



## **Is affirmative action fair or inherently unfair?**

*A look at the American version and some comparisons with other countries*

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*It is a wise man who said that there is no greater inequality than the equal treatment of unequals.*

Justice Felix Frankfurter<sup>1</sup>

### **1. Introduction**

The bold entrance inscription on the United States Supreme Court building reads “Equal justice for all.” Governmental efforts – albeit concededly beneficently intended – to remedy past discrimination or to achieve the illusive “diversity” by affirmative action seemingly contradict this equality of justice notion.

Affirmative action efforts to increase numbers of minorities in the workforce and higher education have faced challenges under the equal treatment principle. Legally mandated discrimination in the form of affirmative action – or, as it is referenced in Europe, positive discrimination – exists not only in the United States, but in post-Good Friday Agreement Northern Ireland, post-apartheid South Africa, and some continental European states.

The primary focus will be on the development of American laws/programs implementing favoritism. Court decisions on the lawfulness of such programs are synthesized in an effort to perceive an evolving standard. Other selected countries’ use of disparity of treatment to achieve a stated worthy result compares.

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<sup>1</sup> Concurring Opinion, *Dennis v. U.S.*, 339 U.S. 162 184 (1950).

## 2. The concept of affirmative action under American law

The 1787 Constitution of the United States was markedly bare regarding basic rights. The primary concern of the drafters of this patently brief document<sup>2</sup> was establishing the unique three-branch American form of federal government. Individual rights were deferred until the first ten amendments (Bill of Rights) in 1791. One provision of the Constitution actually recognized a patent inequality between slaves and “free persons.”<sup>3</sup>

The Civil War (1861–1865) instigated three constitutional amendments. Most germane to this topic among these amendments is the Fourteenth Amendment (1868), assuring citizenship to anyone born in the United States and guaranteeing to persons within its jurisdiction “equal protection under the law.”<sup>4</sup>

In addition to the “equal protection” clause (applicable in the public sector), the most significant statute used to challenge affirmative programs is the comprehensive 1964 Civil Rights Act,<sup>5</sup> in particular, Title VII (employment)<sup>6</sup> and Title IX (governmental bodies receiving federal funding, including institutions of higher education).<sup>7</sup> This law expressly prohibits discrimination based on race, color, religion, national origin, and/or sex.<sup>8</sup>

A prescient statement from Supreme Court Justice Joseph P. Bradley in *The Civil Rights Cases* (1883) merits mention. His cautionary advice seems a premonitory warning against long-term uses of the shield of equality for racial preferences:

When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off [its] inseparable concomitants... *there must be some stage in the progress of his elevation that he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and his rights, as a citizen, or as a man are to be protected in the ordinary modes by which other men’s rights are protected.*<sup>9</sup>

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<sup>2</sup> The original Constitution contains only seven articles, and the current version with amendments, has only 34 articles, after 230 years. To compare, *see, e.g.*, the more recently adopted constitutions of Austria, with 151 articles; France, with 89; Germany, 146; Hungary, 78; Norway, 112; Poland, 243; and Switzerland, 191. Even relatively more concise constitutions in common law countries are typically longer. *See, e.g.*, the 1937 Constitution of the Republic of Ireland, with 50 articles.

<sup>3</sup> Each state’s apportionment of the number of Congressional Representatives was calculated by the number of “free persons” and “other persons,” each which counted as 3/5 a “free person.” Article I sec. 2 clause 3, Const. of the United States.

<sup>4</sup> The Fourteenth Amendment also changed the “3/5” of a person status reserved for former slaves in the original constitution. The Thirteenth Amendment (1865) abolished slavery in all states.

<sup>5</sup> Pub. L. 88-352, 78 Stat. 241 (July 2, 1964).

<sup>6</sup> 42 U.S.C. sec. 4000e.

<sup>7</sup> 42 U.S.C. sec. 4000d.

<sup>8</sup> 42 U.S.C. sec 4000e-2.

<sup>9</sup> *Civil Rights Cases*, 109 U.S. 3, 25 (1883). Emphasis added.

## 2.1. Executive Order 1965

In 1961, President John F. Kennedy established the Presidential Committee on Equal Employment Opportunity,<sup>10</sup> charged with "recommend[ing] additional affirmative steps to effect nondiscrimination based on race, color, religion or national origin."<sup>11</sup> Despite the word "affirmative," there was no indication that Pres. Kennedy intended any preferential treatment. In fact, the same executive order required government contractors and sub-contractors to ensure equal treatment in employment "without regard to" these criteria (adding "creed" and "national origin").<sup>12</sup>

With President Lyndon B. Johnson's 1965 executive order,<sup>13</sup> affirmative action found its proverbial "legs."<sup>14</sup> Although this mandate retained the apocryphal "without-regard-to-race,-creed,-color-or-national-origin" phrase, it paved the road for preferences.

The term "affirmative action" appeared again in the Rehabilitation Act,<sup>15</sup> applicable to recipients of federal aid regarding hiring of otherwise qualified handicapped persons, and in the post-Vietnam War-era Veterans Readjustment Act<sup>16</sup> for disabled veterans. Whereas legislation benefitting the disabled and veterans is generally lauded, racial or ethnic preferences have struck a "raw nerve in the American sensibility."<sup>17</sup>

A 1996 California referendum forbade preferential treatment for public employees because of race, ethnicity, sex, or color.<sup>18</sup> Interestingly, this did not result in doomsayers' prediction that black university admissions would suffer. For example, there was no negative effect of Proposition 209 on black students at the state's flagship U.C. Berkeley's law school.<sup>19</sup>

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<sup>10</sup> Executive Order 10-925, March 6, 1961.

<sup>11</sup> *Id.* at Part II, sec. 201.

<sup>12</sup> *Id.* at Part III. Sec. 301.

<sup>13</sup> Executive Order 11246.

<sup>14</sup> This term was used by Jackie MANSKY: The Origins of the term 'Affirmative Action'. *Smithsonian on line*, June 22, 2016, accessible at [www.smithsonianmag.com/...origins-term-affirmative-action-180959531](http://www.smithsonianmag.com/...origins-term-affirmative-action-180959531)

<sup>15</sup> Rehabilitation Act of 1973, 29 U.S.C. sec 793 et seq. This law applied to government agencies and private entities contracting for the performance of procurement of service and in receipt of federal funds in the amount of \$10,000 or more. This minimum was later increased to \$15,000.

<sup>16</sup> Veterans Readjustment Act of 1974, 38 U.S.C. sec 4212. This statute applies to governmental agencies or private agencies receiving federal funds in the amount of \$100,000 or more.

<sup>17</sup> WISOTSKY: What is the Law of the Land on Reverse Discrimination? *Florida Bar Journal*, vol. LIV., no. 1, 1980.

<sup>18</sup> Proposition 209, amending the state constitution in Cal. Const. art. I, sec 31.

<sup>19</sup> See Carol Daugherty RASNIC: Are Some of Us 'More Equal' Than Others? *The Scholar St. Mary's L. Rev. on Minority Issues*, vol. 7, n. 155, 2004. 23, 29.

## 2.2. Chronology of Supreme Court holdings

*Regents of University of California v. Bakke*<sup>20</sup> was the first Supreme Court decision approving race as a factor in university admissions decisions. The white-male plaintiff had been denied admission to U.C. Medical School, where sixteen of 100 slots were reserved for specified minority applicants. The Court addressed two issues: (a) is race ever an appropriate factor? (held, yes); (b) if so, was it constitutionally used here? (held, no) On both issues, the Supreme Court split 5-4, J. Powell being the determining vote on each. Thus, the plaintiff won the battle (in part), but lost the war. The six opinions make finding guidance from *Bakke* difficult.

In *United Steelworkers v. Weber*,<sup>21</sup> the Court approved 5-2 a collectively bargained racial preference for entry into training for higher-paid jobs. The plan was temporary, intended to continue only until the percentage of blacks in skilled job (then 2%) approximated the 40% of blacks in the local work force that would likely be violated by the seniority plan.

In *Fighters of Local Union No. 1784 v Stotts*,<sup>22</sup> a Memphis, Tennessee city ordinance applied a seniority rule to any future firefighter layoffs. The Court upheld this plan, despite an earlier consent order favoring blacks in layoff decisions.

Similarly to *Stotts*, *Wygant v. Jackson Board of Education*<sup>23</sup> involved a seniority preference for layoffs of public school teachers. The collectively bargained plan contained a proviso for retention of black teachers if their termination would reduce the existing percentage of blacks. The Court held the exception favoring blacks to violate Title VII and the Fourteenth Amendment.

A 5-4 Court approved a federal court order directing Alabama to allot 50% promotions to blacks, provided they were qualified in *U.S. v. Paradise*.<sup>24</sup> Significantly, the Court cited a history of pervasive and systemic discrimination.

In *Local 28 Sheet Metal Workers v. EEOC*,<sup>25</sup> the Court affirmed a lower court order requiring a union to achieve a 29% black membership percentage (in alignment with percentage of blacks in local labor pool). This holding seems to modify *Paradise* because intentional racial discrimination on the part of the union had clearly been proven.

On the same day as *Local 28*, the Court in *Local 93 IAF v. Cleveland*<sup>26</sup> approved a consent decree benefiting non-victims of past discrimination.

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<sup>20</sup> 438 U.S. 312 (1978). *Defunis v. Odegard*, 416 U.S. 312 (1974) involved a similar issue. The white male applicant had been denied admission to University of Washington Law School, with a similar affirmative action admissions program benefitting minorities. When the case reached the Supreme Court, it was moot. He had been admitted and was then a candidate for graduation

<sup>21</sup> 443 U.S. 193 (1979).

<sup>22</sup> 467 U.S. 561 (1984).

<sup>23</sup> 476 U.S. 267 (1986).

<sup>24</sup> 480 U.S. 149 (1987).

<sup>25</sup> 478 U.S. 421 (1986)

<sup>26</sup> 478 U.S. 501 (1986).

*Johnson v. Santa Clara County*<sup>27</sup> affirmed a local government's appointment of a female worker to an upgraded position despite her male colleague's having outscored her on an assessment test. Although not expressly temporary, the Court viewed this as a non-permanent effort to correct an imbalance of women in that position. The Johnson holding appears to view a race or sex balance in the workplace as meritorious.

In *Fullilove v. Klutznick*,<sup>28</sup> the Court held the PWEA<sup>29</sup> 10% set-aside grants for minority business enterprises to be within Congress' Commerce Clause<sup>30</sup> powers.

*Richmond v. Croson*<sup>31</sup> involved another set-aside of issuance of contractors' grants by the City of Richmond. The Court did not approve this preference (30%), perhaps because (in part) of the percentage disparity from *Fullilove*. Probably more importantly, the challenge was on 14<sup>th</sup> Amendment, rather than Congressional powers, grounds.

In *Metro Broadcasting v. FCC*,<sup>32</sup> a 5-4 Court upheld an FCC broadcasting license minority preference, holding diversity to be a substantial governmental interest. Moreover, the Court retreated from the strict-scrutiny-of-all-racial-preferences and inexplicably applied the "intermediate scrutiny" standard.

*Adarand Construction v. Peña*<sup>33</sup> was a 5-4 reversal of the *Metro Broadcasting* short-lived "intermediate scrutiny" test, holding strict scrutiny applicable to all race-based plans.

*Taxman v. Bd. of Education of Piscataway*,<sup>34</sup> a case that many lawyers believed would be the death knell for affirmative action, was settled the night before the white plaintiff's case was to be argued before the Court. When layoffs became necessary, a public school had selected plaintiff for termination and had retained her less-qualified black colleague expressly because of race-based "diversity". There was no showing of prior discrimination, and the percentage of black teachers exceeded that of the local work force.

The Court denied certiorari in *Hopwood v. Texas*,<sup>35</sup> a pre-*Fisher* challenge to University of Texas racial preference in law school admissions. Both the trial and appellate courts had held the plan to violate constitutionally assured Equal Protection.<sup>36</sup>

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<sup>27</sup> 480 U.S. 616 (1987).

<sup>28</sup> 448 U.S. 448 (1980).

<sup>29</sup> Public Works Employment Act, 42 U.S.C. secs 677-1-6736 (2003).

<sup>30</sup> U.S. CONST. Art. I sec 8(3).

<sup>31</sup> 488 U.S. 469 (1989).

<sup>32</sup> 497 U.S. 547 (1990).

<sup>33</sup> 515 U.S. 200 (1995)

<sup>34</sup> 91 F.2d 1547 (3d Cir. 1996), *cert. granted*, 521 U.S. 1117, *cert. dismissed*, 522 U.S. 1010 (1997).

<sup>35</sup> 78 F.3d 932 (5<sup>th</sup> Cir. 1996).

<sup>36</sup> 816 F.Supp. 551, (W.D.Tex. 1994), *rev'd in part and dismissed in part*, 78 F.3d 932 (5<sup>th</sup> Cir.), *cert. denied*, 518 U.S. 1033 (1996).

The Court's same-day-but-different-results decisions in *Grutter v. Bollinger*<sup>37</sup> and *Gratz v. Bollinger*<sup>38</sup> compounded the confusion over a defining standard confusion. The University of Michigan Law School affirmative action admissions plan was held constitutional (5-4), but the undergraduate program, differing only with regard to its specific quota for admitting black applicants, unconstitutional (6-3).

Another argument opposing academic affirmative action is the mismatching theory. This position bemoans admission of unprepared minority students to rigorous programs where many inevitably fail, rather than to a less demanding institution where they would succeed.<sup>39</sup>

The most recent Supreme Court decision on an affirmative action plan was *Fisher v. University of Texas*,<sup>40</sup> with a serpentine meandering to, from, and back to the Supreme Court. Two white women had been denied admission to the University of Texas at Austin (hereinafter UT). Automatically admitted by state statute were the top 7% ranking graduates of any Texas high school class,<sup>41</sup> without regard to race or ethnicity. UT's second-tier plan favored minority applicants. This was the part of the program the plaintiffs challenged on Equal Protection grounds.

The state legislature altered the 7% first year automatic acceptance provision to 10%, and in the year of this plaintiff's application, 81% of 2,000 freshmen had been admitted under this plan. The remaining 19% was selected under a "holistic review" considering several factors, including talents, leadership qualities, family circumstances (e.g., financial), and race, the latter category constituting the reason for the challenge. The lead plaintiff's Scholastic Aptitude Test score was in the range of acceptances in the second-tier process. She graduated in the top 12% of her class, was a member of the school orchestra, a math competition participant, and a volunteer for Habitat for Humanity.

The federal district court, applying *Grutter*,<sup>42</sup> upheld the plan as constitutional, and the Fifth Circuit Court of Appeals affirmed. In *Fisher I*,<sup>43</sup> the Supreme Court remanded 7-1, directing the Fifth Circuit to apply the "strict scrutiny" test. Only Justice Ginsburg dissented.<sup>44</sup> Justice Kagan did not participate because of her connection with the litigation in her role as Solicitor General.

On rehearing, the Fifth Circuit approved the plan 2-1. The Supreme Court affirmed 4-3 (*Fisher II*).<sup>45</sup>

Justice Kennedy's majority opinion (he also wrote the *Fisher I* opinion) announced three controlling principles that would determine affirmative action issues: (1) always required is the strict scrutiny standard; (2) the Court would defer to the defendant's diversity explanation; and (3) there would be no

<sup>37</sup> 539 U.S. 306 (2003).

<sup>38</sup> 539 U.S. 244 (2003).

<sup>39</sup> J. Thomas, the sole black justice, took this position in his concurring opinion in *Fisher II*, 133 S.Ct. 2431-2.

<sup>40</sup> 133 S.Ct. 2411, 579 U.S. (2013) (*Fisher I*), 136 S.Ct. 2198 (2016) (*Fisher II*).

<sup>41</sup> Texas H.B. 588.

<sup>42</sup> *Supra* n. 37.

<sup>43</sup> 133 S.Ct. 2411, 576 U.S. (2013).

<sup>44</sup> Ginsburg would have affirmed the Fifth Circuit decision that the plan met constitutional muster. *Id.* at 2434 (Ginsburg, J., dissenting).

<sup>45</sup> 136 S.Ct. 2198, 579 U.S. \_\_\_\_ (2016). Justice Scalia, who had died the preceding February, had raised the mismatching theory in *Fisher I* oral arguments.



such deference regarding whether the use of race had been narrowly tailored. The Court would decide regarding the third requirement.

The holdings and grounds for the pivotal U.S. affirmative action decisions are charted below. With two exceptions (\*), all are U.S. Supreme Court decisions, with the justice writing for the majority indicated. Plus sign designates collectively bargained plan.

	Case	Upheld?	Vote	Basis	voluntary?	temporary?
1.	<i>Bakke</i>	no	(5-4, Powell)	Title VII, 14 <sup>th</sup> Amend.	yes	no
2.	<i>Weber</i>	yes	(5-2, Brennan)	Title VII+	yes	yes
3.	<i>Fullilove</i>	yes	(6-3, Burger)	Title VI, 14 <sup>th</sup> Amend.	no	no
4.	<i>Stotts</i>	no	(6-3, White)	Title VII	no	yes
5.	<i>Wygant</i>	no	(5-4, Brennan)	14 <sup>th</sup> Amend. +	no	yes
6.	<i>Local 27</i>	yes	(5-4, Brennan)	Title VII, 14 <sup>th</sup> Amend.	no	yes
7.	<i>Local 93</i>	yes	(6-3, Brennan)	Title VII (consent decree)	yes	no
8.	<i>Paradise</i>	yes	(6-3, Brennan)	14 <sup>th</sup> Amendment	no	yes
9.	<i>Johnson</i>	yes	(6-3, Brennan)	Title VII	yes	no
10.	<i>Croson</i>	no	(6-3, O'Connor)	14 <sup>th</sup> Amend., city ordinance	no	no
11.	<i>Metro Broadcasting</i>	yes	(5-4, Brennan)	5 <sup>th</sup> Amend., fed. statute	no	no
12.	<i>Adarand</i>	no	(5-4, O'Connor)	5 <sup>th</sup> Amend., fed. statute	yes/no	no
13.	<i>Piscataway*</i>	settled while on appeal		Title VII	yes	N/A
14.	<i>Grutter</i>	yes	(5-4, O'Connor)	Title VI, 14 <sup>th</sup> Amend.	yes	no
15.	<i>Gratz</i>	no	(6-3, Scalia)	Title VI, 14 <sup>th</sup> Amend.	yes	no
16.	<i>Hopwood*</i>	no	(5 <sup>th</sup> CCA, cert. den.)	Title VI, 14 <sup>th</sup> Amend.	yes	no
17.	<i>Fisher</i>	yes	(4-3, Kennedy)	14 <sup>th</sup> Amendment	yes	no

Note: The Court actually remanded *Local 93* and *Adarand*, rather than holding either to be valid.

### 3. Some comparative perspectives

#### 3.1. The 1998 Good Friday Agreement (Northern Ireland)

Northern Ireland's "Troubles" era is legendary. The conflict has been between Unionist (favoring the province's remaining a part of the United Kingdom), identified with the Protestant sector, and Nationalists (favoring a united Ireland, that is, a joining of the Republic of Ireland with Northern Ireland), usually identified with the Catholic population. Although the 1998 Good Friday Agreement<sup>46</sup> achieved a truce, the need for subsequent Irish-United Kingdom treaties<sup>47</sup> has solidified an albeit fragile collaborative government. The affirmative action provisions in the 1998 negotiations were crafted in the spirit of an express statutory exception<sup>48</sup> to the general prohibition of such preferences. The positive discrimination agreed upon was a 50% Catholic, 50% Protestant in new police hires until

<sup>46</sup> Implemented in Northern Ireland Act 1998 and Police (NI) Act 2000.

<sup>47</sup> Beginning February, 2000, the devolved government was suspended four times, and the St. Andrews Agreement 2006 amended the GFA.

<sup>48</sup> Sec. 75(1) Northern Ireland Act 1998 made it the express duty of governmental authorities to "promote equality," giving the word "promote" a positive and proactive connotation.

the ratio reached 70-30%, projected to be ten years. The police force at that time was overwhelmingly Protestant (88%, with only 4% Catholics<sup>49</sup>).

There would have been no need for the Northern Ireland exception after the United Kingdom Equality Act 2010 became effective.<sup>50</sup> This law permits, but does not require, positive discrimination by allowing “any action” to support persons within a protected group, provided the preference granted is a “proportionate means.”<sup>51</sup> The language referring to the proportional necessity implies that the preference is for the purpose of altering an underrepresentation of one part of a group, for example, women, blacks, or the disabled, or, in the case of Northern Ireland, Catholics.

The police-hiring quota was discontinued in April, 2011, with questionable success. Although some 29.7% of PSNI officers were then Catholic, the 2500 support staff was only 18% Catholic.<sup>52</sup>

Addressing the employment sector in general were the MacBride Principles, a compromising philosophy that had begun in 1984<sup>53</sup> as an effort by the GFA Equality Commission (ECNI) to negotiate positive discrimination measures with employers. Findings have shown that this process has been more effective than legislated positive discrimination has been.<sup>54</sup>

### 3.2. Republic of South Africa

As in Northern Ireland, recent South African history reflected rampant discrimination, or at least non-inclusion, of specified groups. Apartheid – an Afrikaans word meaning “separation” – had been ingrained in federal law since shortly after South African independence from the United Kingdom in 1910. The 1913 Land Act forced blacks to live in reserved areas and prohibited their working as sharecroppers. The 1950 Population Registration Law solidified apartheid by officially classifying South Africans by race: (1) Bantu (black), (2) colored (mixed), and (3) white. (A later classification was added to Asians, *i.e.*, Indian and Pakistani immigrants.) Subsequent legislation set aside more than 80% of all land in the country for whites, established public facilities separated by race, and permitted only whites to participate in government.<sup>55</sup>

<sup>49</sup> Fionnula Ní Aoláin: *The Politics of Force: Conflict Management and State Violence in Northern Ireland*. Blackstaff Press, 2000. 91. Eight percent was listed as “other religions.”

<sup>50</sup> This statute consolidated the 1975 Sex Discrimination Act, the 1976 Race Relations Act, and the 1995 Disability Discrimination Act.

<sup>51</sup> Secs 158-159 Equality Act 2010.

<sup>52</sup> Workforce Composition Figures, PSNI, [psni.police.uk](http://psni.police.uk). 2008-10-10.

<sup>53</sup> Christopher McCrudden – Raya Muttarak – Anthony Heath: Affirmative Action without Quotas in Northern Ireland. *The Equal Rights Review*, vol. 4, 2009. 7, 10–13.

<sup>54</sup> *Id.* at 12. For an assessment of positive results of the policing quota plan, see Desmond Rea – Robin Mansfield: *Policing in Northern Ireland: Delivering the New Beginning*. Liverpool University Press, 2014. “New beginning” was the phrase used by Chris Patten: *Chair of the Independent Commission on Policing for Northern Ireland*, in the post-GFA police report. See also John Doyle: *Policing the Narrow Ground*. Royal Irish Academy, 2010.

<sup>55</sup> See “Apartheid,” accessible at [www.history.com/topics/apartheid](http://www.history.com/topics/apartheid)



Changes began in 1989, when then-President F.W. DeKlerk began negotiating with the imprisoned Nelson Mandela, political activist for the African National Congress (ANC). Mandela, who had been detained for activism since November, 1962, was released in February, 1990, and the ban on the ANC was accordingly lifted. Democracy was built “laboriously, brick by brick.”<sup>56</sup> After two days of peaceful negotiations on April 27-28, 1994, the ANC was the victor in national elections.

Accordingly, the Employment Equality Act of 1998, applicable to businesses with 50 or more workers, requires equal representation of designated groups (blacks, women, and disabled persons).<sup>57</sup> Second, the Black Economic Empowerment Act of 2003 introduced quotas for blacks in the business sector and implemented regular government assessments of companies’ progress regarding black persons in hiring, training, and placing in positions of ownership.<sup>58</sup>

Similarly to criticisms of affirmative action in the United States, these efforts have met opposition as having stereotyped black persons and given some a sense of entitlement. Moreover, because of the high demand to meet statutory quotas, some blacks are in positions for which they are not suitably trained.<sup>59</sup>

### 3.3. Canada

The Constitution of Canada ensures equality before and under the law for every individual and grants the right to equal protection and equal benefits of the law. This equality is assured “without discrimination [...] based on race; national or ethnic origin; color; religion; sex; age; or mental or physical disability.”<sup>60</sup> A significant subsection to this clause was a proviso that expressly did not preclude any law, program, or activity that “has as its object the amelioration of conditions of disadvantaged individuals,” including those groups listed in the first subsection.<sup>61</sup> Presumably, this opened the door for affirmative action, provided the clear objective was to alter those conditions.

Those few affirmative action efforts that have occurred in Canada have addressed favored treatment for women over men in employment, rather than blacks over whites. One court decision merits mention, *Canadian National Railway Co. v. Canada (Human Rights Committee and Action travail des femmes)*,<sup>62</sup> a victory for an affirmative action program in the hiring of women. This philosophy reflects

<sup>56</sup> *South Africa: Overcoming Apartheid, Building Democracy*, Unit 6, a project sponsored by Michigan State University. Accessible at [overcomingapartheid.msu.edu-unit.php?id=65-24E-6](http://overcomingapartheid.msu.edu-unit.php?id=65-24E-6)

<sup>57</sup> Employment Equality Act of 1998 sec 1(a).

<sup>58</sup> Specifically listed as one of the seven criteria on which business were judged regarding compliance with statutory duties was “preferential procurement.” See Codes of Good Practice, Black Economic Empowerment Act.

<sup>59</sup> See comments of Boitumelo Sethlatswe, researcher at South African Institute of Race Relations, in Emilie IOB: *10 Years in South Africa, Affirmative Action Faces Criticism*, October 29, 2013, accessible at [www.voanews.com/a/south-african-affirmative-action-faces-criticism](http://www.voanews.com/a/south-african-affirmative-action-faces-criticism) See also “mismatching theory, *supra* n. 39 and accompanying text.

<sup>60</sup> Sec. 15(1) Canadian Charter, the principal constitutional document.

<sup>61</sup> *Id.* Sec. 15(2)

<sup>62</sup> (1987), 8 C.H.R.R. D/4210 (S.C.C.).

the same approach taken by the United States Supreme Court in *United Steelworkers v. Weber*, *Local 28 Sheet Metal Workers v. EEOC*, and *Johnson v. Santa Clara County*. The federal railway system was ordered by an employment tribunal to hire one woman among each four new hires in unskilled jobs in areas of female underrepresentation (defined as their constituting less one-half the work force in a sector). The order was to be a temporary one, in force only until the percentage of women in the designated sector reached 13%, the national percentage of women in such positions. A Federal Court of Appeals held the order to violate constitutional equality, but the Supreme Court of Canada reversed and reinstated the order. The high court viewed the plan as within the amelioration-of-conditions proviso.

### 3.4. Germany

Two selected continental European countries, Germany and Austria, have legislated affirmative action favoring women, similarly to Canada. These local or state, rather than the federal, laws have raised objections of conflicting with European Union law.

The two European Court of Justice (ECJ) decisions that have come by referrals from German courts are juxtaposed, seemingly without justification for the contrary results. The first, *Kalanke v. Freie Hansestadt Bremen*,<sup>63</sup> was the Court's first encounter with a positive discrimination mandate. *Kalanke* involved a state law<sup>64</sup> that required equal pay for men and women in civil service positions. Additionally, for promotion to an open position, if two candidates of opposite sexes were equally qualified, the female candidate was to be preferred if women were underrepresented in the unit. "Underrepresentation" was presumed if women constituted less than one-half the work force in the subject sector. A male applicant for a promotion in the municipal park system, conceded by the parties to be underrepresented by women, lost to an equally qualified female. The male candidate challenged the statute as contrary to the Equal Treatment Directive,<sup>65</sup> and the German Labor Court (*Arbeitsgericht*) referred the issue to the ECJ. A.G. Tesouro advised the Court that the aim of the Equal Treatment Directive was to achieve equality of opportunity between men and women, not equality of results. The ECJ agreed, holding that the preference given women went beyond this goal.

One year later, in *Helmut Marschall v. Land Nordrhein-Westfalen*,<sup>66</sup> the ECJ addressed a civil service statute of the State of Nordrhein-Westfalen that required preference of female candidates over equally qualified men for positions where there were fewer women in the relevant pay bracket. This law was similar to the one in *Kalanke*, except for a proviso in the Nordrhein-Westfalen statute

<sup>63</sup> Case C-450/93, 1996 E.C.R. I-305 [1996], 1 C.M.L.R. 175 (1996).

<sup>64</sup> Art. 4 *Ladegleichstellungsgesetz* (LGG). Bremen and Berlin are two city-states among the sixteen German *Laender* (states).

<sup>65</sup> Art. 2(4) Directive 76/207/EC.

<sup>66</sup> [1997] Case C-409/95.

permitting selection of an equally qualified male if there were “reasons specific” to him that “tilted the balance.” The tenured male school teacher in *Marschall* had been denied a promotion to a higher position offered to an equally qualified female candidate. He challenged the law under the Equal Treatment Directive, and the German Administrative Court (*Verwaltungsgericht*) referred the question to the ECJ. Advocate General Jacob rendered the same advice as had Advocate General Tesauro in *Kalanke*, that preference for the equally qualified female candidate went beyond the guarantee of equal opportunity intended by the directive. This time, however, the ECJ did not follow the position of the AG, but responded that the law met the requirements of the ETD. The stated rationale was that the “saving language” in the Nordrhein-Westfalen statute offered flexibility to the decision makers, unlike the absolute and unconditional *Kalanke* statute.

This reasoning seems tenuous. With no legislative guidance regarding “reasons specific to the candidate,” the proviso is arguably vacuous window-dressing.

### 3.5. Austria

Rather than merely permitting positive discrimination as does UK legislation, Austria has a strong affirmative action mandate applicable to the higher education setting. The Equal Treatment Act (*Gleichbehandlungsgesetz*)<sup>67</sup> requiring equality of treatment for various stated grounds (the usual array of race, sex, religion, age, ethnicity, creed, sexual orientation, and disability) expressly applies to state universities.<sup>68</sup> However, affirmative action is required with regard to sex.

A separate federal university statute (*Universitaetsgesetz*)<sup>69</sup> incorporates the *Gleichbehandlungsgesetz* by reference,<sup>70</sup> but contains additional requirements. When qualifications between a female and male candidate are equal, the female must be given preference.<sup>71</sup> There is no reference to historical discrimination or a desire for diversity.

## 4. Conclusion

What can we glean from the success of and/or future for affirmative action? Proponents cite reparation for past discrimination, group underrepresentation, and/or diversity. Opponents insist that non-victims are benefitted, “diversity” is unclear, non-minorities suffer, and mismatching actually harms intended beneficiaries.

<sup>67</sup> *Bundes-Gleichbehandlungsgesetz* (Federal Equal Treatment Act) [*B-GIBG*] *BGBI.* Nr. 100/1993 *wie geaendert* (as amended).

<sup>68</sup> Sec. 42 *B-GIBG*.

<sup>69</sup> *Bundesgesetz ueber die Organisation der Universitaeten und Ihre Studien* [*Universitaetsgeetz, UG*] 2002 (Federal Act on the Organization of Universities and Studies, *i.e.*, University Act), *BGBI.* I Nr. 120/2002 *wie geaendert* (as amended).

<sup>70</sup> Sec 42 *Universitaetsgesetz*.

<sup>71</sup> Secs 20(a), (b), 41, and 44 *Universitaetsgesetz*.

In Canada, Austria, and Germany, positive discrimination has been primarily directed toward women rather than racial minorities.

Affirmative action has addressed very recent proven blatant discrimination in opportunities for specified groups (Northern Ireland [religion] and South Africa [race]), and, as such, is likely providential.

Although the U.S. Supreme Court decisions on the legality of affirmative action have been erratic, some judicial guidance is clear: (1) no employment plan has been approved that would result in loss of non-minorities' jobs (*Wygant, Piscataway*); (2) voluntary efforts by employers or governmental entities appear more likely to meet legal muster than legislatively mandated ones (*Weber, Stotts, Local 93, Croson*); (3) temporary preferences are viewed more favorably (*Weber, Paradise, Johnson*); (4) courts look with a jaundiced eye on interference with seniority plans (*Stotts, Wygant*); (5) the strict scrutiny-and narrowly-tailored standards apply to all racial preferences (*Bakke, Adarand, Hopwood, Fisher*); (6) plans benefitting non-victims are acceptable if actual past discrimination is proven (*Local 93, Fullilove, Hopwood*); (7) racial quotas can be acceptable if aimed toward correcting a decided imbalance, or "under-representation" (*Weber, Paradise, Local 28*; J. Powell would have held otherwise [*Bakke*]; see also *Gratz*); (8) diversity is a lawful reason for affirmative action (*Grutter, Fisher*).

Does affirmative action conform to the American concept of fairness and equity? Arguably, the amorphous definition of diversity is so elusive as to be unjustified (particularly when equal rights have been assured by law for more than one-and-one-half centuries; this also renders illogical any proclaimed need for reparations). Nonetheless, the alleged "lack of diversity" camp persists.<sup>72</sup> Moreover, underrepresentation of a group in the workplace or in an academic setting might be coincidental, not the result of intentional discrimination.

"Remember the Titans" was an American movie about the 1971 desegregation of a Virginia high school by consolidating all-black and all-white schools. Chosen head football coach was a black man, whose reaction to the white assistant coach's inclination to lend special treatment to black players is instructive:

„Now, I may be a mean cuss. But I am the same mean cuss with everybody out there on that football field. The world don't give a damn about how sensitive these kids are, especially the black kids. You ain't doing [them] a favor by patronizing them. You're crippling them... for life.”<sup>73</sup>

Plausible arguments probably support positive discrimination in settings such as Northern Ireland and South Africa, where vestiges of recent and painful discrimination still linger. However, prefer-

<sup>72</sup> See Patrick WILSON: Diversity is lacking among General Assembly assistants. *Richmond Times-Dispatch*, February 19, 2017, at A-1 (col. 1-2), in which the 91%-white statistic among hired workers for state lawmakers is bemoaned as failing the diversity test.

<sup>73</sup> Coach Herman Boone (played by actor Denzel Washington) in "Remember the Titans," 2000, Walt Disney Pictures.

ential treatment clearly works to the detriment of non-minorities undeserving of inequality, and it arguably fosters a sense of entitlement among beneficiaries.

The words of the Titans coach and Justice Story (1883 *Civil Rights Cases*<sup>74</sup>) likely mean that affirmative action in the U.S.A. has outlived its usefulness. The playing field now being level, it is time to stop moving the goalposts.

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<sup>74</sup> See *supra* n. 9.