3.13: Affirmative Action

Explain how the Court has at times allowed the restriction of the rights of minority groups and at other times has protected those rights.

Affirmative action can be described "as a civil rights policy premised on the concept of group rather than individual rights, which seeks equality of results rather than equality of opportunity." Affirmative action was an attempt to address discriminatory hiring practices. Classes of people who have been "adversely impacted," including race and gender, can claim they have been discriminated against. As a result, public and private employers and schools must demonstrate that these "protected classes" have in fact been provided equal opportunities. Opponents cry "racial quotas" and "reverse discrimination." Some have insisted that our Constitutional commitment to equality necessitates colorblindness. Again we turn to the Supreme Court for guidance.

In the case Regents of California v. Bakke (1978) the Court opinion stated that race conscious policies adopted as a remedy for proven discrimination were permissible under the Civil Rights Act and the Constitution. Despite the Reagan administration's attempt in the 1980's to stop the spread of affirmative action the Supreme Court reaffirmed the legality of quotas. In Local 28 Sheet Metal Workers v. E.E.O.C. (1986) the Court argued, ". . . race conscious class relief [quota]" was appropriate where an employer or union "has engaged in persistent or egregious discrimination, or where necessary to dissipate the lingering effects of pervasive discrimination." In Johnson v. Santa Clara County (1987) the Court acknowledged that affirmative action is a prospective policy based on the idea of group rights that aims at achieving racial and gender balance.

The Supreme Court in more recent years has seemingly shown their lack of patience with affirmative action policies. Little by little the Court has weakened previous precedent. The Court has applied a "strict scrutiny" test to programs seeking diversity. In cases like Gratz v. Bollinger (2003) and Fisher v. Texas (2013) the Little by little the Court has weakened previous precedent. The Court has at times allowed the restriction of the rights of minority groups and at other times has protected those rights.

Need more evidence? Check out the Court's treatment of LGBT issues. In 1986, in the case Bowers v. Hardwick, the Court upheld state laws that prohibited same sex activities. By 2015 the Court, in Obergefell v. Hodges, overturned any state law banning same-sex marriage. Our civil rights prove again to be a dynamic force in American life.

Civil liberties and civil rights took center stage with the passage of the Fourteenth Amendment. The "due process" clause along with the "equal protection" clause brought about a revolutionary change in American public life. The Selective Incorporation Doctrine made most of our fundamental liberties efficacious in all fifty states. And the national government took on a greater responsibility to safeguard minority rights, our egalitarian ideal. In Federalist 10 Madison had warned, "The great danger in republics is that the majority will not respect the rights of the minority." As much as "we the people" hope our elected officials, in both the executive and legislative branches, are up to the task it has been the U.S. Supreme Court who has played the role of guardian. As we continue to debate the full meaning of civil liberties and civil rights, we engage in that revolutionary struggle that started over 200 years ago.