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The Commentators Speak: Emerging Trends in the Legal Analysis of Affirmative Action

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In the last issue of TIP, I suggested that the controversy over affirmative action would likely continue to heat up. That prediction has proven to be something of an understatement. In a ruling that will probably force the Supreme Court to reconsider the affirmative action issue during its next session, a federal appellate court recently struck down on equal protection grounds an admissions policy at the University of Texas law school which gave preference to black and Hispanic applicants (*Hopwood v. State of Texas*, U.S. App. LEXIS 4719, 5th Cir., March 1996). Although the appellate court's order to eliminate affirmative action-based admissions in Texas has been stayed pending further appeal, various proposals to end affirmative action are getting serious attention in state legislatures, public university governing boards, and grass-roots initiatives in Arizona, Pennsylvania, and Washington, respectively. Meanwhile, California has continued to serve as a lightning rod for affirmative action issues: the California Civil Rights Initiative (which would ban preferential treatment based on race, sex, color, ethnicity, or national origin) made it onto the fall ballot in March, a bill passed the Judiciary Committee of the state assembly in April which would impose *criminal* liability on any college or government official granting a racial or gender preference, the Clinton administration came under fire for awarding a \$3.2 million contract through the Commerce Department's Minority Business Development Agency to a Los Angeles firm known to be running a huge operating deficit and carrying nearly \$1 million in unpaid tax liens, and a San Francisco Bay Area county government stunned local affirmative action specialists and EEOC officials by disclosing the existence of—and its failure to meet—hiring goals for whites and males as part of its affirmative action plan.

Although it is important to remain apprised of these and other affirmative action developments on executive, judicial, and legislative fronts, it may also be helpful, in attempting to make more proactive sense of the affirmative action landscape, to examine the comments of legal scholars with respect to trends in the analysis of affirmative action. This article provides the reader with guidance in that process by digesting recent law review commentaries which address important aspects of affirmative action. These aspects include affirmative action implications of the Civil Rights Act of 1991, the Supreme Court's 1995 decision in *Adarand*

Constructors, Inc. v. Pena, reverse discrimination, the Glass Ceiling Initiative, and the relationship of employment tests to the economic "efficiency" of affirmative action plans (AAPs). An overview of other elements of the affirmative action debate can be found in Terpstra, *Affirmative Action: A Focus on the Issues*, 46 Lab. L.J. 307 (1995).

Affirmative Action Implications of the Civil Rights Act of 1991

An excellent starting point for gaining a broader perspective on the legal analysis of affirmative action can be found in Munro, *The Continuing Evolution of Affirmative Action under Title VII: New Directions after the Civil Rights Act of 1991*, 81 Va. L.Rev. 565 (1995). This article demonstrates that, contrary to popular belief, the CRA of 1991 did not provide clear support for affirmative action. Rather, passage of the Act at best served to maintain, but not codify, previous law on affirmative action, which remains highly subject to ongoing judicial revision. The article points out that a core of current Supreme Court justices disfavors affirmative action, which often "unfairly squeezes employers between the competing demands of disparate treatment and disparate impact law" (81 Va. L.Rev. at 574; the latter theory is typically used by protected class non-members to challenge affirmative action programs).

Munro's article also explains how the debate surrounding the use of quotas in AAPs ultimately left the Act ambiguous and contradictory with respect to race-based preferences in employment. A primary focus of the debate involved elements of disparate impact liability, including the definition of "business necessity" for use in defending employment practices which have a disparate impact, and whether quotas would be required in practical terms to avoid such liability. Nevertheless, the definitions which ultimately appeared in Section 104 of the Act failed to define either business necessity or job relatedness, and left the courts with broad interpretive discretion, notwithstanding Section 105's stated intent to revert to the law as it had existed prior to the Supreme Court's 1989 *Wards Cove* decision. In addition, Section 106's prohibition against "race-norming" of employment tests (adjustment of scores along racial lines) made it more likely that employers with demographic imbalances in their workforces would be forced to adopt outright racial preferences, which are increasingly subject to reverse discrimination attack. Even Section 116's "simple, direct" language that nothing in the Act "should be construed to affect affirmative action [programs] that are in accordance with the law" carries the implied caveat that not all such programs are legal. Rather than explicitly validating or preserving programs that are "in accordance," this language leaves the propriety of individual AAPs up to the courts. In sum, Munro argues, these sections of the Act "produce a decidedly muddled picture of congressional intent...[courts] may discern a curious 'canceling out' effect among the relevant sections." The author maintains that failure

of the Act to support affirmative action was a result of conservatives' success in framing the debate as one about quotas, and that, "in their rush to define the Civil Rights bill as anti-preference legislation...supporters of affirmative action were the chief source of the provisions that 'cancel out' the proaffirmative action sections" (81 Va. L.Rev. at 599-601).

Munro's article concludes with an interesting proposal for replacing racial preferences with economic disadvantage preferences, a proposal that might bear consideration should the subject of affirmative action be legislatively revisited in the future. A principal goal of affirmative action is to reapportion jobs and wealth such that the economic position of minorities becomes roughly equal to that of whites. Because economic status correlates significantly with race, this goal can be more directly (and less controversially) accomplished by an economic, rather than a racial, approach. Economic issues in the context of affirmative action are addressed further below.

Adarand Constructors, Inc. v. Pena: The Supreme Court's Decision in Historical Perspective

As discussed in the previous issue of TIP, the U.S. Supreme Court in *Adarand Constructors, Inc. v. Pena*, 115 S.Ct. 2097 (1995) held that federal affirmative action programs that use racial and ethnic criteria as bases for decision making are subject to strict judicial scrutiny. This standard requires that an AAP be "narrowly tailored" to effectuate a "compelling government interest." Successful defense of an AAP under this standard typically requires either specific evidence of past discrimination caused by the program which the AAP seeks to redress or a "manifest imbalance" between the makeup of an organization's work force and that of the local labor pool, and a showing that the rights of non-minorities have not been "unnecessarily trammled" (*Kaiser Aluminum and Chemical Corp. v. Weber*, 443 U.S. 193, (1979)).

When read in context with previous Supreme Court affirmative action cases that have avoided explicit reliance on race-based discourse (see Winkler, *Sounds of Silence: The Supreme Court and Affirmative Action*, 28 Loyola L.A. L.Rev. 923, (1995)), the *Adarand* decision may merely represent further evidence that the law on affirmative action will continue to be rewritten judicially in the absence of legislative attempts to fill the statutory void left by the Civil Rights Act of 1991. Nevertheless, pending further action on *Hopwood*, *Adarand* remains the Supreme Court's latest pronouncement in the affirmative action area. Insights into the implications of the decision can be gleaned from Robinson, Fink, and Allen, *Adarand Constructors, Inc. v. Pena: New Standards Governing the Permissibility of Federal Contract Set-Asides and Affirmative Action*, 46 Lab. L.J. 661 (1995), and Welsh, *Adarand Constructors, Inc. v. Pena: A Forecast for En-*

hanced Scrutiny of Affirmative Action Programs, 5 Seton Hall Const. L.J. 933 (1995).

First, it is important to clarify what the *Adarand* decision does and does not do with respect to existing law. As Robinson et al., point out, prior to *Adarand*, there were two different standards with respect to state or local racial classifications on one hand, and those in federal affirmative action and set-aside programs on the other (46 Lab. L.J. at 665). The former were held to strict judicial scrutiny before *Adarand*, as they still are; all such classifications were conclusively presumed to be invidious by their very existence. The latter (federal) classifications, however, were presumed to be "benign," and were thus held only to "intermediate" scrutiny (i.e., only had to serve a "significant" government purpose, rather than a "compelling" one; *Metro Broadcasting v. FCC*, 497 U.S. 547 (1990)). *Adarand* brings these two standards into alignment; federally imposed preferential treatment is still allowable, but only under more exacting standards of judicial review. Robinson et al. predict that most federal programs will be able to meet the compelling government interest test, but are more likely to run afoul of the "narrowly tailored" language, which requires that race-neutral alternatives be considered and found unworkable before race-based programs can be permissibly implemented (46 Lab. L.J. at 667).

Next, it is important to determine what the *Adarand* decision forecasts with respect to future changes in the law applicable to AAPs. In this regard, interested readers may find Welsh's analysis illuminating. This article was written while the *Adarand* case was pending, but its thorough analysis of prior judicial decisions, speeches, and writings of individual Supreme Court justices enabled the author to correctly predict the increased scrutiny now applicable to federal AAPs. Welsh observes that at least one Justice (Stevens) appears likely to focus on the characteristics shared by members of a disadvantaged class (e.g., socio-economic, rather than racial ones) that justify the use of AAPs. This analysis may open the door for economic-based classifications to supplant more objectionable race-based classifications (as Munro proposes, in order to prevent complete abolishment of AAPs. It is interesting to note here that economic classifications need only survive the more lenient "rational basis" standard of review, under which classifications need only be shown to be rationally related to a "legitimate" (as opposed to "significant" or "compelling") government interest to survive constitutional scrutiny.

Affirmative Action and Reverse Discrimination

It has been estimated that almost two thirds of the population (women and minorities) are entitled to preferential treatment under affirmative action, while the other third (white males) are not (see Terpstra, 46 Lab. L.J. at 308; Kandel, 21 Empl. Rel. L.J. at 114). It is thus not surprising that

reverse discrimination cases have received increasing attention over the last several years, and reflect pressure to modify the force of existing AAPs. The number of race-based discrimination charges filed with the EEOC by white males increased from just over 1,200 in 1990 to about 1,400 in 1993-1994 (an average of about 4.4% of all race-based complaints), and the number of gender-based discrimination charges filed by white males increased from just over 3,000 to almost 4,400 over the same period (an average of almost 18% of all gender-based EEOC complaints). As noted in Kauffman, Miller, and Ivey, *Affirmative Action and the White Male in America*, 46 Lab. L.J. 692 (1995), a number of recent court cases (many of which coincidentally involve law enforcement agencies) have found that affirmative action plans impermissibly infringe upon the rights of protected class non-members with respect to organizational practices including selection, promotion, and reductions in force. These include *San Francisco Police Officers Association v. San Francisco*, 812 F.2d 1125 (9th Cir. 1987; racial and gender preferences in employment testing "unnecessarily trammled" interests of white males), *Hayes v. North State Law Enforcement Officers Association*, 10 F.3d 207 (4th Cir. 1993; promotion of black officers ahead of higher ranking white officers pursuant to outdated and unjustified quotas in court-ordered consent decree held improper), *Detroit Police Officers v. Young*, 989 F.2d 225 (6th Cir. 1993; promotional affirmative action plan terminated after 19 years when found to provide preferential treatment for current minorities who had experienced no actual discrimination, and to work excessive hardship on non-minority candidates), and *Britton v. South Bend Community School Corporation*, 35 EPD No. 34,777 (1987; white teachers impermissibly laid off over less senior black teachers pursuant to planned RIF). It appears from these and other cases that courts have had increasing difficulty finding circumstances under which the "trammeling" of the interests of non-minorities is in fact "necessary," and there is every reason to expect this trend to continue after *Adarand*. For assistance in making further sense of trends in reverse discrimination cases, and an illustration of the importance of utilization analyses in helping organizational practitioners "comprehend the razor's edge that they must walk between affirmative action and reverse discrimination," see Robinson, Seydel, and Sloan, *Reverse Discrimination Employment Litigation: Defining the Limits of Preferential Promotion*, 46 Lab. L.J. 131 (1995).

The Status of the Glass Ceiling Initiative

In a sense, current developments with respect to the Glass Ceiling Initiative can be seen as a counterpoint to those regarding reverse discrimination. Conclusions presented in a March, 1995 report of the 21-member, bipartisan Glass Ceiling Commission created pursuant to Section 203 of the Civil Rights Act of 1991 are discussed in Kandel, *Affirmative*

Action and the Glass Ceiling: Contract Compliance and Litigation Avoidance, 21 Empl. Rel. L.J. 109, 114 (1995; the report is entitled "Good for Business: Making Full Use of the Nation's Human Capital" and is available—all 250 pages of it—from the Labor Department). A principal impact of the report was to focus debate on eliminating "barriers to full and fair competition in the workplace [and to] finding the best person for the right job." This focus has important implications with respect to the economics of AAPs, as discussed further below, and would appear to favor affirmative action insofar as it would serve to enhance more inclusive consideration of qualified individuals for jobs at all levels of an organization. Meanwhile, according to the Commission's report, among top executives at *Fortune* 500 and *Fortune* 1000 industrial companies, 97% are white, 95% are men, and pay and promotion disparities remain even where women and minorities have been able to gain access to fast tracks or executive suites. The report advocates merit-based solutions rather than race- or gender-based quotas, and urges that glass ceiling initiatives not exclude white non-Hispanic men. As Kandel notes, "it is altogether sensible that initiatives undertaken to reduce turnover and enhance upward mobility of women and minorities be equally applicable to white males. Besides spreading the benefits of worthwhile programs throughout its workforce, the 'inclusive' employer thereby reduces or eliminates the 'white male anger' which can otherwise undermine such affirmative efforts" (21 Empl. Rel. L.J. at 115). Kandel also observes that program inclusiveness (availability to whites as well as minorities) was a major factor saving the affirmative action skills training program in *Weber* (443 U.S. 193) from a finding that it had violated Title VII.

Employment Tests and the Economic Efficiency of AAPs

The Glass Ceiling Commission's focus on eliminating barriers to full and fair competition for upwardly mobile jobs relates directly to the issue of economic efficiency of AAPs. As Kandel makes clear, the Commission's report emphasizes "competition for jobs, not social engineering or moral worth. To the extent that workforce 'diversity' is advocated by the Report as a desirable goal, it is not as an end in itself, but as a means to help U.S. enterprises in worldwide competition which requires multilingual, multicultural adeptness" (21 Empl. Rel. L.J. at 114). A thorough analysis of more fundamental economic issues in this context can be found in Michael Selmi's article, *Testing for Equality: Merit, Efficiency, and the Affirmative Action Debate*, 42 UCLA L.Rev. 1251 (1995). This article is important reading for those interested in relationships among employment tests, affirmative action, discrimination, and productivity.

Professor Selmi's article begins by challenging two assumptions which have persisted through much of the affirmative action debate: that lesser

qualified (or unqualified) individuals will be necessarily selected over more qualified individuals pursuant to AAPs, and that a negative relationship therefore must exist between affirmative action and workforce productivity. Selmi debunks these myths by demonstrating that the often-minor differences between employment test scores of the "most qualified" candidate and those of the affirmative action candidate in reverse discrimination cases are typically only weak predictors of potential differences in future productivity. Selmi further argues that discrimination is economically inefficient, and that voluntary AAPs can actually be rational employer responses to the persistence of employment discrimination. Selmi contends that AAPs can alter workplace incentives so as to increase effort, and thus productivity, among both protected class members and non-members.

In support of these arguments, Selmi provides evidence from a number of studies to show that AAPs have not been linked to significant productivity losses. The author then utilizes principles regarding the standard error of measurement and true scores to show that test score ranking differentials in actual reported cases are virtually meaningless from both practical and statistical points of view. With regard to productivity, Selmi presents an economic analysis to show that a more competitive environment can be created through AAPs by increasing the perception of opportunity in the workplace for groups that might otherwise be discouraged from participating at optimal levels. This analysis dovetails nicely with Kandel's point about global competition, and the potential contribution of glass ceiling and other affirmative action initiatives for U.S. companies to develop "multilingual, multicultural adeptness" in order to compete effectively in the international marketplace.

Summary and Conclusion

From these articles, it seems reasonable to conclude that race-based affirmative action will continue to draw fire for practical as well as political purposes. If the goal of affirmative action is to reapportion jobs and wealth such that the economic position of minorities comes to more closely resemble that historically occupied by non-minorities, then race-based affirmative action programs are both under inclusive (many economically disadvantaged individuals are not minorities) and over inclusive (many minorities are not economically disadvantaged). An affirmative action system of socioeconomic preferences to supplant the current system of race-based preferences therefore makes sense. Whether proposals to institute such a system can fare well in today's political climate remains to be seen. All indications are that trends toward the erosion of affirmative action exemplified earlier in this article are likely to continue. Armed with the insights of these commentators, it should be interesting to make our own predictions.