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Affirmative Action in Employment: A Legal Overview

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Summary

Affirmative action remains at the center of legal and political debate at the federal, state, and local levels. Seeds of the current legal controversy may be traced to the early 1960s as first the Warren and then the Burger Court grappled with the seemingly intractable problem of racial segregation in the nation's public schools. Judicial rulings from this period recognized an "affirmative duty," cast upon local school boards by the Equal Protection Clause, to desegregate formerly "dual school" systems and to eliminate "root and branch" the last "vestiges" of state-enforced segregation. Soon after, Congress and the Executive followed the Court's lead by approving a panoply of laws and regulations that authorize, either directly or by judicial or administrative interpretation, "race-conscious" strategies to promote minority opportunity in jobs, education, and governmental contracting.

The historical model for federal laws and regulations establishing minority participation "goals" may be found in Executive Orders which since the early 1960s have imposed affirmative minority hiring and employment requirements on federally financed construction projects and in connection with other large federal contracts. Executive Order 11246, as presently administered by the Office of Federal Contract Compliance Programs, requires that all employers with 50 or more employees and federal contracts in excess of $50,000 file written affirmative action plans with the government. These must include minority and female hiring goals and timetables to which the contractor must commit its "good faith" efforts.

The basic statutory framework for affirmative action in employment derives from the Civil Rights Act of 1964. Public and private employers with 15 or more employees are subject to a comprehensive code of equal employment opportunity regulations under Title VII of the 1964 Act. The Title VII remedial scheme rests largely on judicial power to order monetary damages and injunctive relief, including "such affirmative action as may be appropriate," to make discrimination victims whole. Except as may be imposed by order of a court to remedy "egregious" violations of law, however, or by consent decree to settle pending claims, there is no general statutory obligation on employers to adopt affirmative action plans. But the EEOC has issued guidelines to protect employers and unions from charges of "reverse discrimination" when they voluntarily take actions to eliminate the effects of past discrimination. In addition, federal departments and agencies are required to periodically formulate affirmative action plans for their employees and a "minority recruitment program" to correct minority "underrepresentation" in specific federal job categories.

Contents

Affirmative Action in Employment: A Legal Overview[1]

Introduction

Affirmative action remains at the center of legal and political debate at the federal, state, and local levels. Seeds of the current legal controversy may be traced to the early 1960s as first the Warren and then the Burger Court grappled with the seemingly intractable problem of racial segregation in the nation's public schools. Judicial rulings from this period recognized an "affirmative duty," cast upon local school boards by the Equal Protection Clause, to desegregate formerly "dual school" systems and to eliminate "root and branch" the last "vestiges" of state-enforced segregation.[2] To remedy the legacy of past discrimination, courts eventually turned to mandatory student reassignment and busing to overcome persisting patterns of racially imbalanced schools.[3] Soon after, Congress and the Executive followed the Court's lead by approving a panoply of laws and regulations which authorize, either directly or by judicial or administrative interpretation, "race-conscious" strategies to promote minority opportunity in jobs, education, and governmental contracting.

The basic statutory framework for affirmative action in employment derives from the Civil Rights Act of 1964. Public and private employers with 15 or more employees are subject to a comprehensive code of equal employment opportunity regulations under Title VII of the 1964 Act.[4] The Title VII remedial scheme rests largely on judicial power to order monetary damages and injunctive relief, including "such affirmative action as may be appropriate,"[5] to make discrimination victims whole. Except as may be imposed by order of a court to remedy "egregious" violations of law, however, or by consent decree to settle pending claims, there is no general statutory obligation on employers to adopt affirmative action plans. But the EEOC has issued guidelines to protect employers and unions from charges of "reverse discrimination" when they voluntarily take actions to eliminate the effects of past discrimination. In addition, federal departments and agencies are required to periodically formulate affirmative action plans for their employees and a "minority

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[1] This report was originally prepared by Charles V. Dale, Legislative Attorney.

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

[3] See CRS Report RL30410, *Affirmative Action and Diversity in Public Education — Legal Developments*, by Jody Feder for a more detailed discussion.

[4] 42 U.S.C. §§ 2000e et seq.

[5] Id. at § 2000e-5(g).

recruitment program" to correct minority "underrepresentation" in specific federal job categories.[6]

The historical model for federal laws and regulations establishing minority participation "goals" may be found in Executive Orders which since the early 1960s have imposed affirmative minority hiring and employment requirements on federally financed construction projects and in connection with other large federal contracts. Executive Order 11246, as currently administered by the Office of Federal Contract Compliance Programs, requires that all employers with 50 or more employees and federal contracts in excess of $50,000 file written affirmative action plans with the government. These must include minority and female hiring goals and timetables to which the contractor must commit its "good faith" efforts. Smaller contractors are bound by the nondiscrimination requirements of the Executive Order, but are not required to maintain formal written programs.[7] Judicial decisions early on had upheld the executive order program as a constitutionally valid governmental response to racial segregation in the construction trades and affected industries.

By the mid-1980s, the Supreme Court had approved the temporary remedial use of race- or gender-conscious selection criteria by private employers under Title VII. These measures were deemed a proper remedy for "manifest racial imbalance" in "traditionally segregated" job categories, if voluntarily adopted by the employer,[8] or for entrenched patterns of "egregious and longstanding" discrimination by the employer, if imposed by judicial decree.[9] In either circumstance, however, the Court required proof of remedial justification rooted in the employer's own past discrimination and its persistent workplace effects. Thus, a "firm basis" in evidence, as revealed by a "manifest imbalance" — or "historic," "persistent," and "egregious" underrepresentation — of minorities or women in affected job categories was deemed an essential predicate to preferential affirmative action. Of equal importance, all

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[6] Section 717 of the 1972 Amendments to Title VII of the 1964 Civil Rights Act empowers the EEOC to enforce nondiscrimination policy in federal employment by "necessary and appropriate" rules, regulations, and orders and through "appropriate remedies, including reinstatement or hiring of employees, with or without backpay." Id. at § 2000e-16(b). Each federal department and agency, in turn, is required to prepare annually a "national and regional equal employment opportunity plan" for submission to the EEOC as part of "an affirmative program of equal employment opportunity for all . . . employees and applicants for employment." Id. at § 2000e-16(b)(1). Section 717 was reinforced in 1978 when Congress enacted major federal civil service reforms, including a mandate for immediate development of a "minority recruitment program" designed to eliminate "underrepresentation" of minority groups in federal agency employment. 5 U.S.C. § 7201. The EEOC and Office of Personnel Management have issued rules to guide implementation and monitoring of minority recruitment programs by individual federal agencies. Among various other specified requirements, each agency plan "must include annual specific determinations of underrepresentation for each group and must be accompanied by quantifiable indices by which progress toward eliminating underrepresentation can be measured." 5 C.F.R. § 720.205(b).

[7] See 41 C.F.R. §§ 60-1 to 999.

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

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

racial preferences in employment were to be judged in terms of their adverse impact on "identifiable" non-minority group members. But the consideration of race or gender as a "plus" factor in employment decisions, when it did not unduly hinder or "trammel" the "legitimate expectations" of non-minority employees, won ready judicial acceptance.[10] Affirmative action preferences, however, had to be sufficiently flexible, temporary in duration, and "narrowly tailored" to avoid becoming rigid "quotas."

A perennial aspect of the legal debate over affirmative action has centered on the proper role of the remedy in employment discrimination litigation. One legal theory emphasizes compensation for actual victims of discrimination, while another focuses more upon the elimination of barriers to equal opportunity for all members of a previously excluded class of individuals. In a series of cases during the 1980s, the Justice Department argued, largely without success, that victim compensation was the only proper remedial objective and that class-based affirmative action remedies, which benefit women and minorities who are not themselves actual victims of an employer's past discrimination, are illegal. The employment cases to date have yet to fully embrace this position, although it appears to have gained some footing in the minority contracting arena.[11]

Judicial precedents on affirmative action in employment have developed along two concurrent but not necessarily coterminous lines. One line of authority delineates the permissible scope of affirmative action imposed by judicial decree to remedy proven violations of Title VII or the Constitution. The other involves the validity of voluntary affirmative action plans by public and private employers. Several basic principles emerge from the case law.

First, a fundamental prerequisite to the adoption of minority goals or preferences is a remedial justification rooted in the employer's own past discrimination and its persistent workplace effects. Stricter probative standards mandated by the Constitution may bind public employers in this regard than apply to private employers under Title VII. Basically, a "firm basis" in evidence — as revealed by a "manifest imbalance," or "persistent" and "egregious" disparities in the employment of minorities or women in affected job categories — has been viewed by the courts as an essential predicate for affirmative action preferences.

Secondly, beyond a record of past discrimination by the employer, all affirmative action plans are judged in terms of the burden they place on identifiable non-minorities. Thus, remedies that immediately result in the displacement of more senior white male employees — like promotion preferences or minority group protections against layoff — are most suspect and least likely to pass legal or constitutional muster. At the other end of the spectrum, hiring or recruitment goals

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

[11] In City of Richmond v. Croson, 488 U.S. 469 (1989), Justice O'Connor implied that individual victimization may be the benchmark for any finely-tuned "waiver" procedure necessary for salvaging Richmond's minority business set-aside program. This aspect of the decision was reinforced by Adarand Constructors Inc. v. Pena, 515 U.S. 200 (1995).

or preferences that do not "unnecessarily trammel" the "legitimate expectations" for advancement of non-minority candidates are more likely to win judicial acceptance. Finally, all "race-conscious" affirmative action remedies must be sufficiently flexible, temporary in duration, and "narrowly tailored" so as to avoid becoming rigid "quotas."

Judicial Affirmative Action Remedies

Even before the Supreme Court had spoken, every federal circuit court of appeals, in cases dating back to the very inception of the 1964 Civil Rights Act, had approved use of race or gender preferences to remedy "historic," "egregious," or "longstanding" discrimination. This line of judicial authority was ratified by the Court's rulings in *Local 28, Sheetmetal Workers v. EEOC* and *United States v. Paradise*.[12] The former involved contempt proceedings against a union with an established history of racial and ethnic discrimination for its willful violation of a judicially imposed 29% minority membership goal. To remedy years of union evasion, amounting to contempt of court, the Second Circuit had approved an order reinstating the minority membership goal and requiring that job referrals be made on the basis of one apprentice for every four journeyman. The Supreme Court affirmed, five to four.

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

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

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[12] 478 U.S. 421 (1986); 480 U.S. 149 (1987).

sergeant rank was suspended. The Supreme Court granted review of the order under the Equal Protection Clause.

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

Justice Brennan therefore concluded that the promotion quota was "narrowly tailored" and justified by the government's "compelling" interest in eradicating the state's "pervasive, systematic, and obstinate exclusion" of blacks and its history of resistance to the court's orders. Justice Stevens, who provided the fifth vote for the Court's judgment, stated in a separate opinion that the district court did not exceed the bounds of "reasonableness" in devising a remedy. Justice O'Connor, joined in dissent by Justice Scalia and the Chief Justice, found the plan "cannot survive judicial scrutiny" because the one-to-one promotion quota is not sufficiently tied to the percentage of blacks eligible for promotion. Finally, Justice White, in a two sentence dissent, stated simply that the district court "exceeded its equitable powers."

Voluntary Affirmative Action

The remedial justification for voluntary affirmative action in employment was explored by the Court in *Wygant v. Jackson Board of Education*.[13] A collective bargaining agreement between the school board and the teacher's union in that case provided a hiring preference for minority teachers coupled with layoff protection until the minority composition of the faculty mirrored that of the student body district wide. Seniority was to govern layoff except that in no event were overall minority faculty percentages to be reduced. In the face of a constitutional challenge by ten laid-off white teachers, the Court voided the minority layoff provision, but no particular rationale commanded majority support.

Seven members of the *Wygant* Court agreed that some forms of voluntary affirmative action may be constitutionally justifiable on the part of a governmental entity itself guilty of past discrimination. However, neither the asserted interest in the presence of minority teachers as critical "role models," or to ameliorate "societal discrimination," provided "compelling" justification for the layoff plan absent "convincing" evidence of the board's own past discrimination. Moreover, while innocent non-minorities could be made to share some of the burden, the remedy could not intrude too severely upon their rights. Because the minority layoff protection in *Wygant* "impose[d] the entire burden of achieving racial equality on

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[13] 476 U.S. 267 (1986).

particular individuals," Justice Powell concluded that innocent third parties were impacted too heavily. In this respect, the layoff provision was distinguishable from preferential hiring decisions, which "diffuse" the burden more generally. Reserving judgment on the hiring issue, Justice White concurred that the layoff remedy went too far because it displaced more senior white employees in favor of minorities who were not actual discrimination victims. In a separate concurrence, Justice O'Connor aligned herself with the Powell view that societal discrimination will not justify voluntary affirmative action remedies, and that the layoff plan was infirm because overbroad and not "narrowly tailored" to the board's past discrimination.

Significantly, *Wygant* was a constitutional case decided on Fourteenth Amendment equal protection principles. Corollary issues concerning voluntary affirmative action plans adopted by private employers under Title VII reached the High Court in *United Steelworkers v. Weber*.[14] The *Weber* case upheld a voluntary affirmative action plan by a private employer, including a minority quota for a craft training program, to rectify "manifest racial imbalance in traditionally segregated job categories." The Court required no specific finding of past discrimination by the employer, deciding the case instead on the basis of the historically well established record of nationwide bias in trade union membership.

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

Conceding that Title VII could literally be read to bar all race-conscious employment practices, the Court decided that the purpose of the act, rather than its literal meaning, controlled. The legislative history and context from which the act arose, Justice Brennan wrote, compelled the conclusion that the primary purpose of Title VII was to "open employment opportunities for Negroes in occupations which have traditionally been closed to them." Accordingly, "[i]t would be ironic indeed" to read the statute to preclude "all voluntary, private, race-conscious efforts" to abolish workplace segregation. Moreover, the specific plan in question, mandating a one to one racial ratio until a specific minority participation rate is achieved, was permissible affirmative action because it did "not unnecessarily trammel the interest of white employees."[15] *Weber* thus permitted private employers to implement certain

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[14] 443 U.S. 193 (1979).

[15] In this regard the Court emphasized: "The plan does not require the discharge of white workers and their replacement with new black hires. Nor does the plan create an absolute bar to advancement of white employees; half of those trained in the program will be white.

(continued...)

forms of temporary affirmative action to advance minority employment opportunities, even where such measures have an incidental adverse impact on white workers.

In *Johnson v. Transportation Agency*,[16] the Court reviewed a voluntary affirmative action plan adopted by a public employer, the Transportation Agency of Santa Clara County, California. That plan authorized the agency to consider the gender of applicants as one factor for promotion to positions within traditionally segregated job classifications in which women had been underrepresented. Women were significantly underrepresented in the county's labor force as a whole and in five of seven job categories, including skilled crafts where all 238 employees were men. The plan's long range goal was proportional representation. However, because of the small number of positions and low turnover, actual implementation was based on short term goals which were adjusted annually and took account of qualified minority and female availability. No specific numerical goals or quotas were used.

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

The Supreme Court upheld the county's action, six to three. Justice Brennan decided for the majority that Title VII was not coextensive with the Constitution and that, therefore, *Weber* not *Wygant* was controlling. The noted disparities in female workforce participation satisfied the *Weber* requirement for a "manifest imbalance" since to require any additional showing could expose the employer to discrimination lawsuits and operate as a disincentive to voluntary compliance with the statute. The Court likened the county plan to the treatment of race as a "plus" factor in the "Harvard Plan"for higher educational admissions approved by Justice Powell in the *Bakke* case.[17] Because sex was but one factor in the decision-making process, no applicant was excluded from participation on account of sex. In a caveat, however, the Court warned that "[i]f a plan failed to take distinction in qualification into account in providing for actual employment decision, it would dictate mere blind hiring by the numbers," and would be invalid because "it would hold supervisors to achievement of a particular percentage of minority employment or membership . . .

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[15] (...continued)
Moreover, the plan is a temporary measure; it is not intended to maintain racial balance, but simply to eliminate manifest racial imbalance. Preferential selection of craft trainees at the . . .plant will end as soon as the percentage of black skilled craft workers in the . . . plant approximates the percentage of blacks in the local labor force." Id. at 208-09.

[16] 480 U.S. 792 (1973).

[17] Regents of the Univ. of California v. Bakke, 438 U.S. 265 (1978).

regardless of circumstances such as economic conditions or the number of available qualified minority applicants . . .”[18]

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

To date, therefore, the Supreme Court has permitted race-conscious hiring criteria by private employers under Title VII, either as a remedy for past discrimination or to redress a “conspicuous racial imbalance in traditionally segregated job categories,” but refused to find that a state’s interest in faculty diversity to provide teacher “role models” was sufficiently compelling to warrant a race-conscious layoff policy. Lower courts are similarly divided, though a few have applied an “operational need analysis” to uphold police force diversity policies, recognizing “that ‘a law enforcement body’s need to carry out its mission effectively, with a workforce that appears unbiased, is able to communicate with the public and is respected by the community it serves,’ may constitute a compelling state interest.”[19]

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[18] Id. at 636 (citing Sheet Metal Workers v. EEOC, 478 U.S. 421, 495 (O’Connor, J., concurring in part and dissenting in part). Justice Stevens concurred that the plan was consistent with *Weber* and Justice O’Connor, in a separate concurrence, provided a sixth vote for the judgment. In her opinion, however, to support a voluntary affirmative action plan, there should be “a statistical disparity sufficient to support a prima facie claim under Title VII by the employee beneficiaries of the affirmative action . . . .” Equal Protection standards, not Title VII, should govern public employee cases, and she was critical of the majority for providing inadequate guidance as to the statistical imbalance standard. But because there were no women in skilled craft positions, and gender was only a plus factor, either standard was satisfied here.

[19] Patrolmen’s Benevolent Assoc. v. City of New York, 310 F.3d 43, 52 (2002) (quoting Barhold v. Rodriguez, 863 F.2d 233, 238 (2d Cir. 1988)); Reynolds v. City of Chicago, 296 F.3d 524 (7th Cir. 2002). See also Cotter v. City of Boston, 323 F.3d 160, 172 n. 10 (1st Cir. 2003)(declining to address question of compelling interest but expressing sympathy for “the argument that communities place more trust in a diverse police force and that the resulting trust reduces crime rates and improves policing”); Wittmer v. Peters, 87 F. 3d 916 (7th Cir. 1996)(consideration of race permitted in promoting black corrections officer to supervisor because prison could not accomplish its “mission of pacification and reformation” of predominantly black inmates with nearly all white staff). But see Lomack v. City of Newark, 463 F.3d 303 (3d Cir. 2006) (city policy designed to eliminate single-race fire companies by involuntarily transferring firefighters to different companies solely on the basis of race violated the Equal Protection Clause).

A three-judge panel of the Seventh Circuit has pressed the legal debate one step further by relying on the student diversity rulings in the Michigan cases[20] to uphold Chicago Police Department's affirmative action hiring program. The decision in *Petit v. City of Chicago*[21] found that large urban police departments have an "even more compelling need for diversity" than universities and affirmed the Chicago police program "under the *Grutter* standards." A "strong basis" for affirmative action was provided by expert testimony that the city's minority residents deeply distrusted police, and that creating a diverse force at the sergeant rank would "set a proper tone" in the department to earn the trust of the community. Outside of law enforcement, however, courts generally allow for consideration of race in hiring and promotion decisions only in response to demonstrable evidence of past discrimination by the employer or within the affected industry. No rule of deference like that extended to educational institutions has been recognized for employers, nor is one necessarily implied by the Michigan cases.

Affirmative Action Consent Decrees

State and local programs mandating affirmative action in employment initially met with greater judicial approval than public contracting preferences for minorities in the wake of the Supreme Court's decision in *City of Richmond v. J.A. Croson and Co.*[22] This may be due, in part, to the fact that employment preferences are frequently, though not always, linked to settlements of individual or class action lawsuits. Depending on the stage of proceedings, a formal record of past discrimination may already have developed when agreement is reached. At the very least, there is usually some allegation of misconduct by the public employer. In addition, there may be underlying judicial findings of discrimination or district court involvement in fashioning or approving the consent decree, both of which are factors traditionally prompting deference by appellate courts when reviewing affirmative action efforts.[23]

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[20] In Grutter v. Bollinger, 539 U.S. 506 (2003), a 5 to 4 majority of the Justices held that the University of Michigan Law School had a "compelling" interest in the "educational benefits that flow from a diverse student body," which justified its race-based efforts to assemble a "critical mass" of "underrepresented" minority students. For more information, see CRS Report RL30410, *Affirmative Action and Diversity in Public Education — Legal Developments*, by Jody Feder.

[21] 352 F.3d 1111 (7th Cir. 2003), cert. denied 541 U.S. 1074 (U.S. 2004).

[22] 488 U.S. 469 (1989)(rejecting a local government's effort to promote public contracting opportunities for minority entrepreneurs).

[23] E.g. Majeske v. City of Chicago, 218 F.3d 816 (7th Cir. 2000)(city's affirmative action plan lawful because it remedies past discrimination and was narrowly tailored); McNamara v. City of Chicago, 138 F.3d 1219, 1223-24 (7th Cir. 1998)(stating that raw statistics do not prove intentional discrimination, but also finding that defendant had presented strong basis in evidence of need to remedy discrimination, through combination of statistics, anecdotal evidence, and judicial findings); Boston Police Superior Officers Fed'n, 147 F.3d 13, (1st Cir. 1998)(documentary evidence in relation to earlier consent decree supported preferential promotion of black officer to rank of lieutenant). But cf. Crumpton v. Bridgeport Educ. Ass'n, 993 F.2d 1023 (2d Cir. 1993)(refusing to equate parties' stipulations as to existence of discrimination with judicial determination that such discrimination existed); Reynolds

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Between 1972 and 1983, the Department of Justice sued 106 public employers; of those, 93 were settled by consent decree. These court-approved agreements typically set goals and timetables for increasing minority and female under-representation in the workforce. Of the cases that the Justice Department still monitors, many stem from litigation dating back to the 1970s, mainly against police and fire departments.[24] Under *Croson* and, subsequently, *Adarand Constructors, Inc. v. Pena*,[25] however, these orders and consent decrees have come under "strict scrutiny." For example, a major ruling by the Eleventh Circuit in 1994 invalidated a consent decree involving the Birmingham, Ala. fire department for being an "entirely arbitrary" fixed quota that unduly restricted opportunities for whites,[26] and judicial rulings in Boston forced abandonment of a 1980 consent decree, which established a race-based policy for promoting sergeants.[27] Indeed, a number of cities and states have successfully fought consent decrees and ended federal monitoring of their minority hiring practices.

In 1999, the Supreme Court declined to review a Fifth Circuit decision striking down the Dallas Fire Department's affirmative action plan. In *City of Dallas v. Dallas Fire Fighters Association*,[28] the appellate panel held that there was insufficient evidence of past discrimination in the Dallas Fire Department to justify the department's policy of promoting some women and minorities over white males who had achieved scores within the same "band" on a civil service examination. Evidence of discrimination in the record consisted of a 1976 consent decree between the City and the Justice Department finding impermissible racial discrimination by the city under Title VII, and statistical underrepresentation of minorities in the ranks to which the challenged promotions were made. The court recognized that "out-of-rank promotions do not impose as great a burden on non-minorities as would layoff or discharge." But it found that interference by the city with "legitimate expectations" of promotion based on exam performance was unjustified where alternative remedies were not yet exhausted, and there was no proof of "a history of egregious and pervasive discrimination or resistance to affirmative action that has warranted more

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[23] (...continued)
v. Roberts, 202 F.3d 1303 (11th Cir. 2000)(consent decree did not establish that state transportation department had discriminated against black employees).

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

[25] 515 U.S. 200 (1995)(applying "strict scrutiny" to a federal transportation program of financial incentives for prime contractors who subcontracted to firms owned by racial minorities and ruling that all "racial classifications" by government at any level must be justified by a "compelling governmental interest" and "narrowly tailored" to that end).

[26] In re Birmingham Reverse Discrimination Employment Litig., 20 F.3d 1525 (11th Cir. 1994). See also Thigpen v. Bibb County Ga., Sheriff's Dep't, 223 F.3d 1231 (11th Cir. 2000)(*Croson* controlled white police officers' § 1983 action against sheriff's department, challenging constitutionality of consent decree, adopted to settle prior race discrimination action, requiring that 50% of all annual promotions be awarded to black officers).

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

[28] 150 F.3d 438 (5th Cir. 1998), cert. denied, 526 U.S. 1046 (1999).

serious measures in other cases."[29] Even less evidence of past sex discrimination was found by the court to justify the city's gender-based discrimination.

In *Ensley Branch, NAACP v. Seibels*,[30] the Eleventh Circuit rejected both long term and annual goals imposed by consent decree for the hiring of firefighters and police officers by the City of Birmingham, Alabama. The main fault with the city's affirmative action plan was that it had become a permanent alternative to the development of nondiscriminatory tests and other valid selection procedures. Rather than ending discrimination, the long-term goals in the plan were "designed to create parity between the racial composition of the labor pool and the race of the employees in each job position." Annual hiring goals had been arbitrarily set at twenty-five to fifty percent for minorities and had been "mechanically" applied as "rigid quotas," in the court's view, without regard to "relative qualifications" of the candidates. On remand, the district court was ordered to "re-write the decrees to relate the annual goals to the proportion of blacks in the relevant, objectively qualified labor pool" and "to make clear that the annual goals cannot last indefinitely."[31]

Likewise, an affirmative action promotional plan for the Maryland State police, agreed to by the parties with consent of a federal district court, was subjected to strict scrutiny review and found wanting by the Fourth Circuit in *Maryland Troopers Ass'n v. Evans*.[32] Specifically, goals linked to minority representation in the general population, instead of the qualified labor pool, were found deficient under *Croson* analysis, as was the failure to first exhaust all race-neutral alternative means of increasing minority opportunity. The latter factor has frequently been determinative of the constitutional question in the judicial mind.[33] *Croson* was also applied by the Sixth Circuit to defeat a 50% minority goal for the rank of sergeant in the Detroit Police Department, which had been in effect for nearly two decades, since "limiting the duration of a race-conscious remedy which clearly impacts adversely on

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[29] Id. at 440.

[30] 31 F.3d 1548 (11th Cir. 1994).

[31] Id. at 1577. In addition, the court noted: "Once a valid selection procedure is in place for a particular position, neither the City or the Board may continue to certify, hire, or promote according to a race-conscious 'goal' absent proof of ongoing racial discrimination, or of lingering effects of past racial discrimination, with respect to that position. Under no circumstances may the City hire or promote, or the Board certify, candidates who are demonstrably less qualified than other candidates, based on the results of valid, job-related selection procedures, unless the district court finds that such appointments are necessary to cure employment discrimination by the City or Board." Id.

[32] 993 F.2d 1072 (4th Cir. 1993).

[33] E.g. Alexander v. Estepp, 95 F.3d 312, 316 (4th Cir. 1996)("The program is not narrowly tailored because means less drastic than outright racial classification were available to department officials); Middleton v. City of Flint, 92 F.3d 396, 410-11 (6th Cir. 1996)(rejecting race-conscious promotion plan because, inter alia, the City had successfully used "less drastic, alternative ways" to increase percentage of minority police officers); Boston Police Superior Officers Fed'n v. City of Boston, 147 F.3d 13, 25 (1st Cir. 1998)(holding that one-time affirmative action promotion was narrowly tailored because race-neutral measures "would not provide a timely remedy."

[nonminorities] is a keystone of a narrowly tailored plan."[34] Failure to satisfy the court as to the cause of apparent statistical disparities with respect to minority employment,[35] the scope or duration of the remedy,[36] the absence of a provision for waiver where qualified minority candidates were unavailable,[37] and the consequent undue burden placed on nonminorities[38] are all factors that have led to judicial invalidation of state and local affirmative action.

Affirmative Recruitment and Outreach Programs

The Court arguably has yet to precisely define "racial classification" for equal protection purposes, but a plurality of Justices have described the concept in terms of burdens or benefits placed on individuals because of race, or subjecting individuals to unequal treatment. Race-conscious action by government or private employers that neither confers a benefit nor imposes a burden on individuals may not be subject to strict scrutiny or heightened judicial review. Thus, courts have not found data collection activities concerning the racial or gender makeup of a workforce to violate the Constitution. "Statistical information as such is a rather neutral entity which only becomes meaningful when it is interpreted."[39] Similarly, strict scrutiny has generally not been applied by the courts to minority outreach or recruitment efforts that do not amount to an actual preference in employment decisionmaking. A public university, for example, may be racially "aware" or "conscious" by amassing statistics on the racial and ethnic makeup of its faculty and encouraging broader recruiting of racial or ethnic minorities, without triggering strict scrutiny equal protection review. These activities do not impose burdens or benefits,

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

[35] Lalla v. City of New Orleans, 1999 U.S. Dist. LEXIS 3281 (D. La. 1999)("gross statistical disparities" between racial composition of fire department and community population did not establish "strong basis in evidence" for racial hiring preference absent showing that black applicants were rejected as "much higher" rate than whites); Ashton v. City of Memphis, 49 F. Supp.2d 1051 (W.D.Tenn. 1999)(testimony of expert for city overstated number of blacks in qualified labor pool because wrong age group was considered, and it disregarded both the level of minority group interest and relatively higher rates of criminal convictions among blacks, disqualifying factors for police officers); Aiken v. City of Memphis, 37 F.3d 1155 (6th Cir. 1994)(promotion goals set by consent decree were problematic because they were tied to goals for hiring black officers which were, in turn, based on the minority population of the undifferentiated labor force).

[36] United States v. City of Miami, 115 F.3d 870 (11th Cir. 1997)(Report of city's expert on underrepresentation of women and minorities as firefighters lacked probative value where it was based on general census data rather than proper comparisons between minority composition of department and relevant labor market); Ashton, supra n. 33 at 1065(district court "troubled" by city's long-term operation under consent decrees — some fourteen years).

[37] E.g. North State Law Enforcement Officers Ass'n v. Charlotte-Mecklenburg Police Dep't., 862 F. Supp. 1445 (W.D.N.C. 1994).

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

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

it has been held, nor do they subject individuals to unequal treatment. If that institution, however, then engages in race-preferential hiring, firing, or promotion, that action is subject to strict scrutiny. This distinction between "inclusive" forms of affirmative action — such as recruitment, advertising in minority media, and other outreach to minority communities — and "exclusive" affirmative action — such as quotas, set-asides, or layoff preferences — has featured prominently in many decisions.[40]

One of the first post-*Adarand* decisions, *Shuford v. State Board of Education*,[41] upheld provisions similar to E.O. 11246 in the face of constitutional challenge. A consent decree between the State Board of Education and separate classes of white and black women had addressed issues of hiring and promotion within the Alabama system. In addition to a standard nondiscrimination clause, the decree required yearly reports tracking the number of new women hires, procedures for expanding the pool of female applicants, numerical hiring goals, and parity for women in the personnel selection process. Specifically prohibited by the decree, however, were set-asides, quotas, and the selection of less qualified candidates based on race or gender.

Because expanding the pool of qualified minority or female candidates by "inclusive" recruitment and outreach only added to the competition faced by non-class members — in this case, white males — and did not result in lost job opportunities and promotions, the court avoided the traditional Title VII and equal protection analysis applied to "exclusive" affirmative action techniques. It upheld the annual statistical report requirement of the decree since "the attempt to ascertain whether there is a problem and whether progress is being made should be encouraged."[42] Affirmative recruitment of qualified female candidates was similarly acceptable so long as the recruitment did not exclude male applicants. Thus, "if the postsecondary system began recruiting at black and women's colleges and stopped recruiting at Auburn, this would be an instance of exclusion."[43]

Since hiring goals could be applied either inclusively or exclusively, whether the decree mandated appropriate "diagnostic goals that measure the efficacy of pool expansion techniques such as affirmative recruitment" was treated as a question of underlying intent. The *Shuford* goals did not require preferences for women, the court found, and would not permit jobs to be set-aside for specific groups. Because the goals played no role in the selection process, they served only to measure the

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[40] See, e.g., Allen v. Alabama State Bd. of Educ., 164 F.3d 1347, 1352 (11th Cir. 1999)(racially conscious outreach efforts to broaden applicant pool not subject to strict scrutiny), vacated 216 F.3d 1263 (11th Cir. 2000); Duffy v. Wolle, 123 F.3d 1026, 1038-39 (8th Cir. 1997)("An employer's affirmative efforts to recruit female and minority applicants does not constitute discrimination."); Ensley Branch, NAACP, supra n. 30, at p. 1571 (describing efforts to actively encourage Blacks to apply for jobs, including waivers of application fees, as "race-neutral"); Billish v. City of Chicago, 962 F.2d 1269, 1290 (7th Cir. 1992)(describing aggressive recruiting as "race-neutral procedures") rev'd on other grounds, 989 F.2d 890 (7th Cir.1993)(en banc).

[41] 897 F. Supp. 1535 (M.D.Ala. 1995).

[42] Id. at 1552.

[43] Id. at 1553.

effectiveness of the recruitment programs and to "red flag" those positions where women were underrepresented. As such, the goals were found to be inclusive and lawful. *Shuford* has been cited with approval by several federal appellate courts. Most recently, two separate appellate panels affirmed consent decrees requiring public employers to devise race-conscious employment examinations so as to minimize any racially discriminatory impact on minority candidates. "[N]othing in *Adarand* requires the application of strict scrutiny to this sort of race consciousness."[44]

Other courts have disagreed, however, and applied strict scrutiny analysis to facially inclusive affirmative action programs. In *Monterey Mechanical Co. v. Wilson*,[45] the Ninth Circuit considered a California affirmative action statute that required bidders on state contracts either to subcontract a percentage of their work to female- and minority-owned businesses or to document a "good faith effort" to do so. The acknowledged low bidder in the case had been denied a contract with a state university for failure to achieve the mandated goal or to document its outreach efforts. The appeals court found that the statute treated classes unequally because a minority prime contractor could avoid the necessity of subcontracting or demonstrating good faith efforts simply by doing a percentage of the work itself, an option not available to other bidders. In addition, the statute was found to encourage quotas, even if it did not necessarily require them.

Meanwhile, *Messer v. Meno* challenged an affirmative action program involving goals, statistics, and reporting requirements within the Texas Education Agency.[46] In vacating summary judgment for TEA, the Fifth Circuit rejected any distinction between inclusive and exclusive affirmative action, holding that strict scrutiny applies to all governmental racial classifications. In *dicta*, the court noted that the "evidence . . . strongly suggests recruitment was not the sole activity affected by the [affirmative action program], and that once an applicant met the minimum requirements for a position, TEA employees considered race or gender in employment decisions."[47] Although not disputing the applicability of strict scrutiny, Judge Garza warned in a concurring opinion that "the tone of the majority's decision . . . will send the message out that affirmative action is, for all intents and purposes, dead in the Fifth Circuit."[48]

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[44] Allen v. Alabama State Bd. of Educ., supra n. 40, at p. 1353 (affirming consent decree requiring that school board develop teacher certification exam that minimizes racially discriminatory impact); Hayden v. County of Nassau, 180 F.3d 42, 49(2d Cir. 1999) ("[A]lthough Nassau County was necessarily conscious of race in designing its entrance exam [for police officer candidates], it treated all persons equally in the administration of the exam.").

[45] 125 F.3d 702 (9th Cir. 1997), reh'g en banc denied, 138 F.3d 1270 (9th Cir. 1998).

[46] 130 F.3d 130 (5th Cir. 1997).

[47] Id. at 139.

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

Similarly, in *Schurr v. Resort Int'l Hotel*,[49] the Third Circuit disapproved a casino's goal-oriented affirmative action plan, which had been applied to deny employment to a white light-and-sound technician in favor of an equally qualified black applicant, because it had been implemented "in [t]he absence of any reference to or showing of past or present discrimination in the casino industry." The employer argued that the affirmative action plan, and the Casino Control Commission regulations on which it was based, did not create racial preferences, but simply articulated goals aimed at recruiting members of minority groups and women. The court, however, concluded that the regulations "have the practical effect of encouraging (if not outright compelling) discriminatory hiring," particularly because Resorts International supervisors who made hiring decisions testified to a belief that they had to take race into account when filling a position, if a particular job category had a lower percentage of minority employees than the stated percentage goal for that category. There was no "meaningful distinction," the court found, between the casino's requirements and the minority participation goals for nongovernmental contractors, which the Ninth Circuit invalidated in *Bras v. California Public Utilities Commission*.[50] In *Bras*, the goals had the effect of putting a non-minority contractor on unequal footing in competing for business from Pacific Bell, which was subject to minority hiring goals formulated by the California Public Utility Commission pursuant to state law.

Another federal appellate court has applied strict judicial scrutiny as per *Adarand* to defeat equal employment opportunity regulations of the Federal Communications Commission (FCC) imposing affirmative minority outreach and recruitment obligations on applicants for radio broadcast licenses. In *Lutheran Church-Missouri Synod v. FCC*,[51] the D.C. Circuit ruling stemmed from a challenge by the NAACP to the hiring practices of a Lutheran Church organization which holds FCC licences for two radio stations broadcasting from a seminary in Clayton, Missouri. Because of the stations' religious mission, the church has a "Lutheran hiring preference" requiring job applicants to possess "knowledge of Lutheran doctrine." The FCC imposes two basic requirements on radio stations: they must refrain from discriminating in employment for racial, ethnic, or gender-based reasons; and they must adopt an affirmative action program of targeted efforts to recruit, hire, and promote women and minorities. Acting on the NAACP complaint, the FCC ruled that the church's Lutheran hiring preference was too broad, and that while the stations had not discriminated, they violated agency regulation because of insufficient minority recruitment. The church was ordered to pay a $25,000 penalty and to submit reports every six months listing all job applicants and hires, along with the sex and race of each, as well as a statement of their efforts to recruit minorities.

A three judge appellate panel rejected FCC and Justice Department arguments that a more lenient standard of review than strict scrutiny should apply since the FCC regulations "stop[ped] short of establishing preferences, quotas, . . . set-asides" and did not mandate race-conscious "hiring decisions." *Adarand* required "[a]ll

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[49] 196 F.3d 486 (3d Cir. 1999)

[50] 59 F.3d 869 (9th Cir. 1995), cert. denied, 516 U.S. 1984 (1996).

[51] 141 F.3d 344 (D.C.Cir. 1998).

governmental action based on race" — even when "the government's motivation to aid minorities can be thought 'benign'" — to be narrowly tailored to meet a compelling governmental interest. According to Judge Silberman, by requiring a "formal analysis" by the employer of minority "underrepresentation" and "availability" statistics, the FCC regulations "extend beyond outreach efforts and certainly influence ultimate hiring decisions" because they "pressure stations to maintain a work force that mirrors the racial breakdown of the 'metropolitan statistical area.'" For this reason, it mattered not to the court "whether a government hiring program imposes hard quotas, soft quotas, or goals" since any such race-conscious technique "induces an employer to hire with an eye toward meeting a numerical target."

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

> Perhaps this is illustrative as to just how much burden the term diversity has been asked to bear in the latter part of the 20th century in the United States. It appears to have been coined both as a permanent justification for policies seeking racial proportionality in all walks of life ('affirmative action' had only a temporary remedial connotation) and as a synonym for proportional representation itself. It has, in our view, been used by the Commission in both ways. We therefore conclude that its EEO regulations are unconstitutional and cannot serve as a basis for its decision and order in this case.[52]

In a sequel, *Broadcasters Association v. FCC*,[53] the appeals court voided new FCC rules designed to achieve "broad outreach" in recruiting women and minorities for broadcasting careers. Broadcasters were given a choice between programs specified by the FCC and station-initiated outreach programs. If the station designed its own program, it had to report the race and sex of each applicant or person employed. But the regulations specified that a company's record in hiring women and minorities would not be a factor in the license renewal decision. The alternative approach was struck down, again because the recordkeeping and reporting of employment statistics were deemed a coercive and "powerful threat," almost certain to pressure companies to seek proportional representation of women and minorities. Moreover, the entire rule succumbed to the court's analysis — the offending portion deemed non-severable from the whole — perhaps limiting prospects for recasting FCC affirmative action efforts.

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[52] Id. at 356.

[53] 236 F.3d 13 (D.C.Cir. 2001).

Military Cases

The U.S. military has traditionally enjoyed considerable deference from federal courts in decisions affecting military staffing and manpower needs. Nonetheless, recent challenges to Army and Air Force equal opportunity policies have triggered strict scrutiny of embedded racial classifications. In *Berkley v. United States*,[54] for example, discharged white male officers from the Air Force brought a Fifth Amendment equal protection class action challenging the basis for selecting officers for a reduction in force. The litigation centered on the written instruction from the Air Force Secretary concerning the evaluation of women and minority officers for that purpose. The memorandum noted that such individuals may have been disadvantaged in their careers by past societal attitudes and underutilization by the service. The trial court found no racial classification drawn by the memorandum, and was satisfied that it met minimal rational basis constitutional standards. However, the federal circuit reversed and remanded.[55] It found that strict scrutiny was triggered because the evaluation instruction provided for a different standard based on race and gender. The case was ultimately settled.[56]

In *Christian v. United States*,[57] the U.S. Court of Claims reviewed a U.S. Army policy establishing retention goals for minority and female officers twice considered, but passed over for promotion, who would otherwise have been subject to mandatory early retirement. The percentage of minorities and women to be retired was set by a special Army memorandum, which established different evaluation standards for minorities and women than officers in general, ostensibly due to possible past personal or institutional discrimination.

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

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[54] 48 Fed. Cl. 361 (Fed. Cl. 2000).

[55] Berkley v. United States, 287 F.3d 1076 (Fed. Cir. 2002).

[56] Berkley v. United States, 59 Fed. Cl. 675 (Fed. Cl. 2004).

[57] 46 Fed. Cl. 793 (2000).

the cause, rather than proven "present effects of past discrimination," the only constitutional justification for racial affirmative action.[58]

The Army procedure failed the additional constitutional requirement that affirmative action measures be "narrowly tailored." The minority retention goal was not the "least intrusive means" to remedy discrimination by the Army in promotions. Promotion or recruitment goals would accomplish the same purpose by "more exact connection" to identified institutional discrimination with less burden on affected nonminority officers. Moreover, the policy was of indefinite duration, with no built-in time limitation, and no race-neutral alternatives were attempted by the government before implementing its affirmative action plan. One alternative suggested by the court was to increase educational and training opportunities for all officers from underprivileged backgrounds, whatever their race. This, it was contended, would expand the pool of minorities eligible for promotion and address the Army's concern for societal discrimination without employing a suspect classification. The government successfully appealed the remedy portion of the court of claims decree, which required reinstatement and backpay of involuntarily retired white male officers.[59] But the lower court's threshold determination that the minority retention program violated equal protection was neither appealed to nor addressed by the Federal Circuit.

Similarly, in a legal action by a white officer who was twice denied promotion to full colonel in 1996 and 1997, *Saunders v. White*,[60] a federal district court ruled the Army's equal opportunity promotion process in use at the time unconstitutional. The Army's written instruction to promotion boards required that the possibility of personal or institutional discrimination be taken into account when evaluating the promotion files of women and minority officers — both in initial evaluation and any review or revote — and urged that the percentages promoted from these groups match their proportion in the applicant pool. Because Army promotion selection statistics for more than two decades demonstrated that minorities and women were promoted at virtually the same rate as whites — if not slightly higher — the judge found that there was no demonstrable record of discrimination to justify the Army's consideration of race or gender in its promotion policy. The fatal defect in the Army policy was summed up by the district court: "Nowhere in the Memorandum are selection board officers obliged to consider the possibility of past discrimination for non-Nurse Corps males, whites, or any other group for which there is not an equal opportunity selection goal. Thus, the Memorandum instructs selection board members to, for example, account for an Hispanic applicant's 'past personal or institutional discrimination,' but not to account for a white applicant's past discrimination. This undeniably establishes a preference in favor of one race or gender over another, and therefore is unconstitutional."[61]

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[58] See also Sirmans v. Brownlee, 346 F.Supp.2d 56 (D.D.C. 2004).

[59] Christian v. United States, 337 F.3d 1338 (Fed. Cir. 2003).

[60] 191 F.Supp.2d 95 (D.D.C. 2002).

[61] Id at 101.