



1996

Playing the "Gender" Card: Affirmative Action and Working Women

Mary K. O'Melveny

Coalition of Labor Union Women

Follow this and additional works at: <https://uknowledge.uky.edu/klj>



Part of the [Civil Rights and Discrimination Commons](#), and the [Law and Gender Commons](#)

[Right click to open a feedback form in a new tab to let us know how this document benefits you.](#)

Recommended Citation

O'Melveny, Mary K. (1996) "Playing the "Gender" Card: Affirmative Action and Working Women," *Kentucky Law Journal*: Vol. 84 : Iss. 4 , Article 7.

Available at: <https://uknowledge.uky.edu/klj/vol84/iss4/7>

This Article is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Law Journal by an authorized editor of UKnowledge. For more information, please contact UKnowledge@lsv.uky.edu.

Playing the "Gender" Card: Affirmative Action and Working Women*

BY MARY K. O'MELVENY**

INTRODUCTION

Only seventy-five years have passed since women were allowed to vote, and there are still those who would question the need for gender-conscious actions to ensure that women can play an equal role in our nation's political, social, and economic affairs. A mere thirty years after discrimination in employment was formally outlawed by federal legislation, the key enforcement remedy of affirmative action has become a political football. The public "debate" about affirmative action has missed the mark in many respects, often premised on deliberately inaccurate assumptions about the nature of the remedy as well as the need to employ it.¹ The affirmative action debate has also focused largely on race, intentionally playing to the country's unresolved race relations issues. This focus not only ignores the true picture of discrimination against women in our society, but it once again marginalizes the issue of gender equality by sending the false message that this issue has already been satisfactorily resolved. In addition, it potentially divides forces that should be united in support of remedies that take race, national origin, and gender into account in the quest for a nondiscriminatory workplace.

* © August, 1996. All rights reserved.

** General Counsel, Coalition of Labor Union Women; Headquarters Counsel, Communications Workers of America, AFL-CIO, Washington, D.C. J.D. 1971, Rutgers University School of Law. Prepared for University of Kentucky Law Journal Symposium commemorating the 150th anniversary of the *Seneca Falls Declaration of Sentiments*.

¹ For an excellent critique of the "myths" which are currently circulating about affirmative action, see *Abolishing Government Race or Gender Preferences: Hearings Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 104th Cong., 1st Sess. 4-16 (1995) (testimony of William T. Coleman, Jr., Partner, O'Melveny and Meyers, Washington, D.C.). See generally BARBARA R. BERGMANN, *IN DEFENSE OF AFFIRMATIVE ACTION* (1996).

This Article explores the issue of affirmative action and gender in the employment context.² To do so, it is necessary to recall the pervasive discrimination against women that was widely accepted in the United States for more than 150 years.³ It must also be noted that consciousness of gender discrimination played only a limited role in the early development of affirmative action relief, and gender-conscious remedies have received only limited consideration by the courts. Another factor in the equation is the Supreme Court's failure to rule that sex, like race, is a suspect classification warranting strict scrutiny of governmental classifications based on gender.⁴ This failure has also allowed the affirmative action debate to minimize gender as a key issue. Ironically, the unwilling-

² By focusing on gender discrimination, this Article should in no way be construed as suggesting that racial and ethnic origin discrimination are of any less importance, or that there should be any retreat from remedies that take race and ethnicity into account to increase workforce diversity. The continuation of discrimination against Blacks, Hispanics, Asian-Americans and other minorities is dramatically evidenced by statistical data as well as by the personal experiences of applicants and employees within these groups. For some of the many excellent discussions of these issues, see generally ABA INDIVIDUAL RIGHTS AND RESPONSIBILITIES SECTION REPORT IN SUPPORT OF RESOLUTION ON AFFIRMATIVE ACTION (1995); FAIR EMPLOYMENT COUNCIL, RESEARCH EVIDENCE ON RACIAL/ETHNIC DISCRIMINATION AND AFFIRMATIVE ACTION IN EMPLOYMENT (1995); MEXICAN AM. LEGAL DEFENSE AND EDUC. FUND, AFFIRMATIVE ACTION: A USEFUL REMEDY FOR EXISTING INEQUITY (1995); NAT'L ASIAN PACIFIC AM. LEGAL CONSORTIUM, ASIAN PACIFIC AMERICANS AND AFFIRMATIVE ACTION: MYTHS AND REALITIES (1995); NAT'L COUNCIL OF LARAZA, FACT SHEET ON AFFIRMATIVE ACTION AND LATINOS (1995); MARGERY A. TURNER ET AL., OPPORTUNITIES DENIED, OPPORTUNITIES DIMINISHED: DISCRIMINATION IN HIRING (1991); WOMEN'S LEGAL DEFENSE FUND, AFFIRMATIVE ACTION OPENS DOORS FOR WOMEN OF COLOR (1995); Marc Bendick, Jr. et al., *Measuring Employment Discrimination Through Controlled Experiments*, REV. BLACK POL. ECON., Summer 1994, at 25; Nicholas Lemann, *Taking Affirmative Action Apart*, N.Y. TIMES (Magazine), June 11, 1995, at 36; Roger Wilkins, *The Case for Affirmative Action*, NATION, Mar. 27, 1995, at 409.

³ See *infra* notes 17-31 and accompanying text.

⁴ *United States v. Virginia*, 116 S. Ct. 2264, 2276 (1996) (Virginia's exclusion of women from admission to Virginia Military Institute ("VMI") violates Equal Protection Clause; parties defending gender-based governmental action must offer "exceedingly persuasive justification"); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982) (applying intermediate scrutiny to an equal protection challenge to a state university's policy discriminating on the basis of gender).

ness to employ strict scrutiny for gender-based classifications means that, under the Court's most recent rulings on affirmative action issues, affirmative action programs for women may survive challenge where comparable race-based programs will not.⁵ Or, to put the issue another way, white men may look to greater constitutional protections from race-based affirmative action plans (however well-intentioned) than exist for women challenging programs that discriminate based upon sex.

This Article also discusses some of the evidence which shows that serious discrimination in the workplace still occurs today.⁶ This data clearly discloses why gender-conscious affirmative action programs and approaches must be continued. For those familiar with the report of the Glass Ceiling Commission,⁷ it is hard to imagine any genuine dispute over the fact that women today still face substantial barriers to equal employment opportunities. Yet, the exclusion of gender from the debate about affirmative action overlooks the reality that all is not well for women in the workplace.⁸ It also ignores substantial evidence that discrimination against women dramatically declines when effective affirmative action remedies are employed to remedy current and past discriminatory practices that exclude or impede the hiring, promotion, and fair treatment of women workers.⁹

It is this author's contention that bringing gender issues fully into the affirmative action dialogue will facilitate public understanding and

⁵ See *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 2112-13 (1995) (applying strict scrutiny to a race-based employment preference program); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 494 (1989) (applying strict scrutiny to a race-based affirmative action program).

⁶ See *infra* notes 158-214 and accompanying text.

⁷ GLASS CEILING COMM'N, U.S. DEP'T OF LABOR, GOOD FOR BUSINESS: MAKING FULL USE OF THE NATION'S HUMAN CAPITAL (1995) [hereinafter GLASS CEILING COMMISSION REPORT]. The Commission will be referred to as the "Glass Ceiling Commission."

⁸ See *id.* at 26-36 (discussing the various barriers which still impede the advancement of women and minorities in the workplace). The *Glass Ceiling Commission Report* indicates that only three to five percent of senior positions in Fortune 2000 corporations are held by women. *Id.* at 143.

⁹ See *Affirmative Action: Hearings on H.R. 2128 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 104th Cong., 1st Sess. 4-7 (1995) (testimony of Marcia D. Greenberger, Co-President of the National Women's Law Center) [hereinafter *Affirmative Action Hearings*] (noting specific examples of situations in which affirmative action has helped women in the workplace).

acceptance of the need for this crucial civil rights enforcement tool.¹⁰ By openly addressing discrimination against women in the employment arena, including the public sharing of individual experiences, it will be possible to dispel much of the damaging mythology that has developed about this key civil rights remedy. This sharpened focus will also encourage the courts, the Congress, and the public to acknowledge that the nation's "long and unfortunate history of sex discrimination"¹¹ continues to have an impact on women today. It is this fact which mandates our continued commitment to affirmative action.

I. AFFIRMATIVE ACTION: WHAT IS IT?

Because the debate about affirmative action has become clouded with rhetoric, an objective definition is needed. In 1977, the United States Commission on Civil Rights defined affirmative action as "any measure, beyond simple termination of a discriminatory practice, adopted to correct or compensate for past or present discrimination or to prevent discrimination from recurring in the future."¹²

Affirmative action works to ban discrimination based on an individual's membership in a specified protected group — race, color, national origin, gender — through the use of rules, programs, or other actions which provide benefits or opportunities to members of that group who were previously denied such benefits or opportunities due to past or current discriminatory practices.¹³ The principal focus of affirmative action has been in the areas of employment and education — the major routes by which people contribute as productive citizens to the wealth and breadth of our national dream if given a fair opportunity to do so.¹⁴

Affirmative action is very different from anti-discrimination laws. The former encourages employers to take "pro-active steps to recruit, hire and retain qualified women and minorities in order to ensure the possibility of pluralism in the work force for the present and for the future."¹⁵ Examples of affirmative action measures that encourage these

¹⁰ See *infra* notes 215-22 and accompanying text.

¹¹ *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973).

¹² U.S. COMM'N ON CIVIL RIGHTS, STATEMENT ON AFFIRMATIVE ACTION 2 (1977).

¹³ See, e.g., *Affirmative Action Hearings*, *supra* note 9, at 4-5 (discussing what affirmative action is and how it works).

¹⁴ *Id.* (specifically discussing the different types of affirmative action programs in the education and employment arenas).

¹⁵ *Affirmative Action: An Overview on Race-Based Preferences: Hearings*

objectives include aggressive recruitment efforts that attract women and people of color into jobs from which they have traditionally been excluded. Such efforts go outside traditional word-of-mouth and "old boy network" recruitment practices to sources likely to present substantial numbers of qualified candidates who are not white or male.¹⁶ Hiring goals that encourage diversity by rewarding managers whose work forces include employees from backgrounds that are roughly proportionate to workers available in the relevant labor pool represent another example. In-house training and performance evaluations that feature and encourage the value of workforce diversity provide still another example. None of these actions are *required* by anti-discrimination laws, yet without them, the chance that those laws will be effective is greatly reduced. In each instance, affirmative action provides a method of promoting diversity of experience and ability in the workforce which has largely been ignored by "traditional" recruiting, selection, and promotional practices which exclude and/or limit opportunities for minorities and women.

Affirmative action does *not* mean quotas, reverse discrimination, or the hiring of unqualified workers. The courts have repeatedly held that affirmative action considerations do not even come into play unless the individual is qualified for the job he or she seeks.¹⁷ An effective affirmative action policy focuses on individual potential, using hiring and selection measures that correspond to the actual skills required for the jobs, rather than relying on non-job-related and often biased decision-making methods. When such measures are in place, women and men of all races and ethnic backgrounds are the ultimate beneficiaries.

II. THE HISTORICAL LANDSCAPE OF DISCRIMINATION AGAINST WOMEN

Although the discrimination facing women today is often more subtle than that which epitomized the nation's "long and unfortunate history,"¹⁸ there can be little debate about the relevance of that history. In fact, it is

*Before the Subcomm. on the Constitution, Federalism and Property Rights of the Senate Comm. on the Judiciary, 104th Cong., 1st Sess. 6 (1995) (prepared statement of A. Leon Higginbotham entitled *Senators, Where Would You Be Now if You Had Been Born as an African American and/or a Woman?*).*

¹⁶ *Affirmative Action Hearings*, *supra* note 9, at 5.

¹⁷ *See, e.g.*, *Johnson v. Transportation Agency*, 480 U.S. 616, 625 (1987).

¹⁸ *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973).

the empirical record of longstanding sex, race, and ethnic origin discrimination that requires a continued commitment to affirmative action.

The denial of the vote to women was only one of a substantial framework of laws and policies that treated women as secondary citizens at nearly every level, including employment, public service, property ownership, and educational opportunities.¹⁹ In a 1994 decision in which the Supreme Court ruled that gender was not a constitutionally acceptable basis for jury exclusion, the Court observed that women have historically occupied a position that "was, in many respects, comparable to that of blacks under the pre-Civil War slave codes."²⁰ The Court's recent ruling in *United States v. Virginia*²¹ pointedly referenced the exclusion of women from the political process as well as from other economic and educational opportunities dating from the Nation's founding.²² While the histories of race and sex discrimination differ in many ways, there is profound evidence that discrimination against women today, like that against racial minorities, is inextricably linked to their historic second-class citizenship status.²³

Women were excluded from occupations as diverse as attorney²⁴ and bartender.²⁵ It was not until the 1960s that federal legislation began to address problems of gender-based salary disparities or to guarantee equal employment opportunities for women.²⁶ And, even then, we must remember that "sex" was initially added as a prohibited category of discrimination to Title VII of the Civil Rights Act of 1964²⁷ not because

¹⁹ See generally BARBARA A. BABCOCK ET AL., *SEX DISCRIMINATION AND THE LAW: CAUSES AND REMEDIES* (1975) (describing the dual system of laws that governed the rights of men and women, and the intricate web of laws that required employers to discriminate against working women).

²⁰ *J.E.B. v. Alabama*, 114 S. Ct. 1419, 1425 (1994) (quoting *Frontiero v. Richardson*, 411 U.S. 677, 685 (1973)).

²¹ 116 S. Ct. 2264 (1996).

²² *Id.* at 2274-75, 2277-78, 2281.

²³ For women of color, the impact of both histories is even more problematic. See, e.g., PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (1991) (considering the interrelationship between race and gender discrimination).

²⁴ *Bradwell v. Illinois*, 83 U.S. 130, 139 (1873) (ruling that an Illinois statute which prohibited women from practicing law was constitutional).

²⁵ *Goesaert v. Cleary*, 335 U.S. 464, 467 (1948) (upholding a Michigan statute forbidding any female who was not the wife or daughter of a male owner of a liquor establishment from being a bartender).

²⁶ For current versions of such legislation, see 42 U.S.C. § 2000e-2 (1994) and 29 U.S.C. § 206(d) (1994).

²⁷ Pub. L. No. 88-352, §§ 701-716, 78 Stat. 253 (1964) (current version at

it was the will of Congress to end gender discrimination, but because some members of Congress opposed to federal civil rights legislation believed that doing so would kill the proposed law.²⁸ Prior to the passage of Title VII and legislation such as the Equal Pay Act,²⁹ private employers were free to discriminate in every aspect of the workplace. The passage of these statutes provided women with legal remedies in their quest to end employment discrimination, but they were only the first step in the long struggle for gender equality. In 1972, Congress passed the Equal Rights Amendment ("ERA"), which would have provided that "equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex."³⁰ Sadly, however, after a ten-year battle, the Amendment fell three states short of ratification.³¹

The failure of the ERA was dramatic evidence of the continuing insecurity of women's status as equal citizens. Today, more than thirty years after Title VII became the law of the land, women still face many barriers to equality that demand the vigorous attention which is at the heart of effective affirmative action remedies. Even more troubling, affirmative action itself is at risk of being removed as a federally permissible remedy for serious and pervasive discrimination.³²

42 U.S.C. § 2000e to 2000e-17 (1994)).

²⁸ See Michael E. Gold, *A Tale of Two Amendments: The Reasons Congress Added Sex to Title VII and Their Implication for the Issue of Comparable Worth*, 19 DUQ. L. REV. 453, 453-77 (1981) (discussing the various reasons behind the addition of "sex" to Title VII, and citing numerous authorities supporting what has become the "conventional" view that the addition was made in an effort to sabotage the bill).

²⁹ Pub. L. No. 88-38, 77 Stat. 56 (1963) (codified at 29 U.S.C. § 206(d) (1988)).

³⁰ H.R.J. Res. 208, 92d Cong., 1st Sess. (1971); S.J. Res. 8, 92d Cong., 1st Sess. (1971). See generally Barbara A. Brown et al., *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871 (1971) (providing a detailed discussion of the background elements and potential impact of the proposed Equal Rights Amendment).

³¹ MALVINA HALBERSTAM & ELIZABETH F. DEFEIS, *WOMEN'S LEGAL RIGHTS* 17 (1987).

³² "The Equal Opportunity Act," which is now pending in the Senate, sponsored by former Senator Robert Dole, and in the House of Representatives, sponsored by Representative Charles Canady, would eliminate all federal programs that now provide for any form of affirmative action. S. 1085, 104th Cong., 1st Sess. (1995); H.R. 2128, 104th Cong., 1st Sess. (1995). The legislation would overturn many key Supreme Court decisions supportive of race

III. THE EARLY DEVELOPMENT OF AFFIRMATIVE ACTION

The concept of affirmative action has its roots in presidential directives dating back to President Franklin Delano Roosevelt.³³ Executive orders calling for non-discrimination in federal employment and government contracts were signed by Presidents Roosevelt, Truman, and Eisenhower.³⁴ President John F. Kennedy may have been the first to use the term "affirmative action" in 1961 when he signed Executive Order Number 10,925.³⁵ That order required federal contractors to take whatever action was necessary to ensure that "applicants are employed, and that employees are treated during employment, without regard to their race, creed, color or national origin."³⁶ Gender was conspicuously absent as a protected class.

President Kennedy's Executive Order followed on the heels of a 1960 report by the President's Committee on Government Contracts, chaired by then Vice President Nixon, which concluded that there could be "no justification for discrimination in employment because of race, color, religion, or national origin in work performed by contractors paid by federal funds"³⁷ In addition, the Committee found that the problem of employment discrimination resulted less from "overt discrimination" where an individual's status is the sole basis for the refusal to hire, and more from "*the indifference of employers to establishing a positive policy*

and gender-conscious remedies for discrimination in education, employment, government contracting programs, and other areas, and severely limit judicial enforcement of civil rights. *Id.*

³³ See James E. Jones, Jr., *The Genesis and Present Status of Affirmative Action in Employment: Economic, Legal and Political Realities*, 70 IOWA L. REV. 905-10 (1985). President Franklin Roosevelt signed Exec. Order No. 8,802 in 1941, and established the Fair Employment Practices Committee to investigate charges of racial discrimination by federal contractors involved in the war effort. Exec. Order No. 8,802, 3 C.F.R. 957 (1938-1943). A. Phillip Randolph had threatened to march on Washington to protest this discrimination if no action were taken. Jones, *supra*, at 905-06.

³⁴ Jones, *supra* note 33, at 905-10.

³⁵ Exec. Order No. 10,925, 3 C.F.R. 448 (1959-1963). See Jones, *supra* note 33, at 907.

³⁶ Exec. Order No. 10,925, *supra* note 35, at 450. See also HERBERT HAMMERMAN, A DECADE OF NEW OPPORTUNITY: AFFIRMATIVE ACTION IN THE 1970s 11 (1984).

³⁷ PRESIDENT'S COMM. ON GOV'T CONTRACTS, PATTERN FOR PROGRESS 14 (1960).

of nondiscrimination.”³⁸ The report went on to attribute to employer indifference the fact that

schools, training institutions, recruitment and referral sources follow the pattern set by industry. Employment sources do not normally supply job applicants regardless of race, color, religion or national origin *unless asked to do so by employers*. Schools and other training sources frequently cannot fill nondiscriminatory job orders from employers because training may take from one to six years or more.³⁹

Affirmative action was given more “teeth” in 1965 when President Lyndon B. Johnson signed Executive Order Number 11,246, which for the first time required federal contractors to take affirmative action to hire minority group members or risk loss of their government contracts.⁴⁰ The order specified various types of affirmative action which could be taken: “employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training including apprenticeship.”⁴¹

Noncompliance with the order meant that federal contracts could be “cancelled, terminated, or suspended in whole or in part and the contractor [could] be declared ineligible for further Government contracts.”⁴² Federal contractors were also required to keep detailed information and report regularly on their equal employment efforts.⁴³ It was not until 1967, however, that sex was added as a prohibited category of discrimination.⁴⁴ The Executive Order program was strengthened and clarified in various Executive Orders issued throughout the late 1960s and early 1970s.⁴⁵

Thus, introduction of the specific term “affirmative action” in the 1961 and 1965 Executive Orders came at a time when broad public

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Exec. Order No. 11,246, 3 C.F.R. 339 (1964-1965), *reprinted in* 42 U.S.C. § 2000e (1989).

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Affirmative Action Hearings*, *supra* note 9, at 18.

⁴⁵ See HAMMERMAN, *supra* note 36, at 13-17 (discussing the various executive orders issued during this period). By 1978, all federal contract compliance efforts were consolidated at the Department of Labor in the Office of Federal Contract Compliance, which enforces those programs today.

acceptance of civil rights was only just taking hold. *Brown v. Board of Education*⁴⁶ was only seven years old when President Kennedy signed Executive Order Number 10,925.⁴⁷ According to individuals who were involved in the early drafting of the regulations implementing the affirmative action obligations imposed by these Executive Orders, there was relatively little discussion of, much less adverse reaction to, the concept at that time.⁴⁸ One hopes that this was due to the fact that the country was just coming to grips with the full picture of racial discrimination, with all of its shameful components. Certainly, this was due, at least in part, to the fact that no specific enforcement efforts existed for several years.⁴⁹ When President Johnson signed Executive Order Number 11,246, Title VII had not yet become effective. It was not until 1972 that Congress amended Title VII to include Section 706(g), giving the courts power to order employers to take broad affirmative action measures once a judicial finding of job discrimination was made.⁵⁰

When affirmative action first became part of the civil rights remedial landscape it was unaccompanied by the type of intense rhetoric that characterizes today's discussion of the topic.⁵¹ In fact, support for affirmative action was bipartisan. During the debates on the 1972 amendments to Title VII, Congress specifically rejected proposals to limit federal contractor compliance programs and eliminate goals and timetables.⁵² In addition, Congress spurned efforts to eliminate statutory language that allowed courts to "order such affirmative action as may be

⁴⁶ 347 U.S. 483 (1954).

⁴⁷ Exec. Order No. 10,925, *supra* note 35. Decided along with *Brown* was *Bolling v. Sharpe*, 347 U.S. 497 (1954), the first major case to impose on the federal government an obligation not to discriminate.

⁴⁸ See, e.g., *Jones*, *supra* note 33, at 908-10.

⁴⁹ See *id.* at 909 ("I suspect the great acceptance of the idea, or at least the lack of a public flap over it at the time it was introduced, stemmed from a failure to see its potential or, if recognized, a belief that the government would be unable either to define the obligation or to enforce it.").

⁵⁰ Pub. L. No. 92-261, 86 Stat. 103 (1972) (current version at 42 U.S.C. § 2000e-5(g) (1994)).

⁵¹ See KATHANNE W. GREENE, *AFFIRMATIVE ACTION AND PRINCIPLES OF JUSTICE* 51-54 (1989) (discussing the legislative history of the 1972 amendments to the Civil Rights Act of 1964 and recognizing that an amendment aimed at dismantling affirmative action was defeated by a substantial margin).

⁵² *Id.*

appropriate.”⁵³ The 1972 amendments also obligated federal agencies to implement affirmative action programs to ensure equal employment opportunities for minorities and women.⁵⁴

Congress passed other legislation that included specific “affirmative action” obligations during the 1970s.⁵⁵ In 1979, EEOC first issued affirmative action guidelines, which also received broad support.⁵⁶ Even after affirmative action had been the target of substantial legal assaults, many led by the Reagan and Bush Justice Departments, it survived as an acceptable remedy for employment discrimination when the 1991 amendments to the Civil Rights Act were enacted.⁵⁷ The 1991 Act contains a clear directive that “nothing in the amendments . . . shall be construed to affect court-ordered remedies, affirmative action, or conciliation agreements that are in compliance with the law.”⁵⁸ Again, bipartisan support was key to the defeat of anti-affirmative action proposals, as was the effective advocacy of national women’s rights organizations such as the Women’s Legal Defense Fund and the National Women’s Law Center.

⁵³ *See id.*

⁵⁴ *See generally* CITIZENS’ COMM’N REPORT ON CIVIL RIGHTS, AFFIRMATIVE ACTION TO OPEN THE DOORS OF OPPORTUNITY 51-54 (1984) [hereinafter CITIZENS’ COMMISSION REPORT] (providing an extensive history of the early support for affirmative action).

⁵⁵ The Rehabilitation Act of 1973 obligated federal contractors to undertake affirmative action efforts for handicapped workers. Pub. L. No. 93-112, 87 Stat. 355 (1973) (current version at 29 U.S.C. §§ 701-796 (1988)). The Vietnam Era Veterans Readjustment Acts of 1972 and 1974 imposed the same obligations to ensure the employment of veterans. Pub. L. No. 92-540, 86 Stat. 1074 (1972) (codified at 38 U.S.C. §§ 101-3107 (1994)); Pub. L. No. 93-508, 88 Stat. 1578 (1974) (codified at 38 U.S.C. §§ 219-2026 (1994)).

⁵⁶ Guidelines on Affirmative Action Appropriate Under Title VII, 29 C.F.R. §§ 1608-1608.12 (1995). EEOC prefaced the Guidelines by noting that the passage of Title VII had “established a national policy against discrimination in employment In addition, Congress strongly encouraged employers, labor organizations and other persons subject to Title VII . . . to act on a voluntary basis to modify employment practices and systems which constituted barriers to equal employment opportunity, without awaiting litigation or formal government action.” 29 C.F.R. 1608.1(b) (1995). These guidelines remain operative today.

⁵⁷ Pub. L. No. 102-166, 105 Stat. 1076, § 116 (1991) (codified at 42 U.S.C. §§ 2000e to 2000bb-4 (1994)).

⁵⁸ *Id.*

IV. THE JURISPRUDENCE OF AFFIRMATIVE ACTION

While there have been many key Supreme Court rulings addressing the proper boundaries of affirmative action in the past quarter-century,⁵⁹ only two have specifically addressed gender-based preferences.⁶⁰ At present, the Court's treatment of gender discrimination is diminished by its refusal to rule that governmental classifications based upon gender, like those based on race, require analysis under the constitutional standard of strict scrutiny.⁶¹ Unfortunately, this disparity was not corrected in *United States v. Virginia*,⁶² the case challenging the exclusion of women from VMI, Virginia's all-male military academy.⁶³ Justice Ginsburg's

⁵⁹ See, e.g., *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097 (1995); *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Johnson v. Transportation Agency*, 480 U.S. 616 (1987); *United States v. Paradise*, 480 U.S. 149 (1987); *Local Number 93, Int'l Ass'n of Firefighters v. Cleveland*, 478 U.S. 501 (1986); *Local 28, Sheet Metal Workers Int'l Ass'n v. EEOC*, 478 U.S. 421 (1986); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986); *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1983); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *United Steelworkers v. Weber*, 443 U.S. 193 (1979); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

⁶⁰ *Johnson v. Transportation Agency*, 480 U.S. 616 (1986); *Frontiero v. Richardson*, 411 U.S. 677 (1973).

⁶¹ See *Johnson*, 480 U.S. at 641-42 (upholding a gender-based employment preference and not implementing strict scrutiny).

⁶² 116 S. Ct. 2264 (1996).

⁶³ The United States sued the Commonwealth of Virginia and others responsible for the operation of the VMI under 42 U.S.C. § 2000c-6, on the complaint of a female high school student who was denied admission under VMI's male-only admissions policy. The United States argued that the policy violated the Equal Protection Clause. The district court held that excluding women was substantially related to important state interests of providing opportunities for single-sex education through a distinctive program of military-style education. *United States v. Virginia*, 766 F. Supp. 1407, 1413-15 (W.D. Va. 1991), *vacated*, 976 F.2d 890 (4th Cir. 1992), *cert. denied sub nom. Virginia Military Inst. v. United States*, 113 S. Ct. 2431 (1993). On appeal, a panel of the Fourth Circuit held that VMI's admissions policy violated the Equal Protection Clause, rejecting the claim that an important state policy justified segregated educational opportunities, particularly in light of the state's general policy of encouraging diversity in educational opportunities. The court concluded that "neither the goal of producing citizen soldiers nor VMI's implementing methodology is inherently unsuitable to women," and remanded the case for determination of whether alternatives were available. *United States v. Virginia*,

opinion for the majority reviewed the Court's precedent in cases raising gender-based classifications but declined to make sex a "proscribed classification" subject to strict scrutiny. Instead, the heightened review given to such classifications required an "exceedingly persuasive justification."⁶⁴

Justice Ginsburg went on to note that "inherent differences" between men and women should be appreciated, not used as a basis for placing "artificial constraints on an individual's opportunity."⁶⁵ Thus, "sex classifications" are appropriate to "compensate women 'for particular economic disabilities [they have] suffered,' to 'promot[e] equal employment opportunity,' [or] to advance full development of the talent and capacities of our Nation's people," but not "to create or perpetuate the legal, social, and economic inferiority of women."⁶⁶

In dissent, Justice Scalia was sharply critical of the Court's description of the intermediate scrutiny standard and the "exceedingly persuasive

976 F.2d 890, 899 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 2431 (1993).

On remand, creation of an all-female VMI at Mary Baldwin College, a private liberal arts institution, was proposed by the respondents and accepted by the district court, even though the alternative program differed substantially from the program offered to males at VMI. The alternative program, Virginia Women's Institute for Leadership ("VWIL") differed in many ways from the VMI program. Nonetheless, the court accepted the argument that "developmental and emotional differences between the sexes" provided a pedagogical justification for the separate program and concluded that "a military model . . . would be wholly inappropriate for educating and training most women for leadership roles." *United States v. Virginia*, 852 F. Supp. 471, 476 (W.D. Va. 1994), *aff'd*, 44 F.3d 1229 (4th Cir.), *reversed and remanded*, 116 S. Ct. 2264 (1996). The court of appeals affirmed that ruling, using a "special intermediate scrutiny test" to justify Virginia's stated objective of "providing the option of a single-gender college education" because a "substantively comparable" program was available. *United States v. Virginia*, 44 F.3d 1229, 1236-37 (4th Cir. 1995), *reversed and remanded*, 116 S. Ct. 2264 (1996). The Supreme Court disagreed, finding that VWIL was not equal in military training or in educational offerings, faculty credentials, physical facilities, financial endowments, student body, alumni support, or overall prestige. 116 S. Ct. at 2282-87. Since Virginia was unable to meet its demanding burden of providing an "exceedingly persuasive justification" for the exclusion of women from VMI, the Equal Protection Clause was violated. *Id.* at 2276.

⁶⁴ 116 S. Ct. at 2274-76.

⁶⁵ *Id.* at 2276.

⁶⁶ *Id.* (citations omitted).

justification" requirement.⁶⁷ Far from concluding that strict scrutiny should even be an option for consideration in cases of gender-based classifications, Justice Scalia believed the "stronger argument" would warrant "reducing it to rational basis review."⁶⁸ In his view, statutes such as Title VII and the Equal Pay Act have done their job in placing women outside the category of a minority group deserving of any special judicial concern.⁶⁹

Unfortunately, the Court's inability to embrace strict scrutiny for gender-based classifications allows some to conclude that discrimination against women is no longer a problem, thereby undermining the argument for affirmative action remedies when it is proven to exist. While the majority suggests that affirmative remedial programs based on gender may well advance legitimate governmental objectives,⁷⁰ such programs — particularly affirmative action efforts — should survive strict scrutiny as well if carefully structured to address existing problems caused by sex discrimination.⁷¹ The Court's affirmative action rulings underscore the need for a uniform standard of review for all remedial programs required by discriminatory treatment of minorities and of women.⁷²

To illustrate some of the general rules that have been applied in evaluating race and gender-conscious remedies, several of the Court's affirmative action rulings are discussed below. It is clear, however, that as long as intermediate scrutiny remains the standard by which gender-based governmental programs are judged, negative messages may still be sent with every ruling that evaluates race and sex discrimination by different standards.

⁶⁷ *Id.* at 2293-96 (Scalia, J., dissenting).

⁶⁸ *Id.* at 2295-96.

⁶⁹ *Id.* at 2296. In addition, Justice Scalia argued that the fact that women make up "a majority of the electorate" removes them from the "discrete and insular minority" category entitled to heightened judicial review under *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1938).

⁷⁰ 116 S. Ct. at 2276.

⁷¹ In *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 2117 (1995), Justice O'Connor noted that strict scrutiny of affirmative action programs based on race or national origin was not necessarily going to be "fatal in fact."

⁷² Historically, and currently, women of color are frequently victims of "multiple discrimination." Yet, very few cases have analyzed the effect of discrimination based on combined characteristics. *See, e.g.*, *Lam v. University of Haw.*, 40 F.3d 1551 (9th Cir. 1994) (Asian women are protected subclass under Title VII).

The Supreme Court first validated affirmative action principles in *Regents of the University of California v. Bakke*.⁷³ Alan Bakke, a white medical school applicant, challenged the school's policy of reserving a specific number of places for minority group applicants after he was denied admission. A majority of the Court concluded, using strict scrutiny, that the educational set-aside program was unconstitutional because there had been no findings that the school had previously discriminated against minority applicants, and thus, no showing of a compelling governmental interest to support a race-based admissions standard.⁷⁴ However, the Court also held that race could be used as a *factor* in the admissions process, in addition to other criteria designed to admit qualified applicants, to promote the goal of diversity and correct past exclusionary practices.⁷⁵ Justice Harry Blackmun, concurring in the *Bakke* opinion, eloquently expressed the rationale behind race-conscious remedies: "In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently."⁷⁶

The first major affirmative action decision in the employment arena was *United Steelworkers of America v. Weber*.⁷⁷ There, the Court upheld a joint agreement between Kaiser Steel Co. and the union to reserve fifty percent of the slots in a craft apprenticeship program at a Louisiana steel mill for Blacks. This joint union-employer program was intended to rectify a previously all-White workforce. A white employee who was turned down for the program sued under Title VII of the Civil Rights Act, arguing that he had been excluded on the basis of race.⁷⁸ The Court

⁷³ 438 U.S. 265 (1978).

⁷⁴ *Id.* at 291-320. As a result of the UCLA program, numerous Blacks and other minorities became doctors who would not otherwise have had that opportunity. After the decision, the program was discontinued and subsequent classes contained only one or two Black members. See Nicholas Lemann, *Taking Affirmative Action Apart*, N.Y. TIMES (Magazine), June 11, 1995, at 36. The article compares Dr. Bakke's career (he was ordered admitted to UCLA after the Court's ruling) and that of Dr. Patrick Chavis, one of the candidates who replaced Bakke in the class of 1973. Dr. Chavis went on to become an obstetrician serving the needs of medicare patients in a Black and Hispanic suburb of Los Angeles. Dr. Bakke is an anesthesiologist with no private practice who works on an interim basis at a community hospital in Rochester, Minnesota.

⁷⁵ *Bakke*, 438 U.S. at 316-20.

⁷⁶ *Id.* at 407 (Blackmun, J., concurring).

⁷⁷ 443 U.S. 193 (1979).

⁷⁸ *Id.* at 198-200.

held that "race-conscious" affirmative action programs designed to eliminate "old patterns of racial segregation and hierarchy" could be appropriate.⁷⁹ To pass muster, such programs must aim to remedy a "manifest racial imbalance" rather than "to maintain racial balance."⁸⁰

Since the challenged apprenticeship program did not require that white employees be discharged and replaced by Blacks, and did not create an "absolute bar" to the advancement of white employees, it did not "unnecessarily trammel" the rights of white employees.⁸¹ According to the Court, the private sector employer retained a certain area of discretion to voluntarily adopt affirmative action plans "designed to eliminate conspicuous racial imbalance in traditionally segregated job categories."⁸²

Although affirmative action came under increasing attack during the Reagan and Bush administrations, several significant Supreme Court cases during the mid-1980s continued to uphold affirmative action as an important tool in the fight against race and gender discrimination. One of these cases, *Local 28, Sheet Metal Workers' International Ass'n v. EEOC*,⁸³ directly raised the issue of whether an employer could be ordered to engage in affirmative action on behalf of individuals who had not personally been discriminated against in that workplace.

In *Local 28*, a labor union had denied union membership to qualified Blacks and excluded them from apprentice programs.⁸⁴ After extensive litigation, a court-ordered affirmative action program established a non-White membership "goal" of twenty-nine percent.⁸⁵ The Court rejected the argument that these court-ordered goals were prohibited by law, ruling that "egregious" discrimination could indeed be remedied by such race-conscious programs.⁸⁶ Justice Brennan's majority opinion argued that race-conscious affirmative relief furthered the intent of Title VII:

⁷⁹ *Id.* at 208.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.* at 209.

⁸³ 478 U.S. 421 (1986).

⁸⁴ *Id.* at 427.

⁸⁵ *Id.* at 432.

⁸⁶ *Id.* at 444-79. Section 706(g) of the Civil Rights Act of 1964 provides that courts cannot "require the admission or reinstatement of an individual as a member of a union" or order other relief if the denial of membership was based on "any reason other than discrimination." 42 U.S.C. § 2000e-5(g) (1994).

The purpose of affirmative action is not to make identified victims whole, but rather to dismantle prior patterns of employment discrimination in the future. Such relief is provided to the class as a whole rather than to individual members; no individual is entitled to relief, and beneficiaries need not show that they were themselves victims of discrimination.⁸⁷

Justice Brennan warned, however, that "preferences" must be viewed with caution, and that court orders must be carefully tailored to correct the past discrimination at which it is aimed. Thus, plans which establish "race-conscious" remedies simply to create a "racially balanced work force," without specific findings of discrimination, are suspect.⁸⁸

In *Local 93, International Ass'n of Firefighters v. City of Cleveland*,⁸⁹ the Supreme Court considered a consent decree which gave hiring preferences to Black firefighters who were not actual victims of the city's discriminatory hiring practices, but who contended that the city's hiring, promotion, and assignment practices were discriminatory.⁹⁰ Justice Brennan again wrote the narrow majority opinion which approved of voluntary agreements to remedy admitted past discrimination through "reasonable" race-conscious relief.⁹¹

In *United States v. Paradise*,⁹² the Court upheld two court-ordered affirmative action plans that required the state of Alabama to hire one Black state trooper for every white state trooper hired until Black troopers made up twenty-five percent of the force, and to award fifty percent of all promotions in rank to Blacks if they were otherwise qualified and the rank was less than twenty-five percent Black.⁹³ The plans were ordered following lengthy litigation during which the court found that the state had artificially held down the size of the force to prevent Blacks from

⁸⁷ *Local 28*, 478 U.S. at 474. Justice Brennan's opinion reviewed the 1972 Congressional debates leading to passage of Section 706(g). Those debates focused on the issue of "quotas" and "preferences," not on limiting the type of relief that should be awarded when past discrimination can be shown. *Id.* at 452-75.

⁸⁸ *Id.* at 475. Justices Rehnquist and O'Connor were among the dissenters. They argued that the 29% goal was a strict racial quota. *Id.* at 497-99 (O'Connor, J., dissenting).

⁸⁹ *Id.* at 501.

⁹⁰ *Id.* at 510-12.

⁹¹ *Id.* at 528.

⁹² 480 U.S. 149 (1987).

⁹³ *Id.* at 177.

being hired, and intentionally restricted promotional opportunities for Black troopers.⁹⁴ Twelve years after the court's initial findings of discrimination, the court concluded that the state's discriminatory hiring and promotion practices were still "pervasive" and "conspicuous," leading to the race-conscious hiring plan.⁹⁵

In a five to four decision, the Supreme Court upheld the Alabama plan as justified by a compelling governmental interest in remedying proven past discrimination in hiring and promotional practices.⁹⁶ It found the plan narrowly tailored to meet that lawful objective. Immediate promotion of eight Blacks to the rank of corporal, along with eight whites, was the most appropriate method of dealing with the past discrimination, since it ensured that discrimination would end in a "flexible" manner that was properly linked to the numbers of Blacks in the relevant work force.⁹⁷

Gender-based "affirmative action" preferences were considered for the first time in *Mississippi University for Women v. Hogan*,⁹⁸ a case challenging a female-only admission policy at a nursing school under the Equal Protection Clause. Justice O'Connor, writing for the majority, applied intermediate scrutiny to strike down the policy. The Court found that Mississippi had failed to establish an "exceedingly persuasive justification" for admitting only women.⁹⁹ Mississippi's argument that it was engaging in educational affirmative action failed because it could not demonstrate that women lacked opportunities for training or employment in the nursing field. Instead, said the Court, its policy "tends to perpetuate the stereotyped view of nursing as an exclusively woman's job."¹⁰⁰ Thus, the state "failed to establish that the alleged objective [was] the actual purpose underlying the discriminatory classification," and failed to show that important state objectives were served by establishing a female-only admissions policy.¹⁰¹ Similarly, Mississippi failed to demonstrate that women in nursing school were adversely affected by the

⁹⁴ *Id.* at 170.

⁹⁵ *Id.* at 163.

⁹⁶ *Id.* at 167.

⁹⁷ *Id.* at 177.

⁹⁸ 458 U.S. 718 (1982).

⁹⁹ *Id.* at 724, 731.

¹⁰⁰ *Id.* at 729 (footnote omitted). Justice O'Connor noted that the school's policy "lends credibility to the old view that women, not men, should become nurses, and makes the assumption that nursing is a field for women a self-fulfilling prophecy." *Id.* at 730.

¹⁰¹ *Id.*

presence of men in their classes since the school allowed men to audit nursing courses.¹⁰²

In the employment arena, *Johnson v. Transportation Agency*¹⁰³ was the first case to address whether affirmative action benefitting women violated Title VII. There, the county of Santa Clara, California used its affirmative action plan to justify the promotion of a female employee to a position as road dispatcher with a county transportation agency even though a male employee had scored slightly better on the qualifying examination. The county's plan provided that gender could be taken into account, as one factor, in making promotions to specific job categories from which women had traditionally been excluded. It was created to satisfy a "long term" goal of a workforce of women, minority-group members, and people with disabilities in all major job classifications in a proportion roughly equivalent to their representation in the available county labor market. The plan also contained short-term goals to help meet that objective.¹⁰⁴

The Santa Clara plan was not prompted by any litigation. No specific past discriminatory practices against women were identified, although the plan did state that women had been traditionally underrepresented in technical and skilled-craft positions.¹⁰⁵ Relying upon affirmative action considerations, the county gave the road dispatcher job to a woman who ranked fourth out of seven candidates, based on her experience, test scores, and other criteria. One of the men who was not selected sued, arguing that he had been denied the promotion, even though more qualified, because he was male.¹⁰⁶

The Supreme Court upheld the county's affirmative action plan, by a six to three vote, because it was "temporary" and was intended to remedy the historical absence of women in certain positions. In addition, the plan did not "unnecessarily trammel" the rights of male employees because it did not establish "fixed" numbers.¹⁰⁷ The majority opinion by Justice Brennan concluded that the plan satisfied the requirements earlier established in *Weber* because it was voluntary and designed to

¹⁰² *Id.* at 731.

¹⁰³ 480 U.S. 616 (1986).

¹⁰⁴ *Id.* at 621-22.

¹⁰⁵ Women comprised only 22.4% of the county's workforce, most in jobs traditionally held by women. At the time the plan was adopted, not one woman was employed in any of the 238 skilled craft positions. By contrast, women made up 36.4% of the relevant labor market. *Id.* at 621.

¹⁰⁶ *Id.* at 623-25.

¹⁰⁷ *Id.* at 626, 630.

eliminate a work force imbalance, without creating an absolute bar to the advancement of men.¹⁰⁸

The Court did not "regard as identical the constraints of Title VII and the Federal Constitution on voluntarily adopted affirmative action plans."¹⁰⁹ Thus, the county's plan was evaluated using the analytical framework set forth in *McDonnell Douglas Corp. v. Green*.¹¹⁰ Once the plaintiff establishes that the employer has taken sex into account, a legitimate, non-discriminatory rationale must be articulated (i.e., an affirmative action program). The burden then shifts to the plaintiff to prove that the proffered justification is pretextual (i.e., the affirmative action program is invalid).¹¹¹

This Title VII analysis means that employers may have greater flexibility to devise gender- and race-conscious remedies where a statistically significant workforce imbalance exists in relation to labor market availability. Under Equal Protection analysis, however, public employers may or may not be able to support such programs, particularly if there is no evidence of discriminatory conduct. In *City of Richmond v. J.A. Croson Co.*,¹¹² and *Adarand Constructors, Inc. v. Pena*,¹¹³ the Supreme Court applied the strict scrutiny standard to race-based affirmative action in contractual set-aside programs at the state and federal levels, respectively. However, these cases leave unresolved the fate of comparable gender-based programs where intermediate scrutiny continues to be the Court's preferred analysis.¹¹⁴ The Court's failure to accord strict scrutiny status to gender classifications certainly raises the question whether gender-based public employer affirmative action

¹⁰⁸ The program must be "justified by the existence of a 'manifest imbalance' that reflected underrepresentation of women in 'traditionally segregated job categories.'" *Id.* at 631 (quoting *United Steelworkers v. Weber*, 443 U.S. 193, 197 (1979)).

¹⁰⁹ *Id.* at 632 (citing *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299 (1977)).

¹¹⁰ 411 U.S. 792, 802 (1973) (setting a standard of proof for Title VII claims of race-based hiring decisions).

¹¹¹ *Johnson*, 480 U.S. at 625.

¹¹² 488 U.S. 469 (1988) (invalidating city plan to set aside 30% of construction contracts).

¹¹³ 115 S. Ct. 2097 (1995) (remanding for determination of whether federal program satisfied strict scrutiny).

¹¹⁴ Justice Marshall, dissenting in *J.A. Croson*, had observed that the Court's decisions denying suspect status to gender-based classification "stand on extremely shaky ground." 488 U.S. at 554 (Marshall, J., dissenting).

programs can survive challenges where race-based programs established on comparable assumptions could not.¹¹⁵ Justice Stevens, dissenting in the *Adarand* case, noted the “anomalous result” created by the application of strict scrutiny to affirmative action programs designed to remedy invidious race discrimination but only intermediate scrutiny to programs intended to remedy sex discrimination.¹¹⁶

The lower courts have already reached conflicting results when applying these two different standards to set-aside programs affecting both minorities and women. Some courts have used a strict scrutiny analysis to evaluate gender-based affirmative programs, while others have not.¹¹⁷ While most of these cases have involved contractual set-asides

¹¹⁵ This term the Supreme Court denied review in *Hopwood v. Texas*, 78 F.3d 932 (5th Cir.), *cert. denied*, 116 S. Ct. 2581 (1996), a constitutional challenge brought by rejected white applicants to the University of Texas School of Law’s “flexible” admissions affirmative action program which was subsequently modified by the University. The appellate panel held that “any consideration of race or ethnicity by the law school for the purpose of achieving a diverse student body is not a compelling interest under the Fourteenth Amendment,” rejecting Justice Powell’s view in *Bakke* that race (or gender) could be a factor in a remedial program designed to rectify past discrimination. *Id.* at 944-48. The Circuit also ruled that the State had failed to show that the racial classification was required because of the effects of past discrimination. *Id.* at 952-55. Justices Ginsburg and Souter, commenting on the denial of certiorari, observed that “[w]hether it is constitutional for a public college or graduate school of use race or national origin as a factor in its admissions program is an issue of great national importance.” 116 S. Ct. 2581, 2581 (1996). However, they did not believe that the Texas case afforded the court an opportunity to rule on that issue because it did not present a “final judgment on a program genuinely in controversy.” *Id.* Since the University was not defending the original program, they viewed the appeal as challenging only the “rationale” of the Court of Appeals in overturning a program that would not be reinstated, and thus not an appropriate vehicle for review.

¹¹⁶ 115 S. Ct. at 2122 (Stevens, J., dissenting).

¹¹⁷ Not all affirmative action must provide gender-conscious hiring goals. In *Kilgo v. Bowman Transp., Inc.*, 789 F.2d 859, 879-80 (11th Cir. 1986), for example, a district court’s refusal to impose such goals was upheld. The case involved a trucking company’s requirement that drivers have at least one year of over-the-road experience, a rule that eliminated most women. In the court’s view, the elimination of the discriminatory selection criteria coupled with an obligation to recruit women was sufficient to remedy the discrimination. If later proven wrong, the court noted that plaintiffs could petition for additional relief. *Id.* at 880 n.34. See also *NAACP v. Seibels*, 31 F.3d 1548 (11th Cir. 1994) (applying

rather than the employment arena, the difficulties posed by the application of intermediate scrutiny to gender-based affirmative action have been the subject of comment in several of these rulings.¹¹⁸

The Sixth Circuit, for example, ruled in *Brunet v. City of Columbus*¹¹⁹ that a consent decree established to increase the number of women in the Columbus Fire Department violated the Equal Protection Clause because it was not narrowly tailored to remedy prior discrimination against women. The court employed a strict scrutiny analysis.¹²⁰ The court cited the Supreme Court's decision in *City of Richmond v. J.A. Croson Co.*,¹²¹ ruling that there was no basis, even under the rationale of *Hogan*,¹²² for treating gender-based classifications in affirmative action programs differently than race-based classifications.¹²³

The Ninth Circuit applied the same level of scrutiny to gender- and race-based affirmative action preferences in *Davis v. San Francisco*.¹²⁴ There, a voluntary consent decree entered in a Title VII race and sex discrimination class action suit against the San Francisco Fire Department

strict scrutiny to race component of plan and intermediate scrutiny to gender component); *Brunet v. Columbus*, 1 F.3d 390 (6th Cir. 1993), *cert. denied*, 114 S. Ct. 1190 (1994) (applying strict scrutiny to gender plan); *Contractors Ass'n, Inc. v. Philadelphia*, 6 F.3d 990 (3d Cir. 1993) (applying strict scrutiny to race component and intermediate scrutiny to gender component).

¹¹⁸ See, e.g., *Lamprecht v. FCC*, 958 F.2d 382, 398 n.9 (D.C. Cir. 1992) (applying intermediate scrutiny to gender-based preference for women in radio licensing applications); *Contractors Ass'n, Inc. v. Philadelphia*, 735 F. Supp. 1274, 1303 (E.D. Pa. 1990) (applying intermediate scrutiny to female-owned business preference but severely criticizing the standard as providing "relatively little guidance" for judicial decisionmaking), *vacated in part*, 945 F.2d 1260 (3d Cir. 1991); see also *Milwaukee County Pavers Ass'n v. Fiedler*, 922 F.2d 419, 422 (7th Cir.), *cert. denied*, 500 U.S. 954 (1991), where Judge Posner, in dicta, opined that "it can be argued that if discrimination against women is not so invidious as discrimination against blacks, the case for using discrimination to remedy past wrongs is less urgent; the past wrongs were less severe, less harmful."

¹¹⁹ 1 F.3d 390 (6th Cir. 1993), *cert. denied*, 114 S. Ct. 1190 (1994). See also *Colin v. Blanchard*, 890 F.2d 811, 816 (6th Cir. 1989) (holding that sex-based remedial measures must be narrowly tailored to achieve the goal of correcting proven discriminatory practices).

¹²⁰ *Brunet*, 1 F.3d at 404.

¹²¹ 488 U.S. 469 (1989).

¹²² *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982).

¹²³ *Brunet*, 1 F.3d at 403.

¹²⁴ 890 F.2d 1438 (9th Cir. 1989), *cert. denied*, 498 U.S. 897 (1990).

provided for the hiring of women and minorities in percentages equal to their representation in the relevant labor market over a seven-year period.¹²⁵

The decree settled decade-old litigation contesting discriminatory entry level examinations as well as promotional practices. The local Firefighters union challenged the decree on constitutional grounds. The appeals court approved the district court's use of strict scrutiny analysis.¹²⁶ It held that

the statistical disparities between the numbers of minorities and women hired in the fire department and the numbers of minorities and women residing in the City constituted a "strong basis in evidence" sufficient to establish a prima facie case of past discrimination and justify the affirmative action provisions in the decree.¹²⁷

Likewise, the court found that the decree was "narrowly tailored" to meet its objectives in all respects except its duration, and modified it to extend for seven years "or sooner upon the accomplishment of the objectives or the goals of the consent decree."¹²⁸

Two other Ninth Circuit rulings, however, *Coral Construction Co. v. King County*¹²⁹ and *Associated General Contractors of California, Inc. v. San Francisco*,¹³⁰ used the intermediate scrutiny standard to evaluate contractual set-aside programs favoring female-owned businesses, and strict scrutiny to evaluate preferences for minority-owned businesses. In *Associated General Contractors*, this resulted in the invalidation of that portion of a city ordinance giving preferences to minority-owned businesses but the survival of a preference for women-owned businesses.¹³¹ The court observed that "[l]aws that afford special privileges to women raise some of the most difficult and sensitive questions about the permissible bounds of governmental action within the confines of the

¹²⁵ The terms of the consent decree appear as Appendix A to the district court's decision approving its entry. *United States v. City and County of San Francisco*, 696 F. Supp. 1287, 1311-21 (N.D. Cal. 1988).

¹²⁶ *Davis*, 890 F.2d at 1445-46 (citing *City of Richmond v. J.A. Croson*, 488 U.S. 469 (1989)).

¹²⁷ *Id.* at 1447.

¹²⁸ *Id.* at 1447-48.

¹²⁹ 941 F.2d 910 (9th Cir. 1991), *cert. denied*, 502 U.S. 1033 (1992).

¹³⁰ 813 F.2d 922 (9th Cir. 1987).

¹³¹ *Id.* at 931-34, 941-42.

equal protection clause."¹³² The court expressed concern over the "dangers" of reinforcing stereotypes:

A thin line divides governmental actions that help correct the effects of invidious discrimination from those that reinforce the harmful notion that women need help because they can't make it on their own. It is in part for this reason that the Court has required an "exceedingly persuasive justification" for classifications based on gender. While helping women overcome the adverse effects of discrimination is a sufficiently important objective to justify the limited use of gender-based classifications, "the mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme." The city may invoke a compensatory purpose to justify a discriminatory classification "only if members of the gender benefited by the classification actually suffer a disadvantage related to the classification."¹³³

While finding the preference for female-owned businesses "troubling," the court upheld it because it "hews closely enough to the city's goal of compensating women for disadvantages they have suffered," and, "[u]nlike racial classifications which must be 'narrowly' tailored to the government's objective . . . there is no requirement that gender-based statutes be 'drawn as precisely as [they] might have been.'"¹³⁴

In *Coral Construction Co.*, a similar set-aside program adopted in King County, Washington was challenged. Again, the Court applied strict scrutiny to the minority set-aside branch of the program and intermediate scrutiny to the women-owned business branch.¹³⁵ It found that the county had a "legitimate and important interest in remedying the many disadvantages that confront women business owners"¹³⁶ and had considered evidence of discrimination against women in the local construction industry when fashioning this remedy.¹³⁷ Thus, the Court concluded that the means selected were "substantially related" to the county's objective of eliminating discrimination against women.¹³⁸

¹³² *Id.* at 939. The San Francisco City Council found that "women have suffered disparate treatment in the area of business and employment." *Id.*

¹³³ *Id.* at 940 (citations omitted).

¹³⁴ *Id.* at 941-42 (citations omitted).

¹³⁵ *Coral Constr. Co. v. King County*, 941 F.2d 910, 928-33 (9th Cir. 1991), *cert. denied*, 502 U.S. 1033 (1992).

¹³⁶ *Id.* at 932

¹³⁷ *Id.* at 933.

¹³⁸ *Id.* at 932. The preference for minority-owned businesses was invalidated.

To summarize, employers have generally not been required to justify affirmative action solely by admitting that they had discriminated. While the Supreme Court has failed to articulate firm guidelines for drafting an affirmative action plan that would withstand Title VII challenge, it has made clear that a plan would likely be upheld where the record disclosed a significant statistical disparity between the available qualified work force and those actually hired, or other prima facie evidence of past or current discrimination, and where the plan was narrowly tailored to remedy that discrimination through the use of flexible goals that did not take away vested rights from innocent employees and which ended when the disparities were corrected.¹³⁹ However, in the Equal Protection arena, the analytical conflict remains between programs addressing racial discrimination and those addressing sex discrimination because of the Court's refusal to require strict scrutiny for gender-based classifications.¹⁴⁰

V. THE POSITIVE EFFECTS OF AFFIRMATIVE ACTION FOR WOMEN

Although few cases have considered the use of affirmative action to increase employment opportunities for women, the fact is that affirmative action has provided significant advances for women in the workplace. Some of the gains made by minorities and women during the 1970s and 1980s provide dramatic evidence that affirmative action has been a powerful, positive force in our quest for equality of treatment for all. Some of these gains resulted from voluntary employer efforts to increase the diversity of their workforce. In many cases, however, these programs were prompted by lawsuits, or threats of lawsuits, or as a result of the federal contract compliance program covered by Executive Order Number 11,246.¹⁴¹

These programs were put into place because minorities and women were significantly underrepresented in entry level jobs as well as management level positions, despite their presence in the qualified labor market. Many studies demonstrate the economic progress made by minorities and women because of these early affirmative action ef-

Id. at 925.

¹³⁹ See *United States v. Paradise*, 480 U.S. 149 (1987); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986).

¹⁴⁰ See *supra* notes 98-102 and accompanying text.

¹⁴¹ See *supra* notes 40-43 and accompanying text.

forts.¹⁴² Companies subject to government contract compliance programs during the 1970s had a much better record of minority employment than those that were not. Private employers who agreed to implement affirmative action plans in this period had a much more diverse workforce by the 1980s than those that did not.¹⁴³ As noted in a 1984 report by the Citizens' Commission on Civil Rights,

[t]he evidence shows that two decades of affirmative action have helped produce many gains for minorities and women in our nation's workforce. While neither a panacea nor a substitute for economic growth, education, job training and ambition, affirmative action has made significant contributions to improved occupational status for many minorities and women, a closing of the gap attributable to discrimination.¹⁴⁴

Some of the most significant improvements occurred during this period in public service occupations, such as fire and police departments. In 1983, women made up only 9.4% of police officers and 1% of firefighters. Nine years later, 15.8% of police officers were women, as were 3.3% of firefighters.¹⁴⁵

Other important gains have been made by women because of affirmative action programs. More women of color are now managers or on the managerial track. In 1980, only 3.2% of all managers were women of color; by 1990, that percentage had increased to 6.9%.¹⁴⁶ Some

¹⁴² Numerous studies conducted during the 1970s and mid-1980s demonstrate the success of affirmative action in ensuring access to and more equal treatment in the workplace for minorities and women. *See, e.g.*, Bureau of National Affairs, *Reports, Studies, and Surveys*, in AFFIRMATIVE ACTION TODAY 95-100 (1986); EMPLOYMENT STANDARDS ADMIN., U.S. DEP'T OF LABOR, EMPLOYMENT PATTERNS OF MINORITIES AND WOMEN IN FEDERAL CONTRACTOR AND NONCONTRACTOR ESTABLISHMENTS, 1974-1980: A REPORT OF THE OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS (1984); Jones, *supra* note 33, at 932-39; HAMMERMAN, *supra* note 36; U.S. COMM'N ON CIVIL RIGHTS, THE ECONOMIC PROGRESS OF BLACK MEN IN AMERICA (1986).

¹⁴³ *See, e.g.*, CITIZENS' COMMISSION REPORT, *supra* note 54, at 122-26; *see also* Jonathan S. Leonard, *The Impact of Affirmative Action on Employment*, 2 J. LAB. ECON. 439 (1984).

¹⁴⁴ CITIZENS' COMMISSION REPORT, *supra* note 54, at 122.

¹⁴⁵ BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, ED. NO. 113, STATISTICAL ABSTRACT OF THE UNITED STATES Table 644, at 407 (1993) [hereinafter STATISTICAL ABSTRACT (1993)].

¹⁴⁶ WOMEN'S LEGAL DEFENSE FUND, AFFIRMATIVE ACTION OPENS DOORS

concrete examples will suffice to make this point. The 1984 Report of the Citizens' Commission on Civil Rights cites the six-year consent decree entered into by AT&T, in 1973, that provided for vigorous affirmative action in recruitment, hiring, and promotion. AT&T's action was taken in response to a lawsuit challenging sex-segregated job classifications and lack of promotional opportunities for women and minorities. The results speak for themselves: in 1971, minorities held 4.6% of managerial jobs at AT&T, while women held 33.27%. By 1982, minorities made up 10% of the managerial work force and women made up 39.6%. In the crafts area, women increased from 2.8% in 1971 to 12.3% by 1982, while minorities increased from 8.4% to 14% during this period.¹⁴⁷

The United States Forest Service also implemented an affirmative action program during this period. As a result, the total number of women in its work force increased from 27.8% in 1981 to 43.5% in 1991. Women in professional job categories rose from 11.9% to 36.9%; women in administrative positions increased from 31.8% to 68.4%; women in technical jobs grew from 17.5% to 33.5%.¹⁴⁸

Voluntary private employer affirmative action programs have also improved the employment picture for women. At IBM, for example, the number of female office managers and officials tripled in less than ten years.¹⁴⁹ At DuPont, management set high affirmative action goals to increase workforce diversity. These goals were exceeded and DuPont argues that its development of new markets and innovative programs has been the evident result.¹⁵⁰

Affirmative action has also reduced salary disparities. For example, in 1975, African-American women earned fifty-five cents, and Hispanic women earned forty-nine cents, for every dollar earned by a white man.

FOR WOMEN OF COLOR 3 (1995) (a policy paper) [hereinafter WLDF policy paper], citing Institute for Women's Policy Research Analysis, Bureau of the Census 1980 and 1990 unpublished data.

¹⁴⁷ Sex-stereotyping was also affected by affirmative action programs. For example, clerical jobs at AT&T, long dominated by women, began to include more males, rising from 4.1% in 1972 to 11.4% by 1982. CITIZENS' COMMISSION REPORT, *supra* note 54, at 126.

¹⁴⁸ EQUAL RIGHTS ADVOCATES, AFFIRMATIVE ACTION POSITION PAPER 5 (Jan. 1995), [hereinafter EQUAL RIGHTS ADVOCATES PAPER].

¹⁴⁹ CITIZENS' COMMISSION REPORT, *supra* note 54, at 126-27 (citing Affirmative Action Coordinating Center, A Statement in Support of Affirmative Action: The IBM Story (1981) (unpublished paper)).

¹⁵⁰ Jonathan Glater & Martha Hamilton, *Affirmative Action's Corporate Converts*, WASH. POST, Mar. 19, 1995, at H1.

By 1992, those numbers had risen to sixty-four and fifty-five cents, respectively, for every dollar paid to a white man.¹⁵¹ In 1980, 51.3% of African-American women age twenty-five or older had earned a high school diploma and 8.1% had earned a bachelor's degree. By 1994, 73.8% of African-American women had high school diplomas and 13% had bachelor's degrees.¹⁵²

Under the command of Executive Order Number 11,246, which covers at least one-quarter of the U.S. workforce, federal government contractors also dramatically changed the composition of their workforces.¹⁵³ A 1983 review of hiring practices at more than 77,000 companies with over 20 million employees found that minority employment had increased 20.1% and female employment by 15.2% between 1974 and 1980. These increases came despite a general growth in employment overall of only 3%. By contrast, companies that did not do business with the federal government had increases in minority and female employment of only 12.3% and 2.2%, respectively, during a period where total employment growth was 8.2%.¹⁵⁴ The statistics also indicate that minorities and women hired into federal contractor companies had higher-paying jobs and more mobility than their counterparts hired at non-contractor companies. Black and female managers, for example, increased 95% and 93% respectively in the former, and only 36% and 50% in the latter.¹⁵⁵

¹⁵¹ WLDF policy paper, *supra* note 146, at 3, citing National Committee on Pay Equity, 1994.

¹⁵² *Id.* citing Bureau of the Census, January, 1995.

¹⁵³ Employers subject to the Executive Order program are required to develop and implement affirmative action plans. These plans analyze the workforce, identify job groups that have excluded minorities and women, establish goals and timetables to improve hiring and promotion for those underrepresented groups and demonstrate good faith efforts to achieve those goals. Failure to develop and follow these affirmative action programs can lead to contract debarment as well as costly enforcement proceedings. 41 C.F.R. Part 60-2 (1995). *See generally* OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS, U.S. DEP'T OF LABOR, NOTICE OF TRANSMITTAL NO. 206 (1995).

¹⁵⁴ CITIZENS' COMMISSION REPORT, *supra* note 54, at 123-24 (reporting on a study conducted by the OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS, U.S. DEP'T OF LABOR, A REVIEW OF THE EFFECT OF EXECUTIVE ORDER 11,246 AND THE FEDERAL CONTRACT COMPLIANCE PROGRAM ON EMPLOYMENT OPPORTUNITIES OF MINORITIES AND WOMEN (1983)).

¹⁵⁵ *Id.* at 124. Similar findings were also made by University of California Professor JONATHAN S. LEONARD, THE IMPACT OF AFFIRMATIVE ACTION (1983).

Corporate leaders have consistently recognized that effective affirmative action programs are good for business.¹⁵⁶ In 1995, the Equal Employment Advisory Council ("EEAC"), a lobbying group composed of leading corporate policy makers, reaffirmed the value of federally mandated affirmative action programs, noting that conscious attention to affirmative action helps identify and eliminate discriminatory practices. EEAC concluded that when an employer is not "attracting individuals from all segments of the community," it cannot "develop fully the pool of available workers" or "compete effectively in a global marketplace."¹⁵⁷

VI. SEX DISCRIMINATION ON THE JOB: THE CURRENT REALITY

The workplace doors are only partially open for women, and even less so for women of color. Barriers to advancement remain substantial and pervasive. Many of today's critics of affirmative action agree that affirmative action was a necessary remedy when first implemented in the 1960s, 1970s, or 1980s. They may cite the same workforce changes noted above, but argue that these changes prove that discrimination is a thing of the past and that this remedy is no longer necessary.¹⁵⁸ Such opponents of race- and gender-conscious remedies typically argue that current laws prohibiting employment discrimination are sufficient to address any lingering discrimination issues.¹⁵⁹ Nothing could be further from the truth.

Notwithstanding the substantial gains achieved by women and people of color in the labor market, discrimination remains a stark reality today. Discrimination claims have continued to increase dramatically, with thousands of cases filed each year in state and federal courts, and an even greater volume of complaints filed with the EEOC and state and local fair employment agencies.¹⁶⁰ The Commission receives nearly 100,000

¹⁵⁶ See, e.g., CITIZENS' COMMISSION REPORT, *supra* note 54, at 130-46.

¹⁵⁷ Special Memorandum, Critical Issues in the Affirmative Action Debate: Exec. Order 11,246, EEAC, Mar. 17, 1995, at 4, 10.

¹⁵⁸ Rhonda McMillion, *Affirmative Action Struggle*, A.B.A. J., Jan. 1996, at 93, 93.

¹⁵⁹ A statement made by Senator Robert Dole on *Meet the Press* in February of 1995 typifies this view: "[T]he people in America now are paying a price for things that were done before they were born. We did discriminate; we did suppress people. . . . But should future generations have to pay for that?" *Meet the Press* (NBC television broadcast, Feb. 5, 1995).

¹⁶⁰ David C. Belt, *Election of Remedies in Employment Discrimination Law*:

charges of discrimination each year. The latest EEOC statistics, covering fiscal year end 1995, indicate that more than one quarter of these charges involve claims of sex discrimination, sexual harassment, or violations of the Equal Pay Act. Sexual harassment charges have increased for the sixth consecutive year.¹⁶¹

Most recently, the bipartisan Glass Ceiling Commission found an "enduring aptness to the 'glass ceiling' metaphor." After extensive hearings and research, the Commission concluded that women and people of color rarely reach the highest levels of business and that even when they do, they receive lower compensation than comparable whites.¹⁶² At Fortune 1000 Industrial and Fortune 500 companies, ninety-seven percent of senior managers are white. In Fortune 2000 industrial and service companies, only five percent of senior managers are women, virtually all of them white. Of equal concern, very few women or people of color are even in the "pipeline" positions leading to top jobs.¹⁶³

The Glass Ceiling Commission also concluded that women and people of color face "three levels of artificial barriers to [their] advancement": societal barriers, including both "conscious and unconscious stereotyping, prejudice and bias;" governmental barriers, including "lack of vigorous and consistent monitoring and law enforcement;" and internal structural barriers, including "outreach and recruitment practices that do not seek out or reach or recruit minorities and women," "initial placement and clustering" in positions that are not on the "career track to the top," lack of mentoring, training and opportunities for career development, and use of different, often biased, performance standards.¹⁶⁴

The Glass Ceiling Commission focused on the nation's largest businesses. Other statistics demonstrate a similar pattern. For example, although white men constitute a minority of the total work force (forty-seven percent)¹⁶⁵ and of the college-educated work force (forty-eight

Doorway into the Legal Hall of Mirrors, 46 CASE W. RES. L. REV. 145, 153 (1995).

¹⁶¹ Telephone Interview with Reginald Welch, Director, EEOC Office of Communications (Dec. 13, 1995). EEOC's statistics are compiled annually for its fiscal year ending September 31.

¹⁶² GLASS CEILING COMMISSION REPORT, Introduction by Secretary of Labor, *supra* note 7, at S2-3.

¹⁶³ *Id.* In 1994, only two of the Fortune 1000 companies had female Chief Executive Officers. *Id.* at 12.

¹⁶⁴ *Id.* Overview, at 5-6.

¹⁶⁵ STATISTICAL ABSTRACT (1993), *supra* note 145, Table 622, at 343.

percent), they dominate the top jobs in virtually every field.¹⁶⁶ White males comprise 91.7% of officers and 88.1 percent of directors.¹⁶⁷ Men hold over ninety percent of the top news media jobs,¹⁶⁸ and almost ninety percent of all reporters are white.¹⁶⁹ White men constitute over eighty-six percent of partners in major law firms.¹⁷⁰ White men make up eighty-five percent of tenured college professors.¹⁷¹ White men occupy over eighty percent of the management jobs in advertising, marketing and public relations.¹⁷² The median weekly earnings of white males in 1992 were thirty-three percent higher than those of any other group in America.¹⁷³

While women are over half of the adult population¹⁷⁴ and nearly half of the workforce,¹⁷⁵ most continue to work in traditionally "female" jobs such as teachers, nurses, clerical workers, and librarians.¹⁷⁶ Women remain severely underrepresented in most non-traditional professional occupations as well as blue collar trades.¹⁷⁷ Even though women and people of color now hold jobs in many fields that were closed to them before voluntary and court-ordered affirmative action plans, traditional "old boy" networks still abound. For example, a 1994 study conducted by the New York Police Department found that new

¹⁶⁶ *Id.* Table 234, at 154.

¹⁶⁷ Mark Lowery, *The War on Equal Opportunity*, BLACK ENTERPRISE, Feb. 1, 1995, at 148.

¹⁶⁸ *A Long Way to Go*, NEWSWEEK, Apr. 24, 1989, at 74.

¹⁶⁹ Monte R. Young, *Striving for Color in the Newsroom*, NEWSDAY, Aug. 1, 1994, at A13 (quoting the American Society of Newspaper Editors).

¹⁷⁰ BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, ED. NO. 114, STATISTICAL ABSTRACT OF THE UNITED STATES Table 637, at 407 (1994) [hereinafter STATISTICAL ABSTRACT (1994)]; BARBARA A. CURRAN & CLARA N. CARSON, AMERICAN BAR FOUNDATION, THE LAWYER STATISTICAL REPORT 10 (1994) [hereinafter LAWYER STATISTICAL REPORT].

¹⁷¹ STATISTICAL ABSTRACT (1993), *supra* note 145, Table 637, at 407-10.

¹⁷² *Id.*

¹⁷³ *Id.* Table 671, at 426.

¹⁷⁴ STATISTICAL ABSTRACT (1994), *supra* note 170, Table 616, at 396.

¹⁷⁵ 9 TO 5, PROFILE OF WORKING WOMEN 1 (1994-1995) (based on U.S. Bureau of Labor Statistics and Bureau of Census data) (on file with author).

¹⁷⁶ *Id.* at 2; *see also* STATISTICAL ABSTRACT (1994), *supra* note 170, Table 637, at 407-09; EQUAL EMPLOYMENT OPPORTUNITY COMMISSION ("EEOC"), JOB PATTERNS FOR MINORITIES AND WOMEN IN PRIVATE INDUSTRY Table 1, at 1036 (1993) [hereinafter EEOC JOB PATTERNS]; Sam Roberts, *Women's Work: What's New, What Isn't*, N.Y. TIMES, Apr. 27, 1995.

¹⁷⁷ STATISTICAL ABSTRACT (1994), *supra* note 170, Table 637, at 407-09.

officers followed friends or relatives onto the police force. As a result, most new recruits resemble the rest of the force: white, male, overwhelmingly Catholic (seventy-three percent), resident of the suburbs or lower crime areas; fully fifty percent of new recruits have a relative who is or was a New York City police officer. Thus, a resilient network of white men continue to have a "pipeline" into these jobs despite repeated efforts to diversify the police force, and the 1994 class remained predominantly white (sixty-three percent) and male (eighty-four percent).¹⁷⁸

Women continue to be dramatically underrepresented in non-traditional professions and blue collar trades. Women make up 8.6% of all engineers; 3.9% of airline pilots and navigators; less than 1% of carpenters; 18.6% of architects; and slightly more than one-fifth of all doctors and lawyers.¹⁷⁹

This disproportionate clustering also means that women workers receive lower pay and fewer benefits than men. For example, eighty-two percent of administrative workers in all industries are women.¹⁸⁰ Women make up 99.3% of dental hygienists,¹⁸¹ but only 10.5% of dentists.¹⁸² Even where women enter professions that had been traditionally male, they do not advance proportionately to their male colleagues. Women hold only eleven percent of law firm partnerships, even though they make up twenty-three percent of all lawyers.¹⁸³ Women make up forty-eight percent of all editors and reporters,¹⁸⁴ but hold only six percent of journalism's top jobs.¹⁸⁵ Women hold seventy-two percent of elementary school teaching positions, but make up only twenty-nine percent of school principals.¹⁸⁶ A study cited by the Glass Ceiling Commission concluded that after eleven years on medical school faculties, five percent of women had achieved full professor rank as compared to twenty-three percent of men.¹⁸⁷

¹⁷⁸ EQUAL RIGHTS ADVOCATES PAPER, *supra* note 148, at 3.

¹⁷⁹ *Id.*

¹⁸⁰ EEOC JOB PATTERNS, *supra* note 176, Table 1, at 1036.

¹⁸¹ STATISTICAL ABSTRACT (1994), *supra* note 170, Table 637, at 408.

¹⁸² *Id.* at 407.

¹⁸³ LAWYER STATISTICAL REPORT, *supra* note 170, at 10.

¹⁸⁴ STATISTICAL ABSTRACT (1994), *supra* note 170, Table 637, at 407.

¹⁸⁵ *A Long Way to Go*, *supra* note 168, at 74.

¹⁸⁶ COMM'N ON PROFESSIONALS IN SCIENCE AND TECHNOLOGY, PROFESSIONAL WOMEN AND MINORITIES: A TOTAL HUMAN RESOURCE DATA COMPENDIUM Table 5-11, at 142 (1994).

¹⁸⁷ Bonnie J. Tesch et al., *Promotion of Women Physicians in Academic Medicine*, 273 JAMA 1022, 1023 (1995).

A dramatic earnings gap exists between men and women across a diverse range of occupations. In 1993, women still earned an average of 71.5 cents for every dollar earned by men.¹⁸⁸ In 1991, women physicians earned 53.9% of the wages of male physicians, and women in sales occupations earned 59.5% of the wages earned by men holding comparable sales positions.¹⁸⁹ Of the sixty-two million women working in the United States in 1992, sixty-five percent earned less than \$20,000 each year, and thirty-eight percent earned less than \$10,000.¹⁹⁰ And the median weekly earnings of white men in 1993 were thirty-three percent higher than any other group.¹⁹¹ From 1970 to 1993, 15.0% of white males earned \$50,000 or more annually.¹⁹² Women fall well below that percentage; during the same period, only 2.0% of Black women, 1.4% of Hispanic women, and 3.7% of white women earned \$50,000 or more annually.¹⁹³

Discrimination keeps women of color at the bottom of the economic ladder, both in terms of salary and promotional opportunities. In 1993, for example, Hispanic and African-American female workers averaged substantially lower wages and salaries than men and white women. Hispanic women earned \$313.60 per week; African-American women earned \$348.54 per week; white women earned \$391.52 per week; white men earned \$404.60 weekly.¹⁹⁴ Even when women of color hold college degrees, they fall well below white men in their earnings. For example, college-educated Hispanic women earn almost \$1000 *less* each year than white male high school graduates.¹⁹⁵ This earnings gap jumps dramatically to \$13,000 when compared to college-educated white

¹⁸⁸ NATIONAL COMMITTEE ON PAY EQUITY, *THE WAGE GAP: 1993* (citing U.S. DEPT. OF COMMERCE, CENSUS BUREAU, CURRENT POPULATION REPORTS, SERIES P-60).

¹⁸⁹ WOMEN'S BUREAU, U.S. DEP'T OF LABOR, *HANDBOOK ON WOMEN WORKERS: TRENDS AND ISSUES* 35 (1993).

¹⁹⁰ BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, SERIES P-60-184, *MONEY INCOME OF HOUSEHOLDS, FAMILIES AND PERSONS IN THE UNITED STATES* Table 31, at 150 (1992).

¹⁹¹ STATISTICAL ABSTRACT (1994), *supra* note 170, Table 665, at 429.

¹⁹² BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, ED. NO. 115, *STATISTICAL ABSTRACT OF THE UNITED STATES* Table 748, at 478 (1995).

¹⁹³ *Id.*

¹⁹⁴ Bureau of Labor Statistics (unpublished data), Aug., 1994, *reprinted in* WLDF policy paper, *supra* note 146, at 2.

¹⁹⁵ WLDF policy paper, *supra* note 146, at 2 (citing National Committee on Pay Equity analysis of 1992 Bureau of the Census data).

males.¹⁹⁶ These numbers are almost identical for Black college-educated women, except that they do earn slightly more than the average earned by white male high school graduates.¹⁹⁷

And, in those areas where women have made some inroads into managerial positions, women of color remain severely underrepresented. In the banking industry, for example, where white women make up 37.5% of executive, administrative and managerial jobs, Black and Hispanic women hold only 2.6% and 5% of such jobs.¹⁹⁸ In the hospital industry, Black and Hispanic women each hold 4.6% of these jobs, while white women hold 50.2%.¹⁹⁹

Minority women occupy a disproportionately high percentage of the lowest paid jobs — typists, clerks, nurse's aides, factory workers — and are often concentrated in the contingent workforce.²⁰⁰ In 1993, for example, Black women earned a median income of \$19,816, compared to \$22,023 for white women and \$31,089 for white men. Hispanic women earned a median income of \$16,758.²⁰¹ Even in sectors where women have made inroads into management, women of color continue to be underrepresented, underpaid and undervalued.

These statistics are a sobering reminder to all of us that we still need affirmative action to force the doors of economic opportunity to open wider for women and people of color. A recent poll indicated that eighty-seven percent of men, compared to sixty-five percent of women, are satisfied with their pay.²⁰² Seventy-eight percent feel satisfied with their promotional opportunities, in contrast with only fifty-seven percent of women who share this view.²⁰³ Without the use of race- and gender-conscious programs, it is evident that we will quickly return to the indifference, if not the intentional discrimination, of the pre-affirmative action era.

It is not surprising, in light of these continuing disparities, that the Glass Ceiling Commission identified stereotyping as one of the major

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* Black college-educated women earned approximately \$1000 more than white male high school graduates.

¹⁹⁸ GLASS CEILING COMMISSION REPORT, *supra* note 7, at 79.

¹⁹⁹ *Id.* at iii-iv.

²⁰⁰ *See* 9 TO 5, PROFILE OF WORKING WOMEN, *supra* note 175, at 1.

²⁰¹ INSTITUTE FOR WOMEN'S POLICY RESEARCH, THE WAGE GAP: WOMEN'S AND MEN'S EARNINGS (1995).

²⁰² Remarks by Louis Harris, Feminist Majority Foundation Press Conference, Apr. 25, 1995, at 5, and survey question tabulations.

²⁰³ *Id.*

barriers to advancement for women and minorities in the workplace.²⁰⁴ For women, these stereotypes range from thinking that women do not want to work, or work too hard, have difficulty making decisions, are too “emotional” and are either too aggressive or not aggressive enough to succeed.²⁰⁵ Dramatic evidence of such stereotyping can be found in complaints filed with EEOC where crude sexist and racist remarks are cited in sworn employee statements.²⁰⁶ One recent complaint, for example, recounted the recruitment policies announced by the CEO of one of the nation’s largest discount brokerage firms, asking that “young, good-looking, studly males” be preferred rather than “broads.”²⁰⁷ One female manager at the company was stripped of accounts she had successfully handled because her boss decided she was not spending enough time with her daughter.²⁰⁸ Professor Mari Matsuda recently testified before Congress on the value of continuing and strengthening effective affirmative action efforts. She recounted that a colleague had told her that he had voted against her application to teach because he did not think she could “maintain control in the classroom.”²⁰⁹

Closely related is the problem of sexual harassment which continues to create serious obstacles for women in the workforce. The Glass Ceiling Commission cited a survey concluding that fifty-nine percent of women had personally experienced sexual harassment on the job.²¹⁰ Similar results were reported in a recent Merit Systems Protection Board survey of 8000 women working in the federal sector. Nearly half of that group had received uninvited, unwanted sexual attention at work during the previous two years.²¹¹

Recently, substantial jury verdicts and settlements in sexual harassment cases have provided dramatic evidence that women continue to be subjected to astonishing acts of abusive sexual misconduct at work. For

²⁰⁴ GLASS CEILING COMMISSION REPORT, *supra* note 7, at 28.

²⁰⁵ *Id.* at 148.

²⁰⁶ B. Susan Antilla, *Three Women vs. a Broker—Olde is Accused of Blatant Job Discrimination*, N.Y. TIMES, Apr. 26, 1989, at D1, D7.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Affirmative Action: An Overview on Race-Based Preferences: Hearings Before the Subcomm. on the Constitution, Federalism, and Property Rights of the Senate Comm. of the Judiciary*, 104th Cong., 1st Sess. 3-4 (Oct. 23, 1995) (testimony of Mari J. Matsuda, Professor of Law, Georgetown University).

²¹⁰ GLASS CEILING COMMISSION REPORT, *supra* note 7, at 148.

²¹¹ U.S. MERIT SYSTEMS PROTECTION BOARD, *SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE* viii (1995).

example, a recent class action suit against the District of Columbia's Department of Corrections revealed that promotions for women corrections officers were more likely to be based upon the senior officer's view of the women as candidates for sexual activity than on any other criteria.²¹² When the supervisor's "judgment" proved to be incorrect, the women were then transferred to undesirable positions.²¹³ Del Laboratories, a manufacturer of pharmaceutical products and cosmetics, recently paid more than \$1 million to settle an EEOC complaint brought by fifteen female employees who described a pattern of lewd and abusive behavior by the company's chief executive officer.²¹⁴ And, for every case that results in a jury verdict there are countless numbers of women who have not even reported their experiences, much less filed discrimination charges or commenced litigation.

The current picture for working women cannot be examined without factoring in sexual harassment, gender stereotyping, and blatant prejudice. There is simply no other explanation for the fact that women are largely found in the lowest paid jobs, at the lowest rung of the career ladder, marginalized in their efforts to advance, and treated less favorably than their comparably situated male colleagues in every respect. Only by the continued use of gender-conscious remedies can we change this depressing picture.

VII. THE IMPACT OF THE GENDER EQUALITY MESSAGE

Assuming that gender issues can be raised to a comparable level with race in the public dialogue about affirmative action, it is to be hoped that fuller discussion of the breadth of societal discrimination will yield greater support for race- and gender-conscious enforcement measures.

²¹² Neal v. Moore, No. 93-2420, 1995 U.S. Dist. LEXIS 11461, at *4 (D.D.C. Aug. 9, 1995).

²¹³ A jury awarded \$1.4 million to six of the eight plaintiffs in the suit. The Department of Corrections may ultimately face more damages. Toni Locy, *1.4 Million Awarded in Harassment Suit*, WASH. POST, Apr. 22, 1995, at B1.

²¹⁴ Carey Goldberg, *Company to Pay Record Amount in L.I. Sexual Harassment Case*, N.Y. TIMES, Aug. 13, 1995, at A1. See also Benjamin A. Holden, *IBM Set Back in Sexual Harassment Case*, WALL ST. J., July 18, 1995, at B7 (discussing a sexual harassment suit in which a former marketing representative of IBM was awarded \$65,000 after her IBM supervisors pressured her to have sex with a Pentagon director in order to secure federal funding for the company).

One commentator has described the positive role affirmative action can play in increasing opportunities for women:

Voluntary affirmative action, in many instances, "arguably provides the best means toward a speedy and effective breakdown of stereotypical sexist social attitudes." Whereas first-order discrimination is generally evident, societal discrimination and sexist social attitudes go largely unnoticed even by their own victims. A device to promote equal treatment and to provide compensation to identifiable victims is useless to combat this type of widespread discrimination. On the other hand, a voluntary program of preferential treatment is more desirable because it grants opportunities to individual women while conveying an important message about women and equality in the workplace.²¹⁵

By ignoring the benefits of and continuing need for affirmative action in promoting equal employment opportunities for women, there is a danger that the public will continue to misunderstand this key civil rights enforcement tool. This misunderstanding is exploited by conservative legislators and commentators who want to divide working people on this issue. Ultimately, this will lead to the erosion of gains women have made in the quest for equal treatment and the reduction of opportunities and choices.²¹⁶

It has already been demonstrated that public support for affirmative action can be strong, depending upon how the questions are framed. A good lesson is provided by a recent Louis Harris poll conducted in the Spring of 1995 for the Feminist Majority Foundation on the California ballot initiative that would end state-supported affirmative action.²¹⁷ The

²¹⁵ Deidre A. Grossman, Comment, *Voluntary Affirmative Action Plans in Italy and the United States: Differing Notions of Gender Equality*, 14 COMP. LAB. L.J. 185, 217 (1993) (citations omitted).

²¹⁶ For an excellent analysis of the key relationship between affirmative action and gains made by women in the workplace, see JOCELYN C. FRYE, *AFFIRMATIVE ACTION: UNDERSTANDING THE PAST AND PRESENT, THE AMERICAN WOMAN 1996-1997*, 33 (Women's Research and Education Institute 1996).

²¹⁷ *Focus on Impact of California Initiative Brings Drastic Drop in Support, Poll Finds*, 1995 DAILY LAB. REP. (BNA), No. 194 (Apr. 26, 1995). The California measure, euphemistically known as the "Civil Rights Initiative," provides: "The state will not use race, sex, color, ethnicity or national origin as a criterion for either discriminating against or granting preferential treatment to, any individual or group in the operation of the state's system of public

survey revealed that there was strong support for the initiative until people understood that its passage would actually limit equal employment opportunities for women and minorities.²¹⁸ When asked whether they supported "preferential treatment" for a particular group, most said no.²¹⁹ But, when asked if they would support a proposal that would "discourage and even end programs to help women and minorities achieve equal opportunities in education and employment," a majority said they would not.²²⁰ When Whites were asked if they favored "preferential treatment," clear majorities said no, defining the term as giving jobs to qualified women and minorities to the disadvantage of white men. However, when asked if affirmative action meant "making opportunities for everyone including women and minorities," a majority agreed with that definition.²²¹

Another poll found that overall support for affirmative action had decreased from fifty-seven percent in 1991 to only forty-six percent, although fifty-six percent of those queried continued to favor affirmative action for women.²²² This suggests that bringing gender into the forefront of the discussion about affirmative action may influence those who do not understand what this remedy is or why it is necessary. Working women play key roles in the lives of the supposedly "angry white men" who are repeatedly cited as the "victims" of affirmative action, and others who argue against race- and gender-conscious remedies — they are mothers, sisters, daughters, lovers, wives, friends, and colleagues at work. Thus, working women are uniquely situated to dispel the myths about affirmative action not only by talking about their own experiences with discrimination, but also by talking about the opportunities they have been afforded *because of* affirmative action. Adding gender issues to the discussion ensures greater public recognition that *all* who have experienced discrimination should be afforded these opportunities. It can help unify demands for fairness in the workplace for women and men of all races and ethnic backgrounds, rather than permitting opponents

employment, public education or public contracting." *Id.*

²¹⁸ *Id.*

²¹⁹ See Remarks of Louis Harris, *supra* note 202, at 2.

²²⁰ *Focus on Impact of California Initiative, supra* note 217. The Harris poll queried 1400 adults nationwide. Harris described the results as "one of the most clear-cut, incisive and significant surveys" of his career. *Id.*

²²¹ Remarks of Louis Harris, *supra* note 202, at 3-4.

²²² *Discontent Grows Against Affirmative Action-Programs, but Not for Women*, WALL ST. J., Mar. 10, 1995, at A1.

of affirmative action to play off one group of disadvantaged workers against another.

CONCLUSION

Enforcement of the nation's civil rights laws has not yet levelled the playing field for women or minorities in employment or other arenas. We are neither color-blind nor gender-neutral in hiring, training, promotion, salary, or other benefits. And, we will never achieve that goal unless we recognize that the vestiges of discrimination cannot be corrected by the passage of laws alone. Recognition of past inequities must become part and parcel of every employment decision until we have *substantive* equality of opportunity. Assistant Attorney General Deval L. Patrick recently referred to a broad range of activities designed to achieve this end as "affirmative consideration" — actions that emphasize an individual's full range of qualifications when decisions are made.²²³ We must consider what our workplaces would look like if we abandoned affirmative action today. We must consider what they could look like when it can truly be said that every applicant and employee was selected, trained, compensated and promoted using objective, non-discriminatory criteria, and allowed to contribute to their maximum potential.

Women talking about their experiences in the workplace will give life to the discussion of affirmative action. Gender-conscious programs and selection procedures have opened doors to women of all races and backgrounds. Yet most working women can tell a story that proves those doors are only slightly ajar. Whether that story reflects their own personal experience or that of a friend or co-worker, there is no doubt that it will demonstrate that discrimination is still very much a reality in our nation's workplaces. Those collected stories can soundly defeat current efforts to roll back a proven remedy for job discrimination. We will know that affirmative action is no longer necessary when we can stop talking about it. Regrettably, there is still much to be said.

²²³ *Hearings on H.R. 2128 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 96th Cong., 1st Sess. 3 (1995) (testimony of Deval L. Patrick, Assistant Attorney General, Civil Rights Division, U.S. Department of Justice).

