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FEDERAL PREFERENTIAL SET-ASIDES AFTER *ADARAND*: THE END OF AN ERA?

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ABSTRACT

This article examines the impact the *Adarand* decision will have on federally-mandated preferential treatment in the awarding of government contracts. Particular attention is given to the standards such programs must now meet to avoid violation of implied equal protection under the Fifth Amendment. Finally, preferential programs *not* affected by this ruling are also discussed.

Can there be any doubt that the fate of affirmative action programs (AAPs) will be the major employee relations issue for the next two years, if not the remainder of this decade? President Bill Clinton announced on March 6, 1995, that he was ordering an "intense, urgent review" of all executive orders requiring affirmative action [1]. Three of the major contenders for the Republican presidential nomination, Senators Dole and Gramm and former Governor Alexander, all issued statements that, if elected, they would eliminate all federally-mandated race and gender preferences. President Clinton also convened a panel to examine the effects of affirmative action and make recommendations for its modification [2]. Governor Pete Wilson of California not only supported a 1996 ballot initiative to remove all state-imposed affirmative action, but signed an executive order eliminating all such programs mandated by the governor's office [3]. In addition, the University of California Board of Regents voted to end affirmative action at its nine-campus university system. And on July 27, 1995, a bill was introduced on the

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floor of the U.S. Senate calling for the elimination of all federal preferential programs to include contract set-asides [4].

The Supreme Court entered this arena with its June 12, 1995, decision, *Adarand Constructors, Inc. v. Pena* [5]. Not surprisingly, the media have portrayed this decision as a significant challenge to federal affirmative action policies [6].

The purpose of this article is to examine the impact the *Adarand* decision may have on the future of preferential awarding of government contracts. Additionally, a brief discussion of whether this case represents a substantial shift in judicial attitudes against affirmative action is provided. To enhance the reader's appreciation of the issues surrounding this case and to reduce any misunderstanding as to the ramifications it presents, a brief history of affirmative action as well as a discussion of its components or types is also presented. Finally, this article will inform the reader as to what *Adarand* does *not* alter or eliminate.

A BRIEF HISTORY OF AFFIRMATIVE ACTION

Although *Adarand* dealt with the preferential awarding of federal government construction contracts (a form of affirmative action), the decision has implications for all federally-mandated preferential treatment, including hiring and promoting personnel. Consequently, an overview of federally-sanctioned AAPs will enhance the reader's appreciation of the scope of this decision.

Affirmative action is the product of administrative law, in this particular instance, executive orders. The term "affirmative action" first appeared in President John F. Kennedy's 1961 Executive Order 10925 [7]. At this juncture, the term implied that employers who held government contracts and subcontracts in excess of $2,500 were required to make a special effort to identify and recruit qualified minority applicants. Initially, affirmative action did not, *per se*, require preferential treatment of minority applicants, only that they be actively recruited. Furthermore, women were not included at this time in the class of applicants for which affirmative action was to be taken. Also, affirmative action applied only to employers holding or seeking federal contracts.

Four years later, President Lyndon B. Johnson added the preferential hiring component in Executive Order 11246. This order created the Office of Federal Contract Compliance Programs (OFCCP) to administer the provisions and charged the secretary of labor with ensuring compliance [8]. To facilitate the preferential hiring of minority workers, the OFCCP established fairly specific guidance in its "Revised Order No. 4" [9]. The major function of the OFCCP is to ensure that contractors make adequate progress toward their obligation to take "affirmative action" by ensuring that underutilized minority applicants are recruited *and hired.* This is usually evaluated on the basis of the employer's affirmative action goals and timetables [10]. Preferential treatment on the basis of an individual's sex was later added in Executive Order 11375 on October 13, 1967 [11].

Later that same year, the Supreme Court reinforced the federal judiciary's power to impose involuntary affirmative action goals as a remedy in cases involving unlawful discrimination under the Civil Rights Act of 1964 [12]. What many laymen do not understand is that Title VII of the Civil Rights Act of 1964 makes absolutely no mention of affirmative action—either as a requirement or as a remedy [13]. In fact, no federal statute would contain the term "affirmative action" until the enactment of the Vocational Rehabilitation Act of 1973, which requires any holder of a federal contract or subcontract in excess of $2,500 to "take affirmative action to employ and advance in employment qualified handicapped individuals . . ." [14].

In 1979, the Supreme Court upheld the legality of *voluntary* affirmative action programs in its *Steelworkers v. Weber* decision [15]. Private sector employers were now permitted to engage in racially-based voluntary preferential action so long as it was done to eliminate the effects of past discrimination. To avoid the violation of Title VII, such voluntary plans have to adhere to the following three conditions:

1. The plan cannot unnecessarily trammel the interests of the nonminority employees.
2. The plan cannot create an absolute bar to the hiring or advancement of nonminority employees.
3. The plan must be temporary in nature. It cannot be designed to maintain racial balance; it may only operate to eliminate a manifest racial imbalance [15, at 208].

Public sector employers, those employed by state and local governments, not only have to meet the aformentioned requirements imposed by *Weber*, but also have to avoid conflict with the Equal Protection Clause of the 14th Amendment. A state or local government's AAP has to be predicated on accomplishing some "compelling government interest" [16, 17] and must be "narrowly tailored" to accomplish that objective [16, at 279-280]. A more detailed explanation of these two requirements is provided in our discussion of the *Adarand* decision.

Perhaps the most relevant case to state and local government AAPs is *City of Richmond v. J. A. Croson* [18]. In this case, the city of Richmond, Virginia, had set aside 30 percent of all municipal contracts for minority-owned businesses. The complaining party filed suit under the Equal Protection Clause claiming that the set-asides precluded white-owned contractors from consideration for 30 percent of the contracts solely on the basis of race. The Court, in its final decision, imposed a two-part test for analyzing alleged violations of the 14th Amendment and subsequently concluded the city's set-asides were unlawful.

As a strict scrutiny must be applied to all governmental classifications by race [18, at 491], it must first be demonstrated that a compelling government interest exists for establishing any race-based remedy. In short, the governmental actor must provide a strong basis in evidence that the race-based affirmative action is

necessary [18, at 500]. It is important to note that until the *Adarand* ruling this referred only to state and local governments; this level of scrutiny did not apply to federal programs.

In matters involving race, eliminating the vestiges of facial discrimination is invariably considered to be a "compelling government interest." This requirement is usually satisfied by demonstrating that the government actor had engaged in past discrimination [16, at 277; 17, at 170-171; 19]. Hence set-asides and other preferential affirmative action programs may be justified because of the given government's history of prior discrimination. There is apparently no statute of limitations as to how far in the past this discrimination occurred.

However, this is a double-edged sword. The elimination of these vestiges of prior government racial discrimination must also be reconciled with a second requirement, that governments eliminate all "government imposed discrimination based on race" [20]. The resulting paradox is that affirmative action that favors only blacks often tends to necessarily discriminate against nonblacks on the basis of race. Therefore, governments, in attempting to eliminate prior discrimination against blacks, do so by discriminating against nonblacks on the basis of race. Such apparent contradictions have required the courts to seek to accommodate both requirements. The current compromise attempts to alleviate this contradiction. This has been accomplished by declaring that it is incumbent on government to minimize the imposition of new discrimination on persons of a nonfavored race. Again, these "new discriminations" must further be justified by *strong evidence* that they are warranted [18, at 725].

Once the compelling government interest has been established, the preferential treatment must be "narrowly tailored" to achieve that interest [18, at 508]. Of tantamount concern is that race-based remedies are to be used only as a last resort and only after *other* racially-neutral alternative remedies have been considered [21]. The rationale behind narrowly tailored remedies is to minimize governmentally-imposed discrimination against nonblacks or nonfemales.

Such was the state of affirmative action for public sector entities before *Adarand*, with one notable exception—*federal* affirmative action programs were held to a far less demanding standard. In its 1990 decision, *Metro Broadcasting v. FCC* [22], the Supreme Court had held that *benign* federal racial classifications were only required to be reviewed under "intermediate scrutiny" (a far less onerous burden than the "strict scrutiny" required of state and local governments) [22, at 564-565]. These so-called *benign* federal racial classifications need not be tied to past governmental or societal discrimination. They were constitutionally permissible to the extent they served an "important" (as opposed to "compelling") governmental objective well within the power of Congress. What was regrettable was that *Metro Broadcasting* never provided an adequate explanation as to what criteria a racial classification had to meet in order to be deemed *benign* [5, at 23]. At the time Adarand Constructors filed suit in the federal district court, this was the condition of federal set-aside programs. There

was no requirement imposed on the federal government to limit the government-imposed discrimination against nonprotected groups under its programs. In essence, a dual standard existed between federal and "other" governments' preferential treatment requirements.

THE *ADARAND* CASE

Adarand Constructors, Inc., a Colorado-based highway construction company that specializes in building guardrails, initiated the suit after the Mountain Gravel and Construction Company, a prime contractor for the Department of Transportation (DOT), awarded a subcontract to Gonzales Construction Company instead of Adarand. Although Adarand had submitted the low bid, Mountain Gravel chose to award the subcontract to Gonzales to qualify for additional federal money. This money was available under the subcontractor compensation clauses of the Small Business Act [23] for subcontracting to small business concerns owned and controlled by "socially" and "economically disadvantaged" individuals. Under these clauses, prime contractors receive additional federal funds for subcontracting work to businesses owned by socially and economically disadvantaged individuals. For example, if the prime contractor has one socially or economically disadvantaged subcontractor, the prime contractor is entitled to receive an additional payment from the federal government of 10 percent of the final amount of the approved subcontract, not to exceed 1.5 percent of the total prime contract amount [24]. Because the language of the Small Business Act defines "socially disadvantaged individuals" and "economically disadvantaged individuals" along ethnic and cultural lines, a company owned by a member of ethnic minority (like Gonzales) was determined to have met those requirements. Although Adarand had submitted the lower bid, Mountain Gravel considered it more advantageous, in light of the federal bounty for subcontracting to minority businesses, to award the subcontract to Gonzales.

Having been excluded from subcontracts on several occasions before, Adarand filed suit requesting declaratory and injunctive relief against any future use of the Small Business Act's subcontractor compensation clauses [5, at 7-8] on the grounds that the race-based presumptions in these clauses violated Adarand's right to equal protection. However, both the federal district court and the U.S. Court of Appeals for the Tenth Circuit upheld the use of the subcontractor clauses because they applied the more lenient standard enunciated in *Metro Broadcasting* [25]. As a consequence of applying this standard of review, the court of appeals analyzed the subcontractor compensation clauses in terms of "intermediate scrutiny" rather than "strict scrutiny," meaning that these federal policies had only to meet a "significant government purpose," as opposed to a "compelling government purpose," a far less onerous requirement [5, at 36]. Adarand then appealed to the Supreme Court.

THE DECISION

The Supreme Court resolved two important issues in its *Adarand* decision. First, it explicitly overruled the apparently ill-conceived *Metro Broadcasting* decision [5, at 26]. In doing so, it effectively removed the ambiguity and confusion associated with *benign* racial classifications. The Court, in essence, concluded that no governmental consideration of race can ever be benign. The Court noted that applying benign racial classifications to different standards hardly is compatible with the concept of equal protection. This brings us to the second major outcome of this decision. The Supreme Court, citing numerous other decisions [26], concluded that, even in the absence of an equal protection clause, *per se*, the Fifth Amendment guarantees equal protection from the federal government in the same manner that the 14th Amendment guarantees equal protection from state and local governments [5, at 15]. The Constitution imposes "upon federal, state, and local governmental actors the same obligation to respect the personal right to equal protection of the laws" [5, at 15]. As will be explained later, this does not mean the elimination of federally-sanctioned or federally-imposed preferential treatment, but it does mean such programs will have to withstand a far stricter scrutiny by the courts.

Perhaps the attitude of the Court toward set-asides can best be demonstrated with its majority opinion quoted from *Hirabayashi v. U.S.*: "A free people whose institutions are founded upon the doctrine of equality should tolerate no retreat from the principle that government may treat people differently because of the race *only for the most compelling reasons* [emphasis added by authors]" [5, at 25]. The reader should note that the Court still has allowed an exception to equal treatment by inserting the phrase "only for the most compelling reasons." In other words, preferential treatment *has not* been eliminated by this decision, but it may not be as easily imposed.

STANDARD OF REVIEW FOR FEDERAL SET-ASIDES

In approaching the dilemma of when racially-biased set-asides (we may assume that this would apply equally well to gender-based programs) are permissible under the new paradigm, the Court offered three general propositions covering governmental racial classifications: *skepticism, consistency*, and *congruence* [5, at 21-22].

Under the concept of *skepticism*, any racially- or ethnically-based criterion is inherently suspect and is to be subjected to the most searching examination. *Consistency* implies that it is not the race of those who benefit from a given program, nor the race of those who are penalized by it that is important, rather *all* racial classifications, by their very nature, are to be strictly scrutinized. *Congruence* implies that equal protection analysis for the Fifth Amendment is the

same as that for the 14th Amendment. All government actors must adhere to the same standard of review. Using these three general propositions as the rationale for stricter scrutiny of federal preferential programs, the Court then imposed the two-part test for analyzing the 14th Amendment claims [27] to federal preferential treatment programs.

Two-Part Test

As stated previously, the *Adarand* decision is explicit in requiring federal racial classification to conform to the same standards required of states. Now these federal racial preferences must serve a "compelling government interest and must be narrowly tailored" [5, at 34]. Unfortunately, the Supreme Court failed to enunciate specifically how a compelling government interest is established under the Fifth Amendment. The Court further failed to provide adequate guidance as to how a narrowly tailored, race-based remedy is determined. The only direction regarding these requirements is that the federally-imposed racial classifications are to be analyzed in the same manner as those imposed by state and local governments [5, at 30]. On these points, we can only conclude that the Court must be taken at its word.

COMPELLING GOVERNMENT INTEREST

For a state or local government's preferential program to be permissible under the Equal Protection Clause of the 14th Amendment, the governmental actor is required to demonstrate that its racially- or gender-based preferences are necessary to achieve a compelling government interest. One method of accomplishing this end is to establish that the state government had previously discriminated against women or ethnic minorities. This being established, the state must then present a strong basis in evidence that racially-based remedial action is warranted [18, at 499]. The language of *Adarand* seems to indicate this generally is what could be expected of federal preferential treatment programs, to include set-asides. Again, this presumption is based on the language in *Adarand* that federal programs are to adhere to the same standard as their state and local counterparts. Hence, the first requirement for *all* governments is to justify the program.

However, state and local governments have not been held to merely demonstrating past discrimination as justification for their racial or gender preferences. If one refers to *Johnson v. Transportation Agency of Santa Clara County* [27, at 632], the Supreme Court held that a local government's preferential promotion of a female was justified in the absence of past discriminatory practices because the employer demonstrated that a "manifest imbalance" existed in the agency's internal workforce. Following the Court's central proposition that federal, state, and local affirmative action programs must now be analyzed under the same standard, it must be assumed that federal programs would also be justified by

establishing a "manifest imbalance" in the awarding of contracts or subcontracts. It is further contended by the authors that many federal courts will accept the elimination of such imbalances as sufficient justification for preferential programs.

However, justifying the racially-biased set-aside may merely be an academic exercise of little importance since it is the second part of the test that presents the more arduous requirements for such programs. Having been justified by either appealing to past discriminatory practices or manifest imbalance, the preferential program must next withstand the challenge that it is sufficiently narrowly tailored to achieve the compelling government interest of eliminating the imbalance or remedying the past discrimination.

NARROWLY TAILORED REMEDIES

This is the true acid test for determining the permissibility of the set-asides. *Adarand* states that a federal preferential program operates "within constitutional constraints if it satisfies the 'narrowly tailoring' test *this court has set out in previous cases* [emphasis added by the authors]" [5, at 36]. What then are these constitutional constraints?

In reviewing the case history of Supreme Court decisions on state and local affirmative action programs, several factors have been revealed as satisfying this "narrowly tailored" requirement. First, had the governmental actor considered available race-neutral (gender-neutral) alternatives before resorting to any racially-biased method [17, at 171; 18, at 507]? In satisfying this requirement, the respective governmental actor would have to demonstrate that racially-based alternatives would succeed where racially-neutral ones would fail. Thus, several alternatives to preferential set-asides must be developed and their viability in increasing minority or female representation documented.

Next, the impact of nonminority or male applicants must be considered. Remember that the efficacy of any racially-biased program is also a function of how it affects the nonpreferred classifications. Hence, an alternative that is slower in achieving the compelling government interest (eliminating a manifest imbalance, e.g.) but excludes fewer nonminority applicants would be preferable to a program guaranteeing faster results but at the expense of a greater number of nonminority applicants.

Obviously, the set-aside that would have the greatest impact on nonminority applicants would be one in which nonminorities are totally excluded from consideration. Any such program is likely to be far too broadly construed to satisfy the "narrowly tailored" requirement [16, at 281]. However, some of the language in the Small Business Act appears to encourage just such exclusions. For instance, under Federal Acquisition Regulations, for a firm to qualify as a "Small Disadvantaged Business Concern" it must be "*both* [emphasis added by authors] socially and economically disadvantaged . . ." [28]. To be "socially disadvantaged

individuals," individuals must have been "subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their qualities as individuals" [28, §19001(a)]. Interestingly, one cannot be economically disadvantaged without first being socially disadvantaged [28, §19001(b)], a classification that excludes whites, and is, therefore, likely to fail the narrowly tailored test.

Additionally, the flexibility of the racially-based preference must undergo other standards. Set-asides will fail this test if they can be shown to be inflexible quotas. If the set-aside or preferential treatment operates as a permanent measure to *maintain* a racial or gender balance, it will likely be viewed as a quota [29]. Not surprisingly, the duration of the plan plays a critical role in such assessments. Bearing in mind that affirmative action was designed to be only a temporary measure [30], any program that smacks of a permanent fixture will invariably fail the flexibility test. If the complaining party can show the program is maintaining a racial balance rather than eliminating a racial imbalance, it is unlawful. However, it is not uncommon for many programs to be continued long after their goals have been realized [13]. Even the Equal Employment Opportunity Commission's own AAP was once found to violate this requirement [31].

Another aspect of preferential treatment that is subject to scrutiny under the narrowly tailored test is whether the affirmative action plan's goals are predicated on the relevant labor market or applicant pool. In the previously mentioned *Croson* decision, it was discovered that the City of Richmond's minority set-aside goal of 30 percent failed to consider the number of minority businesses qualified to undertake the prime or subcontracting work. Because this 30 percent set-aside was judged to be arbitrary, it further had to have the effect of discriminatory exclusion. If the affirmative action goal exceeds the proportion of qualified recipients in the relevant market, it becomes an inflexible quota [32]. When governmental actors, including the federal government, provide set-asides for contractors, and such set-asides bear no relation to the number of qualified minority constructors and subcontractors in the area, these ill-conceived and arbitrary numbers will now violate the equal protection intent. The authors see this affecting not only set-asides, but all race and gender preferences mandated by all federal agencies.

AREAS NOT AFFECTED BY *ADARAND*

It must be understood that the *Adarand* decision is fairly narrow in scope. It affects only federally-imposed preferential treatment programs and only the so-called "voluntary" federal programs at that. Nothing in the text of this decision even remotely addresses the involuntary remedial affirmative action plans that can be imposed by federal courts. These are usually imposed as a remedy for Title VII violations and have not been changed from the pre-*Adarand* legal environment.

Additionally, the manner in which state and local government programs are analyzed under the Equal Protection Clause of the 14th Amendment remains unaltered. In fact, this framework for analysis has been merely applied to the federal government and its programs. Consequently, the guidance in prior court decisions governing preferential hiring [33], promotions [27], layoffs [16, at 283], or contract set-asides [18] will continue.

Finally, private sector affirmative action programs that are voluntary in the strictest sense of the word (those that private employers initiate on their own volition) are not affected by the *Adarand* decision. Such programs will continue to be scrutinized under the guidance and standards set forth in *Steelworkers v. Weber* [15, at 208].

CONCLUDING REMARKS

It must be reemphasized that the *Adarand* decision is limited in scope. It affects only federally-mandated "voluntary" affirmative action programs. Though primarily focused on federal contract set-asides, *Adarand* imposes more stringent standards and judicial scrutiny to other federal race- and gender-based programs as well. There is nothing in the text of the *Adarand* decision that precludes its application to preferential hiring and promotions under Executive Order 11246. Additionally, the new requirement for the federal government to demonstrate that racial preferences must serve a compelling government interest and must be narrowly tailored to accomplish that end may equally affect federally-funded minority scholarships and college admissions.

It is further conceivable that the *Adarand* decision may render the Minority Business Program of the Small Business Act unworkable if the narrowly tailored test is applied to the act's definition of "socially disadvantaged." *Prima facie*, since the "socially disadvantaged" classification is based solely on ethnicity (to the exclusion of whites), it is likely to be found to have too great an impact on nonminority applicants.

Though the Court's ruling in *Adarand* seems to indicate that the judiciary is joining the general public dissatisfaction with three decades of preferential treatment [34], it is important to note that the Supreme Court *has not* made preferential programs unlawful. The Court has only made it more difficult to implement federally-mandated ones. The Court appears to have abrogated its opportunity to impose major revisions or the elimination of federally-mandated affirmative action to either the legislative or executive branches. Far from eliminating racially- and gender-based preferential treatment, *Adarand* has merely restricted its use.

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