

Strictly Scrutinizing Affirmative Action

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On June 12, 1995 in *Adarand Constructors Inc. v. Peña*, 63 U.S.L.W 4523, the Supreme Court held that race-conscious affirmative action undertaken by the federal government is subject to the same “strict scrutiny” standard that the Court in 1989 had applied to such measures by state and local governments in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 489. In an opinion by Justice Sandra Day O’Connor (joined in most respects by Chief Justice William Rehnquist and Justices Antonin Scalia, Anthony Kennedy, and Clarence Thomas), the Court overruled the five-year-old precedent of *Metro Broadcasting Inc. v. Federal Communications Commission*, 497 U.S. 547 (1990), where an entirely different majority had held that congressionally sanctioned “benign” racial preferences were subject only to “intermediate scrutiny.” In a portion of her opinion joined only by Kennedy, O’Connor justified the departure from *stare decisis* on grounds that *Metro Broadcasting* itself was a departure from established doctrine- and a quite recent one- and that minimal reliance interests would be affected by the new ruling.

But the Court did not strike down the Transportation Department program at issue in *Adarand*, which provides bonuses to contractors who employ minority subcontractors. O’Connor noted, as she had done in her *Croson* opinion, that some narrowly tailored

race-conscious measures aimed at remedying identified discrimination may satisfy the strict scrutiny standard. The case was then remanded to the U.S. Court of Appeals for the 10th Circuit for reconsideration under that standard as it had been explicated in such cases as *Croson*.

Much will eventually be said about whether *Adarand* departed not only from *Metro Broadcasting*, but also from *Fullilove v. Klutznick*, 448 U.S. 448 (1980), where the Court had upheld a similar congressionally mandated program, and whether O’Connor’s justifications for such departures were plausible. But issues of more practical concern involve what the evident hostility of *Adarand* majority to group-based measures suggests about the viability of precedents upholding race- or gender-conscious measures in other contexts, as well as what heightened scrutiny may mean for the various set-aside measures implemented by the federal government.

The Bakke Precedent

The principal constitutional precedent of concern is the Supreme Court’s 1978 decision in *Regents of the University of California v. Bakke*, 438 U.S. 265, which is commonly cited for the proposition that the 14th Amendment prohibits racial quotas in admissions to state-supported educational institutions,

but allows race to be considered as one factor in admissions.

On the one hand, whatever the failure of Rehnquist, Scalia, and Thomas to join O'Connor's discussion of *stare decisis* may suggest about the greater willingness of those justices to overturn constitutional precedent on affirmative action, it seems that O'Connor and Kennedy would not too readily overturn a constitutional precedent in a manner inconsistent with O'Connor's *Adarand* reasoning. And, at a minimum, *Bakke* differs from *Metro Broadcasting* in having been relied upon by educational institutions for almost two decades now.

Nevertheless, the *Bakke* precedent as it is generally understood may be exceedingly vulnerable simply because it is so unclear what constitutional holding can be found among the varied opinions. Five justices- none still sitting- did agree that the prohibition on racial discrimination in Title VI of the Civil Rights Act of 1964 was not more restrictive than that found in the equal protection clause. But when the same five voted to overturn an injunction prohibiting the University of California from any consideration of race in admissions, Justice Lewis Powell Jr.'s lead opinion did so on the basis that the goal of promoting diversity in the educational environment satisfied strict scrutiny. The four other justices did so on the basis that remedial racial classifications need only satisfy intermediate scrutiny and that remedying past societal discrimination, the university's articulated basis for its admissions policy, satisfied that standard. When *Croson* a decade later squarely rejected the standard underlying those four votes, it became doubtful that *Bakke* stood for any constitutional principle, and certainly O'Connor's

opinion in *Adarand* does not suggest that she believes it stood for very much.

Furthermore, the Court may be able to eliminate most race-conscious admissions policies at state-supported educational institutions without doing any damage to the "holding" reflected in Powell's lead opinion in *Bakke*.

In finding the University of California's reservation of 16 spaces for minorities to be a constitutionally prohibited quota, Powell contrasted the program with that at Harvard. Quoting from Harvard's description of how race could be used as a factor to choose among "the large middle group of applicants who are 'admissible'" - as distinguished from the clear "admits" and "rejects"- Powell opined that such use of race as a "plus" in the selection process would conform to his vision of constitutionally permissible race-conscious action. The notion- that using race as a plus, or as one of a number of factors in a selection process, materially differs from reserving a portion of openings for a particular racial group- has influenced a number of high court opinions over the years, including Justice William Brennan Jr.'s majority opinion in *Metro Broadcasting*.

But even in theory, the distinction is close to meaningless. And certainly in practice, it is wholly illusory, even at Harvard, where the plus factor caused blacks to make up 7 percent of the classes of 1973 through 1979. Powell's *Bakke* opinion and others' criticisms of "rigid quotas" have merely caused universities to attempt to disguise their efforts to achieve the same type of minimum minority representation that the program in *Bakke* had tried to achieve more straightforwardly. To invalidate the great majority of programs that substantially increase minority

representation, a skeptical Court need only rely on Powell's opinion, while sorting out the practical operation of an affirmative admissions program.

Yet there exists an even greater danger to preferential admissions programs than any interpretation of the equal protection clause. As I have suggested here on a couple of occasions (most recently in "Can Affirmative Action Survive the Struggle?" Jan. 21, 1991, Page 23), a Court with a majority as ill-disposed toward race-conscious affirmative action as the *Adarand* majority need overrule no precedent- and could find support in prior precedent- to hold that 42 U.S.C. §1981 (§1 of the Civil Rights Act of 1866) bars all race-conscious affirmative action in the making of contracts. Such a ruling would invalidate race-conscious admissions programs in private as well as state-supported institutions.

Bakke is not the only Supreme Court precedent of concern after *Adarand*. In its 1979 decision in *United Steelworkers of America v. Weber*, 443 U.S. 193, the Court held that Title VII of the Civil Rights Act of 1964 does not prohibit voluntary affirmative action to "eliminate manifest imbalances in traditionally segregated job categories"; and in 1987, in *Johnson v.*

Transportation Agency of Santa Clara County, 480 U.S. 616, Justices O'Connor and John Paul Stevens relied on *stare decisis* to provide the fifth and sixth votes to reaffirm that holding. While all members of the *Adarand* majority have recently joined opinions emphasizing the strength of *stare decisis* in cases interpreting statutes, the greatest deterrent to an outright overturning of *Weber* may lie simply in the fact that O'Connor concurred in *Johnson*.

But she did so while insisting that an employer implementing an affirmative action program, at least where the employer is a governmental entity, must have a firm basis for believing that it is correcting past discrimination- the same standard she had previously applied under the 14th Amendment. So the next case may well interpret Title VII's limitations on voluntary race- and gender-conscious action more in line with O'Connor's *Johnson* concurrence than with the somewhat more permissive approach of Brennan's majority opinion in *Johnson*.

In this context, too, the most important development could be an interpretation of 42 U.S.C. §1981 prohibiting all race-conscious affirmative action in making contracts. Since the statute prohibits only racial discrimination, however, greater range could be left for gender-conscious affirmative action in contracting, employment, and education.

In that regard, some comment is warranted on Stevens' observation in his *Adarand* dissent that the Court's holding "will produce the anomalous result that the Government can more easily enact affirmative-action programs to remedy discrimination against women than it can enact affirmative-action programs to remedy discrimination against African-Americans-even though the primary purpose of the Equal Protection Clause was to end discrimination against former slaves." The inconsistency of standards already existed with regard to measures imposed by state and local governments, and had twice led the 9th Circuit to uphold set-asides for women while striking them down for minorities.

But as I explained here some time ago ("Affirmative Action for Women: New Twist on an Old Debate," Dec. 5,

1988, Page 17), the greater anomaly of such a result lies in the fact that, because women are not disproportionately affected by the economic circumstances of other members of their group in the way minorities are, some of the stronger justifications for group-based remedies for minorities simply do not apply to women. If the courts ever recognize this difference, affirmative action may be more difficult to defend for women than for minorities, notwithstanding that such measures for women face a lesser standard of review.

Meanwhile, there exists a significant issue of precisely what O'Connor had in mind when she suggested in both *Adarand* and *Croson* that some race-conscious measures might be permitted in order to eliminate identified discrimination and "its effects."

In the employment context, at least there is a fairly common understanding of what it means to "remedy the effects of prior discrimination." If a group comprising 20 percent of the relevant labor force makes up only 5 percent of an employer's workers, and the difference is determined to result from discrimination, the employer might be required to hire members of the group at a rate of, say, 40 percent to speed the pace at which the group's representation in the employer's work force will reach 20 percent.

In the contracting context, however, things are much less clear, and O'Connor's *Croson* opinion did much to contribute to this confusion.

To begin with, O'Connor suggested that discrimination in contracting can be inferred from statistics showing a significant difference between the percentage of contractors that are minority-owned and the percentage of contracting dollars going to minority-

owned firms. But given the differences in size and experience between minority and nonminority contractors, she could not have actually meant that such rudimentary comparisons formed a legitimate basis for inferring discrimination- and, presumably, the Court will eventually make that clear. Nevertheless, to support local set-asides following *Croson*, so-called disparity studies have been carried out relying precisely on O'Connor's formulation, and their findings are being uncritically accepted by the courts of appeals.

An even greater source of confusion involves what sort of race- or gender-conscious measure a majority of the Court would regard as permissible. O'Connor's vote is crucial to upholding any affirmative action measure. Yet nothing in her *Croson* opinion suggested that if a disparity study showed that minority firms had previously received less than the share of contracting dollars they would have received absent discrimination, that showing would justify a set-aside allowing minority firms in general to receive much more than their share for some period of time. Indeed, O'Connor has previously shown great skepticism of such measures even in employment. Nevertheless, after accepting disparity studies of minority representation among contractors, the courts have casually approved set-asides far in excess of such figures.

In *Croson*, O'Connor also gave much attention to the rigidity of Richmond's program and the city's failure to consider race-neutral alternatives for increasing minority contracting opportunities. If the issue is whether an entity may impose a race-conscious measure merely to ensure nondiscrimination in the present, consideration of race-neutral alternatives

is highly pertinent, since there are likely to be plausible ones. But it ought to be evident that race-neutral measures are not going to cause minority firms to receive a share of contracting dollars far in excess- or much in excess0of what they would achieve absent any current discrimination. And it is extremely doubtful that the Court is going to sanction race-conscious measures assuring such a share to minority firms simply because race-neutral measures to achieve such a result have been considered and found wanting. It is equally doubtful that the Court will approve measure that tends to achieve such a result simply because the measure is a flexible one. Nevertheless, citing *Croson*, the appeals courts have placed much weight on such factors in their generally lenient review of local set-aside programs that almost certainly could not win O'Connor's crucial vote.

In considerable part due to the lack of relevant guidance in O'Connor's *Croson* opinion, the lower courts' permissive application of strict scrutiny to local set-asides suggest that, at least in the short run, *Adarand* need hardly be the death knell of federally mandated set-asides. The long run is likely to be a different matter, however, both with regard to such measures imposed at the state and local level and with regard to federally imposed measures.

For if the issues are ever clearly framed before the five justices forming the *Adarand* majority, not only are they going to be considerably more skeptical of rudimentary disparity studies than the appeals courts have been, but they are almost certain to find that even legitimate disparity studies cannot justify measures that call for minority firms to receive a much larger share of

opportunities than they would receive on the basis of fair treatment in the present.

The Will of Congress

There is a good chance, of course, that Congress, which seems no less hostile to affirmative action than does the *Adarand* majority, will abolish all contracting and licensing preferences. But even if Congress does not go that far, it can safely be assumed that in those cases where Congress has not yet made appropriate findings, it will not do so now. Thus, even though *Adarand* suggests that congressional findings of discrimination might be accorded more deference than those of state and local governments, as a practical matter federally mandated set-asides may face even bleaker prospects than state and local measures.

In terms of total impact on the opportunities of minorities and women, however, all the various federal preferences in contracting and licensing directly called into question by *Adarand* are together probably not as significant as the Executive Order No. 11246 program of the Department of Labor. The program requires federal contractors to set "goals and timetables" to correct "underutilization" of minorities and women in their work forces. In one respect, the program could be the most defensible federal measure, if the goals and timetables actually implemented are perceived to be based on legitimate findings of discrimination by a particular employer. But the department has usually failed to articulate, with either clarity or candor, the bases for and the precise nature of such measures, most

recently maintaining that they do not involve preferences at all. So it is difficult to guess just how such measures would fare if they were challenged in the courts.

As with contracting preferences, however, given the current Congress, it is quite possible that the Executive Order program will be abolished or much altered before a court ever has to consider the effect of *Adarand*. Varied actions of Congress may indeed moot most of the legal implications of *Adarand* decision.