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Affirmative Action Revisited: A Legal History and Prospectus

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Summary

Affirmative action has again moved to the forefront of public debate as a consequence of legal and political developments at the federal, state, and local levels. In recent years, federal courts have voided the preferential admissions of minority students to the University of Texas and elsewhere, questioning in general the constitutional status of racial and ethnic diversity in education; invalidated minority preferences in public and private employment as a violation of constitutional and federal statutory rights; defeated a Federal Communications Commission policy requiring radio licensees to adopt affirmative minority recruitment and outreach measures; and nullified state and local efforts to increase minority group participation as contractors and subcontractors on publicly-financed construction projects. The U.S. Supreme Court agreed this Term to review the now-famous *Adarand* case for a third time. The Tenth Circuit Court of Appeals, on remand from the Court's divided 1995 ruling in *Adarand Constructors Inc. v. Pena*, held that an earlier program of financial incentives to promote minority and "disadvantaged" small business participation on federally-assisted highway projects was unconstitutional. As revised and amended in 1997, the program was deemed narrowly tailored to a compelling governmental interest and passed constitutional muster. To the chagrin of many observers, however, the Court on November 27, 2001 sidestepped the constitutional issues posed by *Adarand* and dismissed the appeal as "improvidently granted."

Bills to eliminate affirmative action preferences have reportedly been introduced in at least two dozen legislatures, and an initiative to curb affirmative action programs in the State of Washington was passed by the electorate in the 1998. Like Proposition 209 in California, Washington's Initiative 200 bans "preferences" based on race or sex in state contracting, hiring, and admission to public colleges and universities. Similarly, the elimination of racial, ethnic, and gender preferences from federal employment, grant and procurement activity has been a topic of proposed legislation in recent Congresses. Meanwhile, the former Clinton Administration responded with its own set of regulatory reforms designed to "mend" rather than "end" affirmative action by the federal government.

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Affirmative action has again moved to the forefront of public debate as a consequence of legal and political developments at the federal, state, and local levels. In recent years, federal courts have voided the preferential admissions of minority students to the University of Texas and elsewhere, questioning in general the constitutional status of racial and ethnic diversity policies in public education; invalidated minority preferences in public and private employment as a violation of constitutional and federal statutory rights; defeated a Federal Communications Commission policy requiring radio licensees to adopt affirmative minority recruitment and outreach measures; and nullified state and local efforts to increase minority group participation as contractors and subcontractors on publicly-financed construction projects. Without comment, the Supreme Court in 1997 refused to block implementation of California Proposition 209, a ballot initiative designed to eliminate race, ethnicity, or gender as a basis for state governmental action. In *Coalition for Economic Equity v. Wilson*, civil rights groups argued that California's anti-affirmative action measure was unconstitutional because it imposed "special burdens" on women and racial minorities in their quest for equality in public contracting, employment, and education. The Ninth Circuit appeals court determined, however, that the measure "addresses in neutral fashion race-related and gender-related matters" and did not violate federal law or the Constitution.

Ongoing legal controversy has surrounded the Supreme Court's 1995 ruling in *Adarand Constructors Inc. v. Pena*, concerning the constitutionality of race-based affirmative action by the federal government. On remand, the Tenth Circuit ultimately determined that the original program of financial incentives to promote minority and "disadvantaged" small business participation on federally-assisted highway projects challenged in *Adarand* was unconstitutional. But as subsequently reformed by federal officials in 1997 to meet constitutional objections, the program was found to be sufficiently "tailored" to "compelling" governmental interests to withstand strict judicial scrutiny. The case returned to the High Court for a third appearance this Term, as *Adarand Constructors Inc. v. Mineta*, but on November 27, 2001 the Justices sidestepped the constitutional issues posed and dismissed the appeal as "improvidently granted."

Nearly a quarter century after the Supreme Court ruling in *Regents of the University of California v. Bakke*, the diversity rationale for affirmative action in public education remains a topic of political and legal controversy. Many colleges and universities have implemented affirmative action policies not only to remedy past discrimination, but also to achieve a racially and ethnically diverse student body or faculty. Justice Powell, in his opinion for the *Bakke* Court, stated that the attainment of a diverse student body is "a constitutionally permissible goal for an institution of higher education," noting that "[t]he atmosphere of 'speculation, experiment, and

creation' so essential to the quality of higher education is widely believed to be promoted by a diverse student body." Recently, however, federal courts have begun to question the Powell rationale, unsettling expectations about the constitutionality of diversity-based affirmative action in educational admissions and faculty hiring.

In striking down the admissions process at the University of Texas School of Law, the Fifth Circuit in *Hopwood v. Texas* concluded that any use of race in the admissions process was forbidden by the Constitution. Siding with *Hopwood* is the Eleventh Circuit, in *Johnson v. Board of Regents*, which last year voided a numerical "racial bonus" awarded to minority applicants for freshman admission at the University of Georgia. A circuit court conflict was created, however, when the Ninth Circuit relied on *Bakke* to uphold an affirmative action admissions policy to the University of Washington Law School that made extensive use of race-based factors. The judicial divide over *Bakke*'s legacy was perhaps best illustrated by a pair of separate trial court decisions, one upholding for diversity reasons the race-based undergraduate admissions policy of University of Michigan, the other voiding a special minority law school admissions program at the same institution. On May 14, 2002, the Sixth Circuit in *Grutter v. Bollinger* reversed the latter decision, finding that the Law School's interest in achieving the educational benefits of a diverse student body is compelling, and that its admissions policy is "narrowly tailored" to that goal. Appeal is pending with the same court in the undergraduate admissions case. But presently the federal appeals courts to address the question are evenly divided over the constitutional significance of *Bakke* in the realm of higher educational admissions.

Bills to eliminate affirmative action preferences have reportedly been introduced in at least two dozen legislatures, and an initiative to curb affirmative action programs in the State of Washington was passed by the electorate in the 1998. Like Proposition 209, Washington's Initiative 200 bans "preferences" based on race or sex in state contracting, hiring, and admission to public colleges and universities.[1] Similarly, the elimination of racial, ethnic, and gender preferences from federal employment, grant and procurement activity has been a recent topic of proposed congressional legislation.[2] Meanwhile, the former Clinton Administration responded with its own set of regulatory reforms designed to "mend" rather than "end" affirmative action by the federal government.

Legal History of Federal Affirmative Action

The origins of affirmative action law may be traced to the early 1960's as first, the Warren, and then the Burger Court, grappled with the seemingly intractable problem of racial segregation in the nation's public schools. Judicial rulings from

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[1]See CRS Report RL30086, Affirmative Action in Washington State: a discussion and analysis of Initiative 200. 7p. (1999).

[2]See Affirmative Action: congressional and presidential activity, 1995-1998. CRS Report RL30142. 12p. (1999); American Law Division, General Distribution Memorandum, "Legal Effect of H.R. 1909 and S. 950, the Civil Rights Act of 1997, on Affirmative Action by the Federal Government" (Dale)(7-22-97).

this period recognized an "affirmative duty," cast upon local school boards by the Equal Protection Clause, to desegregate formerly "dual school" systems and to eliminate "root and branch" the last "vestiges" of state-enforced segregation.[3] These holdings ushered in a two decade era of "massive" desegregation – first in the South, and later the urban North – marked by federal desegregation orders frequently requiring drastic reconfiguration of school attendance patterns along racial lines and extensive student transportation schemes. School districts across the nation operating under these decrees have since sought to be declared in compliance with constitutional requirements in order to gain release from federal intervention. The Supreme Court eventually responded by holding that judicial control of a school system previously found guilty of intentional segregation should be relinquished if, looking to all aspects of school operations, it appears that the district has complied with desegregation requirements in "good faith" for a "reasonable period of time" and has eliminated "vestiges" of past discrimination "to the extent practicable."[4]

Congress and the Executive Branch soon followed by adopting a panoply of laws and regulations authorizing, either directly or by judicial or administrative interpretation, "race-conscious" strategies to promote minority opportunity in jobs, education, and governmental contracting. The basic statutory framework for affirmative action in employment and education derives from the Civil Rights Act of 1964. Public and private employers with 15 or more employees are subject to a comprehensive code of equal employment opportunity regulations under Title VII of the 1964 Act.[5] The Title VII remedial scheme rests largely on judicial power to order monetary damages and injunctive relief, including "such affirmative action as may be appropriate,"[6] to make discrimination victims whole. Except as may be imposed by court order or consent decree to remedy past discrimination, however, there is no general statutory obligation on employers to adopt affirmative action remedies. Official approval of "affirmative action" remedies was further codified by federal regulations construing the 1964 Act's Title VI, which prohibits racial or ethnic discrimination in all federally assisted "programs" and activities,[7] including public or private educational institutions. The Office of Civil Rights of the Department of Education interpreted Title VI to require schools and colleges to take affirmative action to overcome the effects of past discrimination[8] and to encourage

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[3]See e.g. Green v. County Board, 391 U.S. 430 (1968); Swann v. Board of Education, 402 U.S. 1 (1971); Keyes v. Denver School District, 413 U.S. 189 (1973).

[4]Dowell v. Board of Education, 498 U.S. 237 (1991). See also Freeman v. Pitts, 503 U.S. 467 (1993)(allowing incremental dissolution of judicial control) and Missouri v. Jenkins, 515 U.S. 70 (1995)(directing district court on remand to "bear in mind that its end purpose is not only 'to remedy the violation' to the extent practicable, but also 'to restore state and local authorities to the control of a school system that is operating in compliance with the Constitution.'").

[5]42 U.S.C. §§ 2000e et seq.

[6]Id. at § 2000e-5(g).

[7]42 U.S.C. 2000d et seq.

[8]34 C.F.R. § 100.3(b)(vii)(6)(1999).

"voluntary affirmative action to attain a diverse student body."[9] Another Title VI regulation permits a college or university to take racial or national origin into account when awarding financial aid if the aid is necessary to overcome effects of past institutional discrimination.[10]

By the mid-1980's, the Supreme Court had approved the temporary remedial use of race- or gender-conscious selection criteria by private employers under Title VII. These measures were deemed a proper remedy for "manifest racial imbalance" in "traditionally segregated" job categories, if voluntarily adopted by the employer,[11] or for entrenched patterns of "egregious and longstanding" discrimination by the employer, if imposed by judicial decree.[12] In either circumstance, however, the Court required proof of remedial justification rooted in the employer's own past discrimination and its persistent workplace effects. Thus, a "firm basis" in evidence, as revealed by a "manifest imbalance" – or "historic," "persistent," and "egregious" underrepresentation – of minorities or women in affected job categories was deemed an essential predicate to preferential affirmative action. Of equal importance, all racial preferences in employment were to be judged in terms of their adverse impact on "identifiable" non-minority group members. Remedies that protected minorities from layoff, for example, were most suspect and unlikely to pass legal or constitutional muster if they displaced more senior white workers. But the consideration of race or gender as a "plus" factor in employment decisions, when it did not unduly hinder or "trammel" the "legitimate expectations" of non-minority employees, won ready judicial acceptance.[13] Affirmative action preferences, however, had to be sufficiently flexible, temporary in duration, and "narrowly tailored" to avoid becoming rigid "quotas."

The historical model for federal laws and regulations establishing minority participation "goals" may be found in Executive Orders which since the early 1960's have imposed affirmative minority hiring and employment requirements on federally financed construction projects and in connection with other large federal contracts. Executive Order 11246, as presently administered by the Office of Federal Contract Compliance Programs, requires that all employers with 50 or more employees, and federal contracts in excess of $50,000.00, file written affirmative action plans with the government. These must include minority and female hiring goals and timetables to which the contractor must commit its "good faith" efforts. Race and gender

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[9]44 Fed. Reg. 58,509 (Oct. 10, 1979). See also 34 C.F.R. § 100.3(b)(vii)(6)(ii)("Even in the absence of past discrimination, a recipient in administering a program may take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color, or national origin.").

[10]59 Fed. Reg. 8756 (Feb. 23, 1994). See also Letter from Judith A. Winston, General Counsel, United States Department of Education, to College and University Counsel, July 30, 1996 (reaffirming that it is permissible in appropriate circumstances for colleges and universities to consider race in admissions decisions and granting financial aid).

[11]United Steelworkers v. Weber, 443 U.S. 193 (1979).

[12]Local 28 Sheet Metal Workers v. EEOC, 478 U.S. 421 (1986).

[13]United States v. Paradise, 480 U.S. 149 (1987); Johnson v. Transportation Agency, 480 U.S. 616 (1987).

considerations – which may include numerical goals – are also a fundamental aspect of affirmative action planning by federal departments and agencies to eliminate minority and female "underrepresentation" at various levels of agency employment.[14]

Federal contract "set-asides" and minority subcontracting goals later evolved from Small Business Administration programs to foster participation by "socially and economically disadvantaged" entrepreneurs in the federal procurement process.[15] Minority group members and women are presumed to be socially and economically disadvantaged under the Small Business Act, while non-minority contractors must present evidence to prove their eligibility. "Goals" or "set-asides" for minority groups, women, and other "disadvantaged" individuals have also been routinely included in federal funding measures for education, defense, transportation and other activities over much of the last two decades.[16] Currently, each federal department and agency must contribute to achieving a government-wide, annual procurement goal of at least 5% with its own goal-oriented effort to create "maximum practicable opportunity" for minority and female contractors.[17] Federal Acquisition Act amendments in 1994 amended the 5 % minority procurement goal and the minority subcontracting requirements in § 8(d) to specifically include women-owned businesses in addition to socially and economically disadvantaged individuals.[18]

The *Bakke* ruling in 1978 launched the contemporary constitutional debate over state-sponsored affirmative action.[19] A "notable lack of unanimity" was evident from the six separate opinions filed in that case. One four-Justice plurality in *Bakke* voted to strike down as a violation of Title VI a special admissions program of the University of California at Davis medical school which set-aside sixteen of one hundred positions in each incoming class for minority students, where the institution itself was not shown to have discriminated in the past. Another bloc of four Justices argued that racial classifications designed to further remedial purposes were foreclosed neither by the Constitution nor the Civil Rights Act and would have

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[14]42 U.S.C. § 2000e-16(b)(1); 5 U.S.C. § 7201. The EEOC and the Office of Personnel Management have issued rules to guide implementation and monitoring of minority recruitment programs by individual federal agencies. Among various other specified requirements, each agency plan "must include specific determinations of underrepresentation for each group and must be accompanied by quantifiable indices by which progress toward eliminating underrepresentation can be measured." 5 C.F.R. § 720.205(b).

[15]15 U.S.C.§ 637 (a), (d).

[16]See "Compilation and Overview of Federal Laws and Regulations Establishing Affirmative Action Goals or Other Preference Based on Race, Gender, or Ethnicity," CRS Memorandum, February 17, 1975 (Dale), reprinted at 141 Cong. Rec. S. 3929 (daily ed. 3-15-95).

[17]15 U.S.C. § 644(g)(1). A law passed in 1994 permits federal agency heads to adopt restricted competition and a 10% "price evaluation preference" in favor of "socially and economically disadvantaged individuals" to achieve the government-wide and agency contracting goal requirements. P.L. 103-355, 108 Stat. 3242, § 7104 (1994).

[18]P.L. 103-355, 108 Stat. 3374, § 7106 (1994).

[19]Regents of the University of California v. Bakke, 438 U.S. 265 (1975).

upheld the minority admissions quota. Justice Powell added a fifth vote to each camp by condemning the Davis program on equal protection grounds while endorsing the nonexclusive consideration of race as an admissions criteria to foster student diversity.

In Justice Powell's view, neither the state's asserted interest in remedying "societal discrimination," nor of providing "role models" for minority students was sufficiently "compelling" to warrant the use of a "suspect" racial classification in the admission process. But the attainment of a "diverse student body" was, for Justice Powell, "clearly a permissible goal for an institution of higher education" since diversity of minority viewpoints furthered "academic freedom," a "special concern of the First Amendment."[20] Accordingly, race could be considered by a university as a "plus" or "one element of a range of factors"– even if it "tipped the scale" among qualified applicants – as long as it "did not insulate the individual from comparison with all the other candidates for the available seats."[21] The "quota" in *Bakke* was infirm, however, since it defined diversity only in racial terms and absolutely excluded non-minorities from a given number of seats. By two 5-to-4 votes, therefore, the Supreme Court affirmed the lower court order admitting Bakke but reversed the judicial ban on consideration of race in admissions.

Bakke was followed by *Wygant v. Jackson Board of Education*,[22] where a divided Court ruled unconstitutional the provision of a collective bargaining agreement that protected minority public school teachers from layoff at the expense of more senior white faculty members. While holding the specific layoff preference for minority teachers unconstitutional, seven *Wygant* Justices seemed to agree in principle that a governmental employer is not prohibited by the Equal Protection Clause from all race-conscious affirmative action to remedy its own past discrimination. Another series of decisions approved of congressionally mandated racial preferences to allocate the benefits of contracts on federally sponsored public works projects,[23] and in the design of certain broadcast licensing schemes,[24] while condemning similar actions taken by local governmental entities to promote public contracting opportunities for minority entrepreneurs.[25] However, in each of these cases, the Justices failed to achieve a consensus on most issues, with bare majorities, pluralities, or–as in *Bakke*–a single Justice, determining the "law" of the case.

Not until 1989 did a majority of the Justices resolve the proper constitutional standard for review of governmental classifications by race enacted for a remedial or other "benign" legislative purpose. Disputes prior to *City of Richmond v. J.A.*

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[20]Id. at 311-12.

[21]Id. at 317.

[22]476 U.S. 267 (1986).

[23]Fullilove v. Klutznick, 448 U.S. 448 (1980).

[24]Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990).

[25]City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

Croson[26] yielded divergent views as to whether state affirmative action measures for the benefit of racial minorities were subject to the same "strict scrutiny"as applied to "invidious" racial discrimination under the Equal Protection Clause, an "intermediate" standard resembling the test for gender-based classifications, or simple rationality. In *Croson*, a 5 to 4 majority settled on strict scrutiny to invalidate a 30% set-aside of city contracts for minority-owned businesses because the program was not "narrowly tailored" to a "compelling" governmental interest. While "race-conscious" remedies could be legislated in response to proven past discrimination by the affected governmental entities, "racial balancing" untailored to "specific" and "identified" evidence of minority exclusion was impermissible. *Croson* suggested, however, that because of its unique equal protection enforcement authority, a constitutional standard more tolerant of racial line-drawing may apply to Congress. This conclusion was reinforced a year later when, in *Metro Broadcasting, Inc. v. FCC*,[27] the Court upheld certain preferences for minorities in broadcast licensing proceedings, approved by Congress not as a remedy for past discrimination but to promote the "important" governmental interest in "broadcast diversity."

The two-tiered approach to equal protection analysis of governmental affirmative action was short-lived. In *Adarand Constructors, Inc. v. Pena*,[28] the Court applied "strict scrutiny" to a federal transportation program of financial incentives for prime contractors who subcontracted to firms owned by "socially and economically disadvantaged individuals," defined so as to prefer members of designated racial minorities. Although the Court refrained from deciding the constitutional merits of the particular program before it, and remanded for further proceedings below, it determined that all "racial classifications" by government at any level must be justified by a "compelling governmental interest" and "narrowly tailored" to that end. But the majority opinion, by Justice O'Connor, sought to "dispel the notion" that "strict scrutiny is 'strict in theory, but fatal in fact,'" by acknowledging a role for Congress as architect of remedies for discrimination nationwide. "The unhappy persistence of both the practices and lingering effects of racial discrimination against minorities in this country is an unfortunate reality, and the government is not disqualified from acting in response to it." No further guidance is provided, however, as to the scope of remedial power remaining in congressional hands, or of the conditions required for its exercise. Bottom line, *Adarand* suggests that racial preferences in federal law or policy are a remedy of last resort and, as discussed *infra*, must be adequately justified and narrowly drawn to pass constitutional muster.

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[26]488 U.S. 469 (1989).

[27]497 U.S. 547 (1990).

[28]515 U.S. 200 (1995).

Minority and Small Disadvantaged Business Programs

Statutory History

It has long been the policy of the Federal Government to assist minority and other "socially and economically disadvantaged" small businesses become fully competitive and viable business concerns. The objective has largely been pursued through the federal procurement process by allocating federal assistance and contracts to foster disadvantaged business development. Federal assistance has taken a variety of forms, including targeting procurement contracts and subcontracts for disadvantaged or minority firms, management and technical assistance grants, educational and training support, and surety bonding assistance.

Present day set-aside programs authorizing preferential treatment in the award of government contracts to "socially and economically disadvantaged" small businesses (DBEs) originated in § 8(a) of the Small Business Act of 1958. Initially, the Small Business Administration (SBA) utilized its § 8(a) authority to obtain contracts from federal agencies and subcontract them on a noncompetitive basis to firms agreeing to locate in or near ghetto areas and provide jobs for the unemployed and underemployed. The § 8(a) contracts awarded under this program were not restricted to minority-owned firms and were offered to all small firms willing to hire and train the unemployed and underemployed in five metropolitan areas, as long as the firms met the program's other criteria.[29] As the result of a series of executive orders by President Nixon, the focus of the § 8 (a) program shifted from job-creation in low-income areas to minority small business development through increased federal contracting with firms owned and controlled by socially and economically disadvantaged persons.[30] With these executive orders, the executive branch was directed to promote minority business enterprise and many agencies looked to SBA's § 8(a) authority to accomplish this purpose.

The administrative decision to convert § 8(a) into a minority business development program acquired a statutory basis in 1978 with the passage of P.L. 95-507, which broadened the range of assistance that the government – SBA, in particular – could provide to minority businesses. Section 8 (a), or the "Minority Small Business and Capital Ownership Development" program, authorizes SBA to enter into all kinds of construction, supply, and service contracts with other federal departments and agencies. The SBA acts as a prime contractor and then "subcontracts" the performance of these contracts to small business concerns owned

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[29] Minority Contracting: Joint Hearing Before the Senate Comm. on Small Business and the House Subcomm. on Minority Enterprise and General Oversight of the Comm. on Small Business, 95th Cong., 2d Sess. 37 (1978).

[30] E.O. 11652, 3 C.F.R. § 616 (1971), *reprinted in* 15 U.S.C. § 631 authorized the Office of Minority Business Enterprise created by preceding order, E.O. 11458, to provide financial assistance to public or private organizations that provided management or technical assistance to MBEs. It also empowered the Secretary of Commerce to coordinate and review all federal activities to assist in minority business development.

and controlled by "socially and economically disadvantaged" individuals, Indian Tribes or Hawaiian Native Organizations.[31]

Applicants for § 8(a) certification must demonstrate "socially disadvantaged" status or that they "have been subjected to racial or ethnic prejudice or cultural bias because of their identities as members of groups without regard to their individual qualities."[32] The Small Business Administration "presumes," absent contrary evidence, that small businesses owned and operated by members of certain groups – including Blacks, Hispanics, Native Americans, and Asian Pacific Americans – are socially disadvantaged.[33] Any individual not a member of one of these groups must "establish individual social disadvantage by a preponderance of the evidence" in order to qualify for § 8(a) certification.[34] The § 8(a) applicant must, in addition, show that "economic disadvantage" has diminished its capital and credit opportunities, thereby limiting its ability to compete with other firms in the open market.[35] Accordingly, while disadvantaged status under the SBA includes a racial component, in terms of presumptive eligibility, it is not restricted to racial minorities, but also includes persons subjected to "ethnic prejudice or cultural bias"[36] who are able to satisfy specified regulatory criteria.[37] It also excludes businesses owned or controlled by persons who, regardless of race, are "not truly socially and/or economically disadvantaged."[38]

The "Minority Small Business Subcontracting Program" authorized by § 8(d) of the Small Business Act codified the presumption of disadvantaged status for

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[31]15 U.S.C. § 637(a).

[32]15 U.S.C. § 637(a)(5).

[33]13 CFR § 124.105(b).

[34]Id. at 124.103(c).

[35] The statute, 15 U.S.C. § 637(a)(6)(A), defines economic disadvantage in terms of:

> socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others who are not socially disadvantaged, and such diminished opportunities have precluded or are likely to preclude such individuals from successfully competing in the open market.

[36]15 U.S.C. § 637(a)(5).

[37] 15 U.S.C. § 637(d). Criteria set forth in the regulations requires non-minority individuals to prove by "a preponderance of the evidence," that they have personally experienced "substantial and chronic social disadvantage in American society" as the result of "[a]t least one objective distinguishing feature," including "long term residence in an environment isolated from the mainstream of American society," with a "negative impact "on his or her "entry into the business world." "In every case . . . SBA will consider education, employment and business history, where applicable, to see if the totality of circumstances shows disadvantage in entering into or advancing in the business world." 13 C.F.R. § 124.105(c).

[38]See 49 CFR Pt. 23, Subpt. D, App. C.

minority group members that applied by SBA regulation under the § 8(a) program.[39] Prime contractors on major federal contracts are obliged by § 8(d) to maximize minority participation and to negotiate a "subcontracting plan" with the procuring agency which includes "percentage goals" for utilization of small socially and economically disadvantaged firms. To implement this policy, a clause required for inclusion in each such prime contract states that "[t]he contractors shall presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities, or any other individual found to be disadvantaged by the Administration pursuant to § 8(a). . ." All federal agencies with procurement powers were required by P.L. 95-507 to establish annual percentage goals for the award of procurement contracts and subcontracts to small disadvantaged businesses.

A decade later, Congress enacted the Business Opportunity Development Reform Act of 1988,[40] directing the President to set annual, government-wide procurement goals of at least 20% for small businesses and 5% for disadvantaged businesses, as defined by the SBA. Simultaneously, federal agencies were required to continue to adopt their own goals, compatible with the government-wide goals, in an effort to create "maximum practicable opportunity" for small disadvantaged businesses to sell their goods and services to the government. The goals may be waived where not practicable due to unavailability of DBEs in the relevant area and other factors.[41] Federal Acquisition Act amendments adopted in 1994 amended the 5% minority procurement goal, and the minority subcontracting requirements in § 8(d), to specifically include "small business concerns owned and controlled by women" in addition to "socially and economically disadvantaged individuals."[42]

Additionally, statutory "set-asides" and other forms of preference for "socially and economically disadvantaged" firms and individuals, following the Small Business Act or other minority group definition, have frequently been added to specific grant or contract authorization programs. For example, Congress early on established goals for participation of small disadvantaged businesses in procurement for the Department of Defense, NASA, and the Coast Guard. It also enacted the Surface Transportation Assistance Act of 1982 (STAA),[43] the Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURAA),[44] the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA),[45] and the Transportation

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[39]15 U.S.C. § 637(d). See also 13 CFR § 124.106.

[40]P.L. 100-656, § 502, 102 Stat. 3887, codified at 15 U.S.C. § 644(g)(1).

[41]See, e.g. 49 CFR §§ 23.64(e), 23.65 (setting forth waiver criteria for the Department of Transportation).

[42]P.L. 103-355, 108 Stat. 3243, 3374, § 7106 (1994).

[43]P.L. 97-424, § 105(f), 96 Stat. 2097 (1982)

[44]P.L. 100-17, § 106(c), 101 Stat. 132 (1987).

[45]P.L. 102-240, § 1003, 105 Stat. 1914 (1992).

Equity Act for the 21st Century (TEA-21)[46] each of which contained a 10% minority or disadvantaged business participation goal. Similar provisions were included in the Airport and Airway Improvement Act of 1982 in regard to procurements for airport development and concessions.[47] The Small Business Act definition of DBE, including the racial presumption, applies to contracts, like that in the *Adarand* case, financed by STURAA, ISTEA and related transportation funding legislation. Finally, in 1994, Congress enacted the Federal Acquisition Streamlining Act, permitting federal agency heads to adopt restricted competition and a 10% "price evaluation preference" in favor of "socially and economically disadvantaged individuals" to achieve government-wide and agency contracting goal requirements.[48]

The Adarand Decision and Its Progeny

Background and History of *Adarand*. Litigation surrounding racial preferences in federal contracting followed a convoluted course after 1995, when the Supreme Court settled the constitutional parameters of the issue but avoided a decision of the merits in *Adarand Constructors Inc. v. Pena (Adarand I)*.[49] Preceding its return to the High Court for a third appearance this Term, as *Adarand Constructors Inc. v. Mineta*, the legal and factual framework of the case was considerably altered by multiple lower court decisions and appeals, and by changes in the plaintiff's legal standing, the details of the challenged federal program, and regulatory reforms to "amend, not end" federal affirmative action by the former Clinton Administration. To the chagrin of many legal observers, the Court on November 27, 2001 once again sidestepped the constitutional issues posed by the *Adarand* case and, after agreeing to review the controversy, dismissed the appeal as "improvidently granted." Spawning the Court's latest action – or inaction – was the Tenth Circuit's bifurcated ruling in *Adarand Constructors v. Slater (Adarand III)*.[50] The federal appeals court there invalidated a federal highway program of financial incentives to promote minority and "disadvantaged" small business utilization as implemented at the time of *Adarand I*. But as revised and amended in 1997, the program was found to be narrowly tailored to a compelling governmental interest and passed constitutional muster.

The *Adarand* case has evolved through three distinct phases since 1995. The litigation originated with a now-discontinued "race-conscious subcontracting compensation clause (SCC)" program conducted by the Federal Highway Lands Program of the Federal Highway Administration. The SCC did not allocate or set-aside a specific percentage of subcontract awards for DBEs or require a commitment

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[46]P.L. 105-178, § 1101, 112 Stat. 107 (1998).

[47] For additional Information, see CRS Report RL30059, "Small Disadvantaged Business Programs of the Federal Government," (Eddy); "Compilation and Overview of Federal Laws and Regulations Establishing Affirmative Action Goals or Other Preference Based on Race, Gender, or Ethnicity," CRS Memorandum, February 17, 1995 (Dale), *reprinted at* 141 *Cong. Rec.* S 3929 (daily ed. 3-15-95).

[48]P.L. 103-355, 108 Stat. 3242, § 7104 (1994),

[49]515 U.S. 200 (1995).

[50]228 F.3d 1147 (10th Cir. 2000).

on the part of prime contractors to subcontract with minority firms. Rather, "incentive payments" varying from 1.5% to 2% of the contract amount were paid to prime contractors whose subcontracts with one or more qualified DBEs exceeded 10% of total contract value. The program incorporated the racial presumption from the Small Business Act and regulations (*supra*), in effect relieving minority group subcontractors of the burden of demonstrating disadvantaged status imposed upon nonminorities.

Suit was brought by Adarand Constructors, Inc., a white-owned construction firm whose low bid on a subcontract for highway guard rails was rejected in favor of a higher bidding DBE. Both the federal trial court and the Tenth Circuit initially upheld the program by applying "lenient" judicial review – "resembling intermediate scrutiny"– rather than strict scrutiny under *Croson*, and requiring far less remedial justification by the government. Because the program was not limited to racial minorities, and non-disadvantaged minority group members were ineligible to participate, the appeals court concluded, the program was "narrowly tailored." Justice O'Connor authored the majority opinion in *Adarand I*, and was joined by the Chief Justice and Justices Scalia, Thomas and Kennedy in reversing this first round of decisions.

The majority Justices in *Adarand I* rejected the equal protection approach that applied "intermediate scrutiny" or some other relaxed standard of review to racial line-drawing by the Congress.[51] " Because the "race-based rebuttable presumption" in the DOT program was an "explicit" racial classification, Justice O'Connor determined, "it must be analyzed by a reviewing court under strict scrutiny," and to survive, must be "narrowly tailored" to serve a "compelling governmental interest." *Adarand I* undermined prior judicial holdings, which had afforded substantially greater latitude to Congress than to the states or localities when crafting affirmative action measures for racial or ethnic minorities. *Metro Broadcasting* was expressly overruled, and *Fullilove* adjudged "no longer controlling," insofar as those decisions exhibited greater tolerance for race-conscious lawmaking by Congress. To "dispel the notion," however, that "strict scrutiny is 'strict in theory, but fatal in fact,'" Justice O'Connor appeared to reserve a role for the national legislature as architect of remedies for past societal discrimination. "The unhappy persistence of both the practice and lingering effects of racial discrimination against minorities in this country is an unfortunate reality, and the government is not disqualified from acting in response to it."[52] Thus, a majority of the Justices – all but Justices Scalia and Thomas – appeared to accept some forms of racial preference by Congress in at least

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[51] According to the majority, "strict scrutiny" of all governmental classifications by race was required to determine whether benign or invidious motives inspired the legislative action and because the guarantee of equal protection secured by the 5th and 14th Amendments is a "personal" right extending to the "individual" and "not groups." Strict scrutiny of federal race conscious affirmative action was dictated by "three general propositions" that the majority deduced from the constitutional precedents culminating in *Croson*: judicial "skepticism" regarding all disparate governmental treatment based on race or ethnicity; "consistency," without regard to the race of those "burdened or benefitted" by the classification; and "congruence" between equal protection and due process analysis.

[52] 515 U.S. at 217.

some circumstances.[53] No further guidance was provided, however, as to the scope of remedial authority remaining in congressional hands, or of the conditions for its exercise. Indeed, the Court refrained even from deciding the merits of the constitutional claim before it in *Adarand I*, instead remanding the case to the lower courts to determine the outcome.

On remand, the district court in *Adarand II* [54]decided that the "congruence" required by Justice O'Connor did not mean that federal affirmative action must be supported by the same "particularized" showing of past discrimination as state and local programs. Rather, "Congress' constitutionally imposed role as. . .guardian against racial discrimination" under § 5 of the Fourteenth Amendment more broadly empowered the national legislature to enact remedies for discrimination nationwide. Consequently, findings of nationwide discrimination derived from congressional hearings and statements of individual federal lawmakers were entitled to greater weight than the "conclusory statements" of state or local legislators rejected by *Croson.* "Congress," in other words, "may recognize a nationwide evil and act accordingly, provided the chosen remedy is narrowly tailored so as to preclude the application of a race-conscious measure where it is not warranted."

The "narrow tailoring" aspect of the Judge Kane's decision entailed a fairly technical analysis of the operational details of the SCC program. By linking the race-based presumptions mandated by the SBA programs statutes and regulations with financial "bonus" incentives of the SCC, the program was found to cause prime contractors to discriminate against lower-bidding non-DBE subcontractors. Because the government failed to show any increased costs to prime contractors for hiring DBE's, the incentive payments were not "compensation" at all, but amounted instead to a "bonus" to prime contractors whose choice of a subcontractor was based "only on race." Second, although revised since, the application forms used by the state to grant DBE certification at the time required minimal information from the applicant as to financial condition and property ownership, instead centering "almost exclusively" on minority status. "Indeed," observed the district judge, "under these standards, the Sultan of Brunei would qualify." Thus, the racial presumption governing the SCC program was found to be both "overinclusive" – in that its benefits were available to all named minority group members – and "underinclusive" – because it excluded members of other minority groups or caucasians who may share similar disadvantages. Finally, although "more flexible" than the "rigid racial quota" in *Croson*, or the 10% set-aside approved by *Fullilove*, the SCC program was found by Judge Kane to be tainted by the government-wide 5% goals and

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[53]In their separate concurrence, Justices Scalia and Thomas, espoused a far more restrictive view that would foreclose all governmental classifications by race or ethnicity. Justice Scalia declared that "government can never have a 'compelling interest' in discriminating on the basis of race in order to 'make up' for past racial discrimination in the opposite direction." Justice Thomas was of the view that the "racial paternalism" of affirmative action was more injurious than beneficial to minorities. "In my mind, government-sponsored racial discrimination based on benign prejudice is just as noxious as discrimination inspired by malicious prejudice. In each instance, it is racial discrimination, plain and simple."

[54]Adarand Constructors Inc. v. Pena, 965 F. Supp. 1556 (D.Colo. 1997).

transportation set-asides which it implemented.[55] As such, the program was not "narrowly tailored" and failed strict scrutiny; summary judgment was granted for Adarand Constructors, Inc. and against the federal government.

Two aspects of the district court's analysis of the "narrow tailoring" requirement were especially unsettling for federal small disadvantaged business programs. First, the "optional" or voluntary nature of the SCC program was not enough to save it, notwithstanding the fact that prime contractors were free to accept bid proposals from any subcontractor, regardless of race or ethnicity. The government's failure to prevail on this issue cast a long shadow over other federal minority contracting efforts – e.g. the § 8(a) set-aside, bid or evaluation preferences, and the like – which, under Judge Kane's reasoning, may be viewed as imposing a "choice based only on race" at least as "mandatory" and "absolute" as the incentive payment to prime contractors in *Adarand*, if not more so. Similarly, the fact that the SCC program did not expressly incorporate any "goals, quotas, or set-asides" was not sufficient to divorce it, in the district court's view, from the percentage goal requirements imposed by statutes the program was designed to implement. Those statutory provisions – the 5% minimum disadvantaged small business goal in § 8(d) of the SBA and the parallel 10% requirement in STURAA and ISTEA – were deemed invalid for lack of narrow tailoring. In effect, the district court ruling questioned much of the federal government's statutory infrastructure for advancing minority small business participation in the procurement process by race-conscious means.

On September 25, 2000, the Tenth Circuit issued its decision on the merits of the controversy.[56] The appellate panel in *Adarand III* reversed the district court injunction against future implementation of DOT's disadvantaged business enterprise (DBE) program in Colorado. In so doing the court of appeals considered the

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[55]In this regard, the district court observed:

> Thus, although the SCC's contain no quotas, they are used as one of the methods to attain the percentage goals in the SBA, STURAA and ISTEA, and are thus inextricably linked with these goals. Insofar as the percentage goals are a foundation for the use of the SCCs, rooted in the same race-based presumptions contained in the SCCs, I find the statutory sections containing those goals insufficiently narrowly tailored for the same reasons as I stated in making that determination regarding the SCCs themselves.

[56] Adarand Constructors Inc. v. Slater (Adarand III), supra n. 50. This latest decision of the court of appeals was preceded by an intervening appellate ruling and Supreme Court review confined to procedural questions of standing and mootness occasioned by the plaintiff's change in circumstances. After the district decision in *Adarand II*, the State of Colorado did away with the racial presumption and certified the nonminority owner of Adarand Constructors Inc. as disadvantaged. As a result, the Tenth Circuit dismissed the case as moot and the vacated the judgment against the government. Adarand v. Slater, 169 F.3d 1292 (10th Cir. 1999). The district court decision was reinstated on January 20, 2000, however, when the Supreme Court rejected the mootness finding because there was nothing to prevent the government from reviving the abandoned policy, and returned the case to the circuit court for further proceedings. Adarand Constructors v. Slater, 528 U.S. 216 (2000).

constitutionality of the program, both as structured at the time of the district court decision and of later revisions to DBE regulations adopted in 1997. First, it generally agreed with the district court that the SCC system of financial incentives, in effect at time of *Adarand I*, had not been narrowly enough tailored to satisfy the constitutional requirements of strict scrutiny. But after lengthy congressional hearings, the financial incentives were eliminated, and other reforms were adopted to DBE requirements imposed by DOT regulation on state and local highway aid recipients. As a result, the appeals court ultimately concluded that the DOT disadvantaged business enterprise program as currently structured – though not the former, discarded program of financial incentives – passed constitutional muster.

Initially, the appellate tribunal aligned itself with the district court's finding that the federal government had a "compelling interest" in preventing and remedying the effects of past discrimination in government contracting. And the scope of Congress' authority to act was not limited geographically or to specific instances of discrimination – as in the case of the states and localities under *Croson* – but extended "'society-wide' and therefore nationwide." The range of admissible evidence to support racial line-drawing by Congress was both direct and circumstantial, including post-enactment evidence and legislative history, demonstrating public and private discrimination in the construction industry. The court was largely dismissive of individual statements by members or from committee reports as "insufficient in themselves to support a finding of compelling interest." Congressional hearings over nearly a two-decade period, however, depicted the social and economic obstacles – e.g. "old boy networks," racism in construction trade unions, and denial of access to bonding, credit, and capital – faced by small and disadvantaged entrepreneurs, mainly minorities, in business formation and in competition for government contracts. Moreover, "disparity studies" conducted after *Croson* in most of the nation's major cities compared minority-owned business utilization with availability and "raise[d] an inference that the various discriminatory factors the government cites have created that disparity." This record satisfied the Tenth Circuit panel that Congress had a "strong basis in evidence" for concluding that passive federal complicity with private discrimination in the construction industry contributed to discriminatory barriers in federal contracting, a situation the government had a "compelling" interest in remedying.

The appellate tribunal adopted a two-stage review of the "narrowly tailored" requirement, focusing on the DBE program both as in effect prior to1997 and later as revised to comply with *Adarand I.* Basically, it determined that many of the constitutional flaws that defeated the program in Judge Kane's opinion – an outcome with which the appellate panel largely agreed – had been eliminated by the government's regulatory reforms. In effect, the latest decision lays the old program to rest while reversing Judge Kane's order insofar as it would bar implementation of the revised version. The appeals court also clarified the scope of the DBE program under review. It disagreed with, and specifically reversed, elements of the district court judgment raising issues beyond the specific DBE program as applied by Colorado officials to federally funded highway procurements within that state. Because the 5% and 10% goals in the SBA and underlying transportation authorization measures "are merely aspirational and not mandatory," they were not the reason that "Adarand lost or will lose" contracts, and any challenge to those provisions were outside the scope of the remand in *Adarand I.* Thus, any broader

potential implications of the district court ruling for § 8 (a) set-asides or government-wide goals for DBE participation under the Small Business Act were largely blunted by the appellate panel.[57]

The constitutional virtues of the revised program over the pre-1996 SCC program at issue in *Adarand I* were several. First, race-neutral measures dating back to the 1958 enactment of the SBA had preceded Congressional adoption of "aspirational goals" and other affirmative action measures for minority groups in government-wide contracting. DOT had not considered such alternatives before adopting race-conscious subsidies for prime contractors who select minority subcontractors. However, this defect was cured by the revised regulations, which specifically directed recipients to exhaust race-neutral alternatives – bonding, financing, and technical assistance, etc – before taking race into account.[58] Secondly, the revised regulations incorporated the time limits and graduation requirements for participation of disadvantaged businesses in the §§ 8(a) and 8(d) programs, thereby ensuring the later program's limited duration.[59] The court of appeals also found that the SCC program of financial incentives was more flexible than the mandatory set-asides in *Fullilove* and *Croson* because they were voluntary on the part of the prime contractors and because the post-1996 revisions adopted an express waiver.[60] Any use of "aspirational goals" by recipients of federal highway funds had to make "reference to the relative availability of DBEs in the market" and was restrained in other ways by the new regulations so that "there is little danger of arbitrariness in the setting of such goals, as . . .in *Croson*.[61] The burden of the revised program on third parties was mitigated by placing monetary caps on subsidies to prime contractors – limiting the incentive to hire further DBEs – and by adopting "preponderance of the evidence" for proof of "social disadvantage" by members of "non-presumed" groups in lieu of the former "clear and convincing" standard.

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[57]Specifically, the Tenth Circuit opinion states:

> Subsection 8(a) does not involve the use of SCCs, nor has Adarand made any showing that it has been injured by non-inclusion in the § 8(a) . . . . This case does not involve, nor has Adarand ever demonstrated standing to bring, a generalized challenge to the policy of maximizing contracting opportunities for small disadvantaged businesses set forth in 15 U.S.C. §§ 637 and 644(g), or to the various goals for fostering the participation of small minority-owned businesses promulgated pursuant to 15 U.S.C. § 644(g). Nor are we presented with any indication that Adarand has standing to challenge . . .§ 637d. 228 F.3d at 1152.

[58]49 C.F.R. § 26.51(a),(b)(2000).

[59]Participation in the § 8(a) program is limited by statute and regulation to ten and one-half years, and each DBE is re-evaluated, and may be graduated from the program, based on the submission of financial and other information required annually.

[60]49 C.F.R. § 2615 (2000)(allowing recipients to seek waivers and exemptions, despite the already non-mandatory nature of the program).

[61]The court of appeals found that the SCC had been based in part on "an ill-defined 12-15% goal apparently adopted by the Federal Highway Administration, for which "it could find no explanation in the record." This alone would have warranted summary judgment for Adarand, it concluded.

Finally, the revised program avoided the constitutional vice of over- and under-inclusiveness by "disaggregating the race-based presumption that encompassed both "social" and "economic" disadvantage" in the former regulation. Thus, an individualized showing of economic disadvantage is now required of all applicants to the program, minority and non-minority alike. This change, the appeal court believed, effectively satisfied that Croson requirement of an "inquiry into whether or not the particular MBE seeking a racial preference has suffered from the effects of past discrimination."[62]

The Supreme Court Declines to Decide the Case. The U.S. Supreme Court on March 26, 2001 granted *certiorari* in an appeal from the Circuit Court's latest decision, marking the third High Court appearance by the *Adarand* case.[63] Arguments in the case were heard on October 31, 2001, during which the Justices appeared more concerned with procedural irregularities in the case, as outlined by the Justice Department, than with the substance of the constitutional claims. In essence, the government argued that Adarand's legal challenge was limited to the DOT program and regulations applicable to direct procurement of highway construction on federal lands, like the contract denied, not to the separate regulatory scheme governing federal highway assistance to states. Petitioner Adarand Constructors Inc. made a parallel argument – but for a different reason – that the court of appeals misconceived the scope of the appeal. In particular, petitioner's brief contended, the Tenth Circuit's analysis considered revisions to DOT regulations applicable to federally assisted state and local highway projects, which are irrelevant to the separate set of rules governing direct federal procurement, thereby undermining the court's conclusion that the SDB program was narrowly tailored. Because the race conscious aspects of the original financial incentive program had been suspended in Colorado and several other states as the result of administration reforms to affirmative action rules after *Adarand I*, counsel for the company had difficulty arguing that its client "is still unable to compete on an equal footing" or had "lost a single contract under the provisions they are now challenging." Further complicating Adarand's position, the Tenth Circuit had rejected its earlier "blunderbuss" attack upon the entire statutory framework for federal small disadvantaged business programs, a ruling not appealed to the Supreme Court. The government, therefore, contended that Adarand's lawsuit had "outlived the program that provoked it," and in oral arguments to the Justices, the Solicitor General urged the Court to dismiss the petition for certiorari as improvidently granted.

It came as no great surprise, therefore, that the Justices complied with the government's request and dismissed the case on November 27, 2001. In a per curiam opinion, the Court emphasized technical flaws with the present appeal, as framed during oral arguments. First, Adarand was challenging a by now defunct aspect of

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[62]The current regulations impose additional requirements on applicants with regard to individualized showing: they must submit a narrative statement describing the circumstances of that purported economic disadvantage. 13 C.F.R. § 124.104(b)(1)(2000). See also, 49 C.F.R. § 26.67(b)(1)(2000)(providing a net worth limit for DBEs under transportation programs); id. § 26.65(b)(stating that businesses exceeding a certain amount of gross receipts are ineligible for the DBE program).

[63]Adarand Constructors, Inc. v. Mineta, cert. gr. 121 S.Ct 1401 (mem.) (3-26-2001).

the program that the Tenth Circuit had not ruled upon, asking "whether the various race-based programs applicable to direct federal contracting could satisfy strict scrutiny." Nor had the company sought review of those aspects of the DOT statute and regulations respecting the state and local procurement program on whose constitutionality the appeals court had spoken. Consequently, the Supreme Court declined to reach the merits of a controversy regarding which neither the parties nor the courts below appeared to be reading from the same page.

Had the Court opted to address the merits, however, two major questions were presented by the petition for certiorari. First was "whether the court of appeals misapplied the strict scrutiny standard in determining if Congress had a compelling interest to enact legislation designed to remedy the effects of past discrimination." The Tenth Circuit found that Congress had a "solid basis in evidence" for concluding race-conscious action necessary based on its dissection of hearing testimony, legislative reports, and state and local disparity studies. Generally, its approach conformed to *Fullilove* and other cases, which have stressed deference to congressional fact-finding under § 5 of the Fourteenth Amendment. *Croson* also suggests that as the national legislature, Congress may not be constrained by the same requirements of specificity in regard to regional scope and classes of individuals benefitted by race conscious programs. But recent Court rulings parsing the scope of congressional § 5 power to override state sovereign immunity under a variety of federal civil rights laws, have emphasized the need for "congruence and proportionality" of the remedy to any problem perceived by the Congress.[64] The ramifications of this principle for § 5 race discrimination legislation is undetermined, and questions remain. Conversely, some would argue, the affirmative grant of congressional authority to legislate remedies for equal protection violations by states conferred by § 5 is even broader than its power to place similar conditions on direct spending for federal procurements, which is limited by 5th Amendment due process.

The second aspect of strict scrutiny analysis would have required the Court to determine whether the means chosen by DOT to promote minority group participation in the federal procurement process is "narrowly tailored." In this regard, the Tenth Circuit found that after eliminating financial bonus or subsidy, the adoption of "aspirational goals" for utilization of disadvantaged firms based on "good faith efforts," as required by current regulations, was a more flexible and

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[64]E.g. Kimel v. Florida Board of Regents, 528 U.S. 62 (2000)(Applying "congruence and proportionality" standard, the Court determined that the Age Discrimination in Employment Act was not "appropriate legislation"under § 5); United States v. Morrison, 529 U.S. 598 (2000)(Court invalidated provision of Violence Against Women Act, providing victims of gender-motivated violence with a civil damages remedy, since even as a "prophylactic measure," it was "overbroad" and applied uniformly throughout the nation, rather than merely in states with congressionally documented records of this type gender discrimination.); Board of Trustees of the University of Alabama, 121 S.Ct. 955 (2001)(Congress could not abrogate state sovereign immunity to suit for compensatory damages under Title I of the Americans with Disability Act since historical record "fails to show that Congress did in fact identify a pattern of irrational state discrimination in employment against the disabled," and the rights and remedies provided against the state "raise the same sort of concerns as to congruence and proportionality" as found in previous cases.).

narrowly tailored alternative. That conclusion, however, has been questioned by other courts, which have found that governmentally required goal-setting, coupled with enforcement sanctions – in Adarand's case, liquidated damages under § 8 (d) – is inherently coercive and encourages racial quotas. The Ninth Circuit, for example, has invalidated a California affirmative action statute that required bidders on state contracts to subcontract a percentage of their work to female- and minority-owned firms or document a "good faith" effort to do so.[65] Similarly, in *Lutheran Church-Missouri Synod v. FCC*[66], the D.C. Circuit blurred the distinction between so-called "inclusive" and exclusive "affirmative" action. FCC regulations required broadcast license holders 1) to engage in "critical self-analysis" of minority and female underrepresentation, and 2) to undertake affirmative outreach by using minority and female-specific recruiting sources. Strict scrutiny was held to be appropriate and the regulations were unlawful since beyond simple outreach, their effect was to influence ultimate hiring decisions; that is, the threat of government enforcement "coerced" stations to maintain a workforce that mirrors racial breakdown of the labor area.

The Court's disposition of the latest *Adarand* appeal means that a definitive review of federally-mandated affirmative action must be postponed to another day. That day, however, may not be too far distant. Percolating in the lower federal courts are cases that pose similar questions regarding the power of Congress to enact racial preferences in federal contracting as were bypassed by the Court's inconclusive determination in *Adarand*.

Post-*Adarand* Judicial Decisions.

Federal Affirmative Action Programs. Besides *Adarand*, a handful of other lower federal courts have addressed the issue of congressional authority to fashion affirmative action remedies. These courts have generally been persuaded by the record of committee hearings and other documentary evidence before Congress that the government had a compelling interest for the program in question. However, in applying the constitutional demand for a "narrowly tailored" remedy, the outcome has largely turned on each court's view of the program in actual operation.

Just two weeks after oral argument in Adarand, a Minnesota federal district court approved DBE provisions of the TEA-21 and DOT's implementing regulations. *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation* [67] relied heavily on the Tenth Circuit's "painstaking" review of congressional findings related to the passage of TEA-21 to find a "compelling"congressional interest in remedying persistent "racism and discrimination in highway subcontracting" by a race conscious procurement program. Prior congressional consideration of race-neutral alternative means and the program's limited duration (it expires in 2004) demonstrated that TEA-21 and its regulations were narrowly tailored. Earlier, the

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[65]Monterey Mechanical Co. v. Wilson, 125 F.3d 702 (9th Cir.1997), reh'g en banc denied, 138 F.3d 1270 (9th Cir. 1998).

[66]141 F.3d 344 (D.C.Cir. 1998).

[67]2001 WL 1502841 (D. Minn. 2001)

same court had taken constitutional exception with another DOT program authorized by ISTEA because it operated as an inflexible "quota," which impermissibly burdened non-minority contractors.[68] That predecessor program also was found to lack narrow tailoring since it had been adopted without adequate consideration of race-neutral alternative measures. Similarly, while upholding the constitutionality of the § 8 (a) program on its face, the district court in *Cortez III Service Corporation v. NASA*[69] required federal officials "to decide whether there has been a history of discrimination in the particular industry at issue" before applying a race-based set-aside. Other courts, however, have denied firms or individuals standing to challenge the racial presumption in the SBA statute and regulations on the rationale that they were disqualified from contract consideration because of inability to demonstrate "social and economic disadvantage," and not race.[70]

One other federal appellate court has considered the implications of strict scrutiny analysis for a government contract preference program since the Supreme Court's 1995 *Adarand* decision. In *Rothe Development Corporation v. U.S. Department of Defense*,[71] the trial judge had upheld on motion for summary judgment § 1207 of the National Defense Authorization Act of 1987, which incorporates the SBA definition of small disadvantaged business, including the racial presumption, and establishes a five percent participation goal for such entities in Department of Defense contracts.[72] The § 1207 program authorizes DOD to apply a price evaluation adjustment of ten percent in order to attain the five percent goal. In effect, this means that DOD may raise the bids of non-DBEs by 10% in order to give disadvantaged entrepreneurs a preference. The statutory goal-setting provision in §1207 was reauthorized in 1989 and again in 1992, because DOD efforts in the initial years fell short of meeting the 5% goal. A non-minority bidder in *Rothe* sued DOD and the Department of the Air Force for violating its equal protection rights in awarding a contract to a higher bidder, International Computer and Telecommunications, Inc., because of the race of its owner, who was of Korean descent.

The trial court aligned itself with *Adarand II* in finding that the governmental interest in remedying national patterns of discrimination against minority contractors was compelling, and was amply supported by the evidence presented to Congress and its legislative findings. Nor was the national legislature limited – as were its state

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[68]In re Sherbrooke Sodding Co., 17 F. Supp.2d 1026 (D.Minn. 1998)

[69]950 F. Supp. 357 (D.D.C. 1996). See also Northern Contracting Inc. v. State of Illinois, 2001 WL 987730 (N.D.Ill.)(federal defendants' motion for summary judgment on government's showing of "compelling interest" for TEA-21 contracting goals denied, although the court conceded that plaintiff "may face uphill battle" in gathering adequate rebuttal evidence); Klaver Construction Co. v. Kansas Department of Transportation, 2001 WL 1000679 (D.Kan.)(Motion to stay proceedings pending disposition of Adarand by U.S. Supreme Court denied).

[70]See Interstate Traffic Control v. Beverage, 101 F. Supp. 2d 445 (S.D. W.Va. 2000); Ellsworth Associates v. United States, 926 F.Supp. 207 (D.D.C. 1996).

[71]262 F.3d 1306 (Fed.Cir. 2001).

[72]10 U.S.C. § 2323.

or local counterparts under *Croson* – to a local or regional response, but in enacting § 1207, could "assess the condition of the nation as a whole," and act accordingly. Because Congress represented a "national electorate," the district court concluded, it could legislate in "broader brush" fashion than states or localities, and was entitled to some degree of deference. The U.S. Court of Appeals for the Federal Circuit rejected this "deferential standard of review" and vacated the judgment. In remanding for further proceedings, the appeals court confirmed that when it comes to race-based federal programs, there is only "one kind of strict scrutiny."

The appellate court advanced a different conception of both the constitutional basis for Congress' enactment of §1207 and the degree of scrutiny demanded. As national legislature, it said, Congress could enact race-based programs as a condition to the exercise of its Article I spending powers or pursuant to § 5 of the Fourteenth Amendment as a remedy for lingering discrimination by state and local governments. Whatever deference may be owed to congressional remedies for state equal protection violations under § 5, when legislating racial preferences in federal spending programs, Congress is restricted by the 5th Amendment, which incorporates its own equal protection component. "Strict scrutiny is a single standard and [it] must be followed here," said the appeals court. The proper judicial inquiry was whether a "strong basis in evidence" supported Congress' conclusion that discrimination existed and remedial action was warranted. A "mere listing" of evidence before Congress when it enacted the original statute in 1987 was insufficient, the Federal Circuit warned. Rather, detailed statistical information regarding the existence of discrimination in 1992 was necessary to find the reauthorized § 1207 constitutional. Moreover, the government must produce evidence of pre-enactment discrimination; reports generated after the statute was enacted showing discrimination against specific groups cannot be used to prove the constitutionality of the program when enacted. The "strong basis in evidence" must have existed at the time the law was enacted if it is to survive strict scrutiny.

The Federal Circuit opinion outlined elements for the lower court's review on remand. In determining whether a "compelling Government interest" justified the SDB program, the lower court must decide if the § 1207 program is "truly remedial." This requires a determination whether the program targets present discrimination or the "lingering effects" of past discrimination. If the latter, the opinion notes, the probative currency of the evidence must be determined, as must the existence of specific evidence of discrimination against Asian Americans in the particular industry involved in this case. As to whether the § 1207 program is narrowly tailored, the Federal Circuit highlighted three areas for remand consideration. First, the trial court should conduct "a probing analysis of the efficacy of race-neutral alternatives" to the § 1207 program. Second, the court must review evidence demonstrating whether the 5% goal of SDB participation was relevant to the number of qualified, willing, and able SDBs in the industry. Finally, the lower court had to determine whether the § 1207 program was over-inclusive by "presuming" that the five groups identified in the statute were victims of discrimination.

A federal claims court decision, *Christian v. United States*,[73] also invalidated efforts by the federal government to promote minority group opportunities through race-conscious means. Involved there was a U.S. Army policy establishing retention goals for minority and female officers twice considered but passed over for promotion who would otherwise have been subject to mandatory early retirement. The percentage of minorities and women to be retired was set by a special Army memorandum, which established different evaluation standards for minorities and women than officers in general, ostensibly due to possible past personal or institutional discrimination.

The claims court found that whether the Army program was viewed as a "goal," "quota," or otherwise, the special procedures "pressure[d] review board members "into making racially tainted decisions," thus amounting to "a racial classification subject to strict scrutiny." It also found that the purposes put forward by the government in defense of the policy fell short of "compelling" for several reasons. First, the Army's desire to project a "perception" of equal opportunity and to address the problem of "possible past discrimination" in previous training and assignments was not equivalent to "finding that a particular minority officer was in fact discriminated against." Further undermining any remedial justification for the policy was its focus on issues of "past personal discrimination" – in promotions, assignments, and military school attendance – affecting minority members of the Army, in general, rather than previous biased acts of the retirement board, the entity responsible for implementing the minority retention program. In this respect, the court likened the policy to remedies for "societal discrimination," which *Croson* and *Adarand* rejected as a "compelling" governmental interest. The Army's plan was found to address mere "statistical disparities" in minority retention rates, whatever the cause, rather than proven "present effects of past discrimination," the only constitutional justification for racial affirmative action.

The Army procedure failed the additional constitutional requirement that affirmative action measures be "narrowly tailored." The minority retention goal was not the "least intrusive means" to remedy discrimination by the Army in promotions. Promotion or recruitment goals would accomplish the same purpose by "more exact connection" to identified institutional discrimination with less burden on affected nonminority officers. Moreover, the policy was of indefinite duration, with no built-in time limitation, and no race-neutral alternatives were attempted by the government before implementing its affirmative action plan. One alternative suggested by the court was to increase educational and training opportunities for all officers from underprivileged backgrounds, whatever their race. This, it was contended, would expand the pool of minorities eligible for promotion and address the Army's concern for societal discrimination without employing a suspect classification.

Similarly, in a legal action by a white officer who was twice denied promotion to full colonel in 1996 and 1997, *Saunders v. White*,[74] a federal district court has ruled the Army's equal opportunity promotion process in use at the time unconstitutional. The Army's written instruction to promotion boards required that

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[73]46 Fed. Cl. 793 (2000).

[74]2002 WL 338744 (D.D.C. 2002).

the possibility of personal or institutional discrimination be taken into account when evaluating the promotion files of women and minority officers – both in initial evaluation and any review or revote – and urged that the percentages promoted from these groups match their proportion in the applicant pool. Because Army promotion selection statistics for more than two decades demonstrated that minorities and women were promoted at virtually the same rate as whites – if not slightly higher – Judge Lambert found that there was no demonstrable record of discrimination to justify the Army's consideration of race or gender in its promotion policy. The fatal defect in the Army policy was summed up by the district court: "Nowhere in the Memorandum are selection board officers obliged to consider the possibility of past discrimination for non-Nurse Corps males, whites, or any other group for which there is not an equal opportunity selection goal. Thus, the Memorandum instructs selection board members to, for example, account for an Hispanic applicant's 'past personal or institutional discrimination,' but not to account for a white applicant's past discrimination. This undeniably establishes a preference in favor of one race or gender over another, and therefore is unconstitutional."[75]

Minority Contracting By State and Local Government. With increasing frequency, state and local affirmative action programs have met with constitutional objection from courts applying strict judicial scrutiny. Ten federal circuit courts have addressed the legality of racial preferences in employment and public contracting programs, applying various interpretations of the *Croson* ruling. *Croson* emphasized the obligation of state and local governments to anchor their affirmative action efforts by identifying with specificity the effects of past discrimination. This meant that the governmental entity has to have a "strong basis in evidence"– just short, perhaps, of that required to establish a "prima facie" case in a court of law – for its conclusion that minorities have been discriminatorily excluded from public contracts in the past. In *Croson*, the 30% set-aside for minority subcontractors adopted by the City of Richmond failed this constitutional test. First, the program was premised on a comparison of minority contractor participation in city contracts with general minority population statistics rather than the percentage of qualified minority business enterprises in the relevant geographic market. There was, moreover, no evidence of discrimination in any aspect of city contracting as to certain groups – i.e. Orientals, Indians, Eskimos, and Aleuts – who nonetheless were granted a preference under the plan. As regards "narrow tailoring," the 30 % "quota" was "too inflexible"and had been implemented by the city without any prior consideration of "race-neutral" alternatives. Finally, the "waiver" built into the Richmond plan was too "rigid" because it focused solely on minority contractor "availability" with "no inquiry into whether or not the particular MBE seeking a racial preference has suffered from the effects of past discrimination by the city or prime contractors."

The heightened standards of proof articulated by *Croson*, and further developed by *Adarand*, led many states, counties and municipalities to reevaluate existing minority business enterprise programs. Judicial challenges followed, and while

several race-conscious programs survived – at least initially – [76] the majority were less successful, either because they lacked a compelling remedial justification or were not sufficiently "narrowly tailored" to withstand strict judicial scrutiny. As to the former, local jurisdictions primarily sought to establish a "strong basis in evidence" with "disparity" studies depicting the extent of minority exclusion from public contracting activity within the jurisdiction, coupled with any available "anecdotal" evidence. Such studies have generally been poorly received in the courts. Almost universally cited as the basis for judicial rejection of such statistical proof is over-reliance by the governmental unit on general or undifferentiated population data that failed to adequately reflect minority contractor availability or to account for contractor size and other factors relevant to contractor qualifications.[77]

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[76] See, e.g. Associated General Contractors of California v. Coalition, 950 F.2d 1401, 1416-18 (9th Cir. 1991), cert. denied , 503 U.S. 585 (1992)(use of a bid preference rather than a quota, the definition of beneficiaries on the basis of experience of prior bid discrimination, the ability of nonminority contractors to participate via joint venture option, and the limited geographical scope of the preference assured that the program was narrowly tailored); Indianapolis Minority Contractors Ass'n v. Wiley, 187 F.3d 743 (7th Cir. 1999)(sustaining 10% set-aside of federal highway funds for socially and economically disadvantaged small business concerns); Coral Construction Company v. King County, 941 F.2d 910 1991), cert. denied, 502 U.S. 1033 (1992)(minority business set-aside program sustained as applied to preferences for women since less restrictive, intermediate scrutiny standard allows program without proof of active or passive discrimination by government; racial preferences invalid absent record of past discrimination within industry at least passively supported by governmental infusion of tax dollars).

[77] Associated General Contractors of Ohio, Inc. v. Drabik, 214 F.3d 730 (6th Cir. 2000), cert. denied, 121 S. Ct. 1089 (2001)(Ohio Business Enterprise Act invalid as overly inclusive and not narrowly tailored, extending to ethnic groups that had not suffered discrimination; although there was statistical disparity in proportion of contracts awarded to particular group, statistics failed to take into account how many minority-owned businesses were qualified, willing, and able to perform state construction contracts); W.H. Scott Construction Co., Inc. v. City of Jackson, 199 F.3d 206 (5th Cir. 1999)(disparity study rejected because "it did not include an analysis of the availability and utilization of qualified minority subcontractors, the relevant statistical pool, in the City's construction projects"); Engineering Contractors Ass'n v. Metro. Dade County, 122 F.3d 895 (11th Cir. 1997), cert. denied, 523 U.S. 1004 (1998)(disparities found by studies relied on by Dade County to support separate contracting preferences for blacks, hispanics, and women in construction were not significant, in part, because of "complete failure to take firm size into account;" however, gender preferences required only intermediate scrutiny and could be based on societal discrimination in the relevant economic sector); Concrete Works of Colorado, Inc. v. City and County of Denver, 36 F.3d 196 (10th Cir. 1994), cert. denied 514 U.S. 1004 (1995)(disparity index based on "absolute" number of MBEs in the local market without regard to their size may overstate their underutilization as city contractors); O'Donnell Construction Co. v. District of Columbia, 963 F.2d 420 (D.C.Cir. 1992) (D.C. set-aside of 35% of construction contracts for local MBEs disapproved because many nondiscriminatory reasons could explain disparity between percentages of MBEs participating in public construction contracts and overall percentages of MBEs).

See also federal district court decisions in Builders' Ass'n of Greater Chicago v. County of Cook, 123 F. Supp. 2d 1087 (N.D. Ill. 2000)(no "compelling" governmental interest for minority and female subcontracting set-aide absent proof of systematic lack of

(continued...)

Other major faults have been failure to "narrowly tailor" the remedy – whether a minority participation goal, preference, set-aside, or other "sheltered" bidding arrangement – to any disparities revealed by statistics and anecdotal proof of discrimination;[78] the failure to properly limit the program in scope and duration;[79] the absence of a "waiver" provision;[80] or neglecting first to consider race-neutral

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[77](...continued)
opportunity to bid on private contracts or pattern of refusal to hire minority contractors in adjoining six-county area); Webster v. Fulton County, Georgia, 51 F. Supp.2d (N.D. Ga. 1999)(disparity study rejected for failure to take into account factors such as firm size and ability to obtain financing and bonding that may affect MBE availability and utilization); Phillips & Jordan, Inc. v. Watts, 13 F.Supp.2d 1308 (N.D.Fla. 1998)(court "unconvinced" by disparity study that "assume[d]" all minority firms included were willing or able to bid on road maintenance contract); (Arrow Office Supply Co v. City of Detroit, 826 F. Supp. 1072 (E.D. Mich. 1993)(neither "statistical" study comparing estimates of minority contractors with blacks in population, nor testimony revealing difficulties most MBEs face "as a result of their size" rather than "direct intentional invidious discrimination" would justify the city's sheltered market program); Concrete General v. Washington Suburban Sanitary Commission, 779 F. Supp. 370 (D. Md. 1991)(MBE participation goal of 25% improper because it focused on general population figures and substantially exceeded the percentage of available qualified MBEs); Houston Contractors Ass'n v. Metropolitan Transit Authority of Harris County, 993 F. Supp. 545 (S.D. Tex. 1997)(Houston Metro Authority 21% small disadvantaged business subcontracting goal rejected since "it assumes that participation should equal population" and "Study" used to justify preference was based on "familiar aggregate figures on income disparity between groups" but did not "connect the city's contracting policies to minority impoverishment").

[78]E.g. Contractors Ass'n of Eastern Pennsylvania, Inc. v. City of Philadelphia, 91 F.3d 586 (3d Cir. 1996), cert. denied, 519 U.S. 1113 (1997)(minority set-aside of 15% was arbitrary and not narrowly tailored were evidence of record as to percentage of black subcontractors in market indicated percentage of 0.7%, and city made no effort to identify barriers to entry to market by black contractors); Associated Utility Contractors of Maryland, Inc. v. Mayor and City Council of Baltimore, 2000 WL 201606 (D.Md. 2-16-2000)(rejecting city's reliance on disparity study then in progress for annual minority and female set-asides where there was no record of "what evidence the City considered prior to promulgating the set-aside goals for 1999"); Main Line Paving Co. v. Board of Education, 725 F. Supp. 1349 (E.D. Pa. 1989)(evidentiary basis for the program was too general, since it related to race-neutral practices, and the remedy overbroad in that it did not provide for an individualized determination that those benefitting from the plan were victims of past discrimination).

[79]E.g. Associated General Contractors of Ohio v. Drabik, 214 F.3d 730 (6th Cir. 2000)(state minority preference plan not narrowly tailored where it had been in effect for 20 years with no set expiration); Kornhass Construction, Inc. v. State of Oklahoma, 140 F. Supp. 2d 1232 (W.D.Okla, 2001)(duration of state 10% minority contracting goal "not tied in any way to the eradication of past or present racial discrimination" and "legal authority to bypass a certified minority bidder" has never been exercised); Webster v. Fulton County, Ga. supra n. 77 ("random inclusion" of racial or ethnic groups who may never have suffered from discrimination undermined narrowly tailored remedy); Associated General Contractors v. New Haven, 791 F. Supp. 941, 948 (D. Conn. 1992)(failure to document discrimination against any "disadvantaged" business other than disadvantage based on race made program overinclusive as to other groups and thus not appropriately tailored to its asserted remedial purpose).

[80]Associated General Contractors of Ohio, supra n. 77 (rejecting waiver provision which (continued...)

alternatives, such as bonding and credit assistance programs, to ameliorate minority underutilization.[81]

Post-*Adarand* Regulatory Developments

Regulatory reforms put forward by the former Clinton Administration sought to "narrowly tailor" federal minority and disadvantaged small business programs in line with *Adarand*. An initial focus of the Administration's post-*Adarand* review was a DOD program, known as the "rule of two," developed as a means to attain the 5% goal for disadvantaged firms in 10 U.S.C. § 2323. Section 2323 authority – permitting "less than full and open competit[ion]" in DOD procurements provided that the cost of using set-asides and affirmative action measures is not more than 10% above fair market price – was extended to all agencies of the federal government by the Federal Acquisition Streamlining Act of 1994 (FASA).[82] Under the rule of two, whenever a DOD contract officer could identify two or more qualified disadvantaged firms to bid on a project within that cost range, the officer was required to set the contract aside for bidding exclusively by such entities. Due to *Adarand*, use of the rule of two was suspended, and FASA rulemaking delayed.

On May 23, 1996, the Justice Department proposed a structure for reform of affirmative action in federal procurement, setting stricter certification and eligibility requirements for minority contractors claiming "socially and economically disadvantaged" status under § 8(a) and § 8(d) of the Small Business Act.[83] The plan suspended for two years set-aside programs in which only minority firms could bid on contracts. Statistical "benchmarks" developed by the Commerce Department, and

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[80](...continued)
focused solely on MBE availability without regard to "whether the particular MBE seeking a racial preference has suffered from the effects of past discrimination by the state or prime contractors").

[81]See e.g. Contractors Association of Eastern Pennsylvania, supra n. 78 (minority subcontracting program not narrowly tailored where city failed to consider race-neutral alternatives designed to encourage investment and/or credit extension to small contractors); Associated General Contractors of Ohio, supra n. 77 (Ohio's MBE Act "doom[ed]" by state's failure to consider race-neutral alternatives recommended by the Attorney General before adopting 15% minority set-aside for purchase of nonconstruction-related goods and services.); Concrete Works of Colorado v. City and County of Denver, 86 F. Supp 2d 1042 (D.Colo. 2000)("The City pursued a mandatory goals program as a first, rather than as a last resort.").

[82]P.L. 103-355, § 7102, 108 Stat. 3243 (1994). FASA states that in order to achieve goals for disadvantaged business participation in procurements negotiated with the SBA, an "agency may enter into contracts using – (A) less than full and open competition by restricting the competition for such awards to small business concerns owned and controlled by socially and economically disadvantaged individuals described in subsection (d)(3)(c) of section 8 of the Small Business Act (15 U.S.C. § 637); and (B) a price evaluation preference not in excess of 10 percent when evaluating an offer received from such a small business concern as the result of an unrestricted solicitation."

[83]61 Fed. Reg. 26042, Notices, Department of Justice, Proposed Reforms to Affirmative Action in Federal Procurement.

adjusted every five years, were made the basis for estimating expected disadvantaged business participation as federal contractors, in the absence of discrimination, for nearly 80 different industries. Where minority participation in an industry falls below the benchmark, bid and evaluation credits or incentives are authorized for economically disadvantaged firms and prime contractors who commit to subcontract with such firms. Conversely, when such participation exceeds an industry benchmark, the credit would be lowered or suspended in that industry for the following year. The new system is monitored by the Commerce Department, using data collected to evaluate the percentage of federal contracting dollars awarded to minority-owned businesses, and relies more heavily on "outreach and technical assistance" to avoid potential constitutional pitfalls.

The Justice Department's response to comments on its proposal, together with proposed amendments to the Federal Acquisition Regulation (FAR) to implement it, were published on May 8, 1997.[84] Three procurement mechanisms interact with benchmark limits pursuant to the FAR regulation jointly proposed for the Departments of Defense, General Services Administration, and National Aeronautics and Space Administration. A "price evaluation adjustment" not to exceed fair market value by more than 10%, as authorized by current law, is available to disadvantaged firms bidding on competitive procurement. Second, an "evaluation" credit applies to bids by nonminority prime contractors participating in joint ventures, teaming arrangements, or subcontracts with such firms. Finally, contracting officers may employ "monetary incentives" to increase subcontracting opportunities for disadvantaged firms in negotiated procurements. "Benchmarking" by the Commerce Department is the key feature of the new program, designed to narrowly tailor the government's use of race-conscious subcontracting in line with *Adarand*. The Commerce recommendation will "rely primarily on census data to determine the capacity and availability of minority-owned firms." As explained by DOJ:

> [A] statistical calculation representing the effect discrimination has had on suppressing minority business development and capacity would be made, and that calculation would be factored into benchmarks . . . The purpose of comparing utilization of minority-owned firms to the benchmark is to ascertain when the effects of discrimination have been overcome and minority-owned firms can compete equally without the use of race-conscious programs. Full utilization of minority-owned firms in [an] SIC code may well depend on continued use of race-conscious programs like price or evaluation credits. Where utilization exceeds the benchmark, the Office of Federal Procurement Policy may authorize the reduction or elimination of the level of price or evaluation credits, but only after analysis has projected the effect of such action.[85]

An interim rule incorporating proposed DOJ revisions to the FAR regulation became effective October 1, 1998.[86]

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[84]See Response to Comments to Department of Justice Proposed Reforms to Affirmative Action in Federal Procurement, 62 Fed. Reg. 25649 (1997).

[85]Id. at 25650-52.

[86]Federal Acquisition Regulation; Reform of Affirmative Action in Federal Procurement; (continued...)

Final regulations implementing Justice Department recommendations with respect to the § 8(a) business development and small disadvantaged business program were issued by the SBA on June 30, 1998.[87] The reforms include a new process for certifying firms as small disadvantaged businesses and in place of set-asides, a price evaluation adjustment program administratively tied to the Commerce benchmarks. In the past, the government relied on self-certification for purposes of "disadvantaged" eligibility, which allowed firms to identify themselves as meeting certification requirements. Under the new procedure, SBA, or where SBA deems appropriate, SBA-approved state agencies, or private certifiers make a threshold determination as to whether a firm is actually owned or controlled by specified individuals claiming to be disadvantaged. After ownership or control is established, the application is reviewed by SBA for purposes of a determination of disadvantaged status. A second key reform is the establishment of an SBA price evaluation adjustment program, pursuant to authority in the 1994 Federal Acquisition Streamlining Act.[88] Under this new program, which is separate from § 8(a) business development, disadvantaged firms submitting bids on competitively awarded federal contracts may qualify for a price evaluation credit of up to 10%. Credits are available only to businesses that have been certified as socially and economically disadvantaged by the SBA. Only if price credits, over a sustained period, fail to achieve full benchmark utilization of disadvantaged entrepreneurs may agencies consider the use of set-asides in awarding contracts.

The definition of social and economic disadvantage remains largely intact under the SBA regulation. Members of designated minority groups participating in disadvantaged small business programs continue to enjoy a statutory presumption of social disadvantage. They are required, however, to state their group identification and meet certification criteria for economic disadvantage and are subject to third-party challenge under current administrative mechanisms. Individuals who are not within the statutory presumption may qualify by proving that they are socially and economically disadvantaged under SBA standards. Under prior SBA § 8(a) certification standards, however, persons not members of presumed disadvantaged groups had to prove their status by "clear and convincing evidence. The revised SBA regulations ease this burden on non-minority applicants by adopting a "preponderance of evidence" rule.

Affirmative Action in Employment

The origins of federal law and policy regarding affirmative action in employment are traceable to a series of executive orders dating to the 1960's, which prohibit discrimination and require affirmative action by contractors with the federal government. The Office of Federal Contract Compliance Programs, an arm of the U.S. Department of Labor, currently enforces E.O. 11246, as amended, by means of

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[86](...continued)
Interim rule with request for comment, 63 Fed. Reg. 52426 (1998).

[87]63 Fed. Reg. 35726, 35767 (1998).

[88]Supra n. 65.

a regulatory program requiring larger federal contractors – those with procurement or construction contracts in excess of $50,000 – to formulate written affirmative action plans, and to make a "good faith effort" to achieve "goals and timetables" to remedy underutilization of minorities and women. Smaller contractors are bound by the nondiscrimination requirements of the Executive Order, but are not required to maintain formal written programs.[89] Judicial decisions early on had upheld the executive order program as a constitutionally valid governmental response to racial segregation in the construction trades and affected industries.

Public and private employers with 15 or more employees are also subject to a comprehensive code of equal employment opportunity regulation under Title VII of the 1964 Civil Rights Act.[90] Except as may be imposed by order of a court to remedy "egregious" violations of law, however, or by consent decree to settle pending claims, there is no general statutory obligation on employers to adopt affirmative action plans. But the EEOC has issued guidelines to protect employers and unions from charges of "reverse discrimination" when they voluntarily take actions to eliminate the effects of past discrimination. In addition, federal departments and agencies are required to periodically formulate affirmative action plans for their employees[91] and a "minority recruitment program" to correct minority "underrepresentation" in specific federal job categories.[92]

A major aspect of the legal debate over affirmative action has centered on the proper role of the remedy in employment discrimination litigation. One legal theory emphasizes compensation for actual victims of discrimination, while another focuses more upon the elimination of barriers to equal opportunity for all members of a previously excluded class of individuals. In a series of cases during the 1980s, the Justice Department argued, largely without success, that victim compensation was the only proper remedial objective and that class-based affirmative action remedies, which benefit women and minorities who are not themselves actual victims of an

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[89]See 41 C.F.R. §§ 60-1 to 999.

[90]42 U.S.C. 2000e et seq.

[91]Section 717 of the 1972 Amendments to Title VII of the 1964 Civil Rights Act empowers the EEOC to enforce nondiscrimination policy in federal employment by "necessary and appropriate" rules, regulations, and orders and through "appropriate remedies, including reinstatement or hiring of employees, with or without backpay." 42 U.S.C. § 2000e-16(b). Each federal department and agency, in turn, is required to prepare annually a "national and regional equal employment opportunity plan" for submission to the EEOC as part of "an affirmative program of equal employment opportunity for all . . . employees and applicants for employment." 42 U.S.C. § 2000e-16(b)(1).

[92]Section 717 was reinforced in 1978 when Congress enacted major federal civil service reforms, including a mandate for immediate development of a "minority recruitment program" designed to eliminate "underrepresentation" of minority groups in federal agency employment. 5 U.S.C. § 7201. The EEOC and Office of Personnel Management have issued rules to guide implementation and monitoring of minority recruitment programs by individual federal agencies. Among various other specified requirements, each agency plan "must include annual specific determinations of underrepresentation for each group and must be accompanied by quantifiable indices by which progress toward eliminating underrepresentation can be measured." 5 C.F.R. § 720.205(b).

employer's past discrimination, are illegal. The employment cases to date have yet to fully embrace this position. In *Croson*, however, Justice O'Connor implied that individual victimization may be the benchmark for any finely-tuned "waiver" procedure necessary for salvaging Richmond's minority set-aside program. This aspect of the decision, as reinforced by *Adarand I*, may warrant further examination when the Court next reviews an affirmative action case.

Judicial precedents on affirmative action in employment have developed along two concurrent but not necessarily coterminous lines. One line of authority delineates the permissible scope of affirmative action imposed by judicial decree to remedy proven violations of Title VII or the Constitution. The other involves the validity of voluntary affirmative action plans by public and private employers. Several basic principles emerge from caselaw developments to date. A fundamental prerequisite to the adoption of minority goals or preferences is a remedial justification rooted in the employer's own past discrimination and its persistent workplace effects. Stricter probative standards mandated by the Constitution may bind public employers in this regard than apply to private employers under Title VII.. However, a "firm basis" in evidence – as revealed by a "manifest imbalance," or "persistent" and "egregious" disparities in the employment of minorities or women in affected job categories – has been viewed by the courts as an essential predicate for affirmative action preferences. Secondly, beyond a record of past discrimination by the employer, all affirmative action plans are judged in terms of the burden they place on identifiable non-minorities. Thus, those remedies, like the minority layoff provisions in *Wygant*, which immediately result in the displacement of more senior non-minority employees, are most suspect and least likely to pass legal or constitutional muster. At the other end of the spectrum, hiring or promotional goals or preferences that do not "unnecessarily trammel" the "legitimate expectations" for advancement of non-minority candidates are more likely to win judicial acceptance. Finally, all "race-conscious" affirmative action remedies must be sufficiently flexible, temporary in duration, and "narrowly tailored" so as to avoid becoming rigid "quotas."

Judicial Affirmative Action Remedies

Even before the Supreme Court had spoken, every federal circuit court of appeals, in cases dating back to the very inception of the 1964 Civil Rights Act, had approved use of race or gender preferences to remedy "historic," "egregious," or "longstanding" discrimination. This line of judicial authority was ratified by the Court's rulings in *Local 28, Sheetmetal Workers v. EEOC*[93] and *United States v. Paradise*.[94] The former involved contempt proceedings against a union with an established history of racial and ethnic discrimination for its willful violation of a judicially imposed 29% minority membership goal. To remedy years of union evasion, amounting to contempt of court, the Second Circuit had approved an order reinstating the minority membership goal and requiring that job referrals be made on

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[93]478 U.S. 421 (1986)

[94]480 U.S. 149 (1987).

the basis of one apprentice for every four journeyman. The Supreme Court affirmed, five to four.

Justice Brennan wrote for a plurality of four Justices that Title VII does not preclude race-conscious affirmative action as a "last resort" for cases of "persistent or egregious" discrimination, or to dissipate the "lingering effects of pervasive discrimination," but that, in most cases, only "make whole" relief for individual victims is required. The plurality also felt that by twice adjusting the union's deadline, and because of the district court's "otherwise flexible application of the membership goal," the remedy had been enforced as a "benchmark" of the union's compliance "rather than as a strict racial quota." Rounding out the five-Justice majority for affirmance was Justice Powell, who emphasized the history of "contemptuous racial discrimination" revealed by the record, and the temporary and flexible nature of the remedy. In separate dissents, Justices White and O'Connor found the referral quota excessive because economic conditions in the construction industry made compliance impracticable, while Chief Justice Burger and Rehnquist read Title VII to bar all judicially-ordered race-conscious relief for the benefit of nonvictims.

A parallel situation was presented by *Paradise*. In 1972, to remedy nearly four decades of systematic exclusion of blacks from the ranks of the Alabama State troopers, the district court ordered a hiring quota and enjoined the state from discriminating in regard to promotions. Seven years later, a series of consent decrees calling for new nondiscriminatory promotion procedures was approve to rectify the total dearth of back troopers in the upper ranks. In the interim, however, the court ordered a one-to-one racial quota for the rank of corporal and above, provided sufficient qualified blacks were available, until 25% of each rank was black. Only one round of promotions for corporal was made before the quota for that and the sergeant rank was suspended. The Supreme Court granted review of the order under the Equal Protection Clause.

Justice Brennan, whose plurality opinion was again joined by Justices Marshall, Blackmun, and Powell, considered several factors in determining whether the plan violated the equal protection rights of white troopers: the necessity of the relief and the efficacy of alternative remedies, the plan's flexibility and duration, the relationship between the plan's numerical goals and the relevant labor market, and the plan's impact on the rights of third parties. Significant was the fact that the order did not require the promotion of anyone and could be waived in the absence of qualified minority candidates, as it already had been with respect to lieutenant and captain positions. It was also tied to the percentage of minorities in the area workforce, 25%. Finally, because it did not bar white advancement, but merely postponed it, the plan did not impose unacceptable burdens on innocent third parties.

Justice Brennan therefore concluded that the promotion quota was "narrowly tailored" and justified by the government's "compelling" interest in eradicating the state's "pervasive, systematic, and obstinate exclusion" of blacks and its history of resistance to the court's orders. Justice Stevens, who provided the fifth vote for the Court's judgment, stated in a separate opinion that the district court did not exceed the bounds of "reasonableness" in devising a remedy. Justice O'Connor, joined in dissent by Justice Scalia and the Chief Justice, found the plan "cannot survive

judicial scrutiny" because the one-to-one promotion quota is not sufficiently tied to the percentage of blacks eligible for promotion. Finally, Justice White, in a two sentence dissent, stated simply that the district court "exceeded its equitable powers."

Voluntary Affirmative Action

The remedial justification for voluntary affirmative action in employment was explored by the Court's constitutional analysis in *Wygant v. Jackson Board of Education*.[95] A collective bargaining agreement between the school board and the teacher's union in that case provided a hiring preference for minority teachers coupled with layoff protection until the minority composition of the faculty mirrored that of the student body district-wide. Seniority was to govern layoff except that in no event were overall minority faculty percentages to be reduced. In the face of a constitutional challenge by ten laid-off white teachers, the Court voided the minority layoff provision, but no particular rationale commanded majority support.

Seven members of the *Wygant* Court agreed that some forms of voluntary affirmative action may be constitutionally justifiable on the part of a governmental entity itself guilty of past discrimination. The plurality opinion of Justice Powell applied his strict scrutiny test from *Bakke*: the "limited use of racial classification" must be justified by the "compelling" purpose of remedying "prior discrimination by the governmental unit involved," and "narrowly tailored" to that goal. Neither the board's asserted interest in the presence of minority teachers as critical "role models" or to ameliorate "societal discrimination" was sufficient, however, in the absence of "convincing" evidence of the board's own past discrimination. Moreover, while innocent non-minorities could be made to share some of the burden, the remedy could not intrude too severely upon their rights. Because the minority layoff protection in *Wygant* "impose[d] the entire burden of achieving racial equality on particular individuals," Justice Powell concluded that innocent third parties were impacted too heavily. In this respect, the layoff provision was distinguishable from preferential hiring decisions, which "diffuse" the burden more generally. Reserving judgment on the hiring issue, Justice White concurred that the layoff remedy went too far because it displaced more senior white employees in favor of minorities who were not actual discrimination victims. In a separate concurrence, Justice O'Connor aligned herself with the Powell view that societal discrimination will not justify voluntary affirmative action remedies, and that the layoff plan was infirm because overbroad and not "narrowly tailored" to the board's past discrimination.

The Justices sparred over the nature of the evidence that might support an informal conclusion that past discrimination exists. The plurality opinion suggested "sufficient," "convincing," and "strong" evidence as benchmarks, while Justice O'Connor considered a "firm basis" acceptable. None of the Justices seemed to view "formal findings" of past governmental discrimination a constitutional prerequisite to voluntary affirmative action. Justice O'Connor and three of the dissenters (Marshall J., joined by Brennan and Blackmun, JJ) noted that such a requirement would chill voluntary efforts to end racial discrimination and purge its effects. Only Justice Stevens, in a separate dissent, would have abandoned any requirement for

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[95]476 U.S. 267 (1986).

showing past discrimination in favor of the educational interest in "an integrated faculty."

Significantly, *Wygant* was a constitutional case decided on Fourteenth Amendment equal protection principles. Less remedial justification may be required, however, for voluntary affirmative action plans adopted by private employers to comply with Title VII of the 1964 Civil Rights Act. The first such case to reach the High Court, *United Steelworkers v. Weber*,[96] upheld a voluntary affirmative action plan by a private employer, including a minority quota for a craft training program, to rectify "manifest racial imbalance in traditionally segregated job categories." The Court required no specific finding of past discrimination by the employer, deciding the case instead on the basis of the historically well established record of nationwide bias in trade union membership.

In 1974, the employer and union in *Weber* negotiated an affirmative action plan to increase the percentage of blacks in skilled craft positions from 2% to the level of their overall participation in the area workforce, or 39%. By reserving half of the company's craft training program slots for minorities, several white employees were passed over in favor of less senior blacks. There was no evidence that the under-representation of minorities in craft jobs was attributable to past discrimination by the employer. Nonetheless, relying on general judicial and research findings relative to nationwide patterns of minority exclusion from trade union membership, the Supreme Court ruled five to two that "racial preferences" in the program were a lawful means to combat "manifest racial imbalance" in craft positions resulting from "old patterns of racial segregation and hierarchy."

Conceding that Title VII could literally be read to bar all race-conscious employment practices, the Court decided that the purpose of the Act, rather than its literal meaning, controlled. The legislative history and context from which the Act arose, Justice Brennan wrote, compelled the conclusion that the primary purpose of Title VII was to "open employment opportunities for Negroes in occupations which have traditionally been closed to them." Accordingly, "[i]t would be ironic indeed" to read the statute to preclude "all voluntary, private, race-conscious efforts" to abolish workplace segregation. Moreover, the specific plan in question, mandating a one to one racial ratio until a specific minority participation rate is achieved, was permissible affirmative action because it did "not unnecessarily trammel the interest of white employees." In this regard the Court emphasized:

> The plan does not require the discharge of white workers and their replacement with new black hires. Nor does the plan create an absolute bar to advancement of white employees; half of those trained in the program will be white. Moreover, the plan is a temporary measure; it is not intended to maintain racial balance, but simply to eliminate manifest racial imbalance. Preferential selection of craft trainees at the . . .plant will end as soon as the percentage of black skilled

[96] 443 U.S. 193 (1979).

> craft workers in the . . . plant approximates the percentage of blacks in the local labor force.[97]

Weber, therefore, permits private employers to implement certain forms of temporary affirmative action to advance minority employment opportunities, even where such measures have an incidental adverse impact on white workers.

Johnson v. Transportation Agency[98] reviewed a voluntary affirmative action plan adopted by a public employer, the Transportation Agency of Santa Clara County, California. That plan authorized the agency to consider the gender of applicants as one factor for promotion to positions within traditionally segregated job classifications in which women had been under-represented. Women were significantly under-represented in the county's labor force as a whole and in five of seven job categories, including skilled crafts where all 238 employees were men. The plan's long range goal was proportional representation. However, because of the small number of positions and low turnover, actual implementation was based on short term goals which were adjusted annually and took account of qualified minority and female availability. No specific numerical goals or quotas were used.

The petitioner in *Johnson* was a male employee who had applied for promotion to the position of road dispatcher, only to be rejected in favor of a female competitor. Both the petitioner and the woman who won the promotion were deemed well qualified for the position, although the petitioner had scored slightly in the first round interview. The appointing official for the agency indicated that in reaching the decision to promote the female candidate, he had considered the candidates' qualifications, backgrounds, test scores, and expertise as well as gender considerations.

The Supreme Court upheld the county's action, six to three. Justice Brennan decided for the majority that Title VII was not coextensive with the Constitution and that, therefore, *Weber* not *Wygant* was controlling. The noted disparities in female workforce participation satisfied the *Weber* requirement for a "manifest imbalance" since to require any additional showing could expose the employer to discrimination lawsuits and operate as a disincentive to voluntary compliance with the statute. The Court likened the county plan to the treatment of race as a "plus" factor in the "Harvard Plan" referenced approvingly by Justice Powell in *Bakke*. Because sex was but one factor in the decision-making process, no applicant was excluded from participation on account of sex. In a caveat, however, the Court warned that "[i]f a plan failed to take distinction in qualification into account in providing for actual employment decision, it would dictate mere blind hiring by the numbers," and would be invalid because "it would hold supervisors to achievement of a particular percentage of minority employment or membership . . . regardless of circumstances

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[97]443 U.S. at 208-09.

[98]480 U.S. 792 (1973).

such as economic conditions or the number of available qualified minority applicants . . .”[99]

Justice Stevens concurred that the plan was consistent with *Weber* and Justice O’Connor, in a separate concurrence, provided a sixth vote for the judgment. In her opinion, however, to support a voluntary affirmative action plan, there should be “a statistical disparity sufficient to support a prima facie claim under Title VII by the employee beneficiaries of the affirmative action . . . .” Equal Protection standards, not Title VII, should govern public employee cases, and she was critical of the majority for providing inadequate guidance as to the statistical imbalance standard. But because there were no women in skilled craft positions, and gender was only a plus factor, either standard was satisfied here.

Justice White, dissenting, would have overruled *Weber* as a “perversion” of Title VII, as would Justices Scalia and the Chief Justice, joining in a separate dissent. The dissenters criticized the majority for using Title VII “to overcome the effect not of the employer’s own discrimination, but of societal attitudes that have limited entry of certain races, or of a particular sex, into certain jobs.” Noting the district court finding of no past discrimination by the county agency, they argued in light of *Sheetmetal Workers (supra)* that “there is no sensible basis for construing Title VII to permit employers to engage in race- or sex-conscious employment practices that courts would be forbidden from ordering them to engage in following a judicial finding of discrimination.”

Judicial Developments Since *Croson* and *Adarand*

Affirmative Action Consent Decrees

State and local programs mandating affirmative action in employment initially met with greater judicial approval than public contracting preferences for minorities in the wake of the *Croson* decision. This may be due, in part, to the fact that employment preferences are frequently, though not always, linked to settlements of individual or class action lawsuits. Depending on the stage of proceedings, a formal record of past discrimination may already have developed when agreement is reached. At the very least, there is usually some allegation of misconduct by the public employer. In addition, there may be underlying judicial findings of discrimination, or district court involvement in fashioning or approving the consent decree, factors traditionally prompting deference by appellate courts when reviewing affirmative action efforts.[100]

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[99]Id. at 636 (citing Sheet Metal Workers v. EEOC, 478 U.S. 421, 495 (O’Connor, J., concurring in part and dissenting in part).

[100]E.g. Majeske v. City of Chicago, 218 F.3d 816 (7th Cir. 2000)(city’s affirmative action plan lawful because it remedies past discrimination and was narrowly tailored); McNamara v. City of Chicago, 138 F.3d 1219, 1223-24 (7th Cir. 1998)(stating that raw statistics do not prove intentional discrimination, but also finding that defendant had presented strong basis in evidence of need to remedy discrimination, through combination of statistics, anecdotal

(continued...)

Between 1972 and 1983, the Department of Justice sued 106 public employers; of those, 93 were settled by consent decree. These court-approved agreements typically set goals and timetables for increasing minority and female under-representation in the workforce. Of the cases that the Justice Department still monitors, many stem from litigation dating back to the 1970's, mainly against police and fire departments.[101] Under the *Croson* and *Adarand*, however, these orders and consent decrees have come under "strict scrutiny." A major ruling by the Eleventh Circuit in 1994 invalidated a consent decree involving the Birmingham, Ala. fire department for being an "entirely arbitrary" fixed quota that unduly restricted opportunities for whites.[102] Judicial rulings in Boston last year forced abandonment of a 1980 consent decree, which established a race-based policy for promoting sergeants.[103] So far, nearly a dozen cities and states have successfully fought consent decrees and ended federal monitoring of their minority hiring practices.

The Supreme Court declined to review a Fifth Circuit decision striking down the Dallas Fire Department's affirmative action plan. In *City of Dallas v. Dallas Fire Fighters Ass'n,*[104] the appellate panel held that there was insufficient evidence of past discrimination in the Dallas Fire Department to justify the department's policy of promoting some women and minorities over white males who had achieved scores within the same "band" on a civil service examination. Evidence of discrimination in the record consisted of a 1976 consent decree between the City and the Justice Department finding impermissible racial discrimination by the city under Title VII, and statistical under-representation of minorities in the ranks to which the challenged promotions were made. The court recognized that "out-of-rank promotions do not impose as great a burden on non-minorities as would layoff or discharge." But it found that interference by the city with "legitimate expectations" of promotion based on exam performance was unjustified where alternative remedies were not yet exhausted, and there was no proof of "a history of egregious and pervasive discrimination or resistance to affirmative action that has warranted more serious

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[100](...continued)
evidence, and judicial findings); Boston Police Superior Officers Federation, 147 F.3d 13, (1st Cir. 1998)(documentary evidence in relation to earlier consent decree supported preferential promotion of black officer to rank of lieutenant). But cf. Crumpton v. Bridgeport Education Ass'n, 993 F.2d 1023 (2d Cir. 1993)(refusing to equate parties' stipulations as to existence of discrimination with judicial determination that such discrimination existed); Reynolds v. Roberts, 202 F.3d 1303 (11th Cir. 2000)(consent decree did not establish that state transportation department had discriminated against black employees).

[101]See "Backdraft, Courts are Lifting Decades-Old Consent Decrees Requiring Affirmative Action, " 86 A.B.A.J. 48 (April 2000).

[102]In re Birmingham Reverse Discrimination Employment Litigation. 20 F.3d 1525 (11th Cir. 1994). See also Thigpen v. Bibb County Ga., Sheriff's Department, 223 F.3d 1231 (11th Cir. 2000)(Croson controlled white police officers' § 1983 action against sheriff's department, challenging constitutionality of consent decree, adopted to settle prior race discrimination action, requiring that 50% of all annual promotions be awarded to black officers).

[103]See Cotter v. City of Boston, 73 F. Supp. 2d 62 (D.Mass. 1999), vacated and remanded, 219 F.3d 31 (lst Cir. 2000).

[104]150 F.3d 438 (5th Cir. 1998), cert. denied, 526 U.S. 1046 (1999).

measures in other cases."[105] Even less evidence of past sex discrimination was found by the court to justify the city's gender-based discrimination. Justices Breyer and Ginsburg dissented from the Supreme Court's decision to deny review of the Fifth Circuit's decision.

In *Ensley Branch, NAACP v. Seibels,*[106] the Eleventh Circuit rejected both long term and annual goals imposed by consent decree for the hiring of firefighters and police officers by the City of Birmingham, Alabama. The main fault with the city's affirmative action plan was that it had become a permanent alternative to the development of nondiscriminatory tests and other valid selection procedures. Rather than ending discrimination, the long-term goals in the plan were "designed to create parity between the racial composition of the labor pool and the race of the employees in each job position." Annual hiring goals had been arbitrarily set at twenty-five to fifty percent for minorities and had been "mechanically" applied as "rigid quotas," in the court's view, without regard to "relative qualifications" of the candidates. On remand, the district court was ordered to "re-write the decrees to relate the annual goals to the proportion of blacks in the relevant, objectively qualified labor pool" and "to make clear that the annual goals cannot last indefinitely."[107]

An affirmative action promotional plan for the Maryland State police, agreed to by the parties with consent of a federal district court, was subjected to strict scrutiny review and found wanting by the Fourth Circuit in *Maryland Troopers Ass'n v. Evans.*[108] Specifically, goals linked to minority representation in the general population, instead of the qualified labor pool, were found deficient under *Croson* analysis, as was the failure to first exhaust all race-neutral alternative means of increasing minority opportunity. The latter factor has frequently been determinative of the constitutional question in the judicial mind.[109] *Croson* was also applied by the

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[105]Id. at 440.

[106]31 F.3d 1548 (11th Cir. 1994).

[107]Id. at 1577. In addition, the court noted:

> Once a valid selection procedure is in place for a particular position, neither the City or the Board may continue to certify, hire, or promote according to a race-conscious 'goal' absent proof of ongoing racial discrimination, or of lingering effects of past racial discrimination, with respect to that position. Under no circumstances may the City hire or promote, or the Board certify, candidates who are demonstrably less qualified than other candidates, based on the results of valid, job-related selection procedures, unless the district court finds that such appointments are necessary to cure employment discrimination by the City or Board. Id.

[108]993 F.2d 1072 (4th Cir. 1993).

[109]E.g. Alexander v. Estepp, 95 F.3d 312, 316 (4th Cir. 1996)("The program is not narrowly tailored because means less drastic than outright racial classification were available to department officials); Middleton v. City of Flint, 92 F.3d 396, 410-11 (6th Cir. 1996)(rejecting race-conscious promotion plan because, inter alia, the City had successfully used "less drastic, alternative ways" to increase percentage of minority police officers);

(continued...)

Sixth Circuit to defeat a 50 percent minority goal for the rank of sergeant in the Detroit Police Department, which had been in effect for nearly two decades, since "limiting the duration of a race-conscious remedy which clearly impacts adversely on [nonminorities] is a keystone of a narrowly tailored plan."[110] Failure to satisfy the court as to the cause of apparent statistical disparities with respect to minority employment,[111] the scope or duration of the remedy,[112] the absence of a provision for waiver where qualified minority candidates were unavailable,[113] and the consequent undue burden placed on nonminorities[114] are all factors that have led to judicial invalidation of state and local affirmative action.

Affirmative Recruitment and Outreach Programs

Adarand did not precisely define "racial classification" for equal protection purposes, but a plurality of Justices described the concept in terms of burdens or benefits placed on individuals because of race, or subjecting individuals to unequal treatment. Race-conscious action by government or private employers that neither confers a benefit nor imposes a burden on individuals may not be subject to strict scrutiny or heightened judicial review. Thus, courts have not found data collection activities concerning the racial or gender makeup of a workforce to violate the Constitution. "Statistical information as such is a rather neutral entity which only

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[109](...continued)
Boston Police Superior Officers Fed'n v. City of Boston, 147 F.3d 13, 25 (1st Cir. 1998)(holding that one-time affirmative action promotion was narrowly tailored because race-neutral measures "would not provide a timely remedy."

[110]Detroit Police Officers Ass'n v. Young, 989 F.2d 225, 228 (6th Cir. 1993).

[111] Aiken v. City of Memphis, 37 F.3d 1155 (6th Cir. 1994)(promotion goals set by consent decree were problematic because they were tied to goals for hiring black officers which were, in turn, based on the minority population of the undifferentiated labor force); (Lalla v. City of New Orleans, 1999 WL 138900 (E.D.La)("gross statistical disparities" between racial composition of fire department and community population did not establish "strong basis in evidence" for racial hiring preference absent showing that black applicants were rejected as "much higher" rate than whites); Ashton v. City of Memphis, 49 F. Supp.2d 1051 (W.D.Tenn. 1999)(testimony of expert for city overstated number of blacks in qualified labor pool because wrong age group was considered, and it disregarded both the level of minority group interest and relatively higher rates of criminal convictions among blacks, disqualifying factors for police officers).

[112]United States v. City of Miami, 115 F.3d 870 (11th Cir. 1997)(Report of city's expert on underrepresentation of women and minorities as firefighters lacked probative value where it was based on general census data rather than proper comparisons between minority composition of department and relevant labor market); Ashton, supra n. 82 at 1065(district court "troubled" by city's long-term operation under consent decrees – some fourteen years).

[113]E.g. North State Law Enforcement Officers Ass'n v. Charlotte-Mecklenburg Police Dept., 862 F. Supp. 1445 (W.D.N.C. 1994).

[114]E.g. Crumpton v. Bridgeport Education Ass'n, 993 F.2d 1023, 1031 (2d Cir. 1993)(finding preferential lay-off policy too burdensome on nonminorities).

becomes meaningful when it is interpreted."[115] Similarly, strict scrutiny has generally not been applied by the courts to minority outreach or recruitment efforts that do not amount to an actual preference in employment decisionmaking. A public university, for example, may be racially "aware" or "conscious" by amassing statistics on the racial and ethnic makeup of its faculty and encouraging broader recruiting of racial or ethnic minorities, without triggering strict scrutiny equal protection review. These activities do not impose burdens or benefits, it has been held, nor do they subject individuals to unequal treatment. If that institution, however, then engages in race-preferential hiring, firing, or promotion, that action is subject to strict scrutiny. This distinction between "inclusive" forms of affirmative action – such as recruitment, advertising in minority media, and other outreach to minority communities – and "exclusive" affirmative action – quotas, set-asides, layoff preferences, etc. – has been central to several recent decisions.[116]

One of the first post-*Adarand* decisions, *Shuford v. State Board of Education*,[117] upheld provisions similar to E.O. 11246 in the face of constitutional challenge. A consent decree between the State Board of Education and separate classes of white and black women had addressed issues of hiring and promotion within the Alabama system. In addition to a standard nondiscrimination clause, the decree required yearly reports tracking the number of new women hires, procedures for expanding the pool of female applicants, numerical hiring goals, and parity for women in the personnel selection process. Specifically prohibited by the decree, however, were set-asides, quotas, and the selection of less qualified candidates based on race or gender.

Because expanding the pool of qualified minority or female candidates by "inclusive" recruitment and outreach only added to the competition faced by non-class members – in this case, white males – and did not result in lost job opportunities and promotions, the court avoided the traditional Title VII and equal protection analysis applied to "exclusive" affirmative action techniques. It upheld the annual statistical report requirement of the decree since "the attempt to ascertain whether there is a problem and whether progress is being made should be encouraged."[118] Affirmative recruitment of qualified female candidates was similarly acceptable so long as the recruitment did not exclude male applicants. Thus, "if the

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[115]Sussman v. Tanoue, 39 F.Supp.2d 13, 24 (D.D.C. 1999)(quotingUnited States v. New Hampshire, 539 F.2d 277, 280 (1st Cir. 1976).

[116]See Duffy v. Wolle, 123 F.3d 1026, 1038-39 (8th Cir. 1997)("An employer's affirmative efforts to recruit female and minority applicants does not constitute discrimination."); Allen v. Alabama State Board of Education, 164 F.3d 1347, 1352 (11th Cir. 1999)(racially conscious outreach efforts to broaden applicant pool not subject to strict scrutiny), vacated 216 F.3d 1263 (11th Cir. 2000); Ensley Branch, NAACP, supra n. 86, at p. 1571 (describing efforts to actively encourage Blacks to apply for jobs, including waivers of application fees, as "race-neutral"); Billish v. City of Chicago, 962 F.2d 1269, 1290 (7th Cir. 1992)(describing aggressive recruiting as "race-neutral procedures") rev'd on other grounds, 989 F.2d 890 (7th Cir.1993)(en banc).

[117]897 F. Supp. 1535 (M.D.Ala. 1995).

[118]Id. at 1552.

postsecondary system began recruiting at black and women's colleges and stopped recruiting at Auburn, this would be an instance of exclusion."[119]

Since hiring goals could be applied either inclusively or exclusively, whether the decree mandated appropriate "diagnostic goals that measure the efficacy of pool expansion techniques such as affirmative recruitment" was treated as a question of underlying intent. The *Shuford* goals did not require preferences for women, the court found, and would not permit jobs to be set-aside for specific groups. Because the goals played no role in the selection process, they served only to measure the effectiveness of the recruitment programs and to "red flag" those positions where women were underrepresented. As such, the goals were found to be inclusive and lawful. *Shuford* has been cited with approval by several federal appellate courts. Most recently, two separate appellate panels affirmed consent decrees requiring public employers to devise race-conscious employment examinations so as to minimize any racially discriminatory impact on minority candidates. "[N]othing in *Adarand* requires the application of strict scrutiny to this sort of race consciousness."[120]

Other courts have disagreed, however, and applied strict scrutiny analysis to facially inclusive affirmative action programs. In *Monterey Mechanical Co. v. Wilson*,[121] the Ninth Circuit considered a California affirmative action statute that required bidders on state contracts either to subcontract a percentage of their work to female- and minority-owned businesses or to document a "good faith effort" to do so. The acknowledged low bidder in the case had been denied a contract with a state university for failure to achieve the mandated goal or to document its outreach efforts. The appeals court found that the statute treated classes unequally because a minority prime contractor could avoid the necessity of subcontracting or demonstrating good faith efforts simply by doing a percentage of the work itself, an option not available to other bidders. In addition, the statute was found to encourage quotas, even if it did not necessarily require them. *Messer v. Meno*[122] challenged an affirmative action program involving goals, statistics, and reporting requirements within the Texas Education Agency. In vacating summary judgment for TEA, the Fifth Circuit rejected any distinction between inclusive and exclusive affirmative action, holding that strict scrutiny applies to all governmental racial classifications. In *dicta*, the court noted that the "evidence . . . strongly suggests recruitment was not the sole activity affected by the [affirmative action program], and that once an applicant met the minimum requirements for a position, TEA employees considered

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[119]Id. at 1553.

[120]Allen v. Alabama State Board of Education, supra n. 95, at p. 1353 (affirming consent decree requiring that school board develop teacher certification exam that minimizes racially discriminatory impact); Hayden v. County of Nassau, 180 F.3d 42, 49(2d Cir. 1999) ("[A]lthough Nassau County was necessarily conscious of race in designing its entrance exam [for police officer candidates], it treated all persons equally in the administration of the exam.").

[121]125 F.3d 702 (9th Cir. 1997), reh'g en banc denied, 138 F.3d 1270 (9th Cir. 1998).

[122]130 F.3d 130 (5th Cir. 1997).

race or gender in employment decisions."[123] Although not disputing the applicability of strict scrutiny, Judge Garza warned in a concurring opinion that "the tone of the majority's decision . . . will send the message out that affirmative action is, for all intents and purposes, dead in the Fifth Circuit."[124]

Similarly, in *Schurr v. Resort Int'l Hotel*,[125] the Third Circuit disapproved a casino's goal-oriented affirmative action plan, which had been applied to deny employment to a white light-and-sound technician in favor of an equally qualified black applicant, because it had been implemented "in [t]he absence of any reference to or showing of past or present discrimination in the casino industry." The employer argued that the affirmative action plan, and the Casino Control Commission regulations on which it was based, did not create racial preferences, but simply articulated goals aimed at recruiting members of minority groups and women. The court, however, concluded that the regulations "have the practical effect of encouraging (if not outright compelling) discriminatory hiring," particularly because Resorts International supervisors who made hiring decisions testified to a belief that they had to take race into account when filling a position, if a particular job category had a lower percentage of minority employees than the stated percentage goal for that category. There was no "meaningful distinction," the court found, between the casino's requirements and the minority participation goals for nongovernmental contractors, which the Ninth Circuit invalidated in *Bras v. California Public Utilities Commission*.[126] In *Bras*, the goals had the effect of putting a non-minority contractor on unequal footing in competing for business from Pacific Bell, which was subject to minority hiring goals formulated by the California Public Utility Commission pursuant to state law.

Another federal appellate court has applied strict judicial scrutiny as per *Adarand* to defeat equal employment opportunity regulations of the Federal Communications Commission (FCC) imposing affirmative minority outreach and recruitment obligations on applicants for radio broadcast licenses. The D.C. Circuit ruling in *Lutheran Church-Missouri Synod v. FCC*[127] stemmed from a challenge by the NAACP to the hiring practices of a Lutheran Church organization which holds FCC licences for two radio stations broadcasting from a seminary in Clayton, Missouri. Because of the stations' religious mission, the church has a "Lutheran hiring preference" requiring job applicants to possess "knowledge of Lutheran doctrine." The FCC imposes two basic requirements on radio stations: they must refrain from discriminating in employment for racial, ethnic, or gender-based reasons; and they must adopt an affirmative action program of targeted efforts to recruit, hire, and promote women and minorities. Acting on the NAACP complaint, the FCC ruled that the church's Lutheran hiring preference was too broad, and that while the stations had not discriminated, they violated agency regulation because of

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[123]Id. at 139.

[124]Id. at 141 (Garza J., concurring).

[125]196 F.3d 486 (3d Cir. 1999)

[126]59 F.3d 869 (9th Cir. 1995), cert. denied, 516 U.S. 1984 (1996).

[127]141 F.3d 344 (D.C.Cir. 1998).

insufficient minority recruitment. The church was ordered to pay a $25,000 penalty and to submit reports every six months listing all job applicants and hires, along with the sex and race of each, as well as a statement of their efforts to recruit minorities.

A three judge appellate panel rejected FCC and Justice Department arguments that a more lenient standard of review than strict scrutiny should apply since the FCC regulations "stop[ped] short of establishing preferences, quotas, . . . set-asides" and did not mandate race-conscious "hiring decisions." *Adarand* required "[a]ll governmental action based on race"– even when "the government's motivation to aid minorities can be thought 'benign'"– to be narrowly tailored to meet a compelling governmental interest. According to Judge Silberman, by requiring a "formal analysis" by the employer of minority "underrepresentation" and "availability" statistics, the FCC regulations "extend beyond outreach efforts and certainly influence ultimate hiring decisions" because they "pressure stations to maintain a work force that mirrors the racial breakdown of the 'metropolitan statistical area.'" For this reason, it mattered not to the court "whether a government hiring program imposes hard quotas, soft quotas, or goals" since any such race-conscious technique "induces an employer to hire with an eye toward meeting a numerical target."

Rather than a remedy for past discrimination, the justification advanced by the government for the FCC program was to foster "diverse" programming content, an interest deemed "important" but not "compelling" by the appellate panel. Indeed, the diversity-of-programming rationale "makes no sense," said Judge Silberman, in the "intrastation" context where the FCC's "purported goal of making a single station all things to all people" contradicts "the reality of the radio market, where each station targets a particular segment: one pop, one country, one news radio, and so on." Nor could the FCC regulations be considered "narrowly tailored" because they affected the hiring of even low-level employees whose impact on programming was negligible. In conclusion, Judge Silberman observed:

> Perhaps this is illustrative as to just how much burden the term diversity has been asked to bear in the latter part of the 20th century in the United States. It appears to have been coined both as a permanent justification for policies seeking racial proportionality in all walks of life ('affirmative action' had only a temporary remedial connotation) and as a synonym for proportional representation itself. It has, in our view, been used by the Commission in both ways. We therefore conclude that its EEO regulations are unconstitutional and cannot serve as a basis for its decision and order in this case.

In a sequel, *Broadcasters Assn. v. FCC*,[128] the appeals court voided a new FCC rules designed to achieve "broad outreach" in recruiting women and minorities for broadcasting careers. Broadcasters were given a choice between programs specified by the FCC and station-initiated outreach programs. If the station designed its own program, it had to report the race and sex of each applicant or person employed. But the regulations specified that a company's record in hiring women and minorities would not be a factor in the license renewal decision. The alternative approach was struck down, again because the recordkeeping and reporting of employment statistics were deemed a coercive and "powerful threat," almost certain to pressure companies

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[128]2001 WL 32786 (D.C.Cir 1-16-2001).

to seek proportional representation of women and minorities. Moreover, the entire rule succumbed to the court's analysis – the offending portion deemed non-severable from the whole – perhaps limiting prospects for recasting FCC affirmative action efforts by the new Bush Administration.

Affirmative Action and Diversity in Public Education

College Admissions

The emphasis of *Adarand* on past discrimination has prompted an upsurge in judicial challenges to educational diversity as an independent justification for student and faculty affirmative action. The notion that diversity could rise to the level of a compelling interest in the educational setting sprang two decades ago from Justice Powell's opinion in the *Bakke* case. While concluding that a state medical school could not set-aside a certain number of seats for minority applicants, Justice Powell opined that a diverse student body may serve educators' legitimate interest in promoting the "robust" exchange of ideas. He cautioned, however, that "[t]he diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which ethnic origin is but a single though important element."[129] Thus, a public educational institution could properly deem an applicant's race to be a "plus" factor, provided that the applicant was not insulated from comparison with all other applicants, based upon a consideration of combined qualifications, including personal talents, leadership qualities, maturity, and the like. In other words, the race of a candidate could not be the "sole" or "determinative" factor.

Although Justice Powell's opinion announced the judgment of the Court, no other *Bakke* Justices joined him on that point. Justice Powell ruled the "dual admission program" at issue to be unconstitutional and the white male plaintiff entitled to admission, while four other Justices reached the same result on statutory rather than constitutional grounds. Another four Justice plurality concluded that the challenged policy was lawful, but agreed with Justice Powell that the state court had erred by holding that an applicant's race could never be taken into account. Only Justice Powell, therefore, expressed the view that the attainment of a diverse student body could be a compelling state interest.

More recently, the U.S. Supreme Court denied review of the Fifth Circuit decision in *Hopwood v. State of Texas (Hopwood II),*[130] which invalidated a special minority admissions program of the University of Texas Law School. The procedure adopted by the state provided for two separate paths of applicant assessment, with race determining the path taken. One was for blacks and Mexican-Americans, the other for whites and all other "non-preferred" minorities. Disparate admissions standards applied to the two groups so that the cutoff scores for black and Mexican-Americans were lower, overall, than those used to assess other candidates. At no

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[129]Bakke, 438 U.S. at 315.

[130]95 F.3d 53 (5th Cir.), cert. denied No 95-1773, 116 S. Ct 2581 (1996).

time were the applications of the preferred group compared to, or combined with, those in the other group. In short, "race was always an overt part of the review of an applicant's file." Suit was filed by four white applicants who had been rejected for admission to the law school class of 1992.

A three judge appellate panel held that the desire to admit a diverse student body never provides a "compelling" justification for the consideration of race in student admissions, and that despite its early history of racial exclusion, the law school had failed to demonstrate sufficient continuing effects of its own prior illegal acts to warrant remedial affirmative action. The *Hopwood II* court rejected the diversity rationale proposed by Justice Powell in *Bakke* as "not binding precedent," since his opinion was not formally joined by any other Justice. Race and ethnicity can never be used for nonremedial purposes as a "proxy for other characteristics" valued by an educational institution since that would inevitably lead to racial "stereotyp[ing]" and "stigmatization" forbidden by *Croson* and *Adarand*. Instead,

> For the admissions scheme to pass constitutional muster, the State of Texas, through its legislature, would have to find that past segregation has present effects; it would have to determine the magnitude of those present effects; and it would need to limit carefully the "plus" given to applicants to remedy that harm. A broad program that sweeps in all minorities with a remedy that is in no way related to past harms cannot survive constitutional scrutiny

Hopwood II sharply narrowed the scope of what constitutes past discrimination sufficient to justify a preferential admissions policy. Past societal discrimination was deemed an inadequate basis for considering race in the admissions process, since such an expansive definition would admit of "no viable limiting principle," and the spectrum of acceptable proof for past discrimination's present effects was likewise limited. Thus, the showing by the University of Texas Law School that discrimination had occurred within the Texas state school system as a whole, including the University of Texas undergraduate programs, was insufficient to justify the law school's use of race in its admissions process. The Fifth Circuit decision implies that the only discrimination that would amount to a compelling state interest for race-based remediation would have to be specific discrimination within the law school itself. *Hopwood II* joined an earlier Fourth Circuit ruling, *Podberesky v. Kirwan*,[131] which invalidated a race-based scholarship program administered by the University of Maryland for the exclusive benefit of black students.

Subsequently, another Fifth Circuit panel reviewed an appeal from an injunction order entered by a federal district court on remand from the 1996 *Hopwood II* decision. In *Hopwood v. State of Texas (Hopwood III)*,[132] the appeals court reviewed the district court's determination of three issues remanded by *Hopwood II*. First, an award of attorneys' fees to plaintiffs' counsel was upheld, as was the trial judge's denial of monetary damages and specific relief to the rejected white applicants who were found to have had "no reasonable chance" of admission to the law school in 1992, even under a "race-blind" system. More to the point, however, the appeals

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[131] 38 F.3d 147 (4th Cir. 1994), cert. denied, 115 S. Ct 2001 (1995).

[132] 236 F.3d 256 (5th Cir. 2000).

court applied the "law of the case doctrine" to leave standing those aspects of *Hopwood II* that rejected both a remedial and diversity rationale for the Texas law school's race-based admissions program. Only when a previous ruling is "clearly erroneous," or "dead wrong," said the court, is it judicially proper to disturb the ruling of another appellate panel involving the same legal controversy. Consequently, while there was no direct precedent in *Bakke* or elsewhere for *Hopwood II*'s cramped definition of past discrimination – limited to the law school itself – as a precondition for the race-based admissions program, it was "not clear error for a court of appeals to tackle legal questions that the Supreme Court has declined to answer." Similarly, the departure from Justice Powell's diversity rationale was permissible since not endorsed by any of the other Justice, and "the *Hopwood II* panel was free to determine which among the competing rationales offered by the Justices in *Bakke* is constitutionally valid."

> Although Justice Powell would surely have disagreed with that holding, we cannot say that Hopwood II conflicts with any portion of Bakke that is binding on this court. Some may think it was imprudent for the Hopwood II panel to venture into uncharted waters by declaring the diversity rationale invalid, but the panel's holding clearly does not conflict with controlling Supreme Court precedent.

Thus, in its latest ruling, the Fifth Circuit read *Bakke* as neither requiring, nor foreclosing, the acceptance by lower courts of diversity as a compelling state interest.

The district court, on remand from *Hopwood II*, had entered an injunction forbidding any consideration of racial preferences in admission to the law school. The court of appeals reversed this aspect of the decree for two reasons. First, it had not been preceded by formal hearings into the necessity for such relief, nor was the judgment supported by finding of fact and conclusions of law as required by federal procedural rules. Second, on its face, the injunction was found to conflict with the "square holding" of *Bakke*. That is, the injunction

> forbids the University from using racial preferences for any reason, despite Bakke's holding that racial preferences are constitutionally permissible in some circumstances. Consistent with that position, Hopwood II does not bar the University from using race for any and all remedial purposes; rather Hopwood II bars the University from using race to remedy the effects of previous discrimination in other components of Texas's public education system only. By enjoining any and all use of racial preferences, the district court went beyond the holding of Hopwood II and, in the process, entered a judgment that conflicts with Bakke.

The effect of *Hopwood III* was to lift the district court injunction, at least until justified by further proceedings below, while leaving in tact the constitutional rationale and conclusion of the appeals court in *Hopwood II*.

The *Hopwood* trilogy was later joined by a three-judge panel decision of the Eleventh Circuit in *Johnson v. Board of Regents*,[133] which voided a numerical "racial bonus" awarded minority applicants for freshman admission to the University of Georgia (UGA). A three-tiered admissions program at that institution first evaluates all applicants based strictly on academic credentials, i.e SAT scores and grades. Those who are neither accepted nor rejected on the basis of predetermined cut-off scores at this stage are evaluated further, based on a "Total Student Index" (TSI), taking into account a combination of twelve weighted factors – academic, extracurricular, and demographic. Minority applicants who are self-identified as such are awarded a 0.5 point credit out of a maximum possible 8.15 total points for all 12 factors. Pre-set TSI threshold and minimum scores again determine acceptance and rejection at this stage. Thereafter, all applicants remaining in the pool move forward to the final phase where each applicant's file is individually examined and evaluated by admissions officers. The district court found that explicit consideration of race in the admissions policy was unlawful because student body diversity is not a compelling state interest able to withstand strict judicial scrutiny. The appeals panel affirmed for the different reason that even if diversity were "assumed" a valid constitutional objective, "[a] policy that mechanically awards an arbitrary 'diversity' bonus to each and every non-white applicant at a decisive stage in the admissions process" was not "narrowly tailored" to that end.

While declining to decide the diversity issue, the appellate opinion left little doubt as to the circuit judges' view of the matter. Regarding Justice Powell's discussion in *Bakke*, and his endorsement of the "Harvard Plan" to achieve broad-based diversity in student admissions, the court noted the lack of consensus among the Justices. "In the end, the fact is inescapable that no five Justices in *Bakke* expressly held that student body diversity is a compelling interest under the Equal Protection Clause even in the absence of a valid remedial purpose. . . . Simply put, Justice Powell's opinion does not establish student body diversity as a compelling interest for purposes of this case." But the court treated the constitutional status of diversity as an "open question" and instead faulted the University's program for failing to meet the narrow-tailoring test. The narrow tailoring requirement is meant to insure that the chosen means "fit" a compelling goal so closely as to eliminate any possibility that the motive for a governmental classification is racial prejudice or stereotype. To achieve diversity, of compelling constitutional dimension, required the university to seek to achieve broad-based diversity, not just racial diversity. Such diversity, for the court, entailed consideration of the full range of student possibilities, in terms "of different cultures, outlooks, and experiences," and "does not view racial diversity as an end in itself."

Measured against this definition, UGA's policy failed because it "mechanically and inexorably" awarded "bonus" points to minority applicants and arbitrarily limited the number of nonracial factors that could be considered at the TSI stage, all at the expense of white applicants. Thus, for example, the court found that opportunities were diminished for applicants from rural or economically disadvantaged backgrounds, foreign language speakers, and – in appropriate circumstances – even white males "whose personal backgrounds or skills, while undeniably promoting

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[133] 263 F.3d 1234 (11th Cir. 2001).

diversity, do not fit neatly into one of the categories predetermined by UGA." Also significant was the university's failure to "meaningfully consider" race-conscious alternatives – recruitment and outreach strategies, financial incentives for disadvantaged students, guaranteed admission to the state's top high school graduates – that might foster diversity without adverse racial consequences. Ultimately, the failure to "fully and fairly [consider] applicants as individuals and not merely as members of groups" led to the policy's undoing, a defect that could not be justified by administrative convenience or the difficulty in making individualized determinations of each applicant's potential contribution to diversity. Summing up, the appeals court concluded:

> Unlike the Harvard plan described by Justice Powell, UGA's policy does not allow admissions officers to consider "all pertinent elements of diversity" or to decide – in awarding the 0.5 racial bonus – that the "potential contribution to diversity . . .of an applicant identified as Italian-American" is greater than that of a non-white applicant. The 0.5 point bonus is awarded mechanically, based entirely on the applicant's race. And while it is true that a small number of other TSI factors may, to a limited extent, capture qualities beyond race and contribute to student body diversity, they certainly do not come close to capturing the same degree the qualities or life experiences that would be taken into account if each applicant – including her potential contribution to diversity – were assessed fully and fairly as an individual.

Creating a Circuit conflict with the Fifth and Eleventh, the Ninth Circuit in *Smith v. University of Washington Law School*[134] upheld an affirmative action admission program to higher education that made extensive use of race-based factors. Overt use of race in law school admissions continued from 1994 to 1998, ending only after Washington voters adopted Initiative Measure 2000, a referendum banning all forms of racial, gender, and ethnic discrimination or preference in state programs. The *Smith* court disagreed with *Hopwood*'s holding that Justice Powell's diversity rationale was not binding Supreme Court precedent. Although no other *Bakke* Justices joined, or even discussed, diversity as a compelling state interest, the Ninth Circuit concluded that the four Brennan Justices who approved the racial quota in Davis medical school admissions "would have embraced [the diversity rationale] if need be." It followed, therefore, that Justice Powell's opinion provided "the narrowest footing upon which a race-conscious decision making process could stand" and is, accordingly, the "holding" of *Bakke* under controlling Supreme Court authority.[135] Even though the doctrinal underpinnings of *Bakke* were shaken by *Adarand* and the congressional redistricting cases, the Supreme Court has not revisited affirmative action in higher education, and the Ninth Circuit was reluctant to overturn the earlier precedent.

An appeal of the *Smith* ruling was taken to the Supreme Court, which denied *certiorari* and remanded. In seeking monetary damages, the plaintiffs continue to press their claim that the University's policy was a *de facto* dual admissions system

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[134]233 F.3d 1188 (9th Cir. 2000).

[135]See Marks v. United States, 430 U.S. 188, 193 (1977)("When a fragmented Court decides a case . . . the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds").

that exceeded the limits imposed by Justice Powell in *Bakke*. They argue, in trial which began in April 2002, that at various LSAT and GPA score combinations, every black applicant was accepted while no nonminorities were. Also, it is alleged that only minority applicants received letters from the Law School seeking information about their contribution to diversity.

The judicial divide over *Bakke*'s legacy was perhaps most vividly displayed by separate rulings of two federal district courts in *Gratz v. Bollinger,*[136] which upheld for diversity reasons the race-based undergraduate admissions policy of University of Michigan, and *Grutter v. Bollinger*,[137] where a different federal judge nullified a special admissions program for minority law students at the same institution. The latest word on the topic was delivered on May 14, 2002, when the Sixth Circuit *en banc* court reversed *Grutter*, finding that the Law School's interest in achieving the educational benefits of a diverse student body is compelling, and that its admissions policy is "narrowly tailored" to that goal.

Challenged in *Grutter* were the admission criteria for the University of Michigan Law School. While the documents put into evidence were circumspect in their description of the admission process, one conceded goal was to achieve the entry of some numbers of minority students – African-American, Native-Americans, Hispanics, and mainland Puerto Ricans – into the law school. Generally setting the bar for admission was a "grid" system of "index scores" derived from applicants' composite performance on the Law School Admissions Test (LSAT) and undergraduate grade point average (UGPA). A 1992 policy statement, however, departed from strict adherence to index scores to achieve "distinctive perspectives and experiences" and made an explicit commitment to "racial and ethnic diversity." From a welter of documentary and testimonial evidence, the trial judge concluded that there was indeed a "heavy emphasis" on race in admissions decisions; that the objective was to achieve a "critical mass" of minorities ranging from 11% to 17%; and that large numbers of minority students were admitted with index scores the same as or lower than unsuccessful white applicants. Rejecting the diversity rationale from *Bakke*, the federal district judge invalidated the special admissions program both for lack of a compelling state interest and failure to satisfy the constitutional requisites of narrow tailoring.

The Sixth Circuit *en banc* appeals court reversed Judge Friedman's decision by a five-to-four vote. In his opinion for the majority, Judge Martin adopted the Powell position in *Bakke* to find that the Law school had a compelling interest in achieving the education benefits that flow from a diverse student body, and that its admission's policy was "narrowly tailored" to that end. By considering a range of "soft variables" – including an applicant's unique talents, interests, experiences, leadership qualities, and "underrepresented minority" status, among others – the admissions process was found to treat each applicant as an individual and to be "virtually indistinguishable" from the Harvard admissions plan approved by Justice Powell in *Bakke*. In its pursuit of a "critical mass," the policy was designed to ensure that a "meaningful number" of minority students were able "to contribute to classroom dialogue without feeling

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[136] 122 F. Supp. 2d 811(E.D.Mich. 2000).

[137] 288 F.3d 732 (6th Cir. 2001).

isolated" and "did not set aside or reserve" seats on the basis of race. The court further emphasized that the admissions program was "flexible," with no "fixed goal or target," did not use "separate tracks" for minority and nonminority candidates, and did not function as a "quota system." In answer to the dissenters, who argued for a lottery system or model of "experiential diversity in a race-neutral manner," Judge Martin was persuaded by the Law School's expert that some consideration of race and ethnicity was "necessary" to achieve a diverse student body since otherwise "minority enrollment would drop to 'token' levels." Finally, the majority was willing to extend "some degree of deference" to the "good faith" judgment of the Law School in regard to the groups targeted and duration of any program devoted to academic diversity.

The four dissenting judges, led by Judge Boggs, did not consider themselves bound by Justice Powell's solitary opinion in *Bakke* and concluded that diversity was not a compelling state interest. Disputing Judge Martin's argument that the Powell position was the narrowest ground of decision in *Bakke*, the dissent viewed the varying rationales of the concurring Justices to be so "fundamentally different by degree as to defy comparison." That is, "[t]hey are completely different rationales, neither one of which is subsumed within the other." The Supreme Court's affirmative action jurisprudence since *Bakke*, though not specifically concerned with race as a factor in educational admissions, clearly demonstrated that "racial classifications are unconstitutional unless they are intended to remedy carefully documented effects of past discrimination."

Even if diversity were a compelling interest, Judge Boggs concluded, the law school's admissions program would have failed to pass constitutional muster for lack of narrow tailoring. First, the standard implicit in a "critical mass" of minority students was too "ill defined" and "amorphous" to allow for predictable or quantifiable bounds. Second, there were no time limits provided for the use of race in the admissions process. Third, the "magnitude" of the racial preference – as demonstrated statistically – coupled with the consistent rate of minority admissions over several years amounted to a "two-track system that is functionally equivalent to a quota" and that "applies one standard for minorities and another for all other students." Fourth, the lack of a "principled explanation" for singling out the particular groups receiving special treatment undermined finding that the program was narrowly tailored. Finally, there was no evidence that the law school had investigated alternative race-neutral means for increasing minority enrollment – such as use of a lottery or seeking experiential diversity based on individualized scrutiny of every applicant – before implementing the special minority admissions policy.

Presently under review by the Sixth Circuit, the district court in *Gratz* determined that student diversity is a compelling governmental interest for using race as a "plus" factor in higher educational admissions. Judge Duggan approved the University of Michigan's current undergraduate admissions system, which awards a 20-point advantage to black and Hispanic applicants on a 150-point scale, as well as six points for geographical factors, five points for leadership skills, three points for an outstanding essay, and so on. But the University's former policy, in place until 1998, violated equal protection of the laws because it established entirely separate admission criteria and procedures for white and minority applicants.

On the diversity issue, the *Gratz* court disputed *Hopwood's* conclusion that reticence by a majority of the *Bakke* Justices to embrace the Powell rationale necessarily implied a rejection of that theory. "It is just as likely that the other Justices felt no need to address the issue of diversity based upon their determination that under intermediate scrutiny, the program at issue was justified as a means to remedy past discrimination." Moreover, the defendants' briefs presented "solid evidence" of the educational benefits of racial and ethnic diversity on student intellectual development, which – though perhaps "too amorphous and ill-defined in other contexts"– satisfied the district court that there was a "permanent and ongoing interest" to justify affirmative action in higher education.

> As previously noted, diversity is not a 'remedy.' Therefore, unlike the remedial setting, where the need for remedial action terminates once the effects of past discrimination have been eradicated, the need for diversity lives on perpetually. This does not mean, however, that Universities are unrestrained in their use of race in the admissions process, as any use of race must be narrowly tailored. Hopefully, there may come a day when Universities are able to achieve the desired diversity without resort to racial preferences. Such an occurrence, however, would have no affect (sic) on the compelling nature of the diversity interest. Rather, such an occurrence would affect the issue of whether a university's race-conscious admission program remained narrowly tailored. In this Court's opinion, the permanency of such an interest does not remove it from the realm of "compelling interests," but rather, only emphasizes the importance of ensuring that any race-conscious admissions policy that is justified as a means to achieve diversity is narrowly tailored to such an interest.

Acknowledging the often "thin line" separating the permissible and impermissible use of race in such cases, the district court cited several considerations to uphold the current admission program as "narrowly tailored." First, the award of twenty points for minority status was not a "quota" or "dual track" system, as in *Bakke*, but only a "plus" factor, to be weighed against others in the selection process.

> What Plaintiffs really appear to contest is the fact that race is accorded twenty points while other factors that may more consistently favor non-minority students are not typically accorded the same weight. However, as Justice Powell recognized in *Bakke*, universities may accord an applicant's race some weight in the admissions process and, in doing so, universities are not required to accord the same weight to race as they do to other factors. (citations omitted) As long as the admissions process does not work to isolate the applicants from review, it withstands constitutional muster, despite the fact that it may provide individuals with a 'plus' on account of their race.

Similarly, the practice of "flagging" applications of "under-represented" minorities did not cross the line because it was invoked only to insure that otherwise qualified applicants were included in the "review pool" and likewise applied to other candidates possessing desired non-racial qualities. In addition, race-neutral alternatives to the current policy, including "vigorous minority recruitment," had failed to yield a "sufficiently diverse student body," said the court, therefore necessitating the "consideration of an applicant's race during the admissions process."

Prior to 1998, however, the university maintained a "rolling" admission program, which the court found involved the impermissible use of race because, in effect, it "reserved" seats for under-represented minorities, among other groups, who were "protected" from competition with other applicants. This earlier regime was reinforced by "grids or action codes" that applied different academic standards based solely on race and permitted, for example, the automatic exclusion of nonminority– but not minority – applicants without any "individualized" review.[138]

> Although the . . .use of facially different grids/action codes based on an applicant's race, in and of itself, may not have been constitutionally impermissible, combined with other components previously discussed by the Court, i.e. . . .use of protected seats and the . . .system of automatic rejection, the Court is convinced that [the] prior programs, when examined in their entirety, fall within the impermissible under the principles enunciated by Justice Powell in *Bakke*.

Appeal is pending with the Sixth Circuit in the *Michigan* undergraduate admissions case, and as noted, the federal appeals courts to address the issue are evenly divided over the constitutional significance of *Bakke* for affirmative action in higher educational admissions.

The constitutional standing of Justice Powell's diversity rationale, and the judicial controversy it has spawned, raise several important issues that the Supreme Court may almost inevitably have to revisit. Post-*Bakke* appeals courts, guided by *Marks v. United States*,[139] have sliced and diced the various opinions in *Bakke* to come up with a controlling rationale. In *Marks*, the Supreme Court ruled that when a majority of Justices are unable to agree on a controlling rationale, the holding of the Court is the position of those Justices concurring in the judgment on the narrowest grounds. The pro-diversity circuits have concluded that the Powell opinion approving race as a "plus" factor is narrower than the Brennan rationale, which would have upheld the race quota in *Bakke* on a societal discrimination theory. The opposing circuits have generally reasoned otherwise or concluded that the competing *Bakke* opinions defy rational comparison so that absent a majority consensus, the Powell opinion is without controlling weight. Absent further High Court direction, no conclusion to this debate appears imminent.

Ultimately, the question may turn on how strictly "strict scrutiny" is applied by the Supreme Court to collegiate affirmative action policies. Under a highly formalized competitive bidding process, the Court in *Croson* and *Adarand* ruled any consideration of race in the distribution of government contracts must serve a compelling state interest and be narrowly tailored. An arguably softer form of strict

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[138]For example, in 1995 and 1996, the University used two grids for in state applicants, one for "non-minority" applicants and another for "minority" applicants. The non-minority grid indicated that an applicant with a GPA of 3.2 and ACT test score of 18-20/ SAT of 400-500 would be automatically rejected, whereas a minority applicant with the same grade/score would most likely have been admitted.

[139]430 U.S. 188 (1977).

scrutiny was developed in *Shaw v. Reno*[140] and later cases involving congressional redistricting along racial lines. The ideal of colorblindness does not require that redistricting legislatures ignore race. Instead, the Court has recognized that along with politics, incumbent protection, and a host of other factors, race may play a role in the creation and configuration of districts. But strict scrutiny is triggered if race trumps or subordinates all of these other traditional principles in the redistricting process. Moreover, the state interest in avoiding dilution of minority voting power and discriminatory effects prohibited by the Voting Rights Act are compelling under *Shaw* and its progeny.[141] This may more closely correspond to the Powell rationale that race together with a host of other social, demographic, and personal factors spell diversity deserving of constitutional protection.

Under the narrow tailoring aspect of strict scrutiny, the weight given race in the admissions calculus and its impact on affected nonminority candidates may prove crucial. In *Grutter*, this boiled down to a battle of statistics. For example, the majority pointed to long range variability, year to year, in minority admissions and its marginal impact on the probability of admission by nonminorities to the highly selective law school. This is called the "causation fallacy." In a selective admissions process, the competition is so intense that even without affirmative action, the overwhelming majority of rejected white applicants still would not be admitted. Conversely, Judge Boggs pointed to other statistics indicating the decisive weight of race in the admissions process. Marginally qualified minority candidates were almost invariably admitted while nonminorities of like qualifications were rejected. In other words, according to the dissenter's argument, race was the "predominant," rather than a "plus" factor.

A diversity rationale also poses a dilemna underscored by Justice O'Connor in other affirmative action contexts. In *Croson*, for example, specific findings of discrimination were necessary because the concept of societal discrimination was too amorphous and timeless to deal with. Query whether a university administrator's notion of a "critical mass" of minority students for the sake of educational diversity is any less so. The quest for diversity in admissions not self-limiting. Arguably, it poses a constantly changing commitment as different racial and ethnic groups vie for consideration into the future. A permanent regime of race or ethnic preference "without a logical stopping point" may be the result: a tough sell to a majority of the current Justices. Conversely, explicit numerical standards, as used in *Gratz*, may collide with constitutional demand for flexibility to avoid the "quota" tag.

As a race neutral alternative, both the Eleventh Circuit in the Georgia case, and the *Grutter* dissent, urge an "experiential diversity" model. In effect, this boils down to examining each applicant individually for those factors other than race or ethnicity – talents, family background, struggles against disadvantage, leadership qualities, and the like– that would contribute to academic diversity on a broad scale. While this would level the playing field, its ability to expand opportunities for racial minorities is questioned by most educators. In addition, such a system may impose a substantial

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[140]509 U.S. 630 (1993).

[141]Bush v. Vera, 517 U.S. 952 (1996).

administrative burden in terms of resources devoted to the admissions process by large state institutions with many thousands of applicants.

Public Elementary and Secondary Schools

The constitutionality of race-conscious admissions to magnet or alternative schools, designed to promote elementary and secondary school desegregation, has also begun to reach the courts. A federal court in 1974 found the Boston schools to be unlawfully segregated and ordered into effect a desegregation plan requiring, *inter alia,* a thirty-five percent set-aside for admission of black and Hispanic students to the city's three "examination" schools.[142] This policy was revised to eliminate the set-aside after a successful equal protection challenge was brought in 1996 by a white student who was denied admission to the famed Boston Latin School.[143] Under the new policy, half of the available seats at each school was awarded solely on the basis of students' composite scores, derived from grade point averages and entrance examination scores. The other half was also awarded according to composite score rankings, but in conjunction with "flexible racial/ethnic guidelines." The guidelines required that these seats be allocated by composite rank score in proportion to the racial and ethnic composition of each school's remaining qualified applicant pool. A white student denied admission for the 1997-98 academic year, despite higher qualifications than several admitted minority students, challenged the guidelines on equal protection grounds.

In *Wessman v. Gittens,*[144] the First Circuit reversed a judgment in favor of the Boston School Committee, which had adopted the two-track admissions policy. The district court had applied strict scrutiny, but nonetheless concluded that the policy was constitutional based on the school system's compelling interests in diversity and in "overcoming the vestiges of past discrimination and avoiding the re-segregation of the Boston Public Schools." According to the appeals court, however, the School Committee had not produced sufficient evidence to demonstrate a compelling interest in either goal or that the admissions policy was narrowly tailored to those ends. First, there was no "solid and compelling evidence" that student diversity was "in any way tied to the vigorous exchange of ideas," nor that any achievement gap between minority and non-minority students amounted to "vestiges" of the system's past discrimination. The policy also swept "too broadly" by dividing individuals into "only five groups — blacks, whites, Hispanic, Asians, and Native Americans — without recognizing that none is monolithic." Thus, even assuming *arguendo* that diversity might, in some circumstances, be sufficiently compelling to justify race-conscious actions, "the School Committee's flexible racial/ethnic guidelines appear to be less a means of attaining diversity in any constitutionally relevant sense and

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[142]See Morgan v. Hennigan, 379 F. Supp. 410 (D. Mass), aff'd sub nom. Morgan v. Kerrigan, 509 F.2d 580 (lst Cir. 1974).

[143]See McLaughlin v. Boston School Committee, 938 F. Supp. 1001 (D.Mass. 1996).

[144]160 F.3d 790 (lst Cir. 1998).

more a means of racial balancing," which is neither "a legitimate [n]or necessary means of advancing the lofty principles credited in the policy."[145]

In a pair of recent decisions, the Fourth Circuit invalidated affirmative action policies for admission of minority students to magnet schools in Arlington County, Va. and Montgomery County, Md. Because neither policy was found to satisfy the "narrow tailoring" aspect of strict scrutiny as required by *Adarand*, however, it was unnecessary for the court to decide whether educational diversity may be a "compelling interest" justifying race based admissions in other circumstances. At issue in the Arlington County case, *Tuttle v. Arlington County School Board*,[146] was a "sequential, weighted random lottery" system developed in response to prior litigation which took account of three factors – low-income background, the applicant's primary language, and race or ethnicity – in determining admission to three county magnet schools. The probabilities associated with each applicant's lottery number were weighted, so that members of under-represented groups, as defined by any of those factors, had an increased probability of selection. In the Montgomery County case, *Eisenberg v. Montgomery County Public Schools*,[147] school officials considered a variety of factors, including a "diversity profile" of affected schools, when deciding whether to grant applications for transfer from a student's assigned school to another county public school. The diversity profile, in effect, precluded transfer of students of a particular racial or ethnic background – White, Black, Asian or Hispanic – from any school where the percentage of that group in the student body had declined over the preceding three years and was under-represented when compared to the county as a whole. In both cases, the challenged policy led to white students being denied admission to schools of their choice for racial reasons tied to student diversity.

While the Arlington County school system, earlier in its history, had been found to be *de jure* segregated and was required to desegregate by judicial decree, Montgomery County had never been subject to court supervised desegregation. Rather, the Maryland district had dismantled its formerly segregated schools by voluntary means, one aspect of which included implementation of a magnet school program. In neither case, however, did the Fourth Circuit attribute a remedial purpose to the diversity interest asserted by the school board, but found that the admissions and transfer policies in question were an exercise in "racial balancing." In so doing, the appeals court sidestepped deciding whether racial diversity in education could ever be a "compelling" state interest, proceeding instead to find the challenged policies failed the narrow tailoring aspect of *Adarand* analysis. In the Arlington case, the school board was found to have disregarded "one or more race-neutral policies" recommended by an advisory committee as alternatives to promote diversity. The duration of the plan was criticized for being "in perpetuity" and without "a logical stopping point." Although the weighted lottery did not "set-aside" positions for minorities, according to the court, the practical effect was the same since it "skew[ed] the odds of selection" in their favor to achieve classroom diversity

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[145]160 F.3d at 799.

[146]189 F.3d 431 (4th Cir. 1999), cert. denied 120 S.Ct 1420 (2000).

[147]197 F.3d 123 (4th Cir. 1999), cert. denied 120 S.Ct 1420 (2000).

"in proportions that approximate the distribution of students from [racial] groups in the district's overall student population." Finally, the plan lacked flexibility and impermissibly burdened "innocent third parties" who are denied admission for racial or ethnic reasons. Montgomery County's race-conscious transfer policy was characterized by the court as "mere racial balancing in a pure form" due to many of the same failings and because it was not directed at the correction of any past constitutional wrongs.

> The County annually ascertains the percentage of enrolled public school students by race on a county-wide basis, and then does the same for each school. It then assigns a numbered category for each race at each school, and administers the transfer policy so that the race and percentage in each school to which students are assigned by residence is compared to the percentage of that race in the countywide system. The transfer policy is administered with an object toward maintaining this percentage of racial balance in each school. . . . Although the transfer policy does not necessarily apply 'hard and fast quotas,' its goal of keeping certain percentages of racial/ethnic groups within each school to ensure diversity is racial balancing.[148]

Montgomery County officials were directed to eliminate the consideration of race from student transfer decisions, while in the Arlington case, further proceedings in the district court were ordered to review alternative admissions policies.

On April 15, 2002, the U.S. Supreme Court denied review of the Fourth Circuit *en banc* decision in *Belk v. Charlotte Mecklenburg Board of Education*.[149] The appeals court there affirmed a finding that "all vestiges of past discrimination" had been erased from the school system where student busing was first approved by the Supreme Court as a desegregation remedy. Because of its newly achieved "unitary status," the district court had relinquished jurisdiction of the desegregation case and ordered the school district to stop "assigning children to schools or allocating educational opportunities and benefits through race-based lotteries, preferences, set-asides or other means that deny students an equal footing based on race." The specific target of Judge Potter's order was the race-conscious policy for admission of students to the magnet school program operated by the district for desegregation purposes. After nearly three decades of court-enforced desegregation, a white parent sued the school district, charging that his daughter had twice been denied admittance to a magnet school because she was not black. Six other white parents joined the case, arguing that the school district had been successfully rid of segregation and with it any constitutional justification for race-based preferences.

Judge Potter agreed, calling the argument for continuing the desegregation process a "bizarre posture" and the focus on racial diversity a "social experiment." The policy of allocating available magnet school spaces to reflect the racial student makeup of the district as a whole was condemned by the court as "nothing more than a means for racial balancing," which could not be justified by a "litany of generalizations lauding the benefits of racial diversity." A majority of the *en banc*

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[148]Id. at 133.

[149]269 F.3d 305 (4th Cir. 2001), cert. denied, 70 USLW 3482 (S.Ct. 4-15-2002).

appellate court affirmed that the school district had eliminated the "last vestiges" of unconstitutional segregation to the fullest extent "practicable." Any remaining racial concentrations, therefore, were a consequence of factors – namely residential segregation – beyond the power of school authorities or the courts to control. In a unitary setting, the magnet admissions process could not clear the first hurdle by showing a compelling governmental interest, and the school district could not make "any further use of race-based lotteries, preferences, and set-asides in student assignment." A slightly different majority ruled that the school board could not be held liable for its use of race in assigning students to magnet schools since the program had originated in a then valid desegregate order. But if the same plan were adopted after the district is declared unitary, it would clearly be unconstitutional under *Tuttle* and *Eisenberg (supra)*, these judges opined.

One federal appellate court, the Ninth Circuit, appears ready to part company with other courts on the diversity issue. The University of California operates a popular elementary school as a "laboratory" to research urban education and "to foster a more effective educational system primarily for urban elementary students." Beyond basic research, the school develops new techniques for educating students in multi-cultural urban settings and conducts seminars, workshops, and teacher training programs throughout the state. The school considers applicants' race and ethnicity to obtain adequate cross-samples of the general population and thus to maintain "the scientific credibility of its educational studies." The plaintiff in *Hunter v. Regents of the University of California*[150] challenged the school's admissions policy as an equal protection violation. While perhaps not tantamount to a diversity rationale, the Ninth Circuit nonetheless agreed with the district court judge that the state's interest in "operating a research-oriented elementary school dedicated to improving the quality of education in urban public schools" was compelling even absent any purpose of remedying past discrimination.

> The challenges posed by California's increasingly diverse population intensify the state's interest in improving urban public schools. Cultural and economic differences in the classroom pose special difficulties for public school teachers. In his decision, Judge Kenyon noted that defendants presented 'an exhaustive list of such issues and challenges [that] includes limited language proficiency, different learning styles, involvement of parents from diverse cultures with different expectations and values, and racial and ethnic conflict among families and children.' [An expert witness] stated that '[t]here is no more pressing problem, facing California, or indeed the nation, than urban education; for it is in the urban school system that the majority of California's future citizens will be educated (either well or poorly), creating the basic fabric for the society of the future.' . . . Given this record, the district court concluded, and we agree, that 'the defendants' interest in operating a research-oriented elementary school is compelling.'[151]

Given the demographics of California's urban population, and the necessity of creating a multi-cultural laboratory setting, the consideration of race for admission to the school was deemed "narrowly tailored" since "it would not be possible, nor

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[150]1999 WL 694865 (9th Cir. 9-9-99).

[151]Id. at pp 2-3.

would it be reasonable, to require defendants to attempt to obtain an ethnically diverse representative sample of students without specific racial target and classifications."[152]

Faculty Diversity

Corollary issues concerning faculty diversity have also been before the courts recently, including the *Piscataway* case, which was dismissed as moot by the Supreme Court after the parties reached an out-of-court settlement. The appeal from *Taxman v. Board of Education of Piscataway Township*[153] had asked the High Court to consider whether a local school board's desire to promote faculty diversity could legally justify its decision to protect a black teacher from layoff, while dismissing an equally qualified white colleague, in the absence of a showing of past discrimination or a "manifest" racial imbalance in its workforce. Two teachers, one white, the other black, were hired on the same day in 1980 and were deemed equally qualified for their positions in the business education department when a reduction in force became necessary eight years later. Minority teachers were not underrepresented on the overall faculty–constituting 9.5 % of the district's teachers versus 5.8 % of the relevant county labor pool–and no evidence of past discrimination by the school district was presented at trial. A "coin toss" had traditionally been used to determine retention rights among similarly situated employees in the past. But because only one black teacher was among the business department's ten-member staff, the school district relied on its affirmative action policy to retain the minority employee rather than her white colleague in the interests of promoting racial diversity.

An *en banc* majority of the Third Circuit determined that however laudable the school board's objective might be, laying off a white reacher "solely" on the basis of race to achieve faculty diversity exceeded the bounds of controlling Supreme Court precedent. Title VII rulings in *Weber* and *Johnson (supra)* permitted employers to make employment decisions based on race or gender in order to redress a "manifest" imbalance of minorities and women in "traditionally segregated job categories." But judicial teachings generally caution against affirmative action measures that "unnecessarily trammel" or frustrate the "legitimate and firmly rooted expectation in continued employment" of affected non-minorities. In its 1986 *Wygant* decision, the Court voided race-based layoff protection for minority public school teachers because of its immediate adverse impact on "identifiable" senior white employees. Consequently, while applauding the board's commitment to racial diversity, the *Taxman* appellate opinion rejected the non-remedial educational purposes asserted by the board for its affirmative action plan because "there is no congressional recognition of diversity as a Title VII objective requiring accommodation." And because the entire burden of the board's plan fell upon the white teacher whose interests were "unnecessarily trammeled" by the loss of her job, the race-based policy violated Title VII.

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[152]Id. at 4.

[153]91 F.3d 1547 (3d Cir. 1996), appeal dismissed sub nom. U.S. v. Board of Education of the Township of Piscataway, 118 S. Ct. 595 (1998).

On March 9, 1998, the Supreme Court declined to review the legality of a "minority bonus policy" in an affirmative action plan established for Nevada's public colleges to redress a lack of minority faculty members. In *Farmer v. University and Community College Systems of Nevada*,[154] the plaintiff had been one of three finalists for a faculty position in the sociology department which the university awarded to a black male candidate from Uganda with "comparable" qualifications. The university's minority bonus policy, which the Nevada Supreme Court described as an "unwritten amendment" to its affirmative action plan, allowed a department to hire an additional faculty member following the initial placement of a minority candidate. As a consequence, plaintiff was hired by the sociology department a year later, but at a lesser salary than the earlier-hired black candidate. The differential was defended by the university as reflecting a pay premium necessary "to prevent[ ] a bidding war between two prestigious universities slated to interview [the black candidate]." Farmer challenged both the hiring and pay decisions by the university as race and sex discrimination prohibited by Title VII and the Equal Pay Act.

The state supreme court reversed a jury verdict for the plaintiff and upheld the university's affirmative action hiring policy on both federal constitutional and statutory grounds. First, according to the court, race was only one factor considered by the university–along with educational background, publishing, teaching experience, etc.–in evaluating applicants. In contrast to *Piscataway*, the university faculty was a "white enclave" with only 1 % black members, a factor persuading the court that the university had a "compelling interest in fostering a culturally and ethnically diverse faculty" under standards laid out by the *Bakke* and *Weber* cases.

> Here, in addition to considerations of race, the University based its employment decision on such criteria as educational background, publishing, teaching experience, and areas of specialization. This satisfies *Bakke's* commands that race must be only one of several factors used in evaluating applicants. We also view the desirability of a racially diverse faculty as sufficiently analogous to the constitutionally permissible attainment of a racially diverse student body countenanced by the *Bakke* Court.

Thus, severe minority underrepresentation on the university faculty combined with the employer's consideration of relative qualifications in addition to race distinguished *Piscataway*, the Nevada court felt, and conformed the case to Justice Powell's *Bakke* opinion. In addition, the impact of the initial minority hire was mitigated by affording the disappointed white applicant a subsequent position created pursuant to informal practice or custom under the affirmative action policy.

Conclusion

Collectively, the trend of recent judicial decisions marginalizes the constitutional value of student or faculty diversity as support for racial or ethnic preferences which are not "narrowly tailored" to correcting the present-day effects

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[154]930 P.2d 730 (Nev. 1997), cert. denied No. 97-1104, 118 S. Ct 1186 (1998).

of historical discrimination for which the institution itself is responsible. The Supreme Court refusal to review the *Hopwood* and *Piscataway* cases has had an unsettling impact on academic affirmative action policies nationwide. The reason for this is twofold. First, recent decisions imperil use of the diversity rationale as justification for the use of racial classifications in the admissions process. Prior to *Hopwood*, for example, university officials could argue that their programs promoted the state's compelling interest in the robust exchange of ideas and viewpoints by ensuring a racially and ethnically diverse student body. As important, however, the recent cases limit the scope of the remedial justification traditionally recognized by the courts to justify affirmative action as a constitutional antidote for past discrimination. In addition to rejecting societal discrimination, *Hopwood* and progeny appear to exclude from evidence proof of discrimination originating from any official source — including the public education establishment at all levels — unless attributable to conduct by the specific institution taking the challenged remedial action.

Seeing the writing on the wall, many higher educational institutions have resorted to what has been termed "alternative action," or policies designed to promote racial diversity without relying on racial preferences. Schools in California, for example, are experimenting with "class-based" affirmative action, taking socioeconomic status or family educational background of applicants into account. UCLA targets financial aid programs towards underprivileged neighborhoods as a means of reaching minority students. Texas law, in response to *Hopwood*, entitles the top ten percent of every graduating high school class in the state to public college or university admission. Other schools consider "diversity" or "hardship" essays in which applicants describe challenging life experiences such as poverty, English as a second language, or having a family member in prison. Some reformers advocate targeting additional resources to underperforming elementary and secondary schools as a way to address the root causes of minority under-representation in higher education. Florida has adopted a composite of many of these approaches. The "One Florida" plan guarantees every Florida student who graduates in the top 20% of his or her graduating class admission to one of that state's 10 public colleges. It has replaced race and ethnicity with other socio-economic and geographical proxies for diversity; increased the state's need-based financial aid program; seeks to improve the state's lowest performing primary and secondary schools; and provides free SAT prep courses at those schools.

Whether academic institutions may altogether avoid the constitutional shoals by adopting such "race-neutral" plans to increase minority admissions remains to be seen. On one hand, by eschewing the use of explicit racial classifications and dual track admission policies, these efforts may be far less susceptible to facial challenge as an equal protection violation. Programs involving the explicit consideration of race have thus far been the focus of judicial objection. But equally vulnerable may be policies that employ nonracial factors as a proxy for race if the purpose or intent

is to benefit minority groups. In *Washington v. Davis*,[155] and related precedent,[156] the Supreme Court determined that a race neutral law with a disparate racial impact on minority groups is subject to strict scrutiny if it is enacted with a racially discriminatory purpose. Racial motive was made a constitutional "touchstone" for equal protection analysis, and whether reflected by a racial classification, or other evidence of discriminatory purpose, strict scrutiny was triggered by evidence of such intent. Similarly, alternatives to traditional race-based affirmative action may not escape strict judicial scrutiny if an objecting non-minority applicant is able to demonstrate that the motivation for the plan was the policymaker's purpose or intent to aid racial or ethnic minorities. Corollary principles may spill over to private institutions, which are immune from constitutional limitations, under Title VI of the 1964 Civil Rights Act. In *Guardians Association v. New York Civil Service Commission*,[157] while disagreeing on the appropriate statutory standards, a majority of the Justices agreed that plaintiffs had a private right of action for intentional race discrimination under Title VI.

Whatever the outcome of these issues, affirmative action appears destined to return to the Supreme Court in the not too distant future. A Circuit court conflict with the Fifth and Eleventh was created when the Ninth Circuit relied on *Bakke* to uphold an affirmative action admissions policy to the University of Washington Law School that made extensive use of race-based factors. The judicial divide over *Bakke*'s legacy was perhaps best illustrated by a pair of separate trial court decisions, one upholding for diversity reasons the race-based undergraduate admissions policy of University of Michigan, the other voiding a special minority law school admissions program at the same institution. As noted, the Sixth Circuit in *Grutter v. Bollinger* reversed the latter decision, finding that the Law School's interest in achieving the educational benefits of a diverse student body is compelling, and that its admissions policy is "narrowly tailored" to that goal. Appeal is pending with the same court in the undergraduate admissions case, but presently the federal appeals court are evenly divided over the constitutional significance of *Bakke* in the realm of higher educational admissions.

Included in these cases were allegations of individual liability on the part of current and former officials of the University for maintaining affirmative action policies that they knew, or should have known, were unconstitutional. On appeal,

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[155]426 U.S. 229 (1976).

[156]Cf. Personnel Administrator v. Feeney, 442 U.S. 256 (1979). In Feeney, the Court upheld a state law giving a preference to veterans for civil service employment, which had a significant discriminatory effect against female applicants. Notwithstanding the obvious impact of such a preference, the Court upheld it on the ground that "'[d]iscriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." Id. at 279. Although Feeney involved a claim of sex-based discrimination, the test there announced for determining whether a purpose is "discriminatory" with respect to a particular trait has been applied to claims of racial discrimination as well. See Hernandez v. New York, 500 U.S. 352, 360 (1991).

[157]463 U.S. 582, 593 (1983).

educators contend that their admissions policies differ substantially from the explicit dual track plan in *Hopwood* and conform to the dictates of *Bakke*, which forbids quotas but may allow nonexclusive consideration of race in the admissions process. Any resolution of this issue by the Supreme Court, should it grant review in *Grutter* or *Gratz*, may not be limited to public colleges and universities. Private school affirmative action policies could be challenged under Title VI of the 1964 Civil Rights Act, which imposes a comparable ban on discrimination by private schools as the Equal Protection Clause does in the public sphere. Consequently, since virtually all higher educational institutions receive some federal funding, both public and private schools would likely be affected by whatever the Supreme Court eventually decides regarding affirmative action in education.