Ruth Bader Ginsburg†

Former Associate Justice, Supreme Court of the United States

Deborah Jones Merritt*

John D. Drinko-Baker & Hostetler Chair
The Ohio State University College of Law

AFFIRMATIVE ACTION: AN INTERNATIONAL HUMAN RIGHTS DIALOGUE**

Benjamin N. Cardozo Lecture***

ABSTRACT

The Universal Declaration of Human Rights is one of the first international instruments urging states to take specific action to ensure equality. Throughout the years, Ruth Bader Ginsburg had been a leading activist for women's rights and equality. The present article, - which is based on a lecture delivered by Justice Ginsburg in 1999 with respect to affirmative action, its international legal grounds, as well interesting practice on this matter in the USA, India and the European Union, - analyzes the problems existing by the end of the last century, and addresses relevant challenges and practical approaches.

Even though some progress has been made with respect to the right to equality and affirmative action throughout the last 20 years, equality between men and women has not yet been achieved. Currently, this topic is particularly relevant to the Georgian context, given that the country has implemented one of the strongest and arguably the most controversial affirmative actions – mechanism of quotas for ensuring political representation. The article provides an overview of practice regarding affirmative action aiming to eliminate gender-based discrimination, as well as discrimination on some other grounds.

---

* The authors acknowledge with appreciation the thoughtful review and assistance of Justice Ginsburg's 1998 Term law clerk, William Savitt.

*** Cardozo Lecture given by Justice Ginsburg at the Association of the Bar of the City of New York on February 11, 1999.

This article emphasizes international legal grounds for affirmative action. Oftentimes, laws supposedly aiming to "protect" women do not appeal to them, but rather restrict competition for men. Accordingly, when assessing gender-based affirmative action, we should distinguish those genuinely aiming to remedy historical disadvantages from those that nourish myths and stereotypes, thereby preventing women from achieving their full potential.****

INTRODUCTION

December 10, 1998 marked the fiftieth anniversary of the United Nations Universal Declaration of Human Rights. I thought it appropriate, in recognition of that anniversary, to select for this lecture a subject that touches and concerns main themes of the Universal Declaration. My topic is affirmative action, as anchored in the Universal Declaration, as the idea unfolded in the United States, and as the concept is employed elsewhere in the world.

This Association's members, in the 1990s, have renewed endeavors to act affirmatively, as counseled by the Committee to Enhance Diversity in the Profession and affiliated committees. The Association's ongoing efforts are trained on trying issues – the retention and promotion, by law firms and corporate legal departments, of minority and female lawyers.[1] Affirmative action is currently among the more vigorously debated human rights issues, and this Association's efforts may be closely watched by critics and skeptics as well as participants and their supporters.

The Universal Declaration of Human Rights encompasses both civil or political rights and economic or social rights. Affirmative action stands at the intersection of these two complementary categories. Affirmative action aims to redress historic and lingering deprivations of the basic civil right to equality, the legacy of slavery in the United States, for example, or of the caste system long entrenched in India. It was also conceived as a means to advance the economic and social well-being of women, racial minorities, and others born into groups or communities that disproportionately experience poverty, unemployment, and ill health. Focusing on affirmative action, we may better comprehend how the two classes of rights (civil and economic), though once and still set apart by politicians, jurists, and scholars, commonly relate to promotion of the health and welfare of humankind.[2]

**** This abstract was drafted by the Editor of the Journal of Constitutional Law.

[1] In addition to monitoring the progress of minority and female attorneys, and setting goals for that progress, the Association has commissioned significant scholarship in this field. See Cynthia Fuchs Epstein et al., *Glass Ceilings and Open Doors: Women's Advancement in the Legal Profession*, 64 FORDHAM L. REV. 291 (1995) (report to the Committee on Women in the Profession, The Association of the Bar of the City of New York); Responses to Glass Ceilings and Open Doors: Women's Advancement in the Legal Profession, 65 FORDHAM L. REV. 561 (1996) (collection of essays responding to Epstein's report); see also Ruth Bader Ginsburg & Laura W. Brill, *Women in the Federal Judiciary: Three Way Pavers and the Exhilarating Change President Carter Wrought*, 64 FORDHAM L. REV. 281, 288-89 (1995) (lecture published as companion to Epstein's report, noting that President Clinton's "highly affirmative action" in appointing women to the federal bench was "not the result of any quota system" but of a concentrated search for qualified candidates; those "appointees achieved higher ABA ratings on average than the less diverse appointees of the three previous administrations").

[2] Two covenants, both adopted by the United Nations in 1966, are designed to implement the Declaration: the

I will begin with a few notes on terminology or definition. I will use primarily the United States expression "affirmative action," but I will also refer to the "reservations" of India and the "positive action" of Europe. Under the heading affirmative action, I would include any program that takes positive steps to enhance opportunities for a disadvantaged group, with a view to bringing them into the mainstream of civic and economic life. The steps may be small and encounter little resistance – for example, advertising job openings in newspapers serving minority communities. Or they may be more radical, costly, and controversial, for example, subsidizing childcare for infants and pre-school children and providing paid parental leave for the weeks immediately after childbirth. Also, in the affirmative action arsenal are the goals, preferences, and quotas that have provoked powerful opposition.

1. THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

I turn first to the foundation document for contemporary human rights discourse, the 1948 Universal Declaration of Human Rights. That document does not mention affirmative action, for at mid-century, the term was not yet in vogue. But the Declaration does contain two intellectual anchors for affirmative action.

First, the Declaration repeatedly endorses the principle of equality. The preamble speaks of "the equal and inalienable rights of all members of the human family," and of "the equal rights of men and women."[3] Article 1 declares that "[a]ll human beings are born free and equal in dignity and rights";[4] Article 2 instructs that "[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind."[5] Reiterating the nondiscrimination principle, Article 7 states that "[a]ll are equal before the law and are entitled without any discrimination to equal protection of the law.[6]

The Declaration aims to ensure that proclamations of equality and other civil rights become more than aspirational. Article 8 states that "[e]veryone has the right to an effective remedy [...] for acts violating the fundamental rights" accorded him or her by the adhering nation's constitution or laws.[7] An "effective remedy," in the context of centuries of discrimination, it

---

Covenant on Civil and Political Rights, which follows the first twenty-one articles of the Declaration, and the Covenant on Economic, Social, and Cultural Rights, which centers on social and economic prescriptions of the Declaration. See International Covenant on Civil and Political Rights, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966); International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc A/6316 (1966); Louis Henkin, *The International Bill of Rights: The Universal Declaration and the Covenants*, in INTERNATIONAL ENFORCEMENT OF HUMAN RIGHTS 1, 6–9, 14–16 (Rudolf Bernhardt & John A. Jolowicz eds., 1985). The United States is a party to the Covenant on Civil and Political Rights, but has not joined the Covenant on Economic, Social, and Cultural Rights. For a discussion of the evolution of economic and social rights after the Declaration, see HENRY J. STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 256–264, 267–268 (1996).

[3] Universal Declaration of Human Rights, preamble, G.A. Res. 217A, U.N. GAOR, 3d Sess., pt. 1, at 71, U.N. Doc. A/810 (1948) [hereinafter cited as UDHR].

[4] *Id*. art. 1.

[5] *Id.* art. 2.

[6] *Id*. art. 7.

[7] *Id*. art. 8. While Article 8 mandates remedies for violations of a nation's constitution or laws, the Declaration

has been forcibly argued, must include at least some modes of positive governmental action. U.S. President Lyndon Johnson so indicated when he famously declared: "You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, 'You are free to compete with all the others.'"[8]

The Universal Declaration might be read to touch as well on the major objection to affirmative action, the concern that it promotes one person's equality at the expense of another's right to the same treatment. Article 29 states: "In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others."[9] If not a clarion statement, this formulation can be read to suggest a place for accommodation, to prevent continued suppression of people whose rights were once denied, dishonored, or ignored.

In addition to the Universal Declaration's commitment to the ideal of equality, the document provides (as I just indicated) a second support for affirmative action, one rooted in social and economic prescriptions. Article 23 declares that everyone has the right to work, including "free choice of employment," "just and favourable conditions of work," "protection against unemployment," and "equal pay for equal work."[10] Article 25 pledges an adequate standard of living, encompassing "food, clothing, housing and medical care and necessary social services."[11] And Article 26 affirms that "[e]veryone has the right to education," provided "free, at least in the elementary and fundamental stages."[12]

These articles suggest that all members of the human community should have the wherewithal to reap the fruits of that community. The provisions do not command that all will share equally, but they do imply that there are minimum levels of employment, education, and subsistence all should have. If a nation finds that citizens of one race – or sex or religion – endure a markedly inadequate standard of living, then Article 25 suggests an obligation to uncover the cause of, and respond to, that endurance. Similarly, if women or members of minority races suffer higher unemployment rates than do members of the dominant group, Article 23 suggests an obligation to ask why that is so, in order to address, and not ignore, the imbalance.

---

no doubt anticipates incorporation of the equality principle into those sources of law.

[8] Lyndon B. Johnson, *To Fulfill These Rights*, in THE AFFIRMATIVE ACTION DEBATE 16, 17 (George E. Curry ed., 1996).

[9] UDHR, *supra* note 3, art. 29(2).

[10] *Id*. art. 23(1); *id.* art. 23(2).

[11] *Id*. art. 25(1). The article also declares the "right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond [the individual's] control." *Id*.

[12] *Id*. art. 26(1). The article also directs that "[t]echnical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit." *Id*. The reference to "merit" in relation to higher education might be read to exclude affirmative action in admission policies. The next section of Article 26, however, suggests that "merit" in the context of higher education might include, among other factors, pursuit of a diverse student population. That section calls for education to "promote understanding, tolerance and friendship among all nations, racial or religious groups." *Id*. art. 26(2); see also *infra* note 58 and accompanying text (noting this portion of Article 26 in connection with Justice Powell's opinion in *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978)).

Consider, for example, this statistical picture of the United States. A 1995 United Nations report estimated that white Americans, if ranked as a separate nation, would lead the world in well-being, a measure that combines life expectancy, educational achievement, and income.[13] African Americans, in contrast, would rank a depressing twenty-seventh worldwide, while Hispanic-Americans would rank even lower at thirty-second.[14] After noting these discrepancies, the authors of the U.N. report observed: "full equality still is a distant prospect in the United States, despite affirmative action policies and market opportunities."[15]

Worldwide comparisons between the status of women and that of men are similarly telling. Women shoulder more than half the world's workload, including the lion's share of unpaid housework and childcare.[16] Yet their wages lag behind those of men in every country, and they hold only fourteen percent of administrative and managerial jobs worldwide.[17] More than seventy percent of our planet's poor are women; women suffer more unemployment than men in every world region; and women outnumber men two-to-one among the 900 million who are illiterate.[18]

If we take seriously the promises of employment, education, and sustenance made in the Universal Declaration of Human Rights, these discrepancies demand affirmative government attention. It seems implausible that such marked differences would occur with no discrimination lurking in the background. (Science has now assured us, for example, that the female is not, as was once widely believed, an imperfect or unfinished male. Women today excel in fields once thought beyond their natural talents. Yet another long-held notion fell last summer when Hungarian Judit Polgár defeated world chess champion Anatoly Karpov in match play.[19]). And even without hard proof of discrimination, as I just noted, the Declaration's economic and social prescriptions suggest an affirmative obligation to address marked degrees of disadvantage.

---

[13] See UNITED NATIONS DEVELOPMENT PROGRAMME, HUMAN DEVELOPMENT REPORT 1995, at 22 (1995). When all U.S. populations are combined, the United States ranks second worldwide – after Canada – on the U.N. well-being scale. *Id*. at 18.

[14] See *id.* at 22.

[15] *Id.*

[16] See *id.* at 87-98. [according to 2020 data, women spend 3 times more in unpaid housework than men. PROGRESS ON THE SUSTAINABLE DEVELOPMENT GOALS, THE GENDER SNAPSHOT 2020, UN Women, UN DESA, 2020, p. 11. Available here: https://www.unwomen.org/-/media/headquarters/attachments/sections/library/publications/2020/progress-on-the-sustainable-development-goals-the-gender-snapshot-2020-en.pdf?la=en&vs=127 {last accessed on November 20, 2020} – Editor's note].

[17] See *id.* at 36-37. [according to 2020 data, women in leadership positions have doubled, yet the number is still low at 28%. PROGRESS ON THE SUSTAINABLE DEVELOPMENT GOALS, THE GENDER SNAPSHOT 2020, UN Women, UN DESA, 2020, p. 11, *supra* note 16 – Editor's note].

[18] See *id.* at 36, 34; see also Remarks by First Lady Hillary Rodham Clinton in Commemoration of the 50th Anniversary of the United Nations General Assembly Adoption and Proclamation of the Universal Declaration of Human Rights (Dec. 10, 1997) <http://www2.whitehouse.gov>. [in 2016 750 adults (2/3 out of them women) were illiterate. UNESCO, Fact Sheet No. 45, September 2017, FS/2017/LIT/45 – Editor's note].

[19] Malcolm Pein, *Chess: Polgar Speeds Past Karpov*, DAILY TELEGRAPH, June 15, 1998, at 22. Polgar is one of three champion chess-playing sisters tutored by their father, Laszlo Polgar. Underscoring the relationship between societal expectations and individual achievement, the senior Polgar refused to allow his daughters to play in women-only tournaments because he believed the lower expectations would hinder their development. *Id.*

In addition to the two anchors for affirmative action – ending equality deprivations and advancing economic well-being – the 1948 Declaration contains a provision some might describe as an affirmative action clause. Article 25, which proclaims the right to an adequate standard of living, also declares that "[m]otherhood and childhood are entitled to special care and assistance."[20] Viewed through one lens, this provision compassionately encourages states to develop special policies protecting the physical and emotional health of mothers and their children.

In my view and experience, however, the language of the provision raises a troubling concern. Patriarchal rules long sequestered women at home in the name of "motherhood," rather than allowing them to integrate parenthood with paid labor. It is not always easy to separate rules that genuinely assist mothers and their children by facilitating a woman's pursuit of both paid work and parenting, from laws that operate to confine women to their traditional subordinate status, and to relieve men of their fair share of responsibility for childraising.[21] Article 25 of the Universal Declaration evokes this tension, which runs throughout discussions of affirmative action for women, without in any way resolving it.[22]

Of more recent vintage, the 1979 Convention on the Elimination of All Forms of Discrimination Against Women,[23] one of several conventions stemming from the Universal Declaration, asserts the state's obligation to protect both parenting *and* women's full workplace participation. Article 5 of that convention first directs states to "take all appropriate measures" to eliminate prejudices underlying the assignment of men and women to stereotyped roles.[24] The same article then calls for education to achieve "recognition of the

---

[20] UDHR, *supra* note 3, art. 25(2).

[21] For an earlier discussion of this problem, see Ruth Bader Ginsburg, *Some Thoughts on Benign Classification in the Context of Sex*, 10 Conn. L. Rev. 813 (1978). See also Frontiero v. Richardson, 411 U.S. 677, 684 (1973) (plurality opinion) ("Traditionally, [...] discrimination [on the basis of sex] was rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage."); Sail'er Inn, Inc. v. Kirby, 485 P.2d 529, 541 (Cal. 1971) (*en banc*) ("The pedestal upon which women have been placed has all too often, upon closer inspection, been revealed as a cage."). For discussions of the same tension in other legal systems, see, for example, Deirdre A. Grossman, *Voluntary Affirmative Action Plans in Italy and the United States: Differing Notions of Gender Equality*, 14 Comp. Lab. L. J. 185 (1993); Carol Daugherty Rasnic, *Austria's Affirmative Action for Women Workers Versus Protective Legislation for the "Weaker Sex": Incongruous Concepts?*, 46 Labor L.J. 749 (1995).

[22] The problem is especially acute in the English language version of the Declaration, which uses the masculine pronoun "he" for universal references. In that version, section one of Article 25 guarantees "[e]veryone [...] the right to a standard of living adequate for the health and well-being of *himself* and of *his* family," while section two offers "[m]otherhood and childhood [...] special care and assistance." UDHR, *supra* note 3, art. 25 [emphasis added].

The gendered pronouns reinforce the notion that men support their families, while women devote their lives to motherhood. The French text avoids this dichotomy: "Toute personne a droit à un niveau de vie suffisant pour assurer sa santé, son bien-être et ceux de sa famille [...]. La maternité et l'enfance ont droit à une aide et à une assistance spéciales."

[23] G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, at 193, U.N. Doc. A/34/46 (1979) [hereinafter cited as CEDAW]. The United States is the only western democracy that has not ratified the Convention. See Malvina Halberstam, *United States Ratification of the Convention on the Elimination of All Forms of Discrimination Against Women*, 31 GEO. WASH. J. INT'L L. & ECON. 49, 50 (1997).

[24] *Id*, art. 5(a).

common responsibility of men and women in the upbringing and development of their children."[25]

Article 11 of the convention prohibits dismissal of pregnant workers and those on maternity leave.[26] The article also directs states to introduce paid maternity leaves; to encourage social services, especially childcare facilities that permit parents to combine work and family life; and to protect pregnant women from harmful working conditions.[27] Somewhat ambivalently, Article 11 accords women a right "to protection of health and to safety in working conditions," including "safeguard[s]" of their reproductive functions.[28] It is not altogether clear that this provision calls upon employers to make the workplace safe rather than to protect a woman's pregnancy or fertility by barring her from well-paid occupations.[29] The article also falls short, in my judgment, in failing to recognize that after the weeks surrounding childbirth, leave for childraising is most neutrally typed parental leave, not maternity leave.

In other provisions, the Convention on the Elimination of All Forms of Discrimination Against Women broadly condemns sex discrimination and directs nations to take positive steps to counter that bias.[30] And Article 4 expressly shields affirmative action programs of the controversial kind; it states that "[a]doption [...] of temporary special measures aimed at accelerating *de facto* equality between men and women shall not be considered discrimination as defined in the [...] Convention."[31] The same article also provides that "special measures [...] aimed at protecting maternity shall not be considered discriminatory."[32]

Preceding the convention on elimination of discrimination against women by fourteen years, the 1965 International Convention on the Elimination of All Forms of Racial Discrimination[33] similarly endorses affirmative action as a means of advancing racial equality. Article 1

---

[25] CEDAW, *supra* note 23. art. 5(b). This section also requires education to develop "a proper understanding of maternity as a social function." *Id.*

[26] See *id.* art. 11(2)(a); see also *infra* notes 88, 129 (describing United States and European Union cases on pregnancy leaves and dismissals).

[27] See CEDAW *supra* note 23, art. 11(2)(b); 11(2)(c); 11(2)(d).

[28] *Id.* art. 11(1)(f).

[29] The United States Supreme Court has interpreted Title VII of the Civil Rights Act, 42 U.S.C. §2000e-2(a) (1994), which bars employment discrimination on the basis of "sex," to prohibit sex-specific fetal protection policies. See International Union, United Auto. Workers v. Johnson Controls, Inc., 499 U.S. 187, 211 (1991). As the Court recognized there: "Concern for a woman's existing or potential offspring historically has been the excuse for denying women equal employment opportunities [...]. It is no more appropriate for the courts than it is for individual employers to decide whether a woman's reproductive role is more important to herself and her family than her economic role." *Id.*

[30] For example, Article 2 "condemn[s] discrimination against women in all its forms," and establishes seven undertakings to end that discrimination. CEDAW, *supra* note 23, art. 2.
Article 3 instructs states to "take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men." *Id.*art.3.

[31] *Id.* art. 4(1). The article stresses the temporary nature of these distinctions: the measures "shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved." *Id.*

[32] *Id.* art. 4(2). This prescription is not limited temporally as are other special measures. See *supra* note 31.

[33] G.A. Res. 2106A, U.N. GAOR, 20th Sess., Supp. No. 14, at 47, U.N. Doc. A/6014 (1965) [hereinafter cited as ICRD]. The United States ratified this convention in 1994. See U.S. DEP'T OF STATE, TREATIES IN FORCE 422-23 (1996) (entered into force for the United States on November 20, 1994).

declares that "[s]pecial measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups [...] shall not be deemed racial discrimination.".[34] Notably, this caveat appears in the convention's very first article, even before the document's direct prohibitions of race discrimination.

The race convention also obligates states to take "special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms."[35] The convention thus positively instructs affirmative action to eliminate racial discrimination, "when the circumstances so warrant."[36]

To recapitulate, the Universal Declaration of Human Rights, read together with two of its associated conventions (the one outlawing racial discrimination, and the one proscribing discrimination against women), indicates that affirmative action is not necessarily at odds with human rights principles, but may draw force from them, in particular, from the prescriptions on equality coupled with provisions on economic and social well-being. I turn next to three legal systems that have endeavored to advance equality and economic security through affirmative action measures.

2. AFFIRMATIVE ACTION IN THE UNITED STATES

Concentrating on the legal system I know best; I will describe first the origin and current situation of affirmative action in the United States. Courts sporadically used the term "affirmative action" in the late nineteenth and early twentieth centuries to describe various remedial steps imposed upon a defendant.[37] The words entered the legal lexicon with their contemporary connotation in 1961. That year, President John F. Kennedy, building on an earlier Second World War prescription, signed an executive order requiring government 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."[38] The order also bound executive departments and agencies to recommend

---

[34] ICRD, *supra* note 33, art. 1(4). Like the protection for gender-based affirmative action, this authority is limited to temporary measures: Racial distinctions are permissible "provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved." *Id.*

[35] *Id.* art. 2(2). This prescription includes a proviso similar to the one in Article 1. The "measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved." *Id.*; see also *supra* note 31.

[36] ICRD, *supra* note 33, art. 2(2).

[37] See, *e.g.*, Taylor v. Taintor, 83 U.S. (16 Wall.) 366, 375 (1872) (extradition treaty with a foreign nation "might require prompt affirmative action" by the government in yielding a fugitive); City of Galena v. Amy, 72 U.S. (5 Wall.) 705, 708 (1866) (city's powers had to "be exercised in favor of affirmative action" to collect sufficient revenue to pay interest promised bondholders); see also Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 188 (1941) (concerning NLRB's statutory authority to take "affirmative action" to "effectuate the policies" of the NLRA). For a more recent recognition of affirmative action as an equitable remedy, see, for example, Franks v. Bowman Transp. Co., 424 U.S. 747, 777-78 (1976).

[38] Exec. Order No. 10925, §301, 3 C.F.R. 448, 450 (1959-1963); see also *id.* §302(d), 3 C.F.R. at 451 (authorizing the President's Committee on Equal Employment Opportunity to obtain pledges of nondiscrimination and

"positive measures for the elimination of any discrimination, direct or indirect, which now exists."[39]

During most of the 1960s, this vigorous language was not pressed heavily into service. Kennedy's Committee on Equal Employment Opportunity attempted to "jawbone" government contractors into hiring more minority workers,[40] and President Johnson added sex to the list of protected classes in 1967,[41] but muscular implementation postdated the Kennedy-Johnson years.

It bears remembrance that affirmative action was shifted into high gear in the United States by Republican officeholders – President Richard Nixon; his Secretary of Labor George Shultz and Assistant Secretary Arthur Fletcher; and then Labor Solicitor Laurence Silberman.[42] In 1969, Nixon's Labor Department issued its Revised Philadelphia Plan, requiring government contractors in that city to set goals and timetables for hiring minority workers in

---

"affirmative [] cooperat[ion]" from labor unions associated with government contract work). Kennedy's order built upon a nondiscrimination order issued by President Franklin Roosevelt during World War II. See Exec. Order No. 8802, 3 C.F.R. 957 (1938-1943). Roosevelt's order prohibited "discrimination in the employment of workers in defense industries or government because of race, creed, color, or national origin" and directed agencies involved with defense production vocational and training programs to "take special measures appropriate to assure that such programs are administered without discrimination because of race, creed, color, or national origin." *Id.* Broad language in the order's preamble, proclaiming "the duty of employers and labor organizations [...] to provide for the full and equitable participation of all workers in defense industries," *id.*, hinted at efforts in the direction of affirmative action but embraced neither those words nor the full concept. For discussion of Roosevelt's order as a source of modern affirmative action, see James E. Jones, Jr., *Twenty-One Years of Affirmative Action: The Maturation of the Administrative Enforcement Process Under the Executive Order 11,246 as Amended*,59 CHI.-KENT L. REV. 67, 70-71 (1982).

[39] Exec. Order No. 10925, §202, 3 C.F.R. 448, 449 (1959-1963). For other language creating positive duties to address discrimination see, for example, *id*. preamble, 3 C.F.R. at 448 ("it is the plain and positive obligation of the United States Government to promote and ensure equal opportunity for all qualified persons, without regard to race, creed, color, or national origin, employed or seeking employment with the Federal Government and on government contracts"); *id.* ("a review and analysis of existing Executive orders, practices, and government agency procedures [...] reveal an urgent need for expansion and strengthening of efforts to promote full equality of employment opportunity"); *id.* §103, 3 C.F.R. at 449 (annual reports by Committee on Equal Employment Opportunity "shall include specific references to the actions taken and results achieved by each department and agency"); *id.*§201, 3 C.F.R. at 449 (Committee shall "consider and recommend additional affirmative steps which should be taken by executive departments and agencies to realize more fully the national policy of nondiscrimination"); *id.* §304, 3 C.F.R. at 451("The Committee shall use its best efforts, directly and through contracting agencies, contractors, state and local officials and public and private agencies, and all other available instrumentalities, to cause any labor union, recruiting agency or other representative of workers who is or may be engaged in work under Government contracts to cooperate with, and to comply in the implementation of, the purposes of this order."); *id.* §307, 3 C.F.R. at 452 (contracting agencies must appoint compliance officers).

[40] See James E. Jones, Jr., *The Genesis and Present Status of Affirmative Action in Employment: Economic, Legal, and Political Realities*, 70 IOWA L. REV. 901, 909 (1985).

[41] See Exec. Order No. 11,375, 3 C.F.R. 684 (1966-1970). Johnson previously had issued an order superseding Kennedy's original order. See Exec. Order No. 11,246, 3 C.F.R. 339 (1964-1965). This order incorporated the substantive parts of Kennedy's order but changed the organizational structure for administering the program. Executive Order 11,246, with the addition of sex as a protected class through Executive Order 11,375, has remained the basis of federal affirmative action programs.

[42] Indicative of change over time and experience in perspectives on the legitimacy of affirmative action, Silberman, now a judge on the United States Court of Appeals for the District of Columbia Circuit, recently authored an opinion striking down Federal Communications Commission regulations that required radio stations to take steps aimed at correcting statistical "underrepresentation" of minorities and women on their payrolls. See Lutheran Church- Missouri Synod v. FCC, 141 F.3d 344 (D.C. Cir. 1998).

six construction trades.[43] Contractors who failed to comply risked loss of their valuable contracts. The plan served as a model for imposing affirmative action requirements on other government contractors; subsequent orders also included goals to expand the employment of women.

Nixon's decision to require goals and timetables to break away from historic practices, including trade union nepotism, generated controversy.[44] The program survived both public criticism and legal challenges in the 1970s, I believe, for two reasons. First, the plan did not impose rigid quotas on government contractors. Instead, it required contractors to set their own goals by examining the availability of minority workers in the local workforce. Contractors then pledged to make good faith efforts to meet these goals. The plan was government-monitored, but it left considerable discretion to individual employers.[45]

Second, although Nixon's Philadelphia Plan cited no international covenants, it rested on the twin supports of remedial justice and economic equity. Despite the passage of major civil rights legislation governing the private sector in 1964, overt discrimination still marked workplaces in the United States in 1969. More subtle forms of bias, such as oldboy networks and word-of-mouth hiring among white male workers, further restricted the opportunities of women and minorities. The Labor Department used the government's billion-dollar purse to combat these inequities.[46]

The Philadelphia Plan was propelled by more than government benevolence. It responded to a crisis in the economic well-being of minority Americans. The 1969 plan followed several years of urban unrest, which a blue ribbon investigatory commission attributed in part to economic deprivation.[47] Arthur Fletcher, the Assistant Secretary of Labor who issued the plan, recalls that President Nixon first directed him to fashion a welfare grant program to address this urban poverty. Fletcher persuaded Nixon to raise the standard of living for minority Americans by expanding job opportunities instead.[48] his Labor Department were "necessary and right" because, in his words, "[a] good job is as basic and important a civil right as a good education."[49]

During the 1970s, affirmative action expanded modestly throughout the United States. Government agencies, universities, and private employers, prompted by executive orders and civil rights laws, adopted a variety of plans. These efforts never lacked concerted opposition,

---

[43] See Contractors Ass'n v. Secretary of Labor, 442 F.2d 159 (3d Cir. 1971) (upholding constitutionality of plan). For discussion of the plan, its history, and its implications, see, for example, HUGH DAVIS GRAHAM, THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY 1960-1972, at 278-97 (1990); Arthur A. Fletcher, *A Personal Footnote in History*, in THE AFFIRMATIVE ACTION DEBATE 25 (George E. Curry ed., 1996); Jones, *supra* note 40, at 910-14; Robert P. Schuwerk, Comment, *The Philadelphia Plan: A Study in the Dynamics of Executive Power*,39 U. CHI. L. REV. 723 (1972).

[44] See, *e.g.*, Schuwerk, *supra* note 43, at 747-49.

[45] See *id.* at 741.

[46] See, *e.g.*, Contractors Ass'n v. Secretary of Labor, 442 F.2d 159, 173 (3d Cir. 1971); Fletcher, *supra* note 43, at 27.

[47] See KERNER COMMISSION, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 91 (1968); Jones, *supra* note 40, at 910-11.

[48] See Fletcher, *supra* note 43, at 25-26.

[49] RICHARD NIXON, RN: THE MEMOIRS OF RICHARD NIXON 437 (1978).

including charges that the very idea is at odds with the Constitution. The United States Constitution, framed at the end of the eighteenth century and amended most relevantly in 1865-1870 regarding race, and in 1920 to enfranchise women, enumerates some civil and political rights. Unlike the Universal Declaration, however, the U.S. Constitution details no economic and social goals. And it does not expressly contemplate affirmative action; it simply gives Congress authority to "enforce […] by appropriate legislation" the fundamental instrument's equality guarantee.[50] The constitutionality of affirmative action in the United States, therefore, depends in large measure upon judicial interpretation of the Constitution's promise of "equal protection of the laws."[51]

The U.S. Supreme Court first ruled on the constitutionality of a racebased affirmative action plan in 1978, in *Regents of the University of California v. Bakke*.[52] The case produced six opinions from nine Justices, with the views of a single Justice, Lewis F. Powell, Jr., controlling the outcome. Justice Powell disapproved a state-run medical school's affirmative action program, which set aside about one-sixth of the school's seats for minority students, but he wrote that public universities could consider race as one factor, among several, when admitting students.

Like the designers of the Philadelphia Plan, Justice Powell resisted fixed quotas. Schools could consider minority race as a factor favoring admission, but could not designate a set number of seats for minority students. Powell was willing to countenance softer forms of affirmative action that "treat[] each applicant as an individual in the admissions process"; in his words, "[t]he applicant who loses out on the last available seat to another candidate receiving a 'plus' on the basis of ethnic background will not have been foreclosed from all consideration for that seat simply because he was not the right color or had the wrong surname."[53] The concern that affirmative action plans not trench heavily on settled expectations has been salient in U.S. affirmative action jurisprudence. Thus, preferences permissible for hiring have been rejected when laying off workers is the issue; for layoffs, strict seniority systems prevail.[54]

Justice Powell's *Bakke* opinion rejected most of the justifications urged by the government in support of affirmative action. He dismissed entirely the state's remediation rationale, maintaining that a single medical school could not attempt to redress societal discrimination.[55] And he was unpersuaded by the school's claim that affirmative action in medical student admissions would enhance medical service in minority communities.[56]

---

[50] U.S. Const. amend. XIV, §5; see also *id.* amends. XVIII, §2; XV, §2; XIX.
[51] U.S. Const. amend. XIV, §1.
[52] 438 U.S. 265 (1978). An earlier contest, concerning a state law school's affirmative action program for admissions, was dismissed as moot. See DeFunis v. Odegaard, 416 U.S. 312 (1974).
[53] 438 U.S. at 318 (opinion of Powell, J., announcing the judgment of the Court).
[54] See Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986).
[55] See 438 U.S. at 309. Powell would have allowed the school to remedy "the disabling effects of identified discrimination" in its own past or practices. *Id.* at 307. The four Justices who would have upheld the challenged set-aside system accepted remediation of societal discrimination as a permissible justification for affirmative action programs. See *id.* at 362-73 (Brennan, White, Marshall, and Blackmun, JJ., concurring in the judgment in part and dissenting in part).
[56] On this claim, Powell concluded that the school had introduced insufficient evidence of need and that more

The sole justification Justice Powell accepted for affirmative action in medical school admissions is in line with a social welfare theme placed in the Universal Declaration of Human Rights. A racially diverse student body, Powell concluded, would enrich the educational experience for all students.[57] The Universal Declaration's prescription, contained in Article 26, states that public education "shall be directed" to "promot[ing] understanding, tolerance and friendship among all nations, racial or religious groups."[58] Affirmative action so directed might break down more barriers than it raises by enabling members of diverse groups to share in the everyday business of living, working, and learning together.[59]

The U.S. Supreme Court's next encounter with a constitutional challenge to race-based affirmative action again produced sharp divisions among the Justices, and no opinion to which a majority subscribed. In that 1980 decision, *Fullilove v. Klutznick*,[60] the Court upheld, uneasily, a congressional statute reserving to minority-controlled businesses ten percent of federal funds spent on local public works. Chief Justice Burger's plurality opinion rested on "an amalgam of [Congress's] specifically delegated powers,"[61] including its power to spend public funds for the "general Welfare,"[62] its power to regulate commerce,[63] and its power to "enforce" the Constitution's equal protection clause.[64] In view of that authority, the Court thought it permissible for the National Legislature to target a modest slice of federal funds for minority businesses as a way of compensating for "the present effects of past discrimination."[65]

During the last two decades, however, the Court has become increasingly skeptical of race-based affirmative action practiced or ordered by government actors. A Court majority now exposes such programs to close inspection, which will not be passed absent demonstration of a compelling need for the program and an action plan tightly tied to that need.[66] State and local attempts to remedy "societal discrimination" have not survived Court scrutiny,[67] de-

---

precise inquiries could identify students, both white and nonwhite, interested in serving minority communities. See 438 U.S. at 310-11 (opinion of Powell, J., announcing the judgment of the Court).

[57] See *id.* at 312.

[58] UDHR, *supra* note 3, art. 26(2). The article identifies two further ends for education: "the full development of the human personality" and "further[ing] the activities of the United Nations for the maintenance of peace." *Id.*

[59] *Cf.* Malcolm Gladwell, *Six Degrees of Lois Weisberg*, THE NEW YORKER, January 11, 1999 at 52, 62 ("[W]hat matters in getting ahead is not the quality of your relationships, but the quantity – not how close you are to those you know, but, paradoxically, how many people you know whom you aren't particularly close to [...]. Minority admissions programs work not because they give black students access to the same superior educational resources as white students, or access to the same rich cultural environment as white students, or any other formal or grandiose vision of engineered equality. They work by giving black students access to the same white students as white students – by allowing them to make acquaintances outside their own social world and so shortening the chain lengths between them and the best jobs.").

[60] 448 U.S. 448 (1980).

[61] *Id.* at 473.

[62] U.S. CONST. art. I, §8, cl.1.

[63] *Id.*cl.3.

[64] *Id.* amend. XIV, §5.

[65] 448 U.S. at 487. The Court also stressed the government's flexibility in administering the program, including provision for a waiver when compliance with the 10% requirement was not feasible. *Id.* at 468-72, 481-82, 487-89.

[66] Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 235 (1995).

[67] See City of Richmond v. J.A. Croson Co., 488 U.S. 469, 498-99 (1989) (plurality opinion).

spite empirical evidence documenting persistent racial discrimination in education, employment, housing, and consumer transactions.[68] The ten percent federal set-asides upheld in the *Fullilove* case might fail under the Court's current standard,[69] although the Court itself has specifically reserved decision on that issue.[70] And some lower courts have forecast that today's Court would reject the diversity rationale advanced by Justice Powell in the *Bakke* case.[71]

On the other hand, the Clinton Administration comprehends the Court's dispositions as allowing Congress some leeway to remedy societal discrimination through carefully crafted race-conscious preferences.[72] It was and remains the law that an enterprise, private or public, may be required to act affirmatively to remedy its own proven discrimination.[73] Congress has so far rejected proposals to bar colleges and universities from using affirmative action in admissions policies if they receive federal funds.[74] The Supreme Court, to date, has not revisited Justice Powell's diversity justification for affirmative action in university admissions,[75] and considerable scholarly research may inform the Court's next encounter

---

[68] See *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 273-74 (1995) (Ginsburg, J.,dissenting) (citing studies); GEORGE STEPHANOPOULOS & CHRISTOPHER EDLEY, JR., AFFIRMATIVE ACTION REVIEW: REPORT TO THE PRESIDENT §§4.1-4.3 (1995) (same); BARBARA F. RESKIN, THE REALITIES OF AFFIRMATIVE ACTION IN EMPLOYMENT 19-43 (1998). See also Nicholas LeMann, *Taking Affirmative Action Apart*, N.Y. TIMES, June 11, 1995, §6 (Magazine), at 36 (surveying affirmative action policy and results post-*Bakke*, concluding that affirmative action has helped bridge the nation's racial gap).

[69] Recent commentary has observed that *Fullilove* represented a high-water mark for tolerance of benign racial classifications, and that the ideal of the "colorblind constitution" – with its attendant hostility to race-conscious regulation – has reemerged in the years since. See T. Alexander Aleinkoff, *A Case for Race-Consciousness,* 91 COLUM. L. REV. 1060 (1971). See *generally* ANDREW KULL, THE COLOR-BLIND CONSTITUTION (1992).

[70] See *Adarand Constructors, Inc*., 515 U.S. at 235.

[71] See, *e.g.*, Hopwood v. Texas, 78 F.3d 932, 944 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996); *Adarand Constructors, Inc. v. Pena*, 965 F. Supp. 1556, 1570 (D. Colo. 1997) (on remand). *But cf*. Texas v. Hopwood, 518 U.S. 1033, 1034 (1996) (Ginsburg, J., joined by Souter, J., concurring in denial of certiorari) (noting that the Court "'reviews judgments, not opinions,'" and that no "final judgment on a program genuinely in controversy" remained live in the *Hopwood* litigation when the petition for review was denied (quoting Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837, 842 (1984)).

[72] Statement by the Executive Office of the President, Procurement Reforms: SDB Certification and the Price Evaluation Adjustment Program 2 (June 24, 1998) (on file with the authors). Relying upon this understanding, the Administration has released new guidelines giving minority-owned businesses a small advantage when they bid for government contracts in certain industries. The guidelines target only industries in which minority-owned businesses remain underrepresented. See Small Disadvantaged Business Procurement; Reform of Affirmative Action in Federal Procurement, 63 Fed. Reg. 35,714 (1998).

[73] See United States v. Paradise, 480 U.S. 149, 185-86 (1987); Local 28, Sheet Metal Workers v. EEOC, 478 U.S. 421, 482 (1986) (plurality opinion); *id.* at 483 (Powell, J., concurring in part and concurring in the judgment).

[74] In May 1998, for example, the House of Representatives voted down two proposed amendments to the Higher Education Reauthorization Act that would have restricted the use of preferences in federally funded institutions of higher learning. See 144 CONG. REC. H2914, H2917 (daily ed. May 6, 1998).

[75] *Cf*. Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 286 (1986) (O'Connor, J., concurring in part and concurring in the judgment) ("although its precise contours are uncertain, a state interest in the promotion of racial diversity has been found sufficiently 'compelling,' at least in the context of higher education, to support the use of racial considerations in furthering that interest"). See also Ronald Dworkin, *Is Affirmative Action Doomed?* N.Y. REV. OF BOOKS, Nov. 5, 1998, at 56, 60 (educational diversity is a compelling interest); Goodwin Liu, *Affirmative Action in Higher Education: The Diversity Rationale and the Compelling Interest Test*, 33 HARV. L.R.-C.L. REV. 381, 429 (1998) (concluding that diversity rationale satisfies strict scrutiny). But see Jed Rubenfeld, *Affirmative Action*, 107 Yale L. J. 427, 471-72 (1997) (maintaining that the true purpose of affirma-

with the issue.[76] It is fair to say, in sum, that the channel of constitutionally permissible race-based affirmative action in the United States today is narrow, but not closed.[77]

I move now to the state of things regarding gender-based affirmative action. I would distinguish laws and programs defended as legitimately preferential to or for women from race-based programs in this key respect. Recall that traditional forms of sex discrimination, unlike obviously odious race-based classifications, were once regarded or rationalized as benignly favoring or protecting the second sex – laws that prohibited women from working at night, tending bar, carrying heavy weights, working overtime, for example. Eventually, many women came to see these laws as protecting not women but men's jobs from women's competition.[78] Evaluators of gender-based affirmative action, therefore, must be alert to the difference between measures that genuinely ameliorate the continuing effects of women's historic subordination, and those that perpetuate myths or stereotypes inhibiting women's achievement of their full human potential.

I continue to view with suspicion endeavors to bundle the U.S. Supreme Court's equal protection decisions into neat packages under the headings "strict scrutiny," "intermediate" inspection, relaxed or "rational relationship" review. Nevertheless, I think it is accurate to describe the Supreme Court's current approach to gender-based classifications as more flexible than its current approach to racial classifications. Under the formulation now favored, gender-based linedrawing by lawmakers will fail unless the state advances "an 'exceedingly persuasive justification,'"[79] and does not rely on "generalizations about [to borrow the title of a Mozart opera, *Cosi fan tutti*] 'the way women are.'"[80] Ironically, the less rigid standard for sex classifications has led some decision makers to conclude that efforts to assist women through affirmative action are less vulnerable to constitutional attack than efforts to aid historically disadvantaged racial minorities.[81] That, I think, is a most troublesome notion.

---

tive action is not to achieve diversity but rather to bring more minorities into the nation's institutions).

[76] See, *e.g.*, WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS (1998); STEPHEN THERNSTROM & ABIGAIL THERNSTROM, AMERICA IN BLACK AND WHITE: ONE NATION, INDIVISIBLE (1997); *Symposium, Twenty Years After Bakke: The Law and Science of Affirmative Action in Higher Education*, 59 Ohio St. L.J. 663 (1998).

[77] See also Steven A. Holmes, *Administration Cuts Affirmative Action While Defending It*, N.Y. TIMES, Mar. 16, 1998, at A17 (noting that Clinton Administration has ended or modified some affirmative action programs, while defending the constitutionality of others).

This lecture trains on constitutional challenges to government-run affirmative action programs. The Court has been more tolerant of voluntary affirmative action programs instituted by private parties, although here too the Court scrutinizes programs closely for compliance with statutory bars on discrimination. See United Steelworkers v. Weber, 443 U.S. 193, 208 (1979) (upholding voluntary race-based program); see also Johnson v. Transportation Agency, 480 U.S. 616, 640-42 (1987) (upholding gender-based program instituted by public agency; claim litigated under Title VII rather than the Constitution).

[78] See, *e.g.*, Ruth Bader Ginsburg, *Sex Equality and the Constitution*,52 TUL. L. REV. 451, 454-55 (1978).

[79] United States v. Virginia, 518 U.S. 515, 531 (1996) (quoting J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 136-37 & n.6 (1994), and Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982)).

[80] United States v. Virginia, 518 U.S. 515, 531 (1996) (quoting J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 136-37 & n.6 (1994), and Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982)). 80. *Id.* at 550.

[81] For an instance in which a federal appellate court upheld a city's preference for women owned businesses but not for minority-owned businesses, see Associated Gen. Contractors v. City of San Francisco, 813 F.2d 922, 931-32, 941-42, 944 (9th Cir. 1987).

In gender cases, the Supreme Court's footing was at first insecure. In *Kahn v. Shevin*,[82] a 1974 case I argued from the advocate's side of the Supreme Court's bench and lost, the Court accepted as a permissible preference a nineteenth century Florida law granting widows a slender real property tax exemption. The State of Florida gave widows that small dispensation along with the blind and the totally disabled. The Court upheld the exemption as a fair means of compensating widows for the disadvantages they faced in the marketplace. In my view, the Court overlooked the provision's roots in women's role as subservient spouse. The Court regarded the law as redressing, albeit in minute measure, workplace discrimination against women. But if that were in fact the design, then why, a careful examiner might ask, didn't the exemption apply to divorced women or single heads of households – the very women who might have suffered most from a lifetime of workplace discrimination?[83]

The following year, however, the Court emphasized that compensatory rationales for sex-based differentials would not be accepted as a matter of course. In 1975, and again in 1977, the Court struck down gender distinctions in social security laws, lump classifications based on breadwinning male/dependent female stereotypes.[84] In these cases, the Court required the Legislature to accord childcare benefits to widowed fathers as well as widowed mothers, and held that female wage earners must be accorded the same social insurance for their families as male workers received. Then in 1977, a year before the *Bakke* decision on race-based affirmative action, the Court upheld a preferential measure plausibly justified as slightly ameliorating the workplace discrimination women experienced.

In *Califano v. Webster*,[85] the Court rejected a male worker's challenge to a social security provision that, for benefit calculation purposes, allowed women to exclude more low-earning years than men could exclude. The Court's opinion upholding the provision referred generally to a need "to remedy discrimination against women in the job market"[86] and "to compensate for particular economic disabilities suffered by women."[87] In short, in this rela-

---

[82] 416 U.S. 351 (1974).

[83] See Ginsburg, *supra* note 21, at 816-17. The Court missed the mark again in *Schlesinger v. Ballard*, 419 U.S. 498 (1975), when it upheld a Navy regulation that placed male officers under a strict "up or out" promotion system, but allowed women a longer time before mandatory discharge for failure to advance. Although the Court viewed the differential as compensating women for disadvantages they faced, the regulation's effect was not so clear. In many cases, the regulation operated to women's disadvantage by denying female officers who resigned from service severance pay that male officers could obtain. The regulation, moreover, did nothing to alter the web of rules favoring the advancement of men over women in the military. See Ginsburg, *supra* note 21, at 817-18.

Just last year, the Court confronted a once-pervasive gender-based categorization. The case, *Miller v. Albright*, 118 S. Ct. 1428 (1998), involved a claim to U.S. citizenship pursued by the daughter of a male U.S. citizen. The complainant contended that restrictions on U.S. citizen fathers' ability to pass their citizenship to their children, not applicable to U.S. citizen mothers, violated equal protection. Although the Court denied the daughter relief, five Justices recognized that the statute in question was based on overbroad, and therefore unconstitutional, generalizations about the relationship mothers and fathers bear to their children. See *id.* at 1445-46 (O'Connor, J., joined by Kennedy, J., concurring in judgment); 1449-50 (Ginsburg, J., joined by Souter, J., and Breyer, J., dissenting); 1460-63 (Breyer J., joined by Souter, J., and Ginsburg, J., dissenting).

[84] See Weinberger v. Wiesenfeld, 420 U.S. 636, 637-39 (1975); Califano v. Goldfarb, 430 U.S. 199, 216-17 (1977). These decisions followed a path earlier marked in Frontiero v. Richardson, 411 U.S. 677 (1973).

[85] 430 U.S. 313 (1977).

[86] *Id.* at 319.

[87] *Id.* at 320.

tively noncontroversial gender-classification case, the Court endorsed a societal discrimination rationale resembling the remedial justification it was not willing to embrace, the next year, in the more divisive setting of race and medical school admissions.[88]

In harmony with the Universal Declaration, one can find in U.S. affirmative action rulings both a social welfare strain and a remediation of historic discrimination theme. It is safe to say the governing law is still evolving and variously interpreted.

My account would be inadequate, however, if I did not at least mention the reaction to affirmative action in the U.S. in the media, in lower courts, and on political hustings. Last spring, for example, a *Washington Post* columnist described the case of a white applicant to the University of Washington Law School turned down, the complaint alleged, because of her color, although she had overcome poverty and worked at low-wage jobs throughout her education.[89] This past November, Washington followed California as the second state to curtail by popular initiative state supported affirmative action measures.[90] Due to a federal appellate court ruling controlling in Texas and the California ballot initiative, two of our top universities have been required to end race-based preferences and, instead, admit students on a colorblind basis.[91] And the Court of Appeals for the First Circuit recently decided that racial preferences are impermissible in public high school admissions as well.[92] These decisions and their immediate impact have caused even some long-time opponents of affirmative action to reconsider their opposition.[93] The reaction has also prompted empirical

---

[88] *Cf.* Ginsburg, *supra* note 21, at 823-24 (suggesting that *Califano v. Webster* might have informed the Court's *Bakke* decision). The Court has also recognized that legislatures may take into account women's unique childbearing capacity, but only when the legislative distinction furthers women's employment opportunities. See California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 289-90 (1987) (upholding California statute that required employers to provide leave and reinstatement to employees disabled by pregnancy but extended no similar protection to workers suffering from other disabilities; statute was held consistent with Title VII's prohibitions against employment discrimination based on sex, pregnancy, or childbirth); *cf.* Case C-394/96, Brown v. Rentokil Ltd., 1998 E.C.R. I-4185 (1998) (European Union equal treatment directive precludes dismissal of female workers throughout their pregnancy for absences due to pregnancy-related illness). Protective actions that limit women's workplace participation violate federal prohibitions against sex discrimination. International Union, United Auto. Workers v. Johnson Controls, Inc., 499 U.S. 187, 211 (1991); see also *supra* note 29 and accompanying text.

[89] See Nat Hentoff, *The Cost of Checking 'White,'* WASH. POST, May 9, 1998, at A15; see also Laura L. Hirschfeld, *Colleges Try to Explain Why Top Grades, Test Scores Don't Matter*, DET. NEWS, April 26, 1998, at 5B (affirmative action permits "universities [...] to discriminate against individual white males en masse"). More generally, affirmative action has become a lightning rod for broader issues of social policy and relations between the races. See, *e.g.*, Michael Kinsley, *The Spoils of Victimhood*, THE NEW YORKER, March 27, 1995, at 62, 69 ("Affirmative action has become a scapegoat for the anxieties of the white middle class" even though its "actual role [...] in denying opportunities to white people is small compared with its role in the public imagination and the public debate.").

[90] See Sam Howe Verhovek, *From Same-Sex Marriages to Gambling, Voters Speak*, N.Y. Times, Nov. 5, 1998, at B1, B10.

[91] See Hopwood v. Texas, 78 F.3d 932, 934 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996); California Proposition 209, *codified as* Cal. Const. art. 1, §31; *cf.* Podberesky v. Kirwan, 38 F.3d 147, 161-62 (4th Cir. 1994) (invalidating the University of Maryland's Banneker scholarship program for African American students).

[92] See Weissman v. Gittens, 160 F. 3d 790 (1st Cir. 1998); see also Latin Lesson, The New Republic, Dec. 14, 1998, at 7, 8 (concluding that the Weissman decision demonstrates "just how flimsy" Bakke's diversity rationale has become).

[93] See, *e.g.*, Nathan Glazer, *In Defense of Preference*, NEW REPUBLIC, Apr. 6, 1998, at 18. In 1997, the entering class at the University of Texas's law school included only four African Americans and twenty-six Mexican Americans. The previous year, when the school considered race as a "plus" factor in admissions, thir-

studies reporting the effects of affirmative action in both classrooms and workplaces.[94] What we are witnessing now, in conclusion, may show the sagacity of the comment that the true symbol of the United States is not the bald eagle, but the pendulum.

3. INDIA

For comparative side-glances, I turn first to India's affirmative action in regard to disfavored castes, a set of initiatives both older and more extensive than any program ventured in the United States. In view of time constraints, I will mention only the caste-based programs, although India is also engaged in endeavors to elevate the status and welfare of women.[95] India

---

ty-one African Americans and forty-two Mexican Americans enrolled. See Janet Elliott, *Hopwood Appeal Focuses on Future Without Racial Preferences*, TEX. LAW., May 25, 1998, at 8. The University of California at Berkeley enrolled just one African American law student in 1997, although revised admissions standards somewhat increased offers to African American and Latino law students for 1998. See John E. Morris, *Boalt Hall's Affirmative Action Dilemma*, AM. LAW., Nov. 1997, at 4; Jenna Ward, *Boalt Boosts Minority Enrollment by Downplaying Grades, Scores*, Nat'l L.J., May 18, 1998, at A16. Sharp declines marked undergraduate minority admissions at Berkeley's campus in the spring of 1998, the first year that the college implemented colorblind admissions. See Frank Bruni, *Blacks at Berkeley Are Offering No Welcome Mat*, N.Y. TIMES, May 2, 1998, at A1.

Although these declines are dramatic, they remain a phenomenon of elite universities. Less selective campuses of the University of California experienced smaller declines in minority admissions last year – or even some increase. *Id.* at A8. A nationwide study of college admissions suggests that race-based affirmative action affects admission decisions only at the selective schools attended by one-fifth of all students. "[A]t the less exclusive institutions that 80 percent of 4-year college students attend, race plays little if any role in admissions decisions." Thomas J. Kane, *Racial and Ethnic Preferences in College Admissions*, 59 Ohio St. L.J. 971, 972 (1998).

The elimination of preferences has also spurred lawmakers and educators to consider other strategies to promote diversity in the student body. Under Texas's recently adopted "10 percent plan," students in the top 10 percent of their high school class are automatically admitted to the state's most selective public colleges, irrespective of their S.A.T. scores. One result has been an increase in the number of qualified minority students accepted to these schools. The policy has also increased opportunity for white high school graduates from parts of rural Texas, whose performance on standardized tests also lags. See Lani Guinier, *An Equal Chance*, N. Y. TIMES, April 23, 1998, at A25. In the same vein, the incoming governor of California has proposed to guarantee students in the top four percent of their high school class a place in the University of California system. See *In Search of the Golden Mean*, THE ECONOMIST, Jan. 9, 1999 at 27, 28. Educational institutions unable to rely on racial preferences might also attempt to assure racial diversity by race-neutral means such as geographical or socioeconomic preferences. See Kathleen M. Sullivan, After Affirmative Action, 59 OHIO ST. L.J. 1039 (1998) (arguing that such race-neutral preferences should be held constitutionally permissible); see also Samuel Issacharoff, *Can Affirmative Action Be Defended*, 59 OHIO ST. L.J. 669 (1998) (concluding that modest affirmative action efforts are indispensable to the mission of U. S higher education).

[94] See, *e.g.*, BOWEN & BOK, *supra* note 76; RESKIN, *supra* note 68; Maureen Hallinan, *Diversity Effects on Student Outcomes: Social Scientific Evidence*, 59 OHIO ST. L.J. 733 (1998).

[95] I note, however, that India's constitution, like the Universal Declaration, is ambiguous with respect to gender-based programs. Article 15 of India's constitution, which bans discrimination based on sex and other grounds, declares that: "Nothing in this article shall prevent the State from making any special provision for women and children." INDIA CONST. art. 15(3); see also *id.* art. 42 (nonjusticiable provision instructing state to "make provision for securing just and humane conditions of work and for maternity relief"). Indian courts have invoked Article 15 to uphold some affirmative action measures benefiting women. See, *e.g.*, Dattatraya v. State of Bombay, 1953 A.I.R. 40 (Bom.) 311 (approving reservation of seats for women on elected municipal council). Legislators basing programs on India's constitutional language may of course endeavor to "provi[de] for women and children" in a way that furthers India's constitutional commitment to equality. See, *e.g.*, INDIA CONST. art. 39 (nonjusticiable provision advising state to "direct its policy towards securing – (a) that the citizen, men and women equally, have the right to an adequate means of livelihood; [...] [and] (d) that there is

boldly announced a commitment to affirmative action in its 1950 Constitution, which reserves seats for members of India's lowest social castes in both the House of the People and the state legislative assemblies.[96] The constitution also permits the government to "reserv[e]" public "appointments or posts" for members of "any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State."[97] This permission expressly qualifies a clause otherwise prohibiting discrimination in government employment.[98]

Furthermore, India's constitution imposes a duty on the state to "promote with special care the educational and economic interests of the weaker sections of the people, and in particular, of the [most disadvantaged castes]."[99] Although this language appears in a portion of the constitution that is not judicially enforceable, it enunciates a positive governmental responsibility to assist disadvantaged classes. India's constitution thus unambiguously authorizes affirmative action and affirmatively encourages it.

Indeed, a desire to ensure the legitimacy of affirmative action prompted the first amendment to India's Constitution in 1951. In April that year, the Supreme Court of India struck down a "reservation" or quota for students from disadvantaged classes at a state-run medical school, noting that the constitution allowed such reservations only in allocating legislative seats or government employment.[100] Within two months, India altered its constitution to permit affirmative action in education and other contexts. Article 15(4) now expressly provides that "[n]othing in [the constitution's anti-discrimination articles] shall prevent the State from

---

equal pay for equal work for both men and women").

[96] See INDIA CONST. art. 330; *id.* art. 332. The constitution reserves these seats for members of "Scheduled Castes" and "Scheduled Tribes." The "Scheduled Castes" are India's untouchables, citizens at the bottom of the traditional Hindu class system. See Marc Galanter, COMPETING EQUALITIES: LAW AND THE BACKWARD CLASSES IN INDIA 122 (1984). The "Scheduled Tribes" are "groups distinguished by 'tribal characteristics' and by their spatial and cultural isolation from the bulk of the population." *Id.* at 147. Members of scheduled castes make up about 15.8% of India's population, while the scheduled tribes constitute about 7.8%. See E.J. Prior, *Constitutional Fairness or Fraud on the Constitution? Compensatory Discrimination in India*, 28 CASE W. RES. J. INT'L L. 63, 67 nn.18-19 (1996).

[97] INDIA CONST. art. 16(4). A 1995 amendment added a similar proviso for promotions within the public service, although the latter protection applies only to members of "the Scheduled Castes and the Scheduled Tribes." *Id.* art. 16(4A). The category "backward classes" in Article 16(4), as well as in the articles mentioned below, includes the scheduled castes, the scheduled tribes, and other castes suffering from disadvantage. As decisions of the Indian Supreme Court show, the proper definition of "backward classes" under these constitutional provisions is not self-evident. See, *e.g.*, Balaji v. State of Mysore, A.I.R. 1963 S.C. 649 (caste may constitute one criterion for determining backwardness, but the state must look to other factors as well); Chitralekha v. State of Mysore, A.I.R. 1964 S.C. 1823 (consideration of caste in determining backwardness is permissible but not mandatory); P. Rajendran v. State of Madras, A.I.R. 1968 S.C. 1012 (state may determine that entire caste is backward and then use caste to designate backwardness); Vasanth Kumar v. State of Karnataka, A.I.R. 1985 S.C. 1495 (affirming use of caste as unit for identifying backward classes); Indra Sawhney v. Union of India, A.I.R. 1993 S.C. 477 (stating standards to determine backwardness).

[98] See INDIA CONST. art.16(2); see also *id.* art. 16(1) (guaranteeing "equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State").

[99] *Id.* art. 46. The final portion of the article directs special attention to the "Scheduled Castes and the Scheduled Tribes," but the initial clause appears to include other "weaker sections of the people" as well. *Id.*

[100] See State of Madras v. Champakam Dorairajan, A.I.R. 1951 S.C. 226.

making any special provision for the advancement of any socially and educationally backward classes of citizens."[101]

Some of India's states have maintained affirmative action or "reservation" programs at least since the nation's independence.[102] These programs reserve public university seats or government positions for members of India's disadvantaged castes.[103] In a series of decisions dating back to 1963, India's Supreme Court has upheld the core constitutionality of these programs, although the court has imposed some constraints on their administration. Notably, the court placed a 50 percent ceiling on the number of positions that can be reserved for disadvantaged citizens.[104]A limit so high may appear startling to observers from legal systems more skeptical of affirmative action.

Since 1970, India's affirmative action programs have expanded in both geographic scope (more states have adopted programs) and magnitude (more classes have been catalogued as disadvantaged). The central government was slower than some states to support preferences.[105] In 1990, however, Prime Minister V.P. Singh announced that he would carry out the expansive recommendations of the ten-year-old Mandal Commission Report.[106] Three years later, India's Supreme Court upheld the constitutionality of most of those recommendations and the central government began to implement them.[107]

Affirmative action (sometimes called "compensatory discrimination") has provoked its share of controversy, including violent resistance, in India. A 1968 survey showed that high caste and highly educated citizens strongly opposed reservations in government employment.[108] In 1990, when Prime Minister Singh first announced implementation of the Mandal Commission Report, riots erupted across India, and the protests contributed to the fall of Singh's government.[109] More isolated episodes of violence occurred after India's Supreme Court, in

---

[101] INDIA CONST. art. 15(4). Paralleling other constitutional references to the most disadvantaged castes, the provision adds: "or for the Scheduled Castes and the Scheduled Tribes." *Id.*

[102] Some of the programs continue systems imposed under British rule, which heightens the controversy surrounding them. See Prior, *supra* note 96, at 72-73.

[103] See, *e.g.*, Galanter, *supra* note 96, at 87; SUNITA PARIKH, THE POLITICS OF PREFERENCE: DEMOCRATIC INSTITUTIONS AND AFFIRMATIVE ACTION IN THE UNITED STATES AND INDIA 159-64 (1997).

[104] See Balaji v. State of Mysore, A.I.R. 1963 S.C. 649; see also Devadasan v. Union of India, A.I.R. 1964 S.C. 179 (limiting carry forward of unfilled reserved positions); Indra Sawhney v. Union of India, A.I.R. 1993 S.C. 477 (affirming 50% rule). For other Indian Supreme Court decisions during the 1960s and 1970s, see cases cited *supra* note 97; State of Kerala v. N.M. Thomas, A.I.R. 1976 S.C. 490 (state could give members of the scheduled castes or scheduled tribes a two-year grace period to pass promotion exam; constitution permits means other than reservations to advance the interests of backward classes).

[105] The central government appointed its first Backward Classes Commission in 1953 and received that Commission's report two years later. Parliament, however, rejected the report and the Commission's recommendations were never implemented. See Prior, *supra* note 96, 80-81. The government did not appoint a second commission until 1978, when the commission led by B.P. Mandal began work. The Mandal Commission submitted its report and recommendations at the end of 1980. For a decade, nothing was done to implement them. *Id.* at 69, 81-86.

[106] See *id.* at 63-69.

[107] See Indra Sawhney v. Union of India, A.I.R. 1993 S.C. 477; Prior, *supra* note 96, at 70, 90-94.

[108] See GALANTER, *supra* note 96, at 76.

[109] See Prior, *supra* note 96, at 63-66, 69.

1993, upheld the constitutionality of the Commission's approach.[110] The judicial ruling, however, may have tempered opposition to some degree.[111]

Few citizens of India deny either a long history of overt discrimination against disfavored castes or the persistence of deep-seated bias against those groups. Perhaps that public recognition explains, in part, why "reservations" beyond any set-asides tolerable in the United States have survived in India. A 1964 opinion of the Mysore High Court stated the case this way:

> "[T]here can be neither stability nor real progress if predominant sections of an awakened Nation live in primitive conditions, confined to unremunerative occupations and having no share in the good things of life, while power and wealth [are] confined in the hands of only a few […]. [The] Nation's interest will be best served – taking a long range view – if the backward classes are helped to march forward and take their place in a line with the advanced sections of the people."[112]

4. EUROPEAN UNION

Positive action in the European Union is less complex than in India, where thousands of castes or classes qualify as "backward." The quest for equality within the Union has centered on nationality and on the status of men and women,[113] although the Amsterdam Treaty will permit the Union to address other forms of discrimination as well, including discrimination based on race, religion, disability, age, and sexual orientation.[114]

Affirmative action or "positive discrimination" has so far come before the European Court of Justice only in the context of equal treatment for men and women. At the Community's 1957 birth, the Treaty of Rome required equal pay for male and female workers for work of equal value.[115] This rather early commitment to equal wages did not stem from a lofty desire to promote sex equality and human rights. Instead, the treaty provision reflected a more prosaic concern, the fear that cheap female labor in some countries would undercut the price of

---

[110] See Prior, *supra* note 96, at 69-70.
[111] See PARIKH, *supra* note 103, at 190.
[112] D.G. Viswanath v. Government of Mysore, 1964 A.I.R. 51 (Mys.) 132, 136.
[113] See Treaty Establishing the European Community, *effective* Nov. 1, 1993, art. 6, 4 EUR. UNION L. REP. (CCH) ¶ 25,400, at 10,221-4 (prohibiting "any discrimination on grounds of nationality"); *id.* art. 48(2) (prohibiting nationality discrimination in "employment, remuneration and other conditions of work and employment"); *id.* art. 119 (requiring "equal pay for equal work" by men and women); see also Treaty on European Union, Feb. 7, 1992, art. F(2), 4 EUR. UNION L. REP. (CCH) ¶ 25,300, at 10,056 (requiring "respect [for] fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms").
[114] Treaty of Amsterdam, Oct. 2, 1997, art. 2(7), 4 EUR. UNION L. REP. (CCH) ¶ 25,500, at 10,517 (inserting Article 6A, to be renumbered as Article 14) (empowering the Union's "Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament," to "take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation").
[115] See Treaty Establishing the European Economic Community, Mar. 25, 1957, art. 119, 298 U.N.T.S. 11, 62.

goods in other nations.[116] But the equality principle, rudimentary as it was at the start, had growth potential.

In 1976, the European Union's Council issued a directive designed to promote "the principle of equal treatment for men and women as regards access to employment, including promotion."[117] Article Two of the directive instructs that "the principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex."[118] Shortly after that nondiscrimination prescription, however, Article Two adds: "This Directive shall be without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities […]."[119]

Reconciling this caveat with the more general prohibition against discrimination is the daunting challenge. The European Court of Justice has twice dealt with the matter. In its first encounter, in 1995, the Court rejected a German (Bremen) local law designed to help women gain civil service appointments and promotions.[120] Bremen, one of the German länder, had adopted a measure making gender a tie-breaker for some positions. If women constituted less than half the employees in the salary bracket to which the appointment or promotion was sought, and if a man and woman with equal qualifications pursued the position, the Bremen prescription required selection of the woman.

A male worker who lost out on a promotion challenged the local law as incompatible with the EU equal treatment directive, and the German labor court referred the question to the European Court of Justice. That court held the local law incompatible with the EU directive. "National rules which guarantee women absolute and unconditional priority for appointment or promotion," the Court instructed, "go beyond promoting equal opportunities."[121] Following the lead of the Advocate General, the court condemned the Bremen prescription because it sought to achieve "equal representation" rather than the "equality of opportunity" contemplated by the equal treatment directive.[122]

Some two years later, in 1997, the Court of Justice took a second look. In *Marschall v. Land Nordrhein-Westfalen*,[123] the Court took up, on reference from a German administrative court, another local law-making gender the tie-breaker in civil service promotions. This time, however, the local provision permitted a male applicant to prevail, despite the tie-breaker, if "reasons specific to [his situation] tilt[ed] the balance in his favour."[124] The European Court

---

[116] See Kent Källström, *Article 23*, in THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: A COMMENTARY 357, 370 (Asbjørn Eide et al. eds., 1992).
[117] Council Directive No. 76/207, art.1(1), 1976 O.J. (L 39) 40. The directive also governs vocational training and working conditions.
[118] *Id.* art. 2(1).
[119] *Id.* art. 2(4).
[120] See Case C-450/93, Kalanke v. Freie Hansestadt Bremen, 1995 E.C.R. I-3051 (1995).
[121] *Id.* at I-3078.
[122] *Id.* For discussion of *Kalanke*, see Dagmar Schiek, *Positive Action in Community Law*, 25 INDUS. L.J. 239 (1996).
[123] Case C-409/95, [1998] 1 C.M.L.R. 547 (1997).
[124] *Id.* at 566 (quoting the Land Nordrhein-Westfalen law).

of Justice, *against* the recommendation of the Advocate General, held that this clause saved the preference.[125]

The judgment in the *Marschall* case bears more than a little kinship to Justice Powell's controlling opinion in the *Bakke* case. Both opinions stress the need for individualized decision making and the infirmity of automatic preferences. Under *Bakke* and *Marschall*, race and sex may constitute plus factors favoring employment, promotion, or admission to an educational institution, but the preference may not be absolute and unyielding.

The decision in *Marschall* is perhaps most notable for its sensitivity to sometimes unconscious bias. "[T]hat a male candidate and a female candidate are equally qualified does not mean that they have the same chances," the Court of Justice observed.[126] Traditional habits of thought may lead to the selection of males in preference to females, because employers fear women will be distracted from their work by "household and family duties," the European Court said.[127] In other words, a tie-breaker preference for women may do no more than ensure actual adherence to the nondiscrimination principle. Without such positive action by government, unconscious or half-conscious discrimination might continue unchecked.[128]

The approach most recently taken by the Court of Justice runs little risk of confusing preferences designed to aid women with paternalism effective to constrain them. With fidelity to

---

[125] See *supra* note 123, at 570-71.
[126] *Id.* at 570.
[127] *Id.*
[128] See *id.* at 566, 569-70. I noted the existence of unconscious bias in a 1978 comment and suggested as illustrative a case in which white male managers decided on promotions under a "total person concept." Ginsburg, *supra* note 21, at 825 (citing Leisner v. New York Tel. Co., 358 F. Supp. 359 (S.D.N.Y. 1973)). The results were predictable: "White men [...] consistently chose white men for the job or promotion." Unconscious bias has not yet vanished from the scene. See Nicholas Katzenbach and Burke Marshall, *Not Color Blind: Just Blind*, N. Y. Times, Feb. 22, 1998, §6 (Magazine), at 42, 44 ("The natural inclination of predominantly white male middle managers is to hire and promote one of their own. Most of the time the decision honestly reflects their judgment as to the best candidate without conscious appreciation of how much that judgment may have been conditioned by experience in the largely segregated society we still live in. To hire or promote an African-American is often viewed as risky."); RESKIN, *supra* note 68, at 24-25 ("[D]iscrimination is not simply the result of deliberate attempts to discriminate"; often organizations discriminate "simply by doing business as usual."); *cf.* Deborah Jones Merritt & Barbara F. Reskin, *Sex, Race, and Credentials: The Truth About Affirmative Action in Law Faculty Hiring*, 97 COLUM. L. REV. 199 (1997) (discussing possible presence of unconscious bias in law faculty hiring as well as role of affirmative action in overcoming that bias).
In *Johnson v. Transportation Agency*, 480 U.S. 616 (1987), a case decided under Title VII of the Civil Rights Act, the United States Supreme Court upheld a county affirmative action plan that allowed supervisors to consider sex as one factor in promoting employees to positions in which women were significantly underrepresented. The county had adopted the plan, in part, because it believed that "'the selection and appointment processes are areas where hidden discrimination frequently occurs.'" *Id.* at 653 (O'Connor, J., concurring in the judgment) (quoting the county's plan). Indeed, the job history of the woman who secured a promotion with the plan's help confirms that she might have suffered from "hidden discrimination" absent a conscious commitment to affirmative action. *Id.* at 624 n.5 (opinion of the Court) (recounting that one of three panel members who rated applicants for the promotion had earlier refused to issue the female applicant coveralls given to male workers on the same job, while another panel member had referred to the female applicant as "a 'rebel-rousing, skirtwearing person'"). The Court did not focus as explicitly as the European Court of Justice did on this rationale for affirmative action measures, but Johnson strikes some of the same chords as *Marschall*. See *Johnson*, 480 U.S. at 641 n.17 ("'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.'") (quoting Brief for the American Society for Personnel Administration as *Amicus Curiae*).

the 1976 directive on equal treatment, the *Marschall* judgment trains carefully on the EU's undertaking to "promote equal opportunity [...] by removing existing inequalities which affect women's opportunities."[129]

While debate continues over the *efficacy* of affirmative action in the form of preferences, the *legitimacy* of affirmative action has been confirmed in the 1997 Treaty of Amsterdam. Article 119, a bare equal pay provision in the 1957 Rome Treaty, now includes a commitment to "ensuring full equality *in practice* between men and women in working life" [emphasis added].[130] The amended article further provides that "the principle of equal treatment shall not prevent any member state from maintaining or adopting measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers."[131] Antidiscrimination laws in the United States contain no similarly explicit provision.

CONCLUSION

Time and the limits of my own information counsel me to attempt no further comparative side-glances. I will add just a few closing remarks. Affirmative action sends both inspiring and disturbing messages.[132] It has potential, I have tried to emphasize, both to redress deprivations of equality as a civil right, and to promote economic and social well-being. But it also and inevitably generates opposition as an unfair turn of the tables, reverse discrimination against individuals not responsible for society's past discrimination.

Experience in one nation or region may inspire or inform other nations or regions in this area, as generally holds true for human rights initiatives. India's Supreme Court, for example,

---

[129] Council Directive, *supra* note 117, art. 2(4). The Union has been equally sensitive to some instances of pregnancy discrimination. See, *e.g.*, Council Directive 92/85, art. 10, 1992 O.J. (L 348) (prohibiting dismissal of workers from beginning of pregnancy through end of maternity leave). In *Dekker v. Stichtung Vormingscentrum voor Jong Volwassenen (VJVCentrum) Plus*, Case C-177/88, 1990 E.C.R. I-3941 (1990), the Court of Justice recognized that "only women can be refused employment on grounds of pregnancy and such a refusal therefore constitutes direct discrimination on grounds of sex." *Id.* at I-3973. Just last summer, the same court ruled that the EU's equal treatment directive precludes dismissal of workers for absences stemming from pregnancy-related illnesses. Case C-394/96, Brown v. Rentokil, Ltd., 1998 E.C.R. I-4185 (1998). The court again stressed that pregnancy affects only women, so that such dismissals constitute sex discrimination.
The U.S. Supreme Court did not reason as clearly when it confronted similar questions during the 1970s. See General Elec. Co. v. Gilbert, 429 U.S. 125, 145-46 (1976) (disability plan excluding pregnancy-related disabilities does not violate Title VII's prohibition against sex discrimination); Geduldig v. Aiello, 417 U.S. 484, 496-97 (1974) (similar plan does not violate constitutional guarantee of equal protection); *id.* at 496 n.20 ("The program divides potential recipients into two groups – pregnant women and nonpregnant persons.").

[130] Treaty of Amsterdam, Oct. 2, 1997, art. 2(22), 4 EUR. UNION L. REP. (CCH) ¶ 25,500, at 10,527 (amending Article 119 of the EC Treaty). The provision will become Article 141 in the consolidated treaty. *Id.* at 10,568; see also *id.* art.2(2),4 EUR. UNION L. REP. (CCH) at 10,515 (amending Article 2 of the EC Treaty) ("The Community shall [...] promote [...] equality between men and women."); *id.*art.2(3),4 EUR. UNION L. REP. (CCH) at 10,516 (amending Article 3 of the EC Treaty) ("In all the activities referred to in this article, the Community shall aim to eliminate inequalities, and to promote equality, between men and women.").

[131] *Id.* art. 2(22), 4 EUR. UNION L. REP. (CCH) at 10,527 (amending Article 119 of the EC Treaty) (to become Article 141 in the new consolidated treaty).

[132] See Robert Gordon, What It Does and What It Says: Equity, Expressive Harm, and Race-Based Affirmative Action 50 (unpublished manuscript, on file with the authors).

has considered United States precedents when judging the constitutionality of affirmative action measures.[133] Defenders of Germany's tie-breaker preferences invoked several international covenants before the European Court of Justice.[134] Opponents of affirmative action, too, have referred to U.S. decisions noting, pointedly, that "affirmative action seems to be [in] a state of crisis in its country of origin."[135]

The same readiness to look beyond one's own shores has not marked the decisions of the court on which I serve. The United States Supreme Court has mentioned the Universal Declaration of Human Rights a spare five times, and only twice in a majority decision.[136] The most recent citation appeared twenty-eight years ago, in a dissenting opinion by Justice Marshall.[137] Nor does the U.S. Supreme Court invoke the laws or decisions of other nations with any frequency. When Justice Breyer referred in 1997 to federal systems in Europe, dissenting from a decision in which I also dissented,[138] the majority responded: "We think such comparative analysis inappropriate to the task of interpreting a constitution."[139]

In my view, comparative analysis emphatically *is* relevant to the task of interpreting constitutions and enforcing human rights. We are the losers if we neglect what others can tell us about endeavors to eradicate bias against women, minorities, and other disadvantaged groups. For irrational prejudice and rank discrimination are infectious in our world. In this reality, as well as the determination to counter it, we all share.

---

[133] See, *e.g.*, Indra Sawhney v. Union of India, A.I.R. 1993 S.C. 477, 529-36.
[134] See Case C-409/95, Marschall v. Land Nordrhein-Westfalen, [1998] 1 C.M.L.R. 547, 564-65 (1997) (opinion of Advocate General Jacobs).
[135] Case C-450/93, Kalanke v. Freie Hansestadt Bremen, 1995 E.C.R. I-3051, I-3058 n.10 (1995) (opinion of Advocate General Tesauro); see also Gabriel A. Moens, *Equal Opportunities Not Equal Results: "Equal Opportunity" in European Law After Kalancke* [sic], 23 J. Legis. 43, 55 (1997) (asking "Is the Rehnquist Court to 'Blame' for *Kalancke* [sic]?").
[136] See Dandridge v. Williams, 397 U.S. 471, 520 n.14 (1970) (Marshall, J., dissenting); Zemel v. Rusk, 381 U.S. 1, 14 n.13 (1965); Kennedy v. Mendoza-Martinez, 372 U.S. 144, 161 n.16 (1963); International Ass'n of Machinists v. Street, 367 U.S. 740, 776-77 (1961) (Douglas, J., concurring); American Fed'n of Labor v. American Sash & Door Co., 335 U.S. 538, 549 n.5 (1949) (Frankfurter, J., concurring). Although the Declaration was adopted simply as a resolution of the United Nations General Assembly, and is not binding law, courts in other nations have recognized its importance as a fundamental statement of human rights. See UNITED NATIONS DEPARTMENT OF PUBLIC INFORMATION, THE UNITED NATIONS AND HUMAN RIGHTS, 1945-1995, at 27 (1995).
[137] See Dandridge v. Williams, 397 U.S. 471, 520 n.14 (1970) (Marshall, J., dissenting).
[138] See Printz v. United States, 117 S. Ct. 2365, 2404-05 (1997) (Breyer, J., dissenting).
[139] *Id.* at 2377 n.11 (majority opinion).