GENDER BASED AFFIRMATIVE ACTION: A JOURNEY THAT HAS ONLY JUST BEGUN

I. INTRODUCTION

When the Court handed down *Adarand Constructors, Inc. v. Pena*,[1] it made a bold statement by applying the strict scrutiny standard[2] to federal affirmative action programs[3] that use racial or ethnic selections criteria.[4] However, the Court did not discuss the constitutional standard

1. 115 S. Ct. 2097 (1995).

2. Strict scrutiny requires that "racial classifications . . . serve a compelling governmental interest, and must be narrowly tailored to further that interest." *Id.* at 2117. *See also* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) ("[T]he purpose of strict scrutiny is to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool.").

3. President Johnson issued Executive Order 11,246 requiring businesses contracting with the federal government to implement affirmative action programs. Executive Order 11,375, 3 C.F.R. 339 (1964-1965). Although Order 11,246 made no reference to sex, Executive Order 11,375 amended Order 11,246 to prohibit sex discrimination. Executive Order 11,375, 3 C.F.R. 684 (1966-1970). Under Johnson's Executive Order, an organization could be denied a federal contract or have its existing contracts terminated simply because it failed to show active attempts to enhance the number or status of protected groups within the organization. The Executive Order did not require that anyone lodge a complaint in order for action to be expected or required. The divergence between legislative and executive law gives some explanation to the inconsistency that court-made law has shown in affirmative action cases.

4. In doing so, *Adarand* explicitly overruled Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 565 (1990), which held federal racial classifications need only satisfy intermediate scrutiny even though state racial classifications must satisfy strict scrutiny. *Adarand*, 115 S. Ct. at 2113.

of review for gender-based affirmative action.[5]

Presently, lower courts apply two different standards of review to gender-based affirmative action programs: intermediate scrutiny[6] and strict scrutiny.[7] Courts which apply the intermediate standard find support in cases handed down in the early 1980's.[8] Alternatively, courts which apply a strict scrutiny standard[9] rely on the 1989 Supreme Court decision of *City of Richmond v. J.A. Croson Co.*[10] Although both standards prevail throughout the lower courts, recent decisions indicate a trend towards the strict scrutiny standard in gender-based affirmative action cases.[11]

The application of the strict scrutiny standard to gender-based affirmative action may be detrimental to women.[12] The application of strict scrutiny may eliminate many programs which promote the advancement of women.[13] This Section examines the post-*Adarand* viability of gender-based affirmative action claims. Part II defines affirmative action and sketches the evolution of race-based affirmative action programs under Title VII and equal protection analysis. Part III examines the effect of equal protection analysis on gender-based affirmative action. Part IV examines how far women have advanced in the work force and the necessity of affirmative action based on gender.

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5. *See Adarand*, 115 S. Ct. 2097.

6. The intermediate or middle level of scrutiny requires the gender-based classification to be substantially related to the achievement of an important governmental objective. Craig v. Boren, 429 U.S. 190, 197 (1976). The Court must strike the statute if the gender-based criterion is not substantially related to an important governmental objective even if the criterion favors women and is enacted solely to remedy past anti-female discrimination. *See also* Johnson v. Transportation Agency, 480 U.S. 616 (1987); Califano v. Webster, 430 U.S. 313 (1977).

7. *See infra* notes 63-79 and accompanying text.

8. *See, e.g.*, Concrete Works of Colorado v. City and County of Denver, 36 F.3d 1513, 1519 (10th Cir. 1994) (relying on Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 723-34 & n.9 (1982)); Ensley Branch, NAACP v. Jefferson County, 31 F.3d 1548, 1579 (11th Cir. 1994) (same); Contractors Ass'n v. City of Philadelphia, 6 F.3d 990, 999 (3d Cir. 1993) (same).

9. *See, e.g.*, Vogel v. City of Cincinnati, 959 F.2d 594, 599 (6th Cir. 1992) (requiring the City's plan to "pass muster pursuant to this strict scrutiny standard").

10. 488 U.S. 469 (1989).

11. *See infra* notes 63-79 and accompanying text.

12. *See infra* part V.

13. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 505 (1989) (rejecting a racial-based affirmative action plan under the strict scrutiny standard).

Part V applies the strict scrutiny standard to gender-based affirmative action and demonstrates the effect it will have on women in the work force. In addition, Part V concludes that the courts should not apply the strict scrutiny standard to gender-based affirmative action plans.

II. THE DEFINITION AND EVOLUTION OF AFFIRMATIVE ACTION

Affirmative action is an attempt to equalize the opportunity for women and racial minorities by explicitly taking into account their defining characteristics—sex or race—which has been the basis for discrimination.[14] Affirmative action is a positive measure taken by employers to remedy past discrimination against a class of individuals sharing a common characteristic.[15] An employee can challenge an affirmative action plan as a Title VII violation or as a violation of the Equal Protection Clause of the 14th Amendment.[16] However, the courts apply a different standard depending on whether the employee challenges the plan under Title VII or the Equal Protection Clause.[17]

A. *Title VII Standard*

In *United Steelworkers of America v. Weber*,[18] the Court permitted an employer to consider the employee's race when making employment decisions.[19] In it's opinion, the Court examined Congress' purpose when it enacted the Civil Rights Act of 1964,[20] and concluded that Congress did not intend Title VII to prohibit affirmative action plans.[21] Congress enacted title VII to prohibit racial discrimination and to "open employment opportunities for . . . [African-Americans.]"[22] The Court

14. Thomas Mullen, *Affirmative Action, in* THE LEGAL RELEVANCE OF GENDER, 244-66 (Sheila McLean and Noreen Burrows eds., 1988).

15. *See* United Steelworkers of Am. v. Weber, 443 U.S. 193, 197 (1979) (holding that Title VII does not prohibit employers from taking "race-conscious steps to eliminate manifest racial imbalances in traditionally segregated job categories").

16. Cunico v. Pueblo Sch. Dist. No. 60, 917 F.2d 431, 436-37 (10th Cir. 1990). The Equal Protection Clause reads: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

17. *Cunico*, 917 F.2d at 437.

18. 443 U.S. 193 (1979).

19. *Id.* at 209.

20. 42 U.S.C. §§ 2000e-2000e-17 (1994).

21. *Weber*, 443 U.S. at 200-04.

22. *Id.* at 203.

determined that Congress intended "employers . . . to self-examine and to self-evaluate their employment practices and . . . to eliminate" racial discrimination.[23]

Although *Weber* did not define a permissible affirmative action plan, the Court considered several factors.[24] First, whether the employer enacted the plan in order to correct past discrimination patterns.[25] Second, whether the plan "trammel[ed] the interests of the white employees."[26] Finally, whether the plan was a temporary measure designed to eliminate a racial imbalance.[27]

B. *Race-Based Equal Protection Clause Claims*

In addition to challenging an affirmative action plan under Title VII, a plaintiff may also challenge the plan under the Equal Protection Clause. The Supreme Court, however, has failed to clearly articulate a standard for reviewing such claims. Prior to *Adarand*, the Court had adopted different levels of scrutiny for race-based affirmative action claims.[28] In its various opinions, the Court applied strict scrutiny for state and local government race-based affirmative action plans[29] and intermediate scrutiny for federal government actions.[30]

The Court first addressed affirmative action in *Regents of the University of California v. Bakke*.[31] *Bakke* involved a challenge to a state medical school's admissions program of University of California at

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23. *Id.* at 204.

24. *Id.* at 208.

25. *Id.*

26. *Id.*

27. *Id. See also* Cunico v. Pueblo Sch. Dist. No. 60, 917 F.2d 431, 437 (10th Cir. 1990) (applying *Weber*).

28. *See* Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2108-13 (1995) (discussing the evolution of race-based affirmative action claims under the Equal Protection Clause).

29. *See, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986); Fullilove v. Klutznick, 448 U.S. 448 (1980); University of California v. Bakke, 438 U.S. 265 (1978). *See also Adarand*, 115 S. Ct. at 2108-13.

30. *See, e.g.*, Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990), *overruled by*, Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995).

31. 438 U.S. 265 (1978).

Davis Medical School.[32] The program ensured the admission of a specified number of minority students.[33] Bakke, a white male applicant, claimed the admissions program violated the Equal Protection Clause.[34] A divided Court struck down the University's plan in the first of many four-to-five decisions on affirmative action.[35] Although unable to agree on a basis for its decision, five justices agreed that any racial or ethnic classification, regardless of its purpose, must be subject to strict scrutiny.[36] Thus, the admissions program could employ race as a "plus" factor but could not exclude applicants solely because of their race.[37] Essentially, the University could not use an applicant's race as the sole reason for selecting that individual without comparing that applicant with other applicants.[38]

Since *Bakke*, the Supreme Court has consistently subjected state-implemented affirmative action programs containing race-based preferences to strict scrutiny.[39] In *Wygant v. Jackson Board of Education*,[40] the Court addressed whether the Jackson Board of Education could grant preferential protection against layoffs to some of its

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32. *Id.* at 272-75.

33. *Id.* at 275. The admissions procedure reserved a fixed number of seats in each entering class for disadvantaged minority students. *Id.* Only African Americans, Latin Americans, Native Americans, and Asian-Americans could compete for these places. *Id.* at 289. In addition, the admissions officers attempted to fill the fixed number of seats with persons who were also victims of racial discrimination. *Id.* at 275.

34. *Id.* at 278.

35. *Id.* at 319-20.

36. *Id.* at 289-91.

37. *Id.* at 317. Justice Powell's application of the traditional strict standard required that the Court could only uphold a suspect classification if (1) its objective was "permissible and substantial," and (2) the classification employed was "necessary" to accomplish that objective. *Id.* at 305 (quoting *In re* Griffiths, 413, U.S. 717, 721-22 (1973)). Powell further held that remedying past discrimination (*i.e.*, affirmative action) justified such classifications only where explicit judicial, legislative or administrative findings revealed specific constitutional or statutory violations. *Id.* at 307-09.

However, Powell did find the University's asserted objective of an ethically diverse student body a permissible constitutional goal so long as it was merely one factor in the admissions process. *Id.* at 311-18.

38. *Id.* at 317.

39. *See, e.g.*, City of Richmond v. J.A. Croson, Co., 488 U.S. 469 (1989); Wygant v. Jackson Bd. of Educ., 476 U.S 267 (1986).

40. 476 U.S. 267 (1986).

employees based on race or national origin.[41] In a five-to-four decision, the Court applied strict scrutiny and declared the layoff protection program unconstitutional.[42] The Board adopted the agreement in order to provide the minority students with minority role models.[43] Justice Powell, however, held the Board's attempt to overcome societal discrimination was not a compelling state interest.[44] Rather, the Board had to establish that it had engaged in prior discrimination before it could use racial classifications to remedy that discrimination.[45]

Finally, in *City of Richmond v. J.A. Croson Company*,[46] the majority of the Court rejected race-based remedies implemented by the City of Richmond in the absence of proof the City itself had discriminated against minorities.[47] The City of Richmond designed a minority set-aside program which required a fixed percentage of publicly funded construction projects to be set aside for minority-owned business.[48] Writing for the majority, Justice O'Connor stated the Court must subject state and local race-based affirmative action programs to strict scrutiny.[49] As a result of this decision, if a local governmental body wants to pursue a race-conscious remedial plan, the local legislature must prove

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41. *Id.* at 270. In *Wygant*, the school board and the teachers' union negotiated a collective bargaining agreement which provided that when layoffs were required, the Board would retain teachers with the most seniority "except that at no time will there be a greater percentage of minority personnel laid off that the current percentage of minority personnel employed at the time of the layoff." *Id.* at 270. As a result of this agreement, the Board laid off nonminority teachers and retained minority teachers with less seniority. *Id.* at 272. The nonminority teachers alleged the agreement violated both the Equal Protection Clause and Title VII. *Id.*

42. *Id.* at 279-80, 283-84.

43. *Id.* at 274.

44. *Id.* at 274-76.

45. *Id.* at 274. *But see* Local 28, Sheet Metal Workers Assoc. v. EEOC, 478 U.S. 421 (1986) (holding that Title VII relief is not limited to actual victims of prior discrimination but could instead benefit those who were not themselves actual victims).

46. 488 U.S. 469 (1989).

47. *Id.* at 498-99. *But see* Fullilove v. Klutznick, 448 U.S. 448, 485 (1980) ("[I]t was within congressional power to act on the assumption that in the past some nonminority businesses may have reaped competitive benefit over the years from the virtual exclusion of minority firms from these contracting opportunities."), *overruled by*, Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995).

48. *Croson*, 488 U.S. at 477-78.

49. *Id.* at 509-11.

the presence of past discrimination.[50]

The Supreme Court, however, in *Metro Broadcasting, Inc. v. FCC*,[51] applied a different level of scrutiny to federal race-based programs.[52] In it's opinion, the Court held that "benign race-conscious measures mandated by Congress"[53] were constitutional as long as the program served an important governmental objective and were substantially related to the objective.[54] In other words, *Metro Broadcasting* applied intermediate scrutiny to a federal race-conscious program.[55]

In *Adarand Constructors, Inc. v. Pena*,[56] the Supreme Court overruled *Metro Broadcasting* and held all federal, state, and local race-based affirmative action programs subject to strict scrutiny.[57] *Adarand* involved a federal program giving general contractors on government projects financial incentives to hire subcontractors controlled by "socially and economically disadvantaged individuals."[58] A nonminority subcontractor alleged the program violated the equal protection provision of the Fifth Amendment Due Process Clause.[59] Rather than applying the intermediate scrutiny, the Court held all racial classifications imposed

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50. *Id. Cf.* Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 563-66 (1990) (holding a federal race-conscious measure must satisfy intermediate scrutiny, not the strict scrutiny required of state and local governments under *Croson*), *overruled by*, Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995).

51. 497 U.S. 547 (1990).

52. *Id.* at 563-66.

53. *Id.* at 564.

54. *Id.* at 565.

55. Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2112 (1995).

56. 115 S. Ct. 2097 (1995).

57. *Id.* at 2113. In her majority opinion, O'Connor declined to follow *Metro Broadcasting* because it departed from prior cases in two ways. *Id.* at 2112. First, *Metro Broadcasting* rejected *Croson*'s argument that strict scrutiny is essential because of the difficulty of determining what classifications are "benign" or "remedial" and what classifications are motivated by illegitimate notions of racial inferiority or politics. *Id.* Second, *Metro Broadcasting* rejected a consistent standard between state and federal racial classifications. *Id.*

58. *Id.* at 2102. The program defined socially and economically disadvantaged individuals as "'Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities, or any other individual found to be disadvantaged by the [Small Business] Administration pursuant to section 8(a) of the Small Business Act.'" *Id.* at 2102 (quoting 15 U.S.C. § 637(d)(2),(3) (1994)).

59. *Id.* at 2101. Adarand was not awarded a subcontract despite submitting the lowest bid. *Id.* at 2102.

by any federal, state, or local actor must be analyzed under strict scrutiny.[60]

III. EQUAL PROTECTION AND GENDER-BASED AFFIRMATIVE ACTION PROGRAMS

The Supreme Court limited the holdings in *Croson* and *Adarand* to race-based affirmative action programs and provided little insight as to whether the standard should apply to gender-based programs.[61] As a result, the lower courts are split over the proper level of scrutiny applicable in gender-based affirmative action programs.[62]

A. *Strict Scrutiny*

Courts relying on *Croson* apply the same level of scrutiny to gender-based and race-based preferences. In *Vogel v. City of Cincinnati*,[63] the Sixth Circuit applied strict scrutiny to a gender-based affirmative action program in the City of Cincinnati police department.[64] In *Vogel*, a male nonminority applicant alleged the hiring preferences in the program violated his Fourteenth Amendment rights.[65] In upholding the program, the Sixth Circuit relied on *Croson* and applied

60. *Adarand*, 115 S. Ct. at 2113.

61. In his dissent, Justice Marshall was willing to predict the Court's response to the future of gender-based classifications. He stated:

> If the majority really believes that groups like Richmond's nonminorities, which constitute approximately half the population but which are outnumbered even marginally in political fora, are deserving of suspect class status for these reasons alone, this Court's decisions denying suspect status to women, . . . stand[s] on extremely shaky ground.

City of Richmond v. J.A. Croson, 488 U.S. 469, 554 (1989) (Marshall, J., dissenting).

62. *Compare* Concrete Works of Colorado, Inc. v. City and County of Denver, 36 F.3d 1513, 1519 (10th Cir. 1994) (applying intermediate scrutiny) *with* Vogel v. City of Cincinnati, 959 F.2d 594 (6th Cir. 1992) (applying strict scrutiny).

63. 959 F.2d 594 (6th Cir. 1992).

64. *Id.* at 599. The program was pursuant to a court approved consent decree entered into by the Department of Justice and the City after the Department brought a Title VII suit against the City. *Id.* at 596. The suit alleged the City's hiring and promotion practices discriminated against blacks and women. *Id.*

65. *Id.* at 597. The hiring procedure required all applicants, regardless of race or sex, to score at least 60% on a written examination. *Id.* at 596. At that point, the city used gender and race-based hiring preferences to achieve statistical goals set by the consent decree. *Id.* at 596-97.

the same level of scrutiny to race and gender-based preferences.[66] *Vogel* considered the language in *Croson* which states: "[t]he level of scrutiny does not change merely because the challenged classification works against a group that historically has not been subject to governmental discrimination."[67]

The Northern District of Texas was the first court to apply strict scrutiny after *Adarand* in *Dallas Fire Fighters Ass'n v. City of Dallas*.[68] In *Dallas Fire Fighters*, white and Native American male fire fighters claimed race and gender-conscious promotions violated the Equal Protection Clause.[69] The plaintiffs claimed the department passed them over for promotions solely on the basis of race or gender pursuant to the Department's affirmative action plan.[70] The court held the constitutionality of an affirmative action plan, whether voluntary or court-ordered, must be subjected to strict scrutiny.[71] The court found that the City's policy of "skip promotions" in the fire department was not narrowly tailored and therefore violated the plaintiff's equal protections rights.[72] Although the complaint alleged gender and race-based classifications, the court's analysis focused on the race-based remedial measures.[73] However, the decision neither states that strict scrutiny does not apply to gender-based programs, nor does it suggest an applicable alternative scrutiny.

In *Mallory v. Harkness*,[74] the court for the Southern District of Florida applied strict scrutiny in striking down a Florida statute.[75] In *Mallory*, a white male brought an equal protection claim against the

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66. *Id.* at 599-600. In upholding the program, the court relied on statistics which showed low levels of minority and female employment in the relevant positions. *Id.* at 600.

67. *Vogel*, 959 F.2d at 599 (citing *J.A. Croson*, 488 U.S. at 494).

68. 885 F. Supp. 915 (N.D. Tex. 1995).

69. *Id.* at 919.

70. *Id.* at 918-19. The Department's Affirmative Action program provided promotions for minorities who scored lower on department exams than non-minorities. *Id.* at 918 n.1.

71. *Id.* at 920-21. The Court did not rely on *Adarand* in reaching this conclusion but instead relied on City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) and Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986). *Dallas Fire Fighters*, 885 F. Supp. at 921.

72. *Dallas Fire Fighters*, 885 F. Supp. at 923.

73. *Id.* at 921.

74. 895 F. Supp. 1556 (S.D. Fla. 1995).

75. *Id.* at 1559-62.

Judicial Nominating Committee for Florida's Fourth District Court of Appeal after the Committee refused to consider his application because he was not a woman or a minority.[76] The court determined that the Florida Statute violated the Fourteenth Amendment because it imposed absolute gender and race-based qualifications.[77] Applying strict scrutiny, the court found the defendants failed to assert a compelling state interest to justify infringing upon the plaintiff's equal protection rights.[78] Moreover, the court held that even if it found a compelling interest, the program would not survive strict scrutiny because the statute was not narrowly tailored to serve its purpose.[79]

B. *Intermediate Scrutiny*

Courts applying intermediate scrutiny argue that *Croson* only involved racial classifications and therefore does not apply to gender classifications.[80] In *Concrete Works of Colorado v. City and County of Denver*,[81] the Tenth Circuit applied the intermediate scrutiny standard to a public works ordinance enacted by the City of Denver.[82] The ordinance required the Office on Contract Compliance (OCC) to set aside a percentage of each public works contract to minority business

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76. *Id.* at 1558. The court rejected the plaintiff's application based upon a Florida statute which required that one third of the Judicial Nominating Committee seats be filled by women or by a racial or ethnic minority. *Id.* The court held that the statute imposed an outright ban on the plaintiff's right to seek a particular state public office because of his race or his gender. *Id.* at 1559. The Judicial Nominating Committee has the duty to receive and review applications for judicial vacancies and make at least three recommendations from which the governor may select and appoint a judge. *Id.* at 1558.

77. *Id.* at 1558.

78. *Id.* at 1559-60. The court rejected the defendants claimed promoting diversity, and reasoned that such an interest had not been recognized outside academia. *Id.* at 1560. The court also noted that *Bakke* specifically rejected the diversity argument when based solely on race or gender. *Id.*

79. *Id.* at 1560. The court reasoned that the race and gender quota did not advance the stated goals with any degree of precision or certainty. *Id.* at 1560-61. The court found that the statute treated minorities and women alike. *Id.* Reasoning that such a system could result in appointees from one protected class squeezing out another, the court found the quotas were not necessary to serve the statute's objective. *Id.* at 1561.

80. *See* Concrete Works of Colorado v. City and County of Denver, 36 F.3d 1513, 1519 (10th Cir. 1994).

81. 36 F.3d 1513 (10th Cir. 1994).

82. *Id.* at 1519. The City enacted the ordinance to remedy perceived race and gender discrimination in the awarding of public construction contracts. *Id.* at 1516.

enterprises (MBE)[83] and women-owned business enterprises (WBE).[84] A nonminority and male-owned construction firm challenged the ordinance on Equal Protection grounds.[85] On appeal, the Tenth Circuit applied strict scrutiny to the race-based preferences, citing *Croson*, but applied intermediate scrutiny to the gender-based preferences.[86]

After *Adarand*, the District Court of the Middle District of Alabama applied intermediate scrutiny in *Shuford v. Alabama State Board of Education*.[87] In *Shuford*, black citizens and female educators claimed they were denied promotions in Alabama's post secondary educational system based upon their class membership.[88] In ruling on a consent decree, the court held the Equal Protection Clause required a different level of scrutiny for sex than for race.[89] The court applied strict scrutiny to the race-conscious relief in the decree and intermediate scrutiny to the sex-conscious relief.[90]

IV. GENDER BASED AFFIRMATIVE ACTION AND THE FEMALE WORK FORCE

Women in the work force, particularly in jobs considered to be male-dominated, do not receive equal treatment.[91] A full-time working woman earns approximately three-quarters of a man's salary.[92] At least forty percent of this gap is the result of the concentration of women in

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83. The ordinance defined minority as: "person[s] of Black, Hispanic, Asian American or American Indian decent." *Id.* at 1515 n.1.

84. *Id.* at 1515-16. Bidders could satisfy a project's goal by: (1) demonstrating they are certified MBE or WBE; (2) forming a joint venture with a certified MBE or WBE; or (3) enlisting MBE or WBE as subcontractors or suppliers. *Id.* at 1516.

85. *Id.* at 1517. The firm claimed failure to comply with the participation of the ordinance caused it to lose three construction contracts. *Id.*

86. *Id.* at 1519 (citing Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 723-27 (1982)).

87. 897 F. Supp 1535 (M.D. Ala. 1995).

88. *Id.* at 1543.

89. *Id.* at 1550 (citing Ensley Branch, NAACP v. Seibels, 31 F.3d 1548, 1579-80 (11th Cir. 1994)).

90. *Id.*

91. *See generally* Benjamin T. Isbell, *Gender Inequality and Wage Differentials Between the Sexes: Is it Inevitable or Is there an Answer*, 50 WASH. U. J. URB. & CONTEMP. L. __ (1996).

92. UNITED STATES DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 433 (1995).

low paying jobs.[93] Indeed, men earn more than women in every occupation—even in predominantly female jobs.[94] Part IV discusses why this wage-disparity exists, and how affirmative action can play a role to effectuate that change.

Two dominant theories attempt to explain the roots of discrimination in the work force. First, the conventional theory attributes the above disparities to socialization.[95] This theory posits that because women have domestic and child rearing responsibilities, they are not brought up to be aggressive and ambitious and thus are not as well suited for advancement in the workforce.[96] In addition, the conventional theory argues traditional cultural roles cause the disparity in wages between men and women.[97] Finally, the conventional theory argues employers pay women less because they assume women are supported by their families.[98]

The second theory argues organizational dynamics such as gender discrimination and sexual harassment, not socialization, cause the lack of occupational success.[99] A "glass ceiling" prevents women from reaching the top positions.[100] At the same time, men experience the

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93. BARBARA RESKIN & HEIDI HARTMANN, WOMEN'S WORK, MEN'S WORK: SEX SEGREGATION ON THE JOB 10-12 (1986).

94. CATHERINE MACKINNON, FEMINISM UNMODIFIED 24-25 (1987).

95. *See* JERRY A. JACOBS, REVOLVING DOORS: SEX SEGREGATION AND WOMEN'S CAREERS 37-63 (1989) (discussing the social control approach).

96. *Id.*

97. *See id.*

98. ALICE KESSLER-HARRIS, A WOMAN'S WAGE: HISTORICAL MEANINGS AND SOCIAL CONSEQUENCES (1990). The disparity in wages reflects the long-standing cultural tradition that men are the bread winners of the family. Historically, employers paid different wages to male and female workers because the employers believed men needed more money than women because they had to support their families. *Id.* Therefore, women were originally recruited into jobs such as teaching, nursing and library science, because civic leaders believed the women did not "need" the money. Many employers still hold this belief today. CHRISTINE L. WILLIAMS, STILL A MAN'S WORLD: MEN WHO DO "WOMEN'S WORK" 159-160 (1995).

99. *See generally* WILLIAMS, *supra* note 98, at 6.

100. Pamela M. Prah, *Women: OFCCP, Other Programs Expected to Meet Strict Affirmative Action Test, Aide Says,* Daily Lab. Rep. (BNA) 141 (July 24, 1994). "Glass ceiling" refers to the notion that women reach an invisible barrier to promotion in their careers. In March of 1995, the Glass Ceiling Commission released a fact-finding report which reveled that 97% of the senior managers in *Fortune* 1,000 industries and *Fortune* 500 companies were white males. *Id.*

"glass escalator" which makes it difficult for them to avoid promotion in the work place despite their own intent.[101]

Regardless of which theory one adheres to, occupational sex segregation presents a major problem for working women. It contributes to the income gap between men and women,[102] it perpetuates gender stereotypes[103] and it impedes women from pursuing some of the most powerful and fulfilling careers in our society.[104]

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101. WILLIAMS, *supra* note 98, at 87 (noting that one must work harder to remain in one place while on a moving escalator). Men often have difficulty understanding the notion of glass ceiling since they rarely experience gender discrimination in the work place which affects their ability to excel. *See generally* CYNTHIA F. EPSTEIN, WOMEN IN THE LAW (1981); JACOBS, *supra* note 95; ROSABETH M. KANTER, MEN AND WOMEN OF THE CORPORATION (1977); SUSAN E. MARTIN, BREAKING AND ENTERING: POLICEWOMEN ON PATROL (1980); BARABRA RESKIN & PATRICIA ROSS, JOB QUEUES, GENDER QUEUES: EXPLAINING WOMEN'S INROADS INTO MALE OCCUPATIONS (1990) (discussing women in male-dominated professions). Even more, men in female-dominated professions such as nursing and teaching do not have the same experiences as do females in male-dominated professions. While men may experience discrimination in female-dominated professions, the discrimination tends to work in their favor. Management typically promotes these men from service positions to more lucrative administrative positions thought to be more "appropriate" for male employees. *See,* CAROL T. SCHREIBER, CHANGING PLACES: MEN AND WOMEN IN TRANSITIONAL OCCUPATIONS (1979); CHRISTINE L. WILLIAMS, DOING "WOMEN'S WORK": MEN IN NONTRADITIONAL OCCUPATIONS (1993); CHRISTINE L. WILLIAMS, GENDER DIFFERENCES AT WORK: WOMEN AND MEN IN NONTRADITIONAL OCCUPATIONS (1989); WILLIAMS, *supra* note 98 (offering a more in depth discussion of men in female-dominated professions).

102. *See supra* notes 92-94 and accompanying text. Cross-sectional studies show that gender differences in salary do not disappear when factors such as education, experience, and training are controlled: the amount of increase in salary that a year's education or on-the-job training experience brings is greater for a man than for a woman. *See generally* BARBARA R. BERGMAN, THE ECONOMIC EMERGENCE OF WOMEN (1986).

103. *See* Isbell, *supra* note 91, at __.

104. Women occupy an inequitable position in all types of organizations. For example, women comprise 3% of top management positions; in academic settings women are much less likely than men to hold tenured, tenure track or full-time positions; women comprise only 8.6% of the country's engineers; 3.9% of airplane pilots and navigators; less than 1% of carpenters; 15% of elected officials; and 16% of physicians. While women comprise 48% of the journalists, they hold only 6% of the top jobs in journalism. Judith Applebaum, *Uprooting Gender-Based Discrimination*, CONN. LAW TRIB., May 8, 1995, at 23; SUSAN D. CLAYTON & FAYE J. CROSBY, JUSTICE, GENDER AND AFFIRMATIVE ACTION 9 (1992).

Women are also disadvantaged in the field of law. *See* Judge Judith S. Kaye, *Women Lawyers in Big Firms: A Study in Progress Towards Gender Equality,* 57 FORDHAM L. REV. 111 (1988). Moreover, few women partners in large firms rise to leadership level in their firms. Even as partners, women report that they hit the glass ceiling. Room at the top is often reserved for rainmakers; men have been more effective rainmakers than

However, since 1965, affirmative action has improved the economic position of women.[105] The increase in the percentage of women in the workforce and the reaction that is given to complaints of discrimination reflect improvement.[106] Moreover, empirical data supports the effectiveness of affirmative action. In a survey conducted in private and public companies, management was presented with a hypothetical person whose sex, race and various characteristics were manipulated systematically.[107] The study asked management to assign that hypothetical person a job based on the given characteristics.[108] While the results showed black female college graduates were still assigned lower-paying positions than corresponding white employees, income disparities were much smaller in companies with formal affirmative action guidelines.[109] Today, employers recognize that affirmative action programs prevent them from eliminating qualified applicants, or losing qualified employees.[110] This study supports the conclusion that affirmative action has improved the status of women in the workforce.

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women, having had more opportunity and access necessary to successful rainmaking than women. Eleanor M. Fox, *Being a Woman, Being a Lawyer and Being a Human Being—Women and Change,* 57 FORDHAM L. REV. 955 (1989). *See also,* Zeldis, *Rainmaking at Law Firms: The Last Hurdle for Women,* N.Y. L.J., May 1, 1989, at 1. col. 3.

105. CLAYTON & CROSBY, *supra* note 104, at 98. A 1981 study by the Office of Federal Contract Compliance Programs showed far greater percentages of women and non-white men employed by federal contractors subject to affirmative action requirements than by non-contractor establishments. *Id.* Between 1974 and 1980 employment of minorities and women by federal contractors substantially increased (20% and 15%, respectively), while non-contractors showed a smaller increase of minority hiring (12%) and almost no change in the employment of women (a 2% increase). *Id.*

106. One significant case of sexual discrimination at the University of Minnesota evinces the impact of affirmative action. Originally filed in 1973, the case was expanded to a class action in 1975 and settled in 1980 after the University instituted an affirmative action program. The plan established policies for hiring and promoting women that included goals and timetables for each department and a rule that equally qualified female candidates would be given preference. Between 1979 and 1989, the percentage of women administrators increased from 26% to 54%. In 1979, female faculty earned 77% of what men earned; ten years later they earned 81%. *Id.* at 98-99.

107. *Id.* at 99.

108. *Id.*

109. *Id.*

110. *Id.* Indeed, companies have come to realize that affirmative action programs can be designed to benefit the company as well as the target group. Avon Chairman James Preston has stated that "managing diversity is not something we do because it is nice but because it is in our interest." *Id.* at 127.

V. CONCLUSION

Despite these advances, affirmative action has only begun to remedy the disparity between males and females in the workforce.[111] Affirmative action must continue until true equality is reached and women are fully integrated into the workforce. To reach this goal, however, affirmative action programs implemented only to correct past discrimination is not sufficient. Instead, management must develop proactive programs. Employers implementing affirmative action programs must not only monitor their ongoing operations, they must also respond to and correct problems that arise. In addition, employers must encourage diversity in the workplace by educating all their employees, supporting all the minority employees, and helping each employee maximize their potential regardless of their sex.[112]

In *Adarand*, the Supreme Court applied the strict scrutiny to all federal, state, and local governmental race-based affirmative action programs. Applying strict scrutiny set out in *Adarand* to gender-based affirmative action programs will only impede or reverse the accomplishments achieved thus far. Instead, the courts should give deference to these programs. Although parties oppose affirmative action programs,[113] the public would support these programs if they received an

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111. *See supra* notes 91-94 and accompanying text.

112. *See* Elizabeth M. Fowler, *Managing a Diverse Work Force*, N.Y. TIMES, Apr. 10, 1990, at 17D. Many companies have implemented creative programs to support and promote diversity. *Id.* These programs often include role-playing, sharing personal experiences, engaging in open discussions to expose managers to the subtle dimensions of prejudice and stereotypes, and helping managers deal with race- or gender-related differences in business behavior. *Id.* Some companies develop race- or gender-based support networks. *Id.*

113. In an insightful analogy, author Eleanor Holmes Norton addresses the disagreement over the necessity of affirmative action programs by comparing them to the procedures of electing political representatives in the United States. She states that voting purports to be the process through which citizens elect politicians who will represent their point of view, yet voter turnout continues to drop, distrust of politicians increases, and most people agree that elections have become too much like popularity contests where the candidates try not so much to express their own positions to the voters as to say whatever will win them votes. However, few would advocate abolishing elections because the democratic process necessitates voting. Likewise, she argues that affirmative action is necessary even if it does not always operate perfectly. SUSAN D. CLAYTON, JUSTICE, GENDER, AND AFFIRMATIVE ACTION 3 (1992). Alternatively, James Scanlan, a lawyer with the Equal Employment Opportunity Commission, argues for an end to gender-based affirmative action based on lack of necessity. Scanlan argues that although certain factors

explanation of these programs and if they received information regarding the inequalities that exist between the sexes.

Through the implementation of affirmative action, the application of intermediate scrutiny and the improvement of diversity education, the notion of any disparity between the sex will cease. In order for change to occur, there must be a change in how people feel, behave and respond to other human beings regardless of their gender. Without such change, the nation's journey towards equal opportunity will be unending.

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may justify minority based affirmative action programs, they do not justify gender-based programs. *Id.* Specifically, Scanlan contends that minorities are disproportionately affected by the economic circumstances of other members of their minority group with whom they share their economic situation—blood relations and spouses—are also minorities. *Id.* Thus, a reduction in low-paying jobs tends to mitigate the total impact of poverty. *Id.* In contrast, Scanlan claims that the economic circumstances of other women do not effect women as a group any more than the economic circumstances of men. *Id.* Thus, because women do not disproportionately share their economic situation with other women, reducing female unemployment will not lessen the impact of poverty. *Id.* Scanlan points to this factor as strong evidence for eliminating set-asides based on gender. *Id.*

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