Here Today, Gone Tomorrow – An Analysis of the Position of Affirmative Action in the United States Pre and Post the Harvard Admissions Case

Abhijit B

Assistant Professor (Senior Scale), School of Law, UPES, Dehradun, India

https://orcid.org/0000-0003-4458-0417

DOI: 10.55662/JLSR.2024.10601

Abstract

The title of this Paper is inspired by a famous song of an American rock band called the Ramones. The song describes a love-hate relationship and a choice that is presented to teenage boys or young adults as they stand at the gates of maturity, and the choices between new and old that are presented before them. This song is quite appropriate for the concept of Affirmative Action and its application to the United States of America. Affirmative Action, a social Justice tool which has received Constitutional protection for around four and a half decades in the United States was found to be violating the Constitution of the United States by the Supreme Court of the United States in *Students for Fair Admissions v. Harvard*.[1] In this paper, I trace the history of Affirmative Action in the United States while analysing how and why a programme such as this was felt necessary. I also look at the journey that Affirmative Action has taken in the United States till its development was cut short after being deemed unconstitutional. The paper also reviews the Harvard Admission case and focuses on the future of Affirmative Action and its beneficiaries in the aftermath of the aforementioned judgment.

Keywords: *Affirmative Action, Social Justice, United States Constitution, SCOTUS, Harvard*

[1] 600 U.S. 181 (2023)

Introduction

I told you why we just can't make it
I want you still but just can't take it
The time has come we ought to break it
Someone had to pay the price
And I think of times we were together
As time went on, it seemed forever
But times have changed, now things are better
Someone had to pay the price

The above lines are the lyrics of from a chartbuster song of the band – 'Ramones' called '*Here Today, Gone Tomorrow'*. These lines convey the angst of a teenage or young adult relationship, which began well, but became toxic and caused angst as the partners grew up. These lines also, as I see it, represent the relationship between Affirmative Action and the United States of America. The system worked well, or at least seemed to work well for a time that *seemed forever*, until it didn't work anymore. And just as the song describes, *the times have changed* in the US, with a politically fractured society, a Conservative supermajority on the Supreme Court of the United States, and a need being felt to make changes and go back what some view as the great times of the country. And *someone had to ay the price,* with the someone, being the racial minorities, who now no longer have the benefit of Affirmative Action to access higher education institutions and universities.

Affirmative action is a proactive approach aimed at mitigating the enduring impact of historical discrimination by fostering equal opportunities in both education and employment for groups that have been historically marginalized. This strategy is grounded in the fundamental principles of fairness and distributive justice. In the United States, affirmative action has undergone a transformative evolution shaped by Constitutional interpretation. The primary objective is to redress the imbalances stemming from a tumultuous history marked by slavery and segregation. This multifaceted approach seeks to dismantle systemic barriers and promote inclusivity by providing preferential treatment to historically disadvantaged groups.

India, on the other hand, has implemented a comprehensive affirmative action system, prominently utilizing reservations, to extend principles of equitable justice and egalitarianism. This robust system addresses deeply rooted social injustices entrenched in caste-based discrimination. By employing quotas in education and public sector employment, India endeavours to uplift historically marginalized communities, fostering a more inclusive and diverse society. Affirmative Action, shaped by principles of justice and equity, manifests uniquely in the United States, and India. The constant thread across these diverse implementations is the commitment to creating a more equitable and inclusive future by actively countering the shadows of historical discrimination.

In this paper, I look at the evolution of Affirmative Action in the United States. I subsequently analyse the present position through a review of the case of *SFFA v Harvard* aka Harvard Admissions case.

Historical Evolution

The history of affirmative action in the United States traces back to the 1600s, marked by the arrival of Black indentured labourers on slavers' ships. The perception of White superiority was evident as early as the arrival of Black tobacco and cotton workers. In the 1690s, John Locke's 'Fundamental Constitutions for Carolina' asserted absolute authority over "Negro Slaves,"[2] reflecting prevailing sentiments. Initially, there was solidarity between European and African indentured labourers due to shared servitude, but preferential treatment eroded this unity.[3] White labourers received land rewards after servitude, while Africans often faced extended servitude for minor transgressions, leading to a lifetime of servitude.[4]

By the mid-1750s, tensions between Americans and the British grew, culminating in the 1775 declaration of American independence. Ironically, the Americans, seeking independence due to perceived mistreatment akin to slavery, offered Black slaves as incentives to White soldiers

[2] PHILIP F. RUBIO, A HISTORY OF AFFIRMATIVE ACTION 1619-2000 (University Press of Mississippi 2001)
[3] *Id.* at 4
[4] *Id.*

during the American Revolution. This historical contradiction highlights the complex and paradoxical nature of the nation's journey with affirmative action.

Plessy and Brown Era

The American War of Independence, fought on the principles of liberty and freedom, led to the establishment of the American Constitution embodying these ideals. However, slavery persisted for eighty-seven years until the Thirteenth Amendment was passed, marking a significant shift. The Fourteenth Amendment granted citizenship and equal protection under the law to freed slaves. In 1866, the Freedmen's Bureau Act, considered an early form of affirmative action, provided assistance, land, and fair working conditions for freed slaves.[5] The Bureau also worked on ensuring that the conditions of work and payment of wages to former slaves who continued working in the plantations were fair.[6] Howard University, America's first University that allowed African-American students was established by this very Bureau. The Bureau however lost a lot of its relevance after the assassination of President Lincoln, as his successor President Andrew Johnson, who being a Southern Democrat, was not in its favour as he thought its use to be unconstitutional.[7] The minority judgement of America's first Black judge, Justice Thurgood Marshall in the 1978 case of *Regents of the University of California v Allan Bakke*[8] has also stated that the Freedmen's Bureau was the first attempt at Affirmative Action.

Historical figures like Frederick Douglass and General Sherman advocated for equality, with Douglass emphasizing federal protection for Black rights.[9] Despite General Sherman's "40 acres and a mule" proposal, such policies faced resistance, especially under President Johnson.[10] The complexities of post-war America, the role of the Freedmen's Bureau, and the

[5] *The Rise and Fall of Jim Crow, 'Freedmen's Bureau'*, THIRTEEN; MEDIA WITH IMPACT (March 08, 2023, 09:53PM) https://www.thirteen.org/wnet/jimcrow/stories_events_freed.html
[6] Id.
[7] Id.
[8] 438 US 265 (1978)
[9] RUBIO, *supra* note 2.
[10] Aderson Bellegarde Francois, *The Brand of Inferiority: The Civil Rights Act of 1875, White Supremacy, and Affirmative Action* 57 Howard L.J. 573 (2014); This article analyses the 1875 Civil Rights Act, which legitimised segregation in many ways, and yet when looked at from a modern perspective had elements that can be argued as provisions of Affirmative Action. The Article has analysed the debates that surrounded the passage of this Act, specifically the debates in both houses of the Congress.

struggle against segregation reveal the intricate journey of affirmative action in the United States.

Despite these efforts, the 1896 *Plessy v Fergusson*[11] decision by the Supreme Court upheld segregation laws, dealing a setback to affirmative action gains.[12] Homer Plessy's challenge, based on Fourteenth Amendment rights, was rejected in an 8:1 decision. Justice Henry Brown argued that if one race were deemed socially inferior, the Constitution couldn't equalize them, endorsing segregation. The dissent by Justice Marshall Harlan which stated that the segregation laws were invalid because in "civil rights all are equal"[13], would later be upheld in *Brown v Board of Education*[14], that overruled Plessy and marked the beginning of the end of segregation and the separate but equal doctrine.

The 1950s marked the commencement of the Civil Rights Movement in the United States. In 1955, a woman named Rosa Parks sat in the middle seat of a bus and was arrested for violating the law by refusing to vacate the seat upon being asked. This incident was followed by the Montgomery Bus Strike, which led to massive losses for the bus company. It also gained national traction, and brought to every TV screen in America the face of a young man, inspired by Mahatma Gandhi, named Martin Luther King Jr. The Civil Rights movement which started here eventually led to the passage of the Civil Rights Act, 1964. In the meantime, the Supreme Court of the United States had unanimously declared racial segregation in public schools to be unconstitutional in the landmark decision of *Brown v Board of Education*.[15] One of the young Black lawyers who argued the case was Thurgood Marshall, the man who would become the first Black American Judge of the Supreme Court of the United States and would sit on the bench of the *Alan Bakke* case. The Court said that despite all assurances that the separate schools that the Black children went to, were equal in quality to the ones that the Whites went to, the separate schools itself were an indication of inherent inequality.

[11] 163 US 537 (1896)
[12] TERRY H. ANDERSON, THE PURSUIT OF FAIRNESS: A HISTORY OF AFFIRMATIVE ACTION (OUP 2004)
[13] ANDERSON, *supra note* 12 at 4.
[14] 347 US 483 (1954)
[15] Ibid.

The Lead up to Alan Bakke Judgment

Although President Harry S Truman had made attempts to end racial discrimination using Executive Orders, it wasn't until President Kennedy's administration that concrete efforts were made on this front.[16]

President Kennedy, having won his presidency on the platform of criticising his predecessors' inaction on Affirmative Action, fulfilled his promise by signing Executive Order 10925, establishing the President's Committee on Equal Employment Opportunity (now the Equal Employment Opportunity Commission) to combat racial and gender discrimination in federally supported housing. This marked the first usage of "affirmative action" in this context. In 1961, he also signed Executive Order 10980, creating the Presidential Commission on Status of Women, chaired by Eleanor Roosevelt.[17] Despite Roosevelt emphasizing equal protection under the 14th Amendment, gender pay disparities persist, with women earning 78 cents for every dollar a man earns. These figures are worse when the factors of race are added to the gender factor.[18]

The pivotal Civil Rights Act of 1964, signed by President Lyndon Baines Johnson, banned discrimination based on sex, race, and later, sexual orientation. Executive Order 11246, introduced by Johnson, became the cornerstone for affirmative action, covering government and contractor discrimination.

The Supreme Court, in *Heart of Atlanta Motel v United States*,[19] upheld the constitutionality of the Civil Rights Act, granting the government power to enforce it against private establishments. Another landmark case, *Phillips v Martin Marietta Corp*,[20] demonstrated the Act's efficacy against gender discrimination. The Supreme Court ruled in favour of a woman

[16] *Executive Orders Harry S Truman 1945-1953,* HARRY S. TRUMAN PRESIDENTIAL LIBRARY AND MUSEUM https://www.trumanlibrary.gov/ (March 08, 2023, 09:53PM). President Truman issued Executive Order 9981 to desegregate the military, and Executive Orders 9980 and 10308, which established organisations or bodies that would ensure that in the service of the federal government, there would be no discrimination, and that the federal government would only employ contractors who practice desegregation and non-discrimination respectively.
[17] ANDERSON, *supra note* 12 at 59.
[18] *What is the Gender Wage Gap,* 78 CENTS PROJECT https://www.78centsproject.com/the-gender-wage-gap (March 08, 2023, 09:53PM)
[19] 379 US 241 (1964)
[20] 400 US 542 (1971)

denied employment due to having a pre-school child, asserting that such discrimination, unless applied universally, violated the Civil Rights Act's principles.

The Alan Bakke Judgment

The judgement which cemented the position of Affirmative Action as a Constitutionally valid act, was the case of *Regents of University of California v Alan Bakke*.[21] In this case the SCOTUS *inter alia* held that although discrimination on the grounds of race is impermissible as it falls foul of the Fourteenth Amendment, protective discrimination, in favour of those who were backward and had been left behind is permissible. This judgement along with the judgement in *Fullilove v Klutznick*[22] of the SCOTUS was also applied to the Indian context in *Indra Sawhney v Union of India* because the Indian Supreme Court was of the view that the social context laid out in these judgements also applies *ex proprio vigore* to India.

The judgement in *Bakke* paved way for affirmative action to move on from mere acts of non-discrimination and equal treatment. The protective discrimination point evolved in this case is significant as it was used to uphold affirmative action-based admissions until recently and hiring even today. This is visible in the judgements of the court in *Grutter v Bollinger*[23] and *Fisher v University of Texas*[24] (Fisher II), wherein the Supreme Court upheld affirmative action-based admissions in those Universities. In *Grutter,* the admissions to the Michigan University School of Law and in *Fisher* admissions to the University of Texas' undergraduate programme were under challenge and the Court found that the necessity to have a racially diverse culture on campus was necessary to improve racial relations, as a consequence of which true equality as espoused under the Fourteenth Amendment could be achieved.[25]

However, in the judgement in *Bakke,* the court was very clear about the unconstitutionality of a fixed social quota system. The judges in *Bakke* clarified that race could be one amongst many factors that affect the selection process, just not the only factor. The medical college of the

[21] 438 US 265 (1978)
[22] 448 US 448 (1980)
[23] 539 US 306 (2003)
[24] 579 US 14-981 (2016)
[25] Eboni Nelson, *The Case for Race-Conscious Affirmative Action,* JSTOR DAILY, April 03 2019 https://daily.jstor.org/the-case-for-race-conscious-affirmative-action/ (March 08, 2023, 09:53PM)

University of California was therefore allowed to continue their selection process whereby the scores of the MAT alone were not a determinant factor. It has also been argued that fixed quotas will lead to people aiming to succeed as a part of a group and not individually this will further alienate and divide an already racially divided America.[26]

This position however has completely been reversed by the SCOTUS with its 2022 judgement in the case of Students for Fair Admissions v Harvard, wherein Affirmative Action was held to be unconstitutional for violating the Equal Protection clause of the Fourteenth Amendment.

SFFA and the Concerning Future

In 2013, Students for Fair Admissions (SFFA) sued Harvard University, alleging violations of the Civil Rights Act by discriminating against Asian Americans in undergraduate admissions. In 2019, a district court judge upheld Harvard's limited use of race in admissions, citing the lack of evidence for discriminatory intent. The U.S. Court of Appeals affirmed the ruling in 2020. SFFA petitioned the Supreme Court in 2021, and on June 29, 2023, the Court, by a 6–2 vote, overturned the lower court's decision, declaring affirmative action in college admissions unconstitutional.

It is also pertinent to note here that the same petitioner also raised a similar challenge to the admissions policy of the University of North Carolina, so the case of *SFFA v University of North Carolina* was also heard alongside this case and the judgement applied to this case too.

The legal action asserted by the plaintiffs alleged that Harvard enforces an implicit "racial balancing" quota, leading to an artificial reduction in the acceptance of Asian-American applicants. The plaintiffs argued that the proportion of Asians admitted to Harvard remained consistently similar over the years, even in the face of significant growth in the number of Asian American applicants and the overall Asian American population.[27]

[26] Nathan Glazer, *Affirmative Action v Quotas,* HARVARD CRIMSON, March 20 1973 https://www.thecrimson.com/article/1973/3/20/affirmative-action-vs-quotas-pbabffirmative-action/ (March 08, 2023, 09:53PM)

[27] Hua Hsu, *The Rise and Fall of Affirmative Action*, THE NEW YORKER, October 08, 2018 https://www.newyorker.com/magazine/2018/10/15/the-rise-and-fall-of-affirmative-action (March 08, 2024, 09:53PM)

Although the judgment did not expressly overrule the judgements in *Grutter* and *Bakke*, it had the effect of abrogating both these landmark cases which had cemented Affirmative Action in the United States. This judgment should not (and probably did not) come as a surprise at all considering the conservative nature of the SCOTUS' present composition. All possibility of the judgement of *Bakke* being retained was extinguished with the judgement of the SCOTUS in *Dobbs v Jackson Women's Health Organisation*[28] which ended the fundamental right of American women to exercise complete control over their reproductive choices, established in the landmark *Roe v Wade* judgment.[29]

One of the primary reasons for a decision of this nature was because of the general American social structure of giving primacy to the individual and their liberties. This prohibits viewing the individual as a part of or as belonging to a community and prevents the viewing of their experiences through the lens of their race. Chief Justice Roberts' majority opinion is clearly a reflection of these understanding.[30] In his opinion, he clearly identifies the problem with Affirmative Action as being one where the individual identity is sacrificed for the larger racial identity. This, according to him, is problematic because the Fourteenth Amendment attempts precisely to prevent this. The Fourteenth Amendment according to him attempts to prevent the caricaturising of an entire community. Chief Justice Roberts' opinion states that any positive action or *affirmative action* in favour of someone, on the foundations of race is the same as any disadvantage caused due to someone's race.[31] He also relies on the SCOTUS' decision in *Brown* to state that how any action with race as its foundation, legitimises the separate but equal doctrine, which was rightfully rendered unconstitutional in *Brown*.

Dissents, Alternatives, and the Way Forward

Justice Sonia Sotomayor was scathing in her dissenting opinion. She states that the decision of the majority, which relies on the *Brown* judgement and a literal reading of the Fourteenth amendment, does injustice to years of constitutional philosophy and jurisprudence

[28] 597 U.S. 215 (2022)
[29] 410 U.S. 113 (1973)
[30] Lincoln Caplan, *The Supreme Court Affirmative Action Rulings: An Analysis*, HARVARD MAGAZINE, June 30, 2023 https://www.harvardmagazine.com/2023/06/harvard-affirmative-action-analysis (March 10, 2024, 07:43PM)
[31] Id.

surrounding the Right to Equality. Justice Sotomayor has expressed the opinion that the Equal Protection clause of the Fourteenth Amendment does not merely mean that the law will be accessible to all equally. It instead means that the law will be made accessible to all and to that effect, anything extra that is required to be done for individuals or groups who are being left, will be done. The law will have to be extended to protect those who need extra protection.[32] Justice Sotomayor clarified that Congress dismissed suggestions aiming to render the equal protection clause of the Fourteenth Amendment colour-blind. She emphasized that the clause does not advocate for a complete prohibition of race-conscious policies. In tandem with the Fourteenth Amendment's adoption, Congress implemented several race-conscious laws to fulfil the promise of equality embedded in the Amendment. This underscores that the Equal Protection Clause allows for the consideration of race to attain its intended objective.[33]

Justice Sotomayor wrote her opinion addressed to a future SCOTUS that could reconsider this judgment. But, before that future arrives, which appears to be distant for now, the United States will have to come to terms with the absence of Affirmative Action and race conscious admission policies. Class-based alternatives have been offered by scholars like Richard Kahlenberg.[34] In fact even Derek Bok, a long-time advocate for race based Affirmative Action[35] has recently championed a class-based alternative.[36]

However, it is also quite obvious to some that they aren't quite as efficient or effective. In fact, in California, where race based Affirmative Action has been abolished, there was a marked drop in admissions from the racial minority communities. The numbers in UCLA and UC Berkeley saw a drop of 60% in Black, Latinx, and Hispanic admissions after the passage of

[32] SFFA v Harvard, 600 U.S. 181 (2023). Sotomayor J dissent
[33] Caplan, *supra* note 30.
[34] RICHARD D. KAHLENBERG, THE REMEDY: CLASS, RACE, AND AFFIRMATIVE ACTION (Basic Books 1996). See also Richard D. Kahlenberg, *A Harvard Champion of Affirmative Action Accepts Reality,* WASHINGTON MONTHLY, March 05, 2024 https://washingtonmonthly.com/2024/03/05/a-harvard-champion-of-affirmative-action-accepts-reality/ (March 10, 2024, 08:03PM).
Prof. Kahlenberg states that the working class loses out when race becomes a factor and therefore race based affirmative action does more harm than good to even the black and Hispanic communities. This is because the rich or upper middle-class children from these communities end up going to top universities and the deserving poor are left behind.
[35] DEREK BOK ET. AL., THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS (Princeton University Press 2004).
[36] DEREK BOK, ATTACKING THE ELITES: WHAT CRITICS GET WRONG—AND RIGHT—ABOUT AMERICA'S LEADING UNIVERSITIES (Yale University Press 2024)

ISSN 2455 2437
Volume 10 Issue 6 – November December 2024

proposition 209 that banned race-conscious admissions. Similar drops were seen in Washington and Michigan too after these states enforced the bans.[37] These numbers continue to remain low despite alternative policies.[38] One excellent suggestion is to end concepts like legacy admissions (Admissions given to persons whose families make donations and/or have been alumni of the said University. Harvard is notorious for the large legacy admissions it provides every year) which are known to benefit white applicants the most. This can free up seats that can be filled up by other deserving students.[39]

But experts like Professor Jeffrey S Lehman, are of the view that this judgement does not in any way end Affirmative Action that can benefit racial minorities, although it does make it difficult.[40] He believes that the Universities will have to work harder on tailoring policies that diversify the classroom, while being easy to justify in case of judicial review.[41]

The matter of concern now is that this judgment will also most likely (*definitely*) affect Affirmative Action policies in hiring, and it might only be a matter of time before Affirmative Action in employment is challenged and struck down too.

Conclusion

The recent Supreme Court ruling in *Students for Fair Admissions v Harvard* has cast a shadow over the trajectory of Affirmative Action in the United States, leaving scholars and advocates of equality in distressed. The decision, abrogating previous landmark cases like *Bakke* and *Grutter*, not only challenges the principles established in the pursuit of equal opportunities but also raises concerns about the Court's interpretation of the Constitution.

[37] Elise Colin & Bryan J. Cook, *The Future of College Admissions without Affirmative Action*, URBAN WIRE, June 23, 2023 https://www.urban.org/urban-wire/future-college-admissions-without-affirmative-action (March 10, 2024, 08:03PM).
[38] Carrie Spector, *After the Supreme Court rulings, what's next for affirmative action?*, STANFORD GRADUATE SCHOOL OF EDUCATION, June 12, 2023 https://ed.stanford.edu/news/after-supreme-court-rulings-what-s-next-affirmative-action (March 10, 2024, 08:03PM).
[39] Id.
[40] Jeffrey S. Lehman, *Don't Misread SFFA v. Harvard,* INSIDE HIGHER ED, July 17, 2023 https://www.insidehighered.com/opinion/views/2023/07/17/dont-misread-sffa-v-harvard-opinion (March 10, 2024, 08:03PM)
[41] Id.

Chief Justice Roberts' majority opinion, seemingly prioritising individual liberties over collective racial identity, has sparked widespread dismay among scholars who argue that this stance stems from a misreading, of the constitutional principles. The anguish is palpable as Justice Sotomayor's dissenting opinion, which acknowledges the complexities of the case, resonates with those who see the decision as a departure from the nuanced understanding of the law.

The contention that Chief Justice Roberts' judgment is based on a clear misinterpretation of *Brown* intensifies the distress felt by those who champion Affirmative Action as a means to rectify historical injustices. The suggestion that this misreading may be influenced by conservative readings of the Constitution to align with political agendas adds another layer of concern.

As the United States grapples with the aftermath of this ruling, the anguish expressed by scholars underscores the precarious state of Affirmative Action in the United States. The fear is not only about its impact on college admissions but also the potential repercussions for Affirmative Action policies in employment. The setback raises urgent questions about how policymakers, educators, and advocates for equality will navigate this challenging terrain, striving to create an inclusive and diverse society despite the prevailing headwinds.