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**LEGAL ISSUE SUMMARY:**

# AFFIRMATIVE ACTION AND THE COURTS

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February 1996 -- CRB-LIS-96-001

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***INTRODUCTION***

*For some time, affirmative action has been debated in the political arena. Recent United States Supreme Court decisions, however, have prompted some commentators to suggest that the future of affirmative action will be determined by the courts, not the legislatures. That future, according to one view, is bleak.[No. 1] The Supreme Court has now made it clear that any government program, federal, state or local, that creates a racial preference is unconstitutional, unless the particular preference "serves a compelling governmental interest, and is narrowly tailored to further that interest." Because this test, known as "strict scrutiny," is notoriously difficult to meet, it is possible that the courts will take a leading role in cutting back on the scope of existing affirmative action plans.*

*On the other hand, Justice O'Connor, the author of the Court's most recent decision on affirmative action, took time in her opinion to reassure advocates for affirmative action that strict scrutiny is not intended to be "strict in theory but fatal in fact":*

*The unhappy persistence of both the practice and the lingering effects of racial*

*discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it. [No. 2]*

*This language, along with early indications that the judiciary will be receptive to new methodologies that carefully document the existence and lingering effects of discrimination, may mean that the courts will play only a modest role in the future of affirmative action.*

*Yet a third perspective on the judiciary's role is credited to Lawrence J. Siskind, who argues that courts may actually be the biggest obstacle to ending affirmative action. Many affirmative action plans are, after all, the result of litigation, and courts and lawyers may have a vested interest in protecting the settlements, consent decrees, and injunctions they have crafted. "There is a powerful professional class whose livelihoods depend upon preserving and protecting affirmative action. These lawyers, experts and consultants are at home in the courts, and they will use the familiar levers of judicial power to thwart or at least delay their opponents."[No. 3]*

*The common ground between these competing views is the belief that litigation may be just as important as political action in deciding affirmative action's future. To aid in understanding the role the courts are likely to play, this paper examines three issues:*

*What types of federal, state and local affirmative action plans are affected by Adarand and Croson?*

*Can affirmative action plans survive judicial "strict scrutiny"?*

*How have federal, state and local affirmative action plans fared under Croson and Adarand so far?*

***What types of Federal, State, and Local Affirmative Action Plans are Subject to Strict Scrutiny?***

*All forms of governmental action, including statutes, regulations, informal practices, consent decrees and injunctions, are subject to strict scrutiny if they confer benefits or impose burdens based on a person's race.*

*Affirmative action comes in a bewildering variety of plans, programs and prohibitions. A recent survey by the California Research Bureau and the Public Law Research Institute revealed more than two dozen California statutes and volumes of administrative regulations that might be characterized as calling for "affirmative action" to end race- or gender-based discrimination. In addition to these statutes, state agencies and local governments have the authority to engage in affirmative action on their own, and many have. Finally, many state and local agencies, and many private employers, have been ordered by courts to adopt affirmative action plans, or have entered into consent decrees requiring affirmative action as a result of litigation.*

*After the Supreme Court's decision in Adarand Constructors, Inc. v. Pena, [No. 4] it is clear that any action by a federal, state, or local government that confers a benefit or imposes a burden on a person because of his or her race is subject to strict scrutiny. It does not matter whether the plan in question was enacted by the legislature, adopted by executive or agency action, or prompted by litigation and approved by a court. All governmental actions, including statutes, regulations, injunctions and consent decrees, that afford preferential treatment on the basis of race must be narrowly tailored to achieve a compelling governmental interest that no reasonable alternative means could achieve.*

*Most of this had already been established by the Court's decision in Richmond v. J.A. Croson, [No. 5] which examined a plan the city of Richmond, Virginia had adopted to aid minority contractors. The Court's most recent decision, Adarand Constructors v. Pena,[No. 6] simply held that programs mandated by federal law are subject to the same strict scrutiny the Court applied to the local program in Croson. For example, the federal Surface Transportation Assistance Act required states to spend 10% of the funds they received with disadvantaged business enterprises. After Adarand, a program started by a state to comply with this requirement would have to meet strict scrutiny. One of the many questions Adarand leaves open is whether it will be enough for Congress to determine for the country as a whole that such programs are necessary to eliminate the effect of past discrimination, or whether each state's program will have to be evaluated individually. [No. 7]*

*Only Programs That Create Suspect, Racial Classifications Are Affected By Adarand and Croson*

*Affirmative action reflects an awareness that simply prohibiting discrimination may not end it or its effects. Thus, governments may need to act "affirmatively" if they are committed to ending racial discrimination. Not all forms of affirmative action, understood in this broader sense, are constitutionally suspect. Indeed, the California Research Bureau's recent survey revealed that many of California's affirmative action laws simply prohibit discrimination, and encourage those involved to take positive steps toward reaching the goal of equal opportunity.*

*On the other hand, while only a handful of California's statutes and regulations impose specific, numerical requirements for minority participation, a program need not be called a quota in order to be subject to strict scrutiny. Whether a program is called a quota, a set-*

*aside, a goal, or a target, if an individual can show that he or she was denied a benefit because of his or her race, the government's actions may be subject to strict scrutiny. [No. 8]*

*Because strict scrutiny is a very difficult standard to meet, Adarand and Croson create a strong incentive for state and local governments to move away from programs that set specific numerical requirements for minority participation, and toward programs that rely on other methods of fostering equal opportunity, such as recruitment and training. A wide variety of programs are being developed, as state and local governments struggle to come to grips with the courts' mandates. Some of these programs are motivated by a desire to diversify the workplace or to remedy discrimination, but do not create racial preferences. Whether such programs are subject to the same strict scrutiny as programs that clearly confer a benefit on the basis of race, is an open legal question.*

*For example, in a recent Philadelphia case, a teacher challenged a board of education rule that limited the ability of teachers to transfer to a school in which their race was already overrepresented. The court upheld the transfer policy. According to the court, the policy was race "conscious," but it did not create a race "preference." The policy limited the transfer rights of minority and nonminority teachers alike. The court held that the policy was not subject to strict scrutiny, but was justified because it furthered the important state goal of providing role models for children of all races in each public school. [No. 9]*

*Programs that Create a Preference for Women, the Disabled, or Veterans May Be Subject to a Lesser Degree of Scrutiny*

*Racial preferences are subject to strict scrutiny because the equal protection clause of the Fourteenth Amendment to the United States Constitution was aimed specifically at eliminating racial discrimination. By contrast, government actions that discriminate on the basis of gender or handicap are subject to a lesser standard of strict scrutiny.*

*Gender preferences are generally subject to what the courts call "intermediate scrutiny." To be constitutional, actions that treat people differently based on their gender must be substantially related to an important governmental objective. Thus, the test for gender classifications is easier to meet than strict scrutiny. With respect to gender, the interest that government asserts need not be compelling, but merely important. The means chosen to carry out the government's interest does not need be the most narrowly tailored, but simply substantially related to the goal. Furthermore, preferences given to groups like the disabled or veterans are subject to even less scrutiny, and can be upheld if these preferences/policies pursue a legitimate end.*

*As a result of these multiple standards, plans that give preferences to different groups may meet different fates in the courts. It is therefore possible that a program giving preferential treatment to racial minorities, women, veterans, and the disabled might be*

*invalid for minorities, but valid for women, veterans, and the disabled. [No. 10]*

***Can Affirmative Action Plans Survive Judicial "Strict Scrutiny"?***

*Strict scrutiny proceeds in two steps. First, the courts ask if the government's actions were aimed at advancing a "compelling governmental interest." Second, they ask if the government's method was "narrowly tailored" to the end pursued.*

*A "Compelling Governmental Interest": Past Discrimination and the Numbers Game*

*One of the main questions remaining after Adarand and Croson is: what governmental interests are compelling enough to justify race-based actions? The Supreme Court has clearly said that compelling interests are: preventing future discrimination; unlawful discrimination; and eradicating the lingering effects of past unlawful discrimination. [No. 11] In the context of higher education, several individual Justices have suggested that diverse and representative student bodies may serve a compelling interest.*

*On the other hand, achieving racial balance in government employment or government contracting is neither a compelling interest nor is ending the effects of general, societal discrimination. In government employment or public contracting, an affirmative action plan that relies on racial preferences must be directed at rectifying the effects of unlawful discrimination by the government itself within a specific program, or where the government has become a "passive participant" in a system of racial exclusion. [No. 12]*

*Thus, if an affirmative action plan is considered as unconstitutional [No. 13] the first hurdle for the plan's proponents is to show that there is "a strong basis of evidence" [No. 14] for the conclusion and that the plan is directed at curing identifiable discrimination. It is not necessary that there be a judicial finding of discrimination, so long as credible evidence of discrimination exists.*

*Blatant discrimination is the best type of evidence. Failing that, circumstantial evidence may do. A glaring disparity between the number of minorities likely to participate in a program, and the number who actually do, may be compelling evidence that there has been past discrimination. Under the right circumstances, evidence of an imbalance in minority participation that is statistically significant can provide sufficient evidence of discrimination to justify corrective action, even race-based corrective action.*

*The Croson case established that it was not enough to show an imbalance between the percentage of minority people in a program or a workforce and the percentage of minority people in the population generally. What must be shown is an imbalance between the number of minority people "qualified" for a kind of job or contract, and the number who are hired for those jobs or contracts.*

*In Croson the Court found that a disparity between the number of minority contractors employed by the city and the number of minorities who lived in the city did not support the city's claim that it had acted to eliminate discrimination. The city needed to prove discrimination by showing a disparity between the number of minorities who received contracts and the number of minority contractors qualified to receive them. Statistics that demonstrate a disparity between the number of minorities qualified for some benefit and those that actually receive the benefit can be "strong evidence" of discrimination. Such evidence may justify affirmative action efforts. [No. 15] When such statistical evidence is bolstered by anecdotal evidence of discrimination, or by evidence of specific discrimination (for example, the use of tests that have not been validated to predict job performance), the case for affirmative action is even stronger.*

*Narrowly Tailored Remedies: Examining the Means to an End*

*Once it has been established that there is a strong basis in the evidence to believe that there has been discrimination, there is a compelling interest to eliminate it and its effects. The means chosen, however, must be narrowly tailored to achieve that objective. To determine if a plan is narrowly tailored, courts look to several factors, including:*

*the necessity for the race-based relief and the efficacy of alternative remedies;*

*the flexibility and duration of the relief, including the availability of waiver provisions;*

*the relationship of the numerical goals to the relevant labor market; and*

*the impact of the relief on the rights of third parties. [No. 16]*

*The necessity for race-based relief and the efficacy of alternative remedies: Courts may be reluctant to accept a race-based remedy if other, race neutral means of achieving equal opportunity have not been explored. [No. 17] If no effective, race-neutral alternatives are available, race-based relief may be an option. [No. 18]*

*The flexibility and duration of the relief, including the availability of waiver provisions: The only legitimate goal for race-based relief in public employment or public contracting is eliminating discrimination and its effects. A plan that: requires an inflexible percentage of minority representation; lasts for an indefinite period of time; or appears to be aimed at racial balancing or parity rather than eliminating discrimination has been defined as not narrowly tailored.*

*The relationship of the numerical goals to the relevant labor market: The purpose of a race-based affirmative action plan must be to eliminate discrimination. A plan's goal must be to allow minorities to reach the level of representation that would have existed in the absence of discrimination. Therefore, for a plan to be narrowly tailored, its numerical*

*goals for hiring or contracting should be pegged to the number of minorities interested in and qualified for the particular position. If the position legitimately requires special qualifications, the relevant number of minorities are those who possess the necessary skills, and not the number of minorities in the general labor force or general population.*

*The impact of the relief on the rights of third parties: Where discrimination has deprived minorities of equal opportunities, the Supreme Court has recognized that third parties can be expected to bear some of the remedy's burden. [No. 19] At the same time, a remedy should not unduly disturb third parties' settled expectations. As an example, an affirmative action plan that creates racial preferences in hiring is more likely to be narrowly tailored than one that creates preferences for promotions or one that affects seniority.*

***How have Federal, State and Local Affirmative Action Plans Fared Under Croson and Adarand?***

*Based on Adarand and Croson, Professor Paul Gerwitz has asserted that federal and state courts are ". . . poised to restrict affirmative action regardless of what the politicians do." [No. 20] The Supreme Court seemed to send that signal when, along with its decision in Adarand, it held two cases striking down affirmative action plans in contracting and refused to review a federal appeals court decision striking down a race-based college scholarship. [No. 21]*

*Certainly, many municipalities reacted as if these cases sounded affirmative action's death knell, at least in the area of public contracts. As a result of the Croson decision, 50 of the 200 state and local affirmative-action programs in place at the time were voluntarily eliminated, and more than 12 programs were eliminated because of reverse-discrimination suits. [No. 22]*

*Other cities, however, responded differently to Croson. About 100 cities modified their programs by commissioning "disparity studies," [No. 23] in an attempt to establish that their affirmative action plans are narrowly tailored to achieve a compelling interest in eliminating discrimination and its effects. Michael Gebhardt, in his article "Documenting Discrimination," argues that just as state and local affirmative action programs were able to survive the strict scrutiny standard of Croson, federal affirmative-action programs should be able to survive the strict scrutiny standard of Adarand. According to Gebhardt, when Croson established that strict scrutiny applied, and required states to justify their affirmative-action programs with detailed proof of discrimination, a veritable "cottage industry" arose to provide the necessary evidence. "Researchers retained by counties, municipalities and their agencies have produced more than 100 studies detailing statistical disparities between the amount of work awarded to minority businesses and the number of such businesses available to do the work." [No. 24]*

*Advocates for federal affirmative action programs want to follow this lead. Assistant Attorney General Deval Patrick, President Clinton's top civil rights appointee and most enthusiastic advocate for preferences, expressed his determination when he commented that Adarand in terms of maintaining affirmative action efforts, "means more work for the government, but it can be done." Thus, in a memorandum advising federal attorneys how*

*to review their affirmative action programs in light of Adarand, the Justice Department seems optimistic that some forms of affirmative action can survive strict scrutiny.*

*The Justice Department memorandum, however, suggests that it may actually be easier for the federal government to meet the standards of Croson and Adarand than it will be for state and local governments. "Unlike state and local programs, Congress may be able to rely on national findings of discrimination to justify remedial racial and ethnic classifications; it may not have to base such measures on evidence of discrimination in every geographic locale or sector of the economy. On the other hand, as with state and local governments under Croson, Congress may not predicate race-based remedial measures on generalized, historical societal discrimination." [No. 25]*

*State and local programs are vigorously defended when they have political support. "After the 1989 ruling, liberal, and in many cases, predominantly black, local political establishments in Richmond, Virginia, and elsewhere were adamant about finding a way to continue some form of affirmative action." [No. 26] Where the political will is not inclined to support affirmative action, such efforts are unlikely. For example, in September 1995, Governor Pete Wilson vetoed a bill sponsored by Assembly Member Barbara Lee, D-Oakland, that would have commissioned a statewide Croson study to support statutory participation goals for minorities, women and disabled person-owned business enterprise. This means that state agencies adhering to statutory participation goals like the Department of General Services, Department of Corrections, and CalTrans are vulnerable to attack in the courts. [No. 27]*

*A Review of Recent Cases*

*Some interesting patterns emerge when reviewing recent cases. Since Croson, most litigated cases have involved either preferences in the award of public contracts, or preferences in public employment (most often, police and fire departments). As Table 1 shows, affirmative action plans have fared well in public employment, but not in public contracting. In the area of public employment, affirmative action plans have been found constitutional in seventeen of the thirty-one litigated cases. In the area of public contracting, minority preferences have been found constitutional in only four of thirteen litigated cases.*

*TABLE 1. Judicial Action in Public Contracting / Set-Asides and Employment Hiring or Promotion*

| Judicial Action | Type of Plan | | |
|---|---|---|---|
| | Public Contracting/ Set-aside | Public Employment: Hiring or Promotion | Other |

| | | | |
|---|---|---|---|
| Plan Upheld | 4 | 17 | 3 |
| Plan Invalidated | 9 | 14 | 3 |
| No Decision | 6 | 6 | 3 |

*A number of factors might account for this pattern. For one, most of the public contracting cases were decided in the immediate wake of Croson, and involved plans drawn up under preexisting law. Thus, the statistical studies offered in their support were relatively crude, and tended to use the general minority population to establish a disparity in treatment -- a practice Croson specifically rejected. One might expect that as new disparity studies are done, and as plans are developed that incorporate flexible goals instead of rigid percentages, their defenders may have greater success. [No. 28]*

*In employment cases, by contrast, courts and lawyers have worked with "disparate impact" statistics for many years. Under Title VII, which prohibits discrimination in private employment, it can be unlawful discrimination to use a test to decide whom to hire or promote. If minorities perform substantially worse than nonminorities on the test, and the test is not shown to be related to job performance, then the test may be considered discriminatory. Courts have gained experience in the public contracting arena in determining when a statistical imbalance in the number of minorities in the workplace suggests unlawful discrimination, and when it does not. Thus, it may be easier to establish that minority underrepresentation in the workplace is the result of unlawful discrimination than it is to show that an imbalance in public contracting results from discrimination.*

*It may also be easier to narrowly tailor a race-based remedy in employment cases. Striving for fairness, public employers tend to rely heavily on tests to determine eligibility for hiring or promotion. Even a cursory reading of the cases, however, demonstrates that many of these tests have never been validated. If a test has not been validated, the employer cannot show that an employee who scores higher on the test will truly perform better on the job. Thus, it may be appropriate to characterize a minority candidate for a job or promotion as "equally qualified," even if he or she has scored lower on the exam. Selecting a minority candidate among a number of qualified candidates is seen as a narrowly tailored remedy, because it does not involve giving someone something they do not deserve, and it does not deprive anyone of something to which they had an established right. [No. 29] By contrast, in public contracting, someone will always be the lowest bidder, and pursuing a minority preference will frequently involve depriving an innocent third party of something he or she has otherwise earned.*

*Judicial Actions in Public Employment*

*Finally, as Table 2 shows, there is a difference in how judges treat employment cases resolved by consent decrees, and affirmative action plans that are unilaterally adopted by state or local governments. Plans that are adopted pursuant to a court order or consent decree have a much greater chance of being found constitutional. When a case is litigated, substantial effort goes into proving that there has been discrimination. When the decree is challenged as unconstitutional, a record can be relied upon to establish the*

*necessary compelling state interest. Appellate courts are likely to defer to the judgment of the lower court judge if that judge has approved a consent decree as narrowly tailored.*

*TABLE 2. Judicial Actions Regarding Affirmative Action in*

*Public Employment*

| Judicial Action | Employment Cases: Type of Plan | | |
|---|---|---|---|
| | Consent decree | Voluntary plan | Court-ordered plan |
| Plan Upheld | 14 | 1 | 2 |
| Plan Invalidated | 7 | 7 | 0 |
| No Decision | 2 | 4 | 0 |

***Conclusion***

*The decisions in Croson and Adarand allow both advocates for and against affirmative action to make their case. Ultimately, however, the courts may play a major role in dismantling or defending affirmative action, depending to a large extent on how "strict scrutiny" is defined and applied. The decisions so far suggest that it is possible to design an affirmative action plan that passes constitutional muster, at least in the opinion of the lower courts. Whether the Supreme Court agrees with the lower courts will be decided in time.*

*So far as voluntary plans are concerned, another factor also comes into play: whether public agencies will rise to the defense of their plans, or abandon them. In either case, there will be repercussions. For example, in Richmond, Virginia, the percentage of public contracts going to minority owned firms dropped by about 25% when the city's affirmative action plan was declared unconstitutional. [No. 30]*

*Furthermore, those with a stake in affirmative action, who are unsuccessful in the political arena, will likely return to the courts where they may find it difficult to prove intentional discrimination. Yet, affirmative action plans shaped in response to litigation will have a greater chance of withstanding a constitutional challenge than those that are legislatively crafted, unless the legislature creates a very careful record. If political solutions to the problem of discrimination are abandoned, those seeking relief from discrimination are likely to turn to the courts, where the legality of such plans will be decided.*

***APPENDIX***

*Recent Court Decisions on Affirmative Action Programs*

***Part One: A Brief History of Affirmative Action in the United States Supreme Court***

*1978 Regents of the University of California v. Bakke. [No. 31] A divided U.S. Supreme Court found the practice of reserving a set number of spaces in the medical school's entering class for minorities to be illegal. Four Justices found that the practice violated a federal statute prohibiting discrimination -- Title VI of the 1964 Civil Rights Act -- and therefore found it unnecessary to decide whether the school's admissions process violated the constitution.*

*Four Justices thought the practice was permissible under the statute, and that it was constitutional. According to those four, although "strict scrutiny" applies to racial classifications, overcoming substantial, chronic underrepresentation of minorities in the medical profession is an important enough goal to permit the remedial use of race.*

*Justice Powell provided the fifth, and deciding, vote. According to Justice Powell, all racial classifications created by state or local governments are suspect, and they are unconstitutional unless they pass "strict scrutiny"; that is, unless they are narrowly tailored to achieve a compelling governmental purpose. Justice Powell thought that the University's purposes for adopting the challenged plan -- remedying past discrimination, and diversifying the student body -- were compelling. The plan the University adopted, however, was not narrowly tailored to achieve these ends, so Justice Powell found it unconstitutional. Therefore, Justice Powell, joined by the four Justices who believed the program violated Title VI, affirmed the lower court's order that the plaintiff be admitted to medical school.*

*At the same time, Justice Powell believed the lower court erred in prohibiting the University from considering race as a factor in the admissions process. The four Justices who believed the University's policy was legal agreed with Justice Powell on this point, and so the lower court's order prohibiting the University from ever considering race as a factor in admissions was reversed.*

*1980 Fullilove v. Klutznick. [No. 32] The U.S. Supreme Court upheld a federal statute requiring a 10% set aside for minority owned businesses. Four Justices argued that the program should be tested under strict scrutiny. One of those Justices thought the program would pass strict scrutiny, while the others thought it would fail. Three Justices argued that remedial, race-based measures need only be substantially related to an important governmental objective. Three Justices refused to adopt either test.*

*1986 Wygant v. Jackson Board of Education [No. 33] The U.S. Supreme Court concluded that a school board could not justify using race to make layoffs as necessary to provide minority role models and alleviate the effects of past discrimination. Four Justices agreed*

*that such racial classifications must be subjected to strict scrutiny.*

*1989 Richmond v. Croson [No. 34] In a 5-4 decision, the U.S. Supreme Court applied strict scrutiny to a set-aside program operated by the city of Richmond that allocated a set percentage of city contracts to minority and disadvantaged business enterprises, and found the program to be unconstitutional. For the first time, a majority of the Court agreed that state and local laws creating even benign racial preferences must be subjected to strict scrutiny.*

*1990 Metro Broadcasting, Inc. V. FCC. [No. 35] In a 5-4 decision, the U.S. Supreme Court upheld a race-based preference in granting broadcast licenses. According to the majority, while racial preferences created by state law must meet the test of strict scrutiny, benign race-based preferences that are enacted by Congress need not satisfy strict scrutiny, but must simply be substantially related to the achievement of important governmental objectives.*

*1995 Adarand Constructors, Inc. v. Pena, Secretary of Transportation. [No. 36] A contractor challenged a federal program that gave prime contractors dealing with federal agencies financial incentives to hire subcontractors controlled by socially and economically disadvantaged individuals. Members of racial minorities were presumed to be socially and economically disadvantaged under this program.*

*The U.S. Supreme Court, in 5-4 decision, ruled that federal laws that grant a preference based on race or ethnicity are unconstitutional unless they are narrowly tailored to achieve a compelling governmental interest. The Court sent the case back to the trial court to evaluate whether the program's presumption of disadvantage met this standard of "strict scrutiny." The Court's decision to apply the same standard to local, state and federal programs overruled the Court's 1990 decision in Metropolitan Broadcasting v. FCC.*

***Part Two: How Affirmative Action Plans Fare Under Strict Scrutiny***

*This part of the appendix lists the judicial opinions, since Adarand and Croson, in which various types of affirmative action plans have been subjected to strict scrutiny. The cases are grouped according to the federal circuit in which they were litigated. The left hand column gives the date of the decision, describes the type of plan, and indicates whether the plan was* ***upheld, invalidated****, or whether there was* ***no decision*** *in the case. The cases are described in the right hand column.*

First Circuit

8/15/95

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| Public contracting, voluntary plan, no decision. | Converse Construction Co. v. Massachusetts Bay Transportation Authority [No. 37] Contractor who challenged minority business enterprise set aside did not show a likelihood of success on the merits because he did not argue that the federal program was unconstitutional, a question the Supreme Court expressly reserved in *Adarand*. Thus, a preliminary injunction was denied. |
| 7/6/92<br>Employment, consent decree upheld. | *Mackin v City of Boston*. [No. 38] Thirty-five white male applicants for positions in the fire department sued the city claiming race discrimination. The court of appeal held that when the consent decree that created preferences for minority firefighters was entered, fifteen years ago, it was narrowly tailored to eliminate underrepresentation that had been caused by discrimination. The plaintiffs challenging the decree failed to show any changed circumstances that would justify modifying the decree. |
| 12/23/91<br>Employment, consent decree upheld. | *Stuart v. Roache*. [No. 39] White police officers challenged race conscious promotions made pursuant to a consent decree between the police department and an association of black officers. The court of appeals held that (1) the decree served compelling state interest in remedying past discrimination, and (2) the decree was sufficiently narrowly tailored. |
| 7/22/91<br>Employment, voluntary plan invalid. | *Bertoncini v. City of Providence*. [No. 40] Applicants for a fire fighter training course who were not selected to attend the course's first section sued to enjoin city and fire department from beginning the training course and to declare the fire department's efforts to establish or maintain a quota system for women, blacks or other minority recruits in its hiring process unconstitutional. The district court held that the one applicant who showed he would have otherwise been selected for the training course had established that his action would probably succeed, and preliminarily enjoined the plan, pending a trial. A program that sets a particular number of positions aside for minorities is not narrowly tailored to remedy past discrimination. |
| 10/4/89<br>Housing, consent decree upheld. | *N.A.A.C.P. v. Boston Housing Authority* [No. 41] Equal housing consent decree approved by the trial court, applying the *Croson,* strict scrutiny standard. |
| Second Circuit | |
| 12/2/92<br>Public | Harrison & Burrowes Bridge Constructors v. Cuomo. [No. 42] 1) Federal set-aside for minority and women owned businesses under Surface Transportation Act was found constitutional in *Fullilove,* and, despite *Croson*, a state can rely on federal finding of past discrimination decision in contracting without making its own findings. (Note that *Adarand* |

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| contracting, voluntary plan, upheld. | specifically reserved the question of whether federal set-aside programs can pass strict scrutiny); 2) Challenge to state law set-aside was moot, because state had changed regulations to require agency to make specific findings of discrimination before requiring contractors to make good faith efforts to hire MBEs. |
| 3/10/92<br><br>Employment,<br><br>consent decree upheld. | *Paganucci v. City of New York*. [No. 43] Based on statistical evidence that the exam for promotion to police sergeant had a disparate impact on minorities, the City had a strong basis in evidence to believe that of minorities' lower test scores were the result of discrimination. Therefore, a consent decree that promoted minority officers who had taken the non-validated exam was narrowly tailored to cure the past violation, and did not violate the equal protection rights of white officers who scored higher on the exam but were not promoted. |
| 9/5/89<br><br>Employment,<br><br>court-ordered plan upheld. | *United States v. City of Buffalo*. [No. 44] In 1979, the court found the Buffalo fire and police departments liable for discriminatory hiring practices, and ordered them to hire 50% qualified minorities until minority representation in these departments reflected minority representation in the general workforce. That goal having been reached, the court lifted that requirement. Because, however, the departments still had not adopted validated examination procedures, the department was ordered to continue to hire and promote minorities in proportion to the number of minorities who apply for positions. Until valid examination procedures are in place, these hiring goals are necessary to insure that the effects of past discrimination are eliminated and discrimination does not recur. |

## Third Circuit

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| 9/21/95<br><br>Student assignment,<br><br>court ordered plan upheld. | Martin v. School District of Philadelphia. [No. 45] Student assignment plan that only permitted students to transfer from schools where their race or ethnic group was overrepresented to schools where their race or ethnic group was underrepresented was constitutional. The plan was aimed at ending unlawful segregation, which is a compelling interest. It was narrowly tailored in that it did not place a substantial burden on students, who were assured in any event that they would not be involuntarily transferred or denied an adequate education. In passing, the court commented that while the plan was race conscious, it affected all races equally and did not create a preference for members of a particular race. Therefore, the court suggested, intermediate scrutiny might be the appropriate legal standard. |
| 8/29/95<br><br>Public contracting, voluntary, no decision. | *Philadelphia Recycling & Transfer Station, Inc. v. City of Philadelphia.* [No. 46] The bidder who won the contract was allowed to intervene in the lawsuit challenging the set-aside city ordinance's application to sanitation contracts. The ordinance sets aside 15% of city contracts for minority business enterprises. The statute was declared unconstitutional as applied to the construction industry in *Contractor's Association of East Philadelphia v. City of Philadelphia*, below, and a temporary restraining order issued in this case to block its application to sanitation |

| | |
|---|---|
| | contracts. |
| 1/11/95<br><br>Public contracting, voluntary plan invalid. | *Contractor's Association of East Philadelphia v. City of Philadelphia*. [No. 47] The city's disparity studies were insufficient to establish that underrepresentation of minority business enterprises in city construction contracts was the result of discrimination. Therefore, the city lacked any compelling interest to justify setting aside 15% of city contracts for disadvantaged, minority business enterprises. |
| 9/10/95<br><br>Employment, voluntary plan, no decision.<br><br>(Plan invalid on statutory grounds). | Taxman v. Piscataway. [No. 48] As between two teachers with equal seniority, the school board chose to lay off a white teacher and retain an African American teacher in order to promote racial diversity and provide a role model for minority students. The court held that this violated Title VII, which only permits racial preferences in employment if they are adopted in order to remedy a manifest imbalance in the workforce. Because the district conceded that minorities were not underrepresented in the workforce, its actions violated Title VII. Having disposed of the case on statutory grounds, the court did not reach the issue of whether the board also violated the Constitution. |
| 9/17/92<br><br>Employment, voluntary plan invalid. | *Quirin v. City of Pittsburgh.* [No. 49] Male applicant denied employment as fire fighter brought civil rights action against city. Applying strict scrutiny, the court held that city's hiring policy for female fire fighters violated Title VII and the equal protection clause. The city's hiring policy was a "quota," and as such was not narrowly tailored to remedy past discrimination. (The court's use of strict scrutiny is out of line with most courts, that would use "intermediate scrutiny.") |
| 4/15/91<br><br>Public contracting, voluntary plan invalid. | General Building Contractors Assn. v. City of Philadelphia [No. 50] Philadelphia Convention Center Authority (PCAA) was authorized to develop its own affirmative action requirements. As a means of assuring widespread minority participation, not eliminating past discrimination, PCAA required contractors to use "best efforts" to assure "meaningful and substantial participation." Target goals were established which, if met, established a presumption that best efforts had been used to, or contractors could show that while they had been unable to meet the targets, they had in fact used their "best efforts." The court held that without a showing of past discrimination, and without having exhausted racially neutral means, the use of target goals in practice amounted to a quota, and this presented an unconstitutional threat of irreparable injury to the contractors challenging the practice. The threat, however, was not imminent, so the court refused to enjoin the practice. |
| 10/16/90<br><br>Employment, consent | Freeman v. City of Philadelphia [No. 51] Plaintiffs challenged the entry exam for police training programs, arguing it was not validated as job related and it had a disparate impact on minorities. The court entered a consent decree providing that minorities would be appointed in proportion to the number of minorities taking the exam, even if they had lower scores than other candidates, until the exam was validated. The |

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| | decree<br><br>no decision. | court held that the consent decree was reasonable under Title VII, because it responded to a manifest imbalance in the workplace and did not unnecessarily trammel the rights of nonminority recruits. The court did not consider whether the decree satisfied strict scrutiny. |
| | 11/29/89<br><br>Public contracting,<br><br>voluntary plan invalid. | *Main Line Paving Co. v. Bd. of Education, School Dist. of Philadelphia*. [No. 52] School board policy that set aside 15% of contracts for minority business enterprises and 10% for women-owned business enterprises was unconstitutional, as evidence did not support finding that set-aside was aimed at providing remedy for specific victims of discrimination and race neutral means had not been explored. |

## Fourth Circuit

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| | 10/11/95<br><br>Employment, voluntary plan upheld. | *Alexander v. Prince George's County*. [No. 53] The disparity between the number of minorities and women in the general labor force and the number hired as firefighters, combined with anecdotal evidence of discrimination, provides a substantial basis to believe that underrepresentation is the result of discrimination, and a compelling interest in eliminating it. Using statistical methods to group applicants whose test scores and interviews indicate that they are equally qualified into "bands," and then giving a preference to minorities within the band in order to meet a flexible goal aimed at proportionate representation is a narrowly tailored means of eliminating discrimination's effects. |
| | 8/16/94<br><br>Employment, consent decree invalid. | North State Law Enforcement Officers Association v. Charlotte-Mecklenburg Police Dept [No. 54] A consent decree that was entered without any evidence of discrimination, and that required a fixed goal of 20% minority representation was neither aimed at a compelling state interest nor narrowly tailored, since percentage was unrelated to the percentage of minorities in the qualified labor pool or any other legitimate goal. |
| | 5/10/94<br><br>Scholarship program, voluntary plan invalid. | *Podberesky v. Kirwan.* [No. 55] Scholarship program for which only African American students are eligible is unconstitutional because it was not narrowly tailored to eliminate the present effects of past discrimination. |
| | 10/27/93<br><br>Employment, voluntary plan invalid. | *Hayes v. North State Law Enforcement Officers Association* [No. 56] The police department's policy, which required affirmative action until 20% of forces' sergeants were African American, violated equal protection. The department did not provide evidence that racial diversity on the force would in fact make the force more effective, which was the stated goal of the policy. Even if it had, and if making the force effective were a compelling state interest, the remedy was not narrowly tailored because less drastic, racially neutral alternatives were never considered. |
| | 5/6/93 | *Maryland Troopers Association v. Evans*. [No. 57] The difference |

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| Employment, consent decree invalid. | between the number of minority state troopers and the number of minorities in the qualified labor pool was not so large as to suggest recent discrimination or lingering effects of past discrimination. Therefore, the state had no compelling interest to justify a promotional policy that gave racial preferences. |
| 11/25/91<br><br>Public contracting, voluntary plan invalid. | *Concrete General, Inc. v. Washington Suburban Sanitary Commission*. [No. 58] Minority business enterprise set-aside program was unconstitutional because, as in *Croson*, the Commission did not rely on evidence of past discrimination in developing the plan, and the plan was too broad, benefiting businesses owned by members of ethnic groups and from geographical areas that experienced no discrimination. |

## Fifth Circuit

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| 7/7/95<br><br>Public commissions, voluntary plan invalid. | *Mallory v. Harkness*. [No. 59] A statute that required one third of appointments to judicial nominating commission to be racial or ethnic minorities was considered unconstitutional without any showing of past discrimination in judicial appointments. Even if such a history were documented, a rigid quota would not be necessary to eliminate past discrimination effects, and therefore would not be narrowly tailored. |
| 4/20/95<br><br>Employment, voluntary plan invalid. | *Dallas Fire Fighters Association v. City of Dallas, Texas*. [No. 60] In response to a suit by black firefighters, the fire department instituted an affirmative action plan that included "skip promotions," which promoted minority candidates over others with higher scores on a validated examination. (The related case, *Black Firefighters Assoc. v. Dallas*, is described below.) The court held that the "skip promotions" plan was not narrowly tailored to eliminate the effects of past discrimination. The plan involved a single, broad percentage goal unrelated to the number of qualified applicants in the appropriate feeder pool, and disturbed nonminorities settled expectations in seniority. Further, other alternatives had shown potential for success. |
| 11/10/94<br><br>Employment, consent decree upheld. | *Edwards v. City of Houston.* [No. 61] Minority police officers produced evidence that the police department's promotionalexamination had a disparate impact on minorities and was not job related. It created a plan that promoted minority officers who had been adversely affected by an exam, without setting any numerical quotas for promotion; and it eliminated discriminatory questions that were narrowly tailored to eliminate the examination's discriminatory effects. |
| 8/19/94 | Hopwood v. State of Texas. [No. 62] Although state law school had a compelling interest in eliminating the effects of past discrimination in the law school and in the system of higher education generally, and in |

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| School admissions, voluntary plan invalid. | maintaining a diverse student body, an admission plan that gave preference to minority applicants without ever comparing the qualifications of individual minority applicants to individual nonminority applicants was not narrowly tailored to achieve the state's compelling interest. While race can be treated as a "plus" in considering a candidate's record, equal protection requires a comparative evaluation among all individual applicants in determining who is best qualified. |
| 6/18/94<br><br>Employment, consent decree invalid. | Black Fire Fighters Assoc. v. City of Dallas. [No. 63] City and black fire fighters' association sought approval of consent decree in employment discrimination action, and fire fighters' association intervened in opposition to settlement proposal. The court held that the consent decree, which used "skip promotions" to promote blacks over non-blacks who scored higher on promotion exams, violated the equal protection clause. |
| Sixth Circuit | |
| 6/15/94<br><br>Employment, consent decree, no decision. | *Aiken v. City of Memphis*. [No. 64] White police officers and white employees of the fire department sued the city for reverse discrimination. The Court of Appeals held that a consent decree that included race based promotions was supported by a compelling governmental interest in eradicating past discrimination, but an issue of fact existed as to whether raced based promotions were narrowly tailored, given that the city failed to explore validated exams, and that the goals set by the decree possibly resulted in over representation of minorities. |
| 7/28/93<br><br>Employment,<br><br>consent decree invalid. | *Brunet v. City of Columbus*. [No. 65] After discovering the fact that a firefighter's exam that had had disparate impact on women and was not job related was replaced with a validated exam, insufficient evidence of past discrimination remained to support consent decree that promoted women over men with higher scores. Applying strict scrutiny, gender preference was unconstitutional where there was no compelling state interest to support it. |
| 7/7/93<br><br>Public contracting, voluntary plan invalid. | *Arrow Office Supply v. City of Detroit*. [No. 66] Former city contractor brought action challenging ordinance establishing set-aside program for minority and female-operated city contractors. Court held that the program did not satisfy either the strict scrutiny test that applies to programs favoring racial minorities or the intermediate-scrutiny test that applies to programs favoring women, and was unconstitutional. |
| 3/24/93<br><br>Employment, consent decree invalid. | *Detroit Police Officers Association v. Young*. [No. 67] The police officers association and white patrolmen challenged the constitutionality of the municipal police department's affirmative action plan. The court held that the plan was no longer narrowly tailored and no longer served the same compelling state interest under changed circumstances of almost two decades. African Americans are now represented in the Detroit police force in rough proportion to their representation in the population, at all levels of the police hierarchy. |

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| 1/7/93<br><br>Employment, voluntary plan upheld. | *Middleton v. City of Flint*. [No. 68] White male police officers passed over for promotion to sergeant brought a 14th Amendment challenge to the city's affirmative action plan. The court held that the plan was adopted based on statistical evidence of minority underrepresentation which, when combined with powerful anecdotal accounts of racism in the city police department, supported a finding of past discrimination. Therefore, the affirmative action plan was supported by a compelling state interest. A system of alternating promotions -- promoting one minority from the eligibility list for every nonminority promoted -- until parity was reached with the number of minority officers who would have occupied these positions had there been no discrimination, was narrowly tailored to eliminate the past discrimination. |
| 12/29/92<br><br>Employment, consent decree, invalid. | *United Black Fire Fighters Association v. City of Akron*. [No. 69] African American firefighters sued alleging the city's promotional examinations within the fire department were discriminatory. The city entered into a consent decree that provided that it would promote 10 or 12 extra firefighters to lieutenant in order to increase the number of African American lieutenants, and the trial court approved. The Court of Appeals held that the trial court did not have sufficient evidence before it to determine whether there had been discrimination in promotions, and remanded the case for further findings to determine if the city had a compelling governmental interest to support the consent decree. On remand, the trial court held that the challenged tests did not have a disparate impact on minorities [No. 70] |

*10/13/92 Jansen v. City of Cincinnati. [No. 71] Employment, consent decree upheld. Consent decree that required firefighters to be hired from "dual lists," one minority and one nonminority, in order to reach a goal of 18% majority representation was narrowly tailored to achieve compelling interest in eliminating past discrimination's effects. All candidates on both lists were considered qualified, and there was no evidence that rank order on the lists in any way predicted future job performance.*

*3/31/92 Jacobsen v. Cincinnati Board of Education. [No. 72] Employment, consent decree upheld (intermediate scrutiny). A teacher transfer policy enacted as part of a consent decree in order to assure that faculty within schools reflected system-wide racial balance would be tested by intermediate scrutiny. While the plan, which restricts the teachers' ability to transfer, was race conscious, it did not create a preference based on race, and therefore it was not subject to strict scrutiny. The policy was substantially related to the important governmental interest in having a racially diverse faculty, and therefore it was considered constitutional.*

*3/13/92 Vogel v. City of Cincinnati. [No. 73] Employment, consent decree upheld. A police department's hiring policy, established by a consent decree, that included*

*affirmative action directed at women and minorities was narrowly tailored to eliminate the effects of past discrimination demonstrated by gross statistical underrepresentation of minorities based on the relevant labor pool.*

*9/17/91 F. Buddie Contracting Company v. City of Elyria [No. 74] Public contracting, voluntary plan invalid. City minority business enterprise ordinance was not supported by substantial evidence of past discrimination, and was not narrowly tailored.*

*8/14/90 Long v. City of Saginaw. [No. 75] Employment, voluntary plan, no decision. Police department's affirmative action plan called for a new, minority officer to be hired for every officer recalled from earlier layoffs. Officers who, as a result of the plan, were not recalled sued. The court held that the city had no evidence that the low number of minority officers was a result of past discrimination. The pool of potential employees the City relied upon for comparison was not the relevant pool, because it was not shown that all the members of the pool would have been qualified to be hired by the police department. Therefore, the court remanded the case to the trial court for trial.*

## Seventh Circuit

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| 10/05/95<br><br>Employment, voluntary plan invalid. | Koski v. Gainer. [No. 76] Affirmative action hiring plan that relied on "dual lists" and called for hiring 50% minorities until representation of minorities in state highway patrol matched that in the general population was unconstitutional. Matching the general population is not a narrowly tailored means of eliminating past discrimination, when there is no suggestion that such racial parity would have existed but for the discrimination. |
| 8/31/95<br><br>Employment, voluntary plan invalid. | *Wittmer v. Peters*. [No. 77] While promoting orderly operation of State's boot camp might be a compelling state interest, the State did not show that it was necessary to promote an African American guard over a white guard who ranked higher on the promotion list in order to achieve that goal. |
| 3/6/95<br><br>Union membership, court ordered plan upheld. | *Equal Employment Opportunity Commission v. Local 638 of the Sheet Metal Workers' International Association.* [No. 78] In a contempt hearing brought against the Union for failure to achieve the court-ordered goal of 23% minority membership, the court held that the membership goal was narrowly tailored to end the effects of past discrimination. (Usually, a court would not apply strict scrutiny to a nongovernmental actor's plan). |
| 11/2/94<br><br>Employment, | *McNamara v. City of Chicago*. [No. 79] White fire fighters sued the city alleging they were victims of the fire department's affirmative action |

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| voluntary plan, no decision. | promotions policies. The court held that a trial would be required in order to establish whether, and to what extent, underrepresentation of minorities was the result of past discrimination. See, *Billish v. City of Chicago*, below, dealing with the same policy. |
| 7/8/92<br><br>Employment, voluntary plan, no decision. | *Billish v. City of Chicago*. [No. 80] White fire fighters sued the city, alleging that their equal protection and due process rights were violated by city's failure to fill all vacancies before retiring eligibility list and by its nonrank-order promotion of minority fire fighters. The court held that a trial would be required to determine if the affirmative action policy violated principles of equal protection. |
| 1/15/91<br><br>Public contracting,<br><br>voluntary plan, no decision. | Milwaukee County Pavers Association v. Fiedler [No. 81] Contractors challenged disadvantaged and minority business set-aside programs. The court held that because the contractors did not challenge the constitutionality of the federally required set-aside, which was similar to the program upheld in *Fullilove*, the State could not be found to have violated the constitution, unless the State's program went beyond what the federal program required. |
| Eighth Circuit | |
| 8/7/91<br><br>Employment, consent decree upheld. | *Donaghy v. City of Omaha* [No. 82] White police sergeant sued, claiming that city discriminated against him by interviewing and promoting a black applicant who had more seniority but scored lower than a white sergeant on the test that the city used to rank job applicants for lieutenant position. The court held that the promotion was justified under a consent decree, and that the consent decree was constitutional. The city had a substantial basis in fact to believe that the underrepresentation of African Americans on the force was the product of past discrimination. The racial preference given in promotions was narrowly tailored to eliminating discrimination, because the consent decree's goals were defined by the number of African American employees eligible for promotion. |
| Ninth Circuit | |
| 7/5/95<br><br>Public contracting,<br><br>voluntary plan, no decision. | *Bras v. California Public Utilities Commission*. [No. 83] The PUC's plan to encourage use of MBEs did not involve set-asides or quotas, but did establish goals for contractors to meet. The lower court held that a contractor who wanted to challenge the plan lacked standing, because he could not show he would bid on a project in the future. The court of appeals reversed and sent the case back for the court to consider the contractor's arguments about the plan's constitutionality. |
| 8/21/91<br><br>Employment, | Officers for Justice v. Civil Service Commission. [No. 84] The city asked the court to modify an existing consent decree to allow it to "band" promotion examination scores, grouping examination scores that fall within a statistically determined range and treating those scores as |

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| consent decree, upheld. | effectively equal. The court permitted the modification, finding that allowing race to be used as a "plus factor" in choosing between candidates who were, statistically speaking, equally qualified, was a narrowly tailored means of eradicating discrimination in police department promotions. |
| 8/8/91<br><br>Public contracting, voluntary plan invalid. | *Coral Construction Co. v. King County*. [No. 85] The construction company challenged the county's minority and women business enterprise set-aside program. The court held that the program was unconstitutional. The program gave a preference to minority business enterprises that had had no prior contact with the county, and thus had obviously never been the victims of the county's discrimination. Therefore, the program was not narrowly tailored to eliminate the effects of past discrimination. |
| 12/6/91<br><br>Public contracting, voluntary plan upheld. | *Associated Gen. Contractors of California, Inc. v. Coalition for Economic Equity*. [No. 86] An organization of construction contractors challenged a city ordinance giving bid preference to minority business enterprises. The court found that San Francisco's federally-funded set-aside programs were "clearly based upon dozens of specific instances of discrimination that are laid out with particularity in the record, as well as significant statistical disparities in the award of contracts." Because the city was likely to demonstrate a strong basis in evidence supporting the adoption of a race-conscious program, the lower court should not have issued a preliminary injunction against the ordinance's operation. |
| 12/4/89<br><br>Employment, consent decree upheld. | *Davis v. City and County of San Francisco*. [No. 87] Class action suits were brought against city fire department alleging racial and sexual discrimination. The court approved a consent decree and entered injunction requiring officers of department to carry out and ensure compliance with measures designed to end racial and sexual discrimination and harassment. |
| Tenth Circuit | |
| 9/23/94<br><br>Public contracting, voluntary plan, no decision. | *Concrete Works of Colorado v. Denver*. [No. 88] Whether Denver's race-and-gender-conscious public contract award program was constitutional could not be determined without a trial, so the case was remanded to the trial court. |
| Eleventh Circuit | |
| 8/11/95<br><br>Employment, consent decree upheld. | Shuford v. Alabama State Board of Education. [No. 89] Consent decree in suit by African American women alleging discrimination in hiring and promotions in higher education was narrowly tailored to end the effects of past discrimination. The remedy extended the provisions of the consent decree entered in an earlier case brought by African American men for five years and allocated half of the goal for African American |

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| | hiring to African American women. |
| 12/29/94<br><br>Employment, consent decree upheld. | *Sims v. Montgomery County Commission*. [No. 90] White deputies challenged consent decree that allowed the department to promote African American deputies to sergeant, although the African American deputies had lower scores on the promotional exam than the white deputies. The court noted that the promotion exam had a disparate impact on minorities and was not validated to predict job performance. Therefore, a remedy that alleviated the disparate impact by creating separate eligibility lists for white and African American deputies, and then promoting deputies from each list in proportion to the number of each group eligible for promotion, was narrowly tailored to meet the compelling governmental interest in eliminating the effects of past discrimination. |
| 12/19/94<br><br>Employment, consent decree upheld. | *Ensley Branch, NAACP v. Siebels* [No. 91] The court modified the consent decrees in two cases challenging Birmingham's system of written examinations for public employment, which were alleged to have a disparate impact on minorities and to be unrelated to job performance. The decrees were modified as follows:<br><br>1) To require the lower court to determine if there was a substantial basis in fact for believing there to have been discrimination in city departments other than the police and fire departments;<br><br>2) As for the police and fire departments, where there was sufficient evidence of discrimination, to order for the city to develop and use tests that are valid, and that have the least possible disparate impact;<br><br>3) To order the police and fire departments to cease using race as a factor in hiring and promotion as soon as validated hiring and promotional practices are in place, unless race-based measures are necessary to remedy discrimination's lingering effects; and<br><br>4) To revise the goals for African American representation to make them flexible goals, not quotas and to base the goals on the proportion of African Americans in the qualified labor pool rather than in the civilian labor force generally. |
| 10/15/94<br><br>Employment, consent decree upheld. | Shuford v. Alabama State Board of Education. [No. 92] The parties entered into a consent decree that set numerical employment goals for hiring and promotion of African Americans in system of higher education, but expressly stated that the goals were not to be construed as quotas and did not require the defendant to hire or promote any but the best qualified candidates. The court approved the consent decree, finding it narrowly tailored to end the effects of past discrimination. |
| | *Peightal v. Metropolitan Dade County*. [No. 93] An unsuccessful applicant for a fire fighter position challenged the county's affirmative |

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| 7/29/94<br><br>Employment, voluntary plan upheld. | action plan. The court held that (1) the evidence supported a finding of gross disparity necessary to support a race and gender-conscious remedy; (2) the finding that county had satisfactorily considered and implemented race-neutral means to remedy past discrimination before adopting preference system was supported by the evidence; and (3) the finding that county's hiring program was tied to the effects of past discrimination was supported by the evidence. |
| 5/4/94<br><br>Employment, consent decree invalid. | In re: Birmingham Reverse Discrimination Employment Litigation. [No. 94] Non-minority employees of the city's fire rescue and engineering departments challenged the city's practice of granting racial preferences in hiring and promotions. The trial court found the consent decree constitutional, but the court of appeals reversed. The trial court had clearly erred in its finding that racially neutral alternatives could not eliminate the effects of past discrimination, and the decree's 50% quota for African American promotions was unrelated to the representation of African Americans in the pool of eligible applicants. Therefore, the consent decree was not narrowly tailored to eliminating past discrimination's effects. (The consent decree at issue has been modified, and, as modified, has been found constitutional. See, *Ensley Branch v. Siebels*, above.) |
| 10/29/93<br><br>Public contracting, voluntary plan, no decision. | *The Cone Corp. v. Hillsborough County*. [No. 95] Contractors challenged a county plan aimed at increasing the participation of MBEs in county construction contracts. The plan required contractors to make good faith efforts to include MBEs. Relying on *Croson*, a trial court found the plan unconstitutional. The court of appeals reversed, holding that the plan (which was based on specific findings of discrimination, which adopted flexible goals rather than a set-aside and allowed contractors who showed good faith efforts to recruit MBEs to be exempt, and which was adopted only after racially neutral alternatives had failed) was sufficiently different from the plan at issue in Croson that a trial was required to determine if it was constitutional.<br><br>(Ultimately, it was determined that the contractors had suffered no injury in fact from the ordinance and lacked standing to sue, because the plan subjected both minority and nonminority contractors to the same requirements [No. 96] No trial on the plan's constitutionality ever took place.) |
| 10/2/92<br><br>Public contracting, voluntary plan invalid. | *Porter v. Metropolitan Dade County*. [No. 97] The lowest bidder on a construction contract for a transit project challenged the county's requirement of 5% minority business enterprise participation. The court held that the set-aside discriminated unconstitutionally, because the county failed to tailor it to even rough findings of earlier discrimination in the area. |
| 4/27/89 | Howard v. McLucas [No. 98] The trial court found that a government employer had used a promotional exam that discriminated. The court calculated that African Americans lost 240 promotions during the period, |

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| Employment, court ordered plan upheld. | and created a promotional list of African Americans who were employed when the discrimination took place, and who might have been promoted. The employer was ordered to alternate in promotions between this list and its usual list of employees eligible for promotion until the list was exhausted. The court of appeal found the plan narrowly tailored to eliminate the effects of past discrimination. |

California State Courts

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| 7/31/95<br><br>Public contracting, voluntary plan invalid. | *Cornelius v. Los Angeles Metro Transportation Authority*. [No. 99] Citing *Adarand*, Los Angeles Superior Court Judge Dzintra Janavs struck down as unconstitutional a Los Angeles Metropolitan Transportation Authority affirmative-action program used to favor women and minorities in public contracts. The county failed to show that its program was based on a pattern of racial discrimination, and the county did not prove that the program was narrowly-tailored to achieve its goals. |
| 12/28/94<br><br>Public contracting, voluntary plan, no decision. | *Domar Electric, Inc. v. City of Los Angeles*. [No. 100] Los Angeles adopted a plan to increase MBE participation in city contracts. The trial court found the plan constitutional, but the court of appeals reversed, finding that the City charter's requirement that contracts subject to competitive bidding be awarded to the "lowest and best regular responsible bidder" prevented the city and its agencies from requiring potential contractors to comply with a subcontractor outreach program. The Supreme Court found the subcontractor outreach program to be consistent with the charter because outreach could result in finding lower bidders. The case was remanded to the court of appeals to consider the constitutional issues. |
| 1992<br><br>Public contracting, voluntary plan upheld. | *RGW Construction v. Bay Area Rapid Transit District.* [No. 101] RGW challenged BART's disadvantaged business enterprise participation goals program in 2 suits over contracts to build interchanges on Interstate 580. BART collected data from previous discrimination studies in Contra-Costa and Alameda counties, and was allowed to continue its affirmative-action plans -- but only in the geographic area and with regard to the specific races that the data supported. When a later study was completed documenting discrimination all over the area, BART was able to reinstate all of its plan. No further proceedings have been reported. |

***Part Three: Pending California Cases***

*Following are selected examples of cases that are currently pending in California:*

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| 7/31/95 | Cornelius v. Los Angeles Metro Transportation Authority. [No. 102] Citing *Adarand*, Los Angeles Superior Court Judge Dzintra Janavs struck down as unconstitutional a Los Angeles Metropolitan Transportation Authority affirmative-action program used to favor women and minorities in public |

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| | contracts. The county failed to show that its program was based on a pattern of racial discrimination, and the county did not prove that the program was narrowly-tailored to achieve its goals. |
| 7/5/95 | *Bras v. California Public Utilities Commission.* [No. 103] PUC's plan to encourage utilization of MBEs did not involve set-asides or quotas, but did establish goals for contractors to meet. The lower court held that a contractor who wanted to challenge the plan lacked standing, because he could not show he would bid on a project in the future. The court of appeals reversed and sent the case back for the court to consider the contractor's arguments about the plan's constitutionality. |
| 3/26/95 | *Camarena v. San Bernardino Community College District Governing Board*. [No. 104] Camarena sued a local community college for refusing to enroll her in an English class because she wasn't African-American. The college district operates two academic programs specifically for African-American and Latino students, and Camarena alleges that the school's refusal to allow her into these classes is a misuse of affirmative action. |
| 7/11/94 | *Ho v. San Francisco Unified School District. [No. 105]* Chinese-American students have sued in federal court challenging San Francisco's 12-year-old desegregation plan because it is largely based on racial quotas. The San Francisco school district uses busing and admission quotas to preserve racial equality in Lowell High School. The Chinese-American students argue that the plan illegally discriminates against them because these students must score higher than every other minority and whites in admissions tests and grades. Because of the cap placed on the number of Chinese-Americans students allowed admission, the students argue that the system is a form of illegal discrimination. |

*NOTES:*

*[No. 1] Action: Don't Forget the Courts," The Wall Street Journal , August 2, 1995, at A 11. The Court's most recent pronouncement is in Adarand Constructors, Inc. v. Pena, Secretary of Transportation, ___ U.S. ___,115 S.Ct. 2097, 132 L.Ed. 2d 158 (1995).*

*[No. 2] Constructors, Inc. v. Pena, Secretary of Transportation, ___ U.S. ___,115 S.Ct. 2097, 2117, 132 L.Ed. 2d 158 (1995).*

*[No. 3] J. Siskind, Rule of Law: A Year Later in San Francisco, The Schools are Still Segregated, The Wall Street Journal, July 12, 1994, at A 15.*

*[No. 4] U.S. ___, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995).*

*[No. 5] 488 U.S. 469, 109 S.Ct. 706, 102 Led.2d 854 (1989).*

*[No. 6] U.S. ___, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995).*

*[No. 7] has been assumed that Congressional findings are enough to validate state programs that are required by federal law, therefore the states do not need to make independent findings of discrimination before implementing federal requirements. See United Fence and Guard Rail Corp., 1991 U.S. Dist. LEXIS 14260 (N.D.N.Y.1991).*

*[No. 8] F.3d 869 (1995).*

*[No. 9] v. School District of Philadelphia, 1995 WL 564344 (E.D.Pa. 1995).*

*[No. 10] court upheld preferences for disabled persons, but required a trial to determine the appropriateness of preferences for women and racial minorities. Contractors Association of Eastern Pennsylvania, Inc. v. City of Pennsylvania, 6 F.3d 990 (3rd Cir.1993). Occasionally courts appear to apply strict scrutiny to gender classifications. See Quirin v. City of Pittsburgh, 762 F.Supp. 1195 (E.D.Pa.1991).*

*[No. 11] individual justices have suggested that promoting diversity might be a compelling interest in the context of higher education. Diversity in the workplace, by contrast, cannot be a compelling interest that stands alone.*

*[No. 12] a plurality of the court in Croson agreed with Justice O'Connor's observations about "passive participants," but presumably the Justices who dissented from the result in the case would support her position. The courts of appeal have cited it approvingly. See, e.g., the Contractors' Association.*

*[No. 13] action plans in the context of employment are also sometimes challenged as violating Title VII, a federal law that prohibits workplace discrimination. A plan must be directed to correcting a "manifest imbalance" in the workplace, and must not impose unreasonable burdens on non-minorities. A plan that meets the stricter requirements of the equal protection clause will be valid under Title VII by definition.*

*[No. 14] v. Roache, 951 F.2d 446 (1991). This case provides an opinion by now-Justice Breyer upholding an affirmative action plan against constitutional attack.*

*[No. 15] Concrete Works of Colorado v. Denver, 36 F.3d 1513 (10th Cir. 1994). This case demonstrates the statistical disparity between women-owned and minority-owned business enterprises in the general marketplace and the number awarded contracts is sufficient to defeat a motion for summary judgment, citing similar cases. In employment cases covered by Title VII, a disparate impact that cannot be justified by some business reason, constitutes unlawful discrimination. In cases not covered by Title VII, only intentional discrimination is unlawful, although statistical disparity can also be evidence of intentional discrimination.*

*[No. 16] States v. Paradise, 480 U.S. 149, 171 (1987).*

*[No. 17] v. North State Law Enforcement Officers Association, 10 F.3d 207 (4th Cir. 1993).*

*[No. 18] v. Texas, 861 F.Supp. 551 (W.D.Tex.1994).*

*[No. 19] v. Jackson Board of Education, 476 U.S. 267, 106 S.Ct. 1842, 90 Led.2d 260 (1986).*

*[No. 20] "Affirmative Action: Don't Forget the Courts," sec. A, col. 11, The Wall Street Journal (8/2/95).*

*[No. 21] Podberesky v. Kirwan, 38 F.3d 137 (1995).*

*[No. 22] Staff Reporter, "Affirmative-Action Advocates Seeking Lessons From States to Help Preserve Federal Programs," p.20, sec. A, col.2, Wall Street Journal (6/14/95).*

*[No. 23] Reporter, "Affirmative-Action Advocates Seeking Lessons From States to Help Preserve Federal Programs," p.20, sec. A, col.2, Wall Street Journal (6/14/95).*

*[No. 24] Gebhardt, "Documenting Discrimination," The San Francisco Recorder, July 14,*

*1995, at 1.*

*[No. 25] of Justice Memorandum on the Adarand decision (6/28/95).*

*[No. 26] Advocates Seeking Lessons From States to Help Preserve Federal Programs," Staff Reporter, p.20, sec. A, col.2, Wall Street Journal (6/14/95).*

*[No. 27] Gebhardt, "Documenting Discrimination," The San Francisco Recorder , July 14, 1995, at 1.*

*[No. 28] for example, the evidentiary showing made in Associated General Contractors of California v. Coalition for Economic Equity, 950 F.2d 1401 (9th Cir. 1991), and the plan described in Cone Corp. v. Hillsborough County, 908 F.2d 908 (11th Cir. 1990).*

*[No. 29] implication is that as employers adopt validated tests, the justification for race-based relief will disappear. Ensley Branch, NAACP v. Seibels, 31 F.3d 1548 (11th Cir. 1994).*

*[No. 30] Reporter, "Affirmative-Action Advocates Seeking Lessons From States to Help Preserve Federal Programs," p.20, sec. A, col. 2, Wall Street Journal (6/14/95).*

*[No. 31] U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978).*

*[No. 32] U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980).*

*[No. 33] U.S. 267, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986).*

*[No. 34] U.S. 469, 109 S.Ct. 706, 102 L. Ed. 2d 854 (1989).*

*[No. 35] U.S. 547, 110 S.Ct. 2997 (1990).*

*[No. 36] S. Ct. 2097, 132 L. Ed. 2d 158 (1995).*

*[No. 37] F.Supp. 753 (D. Mass. 1995).*

*[No. 38] F.2d 1273, cert. denied ___. U.S. ___, 113 S.Ct. 1043 (1992).*

*[No. 39] F.2d 446, cert. denied 504 U.S. 913 (1991).*

*[No. 40] F.Supp. 1194 (1991).*

*[No. 41] F.Supp. 1554 (1989).*

*[No. 42] F.2d 50 (1992).*

*[No. 43] F.Supp. 467 (1992).*

*[No. 44] F.Supp. 463 (1989).*

*[No. 45] WL 564344 (E.D.Pa)(not reported in F.Supp).*

*[No. 46] U.S.Dist. Lexis 12773 (E.D.Pa.).*

*[No. 47] F.Supp. 419 (E.D.Pa. 1995).*

*[No. 48] F.Supp. 836 (D.N.J. 1993).*

*[No. 49] F.Supp. 1486 (1992).*

*[No. 50] F.Supp. 1195 (1991).*

*[No. 51] F.Supp. 509 (E.D.Pa.1990), affirmed without opinion, 947 F.2d 935 (1991), cert. Denied, 503 U.S. 984 (1992).*

*[No. 52] F.Supp. 1349 (1989).*

*[No. 53] ___, 1995 WL 603297 (D.Md.).*

*[No. 54] F.Supp. 1445 (1994).*

*[No. 55] F.3d 147 (4th Cir.1994).*

*[No. 56] F.3d 207 (1993).*

*[No. 57] 3 F.2d 1072 (1993).*

*[No. 58] F.Supp. 370 (1991).*

*[No. 59] F.Supp. 1556 (S.D.1995).*

*[No. 60] F. Supp. 915 (N.D.Tex.1995).*

*[No. 61] F.3d 1098 (1994).*

*[No. 62] F.Supp. 551 (1994).*

*[No. 63] F.3d 992 (1994).*

*[No. 64] F.3d 1155 (1994).*

*[No. 65] F.3d 390 (6th Cir.1993).*

*[No. 66] F.Supp. 1072 (1993).*

*[No. 67] F.2d 225 (1993).*

*[No. 68] F.Supp. 874 (1993).*

*[No. 69] F.2d 999 (1992).*

*[No. 70] FEP Cases 1452 (N.D. Ohio 1994).*

*[No. 71] F.2d 238 (1992).*

*[No. 72] F.2d 100 (6th Cir.1992).*

*[No. 73] F.2d 594 (1992).*

*[No. 74] F.Supp. 1018 (1991).*

*[No. 75] F.2d 1192 (1990).*

*[No. 76] WL 599052 (N.D.Ill.).*

*[No. 77] WL 631639(C.D.Ill.).*

*[No. 78] F.Supp. 642 (S.D.N.Y. 1995).*

*[No. 79] F.Supp. 739 (1994).*

*[No. 80] F.2d 1230(7th Cir.1992).*

*[No. 81] F.2d 419 (1991).*

*[No. 82] F.2d 1448 (1991).*

*[No. 83] F.3d 869 (1995).*

*[No. 84] 979 F.2d 721 (9th Cir. 1992), cert. Denied, 113 S.Ct. 1645 (1993).*

*[No. 85] F.2d 910 (1991). 12/6/91.*

*[No. 86] F.2d 1401 (9th Cir.1991).*

*[No. 87] F.2d 1438 (9th Cir.1989).*

*[No. 88] F.3d 1513 (10th Cir. 1994), cert. denied 115 S.Ct. 1315 (1995).*

*[No. 89] F.Supp.1535 (M.D.Ala.1995).*

*[No. 90] F.Supp. 585 (1994).*

*[No. 91] 31 F.3d 1548 reh. en banc denied, 6 0 F.3d 717 (11th Cir. 1994).*

*[No. 92] F.Supp. 1511 (M.D.Ala.1994).*

*[No. 93] F.3d 1545 (1994).*

*[No. 94] F.3d 1525, reh. denied 60 F.3d 717 (11th Cir. 1994), cert. denied 115 S.Ct. 1695 (1995).*

*[No. 95] F.2d 908 (11th Cir.1990), 5 F.3d 1397 (1993).*

*[No. 96] 157 F.R.D. 533 (M.D.Fla. 1994), 5 F.3d 1397 (11th Cir. 1993).*

*[No. 97] F.2d 762 (1992).*

*[No. 98] F.2d 1000(11th Cir. 1989).*

*[No. 99] No. BC-101-913 (Sup. Ct. L.A. County Aug. 11, 1995); Paul M. Barrett, Los Angeles Transit Authority's Racial Preferences Are Overturned, Wall Street Journal, Aug. 1, 1995, at B9.*

*[No. 100] Cal. 4th 161, 36 Cal. Rptr. 2d 521, 885 P.2d 934 (1994).*

*[No. 101] Reporter, Judge Approves BART Plan on Minority Contracts, San Francisco Chronicle, Dec. 4, 1992, at A25.*

*[No. 102] No. BC-101-913 (Sup. Ct. L.A. County Aug. 11, 1995); Paul M. Barrett, Los Angeles Transit Authority's Racial Preferences Are Overturned, Wall St. J., Aug. 1, 1995 at B9.*

*[No. 103] F.3d 869 (1995).*

*[No. 104] CIV. S. 95-589.*

*[No. 105] Lawrence J. Siskind, Rule of Law: A Year Later in San Francisco, the Schools are Still Segregated, Wall St.J., July 12, 1995, at A15.*