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Can't We Enlarge the Blanket and the Bed?¹ A Comparative Analysis of Positive/Affirmative Action in the European Court of Justice and the United States Supreme Court

By THOMAS TRELOGAN, STEVE MAZURANA & PAUL HODAPP

I. Introduction

In this paper we examine arguments that have been offered for and against European positive action plans and compare those with a number of arguments offered in American affirmative action cases. Our focus will be on the plans considered by the European Court of Justice in four of the Court’s judgments since 2000: Badeck, Abrahamsson, Schnorbus, and Lommers.² In the series of papers of which this paper is a part, our overall purpose is to keep the issue of affirmative action for women alive in the United States during a period when race-based affirmative action receives most of the media attention. We also hope our papers may help citizens, lawyers, and judges in the United States and Europe evaluate the reasoning

1. ROBERT PENN WARREN, ALL THE KING'S MEN 136 (2001) ("[The law is] like a single bed blanket on a double bed and three folks in the bed and a cold night. There ain't ever enough blanket to cover the case, no matter how much pulling and hauling, and somebody is always going to nigh catch pneumonia.").

of the courts in positive or affirmative action decisions.  

II. Positive/Affirmative Action

"Positive action" is the European name for what Americans call "affirmative action." There is no official definition of positive action, but in a Communication from the European Commission to the European Parliament and the European Council, positive action for women was described as embracing "all measures which aim to counter the effects of past discrimination, to eliminate existing discrimination and to promote equality of opportunity between women and men, particularly in relation to types or levels of jobs where members of one sex are significantly underrepresented." That the elimination of inequalities is one of the central goals, if not the central goal, of positive action is also emphasized in the Commission's guide to positive action: "positive action aims to complement legislation on equal treatment and includes any measure contributing to the elimination of inequalities in practice."

Positive action has been characterized as including the adoption of quotas and timetables for hiring or promoting female job applicants—quotas and timetables that may either be automatic or allow preferences to be overridden in certain circumstances—but also as including commitments in principle to preferring the under-represented sex, governmental provisions to reduce social security contributions for firms that hire women in areas in which they are traditionally under-represented, and the development of ways to reorganize work time and to provide for child care to make it easier for women to work. Other recommended

3. We hope to challenge the public perception that discrimination is virtually non-existent and thus that affirmative action is not only unnecessary but also destructive to the principle of merit in hiring. This perception may result from the shift from overt discrimination to subtle discrimination based on an unconscious stereotype that male candidates are better qualified than female candidates, even when the objective qualifications are equal. Anne Lawton, The Meritocracy Myth and the Illusion of Equal Opportunity, 85 Minn. L. Rev. 587, 617-28 (2000).

4. Katherine Cox, Positive Action in the European Union: From Kalanke to Marschall, 8 Colum. J. Gender & L. 101, 105 (1998) (The phrase “positive action” may have been chosen by the U.K. government as an alternative to “affirmative action” because of the controversy associated with the phrase in the U.S. Whatever its source, “positive action” is the term in general use throughout Europe).


measures include encouraging the recruitment of women, advertising for women in under-represented sectors of the job market, disseminating job information to women and raising the consciousness of women regarding job opportunities, diversifying vocational opportunities for women, offering special job training for women, and encouraging gender sharing of occupational and family responsibilities.\(^8\)

American authors also define "affirmative action" as including ways of mitigating identity-based injustices.\(^9\) Given this purpose, affirmative action has been described as any initiative that seeks to affect positively the number of certain group members within a larger group.\(^10\)

Of course definitions are not value-neutral. And commentators continue to question how the different ways of characterizing affirmative action affect judgments about its efficacy and fairness. For example, Richard Delgado argues that it has been at least misleading to frame affirmative action as an issue of minority representation because what there is right now is a huge affirmative action program for white males.\(^11\)

III. The European Community (EC)

The European Community (EC)—originally called the European Economic Community (EEC) and now a part of one of the “three pillars” of the European Union (EU)—was originally created to enable a number of European states to become a single economic entity. In 1957 six countries signed the Treaty of Rome creating the EEC.\(^12\) Article 2 of the Treaty

\(^8\) Council Recommendation of 13 December in Promotion of Positive Action for Women, O. J.(L 331/34) (Dec. 19, 1984). In this paper we are limited to discussing public employment and not, for example, positive action in public procurement. For a discussion on this issue, see Christa Tobler, *Encore: ‘Women’s Clauses’ in Public Procurement Under Community Law*, 25 E.E. REV. (2000).

\(^9\) David Ingram, *Group Rights*, 44-45 (2000) (criticizing affirmative action because it does little to eliminate the inequalities of power and dominance in capitalist economic systems). See also Gitanjali S. Gutierrez, *Taking Account of Another Race: Reframing Asian-American Challenges to Race-Conscious Admissions in Public Schools*, 86 CORNELL L. REV. 1283, 1287 n. 15 (2001) (distinguishing race-conscious programs which have a remedial objective to correct historic and institutionalized racism from preferential treatment programs which suggest that affirmative action is a “deviation from an otherwise non-racial neutrality”).


\(^12\) Treaty Establishing the European Community, March 25, 1957, as amended and renumbered by the Treaty of Amsterdam Amending the Treaty on European Union, the
provides the following objectives for the EEC: "a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, and accelerated raising of the standard of living and closer relations between the states belonging to it." Articles 117-22 of the Treaty provide for the Member States to develop integrated and harmonious social policies on issues including gender discrimination. In particular, Article 119 (now 141) requires Member States to give men and women equal pay for equal work.

The Treaty has been amended on numerous occasions during the course of the evolutionary process that has given rise to the EU. The most important amendment for the purposes of this paper is the Treaty of Amsterdam of 1997. Article 12 (now 13) provides the EU with the power...
to take "appropriate action to combat discrimination based on sex." Legislation based on this Treaty provision is still subject to unanimity in the European Council.\(^{17}\)

While the terms "EU," "EC," and "EEC" have often been used as if they were interchangeable, for our purposes, the EU is the entity that is made up of the various Member States, and the EC (formerly the EEC) is the institutional locus of the system of extra-national law that governs the Member States of the EU.\(^{18}\)

**A. EC Political Institutions**

Because the EC passed its first sex discrimination legislation in 1976, we shall begin our discussion of the political structure of the EC by describing the four principal EC institutions that existed in 1976.\(^{19}\) The Commission was, and still is, the primary policy initiator of EC legislation. The Council of Ministers\(^{20}\) was, and still is, the primary decision making body of the EC. Its decisions were originally generally unanimous, though majority voting was later instituted for many decisions. The Assembly, now the Parliament, exercised limited advisory and supervisory powers. In 1976 it was composed of delegates from national parliaments. In 1978 its members began to be elected by direct universal suffrage. The Court of Justice was, and still is, responsible for interpreting and applying EC law.

**B. EC Law**

The sources of EC law are treaties, legislation, judicial interpretations, international law, and general principles of law.\(^{21}\) Treaties include founding treaties, such as the Treaty of Rome and its amendments. These constitute the primary law of the EC and establish its political institutions.

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\(^{17}\) For a fuller discussion of the Treaty of Amsterdam, see Nugent, *supra* note 12, at 83.

\(^{18}\) Todd Joseph Koback, *The Long Hard Road to Amsterdam*, 17 Wis. Int'l. L. J. 463, 464 n. 5 (1999). See also James Dinnage & John Francis Murphy, *The Constitutional Law of the European Union* (1996); Nugent, *supra* note 12, at 66, 243-45. (Since the time of the creation of the European Union by the Maastricht Treaty, an amendment to the Treaty of Rome effective November 1993, commentators have been uncertain whether to refer to EU law, EC law, or Community law. Whatever the phrase, Germany has been reluctant to recognize the supremacy of this extra-national law, because it does not sufficiently protect individual rights. Manfred Zuleeg, *Gender Equality and Affirmative Action under the Law of the European Union*, 5 Col. J. Eur. L. 319, 326-28 (1999).).

\(^{19}\) Nugent, *supra* note 12, at 45-46, 49-53.

\(^{20}\) After 1966, the Council did not typically vote on legislative proposals. Instead proposals were delayed until there was unanimous agreement. *Id.*, at 168-69.

\(^{21}\) *Id.* at 242-61 for a fuller discussion of EC law.
They also establish individual rights beyond economic rights and have expressly done so since the Maastricht Treaty in 1993. Article 6 of that treaty provides that the "Union shall respect fundamental rights, as guaranteed by the (1950) European Convention for the Protection of Human Rights and Fundamental Freedoms. . . and as they result from the constitutional traditions common to the Member States, as general principles of Community Law."\

EC legislation is secondary law because it makes the general policies and principles of the treaties into specific laws according to the procedures specified by the treaties. Article 249 (formerly 189) of the Treaty of Rome provides for different types of legislation: regulations, directives, decisions, recommendations, and opinions. Regulations are general in that they apply to all Member States, and they are directly applicable to the Member States and binding on them without the need for national legislation. By contrast, directives are "binding as to the result to be achieved upon each Member State to which [they are] addressed, but shall leave to the national authorities the choice of form and methods." The contrast between regulations and directives is not as great in practice as it might appear. Directives are typically addressed to all Member States; they often leave little room for discretion and they are directly applicable when the national legislation is unduly delayed or is inconsistent with the intent of a directive. Under these circumstances, individuals may sue the Member States in national courts to enforce the rights provided for in a directive. Directives are the legislative source of EC sex discrimination law.

Decisions are binding only on the persons addressed in the decision. Recommendations lack binding force and are not technically part of EC law. Judicial interpretations of primary and secondary law will be discussed in the next section. International law, which has not had a role to play in EC sex discrimination law, includes the international agreements to which the EU is a party as well as international treaties to which Member States are parties, such as the Human Rights Convention.

25. Id.
26. NUGENT, supra note 12, at 246-47. See also Christopher McCrudden, The Effectiveness of European Equality Law: National Mechanisms for Enforcing Gender Equality Law in the Light of European Requirements, 13 OX. J. LEG. STUD. 320, 323 (1993) (arguing that, in general, directives have only 'vertical direct effect' which means that they can only be relied upon against the state and not against private persons.).
27. Opinion of Advocate-General Jacobs Case C-84/95, Bosphorous v. Hava Yollari,
The general principles of law are unwritten law to which the Court of Justice has appealed in interpreting primary and secondary law. There is agreement that the principles include proportionality (the means must be appropriate to the end), non-discrimination and equality before the law, basic human rights, respect for legitimate expectations of those who relied on the law, and due process.\textsuperscript{28}

\textbf{C. The European Court of Justice}

In positive action cases, the Court's judgments are issued in the form of preliminary rulings.\textsuperscript{29} The Court decides legal questions presented by a national court of one of the Member States. The Court interprets the relevant EC legal authorities to determine if the challenged positive action plan is consistent with them, but does not apply the law to decide the case itself. This function is reserved for the national court that uses the preliminary ruling of the ECJ to decide the case. The national courts are legally bound by the ECJ judgment in all decisions in that case. The Court, however, is not bound by the common law doctrine of precedent and could reach a different result in any similar case before it in the future. Nevertheless, the Court does not lightly alter the rules of law in its judgments and Member States consider the Court's judgments applicable and binding throughout the EU for all similar cases.\textsuperscript{30}

National courts are also bound to apply the interpretive methodology used by the Court in deciding a case when a national court interprets national law in relation to EC law. The dominant method of the Court is teleological and contextual. The Court sees EC law as containing a grand design. Individual laws are constituent parts of that design. They have a

\textsuperscript{28} NUGENT, \textit{supra} note 12, at 258-59 and LASOK, \textit{supra} note 22, at 178-98.

\textsuperscript{29} See NUGENT, \textit{supra} note 12, at 262-75, esp. 269-70, for a fuller discussion of the Court and Article 234 of the Treaty that provides the Court's authority for preliminary rulings. At present the Court has 25 members appointed for six-year terms. Member States nominate individuals who are typically "men of affairs" who have been involved in government but may have limited judicial experience. Judgments of the Court are deliberated in secret and decided by majority vote without a published dissent. Preliminary rulings are not typically decided by all of the judges; rather the cases are assigned to a chamber of 3-5 judges. See also Jo HUNT, \textit{THE LEGAL SYSTEM OF THE EUROPEAN UNION IN THE EUROPEAN UNION HANDBOOK} 213, 219-20 (Gover ed., 2d ed. 2002) (The Court now has two female judges. The first female judge was appointed in 1999.). For the most recent information about the Court, visit its website at <http://curia.eu.int/en/>.

\textsuperscript{30} LASOK, \textit{supra} note 22, at 163 (The Court is a "continental court" in that it technically has no law making powers for future cases but merely fills in gaps in legislation.).
purpose that the Court is to discover and make effective.\textsuperscript{31}

The ECJ does not declare national legislation constitutional or unconstitutional in the American sense. It is not an appeals court in the sense that it reviews the final judgments of lower courts. Nevertheless, in interpreting a national positive action plan as consistent or inconsistent with EC law, the Court is articulating fundamental or constitutional principles of EC law.\textsuperscript{32}

\textbf{D. The Equal Treatment Directive and Positive Action in the European Court of Justice}

The operative legislative document concerning gender equality and positive action plans is the Equal Treatment Directive. In the 1970s the Council enacted a series of social policy directives in recognition of the social policy objectives of the Rome Treaty to improve working conditions and the standard of living of citizens of the European Economic Community.\textsuperscript{33} The first directive was the Equal Pay Directive based on Article 119 (now 141) of the Treaty, which requires elimination of unequal pay for women and men.\textsuperscript{34} However, the Equal Pay Directive could not be effective until women had access to better paying jobs traditionally enjoyed by men. Therefore, the Commission proposed the Equal Treatment Directive, and with the advice of the Assembly, now Parliament, the Council passed the Directive unanimously.\textsuperscript{35}

\begin{footnotesize}
\textsuperscript{31} Michelle I. Rozof, \textit{The European Court of Justice's Ruling in Marschall v. Land Nordrhein-Westfalen}, 12 EMORY INT'L L. REV. 1505, 1514 (1998). The Court does not typically emphasize the subjective intent of the legislators in interpreting EC law, because of the complexity of the negotiations that lead to EC legislation and because of the multiplicity of languages involved. Laura Molinari, \textit{The Effect of the Kalanke Decision on the European Union}, 71 ST. JOHN'S L. REV. 591, 603 (1997).


\textsuperscript{33} Molinari, \textit{supra} note 28, at 606-08; Means, \textit{supra} note 12, at 1111-12. The directives came out of a summit meeting of the heads of the Member States in 1972. The meeting initially resulted in the Commission's Social Action Program that was adopted by the Council in 1974 with three stated objectives: full employment, improved working and living conditions, and greater industrial democracy. The objectives required sex equality. So studies were ordered that showed women were forced into a narrow range of jobs without a significant chance of promotion, and the studies led to the directives. Koback, \textit{supra} note 18, at 468-69; \textbf{CATHERINE BARNARD, GENDER EQUALITY IN THE EUROPEAN UNION: A BALANCE SHEET IN THE EUROPEAN UNION AND HUMAN RIGHTS 215-20 (Alston, ed. 1999)}.


\textsuperscript{35} Molinari, \textit{supra} note 31, at 608-09 n. 113; Means, \textit{supra} note 12, at 1112 n. 174. The Equal Treatment Directive was not based upon an explicit treaty provision; rather it was
\end{footnotesize}
Article 1 of the Directive sets forth its purpose: “to put into effect in the Member States the principle of equal treatment for men and women as regards access to employment.” Article 2(1) of the Directive provides that “there shall be no discrimination whatsoever on the grounds of sex, either directly or indirectly.” However, Article 2(4) provides that this prohibition does not apply to measures to promote equality of opportunity for men and women. Positive action is one means to the end of eliminating inequalities that negatively affect women’s opportunities in the workplace. Thus, the Directive permits positive action, or at least some methods of positive action. But as directives bind Member States only to the ends of the legislation and allow Member States flexibility in means, Member States are not required to use positive action to eliminate inequalities that negatively affect women’s job opportunities. Nor are they required to use a particular form of positive action. Member States may choose publicity campaigns promoting jobs for women, restructured workplaces that make it easier for women to balance family and job responsibilities, or quotas, goals, or timetables designed to increase female participation in the workplace. But they must act to end gender discrimination and provide men and women equal access to employment.

Directives typically bind Member States only. Thus, the Equal Treatment Directive does not apply directly to a private employer unless it is controlled by a public entity or public authority, such as private employers that provide state-financed medical services. And the private employer covered by the Directive must be endowed with special powers by the state. If the Council wished to permit an employee to sue a private employer, it would have issued a regulation, which does have a direct effect on private individuals in addition to the Member States.

In the 1970s the Court also established certain legal principles that

justified by Article 235 (now 308) of the Treaty of Rome as a necessary means to give effect to the equal pay provision of the Treaty. The Preamble of the Directive states that Community action is necessary to achieve equal treatment for women and men in access to employment, and equal treatment is an objective of the Community necessary to further the stated objective of improving living and working conditions in the Community.

36. The distinction between direct and indirect discrimination is that direct discrimination requires the use of sex-based classifications (whether or not sex discrimination is intended), whereas indirect discrimination occurs when a facially neutral classification has an adverse effect on one gender. Means, supra note 12, at 1113 n. 182.


would be important in later decisions in the 1990s interpreting the Equal Treatment Directive. The occasion was three cases brought by Ms. Defrenne against her employer Sabena under the equal pay provision of the Treaty of Rome, which does have a direct binding effect on both public and private employers.

In Defrenne II the Court recognized that one incentive for the Treaty's equal pay provision was equal competition in the markets of the Member States. If economics had been the Treaty's sole objective, then the law of sexual equality would have evolved very differently; the U.K. and Ireland argued that they could not afford to eliminate pay discrimination against women. They reasoned that the subsequent increase in labor costs would lead to inflation and make their economies unstable.

However, the Court recognized that the Community had a second objective: the social welfare of workers. Thus the Court held in Defrenne III that Article 119 (now 141) of the Treaty created fundamental rights in workers in the Community. But the European Council in the Equal Treatment Directive had already interpreted the fundamental right to a workplace free of discrimination in terms of formal equality, which does not threaten the inequality in family duties.

The Equal Treatment Directive was deliberately drafted to focus solely on formal equality for women working outside the home. Legal advisors had opined that the EU could legislate only in employment matters. "Legislation in relation to the family would, it was argued, have surpassed the limits of legality. Such reasoning demonstrates once more how the family and work are constructed as mutually exclusive spheres."

In 1984 the Council adopted a non-binding recommendation to clarify its position on positive action. The Recommendation does not include a recommendation for the more controversial forms of positive action, e.g.,

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40. Id. at 464, 472.
42. Gillian More, Equality of Treatment in European Community Law, in FEMINIST PERSPECTIVES ON THE FOUNDATIONAL SUBJECTS OF LAW 261-78 (Anne Bottomley ed., 1996); Gillian More, Equal Treatment of the Sexes in E. C.Law, in 1 FEMINIST LEGAL STUDIES 45, 55-59 (1993). (A 1970s report commissioned by the Commission clearly demonstrated the extent of sex discrimination throughout the EC. As a result, the Commission issued its Social Action Program in 1974. One important provision recognized the need to address the inequality in family responsibilities as an integral part of workplace equality.)
quotas. But the Recommendation does recognize that even the limited goal of equal opportunity for women at work requires addressing inequality in the wider society, including the family. The Recommendation states, "Existing legal provisions on equal treatment which are designed to afford rights to individuals are inadequate for the elimination of all existing inequalities unless parallel action is taken by governments, both sides of industry and other bodies concerned, to counteract the prejudicial effects on women in employment which arise from social attitudes, behavior and structures."44

The positive action measures recommended by the Council included: information, respect, studies, vocational training, counseling, encouragement, adjustment of working conditions, and active participation in decision-making.45 The Recommendation was controversial because the Commission had previously requested a study of positive action schemes in the European Community. The study recommended that a new directive be issued that would make positive action obligatory in the EC and in public bodies in the Member States.46 The Commission agreed with the Report. However, the Council preferred a recommendation because it would be supported by the Member States. For example, the U.K. publicly welcomed the Recommendation which was consistent with the U.K. Sex Discrimination Act of 1975. The Act allows limited forms of positive action such as single-sex training courses.47

E. Criticism of Formal Equality in the Equal Treatment Directive

A fundamental criticism of the Directive is that it is premised on the concept of formal equality. Formal equality requires that men and women who are considered similar as workers are to be treated the same unless a justification clearly exists for differentiating between the sexes. In such a

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44. Council Recommendation 84/635 on the Promotion of Positive Action for Women, 1984 O.J. (L 331/34).
45. Id. at para. 4.
47. Robin & Catherine Chater, Positive Action: Toward a Strategic Approach, 7 WOMEN IN MANAGEMENT REV. 3, 6 (1992) at <http://newfirstsearch.oclc.org/WebZ/FTFE>. After the Recommendation, Member States took the following positive action steps among others: the Netherlands' telecommunications corporation gave a preference for qualified female applicants, bolstered female recruitment advertising, and imposed quotas for appointments (50% for lower jobs and 30% for upper jobs); Belgium provided state-funded experts on positive action for private sector employers; and in 1991, Italy, one of the most progressive of the EC states, provided state-funded financial support for positive action. Id. at 7.
case an exception is permitted to the identity principle. A justification for differentiating between the sexes would exist, for example, whenever inequality of treatment is necessary to ensure equality of opportunity.

One criticism of the Directive’s formal principle is that it is not value-neutral. Rather—so the argument goes—it smuggles in a male norm of the worker to which women are compared, a principle of market domination, and a narrow vision of individualism.48

A second criticism of the Directive’s formal equality principle is that it is inadequate to achieve equal results for women as a group in such stratified patriarchal societies as Europe and the United States,49 where distribution of income, prestige, and well-being are structured along gender lines.50 Women as a group have been, and continue to be, systematically discriminated against as a result of traditional ways of organizing men and women at work and in the family.51 In terms of the race analogy, men still start the employment race for good jobs closer to the finish line and thus they continue to win the races for the better jobs.52

48. More, supra note 42, at 58. See also Bacchi, supra note 10, at 24-25. Formal equality creates a we/they dichotomy where the disadvantaged who fall outside the white male norm can only be let in by conforming to the norm at the expense of other disadvantaged persons and under conditions that are set by those who are already in charge of setting and enforcing the norm.

49. Nick Jewson and David Mason, The Theory and Practice of Equal Opportunity, 34 SOC. REV. 307 (1986). See also Notes, The Relationship between Equality and Access in Law School Admissions, 113 HARV. L. REV. 1449, 1453-54 (2000) (by the late 1960s formal equality was seen to be inadequate to achieve widespread integration. Civil rights advocates argued for a result oriented equality, which the United States Supreme Court accepted but not to the extent of accepting quotas). Compare Diana Majury, Strategizing in Equality, 3 WIS. WOMEN’S L. J. 169, 173-77 (1987) (arguing that women should refuse to commit to any single meaning of equality but “develop some equality based tools [to] assist feminist activists in their work on specific issues”).

50. For a summary of the continuing disparities in workplace success between men and women in the United States, see Lawton, supra note 3, at 599-612. For data comparing American and European gender inequality, see ANNE PETERS, WOMEN, QUOTAS AND CONSTITUTIONS 277-78 (1999).

51. Kevin Brew & Thomas Garavan, Eliminating Equality – Women-Only Training, 19 J. EUR. INDUS. TRAINING 13, 14-15 (1995) at <http://newfirstsearch.oclc.org/WebZ/FSQU> (The gender pay gap in the EU is still 18%. The female employment rate is 53%. The female unemployment rate is 3% higher than men’s. Women account for 77% of low-income employees and they are concentrated in low-income occupations.).

52. Catherine Barnard & Bob Hepple, Substantive Equality, 59 CAMBRIDGE L. J. 562, 565-67 (2000). (One way to picture the formal/substantive equality distinction is in terms of a race analogy. Substantive equality requires that all participants start from the same starting point. Special measures or positive action must be used to compensate women for disadvantages and thus make it more likely that women will be able to take advantage of opportunities available in the job market. By contrast formal equality involves merely the removal of obstacles, e.g., word-of-mouth recruiting and non-job related selection criteria.}
But what alternative or alternatives to formal equality would not be subject to these criticisms?

This distinction between formal and non-formal equality has been described in a number of different ways. One author, for example, distinguishes between individual justice (formal equality) and group justice. The former:

[C]oncentrates on cleansing the process of decision-making, and is not concerned with the result, except as an indicator of a flawed process. It is markedly individualistic in its orientation: concentrating on securing fairness for the individual. It is generally expressed in universal and symmetrical terms: women and men are equally protected. It reflects respect for efficiency, merit and achievement and, given the limited degrees of intervention permitted, it preserves, and possibly enhances, the operation of the market.\(^5\)

Thus, one alternative to formal equality is equal results for women as a group.

In contrast to formal equality, a results-oriented or substantive equality focuses on the goal of equalizing burdens and benefits for women and men. Persons committed to substantive equality attempt distributions that are equal in their effect on the lives of women and men. One argument in favor of the connection between the group model and substantive equality is that women are discriminated against as a group and thus the remedy for that discrimination, including positive action, must also treat women as a group.\(^5\) For example, women’s domestic and parental roles differ from those of men, and these roles make it difficult for women to be perceived as efficient workers. Formal equality allows employers to continue to treat female employees less well than male employees, because they have an apparent market justification for doing so. By contrast, the goal of substantive equality rejects the presupposition of the employers’ perception because it “holds that the disadvantaging of women who do not

However, many more distinctions are possible. The authors, citing other articles, distinguish four “overlapping” conceptions of substantive equality: equality of result, equality of opportunity, equality of substantive rights, and equality of respect. \textit{Id.} at 564 n. 19.).

\(^{53}\) McCrudden, \textit{supra} note 26, at 327. (By contrast, group justice tends to be redistributive and focused on the relative improvement of the position of women.) \textit{See also} Marzia Barbera, \textit{Not the Same? The Judicial Role in the New Community Anti-discrimination Law Context}, 31 \textit{Ind. L. J.} 82, 83 (2002) (distinguishing a substantive rights model in which absolute rights are trump cards and an anti-discrimination or formal equality model in which the best protection for rights “lies in the political process”).

adhere to the male norm is discriminatory.”

As criticism of formal equality in the Equal Treatment Directive continued, women worked to make substantive equality supplant formal equality in EC law. And their efforts met recently with limited success.

F. The Treaty of Amsterdam and Subsequent Legislative Developments

The EU took a step toward substantive equality in the Amsterdam Treaty, which designates equality and positive action as goals in all EU activities. Article 2 specifically provides for “equality between men and women” as one of the tasks of the EU. Article 3(2) provides that the EU is to “aim to eliminate inequalities, and to promote equality between men and women.” Article 118 (now 140) includes “equality between men and women with regard to labour market opportunities and treatment at work” as activities of Member States that the EU promises to support. Article 6 allows the EU to “take appropriate action to combat discrimination based on sex.” But again the Article requires unanimity in the Council, so that the practical effect of the Article is likely to be limited.

A final paragraph has been added to Article 119 (now 141) of the Treaty. The aim of the EU is now “full equality in practice.” To this end, the principle of equal treatment “shall not prevent any Member States from maintaining or adopting measures for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.”

The concept of full equality should be read to include both formal and

55. Helen Fenwick & Tamara Hervey, Sex Equality and the Single Market: New Directions for the European Court of Justice, 32 COMMON Mkt. L. REv. 443, 444-46 (1995) (“Formal equality also supports explanations of gender inequality in terms of individual choices by individual women rather than structural inequalities in a market where efficiency is the primary value. Substantive equality demands that male norms of the efficient and therefore meritorious worker be expanded to recognize disadvantages with which women enter the workplace.”).

56. Treaty, supra note 12.
57. Treaty art. 2.
58. Treaty art. 3(2).
59. Treaty art. 140.
60. Treaty art. 6.
62. Treaty supra note 12, art. 141.
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substantive equality in light of the permissible justifications for positive action. The Treaty now allows three justifications for positive action. Positive action is permissible, first, to make it easier for both women and men to pursue jobs in which they are under-represented. It is important to note that the Treaty does not use the term "compete." "Pursue" suggests that this consequentialist justification is independent of an equality of opportunity justification. We cannot argue here from the language of the English version of the Treaty. Nevertheless, one purpose of the paragraph is to add a consequentialist justification for positive action that is not limited to securing equality of opportunity. For example, positive action that equalized domestic responsibilities would be helpful to women at work, and thus permissible under the Treaty. Positive action may now be justified so long as it is helpful to women in the entire process of job-seeking, and is therefore no longer limited to measures designed to equalize competitive opportunities for women and men. Equally important, the Treaty avoids success verbs such as "achieve," the use of which would clearly suggest something more like a quota that is meant to operate regardless of the qualifications of the candidates. Nevertheless, this language should allow positive action that seeks to achieve substantive results in increasing the percentage of women in the workplace.64

The second justification is similar to arguments based on the concept of formal equality that are designed to permit positive action to remove obstacles, e.g., stereotyping in job selection criteria, that disadvantage women seeking employment. But the language and purpose is broader and includes substantive equality in so far as it aims to prevent stereotypes from continuing to disadvantage women. One way to prevent recurring stereotypes is to increase inter-gender contact. Inter-gender contact reduces prejudice over time when individuals are equal, cooperative, and friendly.65 It would not be unreasonable then for Member States to

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64. The language of the Treaty applies to persons who belong to a gender-based group that is under-represented in a position. Thus, the basis of the classification is under-representedness. The Treaty does not give preferential treatment to women. And thus, this classification is not discriminatory and is not an exception to the formal principle of equality of treatment as expressed in the Equal Treatment Directive. Arguably, Article 141(4) replaces the Directive's Article 2(4) which treats positive action as an exception to equal treatment. Accord Barnard, supra note 52, at 576 n. 96. But see Helen Fenwick, From Formal to Substantive Equality: The place of Affirmative Action in European Union Sex Equality Law, 4 EUR. PUB. L. 507, 515-16 (1998) (Article 141(4) is still a "derogation from the equal treatment principle" and must be strictly interpreted. However, the omission of the equal opportunity language suggests broadening the possibility of positive action toward the substantive equality model).

conclude that increased employment of women outside of traditional bottom-rung jobs is a reasonable means to prevent disadvantages from recurring. It remains to be determined by the ECJ whether in the broad context of changes to the Treaty this justification permits some form of quotas and goals as a reasonable means to increase workplace participation among women.

The third justification is a compensatory argument that may be limited by the Court to the compensation of individual victims who can identify a perpetrator of discrimination. But in light of the breadth of the first two justifications, this may also be read broadly to include group based compensation.

Finally, a relevant provision of the revised Directive is Art 2(8), which provides that Member States may maintain or adopt measures within the meaning of Article 141(4) of the Treaty with a view to ensuring full equality in practice between men and women. But, Member States will be required to establish an independent body to promote equal treatment of women and men. That body will investigate sex discrimination complaints, initiate administrative and judicial proceedings, and publish surveys and reports.

G. Present State of the Argument for Gender Equality in the EU

Substantive equality for women has been controversial in the EU. Positive action to achieve substantive equality in the form of equal outcomes for women in the job market and not just formal equality of opportunity has been subjected to three major criticisms, which have been answered by amendments to the Treaty of Amsterdam.

First, positive action is said to disregard merit, which is purported to be the sole basis for a fair distribution of jobs. The Treaty, however, answers this objection by putting forward three requirements for the fair distribution of jobs that are, as defensible as is the merit principle: such a

66. ALAN GOLDMAN, JUSTICE AND REVERSE DISCRIMINATION 67 (1979). (Compensatory justice is best understood as the compensation of individuals.).


68. Id.


70. For a recent criticism of the merit principle, see Alan Kemp, The Missing Jurisprudence of Merit, 11 B.U. PUB. INT. L. J., 141, 145-46 (2002) (merit as an argument against affirmative action in the U.S. is disingenuous because the basis of U.S. employment
distribution must (1) help under-represented groups overcome their under-
representation, (2) promote equality of opportunity, and (3) compensate for
past harms. There is no suggestion in the Treaty that these principles are
to replace the merit principle that only the most qualified persons may be
hired as part of a positive action plan. Instead all four principles are to be
used together.

Second, positive action is said to be unfair when women who are not
discriminated against are compensated for harms they never suffered and
when underprivileged men are punished for the discrimination perpetuated
primarily by men of privilege. The Treaty recognizes that compensation is
only one of the justifications for positive action and thus is not committed
to the view that positive action itself must provide compensation in all
cases.

Third, positive action, because it is inefficient and unjust, is said to
create a bad precedent for the future. This argument assumes the validity
of the prior arguments. And thus the Treaty answered it in answering the
prior arguments against positive action.

H. Positive Action Judgments in the European Court of Justice

We have provided a brief description of the history of relevant
positive action law in the treaties and legislation in the EC. The central
remaining question is how the Court has interpreted this body of law. The
Court’s judgments can be divided into those made before the adoption of
the Treaty of Amsterdam (1997) and those made after.

In interpreting the Equal Treatment Directive in its first round of
positive action cases, the Court had to decide when positive action is
consistent with the fundamental right to be treated equally. In the two
leading cases, Kalanke and Marschall, the Court set out the following

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71. Treaty, supra note 12.
72. For an excellent evaluation of the arguments against affirmative action, see Richard
Delgado, Ten Arguments Against Affirmative Action, 50 ALA. L. REV. 135, 142-45 (1998);
Charles Daye, On Blackberry Picking, Generations of Affirmative Action, and Less
73. Case C-450/93, Kalanke v. Bremen, 1995 E.C.R. I-1875; Case C-409/95, Marschall
v. Land Nordhein-Westfalen, 1997 E.C.R. I-6363. Since both these cases arose in the
national courts in Germany, it may be helpful to read a general discussion of German
positive action law, see Peters, supra note 50, at ch. IV.
principles. First, positive action is an exception to the fundamental right of equal treatment. Any permissible exception is limited to special measures intended to eliminate or reduce actual instances of inequality. Second, no automatic job preference or quota is justifiable simply because a group is under-represented in a position. Third, a rebuttable presumption favoring women is justified, if women are under-represented in a position and if equally qualified male candidates for the position are objectively assessed on their individual merits.  

A rebuttable presumption favoring women is consistent with the Equal Treatment Directive's emphasis on equal opportunity, because positive action is a reasonable means to achieve equality of opportunity for women by overcoming stereotypes that hinder the advancement of women in the workplace.

I. Kalanke v. Freie Hansestadt Bremen

In Kalanke, the state of Bremen legislated a priority for women in hiring in public employment. The priority was triggered when a female candidate had equal qualifications to the male candidates and women were under-represented in the position. The Bremen law allowed non-traditional job qualifications, including maternal and housekeeping experience, to establish equal qualifications.

Specifically, the law provided:

(2) In the case of an assignment of an activity in a higher pay,
remuneration and salary bracket, women who have qualifications equal to those of their male co-applicants shall be given priority in sectors where they are under-represented.

(4) Qualifications shall be evaluated exclusively in accordance with the requirements of the profession, post to be occupied or career. Specific experience and capabilities, such as those acquired as a result of family work, social commitment or unpaid activity, are part of the qualifications within the meaning of subparagraph (1) and (2) if they are of use in performing the activity in question.

(5) There is under-representation if women do not represent at least one half of the persons in the individual pay, remuneration and salary brackets in the relevant personnel group of an official body.

The facts of the Kalanke dispute are as follows. In 1990 the city of Bremen within the state of Bremen published a vacancy notice for the section manager post in the city’s parks department. Two employees competed for the position, Mr. Kalanke, deputy section manager, and Ms. Glissman. The department manager recommended Mr. Kalanke. But a Conciliation Board ruled that both candidates were equally qualified and that Ms. Glissman should be awarded the promotion because of section 4 of the state of Bremen’s equality law.

Ms. Glissman was appointed and Mr. Kalanke appealed the decision. His suit was dismissed by the lower German courts. However, the Federal Labor Court, before deciding his case, sought a preliminary ruling from the European Court of Justice on the question whether the Bremen state law violated the Equal Treatment Directive.

Advocate-General Tesauro in his opinion determined that the Bremen state law was discriminatory under Article 2(1) of the Directive and that the law did not satisfy the requirements of a valid exception under Article 2(4). The Court followed the conclusion of the AG without further reasoning.

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80. This provision tries to break down the distinction between work in and out of the home. However, such provisions have had only limited success in assisting women in the labor market. Koback, supra note 18, at 473 n. 62.
82. Id. at Judgment ¶1-7.
83. Id. at Judgment ¶11.
84. Id. at Conclusions of the Advocate-General ¶28.
85. Id. at Judgment ¶22 ("National rules which guarantee women absolute and unconditional priority for appointment or promotion go beyond promoting equal
Central to the AG’s reasoning in *Kalanke* is the distinction between equality of opportunity and equality of results, or in other words, the distinction between formal and substantive equality. Automatic quotas, such as the priority in the Bremen law, are interpreted as attempts to achieve equality of results. And equality of results is not an authorized exception to equal treatment in the Directive that allows only positive action plans that improve women’s ability to compete in the labor market with men.\(^8\)

As we saw above, the strictness of the distinction between equality of opportunity and equality of results may be questioned on the ground that a national legislature may reasonably believe that striving to obtain equal results is a reasonable way to increase equality of opportunity for women. After all, the more often public employers hire and promote women, the more likely they are to have experiences that weaken traditional stereotypes regarding working women.\(^8\)

The limited either-or thinking of the AG was clear from the beginning of his opinion when he defined the issue facing the Court as whether the fundamental right of each individual to be free from sex discrimination must give way to the rights of minorities to be compensated for past discrimination.\(^8\) He defined “positive action” as a form of preferential treatment for disadvantaged groups.\(^8\) Since the right to preferential compensation is not a fundamental right, it was easy to conclude that positive action could not trump the fundamental right not to be discriminated against.

But the key question was not whether the Bremen law appeared discriminatory under the Equal Treatment Directive. On its face it provided a priority to women not available to men. The key question was whether the law fell within the exception in Article 2(4), which creates equal opportunities for men and women, including positive action that removes existing inequalities that affect women’s opportunities in employment. According to the AG, positive action that does not remove obstacles is not permissible under the Directive. But the language of the Directive makes it plain that the removal of obstacles is only one example opportunities and overstep the limits of the exception in Article 2(4).”). See also Ellis, *supra* note 43, at 405 (“The brevity of the Court’s judgment suggests some judicial disagreement over its conclusion.”).

86. *Kalanke*, 1995 E.C.R. I-3051 at ¶ 13. The AG may have been influenced by the arguments before the Court by the U.K.


89. *Id.* at Conclusions of the Advocate-General ¶¶ 8-10.
of permissible means to the end of creating equal opportunities.\textsuperscript{90}

In conclusion, the reasoning of the AG is not persuasive regarding the limitations he imposes on positive action. There is little support in the text of the Equal Treatment Directive to support his rigid dichotomy between equality of opportunity and equality of results. Instead the Directive’s purpose of reducing actual instances of inequality in social life suggests a broad reading of the Directive that permits legislation, like Bremen’s, that aims at equal results for women so long as the legislation is reasonably designed to achieve equal opportunity for women.\textsuperscript{91} The reconciliation of equality of opportunity with equality of results is one of the results of the Court’s next positive action judgment.\textsuperscript{92}

\textbf{J. Marschall v. Land Nordrhein-Westfalen}

In its next positive action decision, the Court did not reject its judgment in \textit{Kalanke} but it did distinguish and limit it.\textsuperscript{93} In \textit{Marschall}, the Court allowed a positive action plan that created a priority for women in employment decisions when there are fewer women than men in the relevant positions and female candidates are equally qualified for the position. However, a male candidate could overcome the priority with


\textsuperscript{91} See also Donahue, \textit{supra} note 90, at 738-39.

\textsuperscript{92} \textit{Id.} at 745-54 for a full discussion of the political and business responses to \textit{Kalanke}. In general, some thought that it was the end of shortlists and positive discrimination, except for merit discrimination. Others considered it a “step backward,” “out of touch with reality.” \textit{See also Ninon Colneric, Making Equality More Effective: Lessons from the German Experience, 3 CARDOZO WOMEN’S L. J.229, 244-45 (1996) (The actual effects of Kalanke were limited, because the “vast majority of laws regarding decision quotas were not directly affected.” They already allowed men with special circumstances to create exceptions to the decision quotas.)}. The Commission proposed an amendment to the Equal Treatment Directive that allowed positive action short of rigid quotas. \textit{Proposal for a Council Directive amending Directive 76/207/EEC, 1996 O.J. (C 179) 8. See also Communication from the Commission to the European Parliament and the Council on the interpretation of the Judgment of the Court of Justices on 17 October 1995 in Case C-450/93, 1997 O.J. (C 30) 5. However, the proposal has been mooted by subsequent developments in the Court and in the Treaty of Amsterdam.}

\textsuperscript{93} The ECJ has no formal system of binding case law precedent. A judgment is only binding in the immediate case. Thus, the Court’s decision in \textit{Kalanke} would not have been binding on the Court in \textit{Marschall}. Nevertheless, a prior judgment has persuasive force in later cases, since the Court seeks consistency in its judgments. Rozof, \textit{supra} note 31, at 1516 n.61; \textit{LASOK, supra} note 22, at 163.
evidence that favors the decision to hire him. Commentators have since suggested that this evidence might include evidence that the male candidate has an unbroken work history, or that the male candidate is married with children.

The law of the state of Nordrhein-Westfalen provided that "Where, in the sector of the authority responsible for promotion, there are fewer women than men in the particular higher grade post in the career bracket, women are to be given priority for promotion in the event of equal suitability, competence, and professional performance, unless reasons specific to an individual candidate tilt the balance in his favour." The national law creating the plan was defended before the Court as necessary to counteract the inequality of opportunity suffered by women in the workplace. Public employers tend to promote men over women because of stereotypes that men are heads of households and are the breadwinners for families. In addition, employers believe that women interrupt their careers more frequently than men, are less flexible in the hours they are available for work, and are absent from work more often than men.

In Marschall, a school teacher was denied a promotion that was given to a female teacher. He appealed. A German administrative court believed that the law was contrary to the Equal Treatment Directive as interpreted in Kalanke but stayed the proceedings until the European Court of Justice issued a preliminary ruling on the issue.

In the Advocate-General's opinion in Marschall, Advocate-General Jacobs essentially followed the reasoning of AG Tesauro in Kalanke.

Advocate-General Jacobs initially determined that the plan in Marschall was prima-facie discriminatory and thus contrary to Article 2(1)

95. Austin Clayton, Comment, Hellmut Marschall v. Land Nordrhein-Westfalen: Has Equal Opportunity between the Sexes Finally Found a Champion in European Community Law? 16 B. U. INT’L L. J. 423, 443-44 (1998). The author suggests that permissible other criteria to rebut the presumption might include facts that the male candidate was a member of a racial minority, was the principle childcare provider in the family, or was disabled.
96. Marschall, 1997 E.C.R. 1-6363 at Judgment ¶¶ 3, 13. The law is similar to the law of the state of Bremen at issue in the Kalanke case, except for the presence of the "savings clause" in the law of the state of Nordrhein-Westfalen. See Tobler, supra note 69 at 8.
97. Id. at Judgment ¶ 29. In addition, the Finnish government defended the need for positive action based on its experience that other measures to aid women in employment, such as additional job training and counseling, and steps to assist families in sharing household responsibilities, are insufficient to end job discrimination against women. Id. at Judgment ¶ 16.
98. Id. at Judgment ¶¶ 6-10.
99. Id. at Conclusions of the Advocate General ¶¶ 27-44.
of the Equal Treatment Directive. Regarding whether the plan was saved by the exception in Article 2(4), he reasoned that the Court should follow its judgment in Kalanke and decide that the Nordrhein-Westfalen plan did not fall within the exception. He reasoned that an automatic preference, which was rejected in Kalanke, is one that favors women simply because they are women. Thus, a preference is not saved because it allows men to rebut the preference. Thus, the Nordrhein-Westfalen positive action plan is indistinguishable from the Kalanke plan and must also be rejected.\(^{100}\)

According to the Advocate-General, when candidates are equally qualified, a preference for women cannot seek to achieve equal opportunity for women. Under these circumstances, women already have equality of opportunity or they could not have achieved the status of equal qualifications. If, at this point, women are given a job preference, the effect is to provide them with a competitive advantage that, by definition, goes beyond equal opportunity to equal result.\(^{101}\)

The effect of the shared reasoning of the two AG’s was that the Court was not provided with an opinion that questioned the equal result/equal opportunity dichotomy. Challenges to the rigid dichotomy would have included the following arguments. First, the equal result/equal opportunity dichotomy is a classic example of the fallacy of exclusive alternatives. As we mentioned above, a national legislature might reasonably have considered an automatic preference as a reasonable way to achieve equality of opportunity. The language of the Equal Treatment Directive does not prohibit a legislature from seeking to achieve equal results or to use positive action to achieve an equal result so long as the ultimate aim of the legislature is to achieve equality of opportunity.

Second, an equally qualified female candidate for a job may still require a preference to overcome stereotypes that are used by the public employer at the final stage of the decision-making process. In fact, the need for a preference to overcome stereotypes against women is greatest at this final stage when the candidates’ qualifications are objectively equal and the decision-maker must resort to subjective considerations to choose one person.

In conclusion, the ECJ attempted to establish a compromise position concerning positive action while accepting that the Directive permits only formal equality. Positive action is consistent with the Equal Treatment Directive only when its purpose is to increase equal employment opportunities for women. To do this a plan must allow a male candidate to

\(^{100}\) Id. at Conclusions of the Advocate General ¶¶ 29-32.

\(^{101}\) Id. at Conclusions of the Advocate General ¶¶ 29-32.
show that hiring him is not the result of false stereotypes regarding men and women but that the stereotypes are in fact true regarding him, e.g., that he is the head of a household and its breadwinner. Since these stereotypes are likely often to be true, the ECJ, in interpreting the Directive, did little to help women to achieve even limited equality of opportunity. The Court did not question the assumption that positive action is permissible only if it moves women "up to" a male standard. And thus it could not even begin to craft a decision that addressed the issue whether formal equality, which only moves women up to a male standard, subordinates women to men.

Marschall and Kalanke have continued to influence subsequent positive action cases before the Court. But subsequent legislative developments have broadened the range of possibilities for positive action in the EU. By contrast, the legal developments in the United States have become increasingly hostile to affirmative action. Thus, it will be useful at this point to compare EC law concerning positive action with selected affirmative action decisions of American courts.

IV. American Affirmative Action Law

A. Overview

In previous articles, we have argued that the Marschall and Kalanke positive action plans would likely be declared illegal by the United States Supreme Court under the Equal Protection Clause of the U.S. Constitution and Title VII of the Civil Rights Act of 1964.

Our main reason for speculating that the European positive action plans would be declared illegal under U.S. law was that these plans were to be effective until women held 50% of the jobs. The European plans were triggered by a gross disparity between the percentages of male and female job-holders, based on general population data without regard to the

102. A German court has held that the factors that may rebut the preference include traditional secondary criteria. Clayton, supra note 95, at 448-49 n.125.
percentage of female applicants. American courts have held that such broad comparisons are not probative of the need for remedial legislation. General population comparisons are useful only in minimal-qualification, entry-level positions, and not for jobs with specialized qualifications.105

To understand how the U.S. courts have reached this position and what other factors enter into a decision regarding the legality of affirmative action plans, we shall summarize briefly the state of the law regarding gender-based affirmative action plans under the Equal Protection Clause of the Federal Constitution and then under Title VII.

B. The Equal Protection Clause

1. U.S. Supreme Court Decisions

The Equal Protection Clause of the Fourteenth Amendment states that "No state shall . . . deny to any person within its jurisdiction the equal protection of the law."106 In determining the constitutionality of government discrimination under the Equal Protection Clause, the U.S. Supreme Court uses three standards to review government classifications.

In the area of economic and social legislation, the Court uses a rational relationship analysis. The Court examines a governmental classification to determine that it is a reasonable means to a legitimate government purpose.107 This standard is highly deferential to the government's social

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105. Hodapp, supra note 104, at 100-01. See, e.g., Hazelwood School Dist. v. United States, 433 U.S. 299, 307-08 (1977) (stating that general population comparisons are only useful, if at all, in the case of minimum qualification, entry-level positions and not for jobs with special qualifications not possessed by the general population); Hill v. Ross, 186 F.3d 586, 590 (7th Cir.1999) (comparing the percentage of women in a particular job with the percentage of women in the general population is statistical nonsense, because of the assumption that, absent discrimination, group percentages in any job will mirror the general population).


107. GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 628-39 (13th ed. 1997) (stating that judicial formulations of the standard have varied from more to less deferential to the legislature: from "a fair and substantial relation to the object of the legislation" to "any state of facts (that) reasonably can be conceived." Compare F. S. Royster Guano Co. v. Virginia, 253 U.S. 412 (1920) with Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911). For a typical example of equal protection, pre-1960s tri-partite
A second standard of review is strict scrutiny, which is used in evaluating racial classifications among others. The classification must have a compelling purpose and it must be narrowly tailored to achieve that purpose. This review has often been fatal in fact for government classifications.¹⁰⁹

A third standard of review is intermediate scrutiny, which is used for gender classifications, among others. Gender classifications must serve an important government interest and must be substantially related to the achievement of that objective.¹¹⁰


¹⁰⁹. GUNTHER, supra note 107, at 630 (stating that strict scrutiny is also used in cases involving fundamental rights, e.g., voting, criminal appeals and interstate travel). Recent examples of strict scrutiny in affirmative action cases are Adarand Constructors Inc. v. Pena, 515 U.S. 200, 235 (1995) (race as a suspect class); Gratz v. Bollinger 539 U.S. 244, 156 L. Ed. 2d 257 (2003) (University of Michigan’s points-based undergraduate admissions policy, which automatically granted additional points to every ‘underrepresented minority’ applicant, violated the Fourteenth Amendment’s equal protection clause and Title VI of the Civil Rights Act of 1964); and Grutter v. Bollinger 539 U.S. 306, L. Ed. 2d 304 (2003) (narrowly tailored use, by the University of Michigan’s Law School, of race in its admissions decisions to further a compelling interest in the educational benefits of a diverse student body did not violate the Fourteenth Amendment’s equal protection clause or Title VI of the Civil Rights Act). The source of strict scrutiny lies in a footnote in United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938) (“prejudice against discrete and insular minorities may be a special condition, which tends to seriously curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.”). Although strict scrutiny is often fatal in fact, the Court has never explicitly adopted a per se rule that all governmental race-based classifications are per se invalid, that is, that the Constitution is “color-blind.” See generally GUNTHER, supra note 107, at 644, 670.

¹¹⁰. Craig v. Boren, 429 U.S. 190 (1976). The concurring and dissenting opinions use some form of the rational relation standard. The source of the Court’s reasoning for intermediate scrutiny is Frontiero v. Richardson, 411 U.S. 677, (1973). Justice Brennan argued unsuccessfully that gender was a suspect classification on the grounds of the country’s long history of sex discrimination that put women “not on a pedestal, but in a cage.” Women, like blacks, have been subject to stereotypes that denied them the right to hold political office, serve on juries, bring lawsuits, own property, and vote. And, women still face pervasive, invidious discrimination based on an immutable characteristic that bears no relation to ability and subjects women to a lower status. By contrast, Justice Scalia has difficulties with women as a “[d]iscrete and insular minorit[y]’ unable to employ the ‘political processes ordinarily to be relied upon,’ when they constitute a majority of the electorate. And the suggestion that they are incapable of exerting that political power smacks of the same paternalism that the Court so roundly condemns.” United States v. Virginia, 518 U.S. 515, 575 (Scalia, J., dissenting).

¹¹¹. Carey Olney, Better Bitch than Mouse: Ruth Bader Ginsburg, Feminism and VMI,
scrutiny requires an "exceedingly persuasive justification."

Her language raised the question of whether the Court was abandoning intermediate scrutiny in gender classification cases in favor of strict scrutiny. Although the question remains open, our conclusion is that courts will continue to apply intermediate scrutiny to gender classifications until the Court clearly holds that the standard has changed.

A question of more immediate importance to understanding intermediate scrutiny is how the Court has applied that test. A review of its gender discrimination decisions shows that the Court is willing to permit laws that are intended to compensate women for past economic discrimination. For example, in Kahn the Court allowed a property tax exemption for widows but not widowers. The Court rejected the argument

9 Buff. Women's L.J. 97, 110-15, 123-24 (2001) (noting that some of the harshest criticism of her position that women should be elevated to meet the male standard comes from dominance theorists like Catherine MacKinnon who believe that the authentic voice of women is suppressed by a patriarchal society). See, e.g., Gunther, supra note 107, at 716-17 (discussing whether it is constitutionally permissible for states to act on a belief with a "measure of truth" that women have a different attitude or "voice" than men).

112. Virginia, 518 U.S. at 533-34 (1996). Justice Ginsburg is suspicious of the neat packages of the three types of scrutiny. She has stated that the formulation of intermediate scrutiny is that gender-based discrimination will not be permitted unless the state provides an exceedingly persuasive justification for the difference in treatment and the difference does not rely on stereotyped generalizations regarding women. Ruth Bader Ginsburg & Deborah Jones Merritt, Affirmative Action: An International Human Rights Dialogue, 1 Rutgers Race & L. Rev. 193, 212-13, 225-26 (1999) (noting that Marschall is sensitive to unconscious bias which continues to be a problem in the U.S. where "[t]he natural inclination of predominately white male middle managers is to hire and promote one of their own.").


114. Some authorities argue that the Court is moving toward a higher standard for gender classifications than traditional intermediate scrutiny. Virginia, 518 U.S. at 573 (J. Scalia, dissenting); Montgomery v. Carr, 101 F.3d 1117, 1123 (6th Cir. 1996); Jason Skaggs, Justifying Gender Based Affirmative Action under U.S. v. Virginia's "Exceedingly Persuasive Justification" Standard, 86 Cal. L. Rev. 1169, 1174, 1196-1209 (1998). Four circuit courts use intermediate scrutiny in all gender classification cases, including affirmative action. The 6th Circuit Court of Appeals uses strict scrutiny for gender-based affirmative action cases. The author argues for using the "exceedingly persuasive justification" standard for all gender-based classifications, because, in part, gender should face a lower level of scrutiny than race which is a more dangerous classification. Some commentators argue that including women as a suspect class "may ultimately hurt women by restricting their exercise of legislative power in gender-specific ways to foster women's equality." Tracy Higgins, Democracy and Feminism, 110 Harv. L. Rev. 1657, 1675 (1997).

115. Kahn v. Shevin, 416 U.S. 351 (1974). Now-Justice Ginsburg argued this case and lost. She argued that the decision ignores "the provision's roots in women's role as subservient spouse," because the law did not apply the small tax exemption to divorced women or single heads of households, women who because of past discrimination might be most in need of compensation. Ginsburg, supra note 112, at 213.
that the classification of all widows, but not widowers, as needy was a stereotype that harmed women. Instead, the Court applied a deferential rational relation test because a tax statute was involved and upheld the statute as a permissible remedy for past discrimination. The dissent argued that the statute was under-inclusive because wealthy widows received the benefit of the statute and that a 90-year-old statute could not have intended to remedy discrimination against women.

In Webster,\textsuperscript{116} the Court upheld a statute that allowed women to calculate their average monthly wage in a way that gave them higher retirement benefits than men. The Court held that the statute was clearly compensatory without any accompanying harmful stereotypes.

In Virginia, which opened the doors of the formerly all-male Virginia Military Institute to women, the Court recognized that some affirmative action is necessary to compensate women for the economic disadvantages they have suffered and to enable them to achieve equality of opportunity to compete with men. Then women will be able to remove for themselves the last remnants of economic disability.\textsuperscript{117}

2. Danskine v. Miami Dade Fire Dep’t.

A recent example of the use of intermediate scrutiny in evaluating an affirmative action plan designed to compensate women for the continuing effects of discrimination is Danskine v. Miami Dade Fire Dep’t.\textsuperscript{118} There the parties agreed to the application of the intermediate standard that the court interpreted as follows. First, remedying past discrimination in society against women is an important government objective. Second, the government must present sufficient probative evidence of discrimination, but its evidence need not be as strong as that required in strict scrutiny cases. Third, gender-based affirmative action need not be the government’s last resort to remedy discrimination.\textsuperscript{119}

At issue in the case was the affirmative action plan of the county fire department that gave preferential treatment to women in hiring for entry-level firefighter positions. Men who unsuccessfully applied for these positions challenged the county’s long term hiring goal of 36% women as unreasonably high. The objection to the fire department’s long-term goal was that it was not substantially related to the department’s legitimate interest in remedying discrimination. Specifically, the objection was that

\begin{itemize}
  \item \textsuperscript{116} Califano v. Webster, 430 U.S. 313 (1977).
  \item \textsuperscript{117} Virginia, 51 U.S. 515 at 432-33.
  \item \textsuperscript{118} 253 F.3d 1288 (11th Cir. 2001).
  \item \textsuperscript{119} Id. at 1294-95.
\end{itemize}
the 36% figure was based on general population figures. The department arrived at this number by first determining that women constituted 52% of the county’s population. It then discounted this number by 30% because not all women are interested in becoming, or physically able to be, firefighters.  

Certain facts in the case were undisputed. The fire department had excluded women from firefighting positions until the late 1970s or early 1980s. In 1983, the department was only 1% female while the general population of the county was 52% female. The county was unsuccessful in recruiting female firefighters because of its history of discrimination. Then, the county required preferential hiring for women as part of its voluntary affirmative action plan. By 1994-97, the period when the complaining male applicants were not hired, the percentage of entry-level female firefighters went from 8.89% to 11.6%.  

The court’s reasoning recognized that the government is not permitted to rely on general population figures, especially where more refined data existed that more closely approximated the qualified labor pool. The key question was what percentage of women in the county were able and willing to be firefighters. The male applicants introduced statistics that suggested that between 16 and 22% of the women in the county were able and willing to be firefighters. They argued, on the basis of these numbers, that the 36% goal for hiring female firefighters was unreasonable. The court disagreed. It held that a gap of 4-10% between the percent of women in the department (12%) in 1997 and the plaintiff’s own estimate of what the percentage of women should have been (16-22%) was sufficient evidence that the plan was substantially related to the goal of reducing discrimination under the intermediate scrutiny standard.  

The court was troubled by the admission of the department that the goal of 36% was unrealistic and probably unattainable, even in 15-20 years. In fact, the actual percentage of women hired each year was 25%. Nevertheless, that 25% figure was only 3% above the range of plaintiffs’ estimate of the proper hiring goal. Nevertheless, the court opined that the plan might be successfully challenged in subsequent litigation, because its stated goal of 36% was so unrealistic that the plan could not be designed as

120. Id. at 1289, 1295 n.5.  
121. Id. at 1290-91.  
122. Id. at 1296.  
123. Id. at 1295-96.  
124. Id. at 1295-98.
a temporary means to remedy past discrimination. 125

The duration of an affirmative action plan is an important consideration in evaluating the plan. A valid plan must be designed to attain—and not to maintain indefinitely—a balanced workforce. Courts reason that a permanent plan is more likely to affect negatively the legitimate interests of men in the workplace. 126

Judge Hand used his concurring opinion 127 to argue that affirmative action law is an example of what is wrong with American society. "We have developed an overweening desire in our approach to societal issues to try to make all things perfect through the use of law . . . We allow ourselves to be involved in social engineering which is, at best, not an exact science and rarely succeeds in solving its honest intents." 128 The judge would limit the law to ensuring "any who are confronted with it that they will have equal opportunity to or for justice." 129 Any attempt by the law to go beyond this limited goal is "meddling" and "micro management" that will lead to the "loss of individual freedom." 130 The judge was particularly concerned because in this case the county stated during oral argument that it had ceased to discriminate. Thus, for the judge, it was axiomatic that affirmative action was an unjustified attempt by the government to reach a "perceived balance." 131

This judge's opinion is similar to the concurring opinions of justices Scalia and Thomas of the Supreme Court in Adarand, a case where the Court rejected a race-based affirmative action plan using the strict scrutiny standard. Both justices argued that constitutionally there is only one race, American, and that benign discrimination, such as affirmative action, is as obnoxious as malicious prejudice. 132 All three judges accept the narrowest notion of formal equality that permits a difference in treatment only to

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125. Id. at 1298, 1301-02.


127. Danskin, 253 F.3d at 1301-02.

128. Id. at 1302.

129. Id.

130. Id.

131. Id.

132. 515 U.S. at 237-38. Some commentators believe that no racial classification can survive the Adarand test of Scalia and Thomas, who believe that the Constitution does not recognize "group-based remedies," because there are no debtor/creditor races in the Constitution and that there is no "benign discrimination." GIRARDEAU A. SPANN, THE LAW OF AFFIRMATIVE ACTION: TWENTY-FIVE YEARS OF SUPREME COURT DECISIONS ON RACE AND REMEDIES 55-56 (2000).
compensate identifiable victims of purposeful discrimination by an identifiable perpetrator.

Previously, we showed how the European Union's positive action position had moved beyond this narrow conception in order to reduce the systematic discrimination that women suffer there. We have noted the evidence that women in the U.S. also continue to suffer from systematic discrimination. We have argued in this paper that positive action is a reasonable means to achieve substantive equality for women. And, Danskie illustrates the dilemma women face if individual discrimination cases are the sole means to remedy past discrimination and to achieve "equal opportunity to or for justice." In Danskie the court found evidence of the effects of past discrimination, which the county was trying to remedy. But, the county was not prepared to admit continuing discrimination. The past victims of discrimination are time-barred. The present victims face a vigorous defense and expensive litigation. How will the equality of opportunity the dissenting judge seeks be achieved? The impossibility of women's pursuit of fairness through individual litigation must be recognized in light of the increased acceptance of a right of an employer to associate with whomever he pleases, without regard to other social values such as equality.133

C. Title VII of the Civil Rights Act of 1964134

The U.S. Supreme Court has never decided the constitutionality of a public employer's gender-based affirmative action plan under the Equal Protection Clause. But, it upheld a public employer's voluntary gender-based affirmative action plan under Title VII in Johnson v. Transportation Agency.135

The facts of that case were that a male employee (Johnson) and a female employee (Joyce) of the Transportation Agency of Santa Clara County both applied for a promotion to the position of road dispatcher. The Agency and the County had adopted voluntary affirmative action plans that permitted gender to be used as a factor in employment decisions involving traditionally segregated job classifications where women were significantly under-represented. The Agency's hiring procedures allowed it to hire any candidate from the top seven candidates for a position. Johnson

133. See Hasnas, supra note 70, at 430-33.
135. Johnson, 480 U.S. at 641-42.
and Joyce were among the top seven candidates for the road dispatcher position.

Johnson had scored higher after an initial interview, and he scored first after a second interview with Agency supervisors, who recommended that he be promoted. Joyce complained about the hiring process, in part because one of the interviewing supervisors had described her as a “rebelrousing, skirt-wearing person.” The Agency had no female skilled employees and no woman had ever been employed as a road dispatcher. The director of the Agency considered these facts and promoted Joyce. The trial court found for Johnson but the Ninth Circuit reversed.3

The Supreme Court held that the same standard for legitimate affirmative action plans applies to private and public employers under Title VII and that the Agency plan met those standards.137

The requirements for a valid affirmative action plan under Title VII are as follows. (1) The male and female candidate must be qualified for the position. (2) There must be a conspicuous imbalance of women in the traditionally segregated job at issue. (3) The plan must be temporary. And, (4) the plan must not unnecessarily trammel rights of males or create an absolute bar to their job advancement 138

The most significant issue for some members of the Court was the required degree of fault of the employer.139 Johnson argued that there was

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136. Id. at 619-26. See also, Johnson v. Transp. Agency, 770 F.2d 752 (9th Cir.1985). The trial court found that Johnson was the most qualified candidate, that the Agency was not guilty of purposeful discrimination, and that the Agency’s plan was not temporary because it contained no termination date by which a balanced workforce had to be achieved. The Ninth Circuit held that the Agency was not required to prove its own past discriminatory conduct because there was evidence of a conspicuous imbalance of women in its workforce. The court also ruled that the plan was temporary. We question the finding of the trial court that Johnson was the most qualified candidate. The Agency rules did not require a determination of the most qualified candidate. Instead, the Agency director could choose one candidate from the seven most qualified candidates. The amicus curiae brief of the American Society of Personnel Administration questioned whether the notion of best qualified makes sense for semi-skilled positions, especially where, as in this case, the interview scores are not objectively verified. American Society for Personnel Administration as Amicus Curiae at 9-10, Johnson, 480 U.S. 616 (1987) (No. 85-1129). The appeals court did not discuss the trial court’s qualification finding. Johnson, 770 F.2d 752.

137. Johnson, 480 U.S. at 642.

138. Id. at 630. See also United Steelworkers of America, 443 U.S. 193 (1979).

139. Justice O’Connor took a narrow view of permissible plans and would require evidence of discrimination by an employer that would satisfy a prima-facie case. Johnson, 480 U.S. at 637-47 (arguing that the absence of any female road dispatchers would meet the prima-facie test). Justice Scalia, in his dissent, stated that most important proposition of the case was that “sexual discrimination is permitted under Title VII when it is intended to overcome the effect, not of the employer’s own discrimination, but of societal attitudes that
no evidence in the record regarding the number of women who applied for skilled positions with the Agency and no evidence of the number of women in the qualified labor pool for skilled positions. Thus, there was not sufficient evidence in the record that the Agency had discriminated against women. The Agency countered that women had not applied for skilled positions because of the employer's history of discrimination. It pointed to anecdotal evidence that women were denied training given to men, that work was assigned to women because of male supervisors' feeling about what work was appropriate for women, and that an early job description for road dispatchers was written to refer only to men.\textsuperscript{140} A legitimate voluntary affirmative action plan does not require a finding of intentional discrimination by the employer, but in any case, given the evidence, Justice Scalia's suggestion in his dissent, that there was no discrimination on the part of the employer, was mistaken. There \textit{was} evidence of the employee's past intentional discrimination.

Precedent did require that the plan be temporary and the Agency plan had no specific termination date. However, the plan stated that its long-term goal was to achieve a work force reflecting the gender composition of the area work force. Short-term goals were established so that the Agency could measure its yearly improvement in its long-term goals. According to the Court, this evidence was sufficient to meet the temporary requirement.\textsuperscript{141}

Because Johnson had no entitlement to the road dispatcher position and he remained free to apply for future promotions, the Court held that the plan did not unnecessarily trammel his rights. Also the plan did not set aside places for women or prevent men and women from competing for positions. "No persons are automatically excluded from consideration; all are able to have their qualifications weighed against those of other applicants."\textsuperscript{142}

Justice Scalia's dissent in Johnson has been said "to epitomize the conservative opposition to affirmative action."\textsuperscript{143} His argument is based on
the following points. First, the plain language of Title VII clearly prohibits any sex discrimination in employment, which includes affirmative action plans like those of the Transportation Agency. Second, this plan did not remedy discrimination because there was no prior sex discrimination to remedy. Third, the trial court had found that Johnson was better qualified than Joyce and thus he was an innocent victim of discrimination who had been denied a promotion he had fairly won. Fourth, without evidence of specific and egregious discrimination, the majority had embarked on social engineering that had the unattainable goal of reshaping every workforce to mirror the overall population.¹⁴⁴

These arguments are similar to the objections of the dissenting judge in Danskin, and our response is also similar. Both sets of arguments are based on an ideological reading of the case. In fact, the Transportation Agency never had any female dispatchers. There was anecdotal evidence of the discriminatory attitudes there. And, the trial court concluded on the basis of selective evidence that Johnson was better qualified than Joyce. Finally, subsequent information that little has changed for women at the Agency since the time of the decision militates against the charge of social engineering.

U.S. courts are clearly divided on the issue of affirmative action, as are the judges and advocates-general in the European Court. There, recent legislative changes have sought to break the deadlock in a way favorable to positive action, but in America the history of affirmative action, especially its recent history, shows a turn away from affirmative action.

D. History of Affirmative Action in the U.S.¹⁴⁵

President Kennedy’s Executive Order 10925 in 1961 mandated federal contractors to “take affirmative action to ensure that the applicants are employed, and are treated during employment, without regard to race, creed, color or national origin.”¹⁴⁶ The program was voluntary.

In 1965 President Johnson, without much public comment, issued Executive Order 11246 to ensure that federal contractors used more minority contractors and took pre-contract steps to hire and promote more

¹⁴⁴. Id. at 160-63.
¹⁴⁵. Because of the brevity of this discussion, we refer the reader to the more detailed account in Peter Schuck’s *Affirmative Action: Past, Present and Future*. 20 YALE L. & POL’Y REV. 1, 47-54 (2002).
minority employees. His justification was that "you do not take a person who for years has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, 'You're free to compete with others' and justly believe that you have been completely fair."\footnote{147} In 1967, women were added to the protected groups, and specific goals and timetables for the prompt achievement of full and equal employment opportunity were required in 1968.

In 1970, President Nixon demanded workforce percentages with specific target ranges for certain federal contractors. In 1977, under President Carter, Congress approved a 10% set-aside for minorities under the Public Works Employment Act. But, beginning in 1980, President Reagan sought the abolition of all affirmative action, primarily through judicial appointments. President Clinton favored limited affirmative action but not quotas. Even after the \textit{Adarand} decision struck down a federal race-conscious affirmative action plan under the strict scrutiny standard, President Clinton still allowed procurement preferences where there was evidence of discrimination in particular industries.

Finally, two states, Washington and California, have recently adopted ballot initiatives invalidating racial preferences in public employment and education.

\section*{E. Similarities and Differences in Positive/Affirmative Action Law in Europe and the United States.}

First, both courts emphasize that justified plans remove stereotypes that stand as obstacles for the equal opportunity of women to compete with men. Justified plans may use sex as a decision-making factor but absolute quotas are forbidden.

The differences are that American experiences made the United States begin with slavery and race-conscious classifications and only subsequently turn to gender-based classifications.\footnote{148} By contrast, the EC begins with gender discrimination. As a result of the continuing struggle to

\footnote{148} See Ann Shalleck, \textit{Reviving Equality: Feminist Thought about Intermediate Scrutiny}, 6 J. GENDER SOC. POL'Y & L. 31 (1997) (some women are symbolically committed to strict scrutiny for gender classifications, because it is the highest level available in equal protection analysis). However, the Court may be collapsing together the levels of review, strict scrutiny and rational relation review, because rational relation review is becoming stricter and strict scrutiny milder. Donna Matthews, \textit{Avoiding Gender Equality}, 19 WOMEN'S RTS. L. REP. 127, 144 (1998) (arguing that women are a suspect class, even though they are not a "discrete and insular minority" because "women are still largely excluded from political and economic power").}
free the United States from the effects of slavery, Americans remain suspicious of racial discrimination. By contrast, EC gender discrimination law began with an economic agreement against equal pay discrimination, within Member States still organized around traditional male-female family roles. For example, until 1976, the German Civil Code listed a wife’s primary responsibility as keeping house, and German tax codes favored households where the husband was the primary breadwinner.\textsuperscript{149}

Second, American courts use fixed categories of judicial review, which virtually determine the result in particular cases. By contrast, the ECJ has established a permissible goal for positive action based on EC legislation.

Third, the proceedings before the U.S. courts are adversarial, while the preliminary ruling proceedings are not adversarial. Fourth, recent legislation in the EC has strengthened positive action, while American legislation has recently invalidated affirmative action.

In light of these similarities and differences, we agree that the EC “has made it easier for women to benefit from voluntary gender-based affirmative action programs” than has the United States.\textsuperscript{150} We shall now examine four recent ECJ judgments to determine if the promise has been fulfilled.

\textsuperscript{149} Rozof, \textit{supra} note 31 at 1505.

\textsuperscript{150} Amie Needham, \textit{Level the Playing Field: Affirmative Action in the European Union}, 19 N.Y.L. SCH. J. INT’L & COMP. L. 479, 481, 493-96 (2000) (The ECJ allows positive action when candidates are equally qualified and are given individual consideration. The Supreme Court does not require the employer to give employees an individualized consideration but does require the Court to balance the rights of women with the rights of males. The ECJ approach, which stresses individualized consideration, "ends the portrayal of women as employees unjustifiably gaining from quotas" by employers who automatically hire women to forestall future litigation. The ECJ approach also emphasizes unconscious discriminatory stereotypes. This approach allows the Court to recognize that under-representation of women is due to "structural elements which are extremely difficult to tackle using only traditional anti-discrimination legislation." By contrast, American courts emphasize intentional discrimination and the fault of the individual defendant/employer). For an earlier and more positive perspective on American affirmative action, see \textsc{Sandra Fedman}, \textit{Women and the Law} 393 (1997) (clear trend of U.S. Supreme Court justices is in favor of substantive equality that rejects individualism and endorses a social responsibility of the state to take positive action to aid women).
V. Four Recent Positive Action Judgments of the ECJ

A. Badeck

1. The First Issue.

The government of the Land Hesse required that its administrative departments eliminate under-representation of women. Each department had to develop an advancement plan for women that required equally qualified women to be offered jobs until women filled at least one-half of all jobs. An exception existed if reasons of greater weight rebutted the preference for the female candidate. The plans were valid for two years or until the number of female employees equaled or exceeded the number of male employees for each particular job group. Some 46 members of the Hesse legislature challenged the positive action plan as contrary to the Equal Treatment Directive. The Hesse Constitutional Court sought a preliminary ruling from the ECJ interpreting the Directive with respect to this plan.

The ECJ cited both Article 2 of the Equal Treatment Directive and Article 119(4) of the Treaty of Amsterdam as relevant legal authority. But, it stated that it would rely on the Treaty "only if the court considers that art. 2 precludes national legislation such as that at issue in the main proceedings." The ECJ applied its principles from the Kalanke and

151. Badeck, 2000 E.C.R. I-1875, ¶¶ 7-9. “Law of the Land of Hesse on equal rights for women and men and the removal of discrimination against women in the public administration.” Id. ¶¶ 1-14. Paragraph 1 states the aim is “equal access of women and men to posts in the public service, by the adoption of advancement plans relating to conditions of access and promotion for women and their working conditions, with binding targets.” Id. ¶ 1. The plans were initiated in 1993 and will exist through 2006. The ECJ refers to the plan as using “flexible result quotas” because the targets are not fixed uniformly for all departments and all decisions. That is, there is no tie-breaker that favors women automatically. Id. ¶ 28. In our view, these are not quotas but timetables and goals that are contained in “advancement plans,” a less controversial phrase used in the Hesse legislation. The distinction between “advancement plans” or “equality plans” in Badeck and the “decision quotas” in Kalanke and Marschall is important. Equality plans which are newer are more likely to be accepted because they are less likely to be perceived as requiring a decision favoring women. Colneric, supra note 83, at 241-45.


153. Id. ¶¶ 3-6, 14. AG Saggio argued in his opinion that the new amendment to the Treaty requires a broad interpretation of EC equality law that allows positive action when gender-based disadvantages cannot be remedied in any other way. Id. ¶¶ 26-27. We have argued previously that the Treaty goes even farther and allows positive action under three different justifications, including when it is likely to be helpful to women to achieve equality. The Court also referred to the Council Recommendation of 1984 on the promotion of positive action for women.
Marschall judgments to determine that these positive action plans are consistent with the Directive. The Court first considered whether the plan in general was consistent with the Directive and then considered four specific parts of the legislation.

The Court stressed that the plan allowed for individualized consideration of all candidates. Such selection criteria as family work, seniority and age, and date of the last promotion are to be individually considered but only insofar as they are important for the "suitability, performance and capability" of candidates, and such selection criteria as family status and income of a partner are immaterial. And, part-time work and delays in training while caring for dependents may not have a negative effect on a candidate's evaluation. Also, the law allowed that "reasons of greater weight" may oppose the selection of women. These include preferences for the disabled, part-time employees, certain public sector employees, and the long-term unemployed to rebut the preference for women. Thus the plan was consistent with Marschall and the Directive.

2. Comparison with the U.S. Supreme Court.

In comparing ECJ judgments and Supreme Court decisions, we noted earlier that the plans in Kalanke and Marschall would likely be held unconstitutional under the American Equal Protection Clause and thought to violate Title VII. European plans with their 50% goals are not sufficiently closely tied to the government's legitimate goal in reducing social discrimination against women for an American court. American courts have consistently held that broad comparisons between the number of women in a particular job and general population data are not probative evidence of the need for remedial legislation. According to American courts it is unrealistic to assume that women will seek employment in the same proportion as their representation in the general population.

154. Id. ¶ 10.
155 Id. ¶¶ 31-33, at I-1890-92. The legislation is clearly intended to achieve substantive equality rather than only formal equality "by reducing the inequalities which may occur in practice in social life." Id. One commentator believes that the Court in Badeck abandoned the formal equality principle that set equality of opportunity against equality of result. Kristina Kuchhold, Badeck: The Third German Reference on Positive Action, 30 INDUS. L.J. 116, 119 (2001).
156. Badeck, 2000 E.C.R. I-1875, ¶¶ 34-35, at I-1893 (The Prime Minister identified these preferences in response to a written question from the Court).
The distinction between European equality plans with timetables for large organization units and American decision quotas that favor women in individual decisions explains why the Europeans use the 50% goal. The comprehensiveness of the plans considered by the ECJ contrasts with the plans for specific jobs evaluated by American courts. In *Badeck*, the ECJ first examined the entire positive action plan required in all departments. By contrast, because of the adversarial nature of individual discrimination cases in the U.S., in *Danskine* and *Johnson* the courts were considering an affirmative action plan limited to just one position. The European 50% goal makes more sense when a large number of jobs in different sectors and grades of public service are considered. Women may not be interested in a particular government job, but given the vast array of government jobs only a principled libertarian would reject a job just because it was a government job.

One may challenge our attempt to compare European and American decisions on the ground that ECJ judgments are not based on the extensive evidentiary record that is required in U.S. affirmative action cases. We recognize the importance of the difference but believe that discussing the reasons for the difference is important in understanding the reasoning of the two courts.

First, American courts implicitly assume that only some women have been disadvantaged by discrimination. Women who are not interested in or qualified for a position cannot have been harmed by discriminatory decisions concerning that position. For American courts, social discrimination does not refer to the pervasive network of systematic gender discrimination. Instead, the courts assume a model of methodological individualism. Social discrimination is the sum total of individual acts of discrimination that are intended by an individual employer and that harm an individual woman. The Equal Treatment Directive requires that permissible positive action remove existing inequalities that affect women's opportunities. Thus, for both courts permissible positive or affirmative action may remedy actual inequalities. The difference is that the European Equal Treatment Directive uses the plural to describe these inequalities. They affect women's opportunities — not only a particular woman's opportunities. Thus, the ECJ has been inclined to accept attempts by Member States to remove women's inequalities without evidence that

(30% of government contracts were reserved for minority businesses because 30% was midway between the percent of minority contractors and the percent of minorities in the area). Compare United States v. Paradise, 480 U.S. 149, 179, 182 (1987) (the Court permitted a race-conscious hiring floor of 50% in order to quickly achieve 25% black representation among police officers).
specific women have been injured by a specific discriminatory decision.

A similar point may be made using the concept of fault in discrimination law. The need to establish fault or intentional discrimination is central to American discrimination law but not to EC law.\textsuperscript{59} Remediing social discrimination is a legitimate government purpose under intermediate scrutiny. Nevertheless there must be some evidence of fault on the part of the individual government employer, namely, evidence that the government employer has itself been guilty of discrimination. However, the justices of the Supreme Court divided on the degree of fault of the employer required to make a gender-based affirmative action plan permissible. The justices’ positions range from the manifest imbalance requirement, to evidence of a prima-facie case, to proof of intentional discrimination.

The American courts’ use of the qualified labor pool as the comparator to determine if a manifest imbalance exists incorporates the fault concept. To illustrate this point, we shall use numbers from the \textit{Danskine} decision. There the employer had a workforce in which only one percent of its employees were women. The employer then created an affirmative action plan requiring that 36% of entry-level hires be women. This percentage was based on general population figures, discounted because of a belief that some women would not be interested or qualified for these positions. Certainly if 36% of the hires should be women and the employer has only 1% female employees, it is reasonable to assume that the employer bears some fault for not having hired qualified female applicants. It must have known that it was not hiring enough women, given the qualified labor pool. Even if its reputation for discriminating against women caused women not to apply for positions, given the huge disparity, the employer should have recognized that something was wrong in its failure to hire qualified women.

If the 36% figure is not sufficiently realistic to show a manifest imbalance, i.e., some fault on the part of the employer, then the affirmative action plan cannot be justified. The 36% goal would not be realistic if, for example, 12% of the hires were women and only 16% of qualified applicants were women. Under this situation the employer would not be so clearly at fault for not hiring the full 16% of qualified female applicants.

By contrast, the European Court is not required to find employer fault before allowing it to take reasonable steps to remedy societal discrimination. It need only show a legitimate end and a proportional means, that is, the means must fit with the end sought by the legislation.

\textsuperscript{159} See discussion at note 150.
Badeck supports our hypothesis that the ECJ is more likely to allow positive action plans to assist women in employment. However, the European analysis might seem problematic to the American courts when applied only to specific jobs. Imagine, for example, that a positive action plan sets a decision quota for a specific job of 50% women. There are three women applicants and eight men. There are three openings for a particular job, and the other three positions are already held by men. Then, absent considerations that rebut the female preference, all of the female applicants are hired and none of the men are hired. Under these circumstances, what sense is there in saying that these men had an equal opportunity to compete with the female candidates?

To an American court, the way the European courts would deal with this case shows that the European goal of equal representation for women in the workplace is not consistent with equal opportunity for men and women.

The European Court might respond to such a reaction by situating such a case in its historical context. The Court recognizes that there are significant social stereotypes that continue to keep women from competing equally in the workforce. These barriers are in part responsible for the presence of only three qualified female applicants but eight qualified male applicants. The European Court addresses these barriers across all government jobs. As a result, the percentage of women in the entire workforce is likely to mirror the percentage of women in the population.

Another possible European response would invoke the legitimacy of democratic procedures. The cases discussed in this paper all involve public employers in democratic societies. American courts are suspicious of government and increasingly favor relying on the free market to resolve such social problems as gender inequality rather than adopting a government program of affirmative action. Thus, government employers are not free to use affirmative action unless they are prepared to provide sufficient evidence that affirmative action is justified, because affirmative action is viewed as inconsistent with market principles of individual merit and efficiency. 160

By contrast, the EC law allows a democratic government to balance the interests of different groups of citizens so long as it acts with objective reasons that any citizen can recognize. Three of these reasons are codified in the Treaty of Amsterdam. A Member State may provide assistance to

under-represented groups, it may take steps to prevent disadvantages in the professional life of members of under-represented groups, and it may compensate members of under-represented groups for disadvantages they suffer in their professional lives.\footnote{161} And thus it may define what constitutes under-representation in terms of general population figures so long as its definition is reasonably related to the three goals. Democratically enacted positive or affirmative action is not unfair or contrary to the free market, because equality of chances to compete is a necessary condition for the legitimacy of the competitive free market.\footnote{162}

But there is a suggestion in \textit{Badeck} that the U.S. analysis of affirmative cases may be influencing the ECJ and thus the differences between the courts on this issue may become smaller.

Advocate-General Saggio relied on the new additions to EC equality law to argue for changes in ECJ interpretation of EC equality law that would bring EC law closer to American law. But, these changes are not in accord with the progressive elements in the Treaty of Amsterdam. In his opinion, he initially proposed a progressive reinterpretation of EC positive action law. He argued that the Court’s strict interpretation of the Equal Treatment Directive article 2(4) that creates an exception to equal treatment is inconsistent with the development of EU law. His specific proposal, however, is far from progressive. He argues that substantive equality is not completely incompatible with formal equality when a Member State has determined that formal equality of opportunity cannot remedy actual inequalities and thus equality of results is required.\footnote{163} A second condition necessary to justify positive action is that it not excessively impinge on the rights of men and that it not be disproportionate to the real needs of women.

In effect, he has adopted two conditions that American judges will recognize. The first condition is similar to the strict scrutiny standard that requires that a government have exhausted all other means of remedying discrimination before adopting an affirmative action plan.\footnote{164} The second condition is similar to the requirement in Title VII affirmative action cases that a plan not unnecessarily trammel the legitimate interests of innocent males.\footnote{165}

\footnote{161} Treaty of Amsterdam, \textit{supra} note 12, arts. 141(1), 141(4).
\footnote{162} Hodapp, \textit{supra} note 104, at 99-100.
\footnote{163} \textit{Badeck}, E.C.R. I-1875, \textit{supra} note 104, at 26-27.
\footnote{165} \textit{Johnson v. Transp. Agency}, 480 U.S. 616, 637-38 (1987). In \textit{Johnson} the Court decided that the affirmative action plan did not violate this condition, because Johnson could be a candidate for future promotions and he had no legal entitlement to a promotion to the
However, pace the AG, nothing in the Treaty requires the adoption of these restrictive conditions from American law. We would favor the American courts' looking to the European cases that favor positive action for guidance in reevaluating American equal protection law, rather than the other way round.  

3. The Remaining Issues in Badeck

The remaining issues before the ECJ in Badeck can be evaluated more quickly, for it appears that the Court was merely permitting established European practices. A second provision of the Hesse legislation provided binding targets for certain academic positions that had to be filled with the same proportion of women as the proportion of women who had received training in the field. The ECJ approved the plan because instead of creating an absolute quota, it created a flexible quota related to the number of women trained for the position at any given time.

It may seem that the application of the concept of flexibility has changed from the Marschall judgment. There "flexibility" referred to the opportunity of male candidates to rebut the preference. Here "flexibility" refers to the relativity of the quota to a changing number of persons trained for the position. But, in both cases "flexibility" refers to the absence of a specific number of women who are required to be hired for a position. The key point is that in both situations the number of women actually hired is established either by objective reasons that rebut the presumption favoring women or by a determination of the number of trained women who are

specific position at issue.

166. Justice Ginsburg has stated that comparative analysis is relevant in discrimination cases because discrimination is an infection throughout the world that we must all work to eradicate. Ginsburg, supra note 112, at 224-30. She has compared Marschall with U.S. Supreme Court decisions on two bases. See id. First, Marschall is similar to the Bakke decision, by Justice Powell, in its emphasis on individual decision-making instead of automatic preferences for women. Id. Second, the ECJ shows more sensitivity to unconscious biases in employers' decisions by recognizing that mere tie-breakers allow biases against women to affect the final employment decision. Id. See also Mark Tushnet, The Possibilities of Comparative Constitutional Law, 108 YALE L.J. 1225, 1228 (1999) (stating that U.S. courts can gain insight from constitutional experience elsewhere). In addition, Justices O'Connor and Breyer have stated that they may consider ECJ decisions. E. Greathous, Justices See Joint Issues with the EU, WASH. POST, July 9, 1998, at A24. However, the Court has stated that comparative analysis is inappropriate in constitutional cases. Printz v. United States, 521 U.S. 898, 920 n.11 (1997). The Advocate-General in Kalanke referred to U.S. discrimination law in his opinion, paragraphs 8, notes 8, 9, and 10. Kalanke, 1995 ECR I-3051, ¶ 8 nn. 8-10.


168. At least four German states have binding prescriptions favoring the hiring of women for certain academic positions. Peters, supra note 50, at 134.
available for the position.

From an American perspective, the fit between the proportion of qualified trainees and the proportion of women hired for a position is closer to the legitimate government interest in reducing social discrimination than the 50% goal described by the ECJ in its handling of the first issue in Badeck. Thus, given the flexibility of the substantial-relation prong of the intermediate scrutiny test, our opinion is that this type of plan might withstand constitutional scrutiny under the Equal Protection Clause.

A third provision of the Hesse law required that at least one-half of all training places be allocated to women. The ECJ allowed the plan, by distinguishing between training and hiring. In addition, the law applied only to training that was not exclusively provided by the state. Thus, no man was entirely excluded from training because it was available in the private sector.\footnote{Badeck, 2000 E.C.R. I-1875, ¶45-55.} It is possible that the Court considered this quota as flexible on the ground that the proportion of women who fill any public training position is not absolute but is relative to the number of men who purchase private training.

The distinction between the use of quotas in training decisions and their use in employment decisions is widely accepted in Germany. Quotas for women who are minimally qualified for training, but not as well qualified as the men who are seeking training, are considered permissible, though such quotas are not accepted for employment decisions. One reason is that training is essential for many jobs in Germany and without preferences in training, achieving equal opportunity in employment is nearly impossible.\footnote{PETERS, supra note 50, at 134-35. One commentator who disagrees with the Court's judgment argues that because private training is more costly, the Court should have expressly balanced the interests of men denied public training. Schuck, supra note 135. We disagree. In setting out the circumstances in which positive action is permissible, the Treaty of Amsterdam has already implicitly balanced interests in favor of aiding disadvantaged groups. Also in distinguishing training versus employment quotas, the Court recognized the persistent structural discrimination that women face, and will continue to face, without greater access to training opportunities.}

The distinction between the use of quotas in training decisions and their use in hiring decisions has no basis in American law. However, an American court might accept the argument in a particular situation because women's opportunities in employment could not be increased without a quota for training positions. If alternatives have been exhausted without removing inequalities, then the plan is as narrowly tailored as is possible under the circumstances. However, absent such a showing, this training
quota would likely be declared unconstitutional by an American court, because there is no evidence that 50% of all women are qualified for and interested in training.

A fourth provision of the Hesse law would clearly be declared unconstitutional by an American court. The ECJ determined that it was consistent with EU law to guarantee that every woman qualified for a position where women were under-represented would be interviewed for the position. The position of the European Court is consistent with its reasoning regarding training positions, namely, that the Equal Treatment Directive should be interpreted more liberally with respect to positive action when applied to pre-employment decisions as opposed to employment decisions. American courts make no similar distinction under the Equal Protection Clause that would save this law from unconstitutionality.

Again this result of the Court is consistent with existing German practice. Some German statutes require that where women are under-represented, one-half of the candidates offered an interview must be women. One state requires that all qualified women must be offered an interview.

A fifth provision of the Hesse law recommended that one-half of the members of employee representative bodies and supervisory bodies be women. The ECJ allowed this provision because it did not require an inflexible quota. Most German states require that half of the members of an official organ be women. U.S. courts would not find the provision unconstitutional unless a male plaintiff could prove that he was harmed by the recommendation, which caused him not to receive the appointment for discriminatory reasons.

In conclusion, in comparing positive and affirmative action, we have noted some respects in which the ECJ is more proactive than American courts. The European Court in Badeck permitted plans that would have been rejected by U.S. courts. And, we have speculated about justifications for the European position. Nevertheless, it is imperative to remember that neither court permits much in the way of positive action. After Badeck, the general principles of the European approach remain the same. The ECJ

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175. Compare Marchiorov v. Chaney, 582 P.2d 487, 492 (Wash. 1978) (upholding law requiring state committees of major political parties to be comprised of equal numbers of men and women because of state equal rights amendment mandating sexual equality).
allows women to be considered for a job without stereotypes negatively influencing the employment decision. Once a public employer has evidence of a non-discriminatory reason favoring the male candidate, its judgment in his favor is no longer based on stereotypes. The male candidate may also be hired because the preference favoring the female candidate has been rebutted. The actual situation is now worse for women. They have been trained, interviewed, and found equally qualified, but they still may not be hired. The next two judgments of the ECJ illustrate just how limited the approach of the ECJ to positive action actually is.

**B. Abrahamsson v. Fogelqvist**

A Swedish regulation required positive action in appointments to professional academic chairs, because extra effort was necessary to significantly increase the number of female professors. The Swedish law on equality, Article 16 point 2, authorized positive discriminations "where they contribute to efforts to promote equality in the workplace."

Articles 15, 15a, and 16, chapter 4 of the Swedish regulation on universities also allowed positive discrimination but appointments had to be based on merit and "scientific and educational abilities." The specific regulation at issue in this case was the "Swedish Regulation concerning certain professors' and research posts created with a view to promoting equality." The legislative history of the regulation provided that "progress towards a fairer allocation of teaching posts as between the sexes has been particularly slow, so that an extraordinary effort is needed to insure, in the short term, a significant increase in the number of female professors." The 1995 Regulation replaced portions of the 1993 Regulation and required a preference when necessary to appoint a member of the under-represented sex, unless the appointment would breach the requirement of objectivity in the Swedish Constitution. The Constitution, Article 9 of chapter 11, provided that for appointment to state posts only objective criteria may be considered, such as merit (e.g., length of service) and abilities (e.g., aptitudes evidenced by training and experience). The phrase "objective criteria" was otherwise not defined in Swedish law. So, the Swedish Board interpreted the phrase to mean that positive action was not to be used when the appointment of the less-qualified candidate is likely to reduce the level

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177. Id. ¶¶ 8-10.
178. Id. ¶ 11.
179. Id. ¶ 13.
180. Id. ¶ 15.
of performance in the position.\textsuperscript{181}

The University of Göteborg appointed a women, Ms. Fogelqvist, to a professional academic chair. She was qualified for the position but was judged less qualified than a male candidate, Mr. Anderson. The Rector of the University decided that the difference in their qualifications was not so great as to breach the objectivity requirement of the Swedish Constitution.\textsuperscript{182}

Mr. Anderson and Ms. Abrahamsson, another candidate, appealed the decision to the Universities Appeals Board. Mr. Anderson claimed that the decision was contrary to \textit{Kalanke}. Ms. Abrahamsson claimed that her scientific output was better than that of Ms. Fogelqvist, who was appointed to the position. The Board determined that Mr. Anderson was more competent in the scientific area and Ms. Fogelqvist more competent in the administrative area, though her competence was not so great as to outweigh his scientific competence. The Board sought a preliminary ruling from the ECJ whether the 1995 Regulation requiring positive discrimination that did not violate the objectivity condition was consistent with Article 2(4) of the Equal Treatment Directive.\textsuperscript{183}

The ECJ applied the principle of the \textit{Marschall} decision that male candidates must be given an individualized consideration for a position. Arguably, the University did this under the objectivity standard set by Swedish law. The Court, however, interpreted the Swedish law as, in effect, creating an absolute preference for women. The Court apparently reasoned that the Swedish standard to rebut the female preference was so difficult to meet that there was effectively no exception to the preference.\textsuperscript{184}

The clear implication of the Court's judgment is that any standard that permits the male candidate to rebut a preference must be no more difficult to satisfy than the standard articulated by the Court in \textit{Marschall}.\textsuperscript{185}

\textsuperscript{181} \textit{Id.}, ¶ 7-15, 25. The 1995 Regulation is referred to as the "Tham package" after a former minister of education. At that time less than 10% of full professors were women. "There was also a resource argument for the Tham package, namely, that a more equal representation of women would positively affect the scope and content of research." Ann Numhauser-Henning, \textit{Swedish Sex Equality Law before the European Court of Justice}, 30 INDUS.L. J. 121-22 (2001).

\textsuperscript{182} \textit{Abrahamsson}, 2000 E.C.R. I-5539, ¶¶ 16-20. The selection board found the difference in scientific qualifications "considerable."

\textsuperscript{183} \textit{Id.} ¶ 21-27.

\textsuperscript{184} \textit{Id.} ¶ 56.

\textsuperscript{185} A remaining question not expressly answered by the Court is whether the Article 2(4) of the Directive and Article 141(4) of the Treaty of Amsterdam require that male and female applicants be equally qualified, substantially equal or something less than that. See Numhauser-Henning, \textit{supra} note 181, at 124-26 (noting that Carl Tham has criticized the decision for not using Article 141(4) of the Treaty to uphold the Regulation and that one
The Court also found the Swedish selection method contrary to Article 141(4) of the Treaty. The Court simply stated that the method was "disproportionate to the aim pursued." It is interesting to note that the Court only referred to the second and third permitted ends of positive action, namely, prevention of and compensation for disadvantages in professional life. The Court did not refer to measures that make it easier for the under-represented sex to pursue a vocational activity. Thus, the Court may be signaling that it intends to read the vocational/professional distinction literally and allow greater latitude for positive action involving vocations than for professions. The Court's flexible approach to quotas for training slots for vocations in *Badeck* may be an example of the Court's use of the vocational/professional distinction.

*Marschall* and *Abrahamsson* may be read in a way that continues the limitation of job preferences for women, namely, that positive action may only be used to remove explicit stereotypes in the decision-making process. Under this reading, ECJ law requires that when individualized consideration reveals that the male candidate is better qualified, then the male candidate has rebutted the preference and must be hired. Furthermore, a positive action plan that allows the hiring of qualified women over better qualified men cannot promote equality of opportunity. This type of positive action cannot be consistent with the Equal Treatment Directive and the Treaty of Amsterdam.

Swedish university has abandoned its positive action plan under the permissive Regulation of 1993 because it does not conform to the *Marschall* requirement of individualized consideration).


187. The positive action plan in *Marschall* required that before a female candidate may be hired pursuant to the plan she had to be equally qualified with the male candidate in terms of equal suitability, competence and professional performance. *Marschall*, 1997 E.C.R. 1-6363, ¶ 13.

188. The Court may have signaled its intent to reject positive action for less than equally qualified candidates when it referred to its holding in *Badeck* allowing plans that use positive and negative criteria to evaluate the qualifications of candidates that "in general favor women." For example, seniority, which generally favors men, must be important for a candidate's qualifications and part-time work and delays in training to care for dependents, which generally favor women, must not have a negative effect on a candidate's evaluation. *Abrahamsson*, 2000 E.C.R. I-5539, ¶¶ 47-48, citing *Badeck*, 2000 E. C. R.I-1875, ¶¶ 31-32. The Court may have reasoned that these criteria are sufficient to allow women rise to a level equal to men, thus continuing the Court's reliance on the male norm for equality. It is important to note that the Court does not include one of the criteria allowed in *Badeck*, namely, "capabilities and experience which has been acquired by carrying out family work." This criterion was mandatory in the *Badeck* positive action plan. Is the Court in *Abrahamsson* signaling that this criterion is too favorable to women? *Abrahamsson*, 2000 E.C.R. I-5539, ¶ 48.
Like Badeck, Abrahamsson is a case in which the Court followed common practices. For example, in Germany, most statutory quotas provide only for preferences that aid equally qualified candidates. 189

An American court would also find the Abrahamsson affirmative action plan unacceptable. Justice Scalia dissented in Johnson, a Title VII case in which the Court considered the validity of a gender-based affirmative action plan. He thought that affirmative action plans are likely to lead to the selection of under-qualified female candidates. 190 The positive action plan in Abrahamsson is likely to feed these fears in judges who fail to distinguish between less qualified and under-qualified candidates. The Swedish law seeks to avoid hiring the under-qualified by requiring an evaluation to determine whether an appointment under a positive action plan is likely to reduce the level of performance in the position.

Johnson, an American case with controversial facts regarding candidate qualification, is interesting to compare to Abrahamsson. The Johnson plan did not require the selection of the best-qualified candidate. Nor did the plan require a determination that the selected candidate was as qualified as the other remaining candidates. Rather, the plan allowed the employer to select from the seven top candidates. The facts of Abrahamsson did not reveal how close the qualifications of the candidates were, though the selection board determined that the difference in scientific credentials was considerable. By contrast, in Johnson, the qualifications of the male candidates and the female candidate were virtually equal, though three of the employer's supervisors had recommended the male candidate who had scored slightly higher on an objective test. But, the director of the agency selected the female candidate from a list of the seven top candidates. 191 Thus, in Johnson, the applicants were closer in their qualifications than they might have been under Swedish law. Nevertheless, neither plan required the selection of the best-qualified candidate or of an equally qualified candidate.

In conclusion, the European Court used Abrahamsson to signal that it requires at a minimum substantially equivalent qualifications in positive action cases involving professional positions. In general, Abrahamsson suggests a retreat from the Court's earlier positive action decisions that

190. Johnson, 480 U.S. at 657-77.
were moving toward substantive equality for women. Among other things, Sweden was not permitted to use its more demanding standard to rebut the preference for women, even in light of the strong evidence of women’s under-representation in higher education.\footnote{In a recent study in Sweden, women applying for postdoctoral fellowships had to be 2.5 times more productive than the average male applicant to receive the same competence score. Peters, supra note 50, at 303 n. 122, 210 n. 525 (noting that after a decade of positive action in some of the German states, the proportion of positions occupied by women increased by less than 1 percent).}

\textbf{C. Schnorbus v. Land Hesse}

\textit{Schnorbus} is not a case in which the ECJ considered the validity of a gender-based positive action plan, but it is a case with important implications for positive action in the EU. In \textit{Schnorbus}, the ECJ upheld a veteran’s preference that adversely affected women’s training opportunities.\footnote{\textit{Schnorbus}, 2000 E.C.R. 1-10997, ¶ 47. The Hesse statute was amended in May 1998 so that only 15\% of the training slots were to be filled on the basis of hardship, including compulsory military service. \textit{Schnorbus}, 2000 E.C.R. 1-10997, ¶ 11 (opinion of A.G. Jacobs).}

Ms. Schnorbus applied for practical legal training, but her application was denied temporarily because there were already too many applications from persons who had completed compulsory national service. She objected on the ground that the selection procedure discriminated against women. She argued that only men were subject to compulsory service. Her administrative objection was dismissed because the veteran’s preference was designed to counterbalance the disadvantage suffered by applicants who were obliged to complete military or civilian service.\footnote{Id. ¶¶ 14-17.}

Upon appeal, her request for interim relief was upheld by the administrative court, but set aside by the higher administrative court. The lower administrative court found discrimination against her as a woman, given the large number of men who were able to take advantage of the priority in comparison to the much larger number of women who applied for training. Upon remand, the lower court sought a preliminary ruling from the ECJ. The primary question was whether the veteran’s preference was consistent with the Equal Treatment Directive.\footnote{Id. ¶¶ 18-19.}

The ECJ concluded that the veterans’ preference was not directly discriminatory based on sex but that it was indirectly discriminatory\footnote{Direct discrimination exists if a difference in treatment is based on a criterion either explicitly sexual or linked to a characteristic necessarily associated with one sex.}
because women who are not required to do compulsory service cannot benefit from the preference. However, the Court concluded that the discrimination was within the exception of Article 2(4) because the preference was objective and intended solely to counterbalance the delay in training suffered by men during compulsory service. Further, women's training was delayed no more than 12 months, a period of time equal to the time of compulsory service.\textsuperscript{197}

Based on Marschall, the Court might have reasoned that the preference for veterans was automatic and thus invalid, unless women were allowed individualized consideration to rebut the preference, e.g., with evidence of their own hardships. However, the Court arguably limited its positive action principles to the facts of cases like Marschall, where there was evidence that public employers were relying on gender stereotypes to make employment decisions. In this case the Land Hesse was not relying directly on gender stereotypes in its veteran's preference, though the policy of excluding women from compulsory military service of women certainly relies on gender stereotypes. Thus the principles of the Court prohibiting gender stereotypes did not apply in Schnorbus because the gender stereotypes were not directly applied but were one step removed.

The U.S. Supreme Court would likely hold that a veteran's preference like the one in Schnorbus is constitutional under the Equal Protection Clause based on Court precedent. In Personnel Administrator of Mass. v. Feeney,\textsuperscript{198} the Court upheld an absolute veterans' preference that disproportionately advantaged men, because it was not intended to discriminate on the basis of sex. Similarly, in Rostker v. Goldberg,\textsuperscript{199} the


\textsuperscript{197} Schnorbus, 2000 E.C.R. I-10997, ¶¶ 30-47.
\textsuperscript{198} 442 U.S. 256 (1979).
\textsuperscript{199} 453 U.S. 57 (1981).
Court held that the male-only draft is not unconstitutional sex discrimination because only men are eligible for combat and thus the sexes are not similarly situated. In Schlesinger v. Ballard,200 the Court held that a military regulation that allowed women more time in rank before being promoted than men did not violate equal protection. Men and women were not similarly situated because women were not permitted to serve in combat, which was a way to achieve promotion more quickly. These cases reveal that both Courts will allow one discriminatory law to justify another discriminatory law. Women are discriminated against because they are not allowed to serve in combat. Thus, this discriminatory law results in men and women being differently situated, and that, in turn, justifies differences in treatment.

In conclusion, progress in Europe toward full equality as set out in the Treaty of Amsterdam has not been smooth. And, Schnorbus represents one of the cases in which the Court appears to balance its positive action cases favoring women by deciding a positive action case favorable to men. We wonder if the effect of positive action for women will continue to diminish as Member States recognize more non-gender based preferences. And what will be the effect on women who are told that they have been given "preferential treatment" but still do not seem to be able to break through the glass ceiling? Now they must compete for positive action and jobs.

D. Lommers v. Minister van Landbouw

The issue before the Court was whether the Netherlands’ Ministry of Agriculture’s refusal to give Lommers access to subsidized child care, because access was generally limited to female officials of the Ministry, was consistent with the Equal Treatment Directive.201

Article 1a and 5 of the Law on Equal Treatment of Men and Women provided as follows:

In the public service, the competent authority may not make any distinction between men and women... as regards working conditions (unless) the distinction made is intended to place women in a privileged position in order to eliminate or reduce de facto inequalities and the distinction is reasonable in relation

201. Lommers, 2002 E.C.R 1-2891, ¶ 1-2. The circular allowed exceptions in emergencies as determined by the Director.
to the aim in view.\textsuperscript{202}

Mr. Lommers filed a complaint with the Commission for Equal Treatment. In response, the Ministry explained that it had decided to tackle the under-representation of women in the Ministry, where only 2,700 of 11,200 employees were women in 1994. The Commission held that there was no violation of Netherlands law. It found that women are less likely to pursue a career because of child-care and that it was a reasonable assumption that inadequate child care was likely to play a decisive role in women’s decisions in their careers. The Commission concluded that the Ministry did what was necessary to reduce the number of female staff members quitting their jobs. The district court endorsed the Commission’s opinion. Mr. Lommers appealed and the appeals court sought a preliminary ruling from the ECJ.\textsuperscript{203}

The Court concluded that the child care scheme was discriminatory on its face. It created a distinction in treatment based on sex because male and female employees are comparable as regards to the possible need for nursery facilities. However, the Court concluded that the scheme was a permissible exception under Article 2(4). The Court compared child-care quotas for female employees with quotas for training positions, which were permitted in \textit{Badeck}. Both quotas may be absolute, unlike quotas for places in employment. They may be justified insofar as they are “designed to eliminate the causes of women’s reduced opportunities of access to employment and careers and intended to improve the ability of women to compete on the labour market and pursue a career on an equal footing with men.”\textsuperscript{204}

The Court then considered whether the measure was proportional in relation to the goal of reducing \textit{de facto} inequality. The Court noted that nursery places were limited, that some women were on a waiting list, and that nursery facilities were available in the private sector. Also the Netherlands government informed the Court that male officials who raise children by themselves have access to the government nursery.\textsuperscript{205}

The Netherlands’ plan to allocate childcare to promote the substantive equality of women in the workplace would likely run afoul of U.S. law. Unequal terms and conditions of employment are actionable under Title VII and the Equal Protection Clause, when intentional discrimination is

\textsuperscript{202} Id. ¶¶ 7-8.  
\textsuperscript{203} Id. ¶¶ 4-19.  
\textsuperscript{204} Id. ¶¶ 24-50 (especially paragraph 33).  
\textsuperscript{205} Id. ¶¶ 39-46.
Employers may not defend these lawsuits by relying on traditional job stereotypes or good-faith attempts to eradicate discrimination against women.  

In *Lommers*, the child-care slots were allocated on the basis of sex. And, there is nothing in the reported judgment from which to construct an affirmative defense that would legally justify the employer's policy. Without, for example, an affirmative action plan defense, the Supreme Court would strike down the employer's child care allocation despite its benign purpose.

In conclusion, at this time, the score in the ECJ is three decisions that move the EC closer to full equality for women and four decisions that do not. If these cases were decided in the United States, an American court would likely find against affirmative action in all of the cases for reasons we have discussed previously, namely, that U.S. decisions focus too narrowly on the intentional discriminator. U.S. courts view affirmative action as a governmental limitation on business analogous to a criminal statute. By contrast, the European Court, even with its limitations, does at least consider positive action as a permissible means for a democratic government committed to working within the market to increase the labor participation and effectiveness of all its citizens.

**Conclusion**

In this paper we have examined the validity of positive action plans in cases before the European Court of Justice decided under the Equal Treatment Directive and the Treaty of Amsterdam, and of affirmative action plans in cases before American courts decided under Title VII and under the American Equal Protection Clause. Our conclusion is that the courts would reach similar results with regard to some of the positive or affirmative action plans. A number of provisions would nevertheless be unconstitutional under American law, although they have been upheld under European law. This result makes it appear that the European Court is

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207. See *Crawford v. Scotch n' Sirloin, Inc.*, 47 F.E.P. 473 (N.D. N.Y. 1973) (employer who allowed male employer with a family to work two shifts but not a female employee with a family to support violated Title VII); *Schoenfeld v. Babbit*, 168 F.3d 1257 (11th Cir.1999) (violation of Title VII when employer tried to aid women by hiring an unqualified woman).

more tolerant of positive action plans favoring women than are the U.S. courts. And, in general we believe that this is true, though we have noted ways in which this conclusion needs to be qualified. We believe that a careful study of EC law offers concrete suggestions to Americans designing affirmative action plans to achieve equality for women. ECJ opinions and judgments also offer strategies and legal arguments that may become more persuasive to U.S. courts. Nevertheless, we have discussed the substantial limitations on positive action plans in the judgments of the ECJ, and we hope that we have pointed to some interpretations of the judgments and legislation on sex equality that will assist the EC in moving even further toward full equality for women.

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