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Affirmative Action as a Women's Issue

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Good morning. I'd like to focus this morning on women's stake in the debate over affirmative action, a subject that gets almost no discussion in the policy discourse, the media coverage, or even in the case law. I'd like to talk about why affirmative action is important to women and why its impact on women deserves more attention. I'll also speculate a little about some of the reasons why women's interests in this debate have so far received so little attention.

Let me start with the Supreme Court and ask, for example, what *Adarand Constructors, Inc. v. Pena*[1] means for women. What is the post-*Adarand* standard of review for gender-based affirmative action programs? *Adarand* itself does not address the appropriate level of constitutional review for such programs. As you probably know, *Adarand* holds that any race-based classification by the federal government, including affirmative action, is subject to strict scrutiny.[2] In other words, it must be necessary to achieve a compelling government interest.[3]

However, there is no Supreme Court case law on the constitutionality of gender-based affirmative action programs. In fact, the only holding in the area is a Title VII case, *Johnson v. Transportation Agency*,[4] which I'll talk about a little later on. In the absence of Supreme Court guidance, most folks assume (as Justice Stevens did in his dissent in *Adarand*) that if the Court is serious about a commitment to "consistency" in its equal protection jurisprudence, then intermediate scrutiny must apply to gender-based affirmative action just as it does to invidious gender discrimination. Intermediate scrutiny has been applied to gender-based classifications by government since the Court decided *Craig v. Boren*[5] in 1976. Intermediate scrutiny requires that gender-based classifications by

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1. 115 S. Ct. 2097 (1995).
2. *Id.* at 2113.
3. *Id.*
4. 480 U.S. 616 (1987).
5. 429 U.S. 190 (1976).

the government be substantially related to an important government interest.[6]

The theory, in other words, is that since *Adarand*—and *City of Richmond v. J.A. Croson Co.*[7] before it—conclude that strict scrutiny applies to any governmental use of race-based classifications, regardless of whether such use is motivated by invidious or benign intentions, intermediate scrutiny should apply to remedial gender-based programs, just as it does to invidious gender classifications. And, in fact, that is what most lower courts have decided in the wake of *Croson* (which, in 1989, applied strict scrutiny to all race-based classifications by state and local governments).

Note, however, what this means. Due to the difference between intermediate scrutiny and strict scrutiny, it is now easier for governments to engage in invidious gender discrimination against women than to engage in race-based affirmative action programs. To take one example, it's easier for a state to exclude women from state-sponsored military schools than to establish a race-based affirmative action program designed to remedy proven invidious racial discrimination.

Note also the especially interesting anomaly in the Sixth Circuit, which is the source of a great deal of case law of concern to civil rights attorneys. In two separate post-*Croson* decisions, the Sixth Circuit has held that gender-based affirmative action programs are subject to strict scrutiny.[8] So, it's easier for the state governments of Ohio, Michigan, Tennessee, and Kentucky to expressly discriminate against women invidiously than it is for those same states to defend affirmative action programs designed to correct sex discrimination.

These anomalies are pretty hard to justify, and they demonstrate some of the problems with the Court's current equal protection jurisprudence. In fact, it is entirely possible that this term the Court will re-examine the constitutional standards that apply generally to sex discrimination when it takes up *United States v. Virginia*.[9] In that case, the Department of Justice is bringing an equal protection challenge to Virginia's sponsorship of the Virginia Military Institute (VMI), a school that excludes women because they are women, regardless of their qualifications. Note that the Court has never foreclosed the possibility of applying strict scrutiny to gen-

6. *Id.* at 197.

7. 488 U.S. 469 (1989).

8. Brunet v. City of Columbus, 1 F.3d 390, 404 (6th Cir. 1993), *cert. denied*, 114 S. Ct. 1190 (1994); Conlin v. Blanchard, 890 F.2d 811, 816 (6th Cir. 1989).

9. 44 F.3d 1229 (4th Cir. 1995), *cert. granted*, 116 S. Ct. 281 (1995).

der.[10] In fact, a plurality of four justices supported the use of strict scrutiny in 1973, in *Frontiero v. Richardson.*[11] If the Court uses the VMI case to hold that strict scrutiny should apply to gender-based classifications, then the anomalies that I've mentioned would disappear.

Let me switch now from the case law to the policy debate, another forum that has been virtually silent with respect to women and affirmative action. I'll start by talking about affirmative action's importance in creating opportunities for women, who, because of their gender and in spite of their merit, have historically been denied opportunities. It's important to recognize our long national history of discrimination, and our comparatively short commitment to equal opportunity and anti-discrimination. I think understanding this history is key to understanding affirmative action's continuing relevance to the lives of American women.

You all know that women have historically been cut off from educational opportunities, and trapped into lower-paying, sex-segregated jobs—discouraged, for example, from pursuing fields like medicine, business, or the skilled trades. As late as 1968, for example, newspapers and employers routinely segregated "Help Wanted" ads by gender, with one section advertising the better-paying jobs only for men and a separate section listing women's jobs, thus systematically excluding women from key opportunities without regard for their qualifications. While some of these most blatant forms of discrimination have dissipated with time and aggressive law enforcement, sex discrimination remains all too prevalent.

It's important to note that despite centuries of discrimination, Title VII, the federal law barring job discrimination, is barely thirty years old. And, in fact, Title VII's protections against sex discrimination came about only by a historic accident.[12] Federal laws ban-

10. *See* J.E.B. v. Alabama, 114 S. Ct. 1419, 1426 n.6 (1994) (discussing "heightened scrutiny" for gender and holding that peremptory challenges based on gender violate the Equal Protection Clause); Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982) (discussing applicable level of scrutiny and holding that a state's exclusion of males from a nursing school violates the Equal Protection Clause); *see also* Harris v. Forklift Sys., Inc., 114 S. Ct. 367, 372-73 (1993) (Ginsburg, J., concurring) (arguing that an "objectively" hostile or abusive work environment violates Title VII of the Civil Rights Act of 1964).

11. 411 U.S. 677, 688 (1973).

12. The statute's protections for women resulted from a political miscalculation by southern segregationists seeking to break Congress' determination to prohibit race discrimination. In 1964, the segregationists gambled that even the most ardent civil rights advocates would balk at passing Title VII if it meant opening up

ning sex discrimination in education date only to 1972,[13] and less than 25 years have passed since the Supreme Court first recognized that governmental sex discrimination is indeed unconstitutional.[14] As recently as 1961, a unanimous Supreme Court that included Earl Warren and William Brennan upheld Florida's policy of exempting women from jury duty, reasoning that a "woman is still regarded as the center of home and family life,"[15] and presumably not of public life and community decision-making.

Given our short history of a national commitment to equal opportunity, sex discrimination's continuing force is not surprising. A few recent examples from the case law also make clear how discrimination continues to limit women's opportunities. For example, a federal judge in California found that a major grocery store chain routinely segregated women and people of color into low-wage, dead-end jobs while hiring white men for jobs that led to management opportunities. Women and people of color were denied access to critical training programs and were steered against their wishes into part-time rather than full-time jobs.[16] In another example, a District of Columbia federal court found that Price Waterhouse, the major accounting firm, refused to promote a woman to partnership, even though she had generated millions of dollars more revenue than any other candidate to be considered for partnership that year. The reason: she wasn't considered sufficiently feminine.[17]

Social science studies further document sex discrimination's continued vitality. Last year, for example, the National Bureau of Economic Research sent equally qualified pairs of male and female applicants to seek jobs at a range of Philadelphia restaurants. Their audit found that high-priced restaurants that offered good jobs,

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employment opportunities to women as well as to people of color. On the last day of the House debate on the Civil Rights Act, segregationist Rep. Howard W. Smith, a Virginia Democrat, offered an amendment adding sex discrimination to the types of discrimination prohibited. Fortunately, he underestimated congressional determination to enact civil rights legislation, and the bill became law as amended, with the prohibition on sex discrimination essentially an afterthought. *See* Willingham v. Macon Tel. Publishing Co., 507 F.2d 1084, 1090 (5th Cir. 1975) (citing Peter F. Ziegler, Note, *Employer Dress and Appearance Codes and Title VII of the Civil Rights Act of 1964*, 46 S. CAL. L. REV. 965, 968 (1973), and Note, *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1167 (1971)). *See also* 110 CONG. REC. 2577 (1964).

13. 20 U.S.C.A. § 168 (West Supp. 1990).

14. Reed v. Reed, 404 U.S. 71 (1971).

15. Hoyt v. Florida, 368 U.S. 57, 62 (1961).

16. Stender v. Lucky Stores, Inc., 803 F. Supp. 259, 332-35 (N.D. Cal. 1992).

17. Hopkins v. Price Waterhouse, 920 F.2d 967 (D.C. Cir. 1990).

with decent pay and good tips, were twice as likely to offer jobs to the male applicants over their equally qualified female counterparts.[18]

The not-so-surprising result of this ongoing discrimination is that white men still dominate most upper-level managerial jobs. Folks are probably pretty familiar with the statistics.[19] Not surprisingly, men are more likely to be high wage earners than women.[20] Qualified women consistently earn less than their male counterparts, and, in fact, they don't receive the same return on their investment in education.[21] As a result, women are painfully aware that merit still too often takes a back seat to discrimination.

Now, affirmative action seeks to try to prevent discrimination before it happens, by urging institutions to scrutinize their decision-making practices for stereotyping and other discriminatory actions. Affirmative action also enables institutions to correct discrimination once the infraction has been identified. In other words, the programs are designed to counter the discrimination that too often taints decisions about education, business, and job opportunities. In great part because of programs like these, women have made significant progress in recent years. Women do earn more. In 1963

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18. DAVID NEUMARK ET AL., SEX DISCRIMINATION IN RESTAURANT HIRING: AN AUDIT STUDY (National Bureau of Economic Research Working Paper No. 5024, February 1995).

19. Women and people of color make up less than 5 percent of senior managers in Fortune 1500 companies, even though women are 46 percent and people of color are 21 percent of the national workforce. FEDERAL GLASS CEILING: COMMISSION, GOOD FOR BUSINESS: MAKING FULL USE OF THE NATION'S HUMAN CAPITAL (1995).

20. In 1994, 16 percent of white men were high wage earners, meaning they earned more than $50,000 a year. Only 4 percent of white women, less than 2 percent of black women, and less than 2 percent of Hispanic women earned as much. Conversely, only 12 percent of white men were low wage earners, earning less than $13,000 per year, compared to 21 percent of white women, 27 percent of black women, and 37 percent of Hispanic women. U.S. CENSUS BUREAU, THE EARNINGS LADDER: WHO'S AT THE BOTTOM? WHO'S AT THE TOP?, STATISTICAL BRIEF (June 1994).

21. College-educated Hispanic women annually earn $1,600 less than white men who have only high school diplomas. They earn nearly $16,000 less than college-educated white men. College-educated black women earn only $1,500 more than white men with high school diplomas, and $13,000 less than college-educated white men. College-educated white women earn $3,000 more a year than white men with high school diplomas, and $12,000 less than white men with college degrees. U.S. Census Bureau, 1993 Current Population Survey, Table 15, Educational Attainment—Total Money Earnings in 1993 of Persons 25 Years Old and Over, by Age, Race, Hispanic Origin, Sex, and Work Experience in 1993 (unpublished tabulations on file with the *Annual Survey of American Law*).

women earned $0.59 for every dollar earned by men. Today, women earn on average $0.72 for every white male dollar.[22] More women are in the pipeline for top jobs. In 1980, for example, women were 27 percent of all middle and upper managers. By 1990, this number had increased to 35 percent.[23] This is progress, but it's obviously far short of parity.

In short, affirmative action has proven an important tool in opening doors for qualified women. And it's important to realize that, as a result, women do have an enormous stake in this debate. Rolling back these programs would prematurely abandon a relatively short commitment to women's equality.

Affirmative action is also important to women because it strives to create an environment where merit can thrive and succeed. It allows qualified women to compete fairly for decent jobs and educational opportunities. Professor Roger Wilkins summed this up when he described affirmative action as a process designed to encourage institutions to develop fair and realistic criteria for assessing merit, and then to recruit a diverse mix of individuals qualified to take advantage of those opportunities.[24] Opponents of affirmative action too often mischaracterize these programs as the enemy of merit. I think it's worth taking a couple of minutes to talk about why this isn't so. I'd like to outline some of the broad principles that make clear that folks who try to set up the debate as one between affirmative action and a commitment to excellence are misstating what's really going on. In a string of cases that has spanned nearly two decades—most recently in *Adarand*—the Supreme Court has made clear that lawful affirmative action in no way permits quotas, reverse discrimination, or favorable treatment of unqualified women and minorities. The Court has consistently made clear that gender or race can be taken into account to expand opportunities for qualified women and people of color. In the words of Justice Blackmun, "In order to get beyond racism, we must first take account of race."[25] And as Justice O'Connor emphasized in *Adarand*, "[t]he unhappy persistence of both the practice and the lingering

22. U.S. CENSUS BUREAU, CURRENT POPULATION SURVEY, SERIES P-60, NO. 189 (1994).

23. INSTITUTE FOR WOMEN'S POLICY RESEARCH, IMPACT OF THE GLASS CEILING AND STRUCTURAL CHANGE ON MINORITIES AND WOMEN (based on 1980 and 1990 U.S. Census data), *cited in* press release, The Feminist Majority Foundation, Key Findings of Women's Equality Poll (May 15, 1995).

24. Roger Wilkins, *The Case for Affirmative Action*, NATION, March 27, 1995, at 409.

25. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 407 (1978) (Blackmun, J., concurring).

effects of racial discrimination against minorities in this country is an unfortunate reality, and government is not disqualified from acting in response to it."[26] The same is true for sexism.

The Supreme Court has developed a number of safeguards to ensure that affirmative action programs are justifiable. First, there has to be a sufficiently strong reason for the program. The Court has approved programs designed to correct actual discrimination or to respond voluntarily to a serious under-representation of women in the workforce. In the sole Supreme Court decision covering gender-based programs under Title VII, *Johnson v. Transportation Agency*, the Court upheld an employer's affirmative action plan that allowed gender to be considered as a "plus-factor" when choosing between qualified candidates for jobs in which women were seriously under-represented.[27] The employer developed this plan, and the Court deemed it justified, because, after review, the employer found that no women were employed or had ever been employed in any of its 238 skilled craft positions.[28]

Lawful affirmative action programs may be based on other rationales as well. For example, in *Bakke*, Justice Powell noted that a university's educational interest in attaining a diverse student body could justify appropriate affirmative action programs for school admissions.[29]

The Court's second safeguard is the principle that affirmative action programs must apply only to qualified candidates. The Court has never wavered in its insistence that affirmative action must only apply to persons who are qualified for the opportunities in question. In doing this analysis, the Court has recognized that several qualified candidates commonly present varying mixtures of experience, skills, and credentials, so that no single candidate is clearly the most qualified. For example, in the *Johnson* case, both Paul Johnson, the male plaintiff claiming reverse discrimination, and Diane Joyce, the woman who received the promotion, had the requisite four years experience.[30] Ms. Joyce's experience was more recent and arguably more relevant; Mr. Johnson received a score of 75 to Ms. Joyce's 73 in the graded oral interview, where 70 was the

26. 115 S. Ct. at 2117.

27. *Johnson*, 480 U.S. at 637-38.

28. *Id.* at 621.

29. 438 U.S. at 311-12. For assessments of the permissible rationales to support affirmative action programs under current case law, *see* Michael Small, 1995 ANN. SURV. AM. L. 445; and Tanya Murphy, Note, 1995 ANN. SURV. AM. L. 515 (arguing that the diversity rationale remains viable in higher education).

30. *Johnson*, 480 U.S. at 623.

threshold of eligibility.[31] The Court upheld the county's use of Ms. Joyce's gender as a positive factor in choosing between these two qualified candidates, especially since no woman had ever held the position in question.[32]

Finally, the Court's third limiting principle is that affirmative action programs must be narrowly tailored. Rigid and inflexible quotas are not allowed. Programs may use numerical goals to measure progress in expanding opportunities, but only where there is a demonstrated link between the goals and the availability of qualified women and people of color in the relevant pool. The programs must also be flexible and temporary, and must respect the rights of men and whites. Programs cannot require, for example, that male workers be discharged to make way for female workers. Nor, as the court ruled in *Wygant v. Jackson Board of Education*,[33] can a public employer lay off more senior white workers to protect the jobs of less senior black workers.

In short, the Supreme Court has developed principles to ensure that affirmative action is justifiable and fair. It has consistently struck down programs that disregard these principles. In this manner, affirmative action creates a climate where qualified women and men can fairly compete and excel.

In fact, affirmative action programs have opened doors for qualified white men too. For example, in 1994, women-owned businesses generated more jobs in the United States—employing women, people of color, and white men—than the Fortune 500 companies worldwide.[34] Similarly, affirmative action programs developed in response to racial or gender discrimination have created new job training opportunities for white men. For example, the affirmative action program developed in *United Steelworkers v. Weber*[35] created equal numbers of new training slots for black and white workers, thus generating opportunities for white workers that wouldn't have existed absent the employer's commitment to affirmative action.

All in all, women have an enormous stake in the outcome of the current debate over affirmative action. And it's thus essential

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31. *Id.*

32. *Id.* at 623-25.

33. 476 U.S. 267 (1986).

34. NATIONAL FOUNDATION FOR WOMEN BUSINESS OWNERS, WOMEN-OWNED BUSINESS: BREAKING THE BOUNDARIES (1995), *cited in* Sharon Hadary & Julie Weeks, *Women-Owned Businesses: A Growing Force in the Economy*, WASH. POST, Oct. 17, 1995, at A17.

35. 443 U.S. 193 (1979).

that they're included in this discussion. At the center of the debate is the fundamental struggle over what affirmative action really means. Poll after poll concludes that Americans firmly support affirmative action to create opportunities for women and people of color, while they vigorously oppose quotas and preferences for unqualified candidates.[36]

Not surprisingly, opponents of affirmative action have attempted to redefine affirmative action as a synonym for these despised quotas and preferences, even though, as we've just discussed, these practices are clearly not components of lawful affirmative action. At the same time, this debate has been structured by some opponents of affirmative action—and eagerly joined by much of the media—as a series of false choices and polarizing divisions: black against white, male against female, affirmative action against merit and excellence.

I believe these opponents have often purposely centered their attacks on race-based affirmative action to capitalize on racial fears and divisions. Their failure to address women's stake in this debate demonstrates their ignorance of, or indifference to, women's continuing quest for equality. For example, Senator Dole and others have based their rhetorical attacks on affirmative action almost exclusively on so-called racial preferences, without any reference to gender.[37] But their legislative proposals would sweep away all affirmative action programs. Last summer I appeared on a panel with a former Reagan Administration official who, in his 20-minute attack on affirmative action, referred exclusively to so-called "racial preferences" without a single mention of women and their stake in the debate.[38] I think it's important to ask why this is so.

I believe that some opponents of affirmative action focus exclusively on race in their rhetoric—even though their policy proposals would eviscerate all affirmative action programs—because they think it makes good copy and good politics. With respect to good copy, exploiting racial fears over affirmative action generates the sort of inflammatory magazine covers that many of you may have seen. For example, the cover of a recent issue of U.S. News & World Report highlighted the phrase, "No White Men Need Ap-

36. *See, e.g., Affirmative Action: The Public Reaction*, USA TODAY, March 24, 1995, at A1 (reporting results of USA Today/CNN Gallup poll).

37. *See, e.g.*, 141 CONG. REC. S3939 (March 15, 1995) (remarks of Sen. Dole); 141 CONG. REC. S10829 (July 27, 1995) (remarks of Sen. Dole).

38. American Bar Association, *"Affirmative Action—Will It Survive the Current Legal, Social, and Political Environment?"*, panel presentation at the Annual Meeting of the American Bar Association (Chicago August 9, 1995).

ply."[39] An issue of Newsweek featured a cover photo of black and white fists clashing.[40]

With respect to politics, I think that some opponents look at the number of women voters and the demonstrably smaller number of voters of color, and conclude that race-baiting is politically wiser than gender-bashing. They follow this up with the strategy of using buzzwords and horror stories to exploit the fears of white voters.

I think it's important for us, as we continue this discussion, to take a careful look at the opponents' rhetoric and to expose the false choices that are too often expressed in this debate. In playing to the racial fears of white voters, a number of affirmative action opponents are seeking to capitalize on the very real economic anxiety that most Americans feel. And, in fact, there's good reason for Americans to have this sort of economic insecurity. They wonder, rightfully, whether there will be enough decent jobs and educational opportunities for themselves and their families. But we need to be honest about the fact that affirmative action is not the cause of the economic conditions that create this sort of insecurity, and that ending affirmative action tomorrow would not do a thing to end this anxiety. It may be true that some opponents of affirmative action are using the debate to divert attention and energy from the much tougher problems of how to create good jobs and how to educate and train folks to take advantage of good opportunities. All in all, it's important that during this debate we refuse to succumb to these sorts of false choices that seek to pit American against American, scapegoating women and people of color for economically difficult times. We need to recognize just how much is at stake here for women: the chance to compete fairly for good jobs and decent educational and business opportunities. In this debate, we need to insist that the discussion fully address women's stake in the outcome. Thanks very much.

39. Steven V. Roberts, *Does Affirmative Action Mean No White Men Need Apply?*, U.S. NEWS & WORLD REP., Feb. 13, 1995, at cover.

40. Howard Fineman, *Race and Rage*, NEWSWEEK, April 3, 1995, at cover.