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The Curious Case of Affirmative Action for Women

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Prefatory note: Earlier expressions of the principal point of this article appeared in "Employment Quotas for Women?" Public Interest *73 (Fall, 1983), 106-12, and "Affirmative Action for Women: New Twist on an Old Debate,"* Legal Times *(Dec. 5, 1988) (reprinted in The Corporate Board (July-August, 1989)). The two footnotes infra did not appear in this article as originally published.*

Few would deny that but for the history of slavery and legally enforced segregation that followed, affirmative action would never have become a feature of American life. Yet, over the near quarter-century in which the controversy over preferential policies has raged in and out of the courts, one of the most neglected issues has been the wisdom or propriety of extending such preferences beyond the 12 percent of the population that is descended from slaves-not only to another tenth or so of the population considered to be also disadvantaged minorities, but to women, just over one-half the population.

Only on rare occasions have the courts given attention to the question of whether the constitutional analysis of gender preferences should be different from the analysis of racial preferences. In 1977, in upholding the affirmative action provisions of the widely publicized consent decree between American Telegraph & Telephone Company and the federal government, the Third Circuit Court of Appeals gave the issue passing notice. After briefly discussing the prevailing constitutional principles whereby gender classifications are subject to a lower level of judicial scrutiny than racial classifications, the court summarily concluded: "The present classifications are permissible in the case of race, and are thus permissible *a fortiori* with respect to sex"

Ten years later the Ninth Circuit also considered the difference between the levels of scrutiny for racial and gender classifications in reviewing San Francisco's set-aside programs. This time, however, in *Associated General Contractors v. City of San Francisco,* relying on the lower standard applied to gender classifications, the court struck down the minority set-aside, but upheld the set-aside for women.

Yet, the approach whereby gender preferences are automatically upheld if racial preferences are upheld-and may even be upheld when minority preferences are invalidated-is plausible only so long as the focus is solely upon the lower level of scrutiny that has historically been applied to gender classifications. Once one goes beyond rote application of constitutional standards and considers what ends various preferential measures are intended to achieve, this becomes a quite dubious approach for fundamental differences between racial and gender groups make certain important justifications for preferential measures for minorities inapplicable to women.

Employment Quotas

If employment quotas are merely intended to ensure that an employer hires minorities or women at a rate representing fair treatment of those groups in the present, there may be little reason to distinguish between such measures for minorities and for women. The quotas that have been considered by the courts, however, have generally gone beyond enduring fair treatment in the present. Rather, they have required the selection of minorities and women at rates above their percentage representation in the relevant labor market in order to somehow remedy the effects of past discrimination or to promote other ends believed to be socially useful.

Justifying such measures as remedies for past discrimination raises the question of how favoring some members of a particular group can make up for discrimination against other members of the group. Although the courts have been disinclined to grapple with the question, a reasonable argument can be made for minorities, especially when one considers the centuries of discrimination against blacks that underlie the basic affirmative action impulse. Most blacks today suffer in some manner from that history of discrimination, at a minimum, because it prevented their parents and remoter ancestors from accumulating wealth, and the advantages associated with wealth, to pass on to the present generation.

Even contemporary discrimination, which employment quotas are specifically designed to remedy, causes blacks (and other minorities as well) to suffer even if directed against other members of their group. Members of racial and ethnic groups are disproportionately affected by the condition of other members of their minority group since the persons

with whom they share economic circumstances-principally blood relations and spouses-tend to be overwhelmingly from the same group. Thus members of minority groups who are not themselves victims of discrimination often experience the economic consequences of past and present discrimination against members of their group.

Whether or not this justifies minority preferences, the same argument simply does not apply to women. Discrimination against women has existed since the beginning of time, but the economic consequences of this discrimination are passed on to male as well as female heirs, just as any economic benefits men may have derived from that discrimination have been passed on to their heirs, just as any economic benefits men may have derived from that discrimination have been passed on to their heirs of either gender. In the present, women are not more affected by the economic circumstances of other women than they are by the economic circumstances of men. This is true even for single women, who on average have approximately as many male as female relatives. Married women are more affected by the economic circumstances of men than of other women.

This difference between racial and gender groups can also affect the legitimacy of another significant justification for employment quotas that go beyond attempts to ensure equal treatment in the present-the mitigation of poverty associated with low-paying jobs and unemployment. Employment quotas do not create new or better jobs; they merely redistribute existing ones. Therefore they can mitigate poverty only if the reduction in the concentration of low-paying jobs and unemployment within a certain group reduces overall poverty. Because minorities are disproportionately affected by the circumstances of other members of their group, the concentration of economic disadvantage within a minority group creates a more serious problem than when that disadvantage is spread throughout society. Even leaving aside the extent to which individuals depend on relatives for economic assistance, the concentration of poverty and unemployment within a particular geographic area can lead to a general demoralization of the inhabitants of that area. Thus, the reduction of the concentration of low-paying jobs and unemployment within a minority group will tend to reduce the total impact of poverty. Not only do women disproportionately share economic circumstances with men rather than with other women, but there are no communities of women comparable to minority communities and neighborhoods. Reducing the concentration of low-paying jobs or unemployment

among women will not reduce the total impact of poverty.

Feminization of Poverty

It is true that concentration of low-paying jobs or unemployment among women tends to concentrate those conditions disproportionately among the neediest group of workers-single parents. And, indeed, the so-called "feminization of poverty"-a dramatic rise in the proportion of the poor made up of female-headed families-is often cited to justify a wide range of policies to enhance employment opportunities for women. But it is difficult to imagine a more misfocused argument for affirmative action for women.

The "feminization of poverty" is not necessarily a bad thing, not even for female-headed families. The proportion of the poor in female-headed families is not the same thing as the proportion of female-headed families who are poor, which ought to be the true concern. In fact, the two proportions tend to vary inversely. This occurs because a group that is poorer on average comprises a higher proportion of each increasingly more poverty-prone segment of the population. In 1979, for example, female-headed family members made up 28 percent of the population below the poverty line itself, and 35 percent of the population below 75 percent of the poverty line. Whenever there is an overall decrease in poverty, female-headed families will make up a higher proportion of the poor, even though the poverty rates for such families has also declined. When poverty increases female-headed families will comprise a smaller proportion of the poor, even though their poverty rate increases.

The dramatic increase in the proportion of the poor in female-headed families between 1959 and the middle 1970s that led to the discovery of the "feminization of poverty" was in substantial part a result of an unprecedented decline in poverty for **all** segments of society (although the increase in the prevalence of female-headed families was a major contributor as well). The role of the overall decline in poverty was entirely overlooked, however, when it was being observed, for example, in the 1980 report of the National Advisory Council on Economic Opportunity that 141 other things being equal, if the proportion of the poor who are in female-headed families were to increase at the same rate as it did from 1976 to 1977, they would comprise 100 percent of the poverty population by the year 2000."

No one questioned why a society has an interest in there being poor people who are not members of a particularly poverty-prone group. In any event, as happened, poverty did not continue to decline, and there is little chance that poverty will soon be confined to the most poverty-prone segments of the population-a necessary step toward total elimination of poverty. The proportion of the poor in female-headed families today is roughly the same as it was in the late 1970s, with the "defeminizing" influence of increases in poverty being offset principally by continuing increases in the proportion of the population comprised by female-headed families.

The "feminization of poverty" probably resulted in part from genuine declines in the relative well-being of female-headed families, a decline that affects a much larger proportion of the population than those near the poverty line. The most obvious reason for such a decline, however, is the dramatic increase of the participation of married women in the labor force. This fact has turned comparisons between female-headed families and married-couple families increasingly into comparisons between one-earner and two-earner families.[1]

Policies that enhance the labor-force status of women could mitigate the disadvantage of working single parents, even though married women and their families could benefit from such policies as well. For example, viewing the matter very roughly, with an increase in average female earnings from 60 percent to 80 percent of the family wage of a married-couple family where only the husband works and would rise from 38 percent (that is, sixty over 160) to 44 percent (that is, eighty over 180) of the family wage of married-couple family where both spouses work. But in reality, female heads of households are unlikely to share proportionately in the expanded opportunities for women because problems of childcare limit their ability to compete with other women for demanding jobs.

In addition, the expansion of opportunities for women has probably caused greater participation of married women in the labor force than it would otherwise be. Thus affirmative action policies are likely to operate to the detriment of even single working parents. And, of course, for the in excess of 50 percent of poor female heads of families who do not work, enhancing the employment opportunities of women who do work (most of whom are married), can only increase their relative disadvantage compared with the married-couple families.

Interest in mitigating poverty or otherwise moderating economic disparities might support arguments for employment preferences for single parents (of either gender). But once one accepts need as a legitimate basis for preferential treatment of single parents, it is a short step to condoning the preferential treatment of the next neediest group of workers-a much larger, and overwhelmingly male, group-married parents whose spouses are not employed. It may even be a shorter step to disfavoring the least needy group of workers-a very large and overwhelmingly female group-married persons whose spouses earn more than the salary of the job for which the worker is competing. These are just some of the reasons why policies that subordinate the principle of individual fair treatment to other aspects of social utility will rarely expand opportunities for women.

Finally, even if it made sense to grant women employment preferences either to make up for past or present discrimination against other women or somehow to mitigate poverty, those justifications have to be weaker for women because such measures lack the transgenerational impact they have for minorities. While minorities will pass the benefits of these measures on to children of the same racial group, women will pass those benefits on more or less equally to male as well as female children.

There are, to be sure, colorable justifications for employment preferences that are not based on the interrelatedness of the beneficiary group, and which

[1] The particular points about the statistical issues concerning the female-headed families and the implications of affirmative action with respect to the comparative situation of the female-headed family are more fully expressed in "Comment on McLanahan, Sorensen, and Watson's ' Sex Differences in Poverty, 1950-1980,'" *Signs: Journal of Women in Culture and* Society 16(2) (1991), 409-13. The purely statistical aspect of the matter, which was first articulated in "'Feminization of Poverty' is Misunderstood," *Cleveland Plain Dealer* (Oct. 9, 1987) (reprinted in *Current* (May, 1988) and *Annual Editions: Social Problems 1989/90* (1989)) and which involves the pattern by which the rarer an outcome the greater tends to be the relative difference in experiencing it and the smaller tends to be the relative difference in avoiding it, is the subject of a great deal of subsequent work concerning the interpretation of data on group differences in the law and the social and medical sciences, as summarized on the Scanlan's Rule page of jpscanlan.com.

may apply to women in much the same way as to minorities. For example, in circumstances where integration of a particular work force is important enough in itself to justify preferential measures for rapid achievement of integration, the justification may well apply equally to race and gender. It should be recognized, however, that in law enforcement, where such arguments may be compelling for racial integration, arguments for gender integration, while possibly valid, rest on very different consideration.

Justifications for employment preferences based on arguments that beneficiaries of such preferences are likely to have been victims of discrimination in employment elsewhere in the economy are also, at least in theory, equally applicable to minorities and women; the validity of such arguments for either minorities and women; the validity of such arguments for either minorities or women, however, is much affected by the verifiable pervasiveness of racial or gender discrimination as well as the length of time beneficiaries of employment preferences usually have been in the labor market.

There are also arguments for preferences for women that do not apply to minorities. For example, one might wish to moderate the disparity in power in marital relationships by equalizing incomes between husbands and wives, but few will find such arguments compelling, particularly after careful consideration of how such preferences would actually operate. When a married woman and a married man with the same income compete for a promotion, for example, the woman's husband will on average earn more than she does, while the man's wife will earn less than he does. Favoring the woman in the promotion will tend to diminish the wage disparities within both families, but at the expense of exacerbating the income differences between the two families.

Though some justifications for employment preferences might apply equally to minorities and women (or only to women), the fact that differences between racial and gender groups render certain of the principal justifications for such measures inapplicable to women necessarily makes employment preferences for women much harder to justify. Since most people consider employment preferences to be, at best, only marginally justifiable even for minorities, few ought to find them justified for women after giving the matter careful considerations.

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Set-Asides

Considering set-asides, justifying preferences for women on the same basis as minorities becomes even more difficult. One rationale for minority set-asides is that they will increase employment in minority communities. But, as already noted, there are no communities of women.

We also cannot ignore the fact that many female contractors who benefit from set-asides were able to start a business with capital accumulated by a father or spouse. In such circumstances, the connection between preferences for a female-owned firm and

redressing past discrimination against women is difficult to divine. And, while defining the level of minority ownership and control that qualifies a firm as a minority contractor is often problematic, the same determination for a female contractor can assume metaphysical dimensions even when the husband is not involved in the business.

Just as significant, in contrast to employment where the benefit of a job is intensely personal-even if one goes on to share one's salary with those who are disproportionately of the same race and disproportionately of a different gender-set-asides peculiarly involve accumulation and control of capital. If an enterprise is successful, the survivors of the entrepreneur may enjoy this capital more than the entrepreneur. It makes little sense to sanction the unfairness and inefficiency usually entailed with set-asides to enable women to acquire a greater share of capital that, counting spouses, they will pass on more often to men than to women.

Supreme Court Actions

Most recently, the United States Supreme Court's attention to affirmative action involved neither contracting nor employment, but the award of broadcast licenses. On the last day of the 1989/90 term, in *Metro Broadcasting Corp. v. Federal Communication Commission (FCC),* by a five to four vote (with Justices William J. Brennan and Thurgood Marshall still sitting), the Court upheld two FCC policies according preferences to minorities seeking broadcast licenses. The Court reasoned that such policies furthered the governmental interest in promoting broadcast diversity. One of the policies at issue applied to women as well as minorities, and the party challenging the policy had requested the Court to treat the gender issue as well. The Court declined because the case could be resolved without treating this issue. So the question of the constitutionality of the gender preference remains open.

Even if one accepts the premise that the diversity of programming rationale is as pertinent to gender as to race, some of the points already mentioned suggest that a gender preference in broadcasting should be more difficult to justify than a racial preference. For example, in contrast to a minority-owned station, a female-owned station is as likely to be inherited by a man as by a woman.

More significant, it is difficult to argue that ownership by a woman is as likely to promote diversity of programming as minority ownership or that the diversity is as important-particularly when the female owners have male spouses and other relatives at all involved in the management of the business. In any event, in *Metro v. FCC,* the Supreme Court did not rely on supposition on the diversity issue, but on empirical evidence to the effect that minority ownership did in fact foster programming diversity. Because this evidence was pertinent only to minorities, the Court ultimately will review the gender preference issue without being seriously constrained by the *Metro* precedent, a precedent with which a majority of the present Court may well disagree.

This could happen relatively soon. During the hearings of Clarence Thomas' nomination to the Supreme Court, it was revealed that he had authored a decision for the District of Columbia Circuit Court, in the case of *Lamprecht v. FCC,* holding that the FCC gender preference was unconstitutional. Though the decision is not yet public, newspaper accounts of descriptions provided by those who have seen the draft of the decision suggest that it focuses on the lack of empirical evidence that female ownership promotes diversity in programming.

In analyzing the gender preference the Court will have to review carefully whether the policy serves its purported ends in the same way for women that it serves those ends for minorities. This could lead the Court to recognize that, in a number of respects that are peculiarly germane to affirmative action issues, minorities and women are quite different kinds of groups.

What may prove significant in the Court's analysis of the FCC's gender preference, and possibly other congressionally mandated gender preferences as well is that the *Metro* majority adopted a more relaxed standard of judicial review for congressionally mandated racial preferences than the standard it had previously adopted for racial preferences imposed by state or local governments. In *City of Richmond v. Croson* (1989), the Court ruled that all racial preferences imposed by state and local governments face "strict scrutiny, " which means that the measures must be shown to promote a "compelling governmental interest."

According to the holding in *Metro,* the Court's adoption of the new standard ought not to make much difference. Because of the factors

presented above, even if racial classifications require greater justifications than gender classifications, in most contexts gender classifications, in most contexts gender preferences should still be more difficult to sustain than racial preferences.

Viewing the matter hypothetically, suppose that a racial preference must reach a level of justification of eight on a scale of ten, while a gender preference need reach only a level of six; it may prove much harder for the gender preference to reach six than for the racial preference to reach eight. Yet, neither the world nor the courts invariably think as clearly as one might hope, and in lieu of clear thinking, categorization often proves critical. Since gender preferences thus no longer face a lower level of scrutiny than racial preferences, the chance increases that a careful review of the ends served by a preference may lead a court to invalidate the preference for women while upholding the same preference for minorities. The merging of standards should, in any event, largely eliminate the possibility of an anomaly in congressionally mandated preferences where a measure is upheld for women while it is invalidated for minorities.

Where preferences are imposed by state and local governments, examination of the differences between racial and gender groups could lead the Court to uphold racial preferences while invalidating similar preferences for gender, even if it applies a lower standard of review for the latter. Since the court is moving toward prohibiting almost all minority preferences imposed by state and local governments, we need not give great attention here to the prospect that gender preferences will be invalidated while similar minority preferences are upheld. But it is worth noting that such a result would not be an unreasonable one, however counter-intuitive it may seem to the formalistic constitutional scholar.

Whether or not the United States Supreme Court thinks through the differences in the nature of racial and gender groups, it is unlikely to rely on the differences between constitutional standards to uphold government-imposed affirmative action programs for women while striking down similar racial preferences. The San Francisco case notwithstanding, the simple fact that no one would have imagined affirmative action measures for women had they not first become commonplace for minorities should be a compelling reason for the Court to avoid such a decision.

The fact that the Supreme Court is unlikely to read the Constitution to prohibit affirmative action programs for minorities while permitting similar programs for women does not eliminate the possibility of a situation in which most affirmative action is available only for women. Such a situation may occur in the private sector, and perhaps in the public sector as well, though for reasons few have anticipated.

The Reconstruction era statute known as Section 1981 prohibits racial discrimination in contracts, including employment.[2] In 1975 the Supreme Court held that Section 1981 protects whites as well as racial minorities. The same case held that Title VII of the 1964 Civil Rights Act, which prohibits racial and gender discrimination in employment, prohibits racial discrimination against whites (and, by implication, gender discrimination against men). But in the famous *Weber* case the Court qualified that holding in the affirmative action context.

The Supreme Court has never considered the implications of Section 1981's protection of whites in an affirmative action context. Were this issue to reach the present Court, without the constraints of contrary precedents like *Weber,* there is a good chance that Section 1981 would be held to prohibit all race-conscious affirmative action in employment and other contractual relationships. But unless the Court over-rules the *Weber* decision, there would be no similar statutory prohibition of gender-conscious affirmative action even in employment.

Congressional Action

Congress has shown no appreciation of the potential for Section 1981 to bar race-conscious affirmative action. And, indeed, most of the attention given to Section 1981 during debates leading to the Civil Rights Act of 1991 involved arguments that it was unfair to place caps on damage remedies being provided for gender discrimination under Title VII when Section 1981 contained no caps on damages for racial discrimination.

One proposal, which was rejected by the House of Representatives, would have addressed this perceived

[2] A fuller explanation of the reasoning regarding Section 1981 may be found in "*Patterson v. McLean* and Affirmative Action," *Labor Law Journal* 41(3) (March 1990), 131-37. The surmises about the Supreme Court Court's actions would eventually be proven incorrect.

unfairness by extending Section 1981 to gender discrimination. Had this provision been enacted, and unintended consequence might well have been to cause affirmative action for women eventually to perish along with affirmative action for minorities. As the law presently stands, however, there could still be much room for affirmative action for women when affirmative action for minorities has been entirely prohibited.