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Affirmative Action: Purveyor of Preferential Treatment or Guarantor of Equal Opportunity? A Call for a "Revisioning" of Affirmative Action

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Affirmative action is under attack from many quarters and appears to be a policy that will soon be a remnant of late-twentieth century public policy history. The perception is that with respect to employment and education the original goal of the 1964 Civil Rights Act, of guaranteeing equal opportunity regardless of race, color, religion, sex, or national origin, has been poisoned by the "toxin" known as affirmative action. Instead of guaranteeing equality of opportunity, affirmative action, the critics charge, has resulted in preferential treatment for women and minorities and reverse discrimination against Caucasian men.

The major question underlying this Article is whether the kind of affirmative action programs envisioned in Johnson v. Transportation Agency and by Justice Powell in his opinion in Regents of California v. Bakke—in which race and sex are to be used as "plus" factors in admissions and hiring decisions—in actuality promotes equality of condition which inevitably leads to preferential treatment and a lowering of standards, or merely guarantees the equality of opportunity which has long been part of our national heritage. Because issues involving affirmative action in employment and education raise different issues, they need to be addressed separately. The Article focuses on affirmative action in employment.

Title VII's goal was to eliminate discrimination in the work place against members of protected classes. Social scientists have conducted extensive research that has conclusively demonstrated that women and minorities' qualifications are subjected to "discounting," an evaluation that is

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lower simply because the evaluator knows the person's gender or race. This "discounting" denies equal opportunity to women and minorities. Thus, because of the discounting that operates in the subjective evaluations inevitably involved in making the hiring, promotion, and other job-related decisions, guaranteeing equal opportunity involves much more than simply mandating that the decision makers be neutral, or non-prejudiced, in their actions. Eliminating discrimination and guaranteeing equal opportunity require additional action, affirmative action.

The author's conclusion is that affirmative action serves the goal of equality of opportunity rather than that of equality of condition. She calls for a "revisioning" of affirmative action, arguing that we need to clarify our understanding of what it means in reality rather than to "reform" it; otherwise, the reformation could ensure continued discrimination against women and minorities, rather than leading to the stated goal of equal opportunity for all.

INTRODUCTION

> What's important . . . is to base admissions on individual merit and effort, not on group entitlement. . . . [M]any of these gains [by women and minorities] would have come about had society simply ended discrimination by race, sex, ethnicity, and other factors, without creating reverse discrimination against others.[1]

> It is impossible for me to conclude that a preference to some based on race is not a disadvantage, is not discrimination against others.[2]

These two quotations illustrate the seemingly widely held frustration with affirmative action. The perception is that affirmative action is a "toxin" that has poisoned the 1964 Civil Rights Act's[3] original goal of guaranteeing equal opportunity in employment and education regardless of race, color, religion, sex, or national origin. The critics charge, as illustrated in the above quotations, that instead of guaranteeing equality of opportunity,

1. Joan Beck, *Affirmative Action: Time to Move Past It?*, COLUMBUS DISPATCH, July 25, 1995, at A7.

2. Ward Connerly, U. of Cal. Regent, *quoted in* Kit Lively, *Preferences Abolished: U. of California Regents Vote to End Affirmative Action in Hiring and Admissions*, CHRON. OF HIGHER EDUC., July 28, 1995, at A26.

3. 42 U.S.C. § 2000e (1988).

affirmative action has resulted in preferential treatment for women and minorities and reverse discrimination against Caucasian men. The goal, the above quotations suggest, should be equal opportunity—achieved by ending discrimination, but without providing preferential treatment to anyone. The perception that affirmative action has violated the equal opportunity ideal, by giving preferential treatment to some and thereby causing reverse discrimination against others, has eroded support for affirmative efforts to erase discrimination. Moreover, this perception has needlessly stigmatized women and minorities who oftentimes are viewed as unqualified beneficiaries of affirmative action both in educational institutions and in the work place.[4]

The equal opportunity ideal has a long and rich tradition in the United States. Indeed, one commentator has described "equal opportunity" as "the most distinctive and compelling element of our national ideology."[5] Our conception of equal opportunity, however, does not mean equality of condition; rather, it means that individuals should be permitted to advance based on their merit and not be hindered by artificial distinctions made on non-relevant criteria such as, for example, social class and status.[6] With civil

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4. Those who argue that affirmative action has led to the hiring of less qualified women and minorities suggest in their argument that prior to affirmative action the "most qualified" person was always hired. However, this argument ignores the fact that oftentimes there is no single most qualified candidate, but rather several well-qualified candidates, each of whom may bring a slightly different set of traits to the position. Citing an amicus brief submitted by the American Society for Personnel Administration, Justice Brennan noted:

> [I]t is a standard tenet of personnel administration that there is rarely a single, "best qualified" person for a job. An effective personnel system will bring before the selecting official several fully-qualified candidates who each may possess different attributes which recommend them for selection. Especially where the job is an unexceptional, middle-level craft position, without the need for unique work experience or educational attainment and for which several well-qualified candidates are available, final determinations as to which candidate is "best qualified" are at best subjective.

Johnson v. Transportation Agency, 480 U.S. 616, 641 n.17 (1987).

5. DOUGLAS RAE ET AL., EQUALITIES 64 (1981).

6. The definition of "relevant criteria" is also an important issue. How we define relevant criteria plays a critical role in determining who is qualified for a particular job. Many would argue that in a workforce where women and minorities are underrepresented, being a woman or a member of a minority group does bring something of value to the job because of the different life experiences and thus should be considered relevant criteria. *See* TAYLOR COX, JR., CULTURAL DIVERSITY IN ORGANIZATIONS: THEORY, RESEARCH, AND PRACTICE 27-36 (1993). The definition of relevant criteria also is infused with subjectivity. As one author has noted, "Merit is what the victors impose. . . . Those in power always make that which they do best the standard of merit." Richard Delgado, *Rodrigo's Tenth Chronicle: Merit and Affirmative Action*, 83 GEO. L.J. 1711, 1746 (1995). Feminist scholars reject the entire concept of "objectivity." As Ann C. Scales has noted:

> Feminist psychology suggests different conceptions of value: women are entirely rational, but society cannot accommodate them because the male standard has defined into oblivion any version of rationality but its own. Paradigmatic male values, like objectivity, are defined as exclusive, identified by their presumed opposites. Those values cannot be content with multiplicity; they created the other and devour it. Objectivity ignores context; reason is the opposite of emotion; rights preclude care.

Ann C. Scales, *The Emergence of Feminist Jurisprudence: An Essay*, *in* FEMINIST LEGAL THEORY FOUNDATIONS 40, 44 (D. Kelly Weisberg ed., 1993).

rights statutes, we have added various other criteria—notably, race, color, religion, sex, national origin, age, and disability—to our list of distinctions that should be considered irrelevant.[7] However, critics of affirmative action charge that we have allowed our civil rights laws to be used to distort the national ideology of equal opportunity into one of equality of result, which, they further charge, leads to reverse discrimination and a lowering of standards.[8]

The major question underlying this article is whether the kind of affirmative action programs envisioned in *Johnson v. Transportation Agency*[9] and by Justice Powell in his opinion in *Regents of University of California v. Bakke*[10]—in which race and sex are to be used as "plus" factors in admissions and hiring decisions—actually promote equality of condition, which inevitably leads to preferential treatment and a lowering of standards, or merely guarantee the equality of opportunity that has long been part of our national heritage. Because issues involving affirmative action in employment and education raise different issues, they need to be addressed separately. This article focuses on affirmative action in employment. My conclusion, based both on studies of discrimination conducted by social scientists and on how the law regarding affirmative action has developed, is that affirmative action does, indeed, serve the goal of equality of opportunity and not equality of condition. I call for a "re-visioning" of affirmative action. We need to clarify our understanding of what affirmative action actually means rather than "reform" it; otherwise, the reformation could

7. *See* 29 U.S.C. § 623 (1994) (prohibiting age discrimination in various employment practices); 29 U.S.C. § 794 (1994) (prohibiting disability discrimination by federal agencies and any programs or activities receiving federal financial aid); 42 U.S.C. § 2000e-2 (1994) (prohibiting discrimination based on race, color, religion, sex, or national origin in various employment practices); 42 U.S.C. § 12112(a) (1994) (prohibiting employment discrimination based on a qualified individual's disability).

8. Some would argue that we should utilize the equality of result standard which can be based on objective standards, rather than the equality of opportunity standard which allows for too much subjectivity. *See* Richard Delgado, *Review Essay: Rodrigo's Fourth Chronicle: Neutrality and Stasis in Antidiscrimination Law*, 45 STAN. L. REV. 1133, 1147-52 (1993). However, the purpose of this essay is not to analyze this issue or even to examine what might be the ideal approach to eliminating discrimination in employment. Rather, the focus of this essay is a more narrow one: to examine whether "plus factor" affirmative action plans do indeed provide a preference to women and minorities.

Much has been written on affirmative action in the last two decades. Just during the first half of 1996 the following articles appeared: Barbara Bader Aldave, *Affirmative Action: Reminiscences, Reflections, and Ruminations*, 23 S.U. L. REV. 121 (1996); Donald L. Beschle, *"You've Got to be Carefully Taught": Justifying Affirmative Action After* Croson *and* Adarand, 74 N.C. L. REV. 1141 (1996); Patricia A. Carlson, Adarand Constructors, Inc. v. Pena: *The Lochnerization of Affirmative Action*, 27 ST. MARY'S L.J. 423 (1996); Karen B. Dietrich, *Federal Affirmative Action After Adarand Constructors, Inc. v. Pena*, 74 N.C. L. REV. 1259 (1996); Russell L. Jones, *Affirmative Action: Should We or Shouldn't We?*, 23 S.U. L. REV. 133 (1996); Richard D. Kahlenberg, *Essay: Getting Beyond Racial Preferences: The Class-Based Compromise* , 45 AM. U. L. REV. 721 (1996); Winston Riddick & Patricia Riddick, *Overview of United States Supreme Court Affirmative Action Decisions in Race and Gender Cases: 1980-1995*, 29 S.U. L. REV. 107 (1996); Kenneth L. Shropshire, *Merit, Ol' Boy Networks, and the Black-Bottomed Pyramid*, 47 HASTINGS L.J. 455 (1996).

9. 480 U.S. 616 (1987).

10. 438 U.S. 265 (1978).

ensure continued discrimination against women and minorities, rather than lead to the stated goal of equal opportunity for all.

This article first provides a brief discussion of the legislative goals for the 1964 Civil Rights Act as well as a brief review of the level of progress for women and minorities that occurred during approximately the first decade after Title VII's effective date in 1965.[11] Next, the essay provides a brief history of the development of affirmative action law.[12] The essay then discusses some of the recent social science research findings on discrimination. Finally, the essay analyzes the "plus factor" legal standard established in *Johnson v. Transportation Agency* within the context of the social science studies and concludes that, at least in theory, the "plus factor" type of affirmative action plan merely guarantees equality of opportunity rather than providing preferential treatment to ensure equality of result.

I

LEGISLATIVE GOALS OF THE 1964 CIVIL RIGHTS ACT

After months of debate, Congress passed the 1964 Civil Rights Law. President Lyndon B. Johnson signed it on July 2, in a ceremony that was preceded by a national television address by the President. In his address President Johnson described the legislative intent as follows:

> The purpose of this law is simple. It does not restrict the freedom of any American so long as he respects the rights of others. It does not give special treatment to any citizen. It does say the only limit to a man's happiness and for the future of his children shall be his own ability.[13]

In an editorial the *New York Times* described the law's purpose as having "objectives [that] are fundamental. The new law seeks to do away with the whole edifice of discriminatory practices and customs that in many parts of the country have put the Negro in a disadvantaged position."[14] Together these statements suggest two goals of the Civil Rights Act: first to create equal opportunity and second to eliminate discrimination based on one's membership in certain groups in society.

These statements were consistent with the congressional debates on the Civil Rights Act.[15] Although the 1964 Civil Rights Act created five pro-

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11. The purpose of this article is not to provide a comprehensive overview of the legislative history or a comprehensive analysis of the level of progress. For these types of works *see infra* note 15.

12. Again, the purpose is not to provide a comprehensive treatment of the law's development. For that see Don Munro, *The Continuing Evolution of Affirmative Action Under Title VII: New Directions After the Civil Rights Act of 1991*, 81 VA. L. REV. 565 (1995); Glen D. Nager, *Affirmative Action After the Civil Rights Act of 1991: The Effects of a 'Neutral' Statute*, 68 NOTRE DAME L. REV. 1057 (1993); Robert A. Sedler, *Employment Equality, Affirmative Action, and the Constitutional Political Consensus*, 90 MICH. L. REV. 1315 (1992).

13. *Johnson's Address on Civil Rights Bill*, N.Y. TIMES, July 3, 1964, at 9.

14. *A National Victory*, N.Y. TIMES, July 3, 1964, at 20.

15. For detailed accounts of the legislative history of the 1964 Civil Rights Act see ROBERT D. LOEVY, TO END ALL SEGREGATION: THE POLITICS OF THE PASSAGE OF THE CIVIL RIGHTS ACT OF 1964

tected classes, the debates on the bill focused on the racial disparities in U.S. society. Senator Hubert Humphrey of Minnesota, the Senate Majority Whip and one of the chief proponents of the bill, opened the debate on Title VII by providing a statistical comparison of the status of whites and nonwhites in the work force. The unemployment rate for nonwhites was twice that of whites; 17% of nonwhite workers held white collar jobs, while 47% of white workers held white collar jobs; nonwhites who had professional or technical training were employed in jobs that utilized those skills at a rate 10% lower than for whites with those skills; nonwhite college graduates earned only half as much in their lifetimes as white college graduates; and, nonwhites with college degrees earned less over their lifetimes than did whites who had completed only the eighth grade.[16] With respect to women, the two major employment issues in 1964 were the lack of access to white collar, upper level positions and the wage gap between men and women. Indeed, the average woman worker at the time made only 60 percent of the salary of the average male worker.[17]

The debates on the Civil Rights Act do indicate that its goal was to provide equal opportunity, as the critics of affirmative action suggest.[18] However, the supporters of the Act clearly understood that equal opportunity would not be achieved through a simple mandate. Rather, the country would need to eradicate the discrimination that had created inequality in opportunity in order to achieve true equality of opportunity, as was reflected in the comments of Senator Williams of New Jersey:

> We do not pretend that passage of this civil rights bill will eliminate discrimination overnight. Bad habits die hard. Bad attitudes die even harder. Many people cling tenaciously to the rigid belief that the mainstream of our society should be closed to an entire race. It is a difficult matter, indeed, to replace early formed, irrational attitudes of prejudice with the sensible dictates of reason.[19]

Thus, the supporters of the Civil Rights Act understood that equal opportunity could be achieved only through the elimination of discrimination. The end goal, then, was equal opportunity; the means to achieve that goal was the elimination of discrimination.

(1990); CHARLES WHALEN & BARBARA WHALEN, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT (1985); *See also*, Francis J. Vaas, *Title VII: Legislative History*, 7 B.C. INDUS. & COM. L. REV. 431 (1966) for the background of the equal employment opportunity legislative history.

16. *See* KATHANNE W. GREENE, AFFIRMATIVE ACTION AND PRINCIPLES OF JUSTICE 35 (1989).

17. *See* SUSAN M. HARTMANN, FROM MARGIN TO MAINSTREAM: AMERICAN WOMEN AND POLITICS SINCE 1960, at 48-56 (1989) (discussing women's employment issues in the early 1960s).

18. Such statements are found throughout the various accounts of the legislative history. *See supra* note 15.

19. 110 Cong. Rec. 14, 335 (1964).

The Supreme Court concurred in this interpretation of the Civil Rights Act's goal. In *Griggs v. Duke Power Co.* the Court described the legislative intent as follows:

> The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees . . . . What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.[20]

Equal opportunity would be achieved by removing the barriers created by discrimination.

Critics of affirmative action likely would not disagree with these goals. As the opening quotes to this essay indicate, critics do support the concept of equal opportunity and they do agree that discrimination needs to be eliminated in order to attain that equal opportunity. The disagreement between proponents and opponents of affirmative action focuses on how to eliminate discrimination. Is merely prohibiting discrimination sufficient, or does additional action need to be taken? Progress achieved during the immediate years after the passage of the Civil Rights Act, during which time the use of affirmative action was not widespread except with government contracts, provides some evidence on this issue.

II
PROGRESS IN ELIMINATING DISCRIMINATION

Statistics show that Title VII had a mixed impact during its first decade. For racial minorities, the percent employed in white-collar jobs grew by 4.6% from 1964 to 1973.[21] This was a modest gain, but nevertheless a gain, although many of these white-collar jobs were clerical rather than managerial or administrative.[22]

However, for racial minorities who were at the bottom of the economic scale, conditions did not improve. One of the concerns raised during the 1964 debates was that the unemployment rate for African Americans had consistently been double that of whites.[23] The explanation for much of this

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20. 401 U.S. 424, 429-31 (1971).

21. Stephen L. Cohen & Kerry A. Bunker, *Subtle Effects of Sex Role Stereotypes on Recruiters' Hiring Decisions*, 60 J. APPLIED PSYCHOL. 566, 566 (1975) (citing U.S. Labor Department data).

22. THE STATE OF CIVIL RIGHTS, 1976: A REPORT OF THE UNITED STATES COMMISSION ON CIVIL RIGHTS 13 (1977) (breaking down employment data by job type).

23. *See* CIVIL RIGHTS: EXCERPTS FROM THE 1961 UNITED STATES COMMISSION ON CIVIL RIGHTS REPORT 10 (1961) ("Nonwhites have consistently experienced unemployment rates at least double those of whites."); FOSTER R. DULLES, THE CIVIL RIGHTS COMMISSION: 1957-1965, at 141 (1968) ("unemployment during the years of economic recession at the close of the 1950's was twice as high among Negroes as among whites, and this unhappy circumstance continued even as the country's economy gradually righted itself.")

disparity was that technological changes had reduced the supply of unskilled jobs and that, because African Americans had been denied equal educational opportunities, many were unqualified for semi-skilled and skilled jobs.[24] The 1971 census figures indicated that this disparity had not changed since the passage of the Civil Rights law: nonwhites experienced a 10% jobless rate while for whites it was 5.4%.[25] Nor did the disparity lessen by the mid-1970s. In 1976, a subcommittee of the Senate Judiciary Committee presented a report that focused on the progress in attaining equal opportunity in employment during the period since the enactment of the 1964 Civil Rights Act.[26] By June 1976, at which time the nation had begun recovering from the severe recession of 1974-75, the unemployment rate for African Americans was 13.3%, but was only 6.8% for whites.[27]

In addition, as of 1971 one-third of all African American families, as opposed to one-tenth of white families, had incomes that placed them below the official poverty line.[28] Further, the dollar gap for median family income in 1971, although it had narrowed somewhat from 1960 to 1971, still remained significant with white families having a median income of $10,236 and African American families $6,516.[29] By 1975, minority family median income was still only 62 percent of family medium income for whites.[30]

Thus, the 1976 Senate Judiciary subcommittee report concluded, "the legal revolution of the 1960s has failed to bring tangible benefits to the great majority of black people mired most deeply in poverty."[31] With the exception of a small gain for the middle class, the law had little impact on integrating African Americans into the economic mainstream.

During the first decade after the passage of the Civil Rights Act, the progress achieved for women generally was comparable to the progress of African Americans. However, women at the managerial level experienced far less progress than did African Americans. From 1964 to 1973 the percent of women employed in white collar jobs increased by only 1.8%.[32] Moreover, the salary gap between men and women actually deteriorated during this period. In 1955 women earned 64 percent of the average male wage; in 1965 the figure was 60 percent, and by 1975 it had dropped to 58 percent.[33] These statistics indicated that the "legal revolution of the 1960s"

24. *See* Dulles, *supra* note 23, at 200 (1968); 3 UNITED STATES COMMISSION ON CIVIL RIGHTS, 1961 COMMISSION ON CIVIL RIGHTS REPORT: EMPLOYMENT 6 (1961).

25. STAFF OF SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS OF SENATE COMM. ON THE JUDICIARY, 94th Cong., Civil Rights 15 (Comm. Print 1976) [hereinafter SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS].

26. *See id.*

27. *Id.* at 114.

28. *Id.* at 15.

29. *Id.*

30. UNITED STATES COMMISSION ON CIVIL RIGHTS, THE STATE OF CIVIL RIGHTS, 1976, 14 (1977).

31. SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS, *supra* note 25, at 15.

32. Cohen & Bunker, *supra* note 21, at 566.

33. UNITED STATES COMMISSION ON CIVIL RIGHTS, *supra* note 30.

had not benefitted women economically any more than it had benefitted racial minorities.

A 1977 report by the United States Civil Rights Commission concluded that "[d]evelopments affecting the employment position of minorities and women in 1977 were generally discouraging."[34] For the year 1977 the unemployment rate for African Americans grew to more than the traditional two to one ratio with 13.9% of African Americans unemployed as compared to 6.2% for whites.[35] The median average income for African American families was only 60% of that of white families for the year 1976.[36] The poverty rate for African Americans continued to be three times greater than for whites.[37] For women, the wage gap continued.[38] Both groups continued to be underrepresented in managerial and administrative white collar jobs.[39]

It appears, then, that merely prohibiting discrimination had no significant impact on the employment problems that had faced minorities and women at the time the 1964 act was passed. Bill McCulloch, the senior Republican on the House Judiciary Committee during the debates on the Civil Rights bill, and a supporter of the bill, had cautioned after the bill was signed that "'no statutory law can completely end discrimination. Intelligent work and vigilance by members of all races will be required for many years before discrimination completely disappears.'"[40] By the mid-1970s it began to appear that the intelligent work and vigilance that McCulloch called for would require more than simply making discrimination illegal; additional actions, affirmative actions, also would be necessary.

III
DEVELOPMENT OF AFFIRMATIVE ACTION

Within the employment context the origins of affirmative action can be traced to John F. Kennedy's March 1961 Executive Order 10925 which required federal contractors both to "take affirmative action" to ensure they were not discriminating in employment on the basis of race or national origin and to provide statistical reports to the government on work force profiles.[41] Subsequent to that order some two hundred fifty federal contractors adopted voluntary affirmative action compliance programs whereby they agreed to change their employment practices in order to ensure equal

34. UNITED STATES COMMISSION ON CIVIL RIGHTS, THE STATE OF CIVIL RIGHTS, 1977, 1 (1978).
35. *Id.* at 1.
36. *Id.* at 2.
37. *Id.*
38. *Id.*
39. *Id.*
40. WHALEN & WHALEN, *supra* note 15, at 228.
41. Exec. Order No. 10,925, 3 C.F.R. 448 (1959-1963); HERMAN BELZ, EQUALITY: A QUARTER CENTURY OF AFFIRMATIVE ACTION TRANSFORMED 18 (1992).

opportunity.[42] Lyndon B. Johnson issued another executive order, Number 11246, following the passage of the 1964 Act, which again required federal contractors to take affirmative action in employment.[43] The premise of affirmative action, as expressed in that executive order, was that positive action involving preferential treatment, rather than merely "benign neutrality," was necessary to address the systemic, institutionalized discrimination that needed to be overcome before true equal employment opportunity could exist.[44]

Although some private businesses began voluntarily adopting affirmative action hiring plans during the 1960s, it did not come to be widely used and did not garner significant national attention until the mid- to late-1970s.[45] It was at this time that businesses began adopting affirmative action programs as a defensive measure to ward off pattern and practice lawsuits.[46] It was also at this time that the U.S. Supreme Court entered the fray and began defining the legalities of affirmative action.

The Supreme Court's initial interpretation of Title VII, as reflected in the 1971 *Griggs* decision,[47] the 1973 *McDonnell Douglas Corp v. Green* case,[48] and the 1976 opinion in *McDonald v. Santa Fe Trail Transportation Co.*,[49] was that the law required total neutrality of treatment. In *Griggs* the Court, describing the neutrality requirement, stated that, "the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any groups, minority or majority, is precisely and only what Congress has proscribed."[50] Two years later, in *McDonnell*, the Court described Title VII as requiring "fair and racially neutral employment and personnel decisions."[51] The Court reaffirmed the neutrality standard in 1976 in *McDonald*: "Title VII tolerates no racial discrimination, subtle or otherwise."[52] In none of these cases, however, did the Court address the issue of the legitimacy of affirmative action programs.

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42. BELZ, *supra* note 41, at 19.

43. Exec. Order No. 11,246, 3 C.F.R. 339 (1964-65); QUOTAS AND AFFIRMATIVE ACTION 1 (Lester A. Sobel ed., 1980).

44. CLINTON L. DOGGETT & LOIS T. DOGGETT, KNOW YOUR GOVERNMENT: THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION 88-89 (1990) (citing Exec. Order No. 11,246, 3 C.F.R. 339).

45. BELZ, *supra* note 41, at 147.

46. United Steelworkers v. Weber, 443 U.S. 193, 209 n.9 (1979).

47. 401 U.S. 424 (1971) (holding invalid an employer's high school diploma requirement under the disparate impact theory).

48. 411 U.S. 792 (1973) (holding that if plaintiff establishes a prima facie case of discrimination, the burden of proof shifts to the employer to show a legitimate, non-discriminatory reason for the employment decision).

49. 427 U.S. 273 (1976) (holding that Title VII protects all races, including the Caucasian race, from discrimination based on race).

50. 401 U.S. at 430-31.

51. 411 U.S. at 801.

52. 427 U.S. at 281 n.8.

The Court did address affirmative action programs in *University of California v. Bakke*.[53] Although this was not an employment case under Title VII, but an educational admissions case based on the equal protection clause and Title VI of the 1964 Civil Rights Act, it provided the first evidence that the Court was shifting away from the total neutrality standard enunciated in *Griggs*, *McDonnell*, and *McDonald*. The University of California at Davis medical school developed an affirmative action plan that reserved sixteen of its one hundred admissions for minority students. Alan Bakke, a white male, sued for reverse discrimination after he was denied admission to the school even though his qualifications were stronger than those of some of the minority students admitted through the plan's quota system. The Court, in upholding Bakke's claim, concluded that rigid quotas did violate the equal protection clause.[54]

The significance of this case, however, is that the Court did move away from the strict neutrality standard established in its earlier cases. Although the case resulted in three separate opinions, none of which was supported by a majority of the court, five of the justices did conclude that race and ethnic origin could be considered by educational institutions in making admissions decisions.[55] Indeed, four of the justices concluded that such consideration was necessary in order to provide equal opportunity: "The Court today, in reversing in part the judgment of the Supreme Court of California, affirms the constitutional power of Federal and State Governments to act affirmatively to achieve equal opportunity for all."[56]

Further, these same four justices concluded that no finding of actual discrimination by the educational institution was necessary to justify the adoption of an affirmative action plan. Rather, such plans could be justified by the goal of eliminating societal discrimination because, "the central meaning of today's opinions [is that] Government may take race into account when it acts not to demean or insult any racial group, but to remedy disadvantages cast on minorities by past racial prejudice."[57]

Because a majority of justices in the *Bakke* case agreed only on the very narrow issue that race could be considered as a "plus" factor in admissions decisions, the various opinions failed to provide solid guidance on the law of affirmative action. However, one year later the Court did provide such guidance in *United Steelworkers v. Weber*.[58]

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53. 438 U.S. 265 (1978).

54. *Id.* at 305, 319-20.

55. *Id.* at 320, 325-26 (Powell, J., judgment of the Court, Brennan, White, Marshall and Blackmun, JJ., concurring in the judgment and dissenting in part).

56. *Id.* at 325 (Brennan, White, Marshall and Blackmun, JJ., concurring in the judgment and dissenting in part).

57. *Id.*

58. 443 U.S. 193 (1979).

The *Weber* case presented the same type of reverse discrimination argument in the employment setting as had the *Bakke* case in the educational setting. In 1974, the United Steelworkers of America and Kaiser Aluminum negotiated a new collective bargaining agreement. In response to pending Title VII charges against the union for race and sex discrimination, the Steelworkers and Kaiser included an affirmative action plan in their agreement. The plan, designed to increase the numbers of minorities in the skilled craft workforce, provided that the trainee positions for each craft training program would be divided equally between African American and Caucasian workers.[59] Trainees traditionally had been selected from the current unskilled workforce, based on seniority. Because African American workers on average had less seniority than Caucasian workers, they were underrepresented in the skilled workforce. For example, in 1974, at the Grammercy, Louisiana Kaiser plant where the plaintiff Brian Weber was employed, African Americans were 39 percent of the relevant labor market, but only 14 percent of the total work force at the Kaiser plant and a mere 1.83 percent of the skilled craft workers at the plant. The Kaiser/United Steelworkers' affirmative action plan was designed to correct this racial imbalance. The plan would terminate once the percent of African American skilled workers equaled the percent of African American workers in the relevant labor market.[60]

Weber, who had sufficient seniority under the pre-1974 system to be selected for a craft training class, but who was denied admission because of the operation of the affirmative action plan, sued for reverse discrimination.[61] Weber argued, successfully in the lower courts, that Title VII banned any kind of voluntary preference based on race in the absence of evidence of actual past discrimination. Thus, he argued, the voluntary affirmative action program was illegal.[62] Both Kaiser and the United Steelworkers defended voluntary affirmative action plans, arguing that they should be able to take remedial action in order to avoid lawsuits that might result in court-ordered affirmative action plans.[63] Indeed, the company argued that permitting voluntary affirmative action plans in situations where the composition of the workforce did not reflect the composition of the relevant labor market, even in the absence of evidence of actual discrimination, was the only means of reconciling Title VII's prohibition on considerations of race with Executive Order 11246's requirement that employers

59. In addition to the factual summary contained in the decision itself, see BELZ, *supra* note 41, at 157-73 (discussing the affirmative action plan).

60. 443 U.S. at 197; BELZ, *supra* note 41, at 158-59.

61. 443 U.S. at 199-200.

62. *Id.* at 200.

63. *Id.* at 210-11.

take affirmative action to ensure a representative racial composition in their workforce.[64]

Based on the *Griggs*, *McDonnell*, and *McDonald* decisions, one would have expected the Supreme Court to invalidate the Kaiser/United Steelworkers' affirmative action plan. However, by a five to two majority, the Court upheld the plan. Justice Brennan, writing for the majority, defined the issue narrowly: does Title VII permit private employers and unions to voluntarily give preferences based on race in order "to eliminate manifest racial imbalances in traditionally segregated job categories."[65] In responding in the affirmative, the Court adopted the reasoning of the four-member opinion issued in *Bakke*. By doing so, the Court reconciled Title VII and Executive Order 11246 by concluding that where a manifest racial imbalance is present in a workforce, societal discrimination in general rather than a showing of actual employer discrimination is sufficient justification for a voluntary private employer plan involving racial preferences.[66] The Court also established general guidelines for affirmative action plans. Such plans would be acceptable if they were designed to correct for manifest racial imbalances, did not unnecessarily restrict the rights of Caucasian employees, did not completely prohibit the ability of Caucasian workers to be hired, and would last only until the manifest racial imbalance was corrected.[67]

Legal scholar Herman Belz described the *Weber* decision as the defining moment in the emergence of "[t]he essential character of affirmative action ideology."[68] Permitting the use of societal discrimination as the underpinning for affirmative action plans for workforces that did not match the racial composition of the relevant labor market, Belz concluded, transformed Title VII from a law that protected individuals from discrimination into a law that provided preferential treatment to individuals because they were members of certain groups, even in the absence of evidence that those individuals had suffered actual discrimination.[69] In his concurring opinion in *Johnson v. Transportation Agency*,[70] Justice Stevens acknowledged that prior to 1978 in interpreting Title VII the Supreme Court had "unambiguously endorsed the neutral approach."[71] However, in the 1978 *Bakke* decision and the 1979 *Weber* decision, Stevens asserted, "a majority of the Court interpreted the anti-discriminatory strategy of the statute in a fundamentally different way."[72]

64. *Id.* at 209 n.9, 210-11.
65. *Id.* at 197.
66. *Id.* at 204.
67. *Id.* at 208.
68. BELZ, *supra* note 41, at 166.
69. *Id.* at 167.
70. 480 U.S. 616, 642 (1987).
71. *Id.* at 643.
72. *Id.* at 644.

The change in the Court's interpretation could not be attributed to a change in personnel. The justices remained unchanged from the *McDonald* case through *Bakke* and *Weber*. In the 1976 *McDonald* decision, all nine justices supported the neutrality approach to Title VII—race could not be considered in any way by employers.[73] Two years later, in 1978, with the *Bakke* decision, five of the justices now were willing to allow race to be considered in admissions decisions, although they did not agree on how or under what circumstances race could be a 'plus' factor.[74] One year later, in the 1979 *Weber* case, five justices supported the affirmative action plan that reserved 50% of the apprentice training slots for minority employees.[75] Powell, who had supported the use of race as a 'plus' factor in the *Bakke* decision, did not participate in the *Weber* case.[76] Stewart, who dissented in the *Bakke* case, voted with the majority in *Weber*.[77] Thus, over a three-year period, six of the justices had changed their interpretation of Title VII, in Justice Steven's words, "in a fundamentally different way"; they now supported affirmative action preferences rather than neutrality.

Because of the importance of certainty, stability, and predictability in the law, the Court has long heralded *stare decisis* as one of its most valued principles.[78] Why, then, in a period of only three years did six of the justices discard the neutrality principle that had guided the Court's deliberations? Speculation on judicial motivation remains just that: speculation. However, the *Weber* decision does provide a clue as to what may have motivated the change in interpretation. The major focus of the Court's opinion, written by Justice Brennan, was understanding congressional intent in passing the 1964 Civil Rights Act. Brennan noted that the legislative history indicated that Congress' primary concern in enacting the 1964 Civil Rights Act was the "'plight of the Negro in our economy.'"[79] The goal of the Civil Rights Act, the Court concluded, was the "integration of blacks into the mainstream of American society."[80] However, the Court observed that "[t]he problem that Congress addressed in 1964 remains with us. In 1962, the nonwhite unemployment rate was 124% higher than the white rate . . . . In 1978, the black unemployment rate was 129% higher."[81] Thus, the Court recognized that during the fifteen years since the Civil

73. 427 U.S. 273 (1976) (The nine justices who participated in the decision were Marshall, Brennan, White, Blackmun, Powell, Stevens, Burger, Stewart, and Rehnquist).

74. *See supra* note 55.

75. 443 U.S. 193 (1979).

76. *See id.*

77. *See id.*

78. Johnson v. Texas, 509 U.S. 350, 352-53 (1993) (noting "the customary respect for the doctrine of stare decisis"); Planned Parenthood of Southeastern PA v. Casey, 505 U.S. 833, 846, 854-55 (1992).

79. 443 U.S. at 202 (quoting Cong. Rec. 6548 (1964) (remarks of Sen. Humphrey)).

80. *Id.*

81. *Id.* at 204 n.4.

Rights Act had been passed, very little progress had been made toward attaining the goal of the Civil Rights Act.

The Court's conclusion that little progress had occurred for equal employment opportunity since 1964 is consistent with the data that was beginning to become part of the public debate, as indicated by the previously discussed congressional reports that detailed this lack of progress.[82] Considering both the lack of progress and the legislative history of the 1964 Civil Rights Act, it appears that the six justices who were now willing to discard the neutrality principle did so because they concluded that the principle simply had not worked and that some type of affirmative action on the part of employers was necessary to ensure equality of opportunity. The Court stated that "[g]iven this legislative history, we cannot agree with respondent that Congress intended to prohibit the private sector from taking effective steps to accomplish the goal that Congress designed Title VII to achieve."[83]

While the *Weber* case did provide some guidance to employers on when they could give voluntary preferences on the basis of race, it left open the question of whether preferences could be given to members of other protected classes. In 1987 the Court gave its sanction to voluntary affirmative action plans for women, and presumably for all protected classes as well, in *Johnson v. Transportation Agency*.[84] In this case, Santa Clara County, California had adopted an affirmative action plan after it concluded that benign neutrality was not promoting equal opportunity for women and minorities: "'mere prohibition of discriminatory practices is not enough to remedy the effects of past practices and to permit the attainment of an equitable representation of minorities, women and handicapped persons.'"[85] However, unlike the *Weber* plan, Santa Clara County's affirmative action plan "set aside no specific number of positions for minorities or women, but authorized the consideration of ethnicity or sex as a factor when evaluating qualified candidates for jobs in which members of such groups were poorly represented."[86] Thus, race or sex could be considered a "plus" factor in making hiring decisions.

Santa Clara County employee Paul Johnson, a Caucasian male, was denied a promotion that went to a woman, Diane Joyce, even though Johnson had scored slightly ahead of Joyce on the overall point tally.[87] Joyce was given the promotion because the consideration of her gender as a plus factor moved her to the head of the list.[88] Johnson sued on the basis of

82. *See supra* notes 21-39 and accompanying text.
83. 443 U.S. at 204.
84. 480 U.S. 616 (1987).
85. *Id.* at 620 (quoting App. to Pet. for Cert. 31).
86. *Id.* at 622.
87. *Id.* at 625.
88. *Id.*

reverse discrimination for violations of both Title VII and the equal protection clause because the employer was a government agency. The Supreme Court denied both Johnson's constitutional claims and his Title VII claims. Again, the Court determined that manifest imbalances in the workforce were sufficient to justify affirmative action plans, and that no evidence of actual discrimination need be shown.[89]

Just as in *Weber*, the *Johnson* decision provided guidelines that employers had to follow for affirmative action plans which considered race or sex as a plus factor. The *Johnson* decision continued the requirements adopted in *Weber*: the plans must be designed to eliminate manifest imbalances in the workforce, need not be based on evidence of actual past discrimination, must not unnecessarily restrict the rights of other workers, must not completely prohibit the ability of other workers to be hired or promoted, and must end once the manifest imbalance has been corrected.[90] In addition, in the *Johnson* case the Court added another criteria: before the plus factor could be considered for a particular candidate, that candidate must first have been deemed "qualified" for the job using the traditional criteria to determine qualifications.[91]

Although since 1987 the Court has issued a variety of decisions dealing with set-asides, *Weber* and *Johnson* remain the current law, as interpreted by the Supreme Court, on affirmative action plans within the employment context.[92] However, the set-aside cases have muddied the waters regarding the legality of affirmative action employment plans. The *Weber/Johnson* standard permitted the use of societal discrimination as a justification for using the plus factor affirmative action plans. The Supreme Court in *Richmond v. J.A. Croson Co.*[93] and *Adarand Constructors, Inc. v. Pena*[94] held that preferences in government set-aside plans could not be justified based on mere past discrimination or societal discrimination. Rather, evidence of actual discrimination or present effects of past discrimination must be shown in order to justify the use of preferences.[95] Thus, the Court adopted a strict scrutiny standard of review for government set-aside plans.

While these decisions dealt with set-aside issues, at least one circuit court has held that the strict scrutiny standard enunciated in these cases

89. *Id.* at 637. *See infra* notes 137-154 and accompanying text for a detailed discussion of the case.

90. *Id.* at 630-31, 637-39.

91. *Id.* at 654-56 (O'Connor, J., concurring).

92. For set-aside cases see Adarand Constructors Inc. v. Pena, 115 S. Ct. 2097 (1995); Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

93. 488 U.S. 469 (1989).

94. 115 S. Ct. 2097 (1995).

95. The Court noted in *Croson* that "the sorry history of both private and public discrimination in this country, . . . standing alone, cannot justify a rigid racial quota in the awarding of private contracts." 488 U.S. at 499.

applies to all types of government affirmative action plans. In holding the University of Texas law school affirmative action plan unconstitutional, the Fifth Circuit in *Hopwood v. Texas* interpreted *Adarand* as holding that all race-based classifications, regardless of their context, must be subjected to the strict scrutiny standard.[96] Because the Supreme Court declined to review the case[97] the impact of the decision is limited to the Fifth Circuit. In addition, constitutional issues were determinative in the set-aside cases and the *Hopwood* case. Thus, it is uncertain whether courts will apply the same standard and require that private employers show evidence of actual discrimination or present effects of past discrimination to justify their affirmative action plans. In any event, the Supreme Court's decision not to enter the fray is certain to lead to increased litigation and increased attacks on affirmative action programs in all contexts, including affirmative action in employment. Thus, societal discrimination as a justification for the plus factor affirmative action plans in employment is in jeopardy.

IV
SOCIAL SCIENCE STUDIES ON SOCIETAL DISCRIMINATION

The two major criticisms of the *Weber/Johnson* criteria that pervaded the pre-*Adarand* and pre-*Hopwood* commentary on affirmative action focused on the Court's decision to permit societal discrimination to provide the legal basis for preferential treatment. First, the critics charged that permitting plans based on societal discrimination against groups rather than on evidence of actual discrimination against individuals transforms Title VII from a law designed to protect individual rights and equal opportunity into a law that protects "group rights" and "equality of result."[98] Second, according to the critics, *Weber/Johnson* type affirmative action plans—indeed affirmative action plans in general—permit less qualified individuals who are members of preferred groups to attain employment or promotions. Critics argued that this focus on groups rather than on individuals—and thus on equality of result rather than on equality of opportunity—sacrifices the interests of better qualified individuals simply because they are not members of those preferred groups.[99]

Both proponents and opponents of societal discrimination-based affirmative action appear to assume that individuals who are members of the groups which have suffered from societal discrimination are less qualified for a given job or promotion because of that discrimination. Preferential treatment, under this view, is a form of retribution for past sins, as well as a

96. Hopwood v. Texas, 78 F.3d 932, 941 (1996).

97. Texas v. Hopwood, 116 S. Ct. 2581 (1996).

98. *See, e.g.*, BELZ, *supra* note 41, at 234.

99. *See, e.g.*, the opening quotations for this article.

technique for achieving equality of result.[100] This debate, then, focuses on the impact that societal discrimination has had on the qualifications of members of protected groups. The assumption is that affirmative action gives preferences to less qualified individuals, who are less qualified because of societal discrimination. And, it is this focus that gives rise to the reverse discrimination claim that less qualified individuals are receiving benefits because of their group membership. What this debate fails to recognize, however, as studies from the social sciences show, is that societal discrimination is a much more complex phenomenon and that it also has an impact on *how* the qualifications of members of protected groups are judged by those making the hiring decisions.

Before courts reject societal discrimination as a basis for affirmative action in employment, they need to examine the social science studies regarding societal discrimination. Title VII's goal was to eliminate discrimination in the work place against members of protected classes. However, because of the subtle prejudices that operate in the subjective evaluations inevitably involved in making the hiring, promotion, and other job-related decisions, eliminating discrimination involves much more than simply mandating that the decision makers be neutral, or non-prejudiced, in their actions.

In his book *Cultural Diversity in Organizations*, organizational behavior specialist Taylor Cox, Jr., whose work focuses on cultural diversity in the workplace, defines *prejudice* as a *bias in attitude* toward a person based on that person's group identity.[101] *Discrimination* is a *bias in behavior* toward a person based on prejudice against that person.[102] Within the context of his discussion on prejudice and discrimination, Professor Cox discusses the social science research on stereotyping. Stereotyping is a normal part of the way in which people cope with the world.[103] We use stereotypes to simplify the world and to make "perceptual and cognitive processes more efficient."[104] Research has shown, Cox asserts, that "stereotyping is a pervasive human tendency and that in socially diverse settings, people routinely process personal information through mental filters based on social categories."[105] We use stereotypes to assign to particular individuals "specific behavior traits . . . on the basis of their apparent membership in a group."[106] Generally, stereotypes "enhance perceptions, interpretations, and memories that are consistent with stereotypical attributes and obscure,

100. *See, e.g.*, William H. Chafe, *Providing Guarantees of Equal Opportunity*, CHRON. HIGHER. EDUC., June 30, 1995, at B1; Beck, *supra* note 1.

101. TAYLOR COX, JR., CULTURAL DIVERSITY IN ORGANIZATIONS: THEORY, RESEARCH, AND PRACTICE 64, 64 (1993).

102. *Id.*

103. *Id.* at 88.

104. *Id.*

105. *Id.*

106. *Id.*

diffuse, or cause us to disregard or forget information that is inconsistent with them."[107]

Stereotyping can lead to discrimination if prejudice exists against the group to which the individual belongs. Thus, even if two individuals are alike, we may see them as different if they belong to different groups.[108] Indeed, numerous studies show that the prejudice/stereotyping/discrimination continuum does operate against groups of people based on their gender, age, race, ethnicity, nationality, or physical ability.[109] A 1989 study from Michigan compared treatment of Caucasians and Hispanics in obtaining rental units. Trained testers from both groups submitted identical qualification materials to twenty housing sites. Thirteen of these sites discriminated in favor of the Caucasian applicants.[110] Numerous studies conclude that an individual's physical attractiveness also shapes others' reactions and perceptions of that person.[111]

Researchers also have found that college students' teacher evaluations are affected by the instructor's gender. In a study published in 1987, the findings were that "male students gave female professors significantly poorer ratings than they gave male professors on the six teaching evaluation measures. . . . Female students also evaluated female professors less favorably than male professors on three measures."[112] Indeed, research shows

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107. Florence L. Geis, *Self-Fulfilling Prophecies: A Social Psychological View of Gender* 9, 12 *in* THE PSYCHOLOGY OF GENDER (Anne E. Beall & Robert J. Sternberg eds., 1993) (citations omitted).

108. *Id.*

109. COX, *supra* note 101. *See also* James E. Haefner, *Race, Age, Sex, and Competence as Factors in Employer Selection of the Disadvantaged*, 62 J. APPLIED PSYCHOL. 199 (1977); Mary B. McCrae, *Sex and Race Bias in Employment Decisions: Black Women Considered*, 28 J. EMPLOYMENT COUNSELING 91 (1991); Cynthia M. Marlowe, et al., *Gender and Attractiveness Biases in Hiring Decisions: Are More Experienced Managers Less Biased?*, 81 J. APPLIED PSYCHOL. 11 (1996); Linda K. Stroh, et al., *All the Right Stuff: A Comparison of Female and Male Managers' Career Progression*, 77 J. APPLIED PSYCHOL. 251 (1992).

110. COX, *supra* note 101, at 73-74.

111. *Id.* at 67.

112. Susan A. Basow & Nancy T. Silberg, *Student Evaluations of College Professors: Are Female and Male Professors Rated Differently?*, 79 J. EDUC. PSYCHOL. 308, 308 (1987). A study conducted in 1996 by psychologists at Weber State University showed similar biases. In this study, the 400 students in an introductory psychology class were divided into four classes of 100 each and sent to separate classrooms. They were told that their professor was ill that day and that they would listen to an audio taped lecture. Posted at the front of each classroom was the picture of the person the students were told was the lecturer on the audiotape. The pictures in each of the four rooms differed: one was a middle-aged white male, one a younger white male, one a middle-aged white woman, and the final one was of a younger white woman. The same male voice was used on the audiotape for the rooms with the two male pictures and the same female voice was used on the tape for the rooms with the female pictures. The identical lecture, which was scripted and read by professional actors, was presented in the four rooms. At the conclusion of the lecture, the students were told that the university was considering hiring the lecturer. The students were then asked to provide written evaluations of the lecturer's teaching effectiveness, including the content of the lecture. The middle-aged male was rated as an excellent teacher who definitely should be hired. The younger male was rated as a good teacher who should be considered for the position. The middle-aged woman was rated as barely competent and the younger woman was rated as totally incompetent who under no circumstances should be hired. Presumably, the students'

that females suffer such disparate evaluations from nursery school through college and that this disparate treatment continues when they join the labor market. It appears that "[t]he differential treatment begins early in life. Consistent with the stereotypes, males are treated as more important and more competent. Discriminatory treatment advantaging males has been found in nursery schools, elementary schools, and college classrooms."[113]

Numerous studies also indicate that the prejudice/stereotyping/discrimination continuum operates in the employment context. A 1990 survey of 241 U.S. CEOs showed that "80 percent believed there are identifiable gender-related barriers to the success of women in organizations and 81 percent of that group stated that the principal barriers are stereotyping and perceptions about women."[114] In a study conducted by Professor Cox, fifty middle and senior level managers at a Fortune 500 company were interviewed. Eighty percent of these managers believed that group membership such as race, ethnicity, and gender influenced employees' work experiences.[115] Several studies conclude that sex role stereotyping operates to favor women for female sex-typed jobs, but to disadvantage women for male sex-typed jobs.[116]

Research further shows that the prejudice/stereotyping/ discrimination continuum operates at a sub-conscious level. In a study published in 1986, forty-eight mid-level managers, 25% of whom were female, were asked to evaluate four fictitious employees as part of their participation in an MBA class.[117] The resumes of the fictitious employees reported "identical level of work success derived from identical causes."[118] Two of the resumes bore women's names and two bore men's names. For each of the four resumes the managers were asked to assess each candidate's level of work success, evaluate each candidate for promotion and salary increase purposes, and finally to rank order the four resumes. The research results showed that the "males were consistently ranked higher than the females,"[119] and that there was no significant difference in the way the female managers ranked the employees versus the way the male managers ranked them.[120] Thus, the author concluded, "the present study highlights the per-

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stereotypes regarding gender and age had influenced their evaluations. Telephone interview with Julianne Arbuckle, Assistant Professor of Psychology at Weber State University, Ogden, Utah.

113. Geis, *supra* note 107, at 18.

114. Cox, *supra* note 101, at 81.

115. *Id.*

116. Madeline E. Heilman, et al., *The Vagaries of Sex Bias: Conditions Regulating the Undervaluation, Equivaluation, and Overvaluation of Female Job Applicants*, 41 ORGANIZATIONAL BEHAVIOR & HUMAN DECISION PROCESSES 98, 98 (1988); Mary B. McRae, *Influence of Sex Role Stereotypes on Personnel Decisions of Black Managers*, 79 J. APPLIED PSYCHOL. 306, 306 (1994).

117. Asya Pazy, *The Persistence of Pro-Male Bias Despite Identical Information Regarding Causes of Success*, 38 ORGANIZATIONAL BEHAVIOR & HUMAN DECISION PROCESSES 366, 369 (1986).

118. *Id.* at 368.

119. *Id.* at 366

120. *Id.* at 373.

sistence of the pro-male bias. . . . [K]nowledge of performers' sex affects evaluation and treatment. . . ."[121] Another researcher, a psychologist, reached a similar conclusion:

> Studies of organizations tell the same story of increasingly egalitarian conscious attitudes but continuing discriminatory treatment. In most organizations of all types, women are less likely to be hired for nontraditional jobs—including professional and managerial positions—than are men with identical qualifications. When women are hired, they receive a lower salary than equally qualified men doing the same job. On the job, women are given less support, authority, autonomy, credence, and resources.[122]

Many studies show similar biases based on stereotypes. In a study published in 1989, two hundred and sixty-eight male managers receiving management training were given a 92-item attribute inventory that measured their perceptions of traits of "successful middle managers," "men," and "women."[123] This study replicated an earlier study that had been conducted in 1973.[124] The 1973 study found a "strong concurrence between the ratings of men and the ratings of successful managers, and only a weak concurrence between the ratings of women and the ratings of successful managers."[125] Thus, these male managers did not believe that women in general possessed the qualities essential to be a successful manager. The results from the 1989 study "closely paralleled those of the earlier study, indicating that men in general still are described as more similar to successful managers than are women in general."[126] Thus, the authors of the 1989 study concluded, very little had changed since 1973:

> [T]he implications of our results seem quite straightforward. The longitudinal aspect of the study suggests that assumptions of progress as a result of social, legal, and organizational changes are unwarranted: today's male managers persist in viewing women in general as far more deficient in the attributes necessary for success as a manager than men in general. Moreover, even with the manager label firmly affixed, women apparently are thought to differ in very important ways from men and successful managers, most notably in their leadership ability and business skill. Thus, these findings make clear that the time has not yet come for the relaxation of procedures and policies that ensure unbiased treatment of women in the workplace. . . . [W]omen still appear to be burdened by perceptions depicting them as unfit for effectively enacting the managerial role—perceptions

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121. *Id.*

122. Geis, *supra* note 107, at 19 (citations omitted).

123. Madeline E. Heilman, et al., *Has Anything Changed? Current Characterizations of Men, Women, and Managers*, 74 J. APPLIED PSYCHOL. 935, 935 (1989).

124. Virginia E. Schein, *Relationships Between Sex Role Stereotypes and Requisite Management Characteristics Among Female Managers*, 60 J. APPLIED PSYCHOL. 340, 340 (1973).

125. *Id.*; Heilman, *supra* note 123, at 935.

126. Heilman, *supra* note 123, at 935.

that, if allowed free reign, will no doubt have extremely costly consequences for their career progress.[127]

In research conducted for the Urban Institute, job audits were conducted in several U.S. cities.[128] These audits, conducted in 1989-1990, involved young male Caucasian and minority auditors, posing as job applicants with identical credentials, applying for the same entry-level jobs.[129] This study concluded that 36% of the African American applicants were treated in a discriminatory way: they experienced "difficulty in obtaining the employment application, had to wait substantially longer before being interviewed, or [were] offered a position inferior to that offered to [their] audit partner."[130]

Stereotypes, then, are powerful forces operating in the work place. Indeed, the Supreme Court recognized the existence of just such stereotype discrimination in the 1989 *Price Waterhouse v. Hopkins* case.[131] Ann Hopkins charged that Price Waterhouse had denied her a partnership because she did not conform to the stereotype of women's behavior, even though she had an outstanding work record.[132] Some of the partners who evaluated Hopkins for partnership status objected to her because she was "macho," needed "a course at charm school," and needed to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."[133]

One issue in the case was the legitimacy of the psychological evidence regarding the existence of sex stereotyping that Hopkins had presented at trial. In its decision, the Supreme Court sanctioned the use of sex stereotyping evidence to support the claim of a Title VII violation:

> As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for "[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."[134]

In the amicus brief it filed in *Price Waterhouse*, the American Psychological Association ("APA") noted that extensive research that "satisfies the

127. *Id.* at 942.

128. James J. Heckman & Peter Siegelman, *The Urban Institute Audit Studies: Their Methods and Findings*, *in* CLEAR AND CONVINCING EVIDENCE 165-68 (Michael Fix & Raymond J. Struyk eds., 1992).

129. Michael Fix *et al.*, *An Overview of Auditing for Discrimination*, *in* CLEAR AND CONVINCING EVIDENCE, *supra* note 128, at 19.

130. *Id.* at 23.

131. 490 U.S. 228 (1989).

132. *Id.* at 235.

133. *Id.*

134. *Id.* at 251. For a discussion of the psychological evidence used in this case, as well as the *amicus curiae* brief submitted in the case by the American Psychological Association *see* Susan T. Fiske, et al., *Social Science Research on Trial: Use of Sex Stereotyping Research in Price Waterhouse v. Hopkins*, 46 AM. PSYCHOL. 1049 (1991).

essential criteria for general scientific acceptance" had been done with respect to sex stereotyping to determine how people's perceptions about men and women "influence their social behavior."[135] The APA asserted that stereotypes "create the foundation for discriminatory behavior" and "[w]hether realized or not, stereotypic beliefs create expectations about a person before that person is encountered and lead to distorted judgments about behavior."[136] The APA's brief further noted that these extensive studies have shown the existence of discrimination based on stereotyping:

> A multitude of studies has shown that providing precisely the same information about job qualifications or job performance and merely varying the identity associated with the information as either male or female leads to differential and negative evaluations for the woman or her work. This is true when women apply for jobs or seek promotions once on the job.
>
> When an individual first seeks entry into an organization, because of the visibility of sex as an attribute, sex stereotypes are apt to be a predominant element in decision making. The attributes ascribed to women are not those believed essential for work success, *e.g.* achievement orientation, and, thus, 'sex discrimination has been repeatedly demonstrated in employee selection processes,' . . . most particularly when women apply for traditionally male positions. Not only are males judged preferable to females and evaluated more favorably in selection deliberations, but they are likely to be offered higher starting salaries and higher level positions. . . .
>
> Once on the job, sex-stereotypic attributes bias the evaluation of women's work performance. Women's achievements are perceived in a way which fit with stereotypic ideas regardless of whether facts about an individual woman objectively support the perception. As a result, accomplishments by women are significantly more likely to be discounted than the same accomplishments by men because the successful performance of women is attributed to ephemeral or unstable causal factors. Performance of women in traditionally male jobs is very often devalued simply because they are women. . . .[137]

The above provides merely a sampling of studies that show how stereotyping based on prejudice leads to discrimination against individuals because they are members of certain groups. Because of the nature of such studies, unless express statements are made as in *Price Waterhouse*,[138] it is often difficult to determine in the employment context whether such discrimination has occurred in a hiring, promotion, salary, or other employment-related decision with respect to a specific individual. However, the research demonstrates that with respect to groups, such discrimination occurs on a fairly widespread basis.

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135. Fiske, et al., *supra* note 134, at 1063.

136. *Id.* at 1064.

137. *Id.* at 1065-66.

138. *See supra* notes 131-33 and accompanying text.

The debate over whether Title VII should address group discrimination and not just individual discrimination becomes particularly relevant because of the nature of the stereotype discrimination that operates against groups.[139] The existence of stereotype discrimination, which is based on perceptions of groups, suggests that if we are to guarantee equality of opportunity the law must address both group discrimination and individual discrimination. If we address only individual discrimination then we are leaving unprotected those individuals who are victims of the subtle, unexpressed stereotype discrimination which the social science research proves exists. As the next section demonstrates, the "plus" factor affirmative action plan as approved in *Johnson v. Transportation Agency*[140] is particularly well-suited to deal with subtle, unexpressed stereotype discrimination.

V

PLUS FACTOR AFFIRMATIVE ACTION PLANS

The facts in the *Johnson* case provide a case study showing how the plus factor affirmative action plan is well-suited to deal with stereotype discrimination.[141] In 1970, Diane Joyce began working in the clerical pool for Santa Clara County Transportation Agency.[142] Joyce remained in the clerical force until 1975 when she was selected for a road maintenance job, considered a male job.[143] In her new position, Joyce's co-workers greeted her with substantial hostility.[144] For example, while she was learning to drive one of the pieces of maintenance equipment the co-workers continually changed the instructions on what to do to master the operation of the equipment.[145] The unit refused to issue her the work coveralls issued to all of the men; she received the coveralls only after she filed a union grievance.[146] While the crew was out working on the roads her foreman refused to let her leave the site to use a women's restroom, telling her "You wanted a man's job; you learn to pee like a man." Joyce was screamed at in staff meetings, told to "go the hell away," and was called a "pig."[147]

After four years on the road crew, Joyce decided that she would prefer one of the higher paying skilled crafts jobs with the agency and she applied

139. For a discussion of the subjectivity involved in applying equal opportunity versus the objectivity involved in using equality of results as the goal see Richard Delgado, *Review Essay: Rodrigo's Fourth Chronicle: Neutrality and Stasis in Anti-Discrimination Law*, 45 STAN. L. REV. 1133 (1993).

140. 480 U.S. 616 (1987)

141. For the facts in the case *see Johnson*, 480 U.S. at 620-26; *see also*, Susan Faludi, *Diane Joyce*, Ms. MAGAZINE, Jan. 1988, at 62.

142. 480 U.S. at 623.

143. *Id.*

144. *Id.* at 624 n.5.

145. *Id.*

146. *Id.*

147. *See*, Faludi, *supra* note 141, at 91.

for a road dispatcher job.[148] Even though Santa Clara County had an affirmative action plan, it had not produced any change in the gender composition of the Transportation Agency's workforce: at the time Joyce applied for the skilled crafts job, none of the Agency's 238 skilled craft positions were held by women, while 76% of the clerical and secretarial positions were held by women.[149]

Nine out of twelve applicants for the road dispatcher jobs were found to be qualified for the position and had interviews with a two-person board.[150] A score of seventy or higher on this interview meant that an applicant was considered "eligible" for selection to the road dispatcher position by the Director of the Agency.[151] Despite an additional stage of interviews with three agency supervisors and the numerical ranking of the "eligible" applicants, the Director of the agency could select any "eligible" applicant for the position.[152] Johnson placed second on the oral test and Joyce placed third, with a two point spread between them.[153] At the time the interviews were held both Johnson and Joyce held the same position with the county, that of Road Maintenance Worker II. The seven candidates then were interviewed by a three-person panel of road superintendents, all of whom were male.[154] Run-ins had occurred in the past between two of the male panelists and Joyce.[155] During the court proceedings, one of the panelists described Joyce as "a rebel-rousing, skirt-wearing person" who was not a lady.[156] The panel ranked Johnson first for the position and Joyce second.[157]

Prior to the interview with the panel, Joyce had contacted the County's affirmative action office expressing fears that her application would not be treated objectively.[158] They, in turn, contacted the Transportation Agency's affirmative action office.[159] After the panel recommended Johnson, the Agency director met with the head of the dispatcher unit to inquire why Johnson had been selected rather than Joyce.[160] The unit head responded that he did not choose Joyce because "I hate her."[161] The Agency director then overruled the decision and awarded the job to Joyce.[162] Johnson then

148. 480 U.S. at 623.
149. *Id.* at 620-21.
150. *Id.* at 623.
151. *Id.* at 623-24.
152. *Id.*
153. *Id.*
154. *Id.* at 624 n.5.
155. *Id.*
156. *Id.*
157. *Id.* at 625.
158. *Id.* at 624.
159. *Id.*
160. *Id.*
161. *See* Faludi, *supra* note 141.
162. 480 U.S. at 625.

filed a reverse discrimination lawsuit claiming that because he ranked higher than Joyce on both the oral test and the interview, he should have received the position. The Court disagreed, holding that because Joyce was considered qualified for the job, and because the criteria for affirmative action plans as established in *Weber* had been met, her gender could be used as a plus factor that would move her ahead of Johnson.[163]

Just as in *Price Waterhouse*, it appears that evidence of actual discrimination based on sex stereotypes was operating in the evaluation of Diane Joyce for the road dispatcher position. Based on the intense hostility with which Diane Joyce was treated while occupying a traditionally male job, and based on the hostility directed at her by two of the three members of the interview panel, it seems highly likely that Joyce's evaluation from the interview panel was lower than it would have been had she been a man. The plus factor could be viewed merely as correcting for this bias. The plus factor, then, may not have provided Joyce with a preference, but may merely have permitted her an opportunity to be considered for the dispatcher position without the handicap of the stereotype bias. The plus factor would operate to provide the same type of correction in cases of discounting arising from sub-conscious stereotyping.

VI

SOCIAL SCIENCE STUDIES ON THE QUALITY ISSUE

The social science research also addresses the quality issue regarding affirmative action hires. Although not as much research has been done on the issue of whether the use of affirmative action has resulted in hiring less qualified workers who bring inefficiencies to the workplace and thereby lower productivity, the preliminary research that has been done suggests that in fact this has not been the result. A study published in 1995 examined the impact of a manufacturing company's adoption of an affirmative action plan on the company's productivity.[164] The company adopted the plan, which contained hiring and promotion goals aimed at increasing the number of African American workers in its blue-collar work force, as part of a settlement of a suit brought against it by the EEOC for Title VII violations.[165] At the same time the company adopted the plan in the early 1980s, both domestic and international competition for the products it produced intensified. Thus, the company was faced with both affirmative action challenges and competitive challenges.[166] From 1983, when the affirmative action plan was adopted, to 1984, the company increased its African American blue collar workforce significantly, with one plant in-

163. *Id.* at 641-42.

164. M.V. Lee Badgett, *Affirmative Action in a Changing Legal and Economic Environment*, 34 INDUS. REL. 489 (1995).

165. *Id.* at 491.

166. *Id.* at 497.

creasing its African American workforce sevenfold.[167] To meet the new competitive challenges, throughout the mid-1980s the company reorganized its work processes and initiated training programs to re-skill its workforce.[168] Because both the affirmative action efforts and the retraining and reorganizing efforts were occurring at the same time, it is impossible to separate the impact of the two programs. However, during the 1980s the company was able to dramatically improve its productivity and it significantly strengthened its competitive position.[169] Thus, the study's author concluded, this company showed that it is possible to successfully pursue both equal opportunity compliance and market competitiveness at the same time.[170] The results of this study support the conclusion that affirmative action hires do not hinder workplace productivity, which further suggests that such hires do not lower the quality of the workforce.

Similar conclusions have been reached by two economists who studied the qualifications of affirmative action hires versus non-affirmative action hires for a representative sample of over 800 employers located in four major metropolitan areas in the United States.[171] The goal of this study was to investigate whether minority and/or female workers hired under affirmative action procedures are less qualified than white males or than minority or female workers hired in firms that do not use such procedures.[172] To measure qualifications, the study examined educational attainment, skill requirements for the jobs for which they were hired, and "a variety of outcome measures that are presumably related to worker performance on the job."[173] The study concluded that there was no evidence of lower educational qualifications among the women hires, although there was some evidence of lower educational qualifications among the African American and Hispanic hires.[174] More importantly, the study found little evidence of substantially weaker job performance among most groups of minority and female affirmative action hires.[175] A third study, conducted by a political scientist attempting to measure the impact of affirmative action hiring on company productivity, reached similar results.[176] This study quantifies the financial costs of affirmative action. It compared financial performance

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167. *Id.* at 494.

168. *Id.* at 498-99.

169. *Id.* at 499-500.

170. *Id.* at 489.

171. Harry Holzer & David Neumark, *Are Affirmative Action Hires Less Qualified? Evidence from Employer-Employee Data on New Hires*, NATIONAL BUREAU OF ECONOMIC RESEARCH, INC., WORKING PAPER SERIES, No. 5603 (1996).

172. *Id.* at 3.

173. *Id.* at 8.

174. Of course, this difference could be explained by the differences in educational opportunities available for these various groups.

175. Holzer & Neumark, *supra* note 171, at 31.

176. Liz McMillen, *Policies Said to Help Companies Hire Qualified Workers at No Extra Cost*, CHRON. OF HIGHER EDUC., Nov. 17, 1995, at A7. This article contains a report on research conducted by

over the period from 1975 to 1987 of the 100 largest businesses in Chicago and examined the linkage between a company's performance and the racial composition of the workforce. Over this time period, the study found no statistically significant relationship between the financial performance of companies with a large percentage of minority workers and those with a low percentage of minority workers. The study concluded that there is no economic cost to affirmative action and hence one could conclude that affirmative action did not result in the hiring of less qualified workers.[177]

Although much more research needs to be done on the issue of the qualifications and the impact of affirmative action hires before conclusive results can be reached, this preliminary research suggests that the "lowering quality" argument may have no validity. In addition, we need to consider whether the entire argument that affirmative action lowers quality is simply a manifestation of the impact of negative stereotypes, rather than a reflection of reality.

VII
CONCLUSION

> Government cannot make us equal; it can only recognize, respect and protect us as equal before the law.[178]

During the debates on the 1964 Civil Rights bill, Senator Williams noted that because "bad habits die hard," and "bad attitudes die even harder," eliminating discrimination would be no easy task.[179] "It is a difficult matter," the Senator stated, "to replace early formed, irrational attitudes of prejudice with sensible dictates of reason."[180] Social science research on stereotyping, thirty years after the passage of the 1964 Civil Rights Act, shows the accuracy of Senator Williams' prediction. We still have a long way to go in replacing these "early formed, irrational attitudes of prejudice."[181]

Social science research shows that one significant barrier to reducing discrimination is negative stereotypes. Even thirty plus years after our nation adopted a non-discrimination policy via the 1964 Civil Rights Act, negative stereotypes continue to plague women and members of minority groups. One of the most significant impacts of stereotyping within the employment context is that it produces a discounting effect where members of protected classes who apply for jobs that members of their group traditionally have not held are rated lower solely because of their group identity. If

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political scientist Major G. Coleman of the State University of New York at Buffalo for his doctoral dissertation. Dr. Coleman currently is preparing the dissertation for publication.

177. *Id.*

178. Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2119 (1995)(Thomas, J. concurring).

179. *See supra* note 19 and accompanying text.

180. *Id.*

181. *Id.*

we truly are to provide equal opportunity for all people then we need to correct for the negative stereotyping that results in this discounting. Otherwise, women and minorities who are victimized by the negative stereotyping will be denied equal employment opportunity.

Affirmative action plans that allow plus factors for members of groups that are under represented in the employer's workforce do correct for any discounting that occurs. Moreover, allowing plus plans to operate even in the absence of evidence of actual discrimination, but where a manifest imbalance exists in the employer's workforce, permits for the correction of subconscious bias that the social science research shows is pervasive in the job evaluation process. Thus, instead of providing a preference, the plus factor merely provides for fair and equitable consideration for all people by counterbalancing the irrelevant factors that are part of stereotypes.

In addition, the plus factor generally must operate on a group basis rather than an individual basis. In most cases it would be difficult, if not impossible, for an individual applicant to prove that discounting had occurred in a particular employment context. Social science studies are able to show the existence of discounting in the job context by examining groups of applicants with identical credentials. In the actual job context, it is rare to find applicants with identical credentials. Moreover, particularly for employers where women or minorities are underrepresented in the workforce in comparison to the relevant labor market—which is one of the required criteria before the *Weber/Johnson* plus factor affirmative action plan can operate—it is reasonable to assume that discounting has contributed to this under representation. Thus, it is reasonable and supportive of the goal of equality of opportunity to apply a plus factor on a group basis to correct for this unfair discounting.

Policy makers must consider the social science studies before they dismantle plus factor affirmative action plans, particularly since the preliminary evidence suggests that affirmative action does not lower the quality of the workforce or the work produced. If we do dismantle affirmative action, then how are we to eliminate the impact of stereotypes and guarantee the goal that the critics of affirmative action support—equal opportunity for all people? These studies suggest that instead of dismantling it because it results in reverse discrimination and the hiring of less qualified workers, we need to re-vision affirmative action as merely providing for equality of opportunity for all peoples. Indeed, these studies show that affirmative action is necessary not to "make us equal," but to "protect us as equal before the law." We must re-vision affirmative action, then, as it actually is: a guarantor of equal opportunity rather than a purveyor of preferential treatment.