Intersectionality and Positionality: Situating Women on Color in the Affirmative Action Dialogue

Laura M. Padilla

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# INTERSECTIONALITY AND POSITIONALITY:
SITUATING WOMEN OF COLOR IN THE AFFIRMATIVE ACTION DIALOGUE

Laura M. Padilla*

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* Associate Professor of Law, California Western School of Law; J.D. Stanford Law School, 1987; B.A. Stanford University, 1983. I thank Professors Barbara Cox, Robert Chang, Leslie Espinoza, Kevin Johnson, and Frank Valdes for their careful reading of this article and their comments. I also am deeply grateful to the participants of the 1996 SE/SW Law Professors of Color Conference for their feedback when I presented this paper, as well as the participants at Harvard’s 1996 Forging Forward: Women of Color and the Law Conference, for allowing me to share an early version of this article. Jacqueline Wagner provided tremendous research assistance, and Zindia Thomas and Magnolia Mansourkia also provided appreciated assistance. Of course, any mistakes are my own, as are the views expressed in this article. Finally, I want to thank my husband, Terry Taylor, for his support, friendship, and willingness to share me with my profession, and to my new son, Jeremiah Estevan, for teaching me so many things so quickly.
AFFIRMATIVE action has come under attack locally,\(^1\) statewide,\(^2\) and federally.\(^3\) During this same period, critical race feminists have brought into sharp relief how women of color are marginalized or erased in discourses over sex and gender, as well as over race and ethnicity.\(^4\) Despite these protests and warnings, the current de-

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In other state action, at Governor Pete Wilson's urging, the regents of the University of California ("UC") voted to support a proposal by regent Ward Connerly, a Wilson appointee, to eliminate race-based preferences for purposes of admissions and faculty appointments (the regents voted for it 14-10 on July 20, 1995). See Dave Lesher & Amy Wallace, UC Vote to End Affirmative Action Echoes Across U.S., L.A. Times, July 22, 1995, at A1. Interestingly enough, more than twice as many students admitted at UC schools are children of alumni (13%), than are admitted through affirmative action programs (6%). Who Benefits From Affirmative Action?, Affirmative Action California: Why It Is Still Necessary (ACLU, Los Angeles, San Francisco, and San Diego, CA), Sept. 1995, at 2, 6 [hereinafter Who Benefits From Affirmative Action?]. Even more interestingly, Governor Wilson, as well as many of the same regents who publicly oppose affirmative action because it results in preferences have reportedly "acted behind the scenes to try to get relatives, friends and children of business partners enrolled into UCLA." UC Regents Aided Own, Paper Says, San Diego Union-Trib., Mar. 17, 1996, at A-3. No one, however, seems to be crying foul over reverse discrimination resulting from these types of preferences.


4. See generally Kimberle Crenshaw, Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics, 1989 U. Chi. Legal F. 139, 150 ("Unable to grasp the importance of Black women's intersectional experiences, [courts and feminist and civil rights thinkers] have treated Black women in ways that deny both the unique compoundedness of their situation and the centrality of their experiences to the larger classes of women and Blacks."); Trina Grillo & Stephanie M. Wildman, Obscuring the Importance of Race: The Implications of Making Comparisons Between Racism and Sexism (Or Other -isms), 1991 Duke L.J. 397, 401, 404-05 (stating that comparisons
bate over affirmative action continues this history of invisibility, perpetuating America's spoken and unspoken conceptions about where women of color belong. For example, most discussion of affirmative action focuses on race, more specifically on African-Americans. Some discussion looks at gender. To date, however, the affirmative action dialogue has not focused on women of color, resulting in a con-

between race and gender discrimination fail because the experiences of women of color are unique); Angela P. Harris, Race and Essentialism in Feminist Legal Theory, 42 Stan. L. Rev. 581, 585 (1990) ("[T]he experience of black women is too often ignored both in feminist theory and in legal theory."). Richard Delgado noted that this discussion by critical race feminists is part of a trend which "consists of subdivision within outsider groups that at one time saw themselves as unitary. Within feminism, for example, women of color are beginning to question whether the agenda of a white, middle-class-dominated woman's movement speaks adequately to their concerns." Richard Delgado, The Inward Turn in Outsider Jurisprudence, 34 Wm. & Mary L. Rev. 741, 753 (1993).


7. See, e.g., John Galotto, Strict Scrutiny for Gender, Via Croson, 93 Colum. L. Rev. 508 (1993) (arguing that strict scrutiny should apply to gender-based affirmative action); Deborah L. Rhode, Perspectives on Professional Women, 40 Stan. L. Rev. 1163, 1196-1202 (1988) [hereinafter Rhode, Perspectives] (discussing how affirmative action has been advocated as a means to achieve gender equality); Judith C. Appelbaum, Gender Goals: Affirmative Action Is Needed Now, More Than Ever, to Neutralize Subtle and Not-So-Subtle Biases Against Women, Legal Times, May 1, 1995, at 28 (stating that affirmative action has played a critical role in creating opportunities for women and minorities); Helen Norton, Affirmative Action Still A Vital Tool for Women, Nat'l L.J., Aug. 14, 1995, at A19 (same); M.A. Stapleton, Women-Oriented Affirmative Action Also May Fall Under Anti-Preference Spotlight: Experts, Chi. Daily L. Bull., July 12, 1995, at 1, available in LEXIS, Legnew Library, Chidlb File (discussing effects of Supreme Court decisions on gender-based affirmative action programs). Discussion of gender, however, remains limited. "In discussions of affirmative action in the 1980s, little attention was given to overcoming the hurdle of gender bias."
continuation of the "nobodying the other" phenomenon described by Professor Anthony Farley.\textsuperscript{8}

This article attempts to rectify this omission by demonstrating that women of color constitute a category of identity uniquely implicated in the affirmative action debate.\textsuperscript{9} The story of women of color told in this article shows that without affirmative action the odds are greater that they will remain in the economic underclass, their acquisition of power will be hampered, and their subordinated status will be perpetuated.\textsuperscript{10} In telling their story, this article strives to change the status

\begin{quote}

8. Professor Farley discussed this during a panel presentation entitled "Race and Representation: Racial Imagery in the Law and Media," Western Law Teachers of Color Conference, Mar. 22, 1996. He stated that intrepid explorers (that is, those from dominant cultures) acquire their power through the process of "nobodying" others (that is, those from subordinated cultures).


10. I do not intend to essentialize women of color. I agree with Angela Harris that gender and racial essentialism oversimplify experiences of women and people of color into basic mathematical formulas, predicated on univocal essential experiences. \textit{See} Harris, \textit{supra} note 4, at 588. Women of color exist in every economic class. There are some powerful women of color, and some women of color who do not think they
of women of color in two ways. First, by ensuring that the ongoing discourse over affirmative action includes women of color as vocal participants, storytellers, and agents of active change. Second, by arguing that various forms of affirmative action should remain in place specifically for women of color.

To enhance the equal availability of opportunities, to work towards inclusion, and to obtain positions of power for women of color, women of color must overcome structural, normative, and pragmatic hurdles. One hurdle arises from the movement to eliminate affirmative action. Affirmative action, by recognizing ingrained patterns of discrimination and exclusion, is one of the few existing paths to improving the position of many women of color through its use of race and gender-conscious remedies. While it is not a panacea and should be considered together with other measures, it has made a difference in many lives and should remain as a way for women of color to break out of the colored feminization of poverty, to gain access to institutional power sources, and to elevate the status of women of color.

Affirmative action tends to consist of race-based policies designed to give preferences to members of certain racial groups. Affirmative action, however, can also be based on gender, physical...
(dis)abilities, and sexual orientation. When there is an intersection between two or more of these identities, then people with multiple subordinated identities are often subject to more intense discrimination than the single axis discrimination suffered by those associated with a single category of subordinated identity. Some scholars have "adopted the notion of multiple consciousness as appropriate to describe a world in which people are not oppressed only or primarily on the basis of gender, but on the bases of race, class, sexual orientation, and other categories in inextricable webs." Interestingly, this concept of intersectionality has made inroads into gender-based discrimination cases, but it is rarely discussed in remedial aspects of


15. While it is difficult to find affirmative action programs which address sexual orientation, one author describes affirmative action plans from Heller, Ehrman, White & McAuliffe, The American Friends Service Committee, and the National Lawyers Guild. Jeffrey S. Byrne, Affirmative Action for Lesbians and Gay Men: A Proposal for True Equality of Opportunity and Workforce Diversity, 11 Yale L. & Pol'y Rev. 47, 92 (1993). While programs targeting physical disabilities and sexual orientation also exist, they are not as common as race- and gender-based programs.

16. Kimberle Crenshaw coined the term "single axis" discrimination. See Crenshaw, supra note 4, at 139. She describes it as a conception of discrimination that conditions us "to think about subordination as disadvantage occurring along a single categorical axis." Id. at 140. She suggests that "in race discrimination cases, discrimination tends to be viewed in terms of sex- or class-privileged Blacks; in sex discrimination cases, the focus is on race- and class-privileged women." Id. She goes on to posit that people who fit more than one category of marginalization are subject to an additional axis of discrimination for each additional category. Id. The sum of the whole, however, is greater than the addition of the parts, with no clear delineation between the axes.

Recent studies have demonstrated that the impact of both racism and sexism on women of color is truly a double burden, not a benefit under the rubric of affirmative action. . . . [Deborah J. Merritt and Barbara F. Reskin] found that women of color were consistently disadvantaged in the hiring process, compared to men of color, despite persistent rumors that women of color enjoyed a premium in the faculty job market.

West, supra note 7, at 72 n.12 (citation omitted).


Each trait a person has that diverges from the defined norm is a deviation. Every standard deviation from the norm is a measure of difference—a degree of separation from the defined norm. The more different a person is, the greater the degree of perceived “otherness,” the more of an “outsider” the person is in relation to the normativa/os, or vis à vis those who deviate less from the normativa/o mold.

Id. (footnotes omitted).

18. Lam v. University of Hawai‘i, 40 F.3d 1551 (9th Cir. 1994). Lam filed suit alleging, among other claims, race, sex, and national origin discrimination. Id. at 1558. On appeal, the court noted that the lower court erred “in its separate treatment of race and sex discrimination.” Id. at 1562. It explained that:

Rather than aiding the decisional process, the attempt to bisect a person’s identity at the intersection of race and gender often distorts or ignores the
discrimination such as affirmative action. I argue that intersectionality should be central in those discussions because otherwise, women of color are boxed into either race- or gender-based identities. If the intersectionality of race and gender is not recognized, their lived realities are bisected and fractured.

The traditional power structure from which women of color are excluded or within which they are marginally represented exacerbates the intensified discrimination arising out of notions of intersectionality and multiple consciousness. Power is typically acquired through education, money, and family and social connections—primarily the province of upper-class white males and only recently accessible to women of color. For example, a report on higher education in California noted that whites are overrepresented in leadership roles, while Latina/os are consistently underrepresented. Naturally, the over-

particular nature of their experiences. Like other subclasses under Title VII, Asian women are subject to a set of stereotypes and assumptions shared neither by Asian men nor by white women. In consequence, they may be targeted for discrimination “even in the absence of discrimination against [Asian] men or white women.” Accordingly, we agree... that, when a plaintiff is claiming race and sex bias, it is necessary to determine whether the employer discriminates on the basis of that combination of factors, not just whether it discriminates against people of the same race or of the same sex.

Id. at 1562 (emphasis in original) (citations omitted); see also Moore v. Hughes Helicopters, Inc., 708 F.2d 475, 480 (9th Cir. 1983) (finding that a black female did not represent the interests of either black men or white women); Jefferies v. Harris County Community Action Ass'n, 615 F.2d 1025, 1032 (5th Cir. 1980) (holding evidence that black males and white females were not subject to discrimination was not on point when considering race and gender discrimination claims of a black female).

19. For a discussion of women's exclusion from positions of power, see Mona Harrrington, Women Lawyers: Rewriting the Rules 3-12 (1994).

20. One report noted that:

[B]y 1954, about one percent of entering [college] freshmen were black. Asian Americans and Hispanic Americans, were legally barred from attending some public schools. And women were systematically excluded from some private and state funded colleges, universities, and professional schools well into the 1970s. In general, it is clear that separation of the races and relegation of women to the sidelines remained the norm for most of this century.

Affirmative Action Review, Report to the President § 2.1 (July 19, 1995) <http://www.whitehouse.gov/WH/EOP/OP/html/aa/aa-index.html> [hereinafter Report to the President]. It is difficult to find statistics specifically addressing women of color—I instead found statistics either for women or for ethnic minorities. Thus, I frequently use these statistics and implicitly extrapolate that women of color, as a discrete identity within either of those identified groups, are going to be even rarer and more marginalized.

21. State of Cal. Assembly Comm. on Higher Education, Progress and Prospects: A Status Report on Diversity in California Higher Education 2 (1993) [hereinafter Progress and Prospects]. To illustrate, even though whites made up 56% of the California population during the time of the study, they accounted for 75% of the Postsecondary Education Commission, 65% of the Student Aid Commission, and 89% of the Council for Private Postsecondary and Vocational Education. Id. In contrast, Latina/os, who made up 27% of the population, accounted for only 9% of the Postseco-
represented voices sound more loudly in policy-making than underrepresented voices. It follows that the underrepresented voices are not heard as loudly or as frequently as the voices of the California Higher Education Commission members. This is not to say that the overrepresented members will not take into consideration the needs, concerns, or positions of the underrepresented members of the Commission or the constituencies which they serve, to the extent those needs, concerns, or positions are expressed.22 Because of their sheer numbers, however, they have more voting power and voice, and can outrace or trivialize those concerns. Furthermore, they may not think to ask about concerns that especially affect minority populations, particularly females of color.23

Likewise, power in the academy remains the domain of white males. “The overwhelming number of academic decision-makers . . . are white men. Not only do men make up 80% of the ladder faculty, but they occupy most of the academic administrative posts.”24 This feeds the phenomenon of self-perpetuating power, resulting in limited opportunities for women of color in the academy.25

As outsiders in the academy, women have not been in the best position to use favoritism, prestige, or academic status to advance themselves or others. Furthermore, one study found that even when women know how to play the game of politics in the academy, they may not be willing to participate.26

22. Nor is this to say that even if expressed, those needs will be granted priority or even significance. More importantly, their lack of experience with issues of concern to minority members might cause those issues to go unnoticed.

23. For example, Latina/os might consistently score lower on verbal tests than others, which could impact their ability to get into colleges and universities. While any Commission member could notice this and propose remedies, a Latina/o who spoke another language growing up and experienced a language disadvantage at school is more likely to point out the source of the discrepancies and offer solutions.

24. West, supra note 7, at 170. Professor West describes “ladder faculty” as “tenured faculty and faculty not yet tenured, but on the tenure track.” Id. at 69 n.4. To illustrate Professor West’s point at a state level, “[t]he leadership of the CSU Academic Senate has been 100 percent White for at least six years.” Progress and Prospects, supra note 21, at 4. CSU is an abbreviation for California State Universities, and academic senates therein are comprised of ladder faculty.

25. In studying women in the legal academy, one scholar concluded that “[t]he pattern that emerges through my experiences and through the study of relevant statistics is that women faculty members disappear at a substantially higher rate than men faculty members, and that women consistently are closed out of the higher ranks of legal education.” Marina Angel, Women in Legal Education: What It’s Like to Be Part of a Perpetual First Wave or the Case of the Disappearing Women, 61 Temp. L. Rev. 799, 801 (1988). While Professor Angel focused on women in the academy rather than women of color, she did note that “[t]he problems of minority women are the most severe.” Id. at 805.

26. West, supra note 7, at 142 (citations omitted).
The road is hard enough for women to travel, and is even harder for women of color because of their double outsider status. Thus, it is no surprise that women of color are only nominally represented in positions of power. Affirmative action is one of the few tools that has been available to help women of color aspire to and secure positions of power by assisting with both initial entry and eventual promotion. Without affirmative action, already dismal statistics for women of color will become even more gloomy.

Affirmative action is making headlines daily, with much of the press and literature criticizing affirmative action on multiple grounds and demonizing affirmative action because of popular myths. Part I of this article explores some of the myths surrounding the affirmative action debate, and attempts to debunk the myths as they apply to women of color.

Part II continues the juxtaposition of reality against the myths of part I, laying out moral bases why we should support affirmative action for women of color. It tells the economic story of women of color, cataloging how women of color have historically been, and continue to be, at the bottom of the economic food chain. It posits that

27. This is evidenced in part by their low numbers in the legal academy. During the 1992-1993 academic year, only 4.3% of the nation's full-time law school faculty members were women of color. ABA, The Burdens of Both, The Privileges of Neither: A Report of the Multicultural Women Attorneys Network 19 (1994) [hereinafter The Burdens of Both]. Professor Marina Angel noted that women of color "face 'double discrimination:' once for being female and once for being racially or ethnically different." Angel, supra note 25, at 805 (citation omitted).

28. See infra Parts I.A and II.A.


30. See generally Carter, supra note 6, at 71 (calling affirmative action a "mixed blessing"); Daniel A. Farber, The Outmoded Debate Over Affirmative Action, 82 Cal. L. Rev. 893 (1994) (describing mixed perspectives of critical race theorists); Kennedy, Racial Critiques, supra note 9 (examining affirmative action within the legal academia context).

31. For example, in 1993, Latinas in female headed households earned a median income of $13,233, compared to $12,423 for African American female headed households, $21,583 for white female headed households and $31,177 for white male headed households. Bureau of the Census, U.S. Dep't of Commerce, Statistical Abstract of the United States 471 (115th ed. 1995) [hereinafter Abstract]. As of 1994, 18% of all families were maintained by single women and 48% of all Black families were headed by single women. Bureau of the Census, U.S. Dept's of Commerce, Statistical Brief 95-1RV (July 1995). In 1993, 35.6% of all households headed by women were below the poverty level. Women's Bureau, U.S. Dep't of Labor, Leaflet No. 95-1, Facts on Working Women: 20 Facts on Women Workers (1995). To illustrate the concrete difference in salaries, female headed households (without husbands) earned a median
until women of color achieve, or at a minimum approach, economic parity with white men, affirmative action should remain a policy that assists women of color in climbing out from the bottom.

Part II also discusses distributive justice as a policy which promotes affirmative action. Under this forward-looking notion of justice, equal opportunities should be available for all. While opportunity has not been a problem for those who typically occupy elite positions, it has not been as available to women of color. Thus, following a distributive justice rationale, affirmative action should continue for women of color until opportunities truly are equally available.

Part II further explores the merits of diversity. It establishes that diversity should be promoted from a policy standpoint, even though the current Court might not consider it legally justified. It concludes that diversity provides many social benefits and that affirmative action for women of color promotes diversity; therefore, affirmative action should be sustained.

Affirmative action is criticized as illegal because it allegedly violates the Equal Protection Clause. The reasoning is that it treats people differently based on race or gender. Part III addresses the legality of affirmative action and explains how the law, even as currently interpreted, supports affirmative action for women of color. It also critiques the law, pointing out its inconsistencies and shortcomings.

income of $17,443 in 1993, male headed households (without wives) earned $26,467, and married couples earned $43,005. Id. The numbers are bleaker for women of color. Families headed by Hispanic women without husbands earned an average of $12,894 in 1992, while families headed by Hispanic men earned $19,468 and Hispanic married couples earned $28,515. Women's Bureau, U.S. Dep't of Labor, Leaflet No. 94-2, Facts on Working Women: Women of Hispanic Origin in the Labor Force (1994). In almost half of the households headed by Hispanic women (49%), the woman's income was below the poverty level. Id.

32. See Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237-38 (1995). While the Supreme Court has not explicitly precluded diversity as a justification for affirmative action, the Fifth Circuit has, at least for now. See Hopwood v. Texas, 78 F.3d 932, 945-46 (5th Cir.), cert. denied, 116 S. Ct. 2581 (1996). Note, however, that many believe that diversity for diversity's sake is still a sufficient rationale to support affirmative action in higher education. See, e.g., Brest and Oshige, supra note 6, at 861-63 (arguing that a diverse student body and faculty in the university environment enhances understanding of commonalities and differences among groups).

33. The Equal Protection Clause provides that “[n]o State shall make or enforce any law which shall ... deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, § 1. In the context of set-aside programs, the argument is that they “assist minorities and women in their quest to achieve the equality guaranteed by the fourteenth amendment, [and] ... by necessity deny equality to nonminorities and men.” Ronald L. Taylor, The Equal Protection Dilemma of Voluntary State and Local Set-Aside Programs for Minorities and Women, 27 Hous. L. Rev. 45, 47 (1990); see also Adarand, 515 U.S. at 204 (outlining Petitioner's argument that financial incentive to hire minorities violates non-minorities' equal protection rights).

34. See infra Part III.C.
Part IV reminds the reader that women of color are still subject to overt, subtle, intentional, unintentional, and unconscious discrimination, and that women of color are still at a tremendous economic disadvantage compared with the rest of the population. Their hardships could be ameliorated in part through the continuation of affirmative action for their benefit. I urge this continuation for several reasons—many criticisms of affirmative action are misplaced or based on incomplete information; significant moral bases support affirmative action; and under certain circumstances, affirmative action is legal. Thus, lawful forms of affirmative action for women of color should not only be upheld, but actively encouraged and promoted. Accordingly, part IV concludes that so long as women of color continue to be burdened by intersectional discrimination, and thus have more hurdles to jump than men and white women, women of color have an especially well-founded claim to affirmative action. Therefore, women of color should be permitted to benefit from long overdue and specifically tailored affirmative action.

I. **Affirmative Action Backlash or Debunking the Myths**

This part considers popular myths about affirmative action and women of color, juxtaposing the myths against women’s lived realities. In particular, I look at five myths: (1) the myth that women of color double-dip from affirmative action; (2) the myth that affirmative action disregards merit for women of color; (3) the myth that affirmative action is inappropriate for women of color because it does not fit the perpetrator-victim or reparations model; (4) the myth that affirmative action is harmful to women of color because it is stigmatizing; and (5)

35. Note, however, that efforts are underway to do away with affirmative action altogether. See *supra* notes 2, 11.

36. While affirmative action has helped many women of color, I acknowledge that, as structured, it has some shortcomings. Rather than do away with affirmative action, it is much wiser to restructure it, particularly as it pertains to women of color. It is beyond the scope of this paper to provide a structural critique of affirmative action. Suffice it to say, if both people of color (statistics are usually for men) and women (statistics are usually for white women) lag behind white men in entry and advancement opportunities in education and employment, it follows that the situation is worse for women of color. Recognizing this imbalance, it would be appropriate to restructure affirmative action to provide greater entry and advancement opportunities for women of color.

37. Women of color are, at a minimum, subjected to dual discrimination based on race and gender. In many cases, women of color suffer from additional discrimination arising from the confluence of sexual orientation, religion, class, etc. See *supra* note 4; *supra* text accompanying notes 12-17.

38. This article does not attempt to discuss whether affirmative action is appropriate for all persons who have suffered discrimination of various sorts. Other authors have already done so and no doubt will continue to do so. See, e.g., Brest & Oshige, *supra* note 6, at 872-73 (discussing the merits of including various racial and socioeconomic minorities in affirmative action). I focus my discussion on whether affirmative action should continue in effect for women of color.
the myth that affirmative action is ineffective because it disregards low-income persons. By debunking these myths, I hope to break down barriers to the continuation of affirmative action for women of color.

A. Myth: Women of Color Double-Dip From Affirmative Action

A common myth is that women of color receive a "double affirmative action benefit" because of their "double outsider" status. A widespread perception is that women of color receive enhanced consideration because of the underrepresentation of both women and people of color in higher education, government contracts, and positions of power generally. For example, "[p]opular belief is that affirmative action is alive and well and that multicultural women attorneys have a double advantage: race and gender."\(^3^9\) The reality is that while affirmative action has benefited women of color, sometimes helping them with college admissions and other times allowing them to enter and advance in professions previously closed to them, the barriers for women of color remain strong even with affirmative action.\(^4^0\) "The combination of being an attorney of color and a woman is a double negative in the legal marketplace, regardless of the type of practice or geographic region involved."\(^4^1\)

In spite of remaining barriers, there is a fight to terminate affirmative action because of the misconception that it is not working.\(^4^2\) Some critics argue that affirmative action does not help minorities or women\(^4^3\) (they are usually silent on women of color), and thus should be terminated. The statistics say otherwise.\(^4^4\) "As a general matter,

\(^{39}\) The Burdens of Both, supra note 27, at 14.

\(^{40}\) One report noted that "multicultural women today encounter the same barriers to employment and advancement as their predecessors who entered the profession decades ago." Id.

\(^{41}\) Id. at 9.

\(^{42}\) This criticism is fraught with ambiguity. If it is not working, how do we explain why government contractors tend to increase their hiring of, or contracting with, minorities and women when there is active enforcement of affirmative action programs, and decrease such hiring and contracting when there is no enforcement? See Report to the President, supra note 20, § 3.3 (stating "active enforcement by [the Office of Federal Contract Compliance Programs ("OFCCP") during the 1970s caused government contractors to moderately increase their hiring of minority workers"). This report went on to note that "contractor establishments that underwent an OFCCP review in the 1970s subsequently had faster rates of white female and of black employment growth than contracting firms that did not have a review." Id. Finally, it noted that when OFCCP enforcement was scaled back, there was less minority hiring. See id.

\(^{43}\) "Blacks now stand to lose more from affirmative action than they gain." Sylvester Monroe, Does Affirmative Action Help or Hurt?, Time, May 27, 1991, at 22, 23 (quoting Shelby Steele). Monroe explains that Steele "asserts that affirmative action has reinforced a self-defeating sense of victimization among blacks by encouraging them to pin their failures on white racism instead of their own shortcomings." Id.

\(^{44}\) Alfred W. Blumrosen, an employment law professor, noted that "ongoing equal employment opportunity programs have produced 'significant improvements'
increases in the numbers of employees, or students or entrepreneurs from historically underrepresented groups are a measure of increased opportunity."45 This increased opportunity is not coincidental—over 6 million women have obtained employment opportunities because of affirmative action.46 Affirmative action's effectiveness becomes clearer when comparing women's membership in various professions before and after its implementation. In the medical profession, women made up 7.6% of all physicians in the United States in 1970, but had increased to 16.9% in 1990.47 In the legal profession, women made up approximately 3% of all lawyers in the late 1960s,48 but had increased to 23% in 1994.49 Furthermore, over the course of a single decade, the number of female attorneys of color went from approximately 7,300 to 23,000.50 These increases are encouraging, and they demonstrate that affirmative action has been effective for women of color and should continue in effect.

These successes, however, must be tempered with sobering statistics which show that women generally, and women of color especially, have a long way to go. The double-dip myth becomes ever more mythical when considering current statistics. An analysis of women in major New York law firms indicates that while the number of women partners increased steadily throughout the 1980's, "there was a sharp drop-off in new women partners after 1990."51 In 1995, while 13.43% of the partners in this country's major law firms were women, only

45. Report to the President, supra note 20, § 1.2.2. As pointed out, it is difficult to determine what portion of that increase is due to affirmative action, but undoubtedly, some of that progress is precisely because of affirmative action. Other factors additionally contributed to this progress, some of which cannot be measured at all and others which are quantifiable, but still not susceptible to exact measure. For example, how do you measure American society's transformation from domineering racists (blatant bigots) to aversive racists (unconscious racists), much less the impact of changing demographics or the impact of media? For a discussion of the transformation of racism in the United States, see Joel Kovel, White Racism: A Psychohistory 54-55 (1970); Charles R. Lawrence III, The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism, 39 Stan. L. Rev. 317, 335 (1987).

47. Id.


50. The Burdens of Both, supra note 27, at 5.
51. Epstein et al., supra note 48, at 297.
2.79% were minorities. There were no statistics on what percentage of those minority partners were women, but I can safely state that it was fewer than 2.79%. In fact, there are so few partners who are women of color, they are statistically insignificant. In a hearing regarding the glass ceiling, one woman testified that she "found no statistical data concerning promotion of minority women to partnership. They are indeed the invisible minority." One newspaper article explained: "Minority women fare the worst. They have the lowest percentage of entry level jobs in law firms, following white men, white women and minority men." In fact, fewer than 3% of all lawyers and judges are minority women. Note also the dearth of statistics on women of color. They are hard to find because until recently, women of color's existence, much less their particular issues and concerns, had not been discretely considered, and certainly was not doubly celebrated.

Not only are there few attorneys who are women of color, but those who have entered the profession face greater obstacles than either men of color or white women. An ABA committee summarized the reasons as follows: "(1) stereotypes that limit job opportunities, (2) failure to be recognized as competent, (3) failure to advance as rapidly as others, (4) undue difficulties in attaining partnership status, (5) pay

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53. All the minority partners were presumably not women. To the contrary, women of color probably made up a very small portion of those partners.
54. Analysts who surveyed large New York firms stated: "We had hoped to analyze the experiences of minority lawyers in the study of glass ceilings in large law firms. There were so few African-American, Latino, or Asian-American senior associates and partners at these firms, however, that no analysis could be reasonably executed." Epstein et al., supra note 48, at 324. Their survey showed that there were no Latina partners and only 3% of the female associates were Latina. Id.
56. Id. In a footnote to this quote, Anderson noted that "African-American, Hispanic, Asian and Native American lawyers, both male and female, constituted 6.8 percent of associates and 2.5 percent of partners at the largest law firms in 1991. Unlike women, minorities [presumably including women of color], continue to be underrepresented at the entry level." Id.
57. Women in the Law, supra note 49, at 17. The percent of women of color in the legal academy was slightly higher as of Fall 1994 when non-white females comprised 6% of legal faculty. Faculty Composition, Consultant's Dig., Nov. 1995, at 4.
58. For example, the findings of a survey of law firms indicated that "[t]he pool of minority partners and senior associates was so tiny that no analysis of their experience could be undertaken." Epstein et al., supra note 48, at 302. That same report concluded that while there was progress for women in the legal profession generally, the picture was not so bright "for minority women, whose numbers remain extremely small, and therefore, for whom we have meager data." Id. at 438 (footnote omitted); see also The Burdens of Both, supra note 27, at 7 ("Beyond the 23,000 total figure of multicultural women lawyers, law teachers or judges that was reported in the 1990 decennial census, specific breakdowns [that include race as well as gender] are rare.").
inequities, (6) insufficient mentoring, and, (7) heightened scrutiny of hours, work product and performance.\textsuperscript{59} The ABA also established a joint project, called the Multicultural Women Attorneys Network ("MWAN"), to study issues of concern to female attorneys of color.\textsuperscript{60} It conducted hearings across the country and made the following findings:

The combination of being an attorney of color and a woman is a double negative in the legal marketplace, regardless of the type of practice or geographic region involved; Multicultural women attorneys perceive they are “ghettoized” into certain practice areas and other options are closed or implicitly unavailable; Multicultural women attorneys must repeatedly establish their competence to professors, peers and judges; As evidenced by continuing attitudes and negative stereotypes, multicultural women attorneys are invisible to the profession and have more difficulty achieving prominence and rewards within the legal field; To succeed, multicultural women attorneys must choose between race and gender;\textsuperscript{61} and, Minority women lawyers face barriers of gender discrimination in minority bar associations and race discrimination in majority bar associations.\textsuperscript{62}

Affirmative action has done a credible job of getting women of color into some power or prestige professions, such as law.\textsuperscript{63} It would seem to follow logically that as women entered these fields, they would change their structure and dynamics, making them more hospitable for women generally and women of color specifically.\textsuperscript{64} This is not happening, however. While a significant number of women have entered the legal profession over the last twenty years, they have not

\textsuperscript{59} The Burdens of Both, supra note 27, at 14. Additionally, many women of color find that their personal lives are scrutinized more closely than the lives of other attorneys, as are their clothes. They are expected to make those around them more comfortable, and they are often treated disrespectfully by other attorneys in their own firms, as well as by staff, not to mention by opposing attorneys, courtroom personnel, and judges. They are also more likely to be isolated because they are excluded from the worlds of both the male attorneys and the white female attorneys.

\textsuperscript{60} The Network was formed through the efforts of the ABA’s Commissions on Opportunities for Minorities in the Profession and Women in the Profession. They approved the formation of what was initially titled the Minority Women Lawyers Subcommittee (now “MWAN”). MWAN’s three initial goals were to: identify issues important to multicultural women; explore possible solutions to those issues; and educate the ABA on its role and responsibilities vis-à-vis those issues. \textit{Id.} at 6.

\textsuperscript{61} This is a common example of women of color having to choose either race or gender as their primary identifier. If this either-or alternative is ever replaced by a both-and alternative, then women of color might actually reap a double bonus, or at least not be penalized for their double outsider status (footnote not in original text).

\textsuperscript{62} The Burdens of Both, supra note 27, at 9 (emphasis added).


\textsuperscript{64} As noted in a recent report on women’s advancement in the legal profession, “[t]o many of us, it appeared that the sheer number of women entering the profession would lead to fundamental changes in certain long-prevailing professional paradigms.” Epstein et al., supra note 48, at 295.
made as much progress in promotion.\textsuperscript{65} Nor are they represented in positions of power in the legal profession.\textsuperscript{66} The situation for women of color is obviously worse.\textsuperscript{67} Not only do they have to contend with gender bias, they deal with racial bias from majority men and women.\textsuperscript{68} Thus, instead of seeing a double advantage, one frequently sees a double negative. “Often, white women attorneys are uncomfortable or unconcerned about addressing race or ethnicity issues. Generally, multicultural women feel ostracized by white women and believe they carry the responsibility of rectifying their own outsider status.”\textsuperscript{69} Thus, discrimination as well as other barriers continue to haunt the small percentage of women of color who actually enter the legal profession. Until these barriers are eliminated, affirmative measures are still necessary to enable women of color a chance to succeed in the law.\textsuperscript{70}

The situation is not much different for female law students of color. They also suffer from relative invisibility, especially compared to white students who are considered the “norm.”\textsuperscript{71} In describing the atmosphere at Yale Law School, former students noted that:

> Entirely absent were images of women and men of color. These surroundings kept us distrustful, reminding us that the institution that admitted us had traditionally denied entrance to women and

\begin{itemize}
  \item[65.] Id. at 313.
  \item[66.] “There . . . has not been any meaningful increase in the number of women who head practice groups or who play a major management role in the large firms studied—suggesting that women may not be ascending the leadership ladder at large firms.” Id. at 297.
  \item[67.] Aside from their slight representation in the law, they face prejudices different from those faced by ethnic male or white female attorneys. For example, some women of color come from backgrounds where women are expected to silently make sacrifices and perform their jobs. “Asian-American women and Latinas acknowledged an additional handicap: their cultural upbringing stresses hard work, harmony and teamwork over the ‘blowing your own horn’ method of gaining prominence.” The Burdens of Both, supra note 27, at 13.
  \item[68.] For a discussion of the chasm that can develop between white women and women of color, see Richard Delgado, Rodrigo’s Sixth Chronicle: Intersections, Essences, and The Dilemma of Social Reform, 68 N.Y.U. L. Rev. 639 (1993).
  \item[69.] ABA Comm’n on Women in the Profession, Unfinished Business: Overcoming the Sisyphus Factor 22 (1995) [hereinafter Unfinished Business].
  \item[70.] Of course, there are no guarantees that affirmative measures will lead to success. On the other hand, I refuse to believe that of the small percentage of lawyers who are women of color, so many of them do not thrive because of their own incompetence. The odds are against that. I do believe that their marginal success rate has much more to do with institutional discrimination and barriers, as well as intentional and unintentional personal discrimination.
  \item[71.] Grillo & Wildman, supra note 4, at 405. Women of color disappear even in discussions of sexism and racism, which tend to end up as discussions of sexism dominated by white women. “Essentialist presumptions became implicit in the discussion; it would be assumed, for example, that all women are white and all African-Americans are men.” Id. at 399.
\end{itemize}
people of color. The pictures, the furniture, the male professors—all indicated that the place had always belonged to white men.72

One report described the grim experiences of women law students of color “primarily in terms of their battle against the credibility problem, which encompasses both the phenomenon of invisibility and the presumption of incompetence.”73 The process of fading women of color into invisibility occurs on many levels. For example, while they may consider themselves as healthy, whole persons comprised of multiple identities, female students of color are often asked to excise portions of their identity by being forced to choose between outsider status on the basis of either gender or race. Thus, their wholeness vanishes. Their classmates, law professors, and law school administrators also contribute to this fading and fracturing process. Classmates may exclude them from study groups, clubs, moot court, and advocacy, negotiation, or other competitions, as well as social activities.74 Law professors are notorious for disproportionately calling upon white males.75 This is even worse for the female of color who gets the nerve to raise her hand, only to be ignored repeatedly.76 Even if she is called on, her comments are often overlooked or attributed to someone else.77 Administrators also contribute to the invisibility of women of color, even if unintentionally. For example, they do not include as many of these students as school spokespersons, as tutors, as advisors, or in other representative capacities. Once again, inter-

72. Weiss & Melling, supra note 63, at 1322-23.
73. The Burdens of Both, supra note 27, at 11. This credibility problem was exacerbated by “the generic gender bias in the profession, as exhibited by white male professors and classmates.” Id. at 12.
74. This “[a]cute alienation...prevents them from taking part in vital extracurricular activities.” Id. at 13.
76. Women of color “are nearly half as likely to volunteer in class as their white—especially white male—counterparts.” The Burdens of Both, supra note 27, at 13. “[W]omen were twice as likely as men never to volunteer in class. Female students reported feeling alienated by the argumentative style of classroom discussion, by professors using stereotyped images of women, by casebooks entirely populated by men, and by ‘women’s issues’ being brushed aside as irrelevant.” Jane Easter Bahls, You’ve Come A Long Way, Baby. But—, Student Law., Sept. 1996, at 20, 21.
77. In a roundtable convened to discuss experiences of women attorneys of color, one African-American Harvard graduate stated that one of her law school professors would call on students in order by row, skip a Black student, then continue in order. See The Burdens of Both, supra note 27, at 11. In a different survey, one student reported that she “held her hand up for 45 minutes without being called on [and] later asked the professor why, and he told her to ‘get used to it; you’re a woman.’” Bahls, supra note 76, at 21.
78. I know that I am not the only woman of color who has made a comment at a meeting, which comment is disregarded, only to resurface later when made by a white male and then to be taken seriously. This has even happened to me at meetings attended predominantly by white females.
sectionality that could be celebrated is instead used against women of color.

The dual burden on women law students of color both perpetuates some patterns that commenced earlier, such as the breeding of self-doubt, and results in new and different forms of silencing. These are the experiences of women law students of color with affirmative action. This speaks of the need to strengthen affirmative action for women of color and to institutionalize multiculturalism so that the entry benefits of affirmative action are not lost in outdated but deeply ingrained institutional racism. Without affirmative action, future generations of attorneys will lack the richness and diversity that women of color bring to the practice, academy, and judiciary, and women of color, the legal system at large, and society as impacted by law will suffer.

Women of color are also noticeably absent in leadership roles in higher education. A study on the status of California’s higher education pointed out that of its thirty-seven top executives, 70% are white, 14% are African-American, 8% are Latino, and 3% are Asian. While 22% of the executives were women, each chief executive officer was a white male, prompting an analyst to point out that “this group is less diverse than it was a decade ago.” The University of California’s team of top executives, the most prestigious of California’s higher education leadership, was the least diverse, with “no Asians, Latinos, or women [who] serve at the vice president level or above.”

In other professions, the doors have barely opened for women, much less women of color. For example, only 3% of firefighters, 8% of police officers, and just over 2% of construction and trades workers are women. The doors to these professions have opened only a crack with affirmative action. Imagine how tightly shut they will be if affirmative action becomes illegal.

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80. The report neglected to state the ethnicity of the women, but it implied that they were white (or without ethnicity) because the same paragraph later identified the ethnicity of particular leaders, including a white woman and an African-American man. Furthermore, because of the poor record of minority participation throughout the report, it is likely that the report would have highlighted any instances where women of color held positions of power. Id. at 3.
81. Id.
82. Id. The report did not specify whether any women of color served in those executive capacities, but it clearly stated that there were no Latinas or Asian women in those roles.
84. Which, of course, is better than the doors being tightly locked, which was true before affirmative action provided a key. There seems to be a locksmith who periodically changes the locks, and we are constantly struggling to keep up with new keys.
85. CCRI and other proposals across the country seek this outcome.
It is clear from the information in this section that women of color are not doubly benefiting from affirmative action. While affirmative action has resulted in increased opportunities for women of color, they are still underrepresented in higher education, government contracting, and positions of power across the board. On the same day that I am writing this, I read that women currently hold only “500 of the 7,213 directors’ seats of the Fortune 500, or 6.9%, and minorities hold 244 directors’ seats, or 3.4%.” While this is concededly better than the 0% figure which I would have read about not so long ago, it remains a challenge to get into those positions, and once there, the work has just begun. Many women of color are struggling even with the benefits that affirmative action offers. If affirmative action disappears, opportunities for women of color will decline. Furthermore, women of color who have advanced partly because of affirmative action will need to tread cautiously because protective measures designed to prevent discriminatory behavior may well disappear.

In sum, the information in this section not only exposes the double-benefits myth for what it is—a myth—but more importantly, it magnifies the need for affirmative action for women of color. Affirmative action has improved lives for many women of color, but it is just beginning to do so. It is pivotal at this stage to continue affirmative action programs in order both to allow the women who have entered schools and professions the chance to progress in environments that are not hostile and discriminatory, and to make equal entry opportunities available to more women of color.

87. For example, the female cadets at the Citadel fought a long, hard battle to gain entry to the formerly all male academy. See Faulkner v. Jones, 51 F.3d 440 (4th Cir. 1995). Yet the decision to admit them signaled only the beginning of a battle to obtain full citizenship at the academy. Recently, two of those cadets were subjected to abuse in what was described as a mere “hazing” incident. “[T]wo of the female cadets were sprayed with a flammable liquid and had their clothes set afire.” Two Women Report Hazing at Citadel, Charleston Daily Mail, Dec. 14, 1996, at 3A, available in LEXIS, News Library, Crdym File. This is another example of what happens to women who enter formerly all-male domains—frequently, the challenges have just started. Women of color have it worse because they also must deal with issues of race which exacerbate, rather than mitigate, gender issues.
88. While affirmative action has done an admirable job of opening doors for some women of color, it has not focused on addressing issues of equality once in the door. For example, while affirmative action may help a woman of color with college and law school admissions and placement as a new associate in a large firm, it cannot (and should not) make her “one of the guys” in that firm. Other steps beyond the scope of this article should be taken to redefine the norms of the workplace or university.
B. Myth: Affirmative Action Disregards "Merit"

A second myth is that affirmative action disregards merit by re-
warding unqualified beneficiaries (read women of color),\(^9\) which con-
sequently punishes otherwise qualified persons (read white men). The
myth goes that unqualified beneficiaries are rewarded with opportuni-
ties which they do not deserve, while qualified persons are being de-
nied those same opportunities. Many people believe the merit myth
and resent affirmative action because of it. They see affirmative ac-
\(^9\) tion as taking away an entitlement which would exist but for affirma-
tive action.\(^9\) This rage is flamed by employers' statements such as "I
would hire you in a second if you were black."\(^9\) In fact, at the time
when a \textit{Newsweek} employee was alleged to have made the preced-
ing remark, "only four reporters, one staff writer, and one editor out of
200-plus editorial employees at \textit{Newsweek} were black."\(^9\) This type of
 inflammatory remark creates damage to the fourth degree from the
perspective of a woman of color. First, she may experience discrimi-
nation as a woman. Second, she may experience discrimination in-
dependent of her gender or compounded by her gender because of
her race or ethnicity. Third, white males may resent her because they
are being told that they cannot get jobs because of her—she is
scapegoated as well as discriminated against. Fourth, and perhaps
most damaging, according to the statistics earlier in this part, she is
probably not getting the coveted spot anyway. If you need proof for
yourself, visit a law school classroom, a medical school laboratory, or
the executive offices of a Fortune 500 company.\(^9\) Once there, the
mythic nature of this claim becomes apparent through the absence of
women of color.

Another sub-myth to the merit myth is the idea that white male
candidates are evaluated and qualify for positions or entry strictly
based on merit, while women of color are evaluated in spite of merit.
Aside from being inaccurate, this myth feeds the related sub-myths

\(^8\) Of course, the term "unqualified beneficiaries" could also read people
of color, which is frequently understood to be men of color, or women, which is
frequently understood to mean white women.

\(^9\) Professor Cheryl Harris discusses at length the notion of whiteness as prop-
erty, which entitles whites to certain benefits or privileges. \textit{See} Cheryl I. Harris, \textit{Whiten-
ess as Property}, 106 Harv. L. Rev. 1709 (1993). Professor Bob Chang also discusses
the concept of white entitlement, but in the context of fueling the affirmative action
backlash. \textit{See} Robert S. Chang, \textit{Reverse Racism!: Affirmative Action, the Family, and

\(^1\) Farai Chideya writes that a higher up at Newsweek made that statement to at
least one prospective employee. Farai Chideya, Don't Believe the Hype: Fighting
Cultural Misinformation About African-Americans 103 (1995). He denied ever mak-
ing such statements, but he conceded that he thought black job applicants were
granted higher consideration than white job applicants. \textit{Id.}

\(^2\) \textit{Id.}

\(^3\) \textit{See supra} note 86 and accompanying text.
that the merit system is objective and that white males have not been the beneficiaries of special treatment.

Let me first address the story that women of color are evaluated in spite of merit. Women of color must qualify for admission or hire under standards that apply to all applicants or candidates. Thus, affirmative action does not operate to elevate an unqualified woman of color to qualified status.⁹⁴ Among a group of qualified candidates, however, affirmative action should operate to provide a woman of color with a "plus" for her status as a woman of color.⁹⁵ But that does not always happen. In a study on employment discrimination, potential employers prevented African-American job applicants from advancing to equivalent interviews or hiring levels as white applicants with the exact same qualifications at least twenty percent of the time.⁹⁶ Another study suggested that, "Hispanic testers were three times as likely to encounter unfavorable treatment when applying for jobs as were closely matched Anglos."⁹⁷

If affirmative action operated as intended, women of color should not only initially qualify under systems that look to their relative merit, but they should also be able to advance at the same rate as their male counterparts. That is not happening either,⁹⁸ and it may not

⁹⁴. I am not arguing that the underrepresented candidate is necessarily the “best” candidate (under objective criteria, of course), only that the candidate is qualified for the position or slot. For affirmative action to operate fairly, an unqualified person cannot be given preference over a qualified person. See Report to the President, supra note 20, § 1.2.4.

⁹⁵. "In... an admissions program, race or ethnic background may be deemed a 'plus' in a particular applicant's file, yet it does not insulate the individual from comparison with all other candidates for the available seats." Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 317 (1978). But see Hopwood v. Texas, 78 F.3d 932, 944 (5th Cir.) (holding that an admissions program which "uses race as a strong determinant rather that a mere 'plus' factor" violates the Equal Protection Clause), cert. denied 116 S. Ct. 2581 (1996).

⁹⁶. Margary Austin Turner et al., Hiring Discrimination Against Young Black Men, The Urb. Inst.: Pol'y and Res. Rep., Summer 1991, 4-5 (emphasis added). Gender discrimination is also common. In a study on gender-based employment discrimination, the analysts found

hiring discrimination against women in high-price restaurants. In addition, our less formal survey evidence suggests that wage and tip earnings are substantially higher in high-priced restaurants. Therefore, the pattern of hiring discrimination that we have uncovered may go a long way towards explaining the sex gap in earnings among waiters and waitresses.


⁹⁷. Immigration Reform: Employer Sanctions and the Question of Discrimination, U.S. GAO Rep. to the Congress, GGD-90-62, at 47 (1990) [hereinafter Immigration Reform]. The report also found that "Anglos received 52 percent more job offers than the Hispanics and 33 percent more interviews." Id. at 48.

⁹⁸. In their examination of patterns of American law schools' minority faculty hiring from 1986 through 1991, Professors Merritt and Reskin compared the treatment of male and female minority faculty. While minority women entered the profession at rates similar to minority men,
have much to do with merit. Once women of color are in the door, they face unique challenges. Different standards are often applied to them or, alternatively, the stated standards which are routinely ignored for others, are diligently applied to them. For example, there are higher expectations for women of color. It is not enough to be average; one must be above-average to get the confidence of peers and superiors. In addition, supervisors frequently provide little or no mentoring or training, women of color receive minimal exposure to influential people or clients who can help with advancement, and women of color work double-duty, often living divided lives, trying to fit in. 

The second merit sub-myth is that merit is objective. Those who chant that “objective merit” alone should control one’s admission or acceptance rely heavily on supposedly neutral criteria, such as stan-

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99. As one women testified in a recent study, she felt “the ‘need to perform 300 per cent better’ in order to compete with male counterparts, to fight for what little recognition” she received. She described this lack of recognition for the accomplishments of multicultural women government attorneys as “subliminal discrimination.” The Burdens of Both, supra note 27, at 19.


[Black professionals] repeatedly complained of being left out of the informal communications network, of ‘not being in on things.’ Few reported having ‘mentors’ or anyone high within their organizations who took a supportive interest in their careers. By and large, they judged themselves less likely to be promoted than their white peers and felt they had to expend an inordinate amount of effort trying to make whites ‘comfortable’ with them. Id. at 77; see also Rosa M. Gil & Carmen Inoa Vasquez, The Maria Paradox: How Latinas Can Merge Old World Tradition with New World Self-Esteem (1996) (discussing conflict Latinas face in preserving their culture while simultaneously assimilating).

101. For a discussion of this notion, see Richard Delgado, Rodrigo’s Tenth Chronicle: Merit and Affirmative Action, 83 Geo. L.J. 1711 (1995). Nicholas Lemann describes the merit debate as follows:

The history of affirmative action can be seen as a struggle over the fairness of the modern meritocracy, with minorities arguing that educational measures shouldn’t be the deciding factor in who gets ahead and opponents of affirmative action saying that to bend the criteria for blacks is to discriminate unfairly against more deserving whites. . . . Either way, the trade-off is stark and will remain so until black America and white America are on the same educational and cultural footing—in other words, for generations.

standardized test scores, while ignoring or devaluing qualifications or attributes that make women of color unique. Some critics of this sub-myth argue that the definition of merit which looks only to standardized test scores is not truly objective, and they are not alone in this assessment. One critic discussed the misconception of objective merit as follows:

Outside of sports and certain technical specialties, merit tends to be defined subjectively, primarily by attaching complimentary labels to those who are thought to be meritorious: people who are “fast starters,” who “have potential,” who show style or demonstrate leadership or otherwise have the mystical “right stuff” that will take them to the top. Once they have risen, as predicted, it is assumed they did so on merit—a reassuring if circular assumption. But what it fails to take into account is the real possibility that merit, objectively defined, has relatively little to do with who gets ahead.

The current application of “objective” merit looks primarily to standardized tests to determine intelligence and the likelihood of succeeding in college. The University of California took this to heart by dismantling its affirmative action program out of its desire to “treat all Californians equally and fairly.” But by dismantling affirmative action, rather than treating all Californians equally and fairly, it elevates privileged Californians who attend better quality schools, who have been raised in households where education is valued and empha-

102. “An education-based meritocracy makes its judgments about people before they’ve ever really done anything, based on a measure, school performance, that depends heavily on who their parents are and what kind of environment they create.” Lemann, supra note 101.


In contrast to messy essay tests, ETS would have you believe, its multiple-choice questions and answers are scientifically designed and entirely above suspicion. . . . When ETS refers to such tests as “objective,” we seldom stop to think that the term can apply only to the mechanical grading process. There’s nothing genuinely objective about a test like the SAT: it is written, compiled, keyed, and interpreted by highly subjective human beings.

David Owen, None of the Above: Behind the Myth of Scholastic Aptitude 33 (1985).

104. Cose, supra note 100, at 87.

105. Ironically enough, it is not entirely clear what standardized tests do measure. Professor Espinoza pointed out that a “six-year Nader study concluded that the SAT successfully predicted college performance in only one out of ten cases. The study found that SAT score correlation to family income was much stronger than the correlation to college performance.” Espinoza, supra note 103, at 139 (footnotes omitted). For a general critique of standardized tests, see Owen, supra note 103.

106. Governor Pete Wilson used these words at the beginning of the meeting where the continuation of affirmative action in the UC system was debated. See Amy Wallace & Dave Lesher, UC Regents, in Historic Vote, Wipe Out Affirmative Action, L.A. Times, July 21, 1993, at Al.
sized, and whose families can spend more on their children’s educations.\textsuperscript{107}

Objective merit’s obeisance to test scores not only privileges the already privileged,\textsuperscript{108} it ignores many positives that women of color contribute which cannot necessarily be measured in test scores.\textsuperscript{109} Follow me through a couple of days in Lilia’s life. Lilia just finished her last high school class of the week and she is on her way to her waitressing job at Hasta Mañana. It is a busy night and she is hustling, taking orders, and serving beer, margaritas, and food. By the end of the evening, she is exhausted. She washes her face, changes out of her work shoes into her tennis shoes, and heads home. Mamá greets her with a kiss and asks her, “¿tiene hambre?”\textsuperscript{110} Lilia answers, “si, mamá, quiero algo de comer mientras estoy haciendo mi tarea.”\textsuperscript{111} Before Lilia can get to her homework, her little brother Paco runs out, hugs her, and begs her to read him a bedtime story. She obliges and reads him “La Cama de Mamá.”\textsuperscript{112}

Once Paco is asleep, Lilia pulls her history book out of a tattered day pack and starts her homework. There are some things she is not quite clear on, but she knows she cannot ask her mamá about them. No need to lose time, so she continues. By midnight, she is fast asleep over her book. Mamá gently wakes her and sends her to bed.

The next morning, Lilia wakes early, feeds her little sister Isabella, and gets ready to tutor grammar school children in English. She recalls her early struggles with English and is happy she can work with others who are going through those same struggles. After a few hours at the elementary school, she is off to Hasta Mañana. She completes a full shift, goes home, and helps her mamá with laundry. This is a snapshot of her life—not unusual days.

Let us fast forward to a college admissions office. Lilia’s SAT scores and grade point average are good, not great. But if an admissions office defined Lilia’s merit based only on her SAT scores and high school grades, it would overlook many of her unquantifiable strengths—her ability to juggle many competing interests at once and

\textsuperscript{107} One high school English teacher stated that “[t]he tests often used to measure achievement often are linguistically skewed to the benefit of white middle-class students.” \textit{UC Affirmative Action Decision}, \textit{L.A. Times}, July 26, 1995, at B8.

\textsuperscript{108} “[T]he narrative content of individual questions creates a discourse, a thematic content, for the whole test. That discourse has been one that favors the dominant social force in our society, white men.” Espinoza, \textit{supra} note 103, at 125-26 (footnotes omitted).

\textsuperscript{109} Yxta Maya Murray reminds us that merit’s meaning “has been constructed without reference to the virtues and values of people of color, women, and sexual minorities—typical ‘Outsiders’—who have demonstrated excellence even under conditions of subordination.” Yxta Maya Murray, \textit{Merit-Teaching}, 23 Hastings Const. L.Q. 1073, 1075 (1996).

\textsuperscript{110} “Are you hungry?”

\textsuperscript{111} “Yes, mommy, I’d like something to eat while I am doing my homework.”

\textsuperscript{112} Mommy’s bed.
to work efficiently, her willingness to embrace family and to turn around and lift up those behind her, and her success without the benefits of a personal computer, a personal tutor, or the time that would have been freed up to devote to school and studies had she not been working.\textsuperscript{113}

A large percentage of women of color live below the poverty level, and that circumstance may teach them greater self-sufficiency and how to make the most out of the little they have. Also, they may learn how to work more efficiently, especially if they are single parents who are working, raising children, and going to school. However, these characteristics, strengths or gifts are not measured in standardized test scores. It is unfair to disregard the special gifts which the Lilies of the world have to offer because they are neither quantifiable nor traditionally valued.\textsuperscript{114} Thus, merit based on talents other than standardized test scores should be considered. Affirmative action helps recognize these other talents and therefore must continue in order to help women of color have equal opportunities.

The third merit sub-myth stems from the idea that white males have not benefited from special treatment. To the contrary, preferential treatment has been with us since the founding of this country, usually for the benefit of white middle- to upper-income males.\textsuperscript{115} When it is used to perpetuate the status quo, it hardly causes a ripple.\textsuperscript{116} When, however, it is used to make opportunities more widely available for women, minorities, and women of color, there is an outcry. In re-


\textsuperscript{114} "Outsiders' experiences with discrimination and subordination can give them a richer perspective and highly sophisticated coping tools that the majority simply has not acquired." Murray, \textit{supra} note 109, at 1092.

\textsuperscript{115} As one author has observed:

For more than forty years, 20\% of Harvard students have been admitted as "legacies," children of Harvard alumni. . . . [T]hese overwhelmingly white and affluent legacies are three times more likely to be accepted than a "normal" applicant who may be a class valedictorian or national merit finalist. What undermines the myth of merit is the fact that many of these children of alumni are not as well qualified as regular applicants using traditional academic criteria.


\textsuperscript{116} One academic even asserts that "[w]hite men continue to be the only beneficiaries of 'affirmative action,' the only group who are hired at rates significantly higher than their proportion in the available pool of qualified candidates." West, \textit{supra} note 7, at 70. This fact has not come under microscopic or widespread criticism.
response to a tirade by a white male about how affirmative action harmed him for the benefit of "unqualified minorities," Ellis Cose took him to task:

When the young man paused to catch his breath, I took the occasion to observe that it seemed more than a bit hypocritical of him to rage on about preferential treatment. A person of modest intellect, he had gotten into Harvard largely on the basis of family connections. His first summer internship, with the White House, had been arranged by a family member. His second, with the World Bank, had been similarly arranged . . . . In short, he was already well on his way to a distinguished career—a career made possible by preferential treatment.117

As Cose pointed out, "[o]ne cannot honestly and intelligently discuss hostility to preferential treatment without examining attitudes toward those who benefit from the treatment."118 In other words, much of the hostility toward affirmative action may arise more from racism, sexism, or a desire to preserve the status quo. It is time to explore these attitudes further to get at the heart of many people's resistance to affirmative action. While the discussion is sure to be volatile, there is no way around the discussion.

Related to the third merit sub-myth that white males do not receive preferences is the notion that there is an abundance of scholarships for minorities and women of color, with white students thus being denied significant privileges. The reality is that:

The GAO, in a 1994 study found that at the undergraduate level, scholarships (from all funding sources) for which minority status is the only requirement for eligibility are rare, accounting for less than 0.25% of all scholarship monies; that scholarships for which minority status is one of several requirements for eligibility represent about 3% of scholarship monies; and that scholarships for which minority status is one factor among many considered are somewhat more common. On the other hand, [Department of Education] officials note that there are countless scholarship programs which are limited to white students, at least de facto, because of some condition on family origins, membership in some social or fraternal organization, family affiliation with the particular school, etc.119

To further reduce the very small percentage of scholarships that are awarded to minorities because of their minority status would be a travesty.120 It seems that affirmative action critics have been blinded

117. Cose, supra note 100, at 111.
118. Id. at 121.
119. Report to the President, supra note 20, § 10.5.1.
120. "[T]here is a virtual consensus within the higher-education community that minority-targeted scholarships are essential to meeting schools' diversity and remedial needs, and that race-neutral approaches will not always be reasonably effective." Id. § 10.5.3.
by the logs in their eyes, \(^{121}\) so they cannot see that those currently "harmed" by affirmative action have in fact been beneficiaries of implicit affirmative action or preferential treatment for at least one hundred years.

Recognizing the various sub-myths, it is easier to understand the popularity of the myth that affirmative action disregards merit. Otherwise, one would have to accept the ideas that a woman of color might actually be qualified for a position, that she may be better qualified than a white male, and that some white males may not be as qualified as they think they are. By continuing to offer alternative definitions of merit, we can help dispel this myth and perhaps do away with the need for affirmative action for women of color. \(^{122}\) But until other definitions of merit are accepted, it is crucial to preserve affirmative action for women of color because it allows them a path, albeit narrow, to opportunity. Furthermore, even under the standard definition of merit, because of unproven assumptions of incompetence for women of color and competence for white men, affirmative action helps women of color by giving them a chance to prove competence—whereas without affirmative action, the assumption would continue with little opportunity to disprove it.

C. Myth: Affirmative Action is Justified Only Under a Perpetrator-Victim Model

A third myth is that affirmative action can only be utilized under a corrective justice model, which requires both an identifiable victim and a proven identifiable perpetrator. \(^{123}\) This corrective justice model attempts to restore equality between two parties. Aristotle was one of the earliest philosophers to elucidate the notion of corrective justice within the legal system to allow an injured party to be made whole by enforcing a claim against the injuring party. \(^{124}\) He described corrective justice as a mathematical equation seeking equality and fair-

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\(^{121}\) And why do you look at the speck in your brother's eye, but do not notice the log that is in your own eye? Or how can you say to your brother, "Let me take the speck out of your eye," and behold, the log is in your own eye? You hypocrite, first take the log out of your own eye, and then you will see clearly enough to take the speck out of your brother's eye.

Matthew 7:3-5 (New American Standard Bible).

\(^{122}\) While some might argue that abolishing affirmative action (without changing the definition of merit) would take care of the myth, that is misguided. The competence of people of color in positions of power was questioned before affirmative action, it is being questioned now, and it will probably continue to be questioned long after affirmative action has gone by the wayside.

\(^{123}\) Perhaps "myth" is not the best word choice here, as the Supreme Court has advocated this position. See Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995); Richmond v. J.A. Croson Co., 488 U.S. 469 (1989). I intentionally use the word "myth," however, because this justification of affirmative action makes the existence of affirmative action mythical. If corrective justice was the only rationale for the existence of affirmative action, it would die a quick death.

\(^{124}\) Aristotle, Nicomachean Ethics 121-122 (Martin Ostwald trans., 1962).
ness.\textsuperscript{125} It is mathematical because it focuses on a quantity that represents what rightfully belongs to one party but is now wrongfully possessed by another party.\textsuperscript{126} In other words, there must be both a wrongdoer and a victim.\textsuperscript{127} Professor Alan Freeman describes the law under this model as follows:

You can’t assert your claim against society in general, but only against a named discriminator, and you’ve got to show that you are an individual victim of that discrimination and that you were intentionally discriminated against. And be sure to demonstrate how that discrimination caused your problem, for any remedy must be coextensive with the violation. Be careful your claim does not impinge on some other cherished American value, like local autonomy of the suburbs, or previously distributed vested rights, or selection on the basis of merit. Most important, do not demand any remedy involving racial balance or proportionality; to recognize such claims would be racist.\textsuperscript{128}

Many foes of affirmative action concede that “compensation” to an identifiable victim via affirmative action is appropriate provided there is a specific injury to that person.\textsuperscript{129} In other words, under a corrective justice model, affirmative action for women of color could be jus-

\begin{itemize}
\item \textsuperscript{125} Id. at 120-23.
\item \textsuperscript{126} See id. at 121.
\item \textsuperscript{127} The corrective justice model is akin to a compensation rationale:
  Under the compensation rationale, affirmative action is seen as offering preferences to women or members of racial minorities as reparation or compensation for past injustices. The term compensation draws heavily on the model of recompense or payment of damages that is found in tort law. In the context of tort remedies, the particular agent who is responsible for injuring another compensates the specific person injured by paying what is judged to be an appropriate sum of money for the actual extent of the injury he or she has caused.

Luke Charles Harris & Uma Narayan, \textit{Affirmative Action and the Myth of Preferential Treatment: A Transformative Critique of the Terms of the Affirmative Action Debate}, 11 Harv. BlackLetter J. 1, 14 (1994). Harris and Narayan do not think affirmative action is justified by a compensation rationale, preferring to justify it based on the need for equal opportunity for all in order to obtain “full and unimpaired citizenship in the United States.” \textit{Id.} Since they dismiss this rationalization, they do not accord it full analysis. For a critique of the perpetrator-victim model, see Lawrence, \textit{supra} note 45, at 324-25 (“By insisting that a blameworthy perpetrator be found before the existence of racial discrimination can be acknowledged, the Court creates an imaginary world where discrimination does not exist unless it was consciously intended.”). For an elaboration of the reparations theory, see Mari J. Matsuda, \textit{Looking to the Bottom: Critical Legal Studies and Reparations}, 22 Harv. C.R.-C.L. L. Rev. 323, 362-97 (1987).
\item \textsuperscript{128} Alan David Freeman, \textit{Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine}, 62 Minn. L. Rev. 1049, 1049-50 (1978) (footnotes omitted). While this quote came from a tongue in cheek discussion between “The Law” and “Black Americans,” Professor Freeman’s point is well taken.
\item \textsuperscript{129} This is the ground on which many affirmative action cases have been decided. If there is statistically supported evidence of past discrimination by an entity, then that entity’s affirmative action program may be upheld so long as the program is narrowly tailored to overcome past discrimination. \textit{See infra} Part III.A.
\end{itemize}
tified only if there was evidence both that particular women of color suffered multiple discrimination and that the perpetrators alone bear the cost of making those women whole through affirmative action remedies.130 Do these women individually have to show that they have been discriminated against in the past, that they are currently being discriminated against, or that they are likely to be discriminated against in the future?131 Or is it enough if women of color have suffered and continue to suffer multiple discrimination because of the confluence of race and gender?132

A criticism of the corrective justice model is that discrimination is systemic and structural, not simply ad hoc or individual. Thus, a shortcoming under the corrective justice model is that it can only be used to equalize parties if intentional discrimination and readily identifiable wrongdoers and victims exist.133 Undoubtedly, women of color have suffered from discrimination, both directly and indirectly.134 But the acts of discrimination are frequently subtle and the match between the discrimination and a remedy under this model is too inexact and inefficient. As one scholar has noted:

To say we must find the offenders against blacks one at a time and try them on an individual basis would be as realistic as saying that if

130. Even evidence of past discrimination against women of color does not justify affirmative action for some—one critic argues that nothing we do today can compensate for wrongdoing in the past. See Shelby Steele, A Negative Vote on Affirmative Action, N.Y. Times, May 13, 1990, § 6 (Magazine), at 46 ("[I]t is impossible to repay blacks living today for the historic suffering of the race.").
131. The Solicitor General, among others, has argued that only actual victims of past discrimination should benefit from affirmative action. See Brief for the United States as Amicus Curiae at 8, 14, Local Number 93, International Association of Fire Fighters v. City of Cleveland, 478 U.S. 501 (1986) (No. 84-1999); Brief for Respondent at 11, Local 28 of the Sheet Metal Workers International Association v. EEOC, 478 U.S. 421 (1986) (No. 84-1656); Brief for the United States as Amicus Curiae at 18, 19, Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) (No. 84-1340).
132. Some scholars believe this is enough:
   An affirmative action program need not limit its benefits to persons who can be shown to have suffered personally from discrimination. Rather, persons may receive benefits because of racial, national origin, or gender group membership. The Court’s approval of affirmative action benefits for non-victims reflects a realization that a group-based remedy is appropriate for a group-based wrong.
   Scherer, supra note 9, at 330.
133. Furthermore, it attempts to return individuals to positions of equality only if they started in positions of equality, which is rarely the case.
134. Professors Harris and Narayan highlight this point by stating:
   Women and people of color, generally like people with particular disabilities, were often literally excluded from certain institutions because their race or gender was seen as a sign of their lack of ability and competence. They were often denied jobs for which they were qualified on grounds that they would make clients uncomfortable. Even when women and people of color gain entry, race and gender often function in a manner similar to physical disabilities in the sense that the institutional arrangement impedes access to the full range of goods and experiences normally provided by the institution.
   Harris & Narayan, supra note 127, at 16.
you prosecute individual criminals when you happen to catch them organized crime will go away. The fixation is at the level of one-to-one individual justice. Such a constricted perspective is useless in the face of the actual problem. We cannot dismantle a caste system any more than we can reform a sexist society simply by plodding from one specific violation to another, leaving the distorted and distorting structures substantially intact.135

The corrective justice model's insistence on clear discrimination and a close match between the victim and the crime invokes such a strict standard of proof that many women of color would be precluded from access to affirmative action under this model. It is also misguided because it detracts from affirmative action's goals of increasing the availability of opportunities, working towards inclusion, and obtaining positions of power for women of color. The corrective justice model thus is problematic because the reality for women of color does not neatly fit this model. For one, the costs to prove discrimination may be prohibitively expensive.136 Furthermore, the one-on-one type of discrimination required by this model may not be provable, because the discrimination tends to be more broadly based and systematic.138 In addition, the time it would take to prove such discrimination could effectively preclude remedial action. For example, if a woman of color is seeking college admission or a job as a highway worker, by the time she presents necessary proof of past discrimination against her by the college or employer, the entering class she wanted to join will have graduated or the job she sought will have long been filled. Finally, and perhaps most troublesome, this model denies that much of race and gender discrimination is subtle, invidious, ongoing, and systemic.139

Even with its shortcomings, the classic corrective justice model could still be invoked if modified or relaxed as it has been in some cases where it was impractical or impossible to identify a particular

136. See, e.g., Rhode, Perspectives, supra note 7, at 1196 (noting that the costs of litigation, both personal and financial, are extensive).
137. For example, it is frequently institutional or unconscious, which is harder to prove but every bit as real.
138. In discussing structural discrimination, Ronald Ellis states: [D]iscrimination in employment, deprives an individual of society's economic rewards. Lack of economic resources, in turn, leads to poorer housing, less desirable living and working environments, and lower self-esteem. These environmental factors affect success in educational endeavors and the ability to obtain "credentials." Failure to secure the appropriate credentials affects the ability to secure good employment. The result is a vicious circle. Ronald Ellis, Victim-Specific Remedies: A Myopic Approach to Discrimination, 13 N.Y.U. Rev. L. & Soc. Change 575, 584 (1984-85) (footnotes omitted).
139. See Freeman, supra note 139, at 1056.
wrongdoer or victim. Accordingly, it could be used to support affirmative action even if there is no particular wrongdoer whose wrongs can be traced to identifiable victims. The theory would be that affirmative action attempts to correct injuries inflicted on women of color through race- and gender-based discrimination.

A criticism of affirmative action under a relaxed corrective justice model is that the beneficiaries (direct or indirect victims who are now perceived as wrongdoers) gain at the expense of perpetrators (direct or indirect wrongdoers who are now perceived as victims). The myth that arises here, which many people have been lulled into believing, is that well-qualified, innocent white males pay for affirmative action which benefits women of color. One problem with this myth is that it assumes innocence, or the lack of racism. But as one scholar pointed out, "[a]n affirmative action program does not violate the rights of innocent white individuals when it guarantees to minorities the portion of society's goods that minority individuals would have

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140. See, e.g., Brest & Oshige, supra note 6, at 865 (altering the corrective justice model to accommodate class action cases). For other examples of modifications of the corrective justice model in reparations cases, see Ishida v. United States, 59 F.3d 1224 (Fed. Cir. 1995) (awarding reparations to Japanese Americans interned during World War II); Sato v. United States, 33 Fed. Cl. 818 (1995) (same); Motoyoshi v. United States, 33 Fed. Cl. 45 (Fed. Cir. 1995) (same).

141. Brest & Oshige, supra note 6, at 865.

142. Professor Kathleen Sullivan noted that the Court itself could have modified the corrective justice theory by "broadening the concept of who has been 'victimized' by past discrimination .... It might have held that because American racism has left blacks an underclass, still systematically disadvantaged as a group compared with whites, no black is not a 'victim' of past discrimination." Sullivan, supra note 9, at 93. In a sense, the Court adopted similar reasoning in the reparations cases. See cases cited supra note 140.

143. They could be indirect wrongdoers insofar as they have received benefits from racism and sexism even if they did not perpetrate the racism or sexism, or if their unintentional or unconscious racism or sexism worked to their benefit. See Sullivan, supra note 9, at 92-94.

144. Justice Scalia has criticized affirmative action because of its unfair impact on innocent persons. See, e.g., Richmond v. J.A. Croson Co., 488 U.S. 469, 520-28 (1989) (Scalia, J., concurring) (cautioning against discriminating against whites to remedy past discrimination against blacks); Johnson v. Transportation Agency, Santa Clara County, Cal., 480 U.S. 616, 657-77 (1987) (Scalia, J., dissenting) (criticizing the majority opinion for permitting racial or sexual discrimination under Title VII when intending to overcome societal attitudes limiting entry of certain races of sexes into certain jobs). The question remains, however: What about the unfair impact of racism?

145. For an incisive elaboration of the "innocent persons" argument, see Ronald J. Fiscus, The Constitutional Logic of Affirmative Action (1992). Fiscus asserts that "the innocent persons argument is more than an important constitutional argument. It is a widely held, racially polarizing social argument. The near-universal belief in it is without doubt the single most powerful source of popular resentment of affirmative action." Id. at 7; see also Linda S. Greene, Twenty Years of Civil Rights: How Firm a Foundation?, 37 Rutgers L. Rev. 707 (1985) (discussing the popular belief that affirmative action adversely affects innocent parties); Thomas B. Ross, Innocence and Affirmative Action, 43 Vand. L. Rev. 297 (1990) (same).
gained for themselves in a nonracist environment."\footnote{Fiscus, supra note 145, at 38.} In other words, as long as society remains racist, the notion of innocence is mythical. Another problem with the innocent white male myth is the often ignored reality that those males not only directly and indirectly benefit from affirmative action, but that they have for a much longer time than any other group, and in substantially larger numbers. "White men continue to be the only beneficiaries of 'affirmative action,' the only group who are hired at rates significantly higher than their proportion in the available pool of qualified candidates."\footnote{West, supra note 7, at 70; see also UCLA Tells of Possible Admission Favoritism, San Diego Union-Trib., Mar. 18, 1996, at A-3 (noting favoritism in admissions for white students at UCLA).}

Another attack on affirmative action relates to the preferential treatment myth. Underlying this myth is the idea that affirmative action beneficiaries are undeservedly preferred to more deserving persons. For example, many people criticize government contract affirmative action programs as unduly burdening majority contractors for the benefit of minority- and women-owned businesses ("MBEs" and "WBEs," respectively). San Diego, California had an affirmative action contracting program entitled "Equal Opportunity Contracting Program."\footnote{This voluntary, interim program replaced the City's goal-based Minority and Women Business Enterprise Program, which in turn was rescinded on November 29, 1993. Comm. on Pub. Safety and Neighborhood Servs., The City of San Diego Manager's Report No. 96-56, at 1 (Mar. 13, 1996).} Its goal was to award 20% of construction projects over $50,000 to MBEs and WBEs, and 15% of consulting projects to MBEs and WBEs.\footnote{See id. at 1.} Even with this policy, which was partly designed to create greater equality of contracting and consulting opportunities for groups traditionally deprived of those opportunities, only 1.9% of construction contracts were awarded to MBEs and 4% to WBEs, for a total of 5.9%—far short of the voluntary goal of 20%.\footnote{See id. at 2.} Only 1.8% of consulting contracts were awarded to MBEs and 0.8% to WBEs, for a total of 2.6%—again far short of the 15% goal.\footnote{Id.} Women of color fared even worse. Of the $209,732 worth of construction contracts awarded to African-American owned businesses, $23,400 worth, or just under 11.2%, went to women.\footnote{Id. at Exhibit B.} This means that African-American women received approximately 0.09% of all construction contracts. Of the $6,829,362 worth of construction contracts awarded to Latino owned businesses, none went to women.\footnote{Id.} Latina owned businesses also received zero percent of the $1,657,454 in consulting
contracts awarded to Latino owned businesses.\textsuperscript{154} Of the $132,353 worth of consulting contracts awarded to African-American owned businesses,\textsuperscript{155} $12,400 worth of contracts went to women.\textsuperscript{156} In other words, approximately 0.48\% of all contracts went to African-American owned businesses. Of these contracts, approximately 9.4\% went to women owned businesses. The African-American women thus received a total of less than 0.05\% of all consulting contracts awarded.\textsuperscript{157}

The point of the San Diego story is twofold: even with modest affirmative action goals, the city fell far short of its goals, and affirmative action opponents still complained about preferential treatment and reverse discrimination.\textsuperscript{158} Majority-owned businesses are hardly being deprived of contracts, and women of color continue to receive only a nominal percentage of construction and consulting contracts in San Diego. As affirmative action proponents point out:

\begin{quote}
[A]ffirmative action is not a matter of affording "preferential treatment" to its beneficiaries, but instead [is] an attempt to offer them greater equality of opportunity in a social context marked by pervasive inequalities, one in which many institutional practices work to impede a fair assessment of the capabilities of those who are working class, women, or people of color.\textsuperscript{159}
\end{quote}

Thus, the notion that affirmative action beneficiaries are receiving preferential treatment to the detriment of more deserving parties remains as mythical as the notion that affirmative action is causing majority contractors to go out of business because of preferential treatment for women of color.\textsuperscript{160}

The San Diego story brings out another wrinkle in the problem. Some people complain that affirmative action generally, and in government contracting particularly, has not been effective and should

\begin{itemize}
\item \textsuperscript{154} Of the $1,657,454 worth of consultant contracts which went to Latino owned businesses, none went to women. \textit{Id.}
\item \textsuperscript{155} The $132,353 worth of consulting contracts was out of a total of $27,617,004 in city-awarded consultant contracts awarded. \textit{Id.}
\item \textsuperscript{156} \textit{Id.}
\item \textsuperscript{157} Interestingly, a recent controversy erupted relating to a report on whether MBEs and WBEs have suffered discrimination in San Diego contracting. San Diego paid $500,000 for this report, and the city has refused to make the report public. Ronald W. Powell, \textit{Minority Builders Irked as City Sits}, San Diego Union-Trib., Aug. 13, 1996, at B-1. "If the study shows a clear pattern of discrimination, the finding could serve as the legal foundation for instituting a preferential contracting program for the groups that have been shut out." \textit{Id.}
\item \textsuperscript{158} It is like someone complaining, after a banquet in which that person ate to excess and felt sick, that a portion of the leftovers went to hired help. In fact, the complaints and 1993 lawsuit filed by opponents of affirmative action led to Judge Keep's 1993 decision ruling San Diego's program unconstitutional. \textit{Id.} The city thus abolished the goal-based program late in 1993. \textit{Id.}
\item \textsuperscript{159} Harris & Narayan, \textit{supra} note 127, at 4.
\item \textsuperscript{160} While some majority contractors may be going out of business, it can hardly be blamed solely on affirmative action.
\end{itemize}
therefore be abolished. The myth is that because goals are not being met, affirmative action is at fault. The reality is "that the city's figures show that minority- and women-owned businesses have received dramatically less city work since the equal opportunity program was abolished." First, note that women of color receive more contracts with affirmative action than without. Hence, it is making a positive difference for women of color. Second, ponder why goals are not being met. It may be because not enough women of color submit bids. But other, more sinister reasons exist as well. For example, in describing why almost all state departments failed to reach affirmative action goals, one report noted that "[t]he program's administration is fragmented and its provisions are applied unevenly; in some cases, the law has simply been ignored while in others advantage has been taken of loopholes." Furthermore, affirmative action in government contracting has not worked very well in California partly because it has been sabotaged by majority-owned firms. Fraud is rampant in the contracting area. "After examining 700 contracts valued at $375 million, auditors hired by the Office of Public School Construction reported that 30% involved fronting or other violations of affirmative action requirements." It is telling that this view of affirmative action does not garner the same attention that the marginal percentage of contracts awarded to MBEs or WBEs receives under reverse discrimination headlines. Thus, affirmative action in

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161. This takes blaming the victim to new lows.
162. Powell, supra note 157.
163. The numbers, however, are not as high as had been hoped.
165. Virginia Ellis & John Hurst, Women, Minorities Still Lag in Government Contracting, L.A. Times, Sept. 11, 1995, at A1. Fronting is the practice of granting business ownership to minorities or females on paper for the purpose of qualifying as an MBE or WBE, but still keeping de facto ownership under white male control. See id. While the audit findings were turned over to the Attorney General's office for prosecution, no action has been taken. Id. So, these companies are lying, preventing business from going to bona fide MBEs and WBEs, getting that same business, complaining about affirmative action, and the government's inaction condones their behavior.
166. There has been a backlash against affirmative action policies: Across the state a core of angry white businessmen believe affirmative action has fostered a new kind of discrimination, aimed directly at them. They say that large contractors, pressed to meet affirmative action goals, are increasingly giving minority- and women-owned enterprises the business that once went to white male owned companies. 
Id. Affirmative action is designed, in part, to give business to those prevented from getting that business in the past due to discrimination. So it should not come as a surprise that that is precisely what is happening with affirmative action. What is surprising is that such a minimal amount of business is going to MBEs and WBEs. What is even more surprising is that the very companies who have historically been getting almost 100% percent of the business are complaining about sharing minuscule percentages of that business.
government contracting has not achieved even modest goals, in part because of fraud committed by majority-owned firms. Those same firms are either moaning that affirmative action should be eliminated because it is not working, or are crying reverse discrimination when a negligible percentage of contracts is awarded to MBEs or WBEs. Clearly, affirmative action is not at fault here, and rather than be eliminated, it should be revamped to run more efficiently and effectively for women of color.

Another story will illustrate the fallacy of the myth that well-qualified white males pay for preferences favoring affirmative action beneficiaries. Many parents have complained that their children could not get into law school because they are not ethnic minorities. Yet a look at the composition of law schools reveals that minorities, including women of color, still make up a only small percentage of all law students, and they are still severely underrepresented. For example, in 1995-1996, out of a total of 129,318 law students, 9779 were Black American, 1085 were Native American, and 2495 were Mexican-American. Thus, it is evident that minority students hardly cause a massive displacement of white students. The numbers for practicing lawyers are even more discouraging. In 1995, only 8.36% of associate attorneys nationwide were minorities, while a paltry 2.68% of partners were minorities. While 38.99% of the associate attorneys were women, only 12.91% of partners were women. As noted elsewhere, few statistics exist on women of color. However, in Chicago, just under 2% of attorneys are women of color. Thus, in spite of the myth that undeserving minorities are taking away white men’s entitlements, women of color are still underrepresented in law and many other professions.

All this is not to say that non-beneficiaries may be asked to bear too much of the cost of some affirmative action programs. To the extent that a program is structured so that those parties pay an undue price, however, the program will not, and should not, last. As case law shows, non-beneficiaries are well-versed in affirmative action law and have shown no hesitation in bringing reverse discrimination law-

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167. For example, at the University of Texas School of Law, “[t]he state population is 11.6% black and 25.6% Hispanic; while the 1992 law school class was 8% black and 10.7% Hispanic.” Wrong Decision: One View on U of Texas Case, Daily Rep. Card, (Mar. 25, 1996), available in LEXIS, News Library, Rptcd File.
168. These students were classified as American Indian or Alaskan Native and their numbers were lumped together. See ABA, A Review of Legal Education in the United States Fall 1995, at 68-69.
169. Id. at 67-69.
171. Id.
172. See supra text accompanying notes 20, 52-58.
suits. The solution is not to do away with a program that is resulting in some improvement, but rather to modify and overhaul the program to make it more efficient and results-oriented.

D. Myth: Affirmative Action Beneficiaries are Stigmatized

The fourth myth is that affirmative action stigmatizes beneficiaries. Critics claim that affirmative action results in continued negative stereotypes of beneficiaries and causes self-doubt and low self-esteem among those beneficiaries who believe they have attained their positions because of affirmative action. For most beneficiaries, this is simply inaccurate—no evidence exists that the majority of affirmative action beneficiaries are stigmatized.

Even if there is some truth to the stigma criticism for occasional beneficiaries, for women of color who have been conditioned to feel low self-esteem and self doubt, the experience is hardly novel. For


175. See, e.g., Richmond v. J.A. Croson Co., 488 U.S. 469, 493-94 (1989) (stating that classifications based on race carry a danger of stigmatic harm); id. at 516-17, 527 (Stevens, J., concurring in part) (same); Fullilove v. Klutznick, 448 U.S. 448, 545, 547 (1980) (Stevens, J., dissenting) (same); Bakke, 438 U.S. at 298 (stating that preferential programs may reinforce common stereotypes); see also Carter, supra note 6, at 12, 14 (observing that some Americans view affirmative action beneficiaries as carrying a "badge of shame"); Thomas Sowell, The Plight of Black Students in the United States, 103 Daedalus 179, 180-84 (1974) (stating that affirmative action can create a sense of perpetual inferiority); Ann Scales & Maria Shao, Gains Can Stigmatize Those Who Benefit, Boston Globe, May 22, 1995, at 8 (stating that beneficiaries sometimes say that whites believe they obtained their positions because of affirmative action rather than qualifications); Steele, supra note 130 (noting that, to some, racial preferences imply an inferior status).

176. It seems that a small minority of beneficiaries buys into the stigma claim. Derek Bok cites a Harvard poll which indicates that fewer than five percent of African-American undergraduates feel the stigma pinch. Derek Bok, The Case for Racial Preferences: Admitting Success, in Social Ethics: Morality and Social Policy 333, 334 (Thomas A. Mappes & Jane S. Zembaty eds., 4th ed. 1992). But see Wilson, supra note 115, at 151-54 (stating "that [although] affirmative action often stigmatizes those who benefit from it . . . [i]t is racism, not affirmative action, that stigmatizes minorities"); see also Thomas I. Chacko, Women and Equal Employment Opportunity: Some Unintended Effects, 67 J. Applied Psych. 119, 122 (1982) ("Women who are selected because of their sex are stigmatized as second-class citizens in need of special remedies."); Madeline E. Heilman et al., Intentionally Favored, Unintentionally Harmed? Impact of Sex-Based Preferential Selection on Self-Perceptions and Self-Evaluations, 72 J. Applied Psych. 62, 67 (1987) ("Women's performance apprehensions were therefore expected to be exacerbated by the ambiguity of preferential selection."). Note, however, that these studies discussed the stigmatizing effects of affirmative action when beneficiaries believed they benefited solely because of affirmative action, not because of merit. Yet few affirmative action beneficiaries believe that they are unqualified for positions or candidacies. Thus, those who feel stigmatized account for a relatively small percent of all beneficiaries.
example, I have spoken with many women of color about their law school experiences of attending class, hearing a professor say something demeaning about women of color, noticing no reaction among their classmates, and ultimately wondering, "Is it just me?" To illustrate, at a conference at Harvard Law School organized by the Women of Color Collective, when one panelist described the "is it just me" phenomenon, women throughout the audience nodded their heads in understanding.

To the extent there is self-doubt or stigma among women of color, there are many explanations other than, or in addition to, affirmative action. For example, women of color already may lack confidence because of family upbringing or cultural or social conditioning, regardless of the existence of affirmative action. Furthermore, many women of color have been treated with disrespect and the expectation that they will not succeed—too often self-fulfilling prophecies. A large percentage of women of color enter traditional occupations such as housecleaning, childcare, and other service/servant types of jobs.

177. See Lani Guinier, et al., supra note 75, at 46 n.117.


179. Id.

180. To the extent that affirmative action contributes to stigma, "one of the tragic consequences of living in a racist and sexist world that is replete with negative stereotypes about the abilities of women and people of color is that some of these individuals have a difficult time not internalizing these views to some degree." Harris & Narayan, supra note 127, at 30; see also Suzanne Homer & Lois Schwartz, Admitted But Not Accepted: Outsiders Take an Inside Look at Law School, 5 Berkeley Women's L.J. 1, 43-44 (1989-90) (noting that rigorous requirements of law school in a majority environment intensifies feelings of isolation and self doubt in women of color).

181. One Latina said that her low self esteem at home caused her to look for self esteem elsewhere—in the streets. Even as she continued through school, she did not think she deserved a quality education. "She thought that teachers gave her good grades because they felt sorry for her. The same with the scholarship to University of California San Diego. And even when she made the provost's list." Anna Cearley, Teacher's Own Story Gives Hope to Latinas, San Diego Union-Trib., Apr. 17, 1994, at B-3.

182. One critic noted:

[Y]oung Latinas are not ambitious, succumbing to low expectations of family and society. Latinas have the highest dropout rate in [San Diego] county, leaving school more than twice as fast as their African-American and white peers. . . . Statistics fail to capture the whole picture, however, since many students leave school before high school, when the state begins to track dropouts.


183. In a report prepared for the United States Department of Labor, the authors stated that:

Nearly 70 percent of the full-time female labor force work in low-paying occupational categories. Women of color work in minority- female-dominated jobs in the race- and gender-specific segment of the secondary labor market. Wage differentials by gender and race are due to channeling women and minorities into less complex jobs, as well as underpaying female-domi-
There are few women who look like them in positions of power or looking after them and their interests. These factors are much more likely to cause low self-esteem or stigma than affirmative action, which could give them a boost out of the colored feminization of poverty.

Regardless of affirmative action, women of color's qualifications are often suspect in the eyes of their colleagues or peers. Until we truly have a color-blind society, however, people will always wonder whether women of color qualify for positions. Women of color often have to work harder just to get the respect that their white male colleagues enjoy as a birth right. The presumption favoring white males seems to be that they are qualified until they prove otherwise. With women of color, the presumption seems to be that they are unqualified until they prove otherwise.

Blacks and whites must face the fact that affirmative action has made no significant difference in the way whites look at blacks. Competent and successful blacks are still seen as exceptional. Before and since affirmative action, most white people see another white as competent until proven incompetent and a black person as incompetent until proved competent.

Thus, there is little risk that affirmative action would wound our self-esteem to the point of disabling us, and it certainly would not be the worst wound we have borne. We would welcome some open doors

Sharon L. Harlan & Catherine White Bernheide, Glass Ceiling Commission, U.S. Dep't of Labor, Barriers to Workplace Advancement Experienced by Women in Low-Paying Occupations (1994). Latina/os sixteen years and older are more likely to be engaged in low-paying, less stable, and more hazardous occupations (such as fabricators, laborers and in service occupations) than their non-Latina/o peers, who are more likely to be in professional or managerial occupations. National Association of Hispanic Publications, Hispanics-Latinos: Diverse People in a Multicultural Society 17 (1995). While the unemployment rate has vacillated for Latina/os as for the rest of the population, it has consistently been higher for Latina/os. For example, in 1994, Latina/os' unemployment rate was 11.1%, compared to 5.7% for non-Hispanic whites. Id. at 20.

184. One academic agreed that affirmative action might cause some stigma, but went on to argue that

[i]t is unrealistic to think . . . that affirmative action causes most white disparagement of the abilities of blacks. Such disparagement, buttressed for decades by the rigid exclusion of blacks from educational and employment opportunities, is precisely what engendered the explosive crisis to which affirmative action is a response.

Kennedy, Persuasion and Distrust, supra note 103, at 1331.

185. America is clearly not yet a color-blind society. If it were, it would be easy for African-Americans to catch cabs, the Los Angeles riots would not have occurred following the Rodney King verdict, and the nation would not have reacted in such a divided fashion following the O.J. Simpson verdicts. For a more detailed critique of the color-blind notion, see infra text accompanying notes 407-13.

186. Joint Ctr. for Political & Econ. Studies, The Inclusive University: A New Environment for Higher Education 18 (1993) [hereinafter The Inclusive University].
even with the potential accompanying "stigma risk." This risk is much more attractive than joblessness or low paying work. Furthermore, any stigma-attached downside to affirmative action does not outweigh the upside of providing opportunities for women of color that would not otherwise exist.

E. Myth: Affirmative Action Disregards Low-Income Persons

The fifth and final myth which I explore is that affirmative action benefits only middle-income beneficiaries to the exclusion of lower-income persons. Critics who make this claim argue that affirmative action is therefore defective and should be abolished. One fallacy underlying this myth is that even if many current affirmative action beneficiaries are from middle-class families, that was not the case at the dawn of affirmative action.

The world in which affirmative action policies were initiated was a world in which a great many prestigious institutions had been exclusive enclaves of upper-class white men. It was also a world where the trades or the skilled blue-collar professions were predominantly the preserve of white working-class men. Even a moderate opening up of these domains to people excluded from throughout history, a process in which affirmative action policies have played a crucial causal role, is arguably an important change in the structural status quo.

In all likelihood, many of today's middle-class women of color are middle-class precisely because of affirmative action. Furthermore, while a larger percentage of middle-income than lower-income persons benefits from affirmative action, that does not mean affirmative action is ineffective. "Affirmative action was never intended to serve as a direct anti-poverty program. To rely on affirmative action alone—or even primarily—to solve the black community's problems would be as unrealistic as relying on black neighborhood self-help programs alone."

Generally fewer lower-income persons than middle- and upper-income persons pursue higher education or become white collar professionals for many reasons other than affirmative action. It is for

187. See Carter, supra note 6, at 71.
188. Harris & Narayan, supra note 127, at 13 (citations omitted).
189. "There is near-unanimous consensus among economists that the government antidiscrimination programs beginning in 1964 contributed to the improved income of African-Americans." Report to the President, supra note 20, § 3.2.1. The Report, however, cautions us that it is unclear exactly which programs led to this change and that it was more likely a result of collective efforts. Id.
190. The Inclusive University, supra note 186, at 19; see also Cornel West, Equality and Identity, The American Prospect, Spring 1992, at 120 ("Progressives should view affirmative action as neither a major solution to poverty nor a sufficient means to equality. We should see it primarily playing a negative role—namely, to insure that discriminatory practices against women and people of color are abated.").
complex and inter-related social, economic, political, and educational reasons that are beyond the scope of this article. But briefly, the economic class breakdown of affirmative action beneficiaries is attributable primarily to systematic factors that favor the success of middle-income persons over lower-income persons generally. For example, middle- and upper-income persons are more likely to be part of two-parent families than are lower-income persons. Two-parent families, in turn, are more likely to provide a greater support system for their children, ranging from more time with them, to greater resources if both parents work. Those resources could include tutors, computers, and extracurricular activities that enhance educational opportunities. Also, children from lower-income families have lower graduation rates than children from middle-income families. That is not surprising, considering that “[t]he children and grandchildren of dropouts tend to have less intellectual stimulation at home and no role models upon which to base their attitude toward education.”

Even acknowledging the distribution of affirmative action beneficiaries by economic status, one should not jump to the conclusion that lower-income persons do not benefit from affirmative action. They directly benefit from affirmative action vis-à-vis college and graduate school admissions, as well as through employment or receipt of contracts. They indirectly benefit from affirmative action in other ways.

191. There are many works that discuss the perpetuation of cycles of low-income jobs, limited education and powerlessness of people of color generally. For a discussion of Latinos in this context, see Earl Shorris, Latinos: A Biography of the People (1992). For a discussion of African-Americans in this context, see Derrick A. Bell, Faces at the Bottom of the Well: The Permanence of Racism (1992); Cose, supra note 100; Nathan McCall, Makes Me Wanna Holler: A Young Black Man in America (1994).


193. After all, they are dividing child-rearing between two people instead of one and if one parent does not work, then the stay-at-home parent can offer even more time and emotional support to children.

194. Some activities might include music, dance or language lessons, art classes, or camps. All of these tend to make children more well rounded. If you extrapolate the impact of these activities over one's childhood, by the time that child is ready to apply for college, he or she should look much better on paper than an applicant from a lower-income family who did not have similar advantages.


196. Shorris, supra note 191, at 220. Shorris also listed additional hurdles which Latinos face—their respect for teachers does not translate into success in the class room, and their history of failure in the class room conditions teachers and administrators to expect Latinos to fail. Id. He noted that many Latinos who have succeeded have done so in spite of repeated counseling to opt for vocational courses. Id. Many of my friends recount that same story—it is familiar particularly to Latinas.
For example, many direct affirmative action beneficiaries serve low-income persons of color. "Black and Hispanic physicians serve proportionally more minority and poor patients than white doctors do ..." In addition, as women of color move up the economic ladder, they are more likely to become advocates for women of color lower down the ladder. Dean Paul Brest and Miranda Oshige describe this multiplier effect as follows:

[A group member's] rise may benefit members of her group and may reduce outsiders' prejudice against group members. Her material success may enable her to support group-related institutions. Her access to power may enable her to promote or protect the interests of other group members. She may serve as an example or inspiration for young members and thus encourage their pursuit of higher education and professional career paths ... [thus,] a rise in [her] status may have a multiplier effect, creating external benefits for other, less advantaged members of her group.

Another problem with the criticism that affirmative action should do less for middle-income persons and more for low-income persons is that it simplistically ignores the confluence of class, race, and gender. The criticism presupposes that if a woman of color is middle- or upper-income, then she does not experience discrimination and thus should not benefit from affirmative action. But the reality is that one's ethnicity and gender do not go away, regardless of economic class. Ethnicity and gender are integral to identity and often times are apparent when class is not. Thus, it is possible for Patricia Williams,

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197. Mike Madden, Assuring Minority Medical Care: Affirmative Action in Medical Schools Key, USA Today, July 29, 1996, at 8B. This article went on to report that "underserved patients receive more treatment from physicians with disadvantaged backgrounds than from doctors who grew up wealthy." Id.

198. For example, I advocate for low-income Latinas in a number of ways, ranging from working with school children to organizing Community Law Schools focusing on issues that impact Latinas. Ellen Head, winner of the Sojourner Truth award, is a black woman and the director of employment management at Hill Air Force Base. She believes that progress must continue for women and minorities and she is committed to "making management aware of the capabilities of those groups." Tom Quinn, Awards Spotlight Spirit of Women: Awards Honor Spirit of Utah Woman, Salt Lake City Trib., Apr. 14, 1995, at C-1, available in LEXIS, News Library, Strib File (quoting Ellen Head). She is passionate about making sure the door stays open for people behind her, including women of color. Dahlia Torres, who went to school at the University of Texas, has done significant service work in San Diego County. For example, she has set up English as Second Language classes in migrant camps, she has organized Mexican dance classes in county areas with large Latino populations, and she has helped plan Cinco de Mayo celebrations. Her vision includes enhancement of opportunities for young Latinas. Lola Sherman, Expert on Migrant Camps 1 of 13 Latinas to Be Honored, San Diego Union-Trib., Apr. 10, 1993, at B-2.

199. Brest & Oshige, supra note 6, at 868 (emphasis omitted); see also Paul Brest, The Supreme Court 1975 Term Foreword: In Defense of the Antidiscrimination Principle, 90 Harv. L. Rev. 1, 46-47 (1976) (illustrating the positive externalities associated with the multiplier effect).

200. See, e.g., Harris and Narayan, supra note 127, at 5 (noting that middle-class minorities are not shielded from the effects of racism).
an African-American law professor, to be refused entrance at a clothing shop. In a similar vein, Patti Chavarria, a Latina lawyer at a prominent San Diego law firm, went to sign in at court and was told by a male bailiff that only attorneys can sign in. Even Oprah Winfrey, one of the wealthiest Americans (no, not women, not African-Americans, but Americans), has been refused entrance to a Manhattan boutique. Granted, that was when she was only making $8 million a year. Finally, virtually every female of color is at a disadvantage when purchasing a car, regardless of her economic status.

In all of these cases of discrimination, class was irrelevant but race and gender were not. Rather than looking at the economic class of women of color, it is more logical to look at whether women of color, who have traditionally been subordinated and marginalized, are still disproportionately underrepresented in higher education, the legal academy, and government contracting. If the answer is yes, then it is desirable to alter the mechanics which cause that underrepresentation. It is not essential that representation come only, or even primarily, from lower-income members of those groups. It is more important to utilize affirmative action to get women of color in the door. Once there, they can work with others to ensure representation of women of color more generally. With more women of color in positions of power, then discriminatory incidents against women of color like those described in this section will decline. Thus, affirmative action is still needed to get women of color into those positions.

In summary, this part has explored five common myths which surround affirmative action: the double-dipping myth, the merit myth, the perpetrator-victim myth, the stigma myth, and the myth that affirmative action ignores low-income persons. This exploration has ex-

201. See Patricia Williams, Spirit-Murdering the Messenger: The Discourse of Fingerprinting as the Law's Response to Racism, 42 U. Miami L. Rev. 127, 128 (1987). Professor Williams wrote that she sought entry into a Manhattan store where a young white male peered out at her for awhile before mouthing the words that the store was closed. Meanwhile, many white people were shopping in the store at mid-day. Id. 202. Telephone Interview with Patti Chavarria (June 3, 1995). It is unclear whether this act was prompted by Ms. Chavarria's race or gender. That is often the case. 203. Forbes estimated Winfrey's net worth as in excess of $340 million. Robert La Franco & Josh McHugh, The Forbes Four Hundred: "Piranha Is Good," Forbes, Oct. 16, 1995, at 68. Her 1996 income alone was estimated at $97 million. Robert La Franco, The Top 40, Forbes, Sept. 23, 1996, at 165. 204. Intriguers: Oprah Winfrey, People Weekly, Dec. 28, 1987-Jan. 4, 1988, at 74. Id. 205. Id. 206. Ian Ayres, Fair Driving: Gender and Race Discrimination in Retail Car Negotiations, 104 Harv. L. Rev. 817 (1991). "[B]lacks and women simply cannot buy the same car for the same price as can white men using identical bargaining strategies." Id. at 821-22. 207. For women of color to get into positions of power, they can take a number of steps, such as going to college, and then graduate school. This would open doors that would not otherwise be open. Once they get into leadership positions, they can open the doors for other women and establish unique networks.
posed these myths to be just that—myths which detrimentally impact women of color by creating hostility, both toward affirmative action and toward women of color as its potential beneficiaries. This exploration has additionally established that affirmative action has been effective in limiting the impact of discrimination, racism, and sexism on women of color and in increasing opportunities for them. Consequently, affirmative action should continue as a strategy to increase opportunities for women of color so long as discrimination, racism and sexism persist.

II. MORAL BASES SUPPORTING AFFIRMATIVE ACTION FOR WOMEN OF COLOR

This part discusses three moral bases or justifications supporting the continuation of affirmative action for women of color.208 One justification stems from the economic injustice which women of color now suffer, and the moral imperative to change the system which causes that injustice. Another justification arises from the theory of distributive justice, which proposes equality of opportunity for all. As long as opportunities are not equally available to women of color, affirmative action should remain in place because it promotes greater equality of opportunity. A final justification for affirmative action arises from its promotion of diversity. Diversity, in turn, encourages inclusiveness and offers many advantages such as role modeling, while also defusing the dangers which accompany exclusiveness, racism and sexism. This part also elaborates on actual lives of women of color, again as juxtaposed against the myths outlined in part I.

A. Economic Justice

This section explores the economic story of women of color. It discusses how women of color have historically been, and continue to be, at the bottom of the economic food chain. It concludes with a discussion of why affirmative action should remain a policy that assists women of color in climbing out from the bottom.

Women generally, and women of color particularly, have virtually always been economically inferior to men.209 One reason is that patriarchal society devalues and discourages women's participation in the

208. While various policies suggest that affirmative action is justified for different groups for distinct reasons, I focus here on policies that uniquely justify affirmative action for women of color.
209. See Deborah Figart et al., The Wage Gap and Women of Color, 26 Inst. for Women's Pol'y Res. 25 (1989); Women's Bureau, U.S. Dep't of Labor, Leaflet No. 93-5, Facts On Working Women: Earnings Differences Between Women and Men 2 (1993); see also Deborah L. Rhode, The "No-Problem" Problem: Feminist Challenges and Cultural Change, 100 Yale L.J. 1731, 1740 (1991) [hereinafter Rhode, Feminist Challenges] (stating that women traditionally have been disadvantaged in the labor market, which led feminists to fight for legislation to correct the disparity).
work force. It has discouraged their participation by deflating their wages, then justifying these lower wages because they are not the heads of households and therefore do not have to support themselves or their families. This may have had some validity when nuclear families were more common, when there were fewer women in the work force, and when divorce rates were lower, but even then women were occasionally heads of household. This wage inequality persists, even though 60% of women are now the “sole or major wage earners” in their families.

In modern times, women frequently entered the outside work force as stenographers and typists. Schools, in fact, often trained girls to perform clerical work. While these occupations paid less than typically male occupations, at least they paid more than the work that was typically available for women of color—domestic or agricultural work. Today, on average, women of color continue to earn less than white women. Consequently, most women of color sit “at the bottom of the earning-prestige-opportunity-status ladder in the United States.”

Women of color continue to be economically disadvantaged. They and their children live in poverty in greater rates than their

211. Id.
213. Davies, supra note 210, at 52-53. Note, however, that women entered the work force for pay much earlier. For example, some women joined the wage labor force in the period following the American Revolution. See Alice Kessler-Harris, Out to Work: A History of Wage-Earning Women in the United States 21-22 (1982). Women also hired themselves out as servants and worked as teachers. Id. at 47-48, 56-57.
214. Davies, supra note 210, at 72.
215. As recently as 1991, full time female workers earned 70 cents for every dollar that full time male workers earned. Elaine Sorenson, Comparable Worth: Is It a Worthy Policy? 3 (1994). Women earn less than men in part because male dominated professions (such as law and engineering) pay more than female dominated professions (such as clerical, teaching and nursing). See U.S. Comm’n on Civil Rights, Comparable Worth: An Analysis and Recommendations 11 (1985). Of course, women could not enter many higher paying professions until relatively recently, in no small part due to men’s desire to keep those jobs, and the related power that comes with those jobs, to themselves.
217. See supra note 31; see also Gerda Lerner, Black Women in White America: A Documentary History 219 (1972) (comparing earnings of women of color to those of white women).
218. See Lerner, supra note 217, at 226.
219. While the following statistics are for men of color, the statistics for women of color are presumably even more disheartening as they represent only a subset of the larger set of “people of color.” [T]he black unemployment rate remains over twice the white unemployment rate; 97 percent of senior managers in Fortune 1000 corporations are white males . . . . In 1993, Hispanic men were half as likely as white men to be
white counterparts. For example, "[i]n 1992, over 50 percent of Afri-
can American children under 6 and 44 percent of Hispanic children
lived under the poverty level, while only 14.4 percent of white children
did so." Furthermore, poor children frequently live in households
headed by women of color. Approximately 8,613,000 children lived
in households headed by women of color as of March 1994. These
statistics are expected considering that "[m]inorities and women con-
tinue to be disproportionately employed in clerical jobs and in the
lower grade levels of other occupational series."

The question of why women of color remain at the bottom is a com-
plex one with no simple answers. However, there are many causes
which contribute to their economic status. One is the inevitable
strength of precedent: "The consequences of years of officially sanc-
tioned exclusion and deprivation are powerfully evident in the social
and economic ills we observe today." Thus, even assuming that so-
ciety recognizes women's economic inequality and considers it a prob-
lem worth solving, it cannot be solved easily or quickly.

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220. Some female scholars argue that they are not only impoverished, but that their
impovery is critically tied to men's enrichment. See, e.g., Joan C. Williams,
Deconstructing Gender, 87 Mich. L. Rev. 797, 801 (1989) [hereinafter Williams,
Deconstructing Gender] (attributing the impoverishment of women and children to
the enrichment of men). Professor Williams also points out that "[s]ixty percent of all
people in poverty... are women," and that "[f]emale-headed households are five
times more likely to be poor and up to ten times more likely to stay poor than are
households with a male present." Joan C. Williams, Married Women and Property,
1 Va. J. Soc. Pol'y & L. 383, 383 (1994) (footnotes omitted) [hereinafter Williams,
Married Women and Property].

221. Report to the President, supra note 20, § 4.3. "[Blacks] number disproportio-
amately among the poor and near-poor." The Inclusive University, supra note 186, at 10.
This statement came up in the context of why minorities generally do not pursue
education, which was tied to escalating tuition costs coupled with major cutbacks in
financial aid. Id.

Professor Williams reminds us that "[c]hildren are the poorest group in the United
States... over half of the children living in female-headed households will experience
childhood poverty." Williams, Married Women and Property, supra note 220, at 384.
222. "As of 1991, 23.8% of Hispanic families were maintained by a female house-
holder, with no husband present, compared to 16.4% of non-Hispanic households."
More frightening, "[a]lmost half (48.3%) of female-headed Hispanic families were
poor in 1990, compared to 31.7% of comparable non-Hispanic families." Id. at 16.
223. Abstract, supra note 31, at 65. During the same time period, approximately
45.9% of Black children and 39.9% of Hispanic children lived below the poverty
level. Id. at 480.


225. Id. § 1.2.2.

226. This is a risky assumption given today's political and judicial climate, as evi-
denced by recent instability in women's rights. For example, since Roe v. Wade, 410
U.S. 113 (1973), granted women a constitutionally protected privacy right to choose
whether to have an abortion, twenty-seven states have enacted laws requiring a par-
ent's consent for a minor to have an abortion. Deborah Haas-Wilson, The Impact of
Another cause is wage inequality. As of 1993, women on average earned only 71 cents for every dollar earned by men.\textsuperscript{227} Still worse, African-American women earned only 64 cents and Latinas earned even less—54 cents.\textsuperscript{228} Thus, even if affirmative action helps women of color acquire an education or employment, it does not ensure economic parity. Nonetheless, if equality of opportunity is a stated goal, it is preferable for women of color to obtain educational degrees and employment through affirmative action, as opposed to not having those opportunities.\textsuperscript{229}

Women also lag behind men economically because of men's reluctance to give up power to women generally, especially if they consciously or subconsciously consider women their inferiors.\textsuperscript{230} In discussing a Glass Ceiling Commission study, one report found that “[t]he fears and prejudices of lower-rung white male executives were listed as a principal barrier to the advancement of women and minorities.”\textsuperscript{231}

Another reason that women of color are economically inferior is their overrepresentation as single mothers.\textsuperscript{232} In particular, women who cared for their children full-time while married incurred tremen-
dous expenses as single parents. This is exacerbated by their lost income while married. For example, over ten years ago, one scholar calculated that a mother who stayed out of the work force until a child was fourteen forfeited an average of $100,000 in earnings. Related to this is the disproportionate financial decline that women and children suffer if a marriage ends in divorce. One scholar found that the standard of living for men in the year immediately following divorce improves by approximately 10%, while the standard of living for women and children tends to decline by approximately 27%.

The differential economic impact of divorce is not surprising, considering the paradigm for property division on divorce. Some community property states divide community property equally, while apportioning to each spouse his or her separate property. The remaining community property states, as well as separate property states, utilize the concept of equitable distribution to divide property on divorce, with a fifty-fifty division of property becoming the norm. At first glance, this “equal” division of property seems fair because it attempts to provide each spouse with fifty percent of the marital property. This model, however, has some built-in problems which typically disadvantage women and children. One problem is that one-half of the marital property goes to one person, for that person’s use, while the other half goes to the other person, for the use of

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234. Id. at 185 n.*. This amount is obviously much higher now.
235. Katharine Webster, Widely Quoted Figures on Women After Divorce Were Off, Author Admits, San Diego Union-Trib., May 18, 1996, at A-25. Lenore J. Weitzman’s original research indicated that women’s standard of living in the year following divorce declined by 73%. Id. Another researcher, however, challenged that figure, and Weitzman recently admitted that her original numbers were off. Id. Note that these figures break down standards of living by gender, not by custodial/noncustodial parent status. Women, however, tend to receive custody more frequently than men. According to a National Center for Health Statistics review, 71% of custody awards go to mothers, 8.5% to fathers, 15.5% were shared, and 5% go to friends or relatives. Maureen Downey, Coping With Separation: Chronicles of Visiting Fathers, Atlanta J J Const., May 31, 1995, at C-9. In Massachusetts, 98% of the State Department of Revenue’s caseload of noncustodial parents are men. Shaun Sutner, DADD Wages Fight for Custody Rights, Telegram & Gazette (Worcester, MA), Feb. 12, 1995, at A1, available in 1995 WL 4255891.
236. See Grace Ganz Blumberg, Community Property in California 6 (2d ed. 1993).
237. Id.
238. A thorough critique of property division on divorce is beyond the scope of this article. Some critiques include Weitzman, supra note 233, at 358; June Carbone & Margaret F. Brinig, Rethinking Marriage: Feminist Ideology, Economic Change, and Divorce Reform, 65 Tul. L. Rev. 953 (1991); Susan Adler Channick, What’s In a Name: A Critical Look at California’s System of Characterizing Marital Property, 26 Cal. W. L. Rev. 1 (1989); Williams, Married Women and Property, supra note 220, at 396-402.
two or more persons, with women overwhelmingly receiving custody of children. This is clearly not an equal division.

Another problem with marital property division is that it generally does not take one of the great forms of modern wealth, human capital, into account. Professor Robert Ellickson elaborates that at least 75% of wealth in the United States is in the form of human capital. Human capital arises from an investment in one’s self, typically through education. As expected, men’s human capital tends to be more valuable than women’s. By not recognizing human capital as property capable of division on divorce, women and children suffer unduly. “Studies document that treating fathers’ human capital as their personal property not only impoverishes women, but also results in systematic disinvestment in children.” Thus, with property division that purports to be equal but is not, coupled with a definition of marital property that does not include human capital, women and children will continue to be economically marginalized following divorce. These effects are magnified for women of color because they tend to

239. The non-custodial spouse receives fifty percent of the property for himself or herself, while the custodial spouse receives fifty percent of the marital property to divide among a minimum of two persons, thus effectively resulting in reduced use of the marital property award. The percentage which the custodial spouse can realistically use declines dramatically with each additional custodial child.

240. Over the past century, women received custody in roughly 85% of divorce cases. Weitzman, supra note 233, at 222; see Webster, supra note 235. Significantly, women frequently want custody of their children but do not want to be impoverished as a result of that choice. Nonetheless, they often gladly choose poverty with children, rather than financial security without. See Williams, Married Women and Property, supra note 220, at 407. Men often wage custody wars, but many times as a bargaining chip to reduce other financial demands. See Scott Altman, Lurking in the Shadow, 68 S. Cal. L. Rev. 493, 494 (1995); Katherine Hunt Federle, Looking for Rights in All the Wrong Places: Resolving Custody Disputes in Divorce Proceedings, 15 Cardozo L. Rev. 1523, 1541-42 (1994). Custody means more than disproportionate care for children: it also means disproportionate spending on children. “[W]omen, upon divorce, remain responsible for not only the care, but the lion’s share of the financial support of children.” Williams, Married Women and Property, supra note 220, at 395.


244. Professor Williams explains why working-class ownership of human capital tends to be concentrated in men:

Among the working class, where the ideology of gender equality has less strong a hold, disinvestment typically occurs before marriage, as women “choose” lower-paid “women’s work” rather than face the informal social sanctions that police women into gender-appropriate jobs, including the severe sexual harassment prevalent in traditionally male working-class jobs.

245. Id. at 395.
have both more children, and less human capital, than white women.

It is common knowledge that education is a primary tool to economic security, and that women have entered the education market in large numbers only relatively recently. Ethnic minorities also lag behind whites in their level of education. “In 1993, . . . 22.6 percent of whites had college degrees, [whereas] only 12.2 percent of African Americans and 9.0 percent of Hispanics did.” Without education, advancement to higher paying jobs is difficult, if not impossible. Acquiring an education without income is difficult. “In 1991, students from families with incomes above $61,600 were roughly five times as likely to complete college by age 24 as students from families that earned between $21,500 and $38,200, and ten times as likely as students from families earning less than $21,500.” The impact of income on a woman of color’s ability to acquire an education accounts for only part of the equation. This, of course, correlates directly with

246. In 1995, the fertility rate for white women was 1984, for black women it was 2427 and for Hispanic women, it was 2977. Jennifer Cheeseman Day, Bureau of the Census, U.S. Dep’t of Commerce, Population Projections of the United States by Age, Sex, Race, and Hispanic Origin: 1995 to 2050, at 2 (1996). The rate is calculated per 1000 women, thus producing an average of 1.984 children per white woman, 2.427 per black woman, and 2.977 per Hispanic woman. A different report noted that “Hispanic women, on average, have 3.5 lifetime births, while white women have 1.7 children.” U.S.-Population: Study Shows High Rate of Hispanic Fertility, Inter Press Serv., Aug. 31, 1995, available in 1995 WL 10133984. Furthermore, among American teenagers, “[b]irthrates were highest among minorities. In 1990, young black women and young Hispanic women were roughly twice as likely as whites to become teen mothers.” Teen Pregnancies: High Rates, Higher Costs, U.S. News & World Rep., Apr. 15, 1996, at 16. Minorities are also overrepresented as unwed mothers generally. One article noted that “[u]nmarrried Hispanic women had a birthrate of 95.3 per 1000. The rate for black women was 86.5, and that for white women was 35.2.” Larry Witham, Unwed Mothers Increase: Illegitimate Births Soar Among Whites, Wash. Times, June 7, 1995, at A3.

247. In 1993, approximately 81% of white females graduated from high school compared with 71.1% of black females and 53.2% of Hispanic females. Abstract, supra note 31, at 157. In 1994, about 20% of white females graduated from four year colleges compared with about 13% of black females and 8.6% of Hispanic females. Id.

248. Nat’l Council of La Raza, supra note 222, at 17 (“[A]ccording to Workforce 2000, about 30% of the new jobs created in the last 15 years of the 20th century will require at least college graduation, and another 22% will require some college. Only 14% of new jobs will require less than a high school education.”).

249. See generally U.S. Dep’t of Educ., National Center for Educ. Statistics, Digest of Educational Statistics (1994) (providing statistical trends in education). In the legal field, in 1965, fewer than 10% of law school admittees were female, whereas in 1994-95, approximately 45% were female. Unfinished Business, supra note 69, at 7.

250. Report to the President, supra note 20, § 4.3; see also Nat’l Council of La Raza, supra note 222, at 17 (“Only about half of Hispanics are high school graduates, less than one in ten is a college graduate, and one in eight has less than five years of schooling.”).

251. Nat’l Council of La Raza, supra note 222, at 16 (“In 1990, 35.7% of families whose householder was not a high school graduate were poor.”).

252. The Inclusive University, supra note 186, at 4.
a woman of color's ability to earn income. There is a virtual catch-22 in place: the less money one has, the harder it is to acquire a college education; without a degree, it is harder to earn money. If one cannot afford a college degree, then employment opportunities are limited to lower paying jobs.\textsuperscript{253}

If we visualize a continuum of income, women of color with limited education (high school or less) will be on one extreme, earning the least, and educated white men will be on the other extreme, earning the most. In between, income rises for everyone with a college degree, but at a greater rate for white men. From these statistics, we learn a number of lessons. First, one's level of education directly impacts one's income potential. Second, the greater a potential student's wealth, the more likely that person will graduate from college. Third, even if one has a college degree, that does not guarantee economic equality. Applying these lessons to women of color, at the outset we need to recognize that college must be accessible to women of color, particularly those from lower-income families. Furthermore, colleges and universities must welcome women of color through genuine inclusiveness. One way to do that, and the main focus of this article, is through affirmative action.\textsuperscript{254} Without affirmative action, it is almost certain that the presence of women of color in higher education will decline significantly. Women of color will continue to reside at the bottom of the economic well unless they have access to higher education. Accordingly, affirmative action must remain in place as a way into education, which can then lead women of color out of poverty.

Until more women, particularly women of color, enter professional careers and elevate to positions of power, they will not have the clout to make policy decisions or institutional changes which can halt the economic marginalization of women of color. Affirmative action has the potential to remove the "in" from invisible, shedding light on a many hued and vibrant resource—women of color. Thus, it should continue in place as long as women of color are underrepresented in education and overrepresented in poverty lines.

B. Distributive Justice

One of the goals of affirmative action is to provide equality of opportunity for people who have been denied opportunities or otherwise discriminated against. Distributive justice looks to provide those op-

\textsuperscript{253} This is not to say that even if a woman acquires a college education, economic parity with white males is achieved. In fact, disparities in income persist. Nonetheless, the gap is narrower than the gap between college educated white males and females of color who are not college educated.

\textsuperscript{254} Another is through outreach programs. In addition, the cost of higher education should not place it out of the reach of women of color. This can be accomplished through financial aid, work study programs, tuition credit vouchers, and related programs which make college more fiscally accessible.
opportunities in part by determining whether traditionally subordinated groups currently have equal opportunities. One academic stated that "[w]hen we consider minimum requirements of equal protection, distributive justice requires that whatever advantages are allowed under fair conditions be allowed to everyone, regardless of race or gender." If those advantages are not equally available to all, distributive justice seeks to increase that availability. This theory also looks to the distribution of resources or property to determine whether groups are perpetually subordinated or discriminated against. Under this theory, because opportunities are still not equally available and women of color are still struggling to enter and advance in higher education, as well as in many professions, it is appropriate to continue affirmative action.

Women of color continue to be underrepresented in the legal academy, with respect to both entry and promotion. This is not for a

255. Fiscus, supra note 145, at 8.
256. Brest, supra note 199, at 48-49 ("The distributive theory assumes the moral permissibility of unequal distributions of welfare among individuals, but holds that it is at least prima facie unjust for one racial or ethnic group to be substantially worse off than others.").
257. For example, in 1990, California's population was 7.4% African-American, 25.8% Latino, and 57.2% Anglo. Bureau of the Census, U.S. Dep't of Commerce, 1990 Census of Population and Housing: Summary of Population and Housing Characteristics—California 38 (1991). During a corresponding time period, the UC system's domestic student population consisted of 4.5% African-American students, and 11.1% Latino students—for a combined total of barely 16% of the total student population which clearly was not proportional to the population of the state at large. UC Office of the President, Student Academic Services, Admissions and Outreach Services, Student Ethnicity Report C88330 4-5 (Jan. 1995). The source of these statistics designated "Chicanos" and "Latinos" as separate categories, with 7.2% of the students listed as Chicanos and 3.9% of the students listed as Latinos. Id. Since the category "Latinos" includes both, to more accurately compare the student population with the state population, I have combined the two student categories. Again, the statistics did not provide a breakdown for women of color. Presumably not all the students of color were women.
258. See Angel, supra note 25, at 801-02, 805. "By 1970, ... while 4.9% of the legal profession consisted of women, the sixty-six tenure track women made up only 2.2% of all law school professors." Id. at 801-02 (citation omitted). I do not think any of those women were women of color. Furthermore, "at the five schools studied women are tenured at a substantially lower rate than men: 31% of female candidates and 60.5% of male candidates, hired and eligible for tenure between 1970 and 1987." Id. at 805 (citation omitted); see also West, supra note 7, at 73-74 (comparing women's progress in entering the academy as students to entering as faculty members). For those women of color who are either denied entry into, or promotions within, the academy because of gender or racial bias, there is little they can do. See id. at 69-70. It is especially hard to prove bias in the academy, given the vague standards and the imprecise and inconsistent application of those standards. This is exacerbated by the disrespect accorded work relating to gender, ethnicity, or other marginalized identities. "Traditional peer review can seriously disadvantage minority and women law professors who pursue work on the problems of race, ethnicity, and gender if definitions of high-quality scholarship systematically exclude these challenging new perspectives." Rachel F. Moran, Commentary: The Implications of Being a Society of
lack of candidates, it has more to do with unequal opportunities. While some women of color do obtain tenure track positions, they frequently receive "low status" courses, inappropriate course loads, or both. Furthermore, women of color in the academy often have atypical burdens placed on them because of their "uniqueness." For example, they are uniquely accessible to both female students and students of color, particularly the female students of color. Also, they are uniquely qualified to serve on just about any

One, 20 U.S.F. L. Rev. 503, 508-09 (1986). For those who do not make it, there is not an uproar because of many people's implicit belief that "they" never belonged:

Either they are deemed mediocre, thereby fulfilling the comforting assumption that "they" are not up to the task, and previous generations of academicians were right in excluding them entirely, or the minority's work is deemed competent, in which case the person is deemed a happy exception to the general rule.


259. Professor Angel performed statistical studies which indicated that there was a more than sufficient pool of female faculty candidates. See Angel, supra note 25, at 801-02, & nn.9-12 (1988).

A justification for not hiring female faculty members has always been "there aren't any qualified ones out there." This is not true nor has it ever been true. The percentage of women faculty members has never matched, nor come close to matching, the percentage of women lawyers in America, even though studies indicate that the academic records of the women are at least as good as, if not better than, those of the men.

Id. at 834 (citations omitted).

260. See Merritt & Reskin, supra note 98, at 2321 ("[W]e found that minority women were significantly more likely than minority men to teach trusts and estates, a course many academics avoid.").

261. One female professor described her initial teaching load as follows:

During my first two years, I was assigned six of seven new courses. Three of those courses had no casebooks . . . . It was not until years later that I realized that such course assignments were ridiculous and inappropriate for a new teacher. It is difficult enough for a new teacher to master three or four new subject matter areas within the first two years of teaching, to get the actual teaching under control, and to begin research.

At the end of two years, the dean wanted to know where my first article was, a matter which had never been raised with me before.

Angel, supra note 25, at 823.


263. In discussing the difficulty of acculturation for minority faculty, Professor Rachel Moran noted that they "are frequently burdened with disproportionately heavy administrative duties. In addition to their teaching responsibilities, they may be asked to assist in minority recruitment, act as advisors to minority student organizations, and direct formal or informal tutoring programs for minority students." Moran, supra note 258, at 508.

264. The Latina professors on my faculty (both of us) spend a significant amount of time with students in our offices, in the hall ways, at student mixers, orientations, new admit receptions, student bar activities, as well as other events. We are committed to being mentors as well as counselors to our students, regardless of gender, race, ethnicity, sexual orientation, etc. However, we are in a double bind of sorts. If we were not so committed, we would probably suffer from assertions that we are not even there for the students we are "supposed to" mentor and counsel. On the other hand, some faculty members probably want us to spend less time with students and more time on
faculty, university, or administrative committee (most committees can claim that they have no females of color on them, hence placing that rare women of color in high demand).

The dearth of women of color in respected careers speaks to the need for affirmative action to make opportunities equally available for women of color. As we are reminded, "[c]laims of distributive justice are . . . always centered on an abstract present; if the past is brought into the argument, it is always incorporated into the terms of the ideal distribution of goods—that is, a distribution that would be just for all persons in all times." Accordingly, when looking at distributive justice as a policy rationale for affirmative action, we must focus on equal opportunity today. For example, we can look at whether women of color are fairly represented in professional careers. If we look around at our current law and medical school faculties, corporate board rooms, and major accounting firms, the answer is no. Claiming that underrepresentation results primarily from our own laziness or inherent deficiencies is simplistic and naive. The problem is much more complex, as is the solution. Yet most people would agree that the problem arises, at least in part, from lack of opportunity and other factors whose impact has multiplied over time. Without opportunity, we expect underrepresentation.

It is important to understand that "distributive justice as a matter of equal protection requires that individuals be awarded the positions, advantages, or benefits they would have been awarded under fair conditions." The term "fair conditions" does not mean that those with the highest SAT scores win. It means that conditions from pre-school through high school should be fair to all, thus giving every student the opportunity to receive quality education, basic nutritional and health care, and school and career counseling, as well as offering parental training in the value and quality of education. Without equal and fair opportunities, people become discouraged, which discouragement grows exponentially over time, resulting in lower self-esteem, lower aspirations, and self-fulfilling low expectations. Likewise, distributive justice also results in its own upside multiplier effects—as women of color move up, they can better serve themselves, their families and communities, and the populations behind them. For example, "[i]ntended or not, (race-based) affirmative action in medicine has served the purpose of improving access to care, and undoing it would

scholarship, teaching, and service of other sorts. It is easier for majority faculty members to justify less time with students because there are many other majority faculty members who can pick up the slack.

266. See infra text accompanying notes 272-73.
268. See supra notes 198-99 and accompanying text.
hurt that access."269 Many women of color who have entered previously inaccessible fields and moved up the ranks have reached a helping hand back to help others.270

To summarize, distributive justice provides a policy justification for affirmative action because it advocates equal availability of opportunity—one of American society's basic tenets. Accordingly, so long as we value equality of opportunity as a social goal, affirmative action should continue in effect because it is proven to help accomplish that goal.

C. Diversity

The need for economic and distributive justice supports affirmative action, as does the need for diversity in higher education, government contracting and positions of power generally. The United States is comprised of a diverse population, yet those with the greatest power and property do not reflect the diversity of that population. Only 0.05% of the population owns 39.3% of the nation's wealth, making "the U.S. No. 1 among prosperous nations in inequality of income."271

Not surprisingly, the wealthiest Americans are men,272 and "women make up just 2 percent of the five top-earning officers at the nation's 500 biggest companies."273 Those with the least power and property likewise do not reflect the diversity of our population. The greatest poverty is concentrated in the hands of people of color.274 Affirmative action will not radically alter the composition of either the wealthiest or poorest segments of our population. But it can increase diversity in the middle, allowing greater opportunities for many who have effectively been blocked from access to power, prestige, and the chance to move up. The Supreme Court has not precluded the goal of diversity as a compelling interest to support affirmative action,275 but


270. See supra notes 198-99 and accompanying text.


274. The ethnic composition of the bottom quintile is as follows: White—17.7%, Black—36.8% and Hispanic—27.9%. Abstract, supra note 31, at 472. People of color represent a smaller percent of the population, yet a larger percent of those living in poverty.

275. Justice Stevens wrote in his dissent, "The proposition that fostering diversity may provide a sufficient interest to justify...[an affirmative action] program is not inconsistent with the Court's holding today—indeed, the question is not remotely presented in this case—and I do not take the Court's opinion to diminish that aspect of our decision in Metro Broadcasting."
a lower federal court has. Nonetheless, it remains an important social goal which can be accomplished in part through affirmative action.

Diversity fosters inclusiveness and serves the interests of the entire population. Without diversity and inclusiveness, we risk the danger of exclusiveness. When people are excluded from opportunity and from society, they become frustrated and desperate. Desperate people do desperate things. Recall the volatility following the acquittal of the police officers who beat Rodney King. People were reacting not only to the acquittal, but also venting the frustration at a social structure that systematically limits the opportunities for people of color, segregates them into the toughest inner-city areas, allows a black man to be severely beaten for a routine traffic violation, and then acquits the officers who beat him. The dangers of exclusion are very real. Through a policy of inclusiveness and diversity, this danger can be averted.

There are many other reasons to support diversity. In the legal academy, the Association of American Law Schools makes a commitment to diversity, valuing it because it can “create an educational community . . . that incorporates the different perspectives necessary to a more comprehensive understanding of the law and its impact on society . . . [and] to produce a truly diverse profession prepared to meet the needs of American Society.” As Dean Paul Brest and Miranda Oshige have pointed out, “The intellectual case for diversity

Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 258 (1995) (Stevens, J., dissenting). In fact, Justice Powell noted earlier that “the interest of diversity is compelling in the context of a university’s admissions program.” Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 314 (1978). But racial classifications used to promote diversity still must be narrowly tailored to cause the least burden to those negatively impacted by that classification. Id. at 314-18; see also Fullilove v. Klutznick, 448 U.S. 448, 543-44, 552 (1980) (Stevens, J., dissenting) (arguing the affirmative action statute was too broad to justify a statutory classification on racial grounds).

276. Hopwood v. Texas, 78 F.3d 932 (5th Cir.), cert. denied, 116 S. Ct. 2581 (1996). “[W]e see the caselaw as sufficiently established that the use of ethnic diversity simply to achieve racial heterogeneity, even as part of the consideration of a number of factors, is unconstitutional.” Id. at 945-46. For a further discussion of Hopwood, see infra text accompanying notes 358-72.

277. See Brest & Oshige, supra note 6, at 858-59; Murray, supra note 109, at 1104-05.


begins with the observation that virtually every important issue of policy ultimately finds expression in law and the legal system. The dynamics and outcomes of the legal process reflect the interplay—often, the struggle—among diverse interests and cultures.  

There are few women of color who hold important positions in the academy, Fortune 500 companies, or other prominent fields or industries. This is not inconsequential. Diversifying these arenas, in part by adding qualified women of color to their ranks, remains important for many reasons. For one, there are scant women of color as role models. In my three years at Stanford Law School, there were no professors who were women of color. Harvard Law School hired its first woman of color, Elizabeth Warren, in 1995. Why would it make a difference to have women of color as professors?  

There is no question that having women on law school faculties makes a difference and that the difference is multifaceted. The presence of women on a faculty also insures that women's interests are protected. When women sit on committees fewer sexist comments are made and women candidates' positive attributes are probably focused upon. But perhaps most important, the presence of more women faculty members alleviated the students' sense that the one woman in the school was unique in some manner. Accordingly, women of color could add new views and experiences which may result in a changed atmosphere and dynamic in the classroom. It could also result in unique scholarship and an increased

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280. Brest & Oshige, supra note 6, at 863.
281. See supra notes 86, 93 and accompanying text.
282. While role modeling to counter past societal discrimination will not legally justify affirmative action according to the Court, see Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 275 (1986), there are socially compelling reasons to have women of color as role models. For example, allowing young girls to see women who look like them who are lawyers and law professors gives them hope that they too can aspire to careers not seen in their families or neighborhoods. See Murray, supra note 109, at 1100-04. But see Richard Delgado, Affirmative Action as a Majoritarian Device: Or, Do You Really Want to be a Role Model?, 89 Mich. L. Rev. 1222 (1991) (rejecting the role model approach).
284. She was hired in 1995-1996 and is a full, tenured professor. Telephone Interview with Michael Chmura, News Director, Harvard Law School (Aug. 6, 1996).
286. "Racial diversity leads not only to methodological change and the reformulation of legal topics, but also to innovations in pedagogy." Ian Haney-Lopez, Community Ties, Race, and Faculty Hiring: The Case for Professors Who Don't Think White, Reconstruction, 1991, at 46, 55.
287. Diversity in the classroom has a positive effect on students: The presence of women and minority scholars has in fact changed the intellectual landscape of some areas of law, and their influence has permeated
willingness for female students, particularly those of color, to speak up in the classroom\footnote{288} and to attend office hours, thus getting the benefits of one-on-one dialogue with professors and an opportunity to know those professors better.\footnote{289} The need for diversity also trickles down or filters up from law school students. In discussing their isolation, former Yale law students stated that: "[A] faculty with percentages of women and people of color reflecting the general population would send a message to students—female and male, Black, Asian, Hispanic, Native American, and white—that women and people of color are good enough to be professors."\footnote{290} Thus, the need for diversity re-

fields that many would not have imagined had much connection with gender or race. In any subject where a faculty member's experience brings different perspectives to her scholarship, it will likely enhance her teaching in similar ways.

Brest & Oshige, \textit{supra} note 6, at 864 (footnotes omitted); \textit{see also} Duncan Kennedy, \textit{supra} note 9 (arguing that affirmative action increases value of legal scholarship); Matsuda, \textit{supra} note 9, at 2-4 (contending that affirmative action will end apartheid in legal knowledge); Carrie Menkel-Meadow, \textit{Excluded Voices: New Voices in the Legal Profession Making New Voices in the Law}, 42 U. Miami L. Rev. 29 (1987) (stating that excluded groups, if included, could offer expanded legal knowledge). For a discussion of the impact of diversity, or the lack thereof, in law reviews, see Mark A. Godsey, \textit{Educational Inequalities, The Myth of Meritocracy, and the Silencing of Minority Voices: The Need for Diversity on America's Law Reviews}, 12 Harv. BlackLetter J. 59 (1995). \textit{But see} Kennedy, \textit{Racial Critiques, supra} note 9, (arguing that proponents of racial critiques have failed to persuasively support claims of racial exclusion from legal scholarship). For a response to Kennedy's article, see Richard Delgado, \textit{When a Story is Just a Story: Does Voice Really Matter?}, 76 Va. L. Rev. 95 (1990). This is not to say that there is an essential voice for women of color. Nonetheless, the importance of a diverse . . . faculty does not depend on the false notion that one's race or ethnicity defines a particular way of thinking about issues of law and policy. It does assume the reality—no less a reality because it is socially constructed—that people of different races and ethnicities often have different life experiences that affect their relations with members of other groups and influence their views on issues of legal doctrine and policy.

Brest & Oshige, \textit{supra} note 6, at 862.

\footnote{288. Guinier et al., \textit{supra} note 75, at 63-64 ("[T]he perception is widespread that within the classroom, white men, more than women of all colors, are encouraged and allowed to speak more often, for longer periods of time, and with greater positive feedback from the professor and peers."); \textit{see also} The Burdens of Both, \textit{supra} note 27, at 11-14 (reporting that the law school environment is hostile, alienating, and abusive to women of color).}

\footnote{289. \textit{See} Guinier, et al., \textit{supra} note 75, at 72, 77-78. Law schools do not hire enough minority women as professors: By neglecting to hire minority women on the same basis as minority men, law schools—and their students—lose the talents and perspectives minority women can offer. Legislatures and courts, in turn, lose the insights that female minority scholars could bring to legal and public policy debates. In an increasingly diverse society, these are losses we can ill afford to sustain.}

Merritt & Reskin, \textit{supra} note 98, at 2301-02.

\footnote{290. Weiss & Melling, \textit{supra} note 63, at 1356. They went on to state that "[a]s long as women and minorities do not appear on the faculty, we will infer that the faculty who do appear consider us inferior as present or future scholars and teachers, and we will be angry." \textit{Id.} at 1357. The presence of women of color in the academy is also beneficial for white students. Aside from providing all students with diverse viewpoints shaped by their experiences, diversity in the academy allows all students to see
mains. Yet we are still not seeing a significant change in faculty hiring. In the CSU system, while the pace of diversification has increased somewhat in recent years, "the rate is still so low that, if the trend continues . . . Latino parity would not be achieved for at least another century." 291 To make matters worse, even if women of color have been hired in cautiously small numbers, whenever the economy falters and budgets are tightened, their security is limited. "[W]omen and faculty of color are most at risk due to budget reductions because they are disproportionately concentrated among the ranks of nontenured faculty." 292

Reviewing statistics on diversity, it is clear that this country needs to make much progress before this it can claim that its institutions represent the diverse society which makes up its population. 293 This poor diversity record exists with affirmative action—envision what these institutions will look like without affirmative action. Diversity would be diminished and the chances of seeing women of color enter and advance in professional careers would decline radically. Thus, it is crucial to preserve affirmative action for women of color if we do not want them virtually to disappear from our institutions of higher education and ensuing professions.

In this part, I have discussed moral justifications supporting affirmative action. The economic justice section presented compelling statistics about the financial plight of women of color, highlighting their position at the bottom of the economic scale. Affirmative action will not single-handedly alter their position. Eliminating affirmative action, however, will almost certainly guarantee that fewer women of color will leave the ranks of the poor. Thus, affirmative action pro-

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women of color in positions of authority, likely a rarity for most of them. See Murray, supra note 109, at 1103; see also Haney-Lopez, supra note 286, at 51 (arguing that minority professors will lessen colored students' sense of inferiority and alienation).

291. Progress and Prospects, supra note 21, at 5 (emphasis added). That same report pointed out that the time frame to parity could actually be much longer. "Because even the new hire rate for Latinos (9%) is less than half of the parity proportion . . . if this rate persists Latinos would remain underrepresented indefinitely." Id. at 6.

292. Id. at 6.

293. For example, in a report on California Higher Education, the authors noted that,

Latinos remain severely underrepresented in virtually every sector of California higher education. Results for other groups are mixed—in general, African Americans are represented in the executive leadership, but under-represented in the faculty and student body, while the reverse is true of Asian Americans. While complete data is not available, the emerging Asian/Pacific ethnic groups—Filipinos, Southeast Asians, South Asians, and the Pacific Islanders, who together comprise more than six percent of the California population and a majority of the state's Asian/Pacific population—are virtually absent among the leadership, faculty, and Ph.D. graduates of the higher education system.

Id. at 1. While this information does not address the situation for women of color (once again invisible or blended in with either women generally, or ethnic minorities generally), we can speculate that the prognosis is even worse for them.
vides a viable option to mobilize out from the bottom and accordingly, must remain in place.

The distributive justice section focused on the theme of equality of opportunity. It reminded the reader that this equality does not yet exist, but that affirmative action brings us closer by providing greater opportunities for women of color. Without affirmative action, the gap will only widen and equality of opportunity will move further out of reach.

The section on diversity confirmed that there is a causal relationship between affirmative action and diversity. This section elaborated on why diversity is important as a social goal and how affirmative action contributes to diversity in education and employment. It discussed the dangers of leaving a significant portion of the population—women of color—behind, and how that can be avoided through a spirit of inclusiveness fostered by affirmative action.

Each of these sections focused on the moral imperative not to leave women of color to fend for themselves in a system which has routinely disregarded their interests and has occasionally offered them as a sacrifice to promote other interests. Women of color have traditionally been powerless to change this system but affirmative action offers a way to educate them and increase their power. It can equip women of color not only to change their own lives, but to change systems and effect paradigm shifts. Accordingly, it would be inequitable, premature, and shortsighted to end affirmative action for women of color.

III. The Legality of Affirmative Action for Women of Color

This part discusses the legality of affirmative action generally and traces the Supreme Court's inconsistent rulings on racial classifications, including an analysis of Adarand Constructors, Inc. v. Pena, the most recent Supreme Court race-based affirmative action case. While case law currently mandates that a strict scrutiny standard always be used in race-based affirmative action cases and assures us that

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296. The Court has since had a chance to directly address race-based affirmative action in higher education, but declined to do so. Hopwood v. Texas, 78 F.3d 932 (5th Cir.), cert. denied, 116 S. Ct. 2581 (1996). It nonetheless acknowledged that the question of whether “a public college or graduate school [could] use race or national origin as a factor in its admissions process is an issue of great national importance.” 116 S. Ct. at 2581-82 (explaining denial of certiorari). For a more detailed discussion of the Hopwood case, see infra text accompanying notes 358-72.
this standard is not fatal, the trend suggests that it is becoming harder to establish a compelling interest to support a benign affirmative action program. Nonetheless, there are compelling reasons why affirmative action should continue for women of color, which reasons are presented later in this part. In addition, this part illustrates how tenuous the law is in this area and how easily it changes based on Court personnel. Thus, with alterations on the Court, the law might switch course. This could result in a different standard for affirmative action cases, a likelier finding of compelling interests supporting affirmative action for women of color, or an easier match between a compelling interest and a program narrowly tailored to obtain that interest.

This part also critiques the Court’s recent treatment of affirmative action, particularly the Adarand case. It analyzes the Court’s conclusions in Adarand and its supporting justifications which demonstrate a flawed understanding of affirmative action. This flawed understanding would uphold affirmative action only under the narrowest of circumstances—completely disregarding how discrimination, racism, and sexism operate in our society. Women of color continue to suffer from discrimination, racism, and sexism in unique ways which defy the formula the Court uses to determine whether to uphold or deny the validity of affirmative action programs. This part thus exhorts the Court and readers alike to consider the pervasiveness of discrimination, sexism, and racism, and how they operate. It then becomes clear that the Court’s “objective” view of a color-blind society is misguided. As long as society is not color-blind and women of color continue to endure oppression and discrimination based on their race and gender, it is appropriate to sustain affirmative action and similar programs which attempt to compensate for the effects of that oppression and discrimination.

Finally, this part demonstrates that even under the formidable standards established in Adarand, specifically tailored affirmative action for women of color could and should be sustained. Those standards require that a court look with strict scrutiny at any affirmative action program for women of color. A program has to have a compelling underlying interest, which could be proven for women of color in many circumstances. Furthermore, a program has to be narrowly tailored to achieve that interest. This part will present generally how to establish a program narrow enough to satisfy this requirement.

This part ends with a reminder that the lens which the Court has used to view affirmative action programs filters out the symptoms, such as discrimination, sexism, and racism, which prompt the need for programs. With new glasses, the Court could adjust its vision to see

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297. See Adarand, 515 U.S. at 235-37.
298. Id. at 200.
299. Id. at 237.
both the problem and a solution, rather than only a solution in isolation and out of context. This part then concludes that affirmative action for women of color could and should be legally upheld.

A. Legality of Affirmative Action

Affirmative action is relatively new in this country's history. Nonetheless, it has frequently come under attack, with the most common criticism of affirmative action being that it discriminates against whites on the basis of their race. The standard of review for challenged race-based governmental classifications typically at issue in affirmative action cases has alternated between strict scrutiny and intermediate scrutiny, changing with the composition of the Court and depending on whether a federal, state, or local government is implicated. To complicate matters further, the Court's judgments frequently have resulted not in opinions for the Court, but instead have

300. The term "affirmative action" came into prominence with President Kennedy's Executive Order 10,925: "The contractor will not discriminate against any employee or applicant for employment because of race, creed, color, or national origin. The contractor will 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." Exec. Order No. 10,925, 26 Fed. Reg. 1,977, 1,977 (1961) (emphasis added).

301. See, e.g., Adarand, 515 U.S. at 235 (holding that federal racial classifications must serve a compelling government interest and must be narrowly tailored); Local 28 of the Sheet Metal Workers' International Association v. EEOC, 478 U.S. 421 (1986) (holding that individuals who are not identified victims of unlawful discrimination are not entitled to race-conscious relief); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 272-73 (1986) (holding that retaining teachers on racial grounds during layoffs was not permissible as affirmative action); Fullilove v. Klutznick, 448 U.S. 448 (1980) (holding that government set-asides for minority business enterprises did not violate the Equal Protection Clause); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (holding that race may properly be a factor in graduate school admissions, but that quotas violate the Equal Protection Clause).


303. As far back as Korematsu v. United States, 323 U.S. 214, 216 (1944), race has been deemed a "suspect" classification which requires strict scrutiny in determining whether this type of classification can be upheld. Under this standard, the classification or action's purpose must be constitutionally permissible, and the classification or action must be narrowly tailored to accomplish that purpose. See In re Griffiths, 413 U.S. 717, 721-22 (1973); Loving v. Virginia, 388 U.S. 1, 11 (1967); McLaughlin v. Florida, 379 U.S. 184, 196 (1964).

304. See Metro Broad., Inc. v. FCC, 497 U.S. 547, 564-65 (1990); infra text accompanying notes 339-46.

305. See, e.g., Fullilove, 448 U.S. 448 (applying intermediate scrutiny to federal government set-asides for minority-owned businesses).

given rise to split opinions with many concurrences and even more dissents.\textsuperscript{307}

Race-based affirmative action cases are commonly recognized as starting with \textit{Regents of the University of California v. Bakke}.\textsuperscript{308} In that case, Allan Bakke, a white male, applied to the University of California at Davis Medical School ("UC") under the regular admissions program in 1973 and 1974, and was rejected each time.\textsuperscript{309} During that time, UC had two admissions programs—a "regular" program and a "special" program.\textsuperscript{310} The special program was similar to the regular one, with some exceptions. First, there was a special admissions committee that reviewed applications and made recommendations to the general admissions committee.\textsuperscript{311} Second, the candidates under this program were culled from those who identified themselves as "economically and/or educationally disadvantaged" or as members of a "minority group."\textsuperscript{312} Third, students with GPAs below 2.5 were not summarily dismissed.\textsuperscript{313} Fourth, about one in five of the applicants under this program were invited for interviews.\textsuperscript{314} These candidates were then given benchmark scores, just as under the regular admissions process, but they were not rated against general candidates, only against each other.\textsuperscript{315} The special admissions committee then made recommendations to the general admissions committee which the general admissions committee was free to reject if there were particular deficiencies in a file. This process continued until the committees admitted a prescribed number of special admission applicants.\textsuperscript{316}

Bakke challenged the special admissions program as unconstitutional, arguing that it discriminated against him based on his race.\textsuperscript{317} UC cross-complained, seeking a declaration that its special admission program was legal.\textsuperscript{318} The trial court held that the special admissions

\begin{itemize}
\item \textsuperscript{307} For example, in \textit{Adarand Constructors v. Pena}, 515 U.S. 200 (1995), Justice O'Connor announced the Court's judgment, and she wrote the opinion for Parts I, II, III-A, III-B, III-D, and IV, which was joined by Chief Justice Rehnquist and Justices Kennedy and Thomas, as well as Justice Scalia to the extent the opinion was not inconsistent with his concurrence. Justice O'Connor also wrote the opinion for Part III-C which was joined by Justices Kennedy, Scalia, and Thomas. In addition, Justice Scalia filed an opinion concurring in part and concurring in the judgment, and Justice Thomas filed an opinion concurring in part and concurring in the judgment. Finally, Justice Stevens filed a dissent, joined by Justice Ginsburg; Justice Souter filed a dissent, joined by Justices Ginsburg and Breyer; and Justice Ginsburg filed a dissent joined by Justice Breyer. \textit{Adarand}, 515 U.S. at 204.
\item \textsuperscript{308} 438 U.S. 265 (1978).
\item \textsuperscript{309} \textit{Id.} at 276-77.
\item \textsuperscript{310} \textit{Id.} at 272-76.
\item \textsuperscript{311} \textit{Id.} at 274-75.
\item \textsuperscript{312} \textit{Id.}
\item \textsuperscript{313} \textit{Id.} at 275.
\item \textsuperscript{314} \textit{Id.}
\item \textsuperscript{315} \textit{Id.}
\item \textsuperscript{316} \textit{Id.}
\item \textsuperscript{317} \textit{Id.} at 277-78.
\item \textsuperscript{318} \textit{Id.} at 278.
\end{itemize}
program created a racial quota which was unconstitutional and that UC could not take race into account in admissions decisions. On appeal, the California Supreme Court applied a strict scrutiny standard because a racial classification was involved.

The Supreme Court upheld the California Supreme Court’s application of the strict scrutiny standard in assessing the special admissions program at UC. Nonetheless, it allowed UC to use race as an admissions factor, reasoning that the goal of a diverse student body comprised a compelling interest. It affirmed the decision that the quota system which UC used was invalid, however, because it was not tailored narrowly enough to promote a compelling interest. Thus, for voluntary state action involving a racial classification, the Court upheld a strict scrutiny standard of review. Following Bakke, strict scrutiny was the appropriate standard in race-based affirmative action, yet the grounds for proving a compelling interest were not so limited, and race could be used as a factor in an admissions program for a public institution of higher education.

Shortly after deciding Bakke, the Court heard Fullilove v. Klutznick, another benign racial classification case, but one which involved a congressionally-mandated affirmative action program and classification scheme. In determining the constitutionality of the classification, Chief Justice Burger’s plurality opinion acknowledged that “[a] program that employs racial or ethnic criteria, even in a remedial context, calls for close examination,” but also conceded that it would

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319. Id. at 278-79.
320. Id. at 279-80.
321. Id. at 291. Justice Powell’s opinion called for a strict scrutiny standard of review for race-based classifications. Id. However, four Justices would have utilized a less stringent standard if the race-based classifications were formulated to advance remedial purposes. Id. at 359. In other words, for benign race-based classifications, Justices Brennan, White, Marshall, and Blackmun would have supported some sort of intermediate standard of review. To clarify, unlike race-based classifications that burden groups which have traditionally suffered discrimination, “benign” race-based classifications are designed to benefit those groups.
322. Id. at 320.
323. Id. at 311-12.
324. Id. at 319-20.
325. For example, here, the goal of attaining a diverse student body was considered to be “clearly... a constitutionally permissible goal for an institution of higher education.” Id. at 311-12.
326. Id. at 320.
327. 448 U.S. 448 (1980). Here, petitioners challenged the minority business enterprise (“MBE”) provision of the Public Works Act of 1977, a federal act which applied to private prime contractors, and state and local grantees. Id. at 454-55. This provision required that in order for applicants to receive federal grants for local public works projects, they had to spend ten percent of the federal grant funds to procure business or supplies from MBEs, unless the grantee obtained an administrative waiver. Id. at 453-54. The petitioners claimed they suffered economic injury as a result of the MBE provision, and that the provision, on its face, violated the equal protection clauses of the Fifth and Fourteenth Amendments. Id. at 455.
apply such standard "with appropriate deference to the Congress." 328 Although this could have been interpreted as strict scrutiny, the deference language implied a lesser standard. 329 In fact, the plurality's application was not as stringent as it has been in other affirmative action cases precisely because it granted deference to Congress. 330 The opinion thus implied a lesser standard if Congress were to enact an affirmative action program.

Accordingly, the source of an affirmative action program may affect whether it will be upheld. Note, however, that in today's climate, affirmative action programs from every level of government are being challenged. 331 Thus, even congressionally-mandated programs would be subject to intense scrutiny. Furthermore, in the current anti-affirmative action milieu, it is unlikely that new congressionally-sponsored affirmative action programs would be introduced. Nonetheless, Fullilove neither precludes nor guarantees that affirmative action will be upheld—it simply provides that if Congress introduces an affirmative action program, it will be subject to less intense scrutiny than programs introduced by state or local governments.

In Richmond v. J.A. Croson Co., 332 a plurality of the Court "definitively" resolved the standard of review question for state and local affirmative action cases, again resorting to strict scrutiny. 333 Here, the city of Richmond adopted a plan under which contractors were required to subcontract at least thirty percent of city-awarded construction contract amounts to MBEs. 334 The plan was prompted in part by a statistical study which showed that even though the city's population was 50% black, only 0.67% of the city's subcontracts had been

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328. Id. at 472. Note that once again, the Court here did not produce an opinion. Chief Justice Burger delivered the judgment, joined by Justices White and Powell. Id. at 453.

329. Justice Powell stated in a separate opinion, however, that the plurality opinion had basically applied strict scrutiny as laid out in Bakke. Id. at 496 (Powell, J., concurring).

330. For example, in Adarand, which is factually similar to Fullilove, the Court applied the test much more strictly, stating explicitly that it was applying strict scrutiny, with significantly different results. See infra text accompanying notes 350-56.

331. See supra note 3.


333. Id. at 493-94. I say "definitively" with caution because this was another split opinion (Justice O'Connor wrote the opinion and she was joined by Chief Justice Rehnquist and Justices White and Kennedy; Justice Scalia concurred in the judgment). Also, as is obvious by now, the Court had yet (and has yet) to reach a consensus on the level of scrutiny it should use to review challenges to race-based classifications. In this case, however, a majority of the Court did agree that a strict scrutiny standard should be used for state and local governmental racial classifications. Id. at 493-94, 520. The Court later admitted that it had been vacillating on standards of review in affirmative action cases when it stated that its "failure to produce a majority opinion in Bakke, Fullilove, and Wygant left unresolved the proper analysis for remedial race-based governmental action." Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 221 (1995).

334. Croson, 488 U.S. at 477.
awarded to MBEs. Nevertheless, in applying a strict scrutiny standard of review, Justice O'Connor's opinion stated that the city failed to demonstrate a compelling governmental interest which could justify the plan. It reasoned that "none of the evidence presented by the city points to any identified discrimination in the Richmond construction industry." In other words, in order for the plan to be upheld, the city would have had to present specific proof that the Richmond construction industry had discriminated in the past against those who were designed to benefit under the plan. The statistical disparities between the city's black population and the percent of the city's subcontracts that had been awarded to MBEs were deemed irrelevant.

Although the Court used a strict scrutiny standard here and the program did not withstand scrutiny, Croson was not necessarily fatal to all affirmative action programs. A problem with the Croson strategy was its comparison of the local population of blacks to the number of subcontracts awarded to MBEs. It would have been more meaningful to compare the percent of subcontracts awarded to non-MBEs against the percent awarded to MBEs, taking into consideration the total number of non-MBEs versus the total number of MBEs who had bid on projects. This would have provided clearer and more direct proof of discrimination.

Thus, to uphold affirmative action programs following Croson, it is essential to demonstrate a compelling governmental interest which may be accomplished by proving direct (as opposed to indirect, unconscious or unintentional) discrimination. In the contracting context, for example, one could compare the number of contracts awarded to qualified women, minorities, and women of color against the number awarded to non-MBEs and non-WBEs, taking into consideration the total number of non-MBEs and non-WBEs versus the total number of women, minorities, and women of color who bid for contracts. To the extent that women, minorities, and women of color continue to be under-awarded in spite of their availability, it will be easier to prove discrimination.

In Metro Broadcasting, Inc. v. FCC, the Court directly addressed federal actions in race-based classifications for only the second

335. Id. at 479-80.
336. Id. at 505.
337. Id.
338. Of course, requiring this sort of proof disregards that more broadly based discrimination may be at the root of why there are so few MBEs. In the text here, I am simply trying to make the point that affirmative action could be upheld even under the strict scrutiny standard. For a critique of the standard used and its application, see infra Part III.B.
339. The task of proving that a program is narrowly tailored to reverse discrimination remains, and that can be a formidable challenge. See id.
At issue was whether Federal Communications Commission ("FCC") policies which granted preferences to minorities violated the Equal Protection Clause of the Fifth Amendment. In determining the constitutionality of the challenged policies, the Court established a distinct standard of review for "benign" racial classifications, which only had to satisfy intermediate scrutiny.

We hold that benign race-conscious measures mandated by Congress—even if those measures are not "remedial" in the sense of being designed to compensate victims of past governmental or societal discrimination—are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives.

Under this standard, the Court held that the challenged policies did not violate the Fifth Amendment's Equal Protection Clause because they arose with Congress' official sanction, and were related to the important governmental objectives of achieving broadcast diversity.

341. Id. at 552. The Court has since addressed an additional claim based on a federal racial classification.

This is the third time in the Court's entire history that it has considered the constitutionality of a federal affirmative-action program. On each of the two prior occasions, the first in 1980, *Fullilove v. Klutznick*, 448 U.S. 448, and the second in 1990, *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, the Court upheld the program.


342. *Metro Broad.*, 497 U.S. at 552. The first challenged policy favorably weighed minority ownership status in comparative proceedings for new licenses. *Id.* The second challenged policy permitted certain existing licenses to be transferred to qualified minority-owned firms through distress sales. *Id.*

343. *Id.* at 564. The Court stated that it was applying the standard promoted by Justice Marshall in his *Fullilove* concurrence, 448 U.S. at 519 (Marshall, J., concurring). *Id.*

344. *Id.* at 564-65.

345. *Id.* Thus, the Court was actually willing to justify affirmative action on some basis other than "penance for past sins." See Sullivan, *supra* note 9, at 80, 83, 91-96. The Court did not go so far as to specifically state what other grounds might justify affirmative action, but it was at least willing to speculate that other such grounds existed. *See Metro Broad.*, 497 U.S. at 564-65.

346. *Metro Broad.*, 497 U.S. at 563 (stating that the policies were mandated by Congress).

347. *Id.* at 566. It was relatively easy to determine that broadcast diversity was an important governmental objective because the Communications Act of 1934 was specifically intended "to promote diversity of programming." *Id.* at 554-55, 566-68. Furthermore, under the intermediate scrutiny standard, the FCC policies at issue only had to be "substantially related" to the important objective of broadcast diversity. The Court found such a relationship because of Congress and the FCC's substantiated findings of a "nexus between minority ownership and programming diversity." *Id.* at 569, 570-600.
Once again, the standard was modified, this time for "benign" racial classifications. The Court decided this only a year after determining that state and local governmental actions and classifications were always subject to a strict scrutiny standard. Thus, federal racial classifications, particularly those formulated by Congress or stamped with Congress's imprimatur, remained subject to shifting standards of review.

The most recent Supreme Court case addressing affirmative action is *Adarand Constructors, Inc. v. Pena*. Justice O'Connor's opinion stated that Supreme Court cases dealing with governmental race-based classifications up through *Croson* had developed a trend resulting in three general propositions. The first proposition was skepticism concerning race-based preferences which gave rise to "a most searching examination." In other words, courts should always look skeptically at race-based classifications. The second proposition was consistency, meaning that the standard of review for challenges to race-based classifications on equal protection grounds should be the same, regardless of the classification's purpose (i.e., benign or otherwise). The third was congruence between treatment of claims under the Fourteenth and Fifth Amendments. Regarding these propositions, Justice O'Connor stated, "Taken together, these three propositions lead to the conclusion that any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny."

Accordingly, the plurality opinion stated that reviewing courts must analyze racial classifications imposed by a federal, state, or local government under a strict scrutiny standard, thereby overruling *Metro*. While the Court tried to reconcile its finding here with that in *Croson* by stating that *Croson* did not "prescribe the level of scrutiny to be applied to a benign racial classification employed by Congress," it was not convincing. See *Croson*, 488 U.S. 469, 493-94 (1989).

515 U.S. 200 (1995). Here, the petitioner challenged the federal governmental policy of providing financial incentives to general contractors for awarding contracts to subcontractors controlled by socially or economically disadvantaged individuals, including individuals classified as racial minorities. At 204. Petitioner challenged the policy on Fifth Amendment due process and equal protection grounds, claiming that the policy discriminated against it because it was not controlled by socially or economically disadvantaged persons. Id.

*Id.* at 223-24.

*Id.* at 223 (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 273 (1986)).

*Id.* at 224

*Id.*

*Id.* Justice O'Connor relied on the principle that the Fifth and Fourteenth Amendments protect persons and not groups. See *id.* at 223-27. Therefore, any group classification (such as race) is subject to strict scrutiny "to ensure that the personal right to equal protection of the laws has not been infringed." *Id.* at 227. Under this principle, even benign racial classifications will be held to a higher standard of scrutiny.
Thus, it extended the strict scrutiny standard to all federal affirmative action programs, requiring any race-based classifications to both serve a compelling governmental interest and be narrowly drafted to advance that interest.\textsuperscript{357}

In the most recent federal affirmative action case, \textit{Hopwood v. Texas},\textsuperscript{358} the Fifth Circuit closely followed the standard laid out in \textit{Adarand}, applying strict scrutiny in a stranglehold fashion that was fatal in fact. Here, white applicants to the University of Texas School of Law ("UT") challenged a special admissions program, arguing that it discriminated against them by granting preferences to select students based on their race, thereby violating the Fourteenth Amendment.\textsuperscript{359} The Fifth Circuit Court of Appeals agreed, holding that, "[t]he law school has presented no compelling justification, under the Fourteenth Amendment or Supreme Court precedent, that allows it to continue to elevate some races over others, even for the wholesome purpose of correcting perceived racial imbalance in the student body."\textsuperscript{360}

While a lower court held that UT presented both remedial and non-remedial goals which satisfied the compelling governmental interest test,\textsuperscript{361} this court disagreed. With respect to the use of race as one factor to achieve the goal of diversity, it stated "that any consideration of race or ethnicity by the law school for the purpose of achieving a diverse student body is not a compelling interest under the Fourteenth Amendment."\textsuperscript{362} Yet UT received the court's blessing to continue to

\textsuperscript{356} Id. at 2113. \textit{Adarand} thus affirmed \textit{Croson}, expanding the application of \textit{Croson} to federal government action under the Fifth Amendment. Note that the Court did not actually apply the strict scrutiny standard to these facts to determine whether the federal action at issue violated the Equal Protection Clause. \textit{See id.} at 237. Instead, it simply determined the standard to be applied, then vacated the Court of Appeals judgment and remanded for a determination of this issue.

\textsuperscript{357} Id. at 227.

\textsuperscript{358} 78 F.3d 932 (5th Cir.), \textit{cert. denied}, 116 S. Ct. 2581 (1996).

\textsuperscript{359} Id. at 938. The program was similar to the one that was challenged in \textit{Bakke}. See \textit{supra} text accompanying notes 308-15, for a description of that program.

\textsuperscript{360} \textit{Hopwood}, 78 F.3d at 934.

\textsuperscript{361} Id. at 941. The non-remedial goal was to have a diverse student body and the remedial goal was "justified as a remedy for the 'present effects at the law school of past discrimination in both the University of Texas system and the Texas educational system as a whole.'" \textit{Id.} (citation omitted).

\textsuperscript{362} Id. at 944. With little explanation, the court wrote that "the classification of persons on the basis of race for the purpose of diversity frustrates, rather than facilitates, the goals of equal protection." \textit{Id.} It is difficult to conceive of how diversity can be achieved without intentionally considering race. Moreover, where diversity in desirable positions is absent, some type of discrimination is usually present, and discriminatory conduct violates equal protection. Yet this court explicitly stated both that achievement of diversity is not a compelling governmental interest and that race cannot be considered in trying to achieve diversity. \textit{Id.} at 948. In a seemingly contradictory statement, the court stated that "a host of factors—some of which may have some correlation with race—[could be considered] in making admissions decisions." \textit{Id.} at 946. If race cannot directly be considered a factor in admissions decisions, it is hard to understand how it can be indirectly considered.
use legacy considerations, thus perpetuating class preferences, while simultaneously prohibiting race preferences. The Fifth Circuit went on to forcefully assert that "the Court appears to have decided that there is essentially only one compelling state interest to justify racial classifications: remedying past wrongs." The court then addressed the remedial goal of employing racial criteria to remedy the present effects of past discrimination in Texas public schools. It initially limited the discriminating actor to UT, deciding that primary and secondary schools, as well as the larger University of Texas system, were too remote. While it is easy to understand why the plaintiffs argued that the discriminatory actor should be limited, it is difficult to comprehend how the court could believe that discrimination occurs in such an isolated fashion. If there had not been so much discrimination along the way, maybe women of color would arrive at the law school admissions process on a level playing field. But it is precisely because of the pervasive and systematic nature of discrimination that the pool of law school applicants comprised of women of color is so small and, under a numbers game, is often less qualified.

Having determined the appropriate actor, the court next looked at whether there were present effects of past discrimination. It decided that there were none and hence, it did not have to consider the question of whether the admissions program was narrowly tailored to promote a compelling state interest. Hopwood's application of the strict scrutiny standard makes it very difficult for an affirmative action program to be upheld. Unlike Bakke, which held that in some circumstances race could be used as a factor in making admissions decisions, this court stated that "the law school may not use race as a factor in law school admissions." It is

363. Not surprisingly, this type of legacy preference effectively discriminates against racial minorities because many schools did not admit minorities until quite recently. Yet this received the court's sanction.
364. Id. at 944.
365. Id. at 948.
366. It reasoned that "when one state actor begins to justify racial preferences based upon the actions of other state agencies, the remedial actor's competence to determine the existence and scope of the harm—and the appropriate reach of the remedy—is called into question." Id. at 951. Even if the state were considered an appropriate actor, in order for the admissions program to be upheld, this court required "the State of Texas, through its legislature, . . . to find that past segregation has present effects; it would have to determine the magnitude of those present effects; and it would need to limit carefully the 'plus' given to applicants to remedy that harm." Id.
367. Id. at 952. "[T]he party seeking to implement the program must, at a minimum, prove that the effect it proffers is caused by the past discrimination and that the effect is of sufficient magnitude to justify the program." Id. (citation omitted). Having proven that, it must "show that it adopted the program specifically to remedy the identified present effects of the past discrimination." Id.
368. Id. at 955.
369. Id. at 933 (emphasis added).
difficult to ascertain how seriously we should take this pronouncement, considering that this court attempts to overrule Supreme Court precedent.\footnote{370} If we take it at its word, racial criteria cannot be taken into account in admissions, and by extension in contracting, hiring, or other entry or promotion circumstances, except under the narrowest of circumstances—where the actor's past discrimination results in present negative effects.\footnote{371} The application of this test by the \textit{Hopwood} court makes the hurdle even higher; it requires an identification of the "types of present effects of past discrimination, if proven, [that] would be sufficient under strict scrutiny review" and if a remedial justification underlies a racial classification, then the court "must make a 'factual determination' as to whether remedial action is necessary."\footnote{372}

\textit{Hopwood} does not bode well for affirmative action programs for women of color. It is unclear how much weight this decision will have beyond the Fifth Circuit, but schools throughout the country have already started to examine their affirmative action programs to see if they comply with \textit{Hopwood}. The Supreme Court's recognition of the importance of the \textit{Hopwood} issues,\footnote{373} yet denial of certiorari, send mixed messages about the future of affirmative action. These mixed messages are also conveyed by the passage of Proposition 209 in California,\footnote{374} followed by a federal judge's injunction prohibiting implementation of Proposition 209.\footnote{375} It is probably best, in this environment, to err on the side of caution. Any affirmative action program should ensure that the administering agency was the one which discriminated in the past (that is, the law school, the city contracting entity, the State Department of Motor Vehicles, etc.), that there are present effects of past discrimination,\footnote{376} that the effects are

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\item \footnote{370} Chief Judge Politz wrote a dissent from the failure to grant a rehearing en banc, and he was joined by Judges King, Wiener, Benavides, Stewart, Parker, and Dennis. They stated that "the opinion goes out of its way to break ground that the Supreme Court itself has been careful to avoid and purports to overrule a Supreme Court decision, namely, \textit{Regents of the University of California v. Bakke}.") Hopwood \textit{v. Texas}, 84 F.3d 720, 722 (5th Cir. 1996) (Politz, C.J., dissenting).
\item \footnote{371} \textit{Hopwood}, 78 F.3d at 949.
\item \footnote{372} \textit{Id.} To elaborate on the first part of the test, the actor must show that "the effect it proffers is caused by the past discrimination and that the effect is of sufficient magnitude to justify the program." \textit{Id.} at 952 (citation omitted). In addition, the actor "must show that it adopted the program specifically to remedy the identified present effects of the past discrimination." \textit{Id.}
\item \footnote{373} \textit{Id.}
\item \footnote{374} \textit{Id.}
\item \footnote{375} \textit{Id.}
\item \footnote{376} It is unclear what would satisfy this test but some effects which will not qualify, according to \textit{Hopwood}, include the acting agency's bad reputation in minority communities and the acting agency's provision of a hostile environment for minorities. \textit{Hopwood}, 78 F.3d at 952. The court seemed to suggest that even if there were currently a hostile environment because of present discrimination, that would not satisfy the past discrimination test. \textit{Id.} at 953. If we follow that reasoning to its logical conclusion, present discrimination would go unpunished and we would have to wait until the future to take any action so that the current discrimination could then qualify as
caused by the actor's discrimination, that there was a need for the program (which seems self-evident if one can get through the above hurdles), and that the program was adopted to overcome the identified discrimination by the narrowly defined actor. Crafting affirmative action programs for women of color to clear these hurdles may require training, but with time, it can be done.

The Court has been more consistent in gender-based affirmative action cases, relying on an intermediate scrutiny test.\textsuperscript{377} This evolved out of the use of an intermediate scrutiny standard for gender classifications more generally,\textsuperscript{378} which crossed over to gender-based affirmative action.\textsuperscript{379} It is important to understand where the case law stands with respect to both race- and gender-based affirmative action. One must also recognize, however, that these "either/or" laws do not take into account multiple consciousness, thus ignoring the "both-and" experiences of women of color. Gender-based laws and remedies, in isolation, are therefore not sufficient to address the experiences of, or discrimination against, women of color.\textsuperscript{380} Nor are race-based laws and remedies. Thus, in order to craft appropriate remedies, laws and judges interpreting the laws must recognize the intersectionality of discrimination which women of color face. Nonetheless, laws do not currently address the experiences of women of color as a discrete identity, taking into account race and gender. While I am hopeful that laws will eventually recognize multiple consciousness in formulating remedies addressing discrimination, until then, I will utilize the higher standard of review, strict scrutiny, which applies to race-based classifications.

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378. See Craig v. Boren, 429 U.S. 190 (1976) (invalidating a state statute which based minimum age for beer sales on gender, relying on an intermediate scrutiny standard); Reed v. Reed, 404 U.S. 71 (1971) (using a rational basis standard to invalidate a state statute which favored males over females as estate administrators).


380. As Professor Harris wrote:

[I]n feminist legal theory, as in the dominant culture, it is mostly white, straight, and socio-economically privileged people who claim to speak for all of us. Not surprisingly, the story they tell about "women," despite its claim to universality, seems to black women to be peculiar to women who are white, straight, and socio-economically privileged . . . .

Harris, supra note 4, at 588 (footnote omitted).
B. Critical Analysis of Affirmative Action Law

Adarand presently stands as the law on government-generated racial classifications, but its hold is not firm. One reason is that most of the seminal affirmative action cases resulted in plurality opinions, indicating that with a slight Court adjustment, another plurality opinion could send the pendulum the other way. Another reason, explained below, is that the plurality's reasoning in Adarand is flawed, partly because of its conclusions regarding the "three general propositions," and partly because it presumes a color-blind society and disregards continuing race- and gender-based discrimination.

The plurality's reasoning in Adarand, particularly the use of the consistency proposition to justify the strict scrutiny standard, is misdirected. This proposition ignores the continued existence of discrimination against women of color. In the words of the plurality opinion, the consistency proposition "means that whenever the government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection." Therefore, any time a white male suffers a disadvantage because of his race under a governmental benign racial classification, he could, and frequently does, challenge the classification. In order to uphold the classification, the government would have to identify a specific past injury to benefited groups. In addition, the classification would have to be narrowly tailored to remedy that past injury. This would effectively preclude any legislation that attempts to deal with subtle, unconscious, or present discrimination, or legislation that otherwise attempts to provide equal opportunities or expand inclusiveness of groups traditionally underrepresented in areas like higher education, professional careers, crime prevention, and firefighting.

381. With no clear majority on this issue, the Court can continue to vacillate as it has over the past twenty years.

382. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 229-30 (1995). Paradoxically, race-based classifications designed to eradicate discrimination against women of color would by necessity discriminate against people who are not women of color, thus always calling a strict scrutiny standard into play. That does not necessarily doom a benign classification, but it limits the tools that can be utilized to eradicate discrimination and to level the field of opportunities. To date, when applying strict scrutiny, race-based classifications are typically upheld only if they are used to counter specific past instances of discrimination, yet cannot be used to eradicate present or future discrimination. They are akin to certain types of stalking laws which only provide a remedy after the fact, when it is often too late. A murder victim finally has a remedy, if only she were around to utilize it.

383. Women have traditionally been underrepresented in firefighting. For example, in 1987, the San Francisco Fire Department admitted women as firefighters for the first time. Report to the President, supra note 20, § 2.1. While male officers of color admittedly made significant strides in 1987 (the number of Black officers increased from 7 to 31, Hispanics went from 12 to 55, and Asians went from 0 to 10), id., with women's recent entry into the department, it will likely be some time before women of color make similar strides. They are concededly in the door, but under the
Under the consistency principle, even if there is blatant discrimination, much less the subtle but thriving discrimination that continues today, the victims of that discrimination cannot receive any benefits provided through racial classifications unless they can prove past discrimination by the body granting the benefits, plus a close fit between the injury and the remedy.

What is a close fit between the injury caused by years of subtle discrimination against women of color and a remedy to correct the injury? Allow me to tell a story which illustrates the difficulty of using this test as the bellwether for determining whether to uphold affirmative action. Let us say that a young Latina is taunted throughout grade school because her English is not very good. This causes her to be silenced, but not beaten. Her grades are excellent. Then in high school, she is harassed by her male classmates because she is a good student. Her silence continues and is reinforced. She may be encouraged to pay less attention to her studies, but she is unusually tenacious and continues to excel at school. She is admitted to an Ivy League college, but her grades there are average. She would like to spend more time at the library during the day, but her days are filled with classes and a part-time job to pay for her college education. She would also like to spend more time at the library in the evenings, but she can only go to the library if she can find someone to walk her back to her dormitory at night. Which of the many discriminatory acts that she has been subjected to are going to be considered sufficient past discrimination to warrant affirmative action relief under *Adarand*? Probably none. Yet, she undeniably has suffered discrimination, partly because of her race, partly because of her gender, and partly because of the intersectionality of race and gender.

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Court's test, if present discrimination hinders their progress, affirmative action cannot intervene to propel forward progress. This is a serious shortcoming of the Court's treatment of racial classifications.

384. Latinas are more likely to be poor than non-Latinas. Thus, it is expected that if they go to college at all, they will work part time. “Even with a parent working full time, year-round, Hispanic children in the U.S. are three times more likely to be poor than children in comparable non-Hispanic families.” Nat’l Council of La Raza, *supra* note 222, at 16-17.


386. Kimberle Crenshaw describes this experience of intersectionality for Black women:

Black women can experience discrimination in ways that are both similar to and different from those experienced by white women and Black men. . . . [O]ften they experience double-discrimination—the combined effects of practices which discriminate on the basis of race, and on the basis of sex. And sometimes, they experience discrimination as Black women—not the sum of race and sex discrimination, but as Black women.
theless, the consistency principle does not allow affirmative action to be utilized to level the playing field currently or prospectively. Hence, the status quo remains. This is not acceptable because it ignores too much of the way that discrimination operates. To the extent that discrimination is intentional, legal-savvy perpetrators rarely will blatantly conduct themselves to give rise to legal action. Instead, they tend to discriminate subtly, with less of a trail.\(^\text{387}\)

Discrimination also occurs unconsciously.\(^\text{388}\) People with the best intentions often are not aware that they are discriminating.\(^\text{389}\) For example, people have “complimented” me by assuring me that “I am not a dirty Mexican,” or “I am different.” Or, less blatantly, law firm partners may provide jobs to women of color, but then not provide the same mentors or training that they provide white males.\(^\text{390}\) Similarly, they may not provide networking opportunities because they think a woman of color would not be comfortable with people unlike herself.

Relatledly, discrimination may occur unintentionally.\(^\text{391}\) For example, in the contracting and subcontracting context at issue in \textit{Adarand}, Justice Stevens pointed out that:

\[\text{[M]inority subcontractors may face more obstacles than direct, intentional racial prejudice: They may face particular barriers simply}\]

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Crenshaw, \textit{supra} note 4, at 149. The point here is that the Court’s insistence that the source and content of discrimination be clearly identifiable is simply not possible all the time, or even most of the time. That does not make the discrimination any less real.

387. See, for example, Freeman, \textit{supra} note 128, at 1081, 1084-85, for a discussion of supposedly objective and neutral practices which are really driven by discriminatory motives.

388. I recently witnessed a perfect example of this. Our church sponsored a vacation bible school in the parks. Each day’s theme sprang from a color, such as white for holiness. Not surprisingly, black symbolized sin. No one in my bible study group thought of the racial implications. I asked them to think about what it would feel like to be the lone black girl in the school and to have church representatives tell everyone that black, your skin color, stood for sin. For a poignant discussion and explanation of unconscious racism and unintentional discrimination, see Lawrence, \textit{supra} note 45.

389. “I am certain that my kindergarten teacher was not intentionally racist in choosing \textit{Little Black Sambo} [to read to class]. . . . I knew even then, from a child’s intuitive sense, that she was a good, well-meaning person.” \textit{Id.} at 318.

390. They may justify this because it would be awkward to play golf with a woman of color or to go to dinner with her after work, as it may upset a spouse or partner. One report noted that this lack of mentoring “could be due to a disparity in white male comfort levels: after all, white women look like their mothers, sisters and wives and minority men can at least use the same locker room. But white males have nothing in common with women of color.” The Burdens of Both, \textit{supra} note 27, at 31.

391. As one critical race theorist has written:

\textit{Traditional notions of intent do not reflect the fact that decisions about racial matters are influenced in large part by factors that can be characterized as neither intentional—in the sense that certain outcomes are self-consciously sought—nor unintentional—in the sense that the outcomes are random, fortuitous, and uninfluenced by the decisionmaker’s beliefs, desires, and wishes.}

Lawrence, \textit{supra} note 45, at 322 (footnote omitted).
because they are more likely to be new in the business and less likely to know others in the business. Given such difficulties, Congress could reasonably find that a minority subcontractor is less likely to receive favors from the entrenched business persons who award subcontracts only to people with whom—or with whose friends—they have an existing relationship.\textsuperscript{392}

The lead opinion’s consistency proposition also falters because it refuses to distinguish between benign and malignant racial classifications. As Justice Stevens pointed out, there is a distinction:

There is no moral or constitutional equivalence between a policy that is designed to perpetuate a caste system and one that seeks to eradicate racial subordination. Invidious discrimination is an engine of oppression, subjugating a disfavored group to enhance or maintain the power of the majority. Remedial race-based preferences reflect the opposite impulse: a desire to foster equality in society.\textsuperscript{393}

If one believes that there is a distinction between the two types of racial classifications, it makes sense to treat them differently under the law.\textsuperscript{394} There are many reasons why one would not believe that there is a distinction between different types of racial classifications. It is certainly easier to posit and enforce a crystalline principle which states that all racial classifications are suspect, requiring the highest level of scrutiny. But ease of administration should not suffice if laws are purposefully designed to assist people who suffer from discrimination. If this were the case, laws purposefully designed to help those with disabilities would be deemed unconstitutional. This is despite the intent of providing special accommodations because existing accommodations had the effect of discriminating against persons with disabilities. On a different but related note, what about laws that intentionally help farmers who own large production farms but not those who own smaller farms? And what about laws designed to give tax breaks to large corporations but not to smaller corporations? There are distinctions here that are not only recognized, but actually drive disparate legislation. The laws in these examples intentionally assist members of certain groups, which by necessity discriminate against members of other groups. Laws have always done this. The difference is that when the laws which do this operate in favor of the powerful to the detriment of the powerless, there is no strong voice to object. Because affirmative action assists those who are typically silenced, those


\textsuperscript{393} Id. at 243 (Stevens, J., dissenting).

\textsuperscript{394} Admittedly, it is not always easy to determine whether a classification is benign or malignant. Furthermore, one cannot be assured that a classification is benign simply because it labels itself as such. That does not justify disregarding the distinction, however, just as other legal distinctions are not disregarded even if they are susceptible to misuse or misidentification.
with booming voices object and their voices are heard. The silenced ones remain marginalized.

There are other reasons that people may not recognize distinctions among racial classifications. For instance, there is the generally unspoken truth that it may be advantageous to disregard the distinction. After all, many people in privileged positions who conceptually support affirmative action are not willing, consciously or otherwise, to abdicate their power to further the goals underlying affirmative action.\(^ {395} \) It is time to reconcile the conceptualization with action. Supporters must be willing to advocate affirmative action for women of color, even if it means some personal sacrifice. Courts, likewise, must be willing to learn about discrimination and how it operates, and acknowledge that we do not yet live in a color-blind society. They can then structure tests which recognize the difference between benign and malignant racial classifications, and which promote remedies for women of color when they suffer intersectional discrimination.

Naturally, those who do not support affirmative action are even less willing to concede any power and will favor any standard or rule which makes it harder for subordinated persons to succeed.\(^ {396} \) Successful claimants have been able to challenge laws or classifications designed to help those who suffer prejudice and discrimination, turning those very classifications around, often invalidating them, thus returning to the status quo.\(^ {397} \) It is easy to understand this reluctance to give up, or even share, power. The American psyche seems to be driven by a notion of power based on domination, a white male norm,\(^ {398} \) as opposed to a notion of power driven by partnership and mutuality.\(^ {399} \) As we proceed toward the 21st century, which brings with it demographic shifts in the population, perhaps power sourced in

\(^ {395} \) “White people cling to the belief that racial justice may be realized without any loss of their privileged position.” Derrick Bell, The Supreme Court 1984 Term, Foreword: The Civil Rights Chronicles, 99 Harv. L. Rev. 4, 8 (1985).

\(^ {396} \) To wit, many of the significant racial classification cases have dealt with reverse discrimination claims in which the claimants argued that a strict scrutiny standard was appropriate. See Adarand, 515 U.S. 200; Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

\(^ {397} \) Hopwood v. Texas, 78 F.3d 932 (5th Cir.), cert. denied, 116 S. Ct. 2581 (1996).


\(^ {399} \) Riane Eisler contrasts domination models, which rely on subordination of others as a power source resulting in inequitable relationships, against partnership or mutuality models. These latter models are sourced in a synergistic discourse between and among different constituencies to arrive at mutually beneficial decisions which do not require one to push others down in order to lift oneself up. Ms. Eisler elaborates: [T]he more male-dominant a society or period is (be it Nazi Germany, the Samurai period of feudal Japan, or Khomeini’s Iran), the more authoritarian and warlike it tends to be. Conversely, where we see more equal partnership between women and men (as in the Scandinavian nations, and Hopi and
mutuality will be more palatable. Eventually, those presently privileged may realize that when they are no longer as privileged because they are in the minority, rules which they create now will then apply to them. Thus, they may prefer rules and standards premised on shared power as opposed to power sourced in domination. Alternatively, they may continue trying to prevent the loss of their privilege by maintaining the status quo, although that behavior is cruel to those who live without privilege. If that happens, which is admittedly a more likely scenario than the mutuality one outlined above, it will be crucial to carry on with affirmative action programs for women of color. Otherwise, the privileged will hoard their power and women of color will continue to slip through the cracks.

Turning now to Justice O'Connor's assertion that the congruence proposition arose as a result of the Court's earlier equal protection cases, it is difficult to see how those cases consistently produced any such proposition. The plurality's tracing of equal protection jurisprudence in racial classification cases proves as much. Although some cases indeed found that the Fifth Amendment provides the same type of equal protection obligation on the Federal government as the Fourteenth Amendment does on state and local governments, other cases found to the contrary. Thus, it is incongruous to claim that...
the congruence proposition *inevitably* results from earlier cases. It is more accurate to state that early equal protection jurisprudence was sourced in the Fourteenth Amendment, and the Court gradually came to locate an equal protection right in the Fifth Amendment. Acknowledging that there is a present equal protection right emanating from the Fifth Amendment does not equate to recognition of supremacy of that right in all circumstances. The Court has conceded this when it defers to Congress. Thus, Congressional legislation, which typically results from extensive fact-finding, has received special consideration by the courts and should continue to do so. To the extent Congress abuses its power, there are mechanisms to counter that abuse.

Another shortcoming in *Adarand* arises from Chief Justice Rehnquist's assertion that preferential racial classifications are only appropriate if preferred races have been discriminated against in the past. The problem is that past discrimination is not the only, or even primary, cause for the subordination of women of color. To the extent that past discrimination has caused subordination, it should support affirmative action for women of color. This type of discrimination, however, should not be the only grounds supporting affirmative action. Women of color should be able to benefit from affirmative action without having to prove in advance that they were discriminated against in the past by specific actors. Indeed, Justice Stevens made a similar claim in his dissenting opinion in *Adarand*. “Instead of merely seeking to remedy past discrimination, the FCC program [in Metro Broadcasting] was intended to achieve future benefits in the form of broadcast diversity.”

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404. Furthermore, the law as established only recognizes race or gender-based discrimination. Women of color, however, are frequently subjected to discrimination which goes beyond race or gender, and it is not possible to tell where one begins and another ends. “Because the intersectional experience is greater than the sum of racism and sexism, any analysis that does not take intersectionality into account cannot sufficiently address the particular manner in which Black women are subordinated.” Crenshaw, *supra* note 4, at 140.

405. “[A]ffirmative action has two general justifications—remediation of discrimination, and promoting inclusion—both of which are consistent with the traditional American values of opportunity, merit and fairness.” Report to the President, *supra* note 20, § 1.2.2.

A final criticism is directed to Justice Scalia’s claim that we are one race, and therefore society, as well as the Court, should operate in a color-blind fashion.407 This is pollyannaish at best, and dangerously ignorant at worst. “One cannot preach color-blindness in a color-conscious society and claim moral sanction.”408 However, I am not surprised at Justice Scalia’s claim, considering the segregation of legal knowledge coupled with the gendered and raced nature of legal language and discourse. A white man can easily and genuinely believe that the world is color-blind. For one who does not experience racism and sexism personally, it is easier to believe that racism and sexism do not exist. Many members of the dominant culture continue to see the world through an egocentric lens, “My experiences are universal experiences—if I do not experience it, it does not happen.”409 Race and gender matter for outsiders on a daily basis.410 Race matters when it is time for a black man to get a cab.411 Race and gender matter for me when I am dressed casually for housecleaning and a solicitor comes to the door asking for the homeowner.412 It matters when women of

407. Adarand, 515 U.S. at 239 (Scalia, J., concurring). (“In the eyes of government, we are just one race here. It is American.”); cf. Michael Omi & Howard Winant, Racial Formation in the United States From the 1960s to the 1990s, at 1 (2nd ed. 1994):

[Even a cursory glance at American history reveals that far from being color-blind, the United States has been an extremely "color-conscious" society. From the very inception of the Republic to the present moment, race has been a profound determinant of one's political rights, one's location in the labor market, and indeed one's sense of "identity."


408. Ellis, supra note 138, at 576.

409. See Matsuda, supra note 9, at 2-3.


411. See Jerelyn Eddings, The Covert Color War, U.S. News & World Rep., Oct. 23, 1995, at 40. In describing “stealth racism staples,” the author went beyond stories of cab drivers who will not stop for blacks, to helpful hints from blacks on getting cabs to stop for them. Some argue, however, that considerations of race are part of the package of prudence that should be utilized in the process of making daily decisions, thus justifying the reluctance of cab drivers to pick up black men.

These [safety] concerns seem to be borne out by cabdriver muggings and killings. . . . The U.S. Labor Department recently reported that driving a cab is the riskiest job in America. . . . These facts suggest how hollow it sounds to accuse cabdrivers of "prejudice" and "stereotypes." While we can be sure that racist taxidrivers would discriminate, not all taxidrivers who discriminate are racist.

Dinesh D’Souza, Myth of the Racist Cabbie, Nat'l Rev., Oct. 9, 1995, at 36, 38; cf. note 186 and accompanying text (arguing that discrimination against Blacks who attempt to hail cabs is alive and well).

412. When I was dressed in spring cleaning attire, a salesperson came to the door and asked for the homeowner. In this case, my gender and race combined to cause her to think I could not possibly own the home. My appearance as a Mexican woman
color try to get jobs.\textsuperscript{413} It matters when one looks at statistics on the composition of the poorest sector of the economy.\textsuperscript{414} Thus, it is specious to state and believe that in U.S. society today, race does not matter, or that we are all one race.

In sum, to send players with gifts, albeit devalued or unrecognized gifts, onto a playing field tilted in favor of players with traditionally valued gifts, and then claim that all opportunities are equal, is disingenuous. I advocate only for equal opportunity. Of course, one cannot force people of any race, gender, physical condition, or sexual orientation to take advantage of those opportunities. If those opportunities are not equally available from the outset, however, it is untenable to claim that the playing field is level. As long as opportunities are not equally available to women of color, they will disproportionately remain in an economic underclass and neither society nor the Court will be able to operate in a color-blind fashion. Affirmative action helps women of color arrive at a playing field which is partly designed by them and for them, thus approaching greater fairness. Therefore, affirmative action should be sustained into the future.

C. Legality of Affirmative Action Revisited

I do not agree with much of the \textit{Adarand} decision, but, for now, it has established a strict scrutiny standard against which all race-based governmental classifications will be judged. However, even under \textit{Adarand}, affirmative action programs which further a compelling governmental interest could survive strict scrutiny and continue in effect for women of color, as long as those programs are narrowly tailored.

There are a number of compelling interests that support affirmative action for women of color. The first and most obvious is that discrimination still exists and affirmative action can be used as a tool to over-

\textsuperscript{413} Research by the Urban Institute "undercuts claims that hiring practices today are effectively color-blind or systematically favor blacks. The study revealed that when equally qualified black and white candidates competed for a job, the whites advanced farther in the hiring process a significant amount of the time." Turner et al., \textit{supra} note 96, at 4. The report found that:

In 20 percent of the cases a white applicant was able to submit an application when a black could not, the white received a formal interview when the black did not, or the white was offered a job when the black was not. The study also found that, in a small share of cases, blacks were "steered" by potential employers to less desirable positions than their white counterparts.

\textit{Id.} at 5.

\textsuperscript{414} "In 1992, 33.3 percent of blacks and 29.3 percent of Hispanics lived in poverty, compared to 11.6 percent of whites." Report to the President, \textit{supra} note 20, § 4.1. As far as sheer numbers are concerned, there are admittedly more whites who live in poverty than any other demographic group, but that is only because they still comprise a majority of the population. But with respect to percentages, whites are underrepresented in the ranks of the poor, while ethnic minorities, particularly women of color, are overrepresented.
come the effects of that discrimination. Of course, to uphold affirmative action, one would have to prove discrimination in a particular setting. Contextual examples of continuing discrimination can easily be found through audit or tester studies. These involve empirical research using persons with similar credentials, but different appearances, as testers. The testers attempt to obtain job interviews, apartments or other limited “commodities.” Many of these studies still find discrimination against people of color, especially women.\(^{415}\)

One General Accounting Office (“GAO”) study found that significant discrimination still exists against Hispanics,\(^{416}\) and other research found that “[t]he percentage of the Hispanic female-Anglo male income gap attributable to employment discrimination falls within a 30-40% range.”\(^{417}\) Another GAO study utilizing Hispanic testers found that Anglo applicants received at least 33% more job interviews, and 52% more job offers, than other interviewers.\(^{418}\) The sequence of events illustrated by these statistics is significant. At the outset, Hispanics received one-third fewer interviews than Anglo applicants. This places Hispanics at an initial disadvantage because so many fewer of them will even get a foot in the door. Once those 75% get to the interview stage, the statistics predict an even grimmer outcome—the Hispanics will receive approximately 50% fewer offers than similarly qualified white job applicants. These statistics are not gender specific, as it is very difficult to get statistics for women of color.\(^{419}\) I can assure

\(^{415}\) See, e.g., Immigration Reform, supra note 97, at 48 (discussing discrimination against Hispanics). Note, however, that many studies are designed to test for race- or gender-based discrimination, but not both. While it would be difficult to design studies to capture both types of discrimination because they can be inextricably interwoven, tests could be produced which detect each type of discrimination, working independently and together.

\(^{416}\) Id. I use the term “Hispanics” here because that is the term the GAO used in its report.

\(^{417}\) Nat’l Council of La Raza, supra note 222, at 27.

\(^{418}\) See id. at 26. In a particularly blatant example of continuing discrimination, a Hispanic tester applied for a job in response to a “counter help” sign at a lunch service company and was told that the job was filled. A mere two hours later, a white tester was offered that very job. Immigration Reform, supra note 97, at 48. That same study found more egregious discrimination. White applicants received 33% more interviews and 52% more job offers than their Hispanic counterparts. Id. Furthermore, while only 11% of the white applicants experienced unfavorable treatment during the hiring process, 31% of the Hispanic applicants experienced such treatment. Id. at 47.

\(^{419}\) This is not surprising considering women of color’s invisibility as a discrete identity. bell hooks notes that subordinated groups tend to be identified as people of color or women, but not women of color:

In America, white racist ideology has always allowed white women to assume that the word woman is synonymous with white woman, for women of other races are always perceived as Others, as de-humanized beings who do not fall under the heading woman. White feminists who claimed to be politically astute showed themselves to be unconscious of the way their use of language suggested they did not recognize the existence of black women. They impressed upon the American public their sense that the word “wo-
you, however, that based on similar statistics for gender, the numbers for Latinas would give even greater cause to worry.

Strategically, to establish the need for affirmative action for women of color in a particular profession, one should start by performing an audit study. For example, a study might reveal that women of color have traditionally been denied higher-paying government jobs at the Department of Motor Vehicles ("DMV"), even though equally qualified men and women of color applied for those jobs. That would provide evidence of discrimination against the women of color, resulting in unequal opportunities. Assuming that it is an important governmental interest to break the cycle of the colored feminization of poverty which is caused in part by discrimination against women of color, the next task is to ensure that such goal is obtained through a narrowly tailored affirmative action program. Once discrimination by a particular actor is established, it is important to demonstrate the present effects of that past discrimination and then to narrowly tailor a program to eradicate those effects. For example, if we can establish that the DMV discriminated against women of color and a present effect of that discrimination is that they currently do not have high-paying jobs at the DMV, then an affirmative action program can be narrowly tailored to hire more women of color for those positions. The program should include built-in mechanisms which would ensure that it remains in place only as long as the present effects of past discrimination persist.

Another area where discrimination persists against women of color is education. Education is a requisite stepping stone out of the colored feminization of poverty and into the world where policy decisions are made. With the structural changes in the economy and the work force that are upon us as we approach the end of this century, there are fewer and fewer jobs for uneducated persons. This decrease in education and employment opportunities will disproportionately impact minorities, particularly Latinos.

420. See supra note 248.

421. One author noted that "[i]n New York City, the official dropout rate for Puerto Rican children was 57 percent as late as 1971, which means the true rate—that is, the entering first grade class compared to the graduating class twelve years later—was probably 70 percent or more." Shorris, supra note 191, at 219-20 (footnote omitted). Shorris also emphasized that "[h]istory weighs most heavily on the children who have come to the United States from another country where parents had little or no education, for their parents may not understand the concept of school beyond the requirement for rudimentary literacy, if that." Id. at 221.

man" meant white woman by drawing endless analogies between “women” and "blacks."
Roughly 80 percent of whites and 70 percent of black adults are high school graduates, but only 53 percent of adult Hispanics and 46 percent of Mexican Americans, according to the U.S. Census Bureau. Blacks also graduate from college at roughly twice the rate of Mexican Americans. And the gap is widening every year.\footnote{422. Scott Thurm, Losing Ground, San Diego Union-Trib., Feb. 5, 1996, at C-2. “Hispanics are a little more than two and a half times as likely as non-Hispanics to live in poverty, and are more likely to attend overcrowded, segregated and poorly funded schools with few or no Hispanic or bilingual teachers; be enrolled below grade level; and be placed in non-academic tracks which greatly reduce access to college.” Nat’l Council of La Raza, supra note 222, at 10. This is clear evidence that Hispanics do not arrive equally equipped to take advantage of an “even playing field.” Thus, it is appropriate for these Latinas to have an opportunity to arrive equally well equipped and if it is too late for that, then it is similarly appropriate to level the playing field at the time of arrival.} Latinas traditionally graduate from high school and attend college at even lower rates, reflecting a cultural bias toward making opportunities available to males, even if the cost is taking those same opportunities away from females.\footnote{423. Shorris, supra note 191, at 220 (“Women had the added problems associated with their gender, making it all but impossible until very recently for even the brightest Latinas, including those from middle-class families, to get through high school and go on to college.”).} This is exacerbated by the Latino tradition that women should serve their men and children first, sacrificing their autonomy in the process.\footnote{424. Mily Trevino-Sauceda talked about the stories of many of the women farmworkers with whom she worked. “They all reflected this belief that the job of women is to obey the men—the men at home, the crew leaders in the field, all the men are to be obeyed, no matter what.” Pamela Warrick, A Life of Their Own, L.A. Times, June 7, 1996, at E1 (quoting Mily Trevino-Sauceda).} Affirmative action is not essential for Latinas or other women of color to acquire an education, but it makes a significant difference in accessibility to education for many of them. Furthermore, without affirmative action, certain substantive areas will continue to be severely underrepresented by women of color. For example, in a report discussing diversity and biomedical and life sciences, the authors noted that:

\begin{quote}
Training and support for underrepresented groups is one means, albeit imperfect, of providing a work force of service providers likely to be concerned with undeserved [sic]\footnote{425. Freudian slip?} populations. There is an added purpose, however, in ensuring that research agendas over time reflect the full range of society’s needs: experts state, for example, that participation of minorities and women in biomedical research helps ensure not only that key questions are being addressed, but that the questions are even asked in the first place.\footnote{426. Report to the President, supra note 20, § 10.6.1.}
\end{quote}

Likewise, “in science, higher education and several other fields addressed by Federal programs, studies project dangerous shortages of talent if we continue to draw the ranks of those professions so over-
whelming [sic] from among white males only."427 With that said, it will be easy to demonstrate that there is a dearth of women of color in biomedical and life sciences. It can also be shown that it is important to have the input of women of color in these fields for the reasons elaborated above. Thus, the first part of the test to uphold affirmative action for women of color under a strict scrutiny standard can be met.

The next step would be to design an affirmative action program which is narrowly tailored to achieve the goal of increasing the number of women of color in a particular area where they are underrepresented. There are a number of ways to narrowly tailor a program—through realistic goals and timetables, as opposed to quotas, which goals and timetables are tied to relevant applicant pools;428 through built-in periodic evaluations and assessments, which would in turn be used to determine both the success of the program to date and the projected need for the program into the future; through evidence of consideration of race-neutral alternatives that would have likely been ineffective in addressing the identified problems; through consideration of the impact of the program on non-beneficiaries; and through application of the program in a flexible manner. Because the task of this article is to position women of color in the affirmative action dialogue, it is beyond the scope of this article to actually design a narrowly tailored program of affirmative action for women of color. Suffice it to say, in formulating a program, governmental actors should document how they have taken these types of factors into consideration.

In closing this part, I want to stress that from a legal standpoint, affirmative action can be upheld for women of color. After all, Justice O'Connor herself wanted to "dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'"429 I am not naive enough to believe the Court would uphold affirmative action programs particularly benefiting "women of color" as a class in the near future. As one court stated:

The legislative history . . . does not indicate that the goal of the statute was to create a new classification of 'black woman' who would have greater standing than, for example, a black male. The prospect of the creation of new classes of protected minorities, governed only by the mathematical principles of permutation and com-

427. Id. (emphasis added).
428. Goals are necessary in designing any project or program. "[G]oals, objectives, and timetables have now become commonplace in relation to a wide range of business activities. Their purpose is to provide objective criteria by which performance can be measured and evaluated to promote desired results." The Inclusive University, supra note 186, at 16-17.
bination, clearly raises the prospect of opening the hackneyed Pandora's box.\footnote{DeGraffenreid v. General Motors, 413 F. Supp. 142, 145 (E.D. Mo. 1976). The Supreme Court would probably follow the spirit of the DeGraffenreid court, focusing on gender and race as separate issues.}

Nonetheless, for the reasons discussed throughout this article, I believe that the intersection of race and gender provides greater support for affirmative action for women of color than either race or gender do separately. If the Court recognized that we do not live in a color-blind society, and that the continued discrimination against certain identities results in unequal opportunities, then affirmative action for women of color would be upheld under even more circumstances.

IV. Conclusion

Part I laid out common myths about affirmative action and attempted to debunk those myths as they apply to women of color. One purpose of that part was to illustrate that even with affirmative action, women of color still suffer discrimination, but are better off than they were without affirmative action. It thus demonstrated the need both to continue affirmative action and to consider restructuring it so that it is more effective. It also revealed that white men are not unduly burdened by affirmative action. After all, they have been and continue to be the primary beneficiaries of preferences. Affirmative action, therefore, does not demand too much of those who have not been beneficiaries under benign affirmative action programs. Finally, Part I argued that if we did not rely so heavily on traditionally defined merit, the need for affirmative action might decline. But as long as we look at merit as defined by test scores, which measure has consistently hurt women of color in the past, then it is crucial to keep affirmative action in place.\footnote{I still think that the definition of merit needs to be expanded, and I will not give up that fight.}

Part II presented moral bases for upholding affirmative action. It first gave the readers a glimpse of what life is like for many women of color—who hold low-paying jobs and are stuck in a cycle of poverty. For those who have escaped, it has often been because of affirmative action. To terminate affirmative action now would close off one of the few paths out of poverty for many women of color. Part II then looked at distributive justice which is concerned with providing equal opportunities for all. It showed that equal opportunities are not currently available for women of color, but that affirmative action pushes us in that direction. Accordingly, as long as equal opportunities are not available for women of color, we should seek as many viable approaches as we can to increase those opportunities, including affirmative action. Part II closed by looking at the symbiotic relationship.
between affirmative action and diversity. It argued that diversity is socially healthy because it supplies role models and promotes a spirit of inclusiveness, and it is enriching because it provides diverse viewpoints. It then concluded that affirmative action is desirable because it promotes diversity.

Part III discussed the legality of affirmative action generally and whether affirmative action for women of color can be upheld. In tracing the history of the Supreme Court's treatment of affirmative action, it acknowledged that it is getting harder to uphold an affirmative action program, but nonetheless concluded that programs for women of color can be crafted which would be upheld. That part also performed a critical analysis of the Court's method of reviewing affirmative action cases, pointing out many shortcomings of that method and suggesting alternate ways of reviewing both discrimination and affirmative action. Part III closed by determining that courts should consider both race and gender in looking at discrimination and affirmative action claims, and should broaden their understanding of discrimination to include subtle, unintentional, and unconscious racism and sexism, in addition to intentional racism and sexism.

I return now to the question of where women of color are positioned in the affirmative action dialogue. My answer remains that at best, they are at the margins, and at worst, they are invisible. I propose that women of color should be at the center of the affirmative action dialogue because they are impacted by both race- and gender-based discrimination. They often cannot determine which self is being discriminated against—is it the female self? The colored self? A combination? The law should not ask women of color to fragment themselves in order to stake a claim to an entitlement, to seek recourse for unlawful behavior perpetrated against them, or to formulate adequate remedies. They should be able to avail themselves of the “both-and” approach discussed by Professor Angela Harris.432 By incorporating the notion of intersectionality into the affirmative action conversation, women of color will be able to heal the fragmentation the law has asked them to bear and avail themselves of affirmative action remedies.

If the law supports continuing and strengthening affirmative action for women of color, it can stand behind the admirable goals of lifting

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432. Professor Harris argues for a holistic analysis of the minority female self: Far more for black women than for white women, the experience of self is precisely that of being unable to disentangle the web of race and gender—of being enmeshed always in multiple, often contradictory, discourses of sexuality and color. The challenge to black women has been the need to weave the fragments, our many selves, into an integral, though always changing, and shifting, whole: a self that is neither “female” nor “black,” but both-and.

Harris, supra note 4, at 604 (footnote omitted). Of course, I would extend the “both-and” concept to all women of color.
women of color out of the colored feminization of poverty, enhancing the breadth and depth of opportunities for women of color, and turning back the tide of the subordination of women of color.