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AFFIRMATIVE ACTION IN THE UNITED STATES AND THE EUROPEAN UNION: COMPARISON AND ANALYSIS

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Abstract: *The existence of affirmative action (better known as "positive discrimination") demonstrates that there are areas where law as a neutral tool shows its limits as a means of resolution of social disputes. This paper undertakes a comparative exploration of affirmative action discourse in US and EU law. Affirmative action first appeared in the US in the 1960s and 1970s, and initially it was used only in the context of racial discrimination. More recently, however, affirmative action came to be extensively utilized in the EU, and it is primarily used to ensure women equality in the workforce. Both systems recognize that affirmative action constitutes a departure from the fundamental principle of formal equality, and because of that departure, requires further justification. However, in the EU, Article 2(4) of the Equal treatment Directive explicitly allows deviation from formal equality that makes the justification of positive action easier than in the US. The usual test applied by the European Court of Justice (ECJ) in reviewing a measure justified under derogation is that of proportionality, which has three parts: suitability, necessity, and proportionality. In the US, there is the raging debate in the US Supreme Court over which is the correct standard of review with regard to race-based governmental actions. The ECJ sees positive action as a measure to diminish discrimination in the whole of society showing that women are not still an equal footing with the men in employment, and no evidence of past discrimination is required. On the contrary, the US Supreme Court's held in* ***Croson*** *that evidence of societal discrimination against minorities, by itself, would not suffice to justify a preferential treatment. Finally, the affirmative action plan in the EU is seen as a remedy for discrimination that women suffer due to persistent stereotypes. From another side, the US Supreme Court recognized in* ***Bakke*** *that "preferential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth. "Today, it is evident that affirmative action in both systems sends both inspiring and disturbing messages. It is very important for us to study it's implementation in these two developed systems, especially after the adoption of the Charter on human and minority rights and civil liberties, which explicitly allows this measure in article 3, to enable every inidividual to equally enjoys its rights.*

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I. INTRODUCTION

Political ideologies have undoubtedly played a major role in shaping public opinion on affirmative action, and under pressure by powerful movements (like the civil rights movement in the US in the 1960s and the feminist movement in both the US and Europe in the 1970s), it became widely accepted that formal equality was not enough to provide all with equal opportunities.

The existence of affirmative action demonstrates that there are areas where law as a neutral tool shows its limits as a means of resolution of social disputes. Thus, the main goal of affirmative action is to remove deeply rooted social practices that interfere with the process of substantial equality in a society. The main problem in implementing affirmative action, however, is based in the liberal notion of equality of opportunity, seen as attempt to create conditions that give individuals equal access to education, training and jobs, and leave individuals to make the best of these opportunities. Therefore, affirmative action is one of the most controversial and confusing public issues today.

This paper undertakes a comparative exploration of affirmative action discourse in US and EU law. The difficulty in comparing these two different forms of discourse comes from the fact that the technical legal structures of US and EU affirmative action policy are quite different. The problem is also visible in different social grounds in which these legal structures have been erected. Affirmative action first appeared in the US in the 1960s and 1970s, and initially it was used only in the context of racial discrimination. More recently, however, affirmative action came to be extensively utilized in the EU, and it is primarily used to ensure women equality in the workforce.

This paper will explore what are the new methods of affirmative action being used in Europe that might be attempted in the US. Also, this paper will explore the US experience that can help the EU in reaching a comprehensive community race discrimination policy.

II. HISTORICAL BACKGROUND

A) The United States

In the 1960s, a number of black leaders in the US began to recognize that simply eliminating racial barriers was not enough to eliminate the consequences of the racial segregation that benefited just a small percentage of middle-class African Americans.[1] They sought adequate minority presentation in employment, education and public programs.[2]

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[1] William Julius Wilson, Race-Neutral Programs and the Democratic Coalition, in Affirmative Action-Social Justice or Reverse Discrimination, p. 147 (Francis J. Beckwith and Todd E. Jones ed. 1997)

[2] Id.

In March 1961, President John F. Kennedy issued Executive Order 10925, in which the government, for the first time, called for "affirmative action" in the context of civil rights.[3] This term meant taking appropriate steps to eradicate the widespread practices of racial, religious and ethnic discrimination.[4] The main goal of this Order was to achieve equal opportunity in employment and to ensure that applicants for jobs would be judged without consideration of their race, religion or national origin.[5]

Four years later, President Lyndon B. Johnson issued Executive Order 11246, that required federal contractors and subcontractors to take affirmative action to ensure that applicants are employed, and that employers are treated during employment without regard to their race, creed, color, or national origin.[6] Specific actions, outlined in the Order, included upgrades, transfers, recruitment, compensation, and training.[7] Importantly, this Order was amended by Executive Order 11375 that provided the initial legal basis for affirmative action for women in employment, but enforcement of its sex discrimination provisions did not occur before 1973.[8]

During the administration of President Richard M. Nixon, the Department of Labor issued Revised Order No. 4, which required that all contractors develop "an acceptable affirmative action program," whenever there are fewer minorities or women in a particular job classification than would reasonably be expected by their availability.[9]

B) The European Union

Europe became acquainted with the model presented in the Revised Order in early 1980.[10] Over the past two decades within the European Community (EC), main efforts were addressed to ensure women and men equal opportunity in the workplace, and not to resolve racial discrimination. In the founding treaty of the EC, the Treaty of Rome, Article 119 provided that "each member state shall ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work."[11] The main goal of the EC was to ensure social progress and the improvement of the living and working conditions for both sexes within its boundaries.

When it become apparent that legislative measures were not enough to help women gain equality, the European Commission established a series of directives whose object was to promote equal opportunities between men and women. The European Commission viewed active policy as desirable within the context of social justice, and

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[3] Steven M. Cahn, Introduction, in The Affirmative Action Debate, (Steven M. Cahn, et al. eds., 2002)
[4] Id.
[5] Id.
[6] Id.
[7] Id.
[8] Order available at http://www.aphis.usda.gov/mb/mrphr/crgded.html#1967
[9] Revised Order 4, which was issued by the U.S. Department of Labor, Office of Contract Compliance Programs (OFCCP), outlines the essential elements of an affirmative action plan. Revised Order 4 stated that an affirmative action plan should minimally contain a policy statement, dissemination techniques, responsibility for implementation, utilization analysis, goals and timetables, action oriented programs, and internal audit and reporting systems. See Steven M. Cahn, supra note 3
[10] Attie de Jong and Bettina Bock, Positive Action in Organizations within the European Union, in Women and the European Labour Markets, p. 187 (Anneke van Doorne-Huiskes, Jacques van Hoof and Ellie Roelofs, ed., 1995)
[11] Now Article 141 of the Treaty of Amsterdam

efficiency, and concluded that more action must be taken by governments and employers.[12]

The European Council recognized the need to "counteract the prejudicial effects on women in employment … which arise from existing attitudes, behavior and structures."[13] Therefore, the European Council recommended that Member States "adopt a positive action policy designed to eliminate existing inequalities affecting women in working life and to promote a better balance between the sexes in employment."[14]

The European Union (EU) was established by the Maastricht Treaty in 1992 that promoted additional policies and areas of cooperation between Member States. While this Treaty did not establish a general principle of non-discrimination based on sex, the principle of equality between the sexes and the elimination of discrimination based on sex are part of the fundamental personal human rights concept that form part of the general principle underlying EU law.[15] Under this concept, the special recognized right is the right to equal treatment that sometimes means treating men and women differently to compensate for social stereotypes and other barriers that affect women in employment.

III. THE DEFINITION OF AFFIRMATIVE ACTION

A) The United States

The American literature on affirmative action suggests that the affirmative action has no precise definition. The first use of the term "affirmative action" has been found in the US National Labor Relations Act of 1935.[16] The Wagner Act, as it is popularly called, prohibited private employers from discriminating against persons because of their membership in labor units.[17] It was used to define the authority and obligation of the National Labor Relations Board to remedy unfair labor practices by ordering offending parties to cease unfair practices, and to take such affirmative action. [18]

According to the US Commission on Civil Rights, affirmative action "encompasses any measure, beyond simple termination of a discriminatory practice, adopted to correct or compensate for past or present discrimination or to prevent discrimination from recurring in the future."[19]

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[12] Katherine Cox, Positive Action in the European Union: From Kalanke to Marshall,Columbia Journal for Gender and Law, no. 8, p. 101 (1998)
[13] Council Recommendation 84/635, 1984 O.J. (L 331) 34
[14] Id.
[15] Todd Joseph Koback, Note and Comment: The Long, Hard Road to Amsterdam: Effects of Kalanke v. Freie Hansestadt Bremen and the Treaty of Amsterdam on Positive Discrimination and Gender Equality in European Community Law, Wisconsin International Law Journal, no. 17, p. 467 (1999)
[16] Ronald, J. Fiscus, in The Constitutional Logic of Affirmative Action, p. 13, (Stephen L. Wasby at al. eds., 1992)
[17] Id.
[18] Id.
[19] US Commission on Civil Rights, Briefing Paper for the US Commission on Civil Rights: Legislative, Executive, Judicial development of Affirmative Action , prepared by the Office of General Counsel, US Commission on Civil Rights, (March 1995)

B) The European Union

1. Similarities between the EU and US concept of affirmative action

European countries use the term "positive action," but no precise definition of positive action exists in the EU too.[20] Nevertheless, positive action generally can be viewed to cover many different measures and strategies which are undertaken in order to compensate for past injustices suffered by women, by redressing current inequalities amongst men and women, primarily in employment. The Commission of the European Community has stated that "the concept of positive action embraces 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 under-represented."[21]

There are, however, some differences between these two concepts.

2. How the EU concept differs from the US concept

The European Council has viewed positive action as the process of providing information and increasing public awareness, diversifying the range of occupational options by means of adequate vocational training and stimulating measures aimed at a better distribution of tasks in occupations and in society at large.[22] Thus, the European Council's definition of positive action is broader than the US definition of affirmative action. Nevertheless, the EU term positive action is narrower than those accepted in the US because it refers just to those measures related directly to the position of women in employment.

In 1988, the European Commission emphasized that "positive action aims to complement legislation regarding equal treatment and comprises any measure contributing to the elimination of inequalities in practice."[23] Furthermore, the European Commission said that affirmative action "is a comprehensive planning process which an employer chooses to undertake in order to achieve a more balanced representation of women and men throughout the work force."[24]

Therefore, the Equal Treatment Directive 76/207/EEC of 9 February 1976 illustrates the important role of equality stating that "equal treatment for male and female workers constitutes one of the objectives of the Community."[25] In Article 2(1) Directive defines equal treatment to "mean that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status."[26]

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[20] Interestingly, the latter term was chosen by the British government as an alternative to "affirmative action" in order to distance itself from the controversy generated by affirmative action in the US. See more supra note 12, at 104

[21] Commission of the European Communities, Communication by the Commission to the Council and the European Parliament on the Interpretation of the Judgment of the European Court of Justice on October 17, in case C-450/93, Kalanke v. Freie Hansestadt Bremen, COM (96)

[22] Michael I. Rozof, Overcoming Traditional Gender Stereotypes in the European Union: The European Court of Justice's Ruling in Hellmut Marshall v. Land Nordrhein-Westfalen, Emory International Law Review, no. 12, p. 1507 (1998)

[23] Commission States Position on Policies, Proposes Amended Directive, Eurowatch, Apr. 15, 1996

[24] Commission of the European Communities, Positive Action Manual, p. 10 (1988)

[25] See Council Directive 75/117/EEC, Preamble, 1975 O.J. (L 45) 19

[26] Id.

Furthermore, distinct from the US law, Article 2(4) explicitly allows deviation from formal equality and provides that "this Directive shall be without prejudice to measures that promote equal opportunity for men and women, in particular by removing existing inequalities that affect women's opportunities."[27] Article 2(4) also sets out three exceptions to this principle:[28]

- A first exception consists of measures which aim to eliminate the causes of underemployment and reduced career opportunities for either sex, by intervening, in particular, when career choices are made and in vocational training. [29]

- The second exception relates to provisions adopted in every member states to protect women related to pregnancy or maternity.[30] This includes measures that try to achieve a better balance between a woman's family and work responsibilities and include the development of childcare infrastructures and the introduction of career breaks.

- The third exception provides that the Directive shall not apply to "measures [designed] to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities" for access to fair employment, promotion, vocational training, and working conditions.[31] This third type is based on the idea that positive action should make up for past disadvantages. As a consequence, preferential treatment can be prescribed in favor of certain categories of persons. This may take the form of targets for the employment of women in sectors and professions where they are under-represented, particularly as regards positions of responsibility.[32]

The concept of positive action is broader in the EU in the sense that the EU member states have adopted norms of preferential treatment to enable women to accomplish their dual roles in the family and at the workplace. It means that positive action must require reorganization in the workplace to make it easier for women to work in and outside the home.[33] These measures include access for all pregnant women to adequate periods of maternity leave, insurances that the health of the mother and the child is not in danger, time off for pre-natal and post-natal care, proper care during pregnancy, and safety from exposure to hazardous working conditions.[34]

Four important legislative measures were adopted in the EU to achieve these goals: the Recommendation on Childcare, the Pregnancy and Maternity Directive, the Parental Leave Directive and the Part-Time Workers Directive.[35] The Recommendation on Childcare was adopted in 1992 and its adoption did represent a symbolic achievement, the objective of which was to "encourage initiatives to enable women and men to reconcile

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[27] Id.

[28] Article 3 provides that: "Member States shall abolish all discrimination between men and women arising from laws, regulations or administrative provisions which is contrary to the principle of equal pay."

[29] See Council Directive, supra note 25, Article 2(1)

[30] Id., Article 2(2). This provision is very broad and leaves every member state to adopt its own conditions related to pregnancy or maternity.

[31] Id. Article 2(3)

[32] Supra note 22, at 1516

[33] Id. at 1533

[34] Id.

[35] Clare McGlynn, Reclaiming a Feminist Vision: The Reconciliation of Paid Work and Family Life in European Union Law and Policy, Columbia Journal of European Law, no. 7, p. 256 (2001)

their occupational, family and upbringing responsibilities arising from the care of children."[36]

The focus on women and their labor market position was also evident in the adoption of the Pregnancy and Maternity Directive. This directive brought considerable improvements in the rights of pregnant women in many member states of the EU.[37] The Part-Time Workers Directive was designed to "promote employment and equal opportunities for women and men," as well as a more flexible workplace "which fulfils the wishes of employees and the requirements of competition."[38] In essence, the Directive seeks to eliminate discrimination against part-time workers, the vast majority of whom are women, by a prohibition on treating part-time workers less favorably than full-time workers solely because they work part-time. [39]

Thus, Community law allows EU countries to undertake several positive action initiatives. In the context of those directives, one sex may be treated differently from the other, but since their aim is to promote equality, such initiatives can be considered to be compatible with the principle of equal treatment between men and women.

IV. Beneficiaries of Affirmative Action Programs

A) The United States

With the onset of affirmative action programs in the US, it became necessary to specify who were to be its beneficiaries. Although the term "affirmative action" and its related programs embraced women and Hispanics, in politics and public debates, affirmative action remained essentially an issue dealing with Blacks and Whites. It was important, however, to define term minority because this term is usually arbitrarily and politically defined.

The most authoritative definition is that used by the federal government. Statistical Directive 15 of the Office of Management and Budget defines the following categories: American Indian or Alaskan Native persons, Blacks, Hispanic, and White, not of Hispanic origin.[40] Implicit in these definitions is that four of them are disadvantaged and

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[36] Id.

[37] Sweden offers the most maternity leave at 96 weeks; Denmark is next with 50 weeks, Italy with 47, and Finland with 44 weeks.

[38] Council Recommendation on Child Care 92/241/EEC, 1992 O.J. (L 123) 16

[39] Id.

[40] Supra note 16, at 176

Statistical Directive 15 of the office of Management and Budget defines as:

American Indian or Alaskan Native- Persons having origins in any of the original people of North America, and who maintain identification through tribal affiliation or community recognition.

Asian or Pacific Islander-Persons having origins in any of the original peoples of the Far East, Southern Asia, the Indian Subcontinent, or the Pacific Islands. This area includes, for example, China, Japan, Korea, the Philippine Islands and Samoa.

Black, not of Hispanic origin-Persons having origins in any of the black groups of Africa.

Hispanic -Persons of Mexican, Puerto Rican, Cuban, central or South American or other Spanish culture or origin, regardless of race.

White, not of Hispanic origin-Persons having origins in any of the original peoples of Europe, North America, or the Middle East.

have been oppressed by the fifth group, Whites.[41] Yet, these definitions of minorities have many omissions.

To be classified as American Indian or Alaskan Native, one needs to maintain cultural identification through tribal affiliation or community recognition, and this element is pretty arbitrary.[42] Furthermore, the term Hispanic is very broad. The term Hispanic-American or Latino would be better for affirmative action purposes. These terms are more precise and would exclude persons of Spanish origin, usually not regarded as affirmative action candidates.

One of the problems is that these minority categories give no consideration to persons of mixed origins.[43] Also, the official minority categories say nothing about socio-economic status and the question remains: Should persons in protected categories from professional or upper-managerial backgrounds be given special consideration? Another polemic involves the category Asian. Japanese and Chinese do well educationally, and have earnings above American averages, but Filipinos for the most part are not so successful and deal with different social problems.[44]

Despite these other issues, many scholars still think that Blacks should hold central stage in affirmative actions programs. As Shelby Steel has stated, "If all Blacks were given a million dollars tomorrow morning it would not amount to a dime on the dollar of three centuries of oppression, nor would it obviate the residue of that oppression that we still carry today. …Suffering can be endured and overcome; it cannot be repaid."[45]

B) The European Union

The positive action programs in EU are referred exclusively for women.

As it was mentioned, one of the most transforming revolutions in the second half of this century in both systems has been the women's movement. This movement was successful in improving the social and economic situations of women, mainly young and white.

Yet, minority, immigrant, and indigenous women have limited employment opportunities and are often at the bottom of the labor market. Furthermore, when a women's race is factored into her experience, the double burden of gender and racial discrimination and related intolerance becomes evident.

Women have been and are being oppressed; even today they earn less than men, work in more sex-segregated occupations and are less represented in upper-level jobs. But, as the term woman is pretty clear, the EU law does not pass through all controversies that are encountered in the US law.[46]

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[41] Id.
[42] Id.
[43] Id. at 177
[44] Id.
[45] Shelby Steele, The Content of Our Character: A New Vision Of Race in America, p. 130 (1991)
[46] Other groups fall into the minority rights category in the EU, protecting national, ethnic, religious and linguistic groups. This concept is very different than positive action, and includes perseverance, maintenance and development of the essential elements of their identity, namely their religion, language, traditions and cultural heritage. *See* more Framework Convention for the Protection of National Minorities (1995)

V. Political Postulate in Allocation of Goods: Liberal and Social State

A) The United States

In the XVII century the core of American emancipation was the elaboration of English liberalism as a new system of norms and values that was associated with a "free trade" and laissez-faire economic theory.47 Since the XVIII century, a widespread consensus has developed over the normative proposition that all individuals are morally equal as individuals. This postulate of equality has also been a cornerstone of the US form of constitutional government, the notion that "all men are created equal," that was proclaimed in the US Declaration of Independence.48 It created a presumption of equality that stipulates that justice requires that individuals be treated equally and that each departure from that standard must be separately justified by some acceptable consideration.[49]

The US legal system is constitutional, meaning that the structure and limits government are shaped substantially by a written Constitution. Also, in considering possible domains of allocation of certain goods for which the government would be the legitimate agent of distribution is very limited.[50] Therefore, each individual's zone of autonomy is to be protected so that each person enjoys the same liberty to exploit his or her own talents.[51] When the government does act, it must not, in doing so, violate any limits on governmental power found in the Constitution, especially the Fourteen Amendment that provides in part that "No state shall … deny any person within its jurisdiction the equal protection of the laws." Furthermore, the government must show an extremely important reason for its action and it must demonstrate that the goal cannot be achieved through any less discriminatory alternative.[52]

As Justice Black in his dissent in *Goldberg* said, in the last half century, the US has moved "far toward becoming a welfare state," but he added that "the operation of a welfare state is a new experiment" for America and "should not be frozen into" the constitutional structure.[53] Therefore, the US political system is still predominantly liberal, based on private and personal autonomy, deeply rooted on the freedom from intrusion by the state, and this factor certainly shape public opinion concerning affirmative action.

B) The European Union

Another model that all European countries implemented in the last century is based on the equal distribution of positive rights and is generally known as the welfare state model. The development of this idea began in Germany about century ago, and spread through all Western industrialized countries with the idea that the term "welfare state" includes the obligations and commitments of the state in many spheres of economic

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[47] Fritz Fabricius, The Legal-Political Status of Workers and European Politics, p. 38 (1992)
[48] See Ronald Dworkin, Liberalism, in Public and Private Morality, p. 113 (S. Hampshire ed. 1978)
[49] Id.
[50] Michael Rosenfeld, Affirmative Action, Justice, and Equalities: A Philosophical and Constitutional Appraisal, Ohio State Law Journal, no. 46, P. 858 (1985)
[51] Id.
[52] Wygant v. Jackson Board of Education, 476 U.S. 267, 280 (1986)
[53] Goldberg v. Kelly, 397 U.S. 254 (1970)

development, such as full employment, social security, and guarantees of certain minimal limits as to income, health care and education.[54] The state obligations were seen as caring for all parts of the population, especially for groups in weak economic positions, to enable all citizens to live a life of human dignity and to take responsibility to equalize any imbalance in society.[55]

Since work has been seen as an essential means whereby individuals may preserve positive rights, the government has positive duties and has concentrated these in the social and economic spheres.[56] The original aims of the EU were, therefore, to promote improved working conditions within the Union and to increase the standard of living of individuals living in the EU.

The idea of a welfare state, deeply rooted in the mind of the European people is certainly an important reason why the public for the most part supports positive action, and sees it as a part of the policy to solve imbalances in a society.

VI. RELEVANT CASES

A) American Judiciary

The US Supreme Court has given plenary consideration to 19 cases concerning constitutional challenges made to affirmative action plans.[57] The common difficulty throughout these cases has been in the determination of which standard of judicial review is required by the Equal Protection Clause of the Fourteenth Amendment and the equal protection component of the Due Process Clause of the Fifth Amendment. None of these cases have been anonymous, and most have been decided by a single vote, involving three or more opinions.[58]

In the beginning, after years of slavery and segregation, affirmative action was primarily addressed to Black people. The main problem that arose after *Brown* was what remedies that could help the existing segregation in schools.[59] Although the right to education was not recognized as fundamental right by the US Supreme Court, in *Brown* Court recognized that "education is perhaps the most important function of state and local governments."[60] Thus, it is not surprising that the Supreme Court's first case, as some others, examined the validity of affirmative action in education.

The US Supreme Court's record of division began with *Bakke,* which remains the most influential decision about affirmative action. By 5-4 vote, the Court ruled that a state university could not set aside a specific number of places in each class for minority

[54] Supra note 47, at 40
[55] Id.
[56] Id. at 41
[57] Girardeau A. Spann, The Law of Affirmative Action-Twenty-Five Years of Supreme Court-Decisions on Race and Remedies, p. 157 (2000)
[58] Id.
[59] Brown v. Board of Education, 347 U.S. 483 (1954)
[60] The Court further stated that education is today "a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment." Id. at 488.

students.[61] The Court established that race cannot be the sole criteria for special admissions programs, but suggested that race may be one of the several factors in consideration for college admissions.[62] The Court said that "the guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color."[63] Furthermore, the Court held that in order to justify the use of a suspect classification, "a State must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is necessary … to the accomplishment of its purpose or the safeguarding of its interest."[64] Writing for the dissent, Justice Brennan advocated the use of the intermediate scrutiny test which Justice Powell had found inappropriate, and determined that race-conscious group remedies may be in consonant with the Equal Protection Clause of the Fourteenth Amendment.[65]

Two years after *Bakke,* in *Fullilove*, the US Supreme Court again considered an affirmative action program, but did not produce a majority opinion concerning the appropriate level of scrutiny.[66] The Court upheld a federal law that required that 10% of federal public works monies given to local governments be set aside for minority-owned businesses.[67] Chief Justice Burger rejected application of either test articulated in *Bakke*, strict or intermediate scrutiny, and simply declared the *Fullilove* program constitutional, and justifiable to remedy past discrimination.[68]

In *Wygant,* the US Supreme Court held unconstitutional as a violation of the Equal Protection Clause of the Fourteen Amendment the school board's plan in Michigan for laying off teachers that gave preference to people of color. [69] Justice Powell, writing for the plurality, cautioned giving preference to teachers as role models for students of color to overcome discrimination in society, indicating that it was not a sufficiently compelling reason to lay off white employees, and that "the plan presented by the school board was not narrowly tailored."[70] Powell concluded that in previous cases, the Court had not ruled

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[61] Regents of the University of California v. Bakke, 438 U.S. 265, 271 (1978)
[62] Id. at 298
[63] Id.
[64] Id. The Court further recognized the following purposes:
1. Reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession;
2. Countering the effects of societal discrimination;
3. Increasing the number of physicians who will practice in communities currently underserved; and
4. Obtaining the educational benefits that flow from an ethnically diverse student body.
[65] Id. at 357
[66] Fullilove v. Klutznick, 448 U.S. 448 (1980)
[67] Id. at 453
[68] Id. at 507 Justice Marshall argued that intermediate scrutiny should be used for racial classifications serving a remedial purpose. Id. at 517 Justice Stewart's dissent asserted that strict scrutiny was the appropriate test and emphasized that "under our Constitution, the government may never act to the detriment of a person solely because of that person' race." Id. at 551-552
[69] Wygant v. Jackson Board of Education, 476 U.S. 267, 276 (1986). The Jackson, Michigan school system provided that when layoffs were required, the Board of Education decided that teachers with the most seniority would be retained, except that at no time would the percentage of minorities to be laid off exceed the percentage of minorities employed at the time of the layoffs. The result was that some white teachers were laid off even though they had more seniority than some of the black teachers who kept their jobs.
[70] Id. at 284 Justice Powell also wrote: "The role model theory allows the Board to engage in discriminatory hir-

that societal discrimination alone justified racial preference.[71] Rather, the US Supreme Court has insisted upon some showing of prior racial discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination.

However, the Court indicated that "there may be times when it becomes necessary to take race into account, even if it meant that innocent persons may be required to bear some of the burdens required in the remedy."[72] But Justices Marshall, Brennan, and Blackmun argued in dissenting opinions that the plan was justified based on historical discriminatory practices, and argued that intermediate scrutiny should be applied.[73] In a separate dissent, Justice Stevens suggested, that "diversity was an important part of public education," and that no rigid judicial test should be applied.[74] The Court established the principle, nevertheless, that faculty diversity and student diversity were not legitimate rationale for protecting African Americans from layoffs.

The next important case involved the question of the constitutionality of the set-aside of the Minority Business Utilization Plan, adopted by the Richmond City Council.[75] In *Croson*, the US Supreme Court relied on the principle of strict scrutiny and suggested that the set-aside plan lacked sufficient proof of discrimination in the construction industry.[76] The key area of concern was the lack of evidence demonstrating prior discrimination, and the US Supreme Court recognized that state or local entities could take actions to rectify the effects of identified discrimination. The majority determined that Richmond neither demonstrated a sufficiently compelling interest in the use of race-conscious remedies, nor tailored their program narrowly enough to address a specifically identified past racial harm.[77] The Court concluded that the 30% quota "cannot be said to be narrowly tailored to any goal, except perhaps outright racial balancing."[78] Justice Scalia, in his concurrence, emphasized that "discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society."[79] He added that a state can act "'to undo the effects of past discrimination' in many permissible ways that do not involve classification by race."[80]

However, Justice Marshall wrote in his dissent that the Court's decision was a giant step backward in the realm of affirmative action, and that the Court had refused to accept

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ing and layoff practices long past the point required by any legitimate remedial purpose… Moreover, because the role model theory does not necessarily bear a relationship to the harm caused by prior discriminatory hiring practices, it actually could be used to escape the obligation to remedy such practices by justifying the small percentage of black teachers by reference to the small percentage of black students."

[71] Id. at 274

[72] Id. at 282

[73] Id. at 303

[74] Id. at 315

[75] Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) This Plan required prime contractors to whom the city awarded construction contracts to subcontract at least 30% of the dollar amount of the contract to one or more Minority Business Enterprises. Minority group members were defined as "[c]itizens of the United States who are Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts."

[76] Id. at 508

[77] Id. at 477- 478

[78] Id.

[79] Id. at 520

[80] Id.

documented proof of historical discrimination.[81] Importantly, *Croson* marked a turning point in that a majority of the Court agreed for the first time on the standard of review appropriate to remedial race-conscious programs- strict scrutiny.

A year after this decision, in *Metro Broadcasting,* the US Supreme Court upheld a Federal Communications Commission policy that gave preferences to certain minority and female applicants for broadcast station licenses.[82] Relying on *Fullilove,* the majority held that congressionally approved affirmative action programs only need to meet intermediate scrutiny.[83] Justice O'Connor's dissent, joined by Chief Justice Rehnquist, Justice Scalia and Justice Kennedy advocated strict scrutiny of minority programs, relying on reasoning similar to that of her majority opinion in *Croson*.[84]

The *Adarand* ruling in June 1995 is important because, the majority held that all government affirmative action programs, whether federal, state, or local, must meet strict scrutiny; any race-conscious program must "promote a compelling state interest" and be "necessary" or "narrowly tailored" to reach that end.[85] The court concluded that the plan must have a permissible basis: to remedy a clear history of past discrimination by an employer or union or to correct a "manifest imbalance" in a traditionally segregated job category.[86]

The US Supreme Court announced that three general propositions had been established with respect to analysis of governmental racial classifications. Consequently, any racial classification resulting in different treatment is inherently suspected.[87] Consistency requires that the standard of review is independent of the race of those burdened or benefited by a racial classification.[88] Finally, equal protection analysis under the Fifth (federal actions) and Fourteenth Amendments (state and local actions) is the same.[89]

The dissent, authored by Justice Stevens, argued that controlling precedent demands the application of intermediate scrutiny to the federal program challenged in *Adarand*, and that the decision given in this case created a new meaning for strict scrutiny.[90] Finally, Justice Ginsburg emphasized that "the Court should consider the fact that affirmative action has been a vital tool in the quest for real equality."[91]

Although the majority in *Adarand* held that all government affirmative action programs must meet strict scrutiny, it is obvious that the US Supreme Court remains closely divided on this issue, as the five-to-four decision in this case indicates.

B) The European Law

The European experience is much younger and the specific issue before the European Court of Justice (ECJ) in all cases was whether certain provisions of the national law

[81] Id. at 555-557
[82] Metro Broadcasting, Inc. v. Federal Communications Commission, 497 U.S. 549 (1990)
[83] Id. at 550
[84] Id. at 552
[85] Adarand Constructors, Inc. v. Pena*,* 515 U.S. 200 (1995)
[86] Id. at 207
[87] Id. at 208
[88] Id.
[89] Id.
[90] Id. at 209
[91] Id.

containing binding targets for increasing proportion of women in sectors of public employment in which they were under-represented could be so interpreted as to be consistent with the Equal Treatment Directive.[92] When this question was referred to the ECJ for the first time in a leading 1995 case, known as the *Kalanke* case, the ECJ held that since positive action become an exception to the general principle of equality, it had to be interpreted restrictively.[93]

The ECJ ruled against a Bremen law that required women to be preferred in the selection process in employment if they had the same qualifications as men applying for the same post.[94] The Court reasoned that this policy on recruitment and promotion contravened Article 2(4) of Equal Treatment Directive 76/207, that provides the possibility of "measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities" in the areas of access to employment, promotion and vocational training.[95]

The *Kalanke* involved Mr. Kalanke and Ms. Glissman, both employed by the city of Bremen as horticultural employees in the Parks Department. Both applied and were short listed for the post of section manager. The Parks' supervisor determined that the two candidates were equally qualified.[96] The criteria "equally qualified" adopted by the Bremen law is mystifying because the question remains how will two candidates ever be truly "equally qualified" for a job?[97] Still, under Bremen law, a hiring committee would settle for a finding of "equally qualified" rather than more rigorously scrutinizing which candidate is better qualified for the job and enables preference to be given to a women applicant, where it can be shown that women are underrepresented in an appropriate quota system.[98] Thus, Ms. Glissman was appointed, and Mr. Kalanke challenged the decision. When the case reached the Federal German Court, it took the view that the quota allocation was in accordance with German Law, and the case was forwarded to the ECJ.[99]

The ECJ found unconstitutional the inflexibility of this decision, based on the Bremen Law on Equal Treatment for Men and Women in the Public Service, saying that if women comprised less than 50% of the employees in an individual pay bracket within the relevant personnel group of a department, priority was to be given to a female candidate over a male candidate of the same qualifications.[100] The argument maintained that the Bremen scheme constituted "automatic priority" because the preference continued to operate even when women did make up 50% of the relevant labor market.[101] The ECJ ruled that laws "which guarantee women absolute and unconditional priority for

[92] The ECJ has jurisdiction to hear the cases pursuant to Article 177 (now 234 of the Treaty of Amsterdam) which permits the Court to hear cases submitted by national courts within the EU. The function of the ECJ is to ensure the uniform interpretation of EU law, interpreting its law in the context of a specific national law.
[93] Kalanke v. Freie Hansestadt Bremen, C-450/93, ECR [1995] I-3051, 1 C.M.L.R. 175 (1996)
[94] Katherine Cox, supra note 12, at 116
[95] Kalanke, 1 C.M.L.R. at 194
[96] Todd Joseph Koback, supra note 15, 474
[97] Rarely will two people be identical in every possible criteria that might have any relevance for the job.
[98] It seems that the concept of "equally qualified" creates an excuse for preferential treatment.
[99] Katherine Cox, supra note 12, at 121
[100] Id.
[101] Id.

appointment or promotion goes beyond promoting equal opportunities" and could not be saved by Article 2(4) of the Equal Treatment Directive.[102]

The influence of American law upon this judgment was minimal, and the Court referred solely to general principles drawn from its own case law. The Advocate-General did, however, draw upon American case law regarding the compatibility of affirmative action with the constitutional protection of equal protection found in the Fourteen Amendment, and his invocation of American authority was restricted to a single footnote.[103] However, at about the same time that the ECJ rendered its decision in *Kalanke*, American affirmative action programs were also being reviewed in the *Adarand* case by the US Supreme Court. As the Advocate General told the European Court, "in Europe, positive action has begun to take hold or, at any event, to become the object of attention at the very time when affirmative action seems to be a state of crisis in its country of origin.[104]

The truth of this statement was based on the 1997 *Marschall* case, where the ECJ clarified some of the uncertainty which existed since *Kalanke*, as much as the hostility of women's rights advocates and organizations that denounced this decision. Many member states and EU institutions also criticized this decision because it was uncertain what kinds of positive action schemes would pass muster, and shortly after the *Kalanke* was handed down, the European Commission set out its interpretation of this decision, proclaiming that positive action measures in general are still lawful, except for rigid quota schemes.[105]

In *Marshall,* the ECJ started from the same principles and quoted the same law as the earlier opinion, but it reached very different conclusions. First, the ICJ recognized that the Directive authorizes member states to take measures in favor of women to improve their ability to compete in the employment market and pursue their career on an equal footing with men.[106] Indeed, the Court decided that if women have the same qualifications as men, they can receive preference for promotion in areas where they are underrepresented.[107]

This case gives greater content and significance to the concept of equal opportunity under the EU law. In *Marschall*, both candidates applied for a promotion to teach in a secondary school in Land Nordrhein-Westfalen, Germany.[108] The school district authority found the candidates to be equally qualified and selected the female candidate. This preferential treatment was intended to counteract structural discrimination that affects women in the workplace since employers tend to promote men rather than women. It was recognized that employers tend to apply traditional promotions based on prejudices and stereotypes concerning the role and capacities of women in working

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[102] Id.
[103] Regents of the Univ. of California v. Bakke, 483 U.S. 265 (1978); United Steelworkers of America v. Webster, 443 U.S. 193 (1979); City of Richmond v. J.A. Croson, 488 U.S. 469 (1989); (cited in Kalanke, 1 C.M.L.R. at 182) (Opinion of Advocate-General)
[104] Opinion of the Advocate- General, Mr. Tesauro, Case C-450/93
[105] See Erika Szyszczak, Positive Action after Kalanke, Modern law Review, no. 59, p. 876 (1996)
[106] See Austin Clayton, Comment: Hellmut Marshall v. Land Nordrhein-Westfalen: Has Equal Opportunity Between the Sexes Finally Found a Champion in European Community Law?, Boston Universitz Public Interest Law Journal, no. 16, p. 440 (1998)
[107] Id.
[108] Marshall v. Land Nordrhein-Westfalen, Case C-409/95, 1 C.M.L.R. 547

life.[109] Land claimed their selection of female candidate on these grounds. According to Land, "where qualifications are equal, employers tend to promote men rather than women because they apply traditional promotion criteria (such as age, seniority and the fact that a male candidate is a head of household and sole breadwinner) which in practice put women at a disadvantage."[110] The Finnish, Swedish, and Norwegian governments supported this position and asserted that this rule "promotes access by women to posts of responsibility and thus helps to restore balance to labor markets which … are still broadly partitioned on the basis of gender in that they concentrate female labor in lower positions in the occupational hierarchy."[111]

The ECJ emphasized that the scope of measures permitted under the mentioned Article 2(4) must be directly linked to the Article's purpose of improving women's ability to compete in the workplace where actual instances of inequality continue to exist.[112] As long as the measure meets these conditions, and is not absolute or unconditional, then the measure is permitted.[113] The Court left it for the national courts to determine which criteria qualify for this objective test, stating that the "criteria must not be such as to discriminate against female candidates."[114] The ECJ also recognized that having women better represented and in positions of authority at work will have a positive effect on breaking down barriers to equal opportunity in the workplace.[115]

By striking down the provision in *Kalanke*, the Court expressed its dissatisfaction with automatic hiring and promotion of women. However, through its ruling in *Marshall*, the ECJ has shown that traditional stereotypes regarding gender differences still persist and that positive governmental action is needed. The ECJ said that "women will interrupt their careers more frequently, that owing to household and family duties they will be less flexible in their working hours, or that they will be absent from work more frequently because of pregnancy, childbirth and breastfeeding."[116]

In contrast to *Kalanke,* the response to *Marshall* was very positive. The European Commission welcomed the ruling as "putting positive action in the European Union back on the rails," and as a step forward for positive action.[117]

VII. COMPARING THE TWO LEGAL SYSTEMS

The EU and the US systems as seen in cases described above, recognize that affirmative action constitutes a departure from the fundamental principle of formal equality, and

[109] Austin Clayton, supra note 108, 432
[110] Id.
[111] Michaelle I. Rozof, Comment: Overcoming Traditional Gender Stereotypes in the European Union: The European Court of Justice's Ruling in Hellmut Marshall v. Land Nordrhein-Westfalen Emory International Law Review, no12, p. 1528 (1998)
[112] Marshall , supra note 110, 547, P 30
[113] Id.
[114] Id.
[115] Id.
[116] Id.
[117] Three recent decisions were decided on the same principles, established by the Marshall Case C-158/97, re: Badeck, 2000 E.C.R. I-1875 (Mar. 28, 2000); Case C-407/98, Abrahamsson v. Fogelqvist, 2000 E.C.R. I-05539 (July 6, 2000); and Case C-79/99, Schnorbus v. Land Hesse, 2000 E.C.R. I-0000 (Dec. 7, 2000)

because of that departure, requires further justification. However, in the EU, Article 2(4) of the Equal treatment Directive explicitly allows deviation from formal equality that makes the justification of positive action easier.

The usual test applied by the ECJ in reviewing a measure justified under derogation is that of proportionality, which has three parts: suitability, necessity, and proportionality.[118] Suitability asks whether the measure accords with the purpose of the derogation. Necessity investigates whether the chosen means are necessary to pursue this goal. Proportionality then balances the goal of the derogation against the burdens that it may engender. The ECJ in positive action after *Marshall* lays its stress on the necessity and a strict reading of necessity may require showing that no less intrusive measures were available.[119] The ECJ's insistence on flexibility in the positive action cases, however, most likely stems from its assessment of proportionality *stricto sensu* and that gives this test weaker scrutiny. As it was presented, there is the raging debate in the US Supreme Court over which is the correct standard of review with regard to race-based governmental actions. It seems that the US Supreme Court has found at least some momentary response in *Adarand*, where for the first time a majority of the Court agreed on the appropriate standard of review, that of strict scrutiny. Therefore, any race-conscious program must "promote a compelling state interest" and be "necessary" or "narrowly tailored" to reach that end, and this test is much harder to pass than according to the ECJ test.

The ECJ sees positive action as a measure to diminish discrimination in the whole of society showing that women are not still an equal footing with the men in employment, and no evidence of past discrimination is required. Thus, positive action under Article 2(4) of the Equal Treatment Directive is premised on a remedial rationale—promoting equal opportunity by remedying procedural bias in employment decisions. On the contrary, the US Supreme Court's held in *Croson* that evidence of societal discrimination against minorities, by itself, would not suffice to justify a preferential treatment. Instead, the Court required that government actors muster "particularized" evidence of discrimination against specific minority groups in the precise context where the preference would apply.[120] In making this distinction between societal and particularized discrimination, the Supreme Court, speaking through Justice O'Connor, emphasized that its rejection of the former should not be read to minimize the widespread social injustice that many minority groups had faced. The problem with societal discrimination was that its contours were too "amorphous" to be measured with the precision required for a judicially-determinable remedy.[121]

Finally, the affirmative action plan in the EU is seen as a remedy for discrimination that women suffer due to persistent stereotypes. As ECJ noticed, the fact "that a male candidate and a female candidate are equally qualified does not mean that they have the same chances."[122] Accordingly, the European Commission has approved member state's

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[118] Sean Pager, Strictness and Subsidiarity: An Institutional Perspective on Affirmative Action at the European Court of Justice, Boston College International and Comparative Law Review, no. 26, p. 59 (2003)
[119] Id.
[120] Leslie Gentile, Giving Effects to equal Protection: Adarand Constructors, Inc. v. Pena, Akron Law Review, no. 29, p. 417 (1996)
[121] Id.
[122] Marshall, supra note 110, P 30

plans which have reduced the impact of these stereotypes, particularly in relation to their role as mothers and home providers. [123] From another side, the US Supreme Court recognized in *Bakke* that "preferential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth."[124] This view was confirmed in *Croson* where the majority said that "classification based on race carry a danger of stigmatic harm."[125]

The US Supreme Court almost always discussed the burden imposed on innocent whites by an affirmative action plan that it is reviewing. Some white males feel that they have to pay the price for discrimination that happened in the past and this can lead to the racial balkanization in a society. Reasonably, this has also led recently to opposition of affirmative action.[126] The EU situation is different because positive action includes women, meaning half of the population that extends through all social categories; thus many people recognize its need and its opposition is, therefore, much weaker.

VIII. CONCLUSION

The EU has faced many difficult problems since its inception, and one continuing problem has been the large disparities between the rights and status accorded the working men and those accorded the working woman. For decades, the EU has attacked this problem and looked for positive action measures as a solution to this problem. Although affirmative action cases in the US involving gender discrimination have recently received less attention than cases involving racial discrimination (particularly cases involving public contracts and higher education), it is certainly important for the US to remain focused on this issue. Recent decisions by the ECJ involving positive action for women in employment and the provisions to the underlying EU gender equality law should help Americans rethink arguments for and against various affirmative action proposals and make them aware of new methods of affirmative action being used in Europe that might be attempted in the US.

From another point, although the policy of equal treatment for women in the EU has proven to be rather successful, is has not to date been extended to race discrimination issues. Therefore, the EU can study the US experience, primarily concerned with this issue, and it can help the EU in reaching a comprehensive community race discrimination policy. Experience in one nation or region may inspire or inform other nations or regions in this area. Comparative analysis emphatically is relevant to the task of interpreting constitutions and enforcing civil rights.

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[123] Commission of the European Communities: Council Recommendation of 13 December 1984 on the Promotion of Positive Action for Women, 84/635/EEC, (1984) OJ L331. While Recommendations are not binding on Member States, they do provide clear statements of policy positions in certain areas and on certain issues.

[124] Bakke, supra note 61, at 271

[125] Croson, supra note 77, at 508

[126] According to Louis Harris, in the past quarter century 60 % have supported affirmative action, with 38% opposed, but those number have shifted recently to 55% in favor and 45% opposed. See Lincoln Caplan, Affirmative Action and the Supreme Court, 34 (1997)

Today, it is evident that affirmative action in both systems sends both inspiring and disturbing messages. It has the potential to redress deprivations of equality as a civil right, and to promote economic and social well-being. Yet, it creates opposition as reverse discrimination against individuals not responsible for a society's past discrimination. But it is also visible that opposition to affirmative action in the EU is much weaker than in the US. The reasons for this could be found in the adopted "welfare state" doctrine and in the fact that its beneficiaries are pretty clear - women.

"AFIRMATIVNA AKCIJA" U SJEDINJENIM AMERIČKIM DRŽAVAMA I EVROPSKOJ UNIJI: POREĐENJE I ANALIZA

Ivana Krstić

Postojanje "affirmativne akcije", (kod nas poznatije kao »pozitivne diskriminacije«) ukazuje na oblasti u kojima pravo kao neutralno sredstvo pokazuje svoja ograničenja u rešavanju postojećih društvenih konflikata. Ovaj rad posvećen je uporednom istraživanju pozitivne diskriminacije u američkom i evropskom pravu. Pozitivna diskriminacija prvo je nastala u SAD 60'tih i 70'tih godina i u početku je korišćena samo u kontekstu rasne diskriminacije. Ipak, od skoro, pozitivna diskriminacija počinje obimno da se koristi kao mera i u okviru EU, primarno kao mera koja će osigurati ženama jednakost na radnom mestu. Oba sistema priznaju da pozitivna diskriminacija predstavlja odstupanje od osnovnog principa formalne jednakosti i upravo zbog tog odstupanja zahtevaju njeno dalje opravdanje. Međutim, član 2, stav 4 Direktive o jednakom postupanju EU eksplicitno dozvoljava odstupanje od formalne jednakosti što lakše opravdava njenu primenu u odnosu na SAD. Test koji primenjuje Evropski sud pravde prilikom razmatranja ovakve mere jeste test proporcionalnosti koji se sastoji iz tri dela: celishodnosti, neophodnosti i proporcionalnosti. U SAD i dalje postoji žučna rasprava u okviru Vrhovnog suda oko odgovarajućeg standarda koji mora postojati kada su u pitanju državne mere zasnovane na rasi.

Evropski sud pravde vidi pozitivnu diskriminaciju kao meru koja umanjuje diskriminaciju u celom društvu i pritom ne zahteva dokaz diskriminacije u prošlosti, stavljajući akcenat na opštepoznatoj činjenici da žene ni do danas nisu jednake sa muškarcima na polju rada. Ova mera je zato viđena kao pravno sredstvo kojim se otklanjaju uvreženi stereoptipi prema ženama. Suprotno, Vrhovni sud SAD je zauzeo stav u slučaju ***Croson*** *da dokaz postojanja društvene diskriminacije u odnosu na pojedine manjine, sam po sebi, nije dovoljno opravdanje za preferencijalni tretman. Ovaj sud u slučaju* ***Bakke*** *smatra da "preferencijalni programi mogu samo učvrstiti opšte stereotype, uzimajući da pojedine grupe nisu sposobne da postignu uspeh bez posebne zaštite koja nije zasnovana na činjenici kvaliteta pojedinca."Uočljivo je da u oba sistema afirmativna akcija šalje i inspirativne i uznemiravajuće poruke danas. Za nas je zato posebno značajno proučavanje njene primene u ova dva razvijena sistema, posebno posle usvajanja Povelje o ljudskim i manjinskim pravima i građanskim slobodama, koja u članu 3 izričito dopušta ovu meru kako bi se svakom pojedincu omogućilo puno uživanje ljudskih prava pod jednakim uslovima.*

Ključne reči: *afirmativna akcija, pozitivna diskriminacija, korisnik, implementacija, jednakost, rasa, žena, liberalna država, socijalna država, Vrhovni sud SAD, Evropski sud pravde.*