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The Historical Roots of Affirmative Action†

Professor Martha S. West‡

INTRODUCTION

Affirmative action is a politically-loaded word in California. People, particularly politicians, use the term as if everyone understands what it means. In fact, people use affirmative action as a label for a wide variety of alleged deeds and misdeeds, some correctly termed affirmative action, but others far off the legal or historical mark. What follows is a brief summary of the legal origins of affirmative action, and of the United States Supreme Court's framework for finding affirmative action programs legally valid in the fields of employment and education.¹

The story of affirmative action begins with the story of American slavery. Although many of the participants in today's debates over affirmative action would have us divorce the term from its historical context, it is misleading and disingenuous to do so. Consequently, we begin our historical examination of affirmative action's legal origins with slavery and its premise of white supremacy.

I.

AFFIRMATIVE ACTION HAS ITS ROOTS IN SLAVERY.

Affirmative action programs are a direct outgrowth of our nation's long and unhappy history of moving away from slavery and toward the goal of racial equality. I begin with slavery, not because I see affirmative action as a way to compensate for slavery and other past injustices, but because of the continuing impact of our unarticulated notions of the racial superiority of whites and the racial inferiority of persons with darker skin color. Although it makes us uncomfortable to talk about American beliefs of racial inferiority in 1996, our society is still permeated with such beliefs and with instinctive reactions stemming from years of racial segregation. Dr. Barbara Smith Nash, an African-American doctor who teaches part-time at the University of California, Davis Medical School, tells us that she can be sitting at her desk in the hospital in Sacramento, behind a sign that says, "Dr.

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‡ Professor of Law, the University of California, Davis. This article is based on a presentation made at the symposium, *Latinos at the School Door: California's Challenge to Affirmative Action*, sponsored by the La Raza Law Journal and the Chicano/Latino Policy Project, held at the University of California, Berkeley, on March 15, 1996. An abbreviated version of the article's text appeared in *History Lessons*, THE WOMEN'S REVIEW OF BOOKS, vol. XIII, No. 5, February 1996, at 19. I thank DeKristie Adams, U.C. Davis Class of 1998, for her research assistance in expanding the article and drafting footnotes.

1. This article will not discuss the rise and demise of affirmative action in the context of government procurement programs, which required prime contractors to set aside a certain percentage of their subcontracts, usually 10%, for minority or women-owned businesses. The Supreme Court's latest opinion on government set-aside programs is *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

Barbara Nash, Chief," and people will approach her and ask her if she is the janitor.² If you have dark skin in this society, even if you come from wealth and privilege, you may be hassled on the streets, discounted in meetings, or assumed to be less competent than a white person when you walk into a room for a job interview or to give a lecture.

Slavery existed in the United States for 250 years, from 1619 to 1865.³ It has been only 131 years since slavery officially ended as a legally-enforced labor system. As we all know, however, the belief system that supported slavery, the belief system that black people were not full human beings, did not end with slavery.

After slavery came "Jim Crow," the label we use for the legal system of racial segregation that followed the end of slavery and lasted until 1954.⁴ "Jim Crow" laws are exemplified by the 1896 United States Supreme Court opinion in *Plessy v. Ferguson*.⁵ In *Plessy*, the Court approved of the "separate but equal" doctrine, holding that Louisiana did not violate the Equal Protection Clause of the Fourteenth Amendment by legally mandating segregation of black and white passengers in railway cars.⁶ In his dissent, Justice Harlan used the term "color-

2. Ruth Y. Ellison & Curt Guyette, *Facing Off on Affirmative Action*, SACRAMENTO NEWS AND REVIEW, Mar. 2, 1995, at 12, 13.

3. In August of 1619, John Hawkins, "dutch man of warre," sold the first 20 slaves to settlers in Jamestown Virginia, marking the beginning of American slavery. JAMES A. RAWLEY, *THE TRANSATLANTIC SLAVE TRADE* 2, 86 (1981). For the next thirty years or so, not all Africans brought to the colonies were considered slaves. Some served as servants for a set number of years and were treated the same as white indentured servants, then freed when their term of service ended. In Virginia, the year 1640 marked a turning point: after that year, all African men and women who arrived came as slaves, not indentured servants. PAULA GIDDINGS, *WHEN AND WHERE I ENTER: THE IMPACT OF BLACK WOMEN ON RACE AND SEX IN AMERICA* (1984) reprinted in KATHARINE T. BARTLETT, *GENDER AND LAW* 28 (1993). It was not until the mid to late 1600s, when the early flow of indentured European servants began to diminish, that the slave trade began in earnest and the rigid slave codes became fixed in law. By the middle of the eighteenth century, colonists in all thirteen colonies owned slaves and slavery had become the heart of agricultural labor in the southern colonies. In the years following the American Revolution, all the northern states abolished slavery. In the South, however, the bondage of Africans and West Indians actually increased due, in part, to the invention of the cotton gin. By the beginning of the Civil War the southern slave population was close to 4 million. The end of slavery as a legal institution began when President Lincoln issued the Emancipation Proclamation. It took effect on January 1, 1863, but was not legally ratified as the thirteenth amendment until December 18, 1865. JOHN B. BOLES, *BLACK SOUTHERNERS, 1619-1869* 11, 17-19 (1983). See generally EUGENE D. GENOVESE, *ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE* (1972).

4. The term "Jim Crow" first appeared in 1832 as a title for a song and dance routine in a minstrel show. However, its use in the "separate but equal" segregation laws began with "Jim Crow car" laws which required blacks to be seated separately in railroad passenger cars. Kenneth Karst, *Separate But Equal Doctrine*, in *CIVIL RIGHTS AND EQUALITY* 185 (Leonard Levy et al. eds., 1989). See generally C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* (3d ed. 1974).

5. 163 U.S. 537 (1896).

6. In his majority opinion for seven justices, Justice Henry Brown wrote that it was the government's job to secure for its citizens "equal rights before the law," and by doing so, "it has accomplished the end for which it was organized and performed all of the functions respecting social advantages with which it was endowed." *Id.* at 551 (quoting *People v. Gallagher*, 93 N.Y. 438, 448 (1883)). He continued: "Legislation is powerless to eradicate racial instincts or to abolish distinctions

blind" that we hear so often today.⁷ In arguing against the "separate but equal" doctrine, he wrote:

It was said in argument that the statute of Louisiana does not discriminate against either race, but prescribes a rule applicable alike to white and colored citizens. But this argument does not meet the difficulty. Everyone knows that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons. . . .

The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth, and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty. But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. *Our constitution is color blind*, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful.⁸

Justice Harlan concluded:

It is, therefore, to be regretted that this high tribunal, the final expositor of the fundamental law of the land, has reached the conclusion that it is competent for a state to regulate the enjoyment by citizens of their civil rights solely upon the basis of race.⁹

While arguing for a color-blind interpretation of the Constitution, Justice Harlan himself also subscribed to beliefs of white superiority, as the text quoted above indicates. In his view, granting legal equality to African Americans would not undermine the continued and expected dominance of white Americans in all other areas of life.

Despite Justice Harlan's plea, the Constitution has never been color blind. At the time it was written, the Constitution counted black slaves as only three-fifths

based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation." *Id.* Therefore, the Court concluded that the requirement of separate accommodations for blacks and whites neither breached the government's obligation nor violated the Constitution.

7. 163 U.S. at 559 (Harlan, J., dissenting). Justice Harlan adopted the phrase "color-blind" directly from the brief filed on behalf of Plessy. His attorney argued, "Justice is pictured blind and her daughter, the Law, ought at least to be color-blind." C. Vann Woodward, *The Birth of Jim Crow*, AMERICAN HERITAGE, Apr. 1964, at 52, 101.

8. 163 U.S. at 556-57, 559 (Harlan, J., dissenting) (emphasis added).

9. *Id.* at 559.

of a person.¹⁰ Despite the addition of the Equal Protection Clause in 1868, the Supreme Court did not interpret the Constitution as color blind until 1954, fifty-eight years later, when *Brown v. Board of Education*¹¹ overruled *Plessy v. Ferguson*.

Racial segregation as a legally-sanctioned constitutional doctrine, based on notions of white supremacy, has officially been dead for less than fifty years, a short time frame in the history of American jurisprudence. Even though the Supreme Court overturned the legal justification for segregation in 1954, segregation did not end overnight. It took the mass protests of the civil rights movement from 1954 until the late 1960s to end formal, legal segregation. From a legal perspective, the civil rights movement culminated at the federal level with the passage of the 1964 Civil Rights Act. Among its provisions was Title VII, a section prohibiting discrimination in private employment and one of two sources of the term "affirmative action" as we use it today.

10. The provision in the Constitution reads:

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, *three fifths of all other persons*.

U.S. CONST. art. I, § 2, cl. 3. (emphasis added). One of the more hotly contested issues at the Constitutional Convention was how to count slaves. Surprisingly, it was the South that fought to have slaves counted as whole persons. The delegates from the North wanted to have slaves count as property, not persons, in order to increase the property-based taxes the Southerners would have to pay. More importantly, if slaves were considered property, it would reduce the number of representatives the South would have in Congress, thereby decreasing the South's power in the new Federal government. The Convention compromised, apportioning taxes according to population, which made it impossible to raise a major portion of federal revenue by taxing property that existed in only one section of the country. For the purposes of both taxation and representation, five slaves were counted as three free persons. John Hope Franklin, *Slavery and the Constitution* in CIVIL RIGHTS AND EQUALITY, *supra* note 4, at 61-62. See also JOHN HOPE FRANKLIN, FROM SLAVERY TO FREEDOM: A HISTORY OF NEGRO AMERICANS 142 (1967); ROBERT SHAW, A LEGAL HISTORY OF SLAVERY IN THE UNITED STATES, 168-69 n.3 (1991) (suggesting the three-fifths of a person provision was passed primarily with the help of the smaller northern states, who were seeking equal representation for themselves in the Senate, irrespective of population. To gain support, they conceded to the South's demands for representation in the House.)

11. 347 U.S. 483 (1954), 349 U.S. 294 (1955) (remedial opinion). *Brown* did not explicitly overrule *Plessy* because it involved segregated schools, not public transportation. *Brown*, however, made crucial findings which were later extended to all public functions. See Kenneth Karst, *Brown v. Board of Education*, in CIVIL RIGHTS AND EQUALITY, *supra* note 4, at 210. The *Brown* opinion first highlighted the change in the status of African Americans since the *Plessy* decision. The Court then focused on education as the most important function of state and local governments. The Court wrote, "To separate [children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely to ever be undone." 347 U.S. 483, 494 (1954). Segregated schools produced feelings of inferiority in black children and interfered with their ability to learn, thus depriving black children of equal protection under the law. The Court declared that separate educational facilities were "inherently unequal." *Id.* at 495.

II. TITLE VII OF THE 1964 CIVIL RIGHTS ACT

Title VII of the Civil Rights Act prohibited, for the first time, discrimination in private employment.¹² Although aimed primarily at eradicating employment discrimination based on race, it prohibited discrimination based on race, color, national origin, religion, and, by the time it passed Congress, even sex.¹³ Title VII provides that if a court finds an employer has violated the act by discriminating against someone, the court may order "such affirmative action" as may be appropriate, such as reinstatement or back pay, or "any other equitable relief" the court deems appropriate.¹⁴ Thus, as used in Title VII, "affirmative action" was a label used for the remedy awarded by a federal court to a plaintiff when an employer had violated the Act.

The term affirmative action as used in Title VII had no special meaning, but was simply borrowed from another federal employment statute, the 1935 National Labor Relations Act,¹⁵ which allowed employees to organize and join unions. The National Labor Relations Act similarly provides that if an employer has violated that

12. Title VII is contained in the Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 701-716, 78 Stat. 253 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (1994)).

13. The word "sex" was proposed as an amendment toward the end of the debate on the bill by a Southern representative working to defeat the entire bill, Howard Smith, Chair of the House Rules Committee. The bill survived, in spite of this inclusion, making the prohibition of gender discrimination an almost accidental by-product of the civil rights movement. For accounts of this peculiar legislative history, see LEO KANOWITZ, *WOMEN AND THE LAW: THE UNFINISHED REVOLUTION* 103-06 (1969); CAROLINE BIRD, *Ladies Day in the House*, in BORN FEMALE: THE HIGH COST OF KEEPING WOMEN DOWN 1-19 (1968). See also *Developments in the Law -- Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1167 (1971); CHARLES WHALEN & BARBARA WHALEN, *THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT* 117-19, 238 (1985); GARY ORFIELD, *CONGRESSIONAL POWER: CONGRESS AND SOCIAL CHANGE* 299 (1975). But see Jo Freeman, *How "Sex" Got Into Title VII: Persistent Opportunism as a Maker of Public Policy*, 9 LAW AND INEQUALITY 1 (1990) (documenting that the word "sex" did not end up in the bill as a result of an accidental breakthrough, but because members of the National Women's Party had been lobbying for years for an Equal Rights Amendment or equivalent legislation). As a side note, it is ironic that white women have perhaps benefited the most from a statute enacted primarily to protect African Americans from discrimination. Because we shared the economic class of our fathers, brothers and husbands, we were better able to take advantage of this new legal protection from discrimination.

14. Section 706 (g)(1), codified at 42 U.S.C. §2000e-5 (g)(1), provides:

If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and *order such affirmative action* as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. (emphasis added).

15. 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-69 (1994)).

Act by discriminating against an employee because of union activity, the National Labor Relations Board shall remedy any violation by ordering the employer to take "affirmative action," including reinstatement with or without back pay, to make the employee whole.¹⁶ Thus, the remedy provisions of Title VII were derived in essence from the remedy provisions of the National Labor Relations Act.

III.

EXECUTIVE ORDER 11246

The term affirmative action began to take on a more specialized meaning under Presidential executive orders issued by Presidents Kennedy and Johnson. These executive orders, parallel products of the civil rights movement, were issued both before and after passage of Title VII.

In 1961 President Kennedy issued Executive Order 10925,¹⁷ prohibiting employment discrimination based on race, creed, color, and national origin by employers who hold contracts with the federal government. This was the latest in a long series of executive orders prohibiting race discrimination in employment by federal contractors, beginning with President Roosevelt's first such order in 1941, prompted by A. Phillip Randolph's threat to stage a march on Washington to protest the refusal of the emerging defense industry to hire black employees.¹⁸ President Kennedy's order not only prohibited discrimination, but for the first time required federal contractors to "take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin."¹⁹ In the context of the executive order, this requirement of taking affirmative action meant something more than "nondiscrimination," something more than simply refraining from discriminating against Black, Latino, or Asian-American men.²⁰ The order, however, did not

¹⁶ National Labor Relations Act of 1935 § 10(c), 29 U.S.C. § 160(c), provides:

If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its finding of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practices, and to take such affirmative action, including reinstatement of employees with or without back-pay, as will effectuate the policies of this act. (emphasis added).

¹⁷ Exec. Order No. 10925, 26 Fed. Reg. 1977 (1961).

¹⁸ For a dramatic account of the events leading up to President Roosevelt's initial executive order, see generally DORIS KEARNS GOODWIN, NO ORDINARY TIME 246-53 (1994). For a history of the executive orders from 1941 to 1961, see generally *Developments in the Law - Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1280-82 (1971).

¹⁹ 26 Fed. Reg. 1977, § 301.

²⁰ Women were not included in any executive orders until 1967. See *infra* note 22. Sex discrimination in employment became illegal when Title VII took effect in July 1965.

According to one account, the words "affirmative action" in Executive Order 10925 were the

contain any specific requirements or examples of affirmative action. Despite this new requirement, little notice was given to President Kennedy's executive order. It took the historic events of the civil rights movement in Birmingham, Alabama, the assassination of President Kennedy, and the passage of the 1964 Civil Rights Act to bring the issue of employment discrimination to the public's attention.

It was President Lyndon Johnson's Executive Order 11246,²¹ issued in 1965, one year after the passage of the Civil Rights Act, which led directly to our contemporary usage of the term affirmative action. Since 1965, any contractor or subcontractor which has a federal contract of \$10,000 or more must include an "equal opportunity" clause in its contract, and must take "affirmative action" to ensure that no discrimination occurs.²² Executive Order 11246 was like previous orders in prohibiting employment discrimination by contractors, but it went further by creating a new agency to monitor compliance, the Office of Federal Contract Compliance.²³

More importantly for our historical overview, the new Office of Federal Contract Compliance (OFCC) issued a series of administrative orders beginning in 1968 which spelled out, in specific terms, the affirmative action obligations of contractors with fifty or more employees and \$50,000 or more in business with the federal government. Effective July 1, 1968, the OFCC required such contractors "to develop a written affirmative action compliance program" to identify problem areas.²⁴ When an employer found deficiencies in its utilization of minority employees, it was required to develop "specific goals and time tables for the prompt

creation of a young black lawyer from Detroit, Hobart Taylor Jr., whose father was a friend of Lyndon Johnson, the new Vice-President. Johnson asked Taylor to help draft President Kennedy's executive order, and Taylor was looking for words that would indicate employers were to take some kind of positive action. "... I was torn between the words 'positive action' and ... 'affirmative action.' ... And I took 'affirmative action' because it was alliterative." Nicholas Lemann, *Taking Affirmative Action Apart*, N. Y. TIMES MAGAZINE, June 11, 1995, at 36-40. Perhaps Mr. Taylor was also hearing the language of the National Labor Relations Act echoing in the back of his mind.

21. Exec. Order No. 11246, 3 C.F.R. § 339 (1965).

22. Originally, the Order prohibited race, national origin, and religious discrimination. It was amended in 1967 by Executive Order 11375 to add sex discrimination. Exec. Order No. 11375, 3 C.F.R. § 684 (1967). As amended, it reads:

The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The contractor will take affirmative action to insure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex or national origin.

Exec. Order No. 11246, 3 C.F.R. § 202 (1) (1965).

23. Executive Order 11246 created the Office of Federal Contract Compliance, now the Office of Federal Contract Compliance Programs (OFCCP) within the Department of Labor. The purpose of the OFCC was to monitor contractors' compliance with the order and to seek debarment from future federal contracts for employers who did not comply. *Developments—Title VII, supra* note 18, at 1283.

24. 41 C.F.R. § 60-1.40(a) (1969).

achievement of full and equal employment opportunity.”²⁵ In November, 1969, under the auspices of President Nixon’s Labor Department, the OFCC issued its first Order No. 4, setting forth in detail what a contractor’s written affirmative action plan must include and how its equal employment goals are to be determined. The Order also required each contractor to make “every good faith effort” to implement its affirmative action program.²⁶ In late 1971, the OFCC issued Revised Order No. 4 to require contractors to add women to their affirmative action plans, to include women in utilization analyses and to develop goals and timetables for correcting gender deficiencies.²⁷ These requirements for written affirmative action plans, with their goals and timetables for eliminating underrepresentation of minority groups and women, have led to our current use of the term affirmative action.

Since Executive Order 11246’s implementation, affirmative action has come to mean any type of program or policy where race, national origin, or gender is taken into account. To be eligible for the benefits of affirmative action in employment, a person must meet two requirements:

- The person must be a member of a group that has been historically underrepresented at that place of employment; and
- the person must be otherwise qualified for the job in question.

The issues of underrepresentation and qualifications are intertwined. Underrepresentation is determined by making comparisons between the composition of an employer’s workforce and the composition of the qualified labor pool in the geographic area from which the employer hires. Under Executive Order 11246 and its implementing regulations, an employer such as the University of California, with over fifty employees and federal contracts over \$50,000, must survey its workforce, and the geographical area from which it hires, to determine if any racial or ethnic groups, or women, are underrepresented in any of its job categories. If the employer finds underrepresentation, then the employer must develop a plan to reduce that underrepresentation and set hiring goals for doing so. Furthermore, the employer must update its workforce data and corresponding goals periodically. At the University of California, Davis, we analyze our workforce and update our employment goals every six months. When a hiring goal exists for a particular job category, and for a particular ethnic group or gender, then the employer’s

25. *Id.*

26. 41 C.F.R. § 60-2.1, 2.10 (1971). Order No. 4, first issued on November 20, 1969, later amplified and reissued on January 30, 1970, 35 Fed. Reg. 2586 (Feb. 5, 1970), required the employer to analyze all its job categories to determine if any minority group was being “underutilized” based on the availability of minority group members in the area’s labor force who met the requisite job qualifications. If the contractor found underutilization, it had to set forth specific goals and timetables for correcting these deficiencies. “Such goals and timetables, with supporting data and the analysis thereof shall be a part of the contractor’s written affirmative action program” 41 C.F.R. § 60-2.11 (1971).

27. 41 C.F.R. § 60-2.1 (1972). For further discussion of these orders, see Michael Braswell, Gary Moore & Stephen Poe, *Affirmative Action: An Assessment of Its Continuing Role in Employment Discrimination Policy*, 57 ALB. L. REV. 365, 369-71 (1993).

affirmative action plan requires the employer to make "a good faith effort" to hire a member of the underrepresented group. Thus, affirmative action—taking race, ethnicity or gender into account in making actual hiring decisions—is required when underrepresentation exists.

Underrepresentation varies greatly among job classifications and groups. For example, women are underrepresented in some jobs, but not others. At the University of California, women are underrepresented among the ladder-rank faculty—assistant, associate or full professors—only 22% of which are women.²⁸ We are not underrepresented, however, as lecturers, over 50% of whom are women.²⁹

Underrepresentation is determined by comparing the composition of an employer's current employees to the composition of the qualified labor pool from which the employer hires. The qualified labor pool for university faculty is composed of recent Ph.D. recipients nationwide with degrees in fields relevant to each department's area of expertise.³⁰ Over an 11-year period from 1981 to 1992, the available hiring pool for faculty in U.C. Davis' particular fields of teaching and research averaged 39% women.³¹ During the most recent 5-year period, 1990-1994, the Ph.D. pool has averaged 44% women.³² Consequently, since women form only 22% of the ladder-rank faculty, each campus has numerous goals for hiring women faculty, with goals determined on a departmental basis.³³ A campus, however, would have few, if any, goals for hiring women as lecturers, because women are

28. In 1995, 22% of the tenured or tenure-track faculty at the University of California campuses were women. Mary Rajkumar, *Glass Ceiling Still Covers the Ivory Tower*, OAK. TRIB., Mar. 31, 1996, at A-1, A-11. In October 1994, out of 6,834 faculty, 1,489 were women (21.8%) and 5,345 were men (78.2%). Aida Hurtado et. al., *Becoming the Mainstream: Merit, Changing Demographics and Higher Education in California*, 10 LA RAZA L.J. 645 (1999).

29. In 1995, 50.7% of the lecturers were women at the University of California Davis. U.C. Davis Academic Affirmative Action and Diversity Progress Report, Table A, Office of the Provost (Nov. 1, 1994 to Oct. 31, 1995). This percentage is typical for any American research university, as is the lower percentage of women on the ladder faculty.

30. For most U.C. departments, a Ph.D. is the required terminal degree for a faculty appointment. In a law school, a J.D., Juris Doctor, is the required degree. In an art department, a Masters of Fine Arts would be the required terminal degree.

31. Martha S. West, *Gender Bias in Academic Robes: The Law's Failure to Protect Women Faculty*, 67 TEMP. L. REV. 67, 150 (1994).

32. In 1990, 43.1% of U.S. citizens receiving American Ph.D.s were women. In 1991, 43.8% were women. In 1992, 44.2% were women. In 1993, 45.1% were women, and in 1994, 45.7% were women. ROBERT SIMMONS & DELORES THURGOOD, SUMMARY REPORT 1994: DOCTORATE RECIPIENTS FROM UNITED STATES UNIVERSITIES, Appendix Table B-2 (1995).

33. At U.C. Davis, in 1995-1996 we had 126 hiring goals for faculty women distributed among the majority of departments. This means that for our faculty to reflect the availability of women among the relevant Ph.D. pool from 1989-1993, 126 more women should be hired, among a total ladder-rank faculty of 1,205 assistant, associate or full professors. Data derived from U.C. Davis Affirmative Action Plan, Academic Utilization Analysis, Oct. 31, 1995.

generally not underrepresented in that job category.³⁴

Although women are significantly underrepresented among the U.C. faculty, the same statement cannot be made about people of color, using an affirmative action plan analysis. This is because there are so few persons of color among Ph.D. recipients, the qualified labor pool for faculty hires. Among recent American Ph.D. recipients, 88.6% were white; only 11.4% were persons of color.³⁵ In 1994, only 882 U.S. citizens classified as Hispanic obtained Ph.Ds, constituting 3.3% of American Ph.D. recipients.³⁶ Other ethnic groups showed similarly low numbers: 1,092 African Americans (4.1%), 949 Asian Americans (3.5%), and only 142 Native Americans (0.5%).³⁷ Consequently, under our affirmative action plans in the U.C. system, we have very few goals for hiring Chicano/Latino faculty because so few are available in the American Ph.D. pool.³⁸ In October 1995, at U.C. Davis, we had 40 Chicano/Latino ladder rank faculty, 3.3% of the 1,205 faculty, a percentage comparable to the American Ph.D. pool of qualified potential applicants. In 1994, among the nine campuses, U.C. employed 289 Chicano/Latino faculty, or 4.2% of the 6,834 ladder faculty, a slightly higher percentage, but still disappointingly low.³⁹

One of the limitations of the affirmative action plans required by Executive Order 11246 is the nationwide basis used for calculating faculty hiring goals. Because the University of California hires faculty through nationwide searches, our affirmative action plans give no consideration to the unique demographics of California, nor are they required to do so. We live in a state where, in 1994, 31% of our population was Chicano/Latino,⁴⁰ yet the University of California seems comfortable with a faculty that is only 4% Chicano/Latino. The University should at

34. In October 1994, U.C. Davis had only 10 goals for hiring women as lecturers, indicating some underrepresentation of women as lecturers in a few departments. U.C.D. Academic Utilization Analysis, Oct. 31, 1994.

35. This figure is based solely on U.S. citizens receiving Ph.Ds. In 1994, 27,105 U.S. citizens received Ph.Ds, 66% of the total 41,011 Ph.Ds awarded by American institutions. Of the total, permanent visa holders accounted for 3,741 (9%); temporary visa holders for 9,393 (23%). Among total recipients, 772 were of unknown citizenship. SUMMARY REPORT, *supra* note 32, Table B-2. Among the U.S. citizens, 253 were of unknown race or ethnicity, leaving 26,852 American citizens of known race or ethnicity: 14,543 men and 12,309 women. Among the men, 90% were white; among the women, 87% were white. *Id.*

36. 445 were Hispanic women and 437 were Hispanic men. In 1993, 830 U.S. Hispanics obtained Ph.Ds: 422 men and 408 women. *Id.*

37. Among African Americans, 407 were men and 685 were women. Among Asian Americans, 591 were men and 358 were women. Among Native Americans, 71 were men and 71 were women. *Id.*

38. In October 1995, U.C. Davis had 13 hiring goals for Chicano/Latino faculty. Academic Utilization Analysis, *supra* note 33.

39. U.C. Higher Education Staff Information (EEO-5) Reports, presented by Aida Hurtado, *supra* note 28.

40. Jorge del Pinal, *Latinos and California's Future: Too Few at the School's Door*, 10 LA RAZA L. J. 631 (1999).

least collect and publish data on the percentage of Chicano/Latino Ph.D. recipients graduating from universities throughout the Southwest or in California, to see if there is any significant regional variation from the national data.

The real tragedy, however, is the low numbers of Chicano/Latino students in graduate schools, which in turn reflects the low number of Latino undergraduates in college and universities. Instead of eliminating affirmative action programs in admissions,⁴¹ we should be increasing our efforts to bring more Chicano/Latino

41. On July 20, 1995, the University of California Board of Regents adopted Resolution SP-1, providing, in part:

Section 2. Effective Jan. 1, 1997, the University of California shall not use race, religion, sex, color, ethnicity, or national origin as criteria for admission to the University or to any program of study.

Section 3. Effective Jan. 1, 1997, the University of California shall not use race, religion, sex, color, ethnicity, or national origin as criteria for "admissions in exception" to UC-eligibility requirements.

Section 4. The President shall confer with the Academic Senate of the University of California to develop supplemental criteria for consideration by the Board of Regents which shall be consistent with Section 2. In developing such criteria, which shall provide reasonable assurances that the applicant will successfully complete his or her course of study, consideration shall be given to individuals who, despite having suffered disadvantage economically or in terms of their social environment (such as an abusive or otherwise dysfunctional home or a neighborhood of unwholesome or antisocial influences), have nonetheless demonstrated sufficient character and determination in overcoming obstacles to warrant confidence that the applicant can pursue a course of study to successful completion, provided that any student admitted under this section must be academically eligible for admission.

Section 5. Effective Jan. 1, 1997, not less than fifty (50) percent and not more than seventy-five (75) percent of any entering class on any campus shall be admitted solely on the basis of academic achievement.

...

Section 7. Nothing in Section 2 shall prohibit the University from taking appropriate action to remedy specific, documented cases of discrimination by the University, provided that such actions are expressly and specifically approved by the Board of Regents or taken pursuant to a final order of a court or administrative agency of competent jurisdiction. Nothing in this section shall interfere with the customary practices of the University with regard to the settlement of claims against the University relating to discrimination.

...

Section 9. Believing California's diversity to be an asset, we adopt this statement: Because individual members of all of California's diverse races have the intelligence and capacity to succeed at the University of California, this policy will achieve a U.C. population that reflects this state's diversity through the preparation and empowerment of all students in this state to succeed rather than through a system of artificial preferences.

students into graduate school to become future faculty members.

The second requirement a person must meet to benefit from an affirmative action plan in employment is the requirement of adequate job qualifications. Any person from an underrepresented group hired for a job must be *otherwise qualified*. No court or affirmative action plan has ever permitted an employer to use affirmative action to hire someone *not* qualified for a job. This requirement of qualifications seems to be one of several areas where much of the current disagreement over affirmative action lies. There is no obligation or intention to extend affirmative action to someone who is not qualified for a job. If an employer has hired unqualified employees, that is its fault, an example of bad management, and *not* the fault of an affirmative action plan.

IV.

AFFIRMATIVE ACTION IN HIGHER EDUCATION

Affirmative action has played a role in higher education both in the employment practices of colleges and universities, and in the admission of students. In employment, educational institutions were not brought under Title VII's prohibitions on discrimination until Title VII was amended in 1972.⁴² Theoretically, educational institutions that had federal contracts were covered by Executive Order 11246 when it was issued in 1965, but little notice was paid to college and universities as federal contractors until discrimination against women was included in the Executive Order by its revision in 1967.⁴³ In the late 1960s, an organization concerned with the lack of women on the faculties of colleges and universities, the Women's Equity Action League (WEAL), led by Dr. Bernice Sandler, began taking advantage of the revised Executive Order and its new implementing regulations requiring affirmative action plans, goals, and timetables. By the end of 1971, WEAL and other concerned women's organizations had filed complaints under the Executive Order against more than 350 institutions, resulting in the delay of federal contract funds at approximately 40 institutions.⁴⁴ In October 1972, the Department of Housing, Education, and Welfare's (HEW) Office of Civil Rights issued its "Higher Education Guidelines," adapting the affirmative action requirements of Executive Order 11246 and Revised Order No. 4 to university employment practices.⁴⁵ With the inclusion of educational institutions in Title VII and the

42. As originally enacted, instructional employees of educational institutions were excluded from Title VII. See Pub. L. No. 88-352, Title VII, § 702, 78 Stat. at 255 (1964). This exclusion was removed when Title VII was amended in 1972 by the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 3, 86 Stat. 103 (amending The Civil Rights Act of 1964, Title VII, §§ 701(a)-(b), 702). The 1972 amendments also extended Title VII's coverage to public employees. See *id.* at § 2(5).

43. See *supra* note 22. Complaints for noncompliance by educational institutions with the Executive Order were handled by the Office of Civil Rights within the Department of Health, Education and Welfare (HEW), not the OFCC. HERMA HILL KAY & MARTHA S. WEST, *SEX-BASED DISCRIMINATION* 1111 (4th ed. 1996).

44. *Id.* at 1112.

45. 37 Fed. Reg. 24686-24696 (Nov. 18, 1972); see also KAY & WEST, *supra* note 43, at 1116.

issuance of the Higher Education Guidelines, universities throughout the United States were busy adopting employment-related affirmative action plans by the mid-1970s.⁴⁶

In the 1970s, the concept of affirmative action—taking race, ethnicity or gender into account when making employment decisions—spread from the employment context into the realm of student admissions. Race discrimination against students in public education had become unconstitutional in 1954 with the Supreme Court's decision in *Brown v. Board of Education*.⁴⁷ In addition to the admonition of *Brown*, Title VI of the Civil Rights Act of 1964 prohibited race or national origin discrimination by any program or activity receiving federal financial assistance.⁴⁸ This included colleges and universities administering federally-funded financial aid programs. In 1973, HEW amended its regulations implementing Title VI to authorize "affirmative action" "to overcome the effects of conditions" which resulted in limited participation by members of particular racial or ethnic groups.⁴⁹ In response, colleges and universities began adopting affirmative action programs in admissions to increase the low numbers of students of color enrolled. With few minority students on campus, higher education institutions were, no doubt, aware of the potential risk of race or national origin discrimination claims by students under either the Equal Protection Clause, if the institution was a public university, or under

46. See West, *Gender Bias*, *supra* note 31, at 95.

47. 347 U.S. 483 (1954). See *supra* note 11. Even before the *Brown* decision, the Ninth Circuit had ruled that segregation of Mexican-American students by local public school districts in California violated the equal protection clause. See *Mendez v. Westminster*, 64 F. Supp. 544 (S.D. Cal. 1946), *aff'd*, 161 F.2d 774 (9th Cir. 1947). For an excellent account of the *Mendez* case and its place in the struggle of the Chicano community in California, see Christopher Arriola, *Knocking On The Schoolhouse Door: Mendez v. Westminster, Equal Protection, Public Education, and Mexican Americans in the 1940's*, 8 LA RAZA L.J. 166 (1995).

48. Title VI, part of the Civil Rights Act of 1964, provides:

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Pub. L. No. 88-352, Title VI, § 601, 78 Stat. 252 (codified at 42 U.S.C. § 2000d (1994)).

49. The HEW regulations provided that if an educational institution had been found to have discriminated against students in the past, an affirmative action program was required. In the absence of such a finding, affirmative action was encouraged:

(i) In administering a program regarding which the recipient has previously discriminated against persons on the ground of race, color, or national origin, the recipient must take affirmative action to overcome the effects of prior discrimination.

(ii) Even in the absence of such prior discrimination, a recipient in administering a program may take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color, or national origin.

Title VI, if it received federal funds. In 1972, sex discrimination in education was prohibited for the first time by the Education Amendments of 1972, when Congress passed Title IX.⁵⁰ With all this legislative and regulatory activity in 1972 and 1973 focused on discrimination in higher education, it is no surprise that the first affirmative action case to reach the Supreme Court came out of higher education.

V.

THE SUPREME COURT'S BOUNDARIES ON THE USE OF AFFIRMATIVE ACTION

The difficulty that our society has had with the concept of affirmative action is reflected by, or perhaps created by, the difficulty the Court has had agreeing on how to deal with the issue. The Court decided its first case on affirmative action in 1978, *Regents of University of California v. Bakke*.⁵¹ Since 1978, by my count, the Court has decided ten more cases dealing with affirmative action.⁵² In these eleven cases, the Justices have written a total of 55 different opinions.⁵³ These include only three majority opinions, where five Justices agree, many plurality opinions, where only four agree, plus a variety of concurrences and dissents. If the nine people on the Supreme Court cannot agree on this issue, we should not be surprised that the issue of affirmative action continues to fracture our society.

A. Use of Affirmative Action in University Admissions

The first case, *Regents of University of California v. Bakke*,⁵⁴ is the only Supreme Court case dealing with affirmative action in higher education. The resolution of that case, or lack of resolution, set the tone for the subsequent debate over affirmative action. *Bakke* involved the admissions policy maintained by the

50. Education Amendments Act of 1972, Pub. L. No. 92-318, 86 Stat. 373 (codified at 20 U.S.C. §§ 1681-88 (1988)). Title IX was aimed primarily at the educational programs and activities of colleges and universities, but included equality of employment as well.

51. 438 U.S. 265 (1978).

52. See *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Firefighters v. Stotts*, 467 U.S. 561 (1984); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986); *Local 28 of Sheet Metal Workers' Int'l. Ass'n v. EEOC*, 478 U.S. 421 (1986); *United States v. Paradise*, 480 U.S. 149 (1987); *Johnson v. Transportation Agency of Santa Clara Co.*, 480 U.S. 616 (1987); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Metro Broad., Inc. v. Federal Communications Comm'n*, 497 U.S. 547 (1990); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

53. *Bakke*: 6 opinions; *Weber*: 4 opinions (one a majority opinion, with 5 votes); *Fullilove*: 5 opinions; *Stotts*: 4 opinions; *Wygant*: 5 opinions; *Sheet Metal Workers*: 5 opinions; *Paradise*: 5 opinions; *Johnson*: 5 opinions (one a majority opinion); *Croson*: 6 opinions (portions of Justice O'Connor's had 5 votes); *Metro Broad.*: 4 opinions (one a majority); *Adarand*: 6 opinions (portions of Justice O'Connor's had 5 votes).

54. 438 U.S. 265 (1978).

University of California, Davis Medical School. In the early 1970s, the Medical School developed a special admissions program for applicants from “economically and/or educationally disadvantaged backgrounds” who were members of a minority group.⁵⁵ In part, this program was designed to remedy the fact that the early classes admitted from 1968 to 1970, when the Medical School first opened, contained few, if any, African Americans or Chicano/Latino students. The Medical School admissions program created two separate tracks: one for “regular” admissions and one for “special” admissions. Each year 16 positions, out of a class of 100, were held for special disadvantaged minority student admits. Over a five-year period, 63 students of color were admitted through this special program and 44 students of color, most of them Asian American, were admitted through regular admissions.⁵⁶ Allan Bakke, a white male, sued, claiming the special admissions program operated as a racial and ethnic quota system. He won his case, and the Court ruled that this special admissions program was unconstitutional.⁵⁷

Five Justices, however, held that some consideration of race or ethnicity could be given in the admission process.⁵⁸ Justice Powell, occupying the middle ground on the Court and writing the controlling opinion, held that a racial or ethnic preference was constitutional as long as it met the Court’s most exacting “strict scrutiny” review under the Equal Protection Clause and furthered a “compelling” governmental interest.⁵⁹ Justice Powell found the “compelling” interest to be the University’s interest in admitting a diverse student body. Under principles of academic freedom and the First Amendment, Justice Powell recognized the University’s right to choose those students who would contribute the most to a “robust exchange of ideas.”⁶⁰ He stated that just as universities use geographic preference as a factor in admissions so as to include students of diverse backgrounds, universities also are allowed to use some degree of racial or ethnic preference to obtain a heterogeneous student body.

In striking down U.C. Davis’ 2-track admissions program, Justice Powell recommended Harvard University’s admissions policy for its undergraduates, which did not reserve any given number of places for disadvantaged students of color but took race or ethnicity into account just as it did geographical origin and rural or city background. He quoted at length from Harvard’s admissions policy and included its text in an appendix to his opinion.⁶¹ Harvard University justified its use of race and

55. *Id.* at 273 n.1.

56. *Id.* at 275-76.

57. *Id.* at 271 (judgment announced by Justice Powell and concurred in by Chief Justice Burger and Justices Stewart, Rehnquist, and Stevens).

58. *Id.* at 320 (Justices Powell, Brennan, White, Marshall, Blackmun concurred that the State has a “substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin”).

59. *See id.* at 315.

60. *Id.* at 312 (quoting *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967)).

61. *Id.* at 316-17, 321-24.

ethnicity in admissions as one method to add greater diversity to its student body:

The belief that diversity adds an essential ingredient to the educational process has long been a tenet of Harvard College admissions. Fifteen or twenty years ago, however, diversity meant students from California, New York, and Massachusetts; city dwellers and farm boys; violinists, painters and football players; biologists, historians and classicists; potential stockbrokers, academics and politicians. The result was that very few ethnic or racial minorities attended Harvard College. In recent years Harvard College has expanded the concept of diversity to include students from disadvantaged economic, racial and ethnic groups. Harvard College now recruits not only Californians or Louisianans, but also blacks and Chicanos and other minority students. . . .

In practice, this new definition of diversity has meant that race has been a factor in some admission decisions. When the Committee on Admissions reviews the large middle group of applicants who are "admissible" and deemed capable of doing good work in their courses, the race of an applicant may tip the balance in his favor just as geographic origin or a life spent on a farm may tip the balance in other candidates' cases. A farm boy from Idaho can bring something to Harvard College that a Bostonian cannot offer. Similarly, a black student can usually bring something that a white person cannot offer. The quality of the educational experience of all the students in Harvard College depends in part on these differences in the background and outlook that students bring with them.⁶²

Thus, after the *Bakke* decision, race or ethnic background could be deemed a "plus" factor in an applicant's file, just as other factors such as geographic origin, background, extracurricular activities, or a parent's alumni status, could be regarded as a "plus" factor when comparing each applicant to all other applicants.

Since *Bakke* was decided in 1978, public university admissions programs have been required to meet a stringent constitutional test: the program must pass the Court's "strict scrutiny" level of review, and the school must demonstrate a "compelling" interest in maintaining the program. No public university has been allowed to set aside or reserve places for students of color; that would be regarded as a quota system. Under the *Bakke* rationale, affirmative action goals are permissible, but quotas are illegal. Universities have continued to take race or ethnicity into account in weighing the variety of factors considered when deciding which applicants to admit.

Public universities continue to run into difficulty, however, when they create special admission tracks for students of color. The Fifth Circuit recently held

62. See *id.* at 322-23.

in *Hopwood v. Texas*⁶³ that the separate admissions track for African-American and Mexican-American applicants at the University of Texas School of Law violated the Equal Protection Clause. Not only did the law school have a separate admissions committee process for these two minority groups, it had adopted "goals" that 10% of each admitted class would be Mexican-American and 5% would be African-American, percentages that were comparable to the composition of students graduating from Texas colleges and universities.⁶⁴ The school adjusted the admission index (based on undergraduate GPAs and LSAT test scores) for both groups during the admissions season in order to attain these approximate percentages.⁶⁵ At no point in the admissions process were the files of the African-American or Mexican-American applicants mixed in with or evaluated alongside the files of any other applicants. The Fifth Circuit upheld the trial court's finding that this separate admissions process could not withstand strict constitutional scrutiny.⁶⁶

The Fifth Circuit went further than the trial court, however, and held that any use of race or ethnicity in the admissions process was prohibited, specifically rejecting Justice Powell's opinion in *Bakke*.⁶⁷ The *Hopwood* court held that a university's interest in a diverse student body is not a "compelling" interest sufficient to pass muster under the "strict scrutiny" standard of equal protection review. Only proof of prior discrimination by the institution practicing affirmative action would convince this panel of Fifth Circuit judges that race or ethnicity could be used in a remedial fashion by the governmental entity.⁶⁸

It remains to be seen whether other federal circuits will conclude, along with the Fifth Circuit, that Justice Powell's opinion in *Bakke* is no longer good law. Any quick resolution of this question by the Supreme Court will not be forthcoming—the Court refused to accept the petition for certiorari in this case.⁶⁹ Consequently, even though no case has reached the Supreme Court on the issue of affirmative action in college admissions since *Bakke*, many schools are limiting their affirmative action plans in student admissions in light of *Hopwood* and the July 1995 University of California Board of Regents' prohibition of the use of racial and ethnic criteria in admissions.⁷⁰

63. 78 F.3d 932 (5th Cir. 1996).

64. *See id.* at 937.

65. *See id.* at 937 n.10.

66. *See id.* at 934, 939.

67. *See id.* at 944.

68. *See id.* at 948, 952.

69. *Texas v. Hopwood*, cert. denied, 518 U.S. 1033 (1996). Justice Ginsburg, joined by Justice Souter, commented on the denial of certiorari in *Hopwood* and explained that the admissions procedure at issue had been discontinued. Therefore, no program was "genuinely in controversy" in this case. *Id.*

70. *See supra* note 41.

B. *Use of Affirmative Action in Court Orders Under Title VII or the Equal Protection Clause*

Originally, the term affirmative action found in the remedy section of Title VII⁷¹ was used in a general way to indicate an appropriate remedy for a violation of Title VII's prohibition of discrimination in employment. Over the years, however, the term took on the more specialized meaning we associate with Executive Order 11246, even in the context of Title VII remedies. In particularly egregious cases of employment discrimination, plaintiffs have asked for—and courts have approved—remedial orders directing employers to meet future hiring or promotion goals, similar to those contained in a written affirmative action plan drafted under the auspices of Executive Order 11246.⁷² Consequently, today some affirmative action plans are in place because of court orders remedying violations of Title VII or, in the case of a governmental employer, violations of the Fourteenth Amendment's Equal Protection Clause.

One of the most stringent affirmative action plans was approved by the Supreme Court after African-American police officers spent fifteen years in litigation attempting to integrate the Alabama State Police force. In *United States v. Paradise*,⁷³ a majority of the Court affirmed a federal court's remedial order, requiring the Alabama Police to promote one African American for every white officer it promoted, until African Americans made up 25% of the higher rank, as long as there were black candidates qualified for promotion.⁷⁴ The Supreme Court held that this affirmative action remedy was constitutional under a "strict scrutiny" analysis, as long as it met the following conditions:

1. The plaintiff had proven, after a trial on the merits, a history of persistent or egregious discrimination at that place of employment.⁷⁵
2. The affirmative action relief was carefully and narrowly tailored to fit the proven violations.
3. The promotion or hiring goals were flexible, modified over time; goals must be revised periodically.
4. The affirmative action plan was a temporary measure; it would end when the goals were met.

71. See *supra* note 14 and accompanying text.

72. See discussion of Exec. Order No. 11246 *supra* notes 21-27 and accompanying text.

73. 480 U.S. 149 (1987).

74. See *id.* at 171, 177.

75. See *id.* at 167. When the Supreme Court enforced this order, this case against the Alabama State Police had been in litigation from 1972 to 1987, with refusals by the employer to comply with various consent decrees. See *id.* at 153, 168-69.

5. The affirmative action plan did not “unnecessarily trammel” white men’s rights—was not an absolute bar to their hiring or promotion.⁷⁶

The Court has approved similar affirmative action plan remedies under Title VII, using the same criteria for finding these race-conscious hiring or promotion requirements necessary to force recalcitrant employers or unions to integrate black Americans and other persons of color into the work force.⁷⁷ These court-ordered remedies issued in the 1980s under Title VII and the Equal Protection Clause were modeled on the written affirmative action plans required by the regulations issued under Executive Order 11246 beginning in 1968.

C. *Voluntary Affirmative Action Plans*

Finally, some employers developed affirmative action plans similar to those required by Executive Order 11246, without discussion of the requirements for federal contractors covered by the Executive Order’s requirements. On two occasions, the Court has upheld these voluntary affirmative action plans, despite white men’s complaints that the plans discriminate against them in violation of Title VII. The first Court ruling on a voluntary plan came in *United Steelworkers v. Weber*,⁷⁸ decided in 1979, one year after the *Bakke* decision. In 1974 the Steelworkers Union and Kaiser Aluminum Corporation agreed on a plan to train African-American employees for skilled craft jobs in the company’s plants.⁷⁹ Previously, Kaiser had only hired craft workers who already had prior craft work experience.⁸⁰ Since blacks had legally been excluded from craft unions until Title VII took effect in 1965, there were few black employees qualified for skilled trade jobs.⁸¹ At the Gramercy, Louisiana plant, where the *Weber* case arose, only 5 of the 273 skilled craft workers (1.83%) in 1974 were black, even though the labor force in that part of Louisiana was 39% black.⁸² Consequently, Kaiser and the union agreed on an in-plant training program for unskilled trade workers, selecting employees for

76. *Id.* at 182. In the case of the Alabama State Police, 50% of the promotions would still go to whites. *See id.*

77. For a similar case under Title VII, not the Constitution, see *Local 28 of the Sheet Metal Workers v. EEOC*, 478 U.S. 421 (1986), where the Court approved a remedial court order requiring the Sheetmetal Workers, Local 28, in New York City to admit African Americans and Hispanics as union members until minority workers constituted 29% of the local union’s members. The Court applied the same criteria to this affirmative action plan order as it did the next year in *Paradise*.

78. 443 U.S. 193 (1979).

79. *Id.* at 197-98.

80. *Id.* at 198.

81. *See id.*

82. *Id.* at 198-99.

training on the basis of seniority, but reserving 50% of the positions for black employees.⁸³ The plan would remain in effect until the percentage of black skilled craft employees reflected the 39% of black workers in the area's labor force.⁸⁴ During the first year of the program, 13 employees were chosen: 7 blacks and 6 whites.⁸⁵ Brian Weber, a white employee, sued under Title VII for race discrimination because black employees selected for the training had less seniority than he did.⁸⁶

A majority of the Supreme Court held that this use of a racial preference under a voluntary affirmative action plan did not violate Title VII, when the purpose of the plan was to "eliminate conspicuous racial imbalance" in a "traditionally segregated" job category.⁸⁷ The Court's majority commented that although Title VII prohibits discrimination against whites, as well as blacks, the statute must be interpreted in light of the historical context from which it arose. "It would be ironic indeed if a law triggered by . . . centuries of racial injustice . . . constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy."⁸⁸ The Court held that although Title VII did not *require* employers to balance their workforces by race, it did not *prohibit* them from trying to do so.⁸⁹ Furthermore, the affirmative action plan for in-plant training did not "unnecessarily trammel the interests of the white employees."⁹⁰ It did not require any white employee to be laid off and did not create an absolute bar to whites' advancement—half of those trained would be white.⁹¹

The second Supreme Court case approving a voluntary plan is the only affirmative action opinion by the Court on gender, instead of race. In *Johnson v. Transportation Agency of Santa Clara County*,⁹² the Santa Clara County Transportation Department adopted an affirmative action plan in 1978, authorizing a job candidate's race, ethnicity, or gender to be taken into account for those jobs where underrepresentation existed.⁹³ Diane Joyce, a woman, applied for a skilled

83. *Id.* at 199.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* at 197, 209.

88. *Id.* at 204.

89. *Id.* at 205-06.

90. *Id.* at 208.

91. *Id.*

92. 480 U.S. 616 (1987).

93. *Id.* at 620-21.

trades job in the road maintenance division.⁹⁴ At that time, 1979, the county employed 238 people in the skilled trades, 238 men and zero women.⁹⁵ By 1982 the county had developed a short-term goal of 6% for women in the skilled trades, because women accounted for approximately 6% of skilled trade “qualified” workers in the Santa Clara County geographical area.⁹⁶ Consequently, if the county met its goals, 14 of 238 skilled trade workers would be women.⁹⁷

In this civil service system, applicants for job openings were interviewed orally by a selection committee and given an overall score. Paul Johnson, a white male, received a ranking of 75; Diane Joyce received a score of 73.⁹⁸ Because there were no women in the skilled trades, the affirmative action coordinator recommended to the director that Diane Joyce be promoted into this vacancy, and she was.⁹⁹ Paul Johnson then sued for gender discrimination under Title VII.¹⁰⁰

Justice Brennan, writing one of the few majority opinions with five Justices agreeing, held that voluntary affirmative action plans are permissible where there is a “manifest imbalance” in a “traditionally segregated” job category.¹⁰¹ In that situation, an employer may set hiring goals, and use race or gender as one factor, among a variety of factors, as long as the plan is flexible, temporary, and not an absolute bar to white men.¹⁰² This plan did not set aside any positions for women, and gender was only one factor considered in the promotion.¹⁰³ In this case, Paul Johnson remained eligible for another promotion and was eventually promoted as well in 1983.¹⁰⁴

Justice O’Connor concurred in the judgment, but differed with Justice Brennan on what degree of statistical imbalance was necessary before affirmative action was justified. She would require a greater degree of imbalance, enough to support a statistical *prima facie* case of discrimination under Title VII or the Equal Protection clause of the Fourteenth Amendment.¹⁰⁵ Justice O’Connor would permit

94. *Id.* at 623.

95. *Id.* at 636.

96. *Id.* at 620-21, 636.

97. *See id.* at 623.

98. *See id.* at 623-24.

99. *See id.* at 624-25.

100. *See id.* at 625.

101. *Id.* at 631 (quoting *Steelworkers v. Weber*, 443 U.S. 193, 197 (1979)).

102. *See id.* at 636-38.

103. *See id.* at 638.

104. *See id.* at 638-39 n.15.

105. *See id.* at 649.

affirmative action using race or gender as a "plus" factor,¹⁰⁶ when it is a "remedial device to eliminate actual or apparent discrimination or the lingering effects of this discrimination."¹⁰⁷ Justice O'Connor's opinion provides the better guide to the future. It remains to be seen whether her position on affirmative action in employment will receive majority support on the new Court.

I must mention Justice Scalia's dissent in this case, because it is such a classic. First of all, he does not acknowledge that prior discrimination played any role in keeping women out of skilled trade jobs. He concludes that the lack of women is not due "to systematic exclusion of women eager to shoulder pick and shovel."¹⁰⁸ Rather, it is a "traditionally segregated" job because of "longstanding social attitudes" and "has not been regarded by women themselves as desirable work."¹⁰⁹ While this may be a true statement in general, he ignores the zero out of 238 and the 6% of women actually qualified for this work in Santa Clara County. But he ends on an amazing note:

[T]he only losers in the process are the Johnsons of the country The irony is that these individuals—predominantly unknown, unaffluent, unorganized—suffer this injustice at the hands of a Court fond of thinking itself the champion of the politically impotent.¹¹⁰

Who is he talking about? White men—politically impotent? Unaffluent? Unorganized? Echoes of Justice Scalia's rhetoric can be heard in our current political debate.

CONCLUSION

Affirmative action was designed as a remedial device to eliminate the effect of centuries of racial slavery and segregation. When Title VII was passed in 1964, it must have been obvious to many that simply prohibiting discrimination in the future would not result in any immediate change in America's then largely segregated workforce. By issuing and then enforcing the Presidential executive orders, the federal government took an extra step to urge the country's major employers, particularly construction contractors and the defense industry, to actively recruit and hire African Americans. Implementation of the resulting affirmative action plans actually made a difference in black men's employment by federal contractors from the mid to late 1970s.¹¹¹ Enforcement of the Executive Order virtually ceased after

106. *Id.* at 656.

107. *Id.* at 649.

108. *Id.* at 668.

109. *Id.* (emphasis omitted).

110. *Id.* at 677.

111. Professor Jonathan Leonard found that the employment of African American men from

1980, with the onset of an economic recession and the Reagan Presidency. Growth in black employment declined during the 1980s.¹¹² During the 1990-91 economic downturn, African-American employees were the only racial or ethnic group to actually experience a net loss of jobs.¹¹³ Consequently, over the long term, affirmative action plans in employment have made some difference, but with spotty results. Many African-American and Latino communities remain locked in their segregated economic ghettos of poverty, cut off from the more prosperous white communities surrounding them.

In American higher education, the success of affirmative action has been mixed. Affirmative action programs in undergraduate admissions have been effective in increasing numbers of African-American and Chicano/Latino students in universities. These programs were effective because the universities hired admissions officers and staff who actually believed in affirmative action and wanted to see these programs succeed. On the employment side, however, particularly in regard to the employment of faculty, affirmative action goals have been largely ignored. Many faculty members have never supported affirmative action in faculty hiring.¹¹⁴ Faculty members control the process of hiring other faculty. With only superficial support of affirmative action among the faculty, affirmative action plans in faculty employment have made little difference.¹¹⁵ No college or university has

1974 to 1980 grew at a slightly higher rate among contractors subject to the Executive Order (1.91 percent per year) than at firms not reviewed by the government's affirmative action requirement (0.62 percent per year). From 1974 to 1980, black male employment grew at the rate of 17% among federal contractors and 12% among non-contractors. Jonathan S. Leonard, *The Impact of Affirmative Action Regulation and Equal Employment Law on Black Employment*, J. OF ECON. PERSPECTIVES, Fall 1990, at 47, 51, 58.

112. *Id.* at 58.

113. The Wall Street Journal studied two years of EEO reports from the 35,242 American companies required to file reports with the EEOC. Among these firms, between the 1990 EEO reports and the 1991 reports, African Americans lost a net of 59,479 jobs. By contrast, Asian Americans and Latinos both made gains: Asian Americans gained a net of 55,104 jobs and Latinos, 60,040 jobs. See Rochelle Sharpe, *Losing Ground: In Latest Recession, Only Blacks Suffered Net Employment Loss*, WALL ST. J., Sept. 14, 1993, at A1. African Americans accounted for 15% of the layoffs at the firms that reduced net employment, but gained only 11.4% of the new jobs at firms that added employees. See *id.* at A14.

114. In a recent survey of faculty at the University of California, only 47% of the faculty supported affirmative action in employment; 39% opposed it. *Survey Finds Little Faculty Consensus on Affirmative Action*, NOTICE, Academic Senate, University of California, Feb. 1996, at 1. The faculty was more supportive of the use of affirmative action in student admissions: 52% were in favor and only 34% were opposed. The faculty opinions, however, were sharply divided along gender lines. In regard to admissions, 73% of the women faculty were in support of affirmative action, but only 47% of the male faculty. See *id.* at 8.

115. At the University of California, women were 27% of the faculty hires from 1984 through 1991. During this period of time, approximately 39% of the Ph.D. pool were women. See West, *Gender Bias*, *supra* note 31, at 88, 150. This comparison between hires and availability indicates discrimination, not affirmative action. For discussion of the University's failure to enforce its affirmative action goals, see *id.* at 161-63.

ever been barred from federal contracts because of race or sex discrimination.¹¹⁶

With such mixed success and with declining public support, perhaps it is time to move away from today's notions of affirmative action as they have developed and expanded since 1965. If affirmative action as we know it ceases to exist, then at a minimum our society will have lost one of its convenient excuses for not doing more about the underlying causes of poverty and discrimination. Without affirmative action programs to assuage white America's conscience, it may be more difficult for our society to continue to ignore its persistent racial and ethnic stratification. We need new efforts to address the more basic issues of racial and ethnic prejudice, gender bias, segregated housing, the lower quality of public education, and the lack of community and economic resources in black and Latino neighborhoods. We need new and more powerful remedies to address continuing segregation and discrimination now and in the next century.

116. *See id.* at 162 n. 365 (citing Valora Washington & William Harvey, ASHE-ERIC Higher Educ. Reps., *Affirmative Rhetoric, Negative Action: African-American and Hispanic Faculty at Predominantly White Institutions* iii, at 50, 72 (1989)).