AFFIRMATIVE ACTION IN EMPLOYMENT
IN THE AFTERMATH OF ADARAND

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Stetson University College of Law:

17th ANNUAL LAW & HIGHER EDUCATION CONFERENCE
Clearwater Beach, Florida
February 11-13, 1996
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I. Introduction

The term affirmative action means different things to different people. The recent debate over the use of affirmative action has centered primarily around a definition which equates affirmative action to preferential treatment of minorities and women. Other less controversial definitions of affirmative action include outreach activities in connection with recruitment of underrepresented groups, changing management attitudes, and changing management practices that may have contributed to underrepresentation of minorities and women in the workplace.

In 1979 and throughout the next decade, the United States Supreme Court decided a number of key cases involving challenges to preferential treatment accorded to minorities and women in hiring, promotion and layoff situations. Programs granting preferences to minorities and women were upheld as lawful under Title VII and the United States Constitution within certain guidelines set by the court for both voluntary and involuntary (court ordered) affirmative action programs.

Earlier this year, in the case of Adarand Constructors, Inc. v Pena, ___ U.S. ___ (1995), the United States Supreme court held that all federal programs using racial classifications must be analyzed under a strict scrutiny standard in order to survive. While employment affirmative action was not specifically addressed, the new standard applied by the Court to federal programs designed to remedy past discrimination has raised questions regarding the continued viability of affirmative action plans in the employment context. In particular, questions have arisen as to the continued validity of a number of federal programs in which private and public employers participate as federal
government contractors, in particular the affirmative action mandates required by Executive Order 11246.

In July, President Clinton called for a review of all existing federal affirmative action programs using the stricter analysis required by the Adarand decision. Executive agencies were instructed that programs must be restructured or eliminated if they involve quotas, reverse discrimination, reward unqualified individuals or continue after their equal employment opportunity goals have been met. This analysis should result in the elimination and/or modification of several federal programs using racial preferences. In addition, several bills have been introduced in Congress to prohibit preferential treatment on the basis of race, color, national origin, or sex in governmental programs and to limit affirmative action in employment. State legislators and executive officers have also undertaken action to eliminate preferences in employment, contracting, and education.

Given the national debate on affirmative action and continued court challenges, the rules governing what constitutes lawful affirmative action may change. This outline explores the current state of the law regarding affirmative action in employment, focusing particularly on the public employer in a higher education setting.

II. Selected Laws and Regulations Affecting Race Based Affirmative Action

A. Federal Laws and Regulations

1. **Fourteenth Amendment, U.S. Constitution** -

   "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

2. **Title VII, Civil Rights Act of 1964** (42 U.S.C. § 2000e-2) -
An employer shall not "fail or refuse to hire or discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."

Title VII does not prohibit preferential treatment. It does, however, specifically state that nothing contained in the statute shall be construed as requiring an employer to grant preferential treatment to any individual because of the race, color, religion, sex or national origin of such individual based on any imbalance in the workforce in comparison to the number or percentage of such individuals in the area or available workforce.

The Civil Rights Act of 1991 which amended a number of federal civil rights laws, including Title VII specifically acknowledges and preserves legitimate affirmative action. The Act provides that it "shall not be construed to affect court ordered remedies, affirmative action, or conciliation agreements, that are in accordance with the law."

3. **EEOC Guidelines Interpreting Title VII (29 C.F.R. § 1608 et seq.)** -
EEOC guidelines encourage voluntary affirmative action to achieve the congressional purpose embodied in Title VII of providing equal employment opportunity. Affirmative action under these guidelines means those actions appropriate to overcoming the effects of past or present practices, policies, or other barriers to equal employment opportunities for classes protected under Title VII. Employers are encouraged to take affirmative action to eliminate
adverse impact on protected class individuals as well as to correct the effects of prior discriminatory practices.

Affirmative action includes but is not limited to training programs for minorities and women, extensive recruitment activities, and elimination of adverse impact caused by unvalidated selection criteria.

Affirmative action plans may be voluntary without a finding or admission of unlawful discrimination. They may also be required by Executive Order 11246, court order, or imposed by state or federal agency directive.

Plans under these guidelines must contain a reasonable self analysis, a reasonable basis for concluding that action is appropriate and reasonable action. Reasonable action is based upon the following standards: the plan should be tailored to solve the problems identified in the self-analysis, goals and timetables should be reasonably related to such considerations as the effects of past discrimination, the need for prompt elimination of adverse impact or disparate treatment, the availability of qualified applicants and the number of employment opportunities expected to be available.

4. Executive Order 11246 (30 Fed. Reg. 12319, September 24, 1965), as amended by Executive Orders 11375, 11478, 12086, and 12107 - Government contractors shall not discriminate against employees or applicants because of race, color, religion, sex, or national origin; and shall take affirmative action to ensure that applicants and employees are treated without regard to these considerations.
5. **OFCCP Affirmative Action Guidelines Implementing Executive Order 11246**  
(Revised Order No. 4, 41 C.F.R. Part 60-2) -

Federal non-construction contractors are required to develop written affirmative action programs to achieve equal employment opportunity. Where there is underutilization of minorities and women, the contractor is required to adopt goals and timetables and undertake good faith efforts to correct the underutilization.

6. **OFCCP Sex Discrimination Guidelines Implementing Executive Order 11246**  
(41 C.F.R. Part 60-20) -

Federal contractors are required to take affirmative action to recruit women to apply for jobs where they have previously been excluded. An important element shall be commitment to include women candidates in management training programs.

7. **Rehabilitation Act of 1973 (29 U.S.C. § 701 et seq.)** -

Federal contracts in excess of $10,000 "shall contain a provision requiring that the party contracting . . . shall take affirmative action to employ and advance in employment qualified individuals with disabilities."

8. **Affirmative Action Obligations of Contractors and Subcontractors for Handicapped Workers** (41 C.F.R. Part 60-741, implementing § 503 of the Rehabilitation Act of 1973) -

Federal contractors must take affirmative action to employ and advance qualified handicapped persons. This includes reviewing personnel processes
to ensure consideration of known handicapped persons for hiring, promotion, and training opportunities, reviewing job qualifications to ensure they do not tend to screen out qualified handicapped persons, and providing reasonable accommodations.


Federal contracts in excess of $10,000 "shall contain a provision requiring that the party contracting with the United States shall take affirmative action to employ and advance in employment qualified special disabled veterans and veterans of the Vietnam era.


Federal contractors shall take affirmative action to employ and advance qualified disabled veterans and veterans of the Vietnam Era. This includes review of personnel practices to ensure consideration for hiring and promotional opportunities and the provision of reasonable accommodation to disabled veterans.

11. **Age Discrimination in Employment Act of 1975** (42 U.S.C. § 6101 et seq.) -

No person in the United States "shall, on the basis of age, be excluded from participation in, be denied the benefits of, or be subjected to discrimination
under, any program or activity receiving federal financial assistance."

12. **OCR Regulations Implementing the Age Discrimination in Employment Act of 1975 (34 C.F.R. Part 110)** -

"Even in the absence of a finding of discrimination, a recipient may take affirmative action to overcome the effects of conditions that resulted in limited participation in the recipients program or activity on the basis of age."

13. **Title VI, Civil Rights Act of 1964 (42 U.S.C. 2000d)** -

"No person . . . shall, on the ground of race, color, or national origin, be excluded from participation in, or be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance."

14. **OCR Regulations under Title VI (34 C.F.R. Part 100)** -

"In administering a program regarding which the recipient has previously discriminated against persons on the ground of race, color, or national origin, the recipient must take affirmative action to overcome the effects of prior discrimination. . . . Even in the absence of such prior discrimination, a recipient in administering a program may take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color or national origin." 34 C.F.R. §100.3(b)(6)(i) and (ii).

B. **Pertinent United States Supreme Court Cases Dealing with Preferential Treatment**

In this case the United States Supreme Court invalidated a special admissions program at the University of California Medical School at Davis that provided a quota of 16 places out of 100 for disadvantaged members of certain minority races. The decision, however, found that there were certain circumstances in which a properly constructed race conscious program would be constitutional. The court held that race based classifications under the Constitution would be judged by a strict scrutiny standard and that the court in reviewing such programs for validity under the Fourteenth Amendment would consider whether the objectives to be served met a compelling governmental interest and whether the means chosen to attain that interest was narrowly tailored. The University asserted two rationales for its program: remedying the effects of past discrimination and providing for student diversity. The remedying of past discrimination was seen by the court as a sufficient compelling interest to sustain a race conscious remedial program and Justice Powell's opinion, concurred in by four other justices, espoused the view that fostering student diversity was also a legitimate compelling state interest. Justice Powell's opinion also would sustain a program that used race as a plus factor rather than the sole factor in admission's decisions.

The court rejected as legitimate compelling reasons remedying societal discrimination in general, increasing the number of minorities in a profession, and increasing the number of physicians practicing in underserved areas.

The affirmative action plan in this case was the result of a collective bargaining agreement that granted minorities at least 50% of the places in the employer's apprenticeship training program. In a 5-2 decision, the court upheld the program finding that Title VII does not prohibit voluntary affirmative action by a private employer to "eliminate manifest racial imbalances in a traditionally segregated job category." An actual finding of discrimination was not required by the court. However, for the plan to be permissible, it had to be limited in duration and not "unnecessarily trammel" the interests of innocent non-minorities.


This case involved the constitutionality of a sex-based admission program in the School of Nursing at Mississippi University for Women. In holding that the sex based admission policy in question violated the Equal Protection Clause, the court noted that in limited circumstances the favoring of one sex over another could be justified if it intentionally and directly assisted members of the disproportionately affected sex. While the university argued that its policy was to compensate for discrimination against women and therefore constituted educational affirmative action, the court found the argument unsupportable because the university made no showing that women lacked opportunities to obtain training in the field of nursing or to attain positions of leadership when the School of Nursing was established or that women were
currently deprived of such opportunities.

The court held that the proper standard to be applied in cases challenging sex based classifications was an intermediate standard of scrutiny, i.e. the state must show that the gender based classification serves "important governmental objectives and that the means employed "are"substantially related to the achievement of those objectives.


The court, in a 5-4 decision, struck down a public employer's collective bargaining agreement that provided preferential protection to minorities in layoffs. The court held that affirmative action was permissible under the Fourteenth Amendment provided that the employer had a compelling interest and the means chosen to achieve that interest were narrowly tailored. In this case, however, the layoff provision was not seen as sufficiently narrowly tailored because it acted to maintain levels of minority hiring and it was too intrusive on the rights of innocent parties.

The court held that the goal of providing faculty role models for students to remedy societal discrimination was not a sufficient compelling interest. Overcoming the effects of past discrimination, however, would suffice. The court did not specifically require that a public employer be subject to an actual finding of discrimination or admit to discrimination as a predicate to pursuing race conscious remedial action. Rather, public employers must have "convincing evidence" to conclude that there has been prior discrimination,
i.e. "a strong basis in evidence" to support its conclusion that remedial action is necessary. What constitutes such evidence has not yet been definitively clarified by the Supreme Court. Justice O'Connor, as noted in her concurring opinion, would not require a remedial purpose to be accompanied by contemporaneous findings of actual discrimination as long as there was a "firm basis" for believing that remedial action is required. Justice O'Connor also notes that at least in the context of higher education, a state interest in the promotion of racial diversity has been found to be sufficiently compelling.


In a 5-4 decision, the Supreme Court upheld the constitutionality of a district court order imposing a 50% quota requirement on promotions of blacks to the position of corporal in the Alabama Department of Public Safety. The plan was temporary, flexible, tied to qualified applicants, bore a proper relationship to the percentage of non-whites in the relevant workforce, and did not impose an unacceptable burden on innocent white promotion applicants. The court upheld the quota in light of the compelling governmental interest in remedying pervasive, systematic and long standing discrimination by the Alabama Department of Public Safety.

Justice Brennan's opinion, joined by three other justices, found the plan narrowly tailored as required by the Fourteenth Amendment to the United States Constitution. The Supreme Court set forth the following criteria to be applied in examining whether a remedial employment affirmative action
program is narrowly tailored: "the necessity for the relief and the efficacy of alternative remedies; the flexibility and duration of the relief, including the availability of waiver provision; the relationship of the numerical goals to the relevant labor market; and the impact of the relief on the rights of the parties."


In this case the Supreme Court upheld under Title VII, a public employer's affirmative action plan that authorized consideration of the sex of a qualified applicant as one factor in making promotions to a traditionally segregated job classification. The case was filed by a male employee who scored two points higher in an oral interview than a female who received the sought after promotion. The plan had no specific set asides or quotas and was seen as temporary in that it was intended to achieve a statistically measurable yearly improvement until the workforce reflected the composition of the relevant qualified work force.

The court applied the Title VII test it enunciated in Weber and found the employer's plan permissible in light of the "manifest imbalance" of women in the employer's skilled craft jobs. At the time of the selection none of the employer's skilled craft jobs were held by women. The court found that the plan was temporary, flexible and did not trammel the fights of male employees. With regard to the latter requirement, the majority opinion specifically notes that no persons were excluded from consideration and all candidates qualifications were weighed against the others. Furthermore, the
male applicant had no firmly rooted expectation as he was only one of seven candidates and remained eligible for other promotions. The majority opinion further found that a prima facie case of discrimination by the employer need not be established to sustain the employer's affirmative action plan and that evidence of actual discrimination by the employer is not necessary in order for an employer to implement a plan permissible under Title VII. The majority's opinion subjects public and private employer's affirmative action plans to the same test with regard to Title VII validity. (Note: A public employer's obligations under the Fourteenth Amendment are higher. See Wygant v. Jackson Board of Education, supra.)

Justice O'Connor, concurring separately in the judgment, states her view that the test for a governmental employer's affirmative action plan under Title VII and the Fourteenth Amendment should be the same. What would be required is that the employer have a "firm basis" for believing that remedial action is required; for example, a statistical disparity sufficient to support a prima facie claim under Title VII of a pattern and practice of discrimination, i.e. that the absence of women or minorities in the workplace cannot be explained by general societal discrimination alone. She reiterates the view espoused in her concurring opinion in Wygant, supra, that an employer need not point to any contemporaneous findings of actual discrimination.

This case involved a challenge to the City of Richmond's affirmative action plan that provided for 30% to be set aside for minority business enterprises in city construction contracts. The plan applied to racial groups beyond blacks, imposed no geographical limits on eligible firms, was set up for a defined period, and provided for waivers in very limited circumstances. Finding the plan unconstitutional under the Fourteenth Amendment, the court held that race based preferences must be judged by application of the strict scrutiny standard. This required a compelling governmental interest and a narrowly tailored plan to accomplish that interest.

In applying strict scrutiny, the court found that while the city's claimed intent was to remedy past discrimination, there was no evidence to support any discrimination in the city's construction industry. The statistical evidence relied upon by the city did not provide a firm evidentiary basis for concluding that the underrepresentation of minorities was a product of discrimination within the city's construction industry. In so holding the court repeated its past holdings that general societal discrimination is an insufficient compelling interest under the Fourteenth Amendment.

The court further found that the plan was not narrowly tailored to accomplish its stated remedial purpose as the plan was overly inclusive and there was no evidence to indicate that the city had considered race neutral alternatives.

In this case the United States Supreme Court upheld minority broadcast licensing preferences on the rationale of the need for diversity in broadcast programming. The court applied an intermediate scrutiny test to preferences mandated by Congress. Adarand Constructor's Inc. v Pena, infra, overruled this decision in holding that racial classifications imposed by the federal government are subject to a higher strict scrutiny standard.


The Supreme Court held that under the Equal Protection Clause and Title VI, the state, after decades of litigation related to dismantling the effects of a racially segregated system, did not meet its burden of eliminating all vestiges of past de jure segregation solely by the good faith adoption and implementation of race-neutral policies where the policies traceable to a past dual system of education were still in force and produced current discriminatory effects.


In the Supreme Court's most recent case involving the legality of racial preferences used by the federal government, the court held that all racial classifications employed by federal, state, or local governmental agencies must be analyzed under a strict scrutiny standard, i.e. they must serve a compelling state interest and be narrowly tailored to achieving that interest. Previously the court had used an intermediate standard for race based classifications established under congressional authority.
The program at issue involved the federal government's practice of giving contractors on government projects an financial incentive to hire subcontractors who were controlled by socially an economically disadvantaged individuals. In implementing the program, the government used a race based presumption in determining who met the definition of socially and economically disadvantaged.

The decision did not discuss the details of what would constitute a compelling state interest or what narrowly tailored would mean in the context of any particular program. The decision did make clear that the strict scrutiny standard applies to all race based programs that are mandated by congress as well as those which are voluntarily undertaken by government agencies. The decision adopts the same standard previously applied by the Supreme Court to state and local governments in the Croson case.

III. Discussion

A. The Effect of Adarand on Executive Order 11246 Enforcement

The program created by Executive Order 11246 and enforced by the Labor Department's Office of Federal Contract Compliance Programs is not a quota program and does not require any race based preferences. Rather, it requires contractors to identify underutilization of minorities and women for the purpose of ensuring equal employment opportunity and non-discrimination. The setting of goals and objectives when underutilization is present does not require the hiring or promotion of any member of a protected class and the program determines availability
based on reference to justifiable job related qualifications. Good faith efforts to eliminate underutilization include such measures as increased outreach and recruitment efforts, removal of potential barriers to equal opportunity, and nondiscriminatory hiring and promotional practices. Thus the program as established by the federal government should survive review under the strict scrutiny standard set forth by the Adarand decision. However, the employer's implementation of the program, i.e. its good faith efforts to meet goals and objectives established to eliminate underutilization, must not operate in such a fashion as to create quotas or preferences which violate the standards set by the courts for permissible affirmative action.

B. Permissible Bases of Affirmative Action

1. The permissibility of private employer affirmative action programs is determined by reference to applicable civil rights legislation (e.g. Title VI, Title VII) while those of a governmental employer are determined by applicable civil rights legislation and the strictures of the Fourteenth Amendment to the United States Constitution.

2. Under Title VII the permissible basis for establishing an affirmative action plan is to correct a "manifest imbalance" in traditionally segregated job categories. An employer is not required to admit prior discrimination or have evidence of an "arguable violation" on its part to employ racial or sexual preferences to correct manifest imbalances provided that its utilization of such preferences is narrowly tailored to achieving such a result. See United Steelworkers v
Weber, supra and Johnson v Transportation Agency, Santa Clara County, supra.

3. Under the Fourteenth Amendment the permissible basis for race based affirmative action depends on whether the governmental employer can point to a compelling governmental objective in using a race based classification and show that race based classification is narrowly tailored to achieve that objective. Remedying past discrimination and achieving diversity in the educational setting have been held to be sufficient compelling interests to justify race based preferences. See Wygant v. Jackson Board of Education, supra and United States v Paradise, supra; Bakke v Regents of the University of California, supra. Whether diversity will continue to be a sufficiently compelling reason is open to question based upon the current composition of the Supreme Court. Compare Justice O'Connor's dissent in Metro Broadcasting, Inc. v FCC, supra with her earlier concurring opinion in Wygant v. Board of Education, supra.

4. Under the Fourteenth Amendment sex based classifications are subject to an intermediate standard of scrutiny. This requires that the classification serve an important governmental objective and be substantially related to achieving the objective. See Mississippi University for Women v Hogan, supra.

5. Title VI standards are the same as those required by the Fourteenth Amendment Equal Protection Clause. See United States v. Fordice, supra.
C. What quantum of evidence is necessary to sustain voluntary affirmative action by an employer?

1. The Supreme Court's decisions give little guidance as to the degree of racial or sexual imbalance that must be established to sustain an employer's affirmative action plan under Title VII. In Johnson v Transportation Agency, Santa Clara County, supra, the court held that in determining whether such an imbalance exists, an employer must look to the skills required for the job. Where no special expertise is required, the percentage of minorities and women is compared to the percentage in the area labor market or general population. Where special skills or expertise is required the comparison is with those in the relevant labor market who possess the requisite qualifications. The court's opinion further indicates that "a manifest imbalance need not be such that it would support a prima facie case against the employer . . . since we do not regard as identical the constraints of Title VII and the Federal Constitution on voluntarily adopted affirmative action plans."

2. As to constitutional challenges under the Fourteenth Amendment, the court's cases are equally unenlightening. Under the Fourteenth Amendment an employer must have sufficient evidence that there has been discrimination if the compelling objective proffered by the employer is the remedying of the effects of past discrimination. In Wygant v Board of Education, Justice Powell's plurality opinion holds that societal discrimination is an insufficient basis upon which to sustain a remedial affirmation action program and an
employer must have "convincing evidence" that remedial action is warranted. The degree of sufficient or convincing evidence that is necessary was not addressed. Justice O'Connor in her concurring opinion does not require a public employer to admit or be subject to a finding of actual discrimination by a court or administrative body but the employer "must have a firm basis for determining that affirmative action is warranted." In her view, evidence of a statistical disparity sufficient to support a prima facie case under Title VII would suffice. The objective of providing role models for student to remedy societal discrimination was specifically disapproved in Wygant.

With regard to diversity, there are no Supreme Court cases which address the type or quantity of proof that will sustain this rationale as a compelling governmental interest. In the Bakke case, the rationale was set forth as a First Amendment consideration related to admission of students to the University of California Medical School at Davis. (Diversity contributes to the "robust exchange of ideas" that is essential to the university's educational mission). In Hayes v North State Law Enforcement Officers Ass'n, 10 F. 3d 207 (4th Cir. 1993), the City of Charlotte employed a race based promotion policy based on a diversity justification. The city argued that diversity within its police force contributed to effective law enforcement. The Fourth Circuit Court of Appeals upheld the trial court's grant of partial summary judgment to the non-minority plaintiffs who challenged the constitutionality of the racial preferences because the city did not provide sufficient evidence on its claim
that racial diversity was "essential to effective law enforcement and constitutes a compelling state interest." Thus if an employer intends to rely upon diversity to sustain a race based preference, it needs to be prepared to establish that diversity is essential to its goal or mission.

D. What constitutes narrow tailoring?

Courts have expressed narrow tailoring in different terms. In \textit{United States v Paradise}, supra, the court looked to the following factors: "the necessity for relief and the efficacy of alternative remedies; the flexibility and duration of the relief, including the availability of waivers; the relationship of the numerical goals to the relevant market; and the impact of the relief on the rights of the parties." In \textit{Johnson}, the court stated that under Title VII an affirmative action plan must be "flexible", "temporary", and not "unduly trammel the employment expectations of non-minorities." From the court's application of these criteria in specific cases it appears that these criteria overlap. The court's bottom line is that race based preferences must not unduly burden the interests of non-minorities.

1. \textbf{Undue burden on innocent third parties}

   a. The context in which the preference operates appears to determine whether non-minorities or males are unduly burdened. Race based promotion quotas have survived scrutiny whereas racial preferences in layoff situations have not. Compare \textit{U.S. v Paradise}, supra (race based promotion plan constitutional) with \textit{Wygant}, supra (race based layoff plan unconstitutional).
b. Using race or sex as one factor under circumstances where everyone is eligible for consideration, all candidates are compared with each other, and no one has had an expectation or right to the position or promotion has been upheld. See Jackson, supra.


2. Duration

a. Plans that have no fixed term and are intended only to achieve racial balance have been upheld. See Weber, supra (plan was temporary because it lasted only until the percentage of black craft workers in the plant equaled the percentage of blacks in the local area workforce). Plans will be invalidated if they are seen as designed to maintain racial balance.

b. Plans that are periodically reviewed to examine the achievement of racial balance will most likely be viewed as temporary in nature.

3. Flexible

a. Plans containing waiver provisions and which recognize consideration of qualified candidates only will be viewed favorably.

b. Use of goals rather than rigid numerical quotas will contribute to a finding of flexibility.
4. **Consideration of Race Neutral Alternatives**

An employer may need to consider race neutral alternatives before implementing race based affirmative action measures unless there is substantial evidence that such measures have or would not have worked. See *Croson*, supra, where the court invalidated a race based set aside program noting in part that the city had failed to consider any race-neutral alternatives to increasing minority business participation; *United States v Paradise*, supra, where there was pervasive and longstanding discrimination litigated over a number of years and alternative remedies were not found. Compare *U.S. v Fordice*, supra.

IV. What does the future portend?

A. The Supreme Court’s most recent pronouncements in *Adarand* make it clear that benign racial preferences will not be treated with deference and that strict scrutiny will be applied in all constitutional challenges to race based preferences. Whether the court will extend this standard to Title VII cases remains to be seen. While Justice O’Connor’s majority opinion in *Adarand* emphasizes that strict scrutiny is not "strict in theory" and "fatal in fact", it is likely that the only types of race based preferential programs which will survive strict scrutiny analysis are those which are factually similar to the situation in *U.S. v Paradise*, i.e. the plan is to remedy pervasive, longstanding and systematic discrimination, there is evidence of substantial disparity between minorities and non-minorities in the workforce as compared to the relevant qualified labor market, race neutral alternatives have been ineffective, and the program
is narrowly tailored.

B. It is unclear whether diversity will be seen as a sufficiently compelling reason to use race based preferences in the employment context although Justice O'Connor may be willing to create an exception for such a rationale in the educational context.

C. It is unclear whether the Court will uphold the use of race or sex as a plus factor in cases involving positive employment actions, such as hiring and promotion. While it may do so in an appropriate case, the court may likely require more of a showing by an employer as to inefficacy of race neutral alternatives before sustaining any race based program.

D. It is likely that Executive Order 11246 will survive scrutiny and federal contractors will still be required to develop affirmative action plans with goals and timetables to achieve equal opportunity in the workplace for women and minorities so long as goals and timetables are not viewed as creating quotas.

E. Affirmative action that does not limit opportunities for minorities and women such as outreach activities, removal of barriers (such as parent friendly programs) and other inclusive processes will continue to receive favorable support.