one of reasonableness – a standard establishing a much lower threshold of constitutional validity than that which applies in the United States. ‘Given our historical circumstances and the massive inequalities that plague our society,’ Justice Sachs wrote in van Heerden, ‘the balance when determining whether a measure promotes equality is fair will be heavily weighted in favour of opening up opportunities for the disadvantaged.’

In other words, the approach to equality is not merely formal (equal treatment) as in the American case. In South Africa, equality is seen in substantive terms, requiring, according to Chief Justice Langa, a social and economic revolution in which all enjoy equal access to the resources and amenities of life and are able to develop to their full human potential.

Having said that, each set of courts has gone on to grapple with some other issues in deciding whether affirmative action measures have been permissible. In some cases, those that the Constitutional Court addressed mirror those attended to by the Supreme Court. In the case of the latter, the ongoing theme of disagreement among justices is evident.

Both systems have wrestled with the question as to who should benefit from affirmative action measures. Must they be those who have actually been victims of discrimination, or is it sufficient to be members of a category of people who have been subject to discrimination? A common criticism in both countries is that there are people who are members of a group (e.g., black) but who were not necessarily personally disadvantaged. In the American context, this question has been met, not surprisingly, with different answers depending on who the justice is who is speaking (an example is Stotts, cited earlier, where this was a source of dispute between the majority and dissent).

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131 van Heerden, para. 152.
In South Africa, the issue has taken a different twist. There, the concern presented in *van Heerden* was rather whether an individual in fact constituted a member of the disadvantaged group. If so, he or she should be a beneficiary of the affirmative action measure. A group is defined as disadvantaged if the ‘overwhelming majority’ has been so.

The EEA in South Africa goes on to state two other criteria that individuals must meet to constitute an intended beneficiary of affirmative action. One is that they be from a designated group defined by the Act as members of specific racial groups, women, and the disabled. They must also be suitably qualified, which is defined very broadly to include those who have the capacity to acquire (within a reasonable time) the ability to do the job. The Civil Rights Act does not define intended beneficiaries because it does not speak to affirmative action at all. Most would agree the intended beneficiaries of that Act were the minorities and women previously subject to discrimination. However, whether the law means for them to benefit from proactive measures or just to be accorded equal treatment remains a matter of dispute. The courts have most often addressed cases where a non-beneficiary was denied an advantage (job, promotion, training, and so forth.) and so claimed he was the victim of discrimination.

Another issue that has faced both sets of courts is the extent of the burden that non-beneficiaries should be expected to shoulder. In both cases, they have decided that the measure should not result in an automatic exclusion of any White man. In *Bakke*, Justice Powell objected to the designation of a certain number of seats in the medical school for minorities, but thought the ‘flexible use of race’ in admissions decisions was okay. In *Weber*, the Court indicated that it would be looking at the extent to which the program ‘trammel[s] the interests’ of White employees. Other justices have believed any consideration of race or sex represents discrimination against White men. In South Africa, the Court has stated there is a price that the non-disadvantaged have to pay in bettering the lot of the disadvantaged. Although due attention must be paid to the interests of those previously advantaged, the focus is squarely on the group to be advanced. However, the ‘price’ that the previously advantaged have to pay should be a reasonable one that does not cause ‘substantial and undue harm’ or place ‘disproportionate burdens’ on non-beneficiaries.

Finally, should affirmative action have an endpoint? As noted, that depends on its purpose. In *van Heerden*, the purpose was to remedy the effects of past discrimination, and it was possible to set a specific endpoint for the measure. The Labour courts, meanwhile, have disagreed over the issue of whether affirmative action measures can remain in place once representivity targets have been met. Nevertheless, it is clear that the South African courts will recognize the legitimacy of affirmative action measures, in the name of achieving substantive equality, long after balance has been simply attained. In the United States, the broadest justification for affirmative action is that it rectifies an imbalance resulting from past discrimination. But, as even the pro-affirmative action Justice Brennan expounded in *Johnson* (1987), the plan must be temporary, seeking ‘to attain a
balanced workforce, not maintain one’. In her 2003 case upholding the consideration of race in admissions to the University of Michigan’s law school, Justice O’Connor went so far as to state that ‘the Court expects that 25 years from now, the use of racial preferences will no longer be necessary’. Presumably, if an affirmative action measure in education is challenged in 2028, the court will find it unlawful. Regardless, it is clear that the American courts, in their focus on equal treatment rather than equal outcomes, are seeking a visible end to proactive measures.

6. Conclusion

In addressing the legacy of discrimination, South African and American policymakers have sought to introduce legislation that would encourage employers to right the resulting imbalances. They have both sought to ensure equality, although what equality means in each case has been markedly different. In the American context, it has meant formal equality, or treating people the same. This has not been constant as American jurisprudence is influenced by who the justices are on the court at the particular time a case is heard. At times, the disagreements have been severe. In recent years, the Supreme Court has largely served as a roadblock, and so affirmative measures are largely absent from the cache of tools that can be used to achieve a representative bureaucracy. In contrast, the South African notion of equality has been much broader, encompassing a redistributive goal, which is absent from the approach followed in the United States. The development of the notion of ‘substantive equality’ in South Africa was shaped by a political context of democratic change and a global legal context that provided comparative examples of the limitations of ‘formal equality’ and some jurisprudential precedents for a ‘substantive’ approach. Consequently, in South Africa, affirmative action measures receive explicit endorsement in the Constitution and are extensively regulated in the EEA. The single Constitutional Court judgment on the subject gave affirmative action measures, properly devised, a unanimous green light. Not surprisingly, the country has had extraordinary success in achieving a representative civil service.

133 Johnson, 616.
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