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AFFIRMATIVE ACTION AFTER *ADARAND*

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THE SUPREME COURT'S DECISION in *Adarand*[1] was a wake up call for those who believed that the opinions on affirmative action that Justice Brennan wrote for the Court in *Weber*,[2] *Johnson*,[3] and *Metro Broadcasting*[4] would survive his retirement.

Adarand explicitly overruled *Metro Broadcasting* in holding that remedial racial set asides adopted by federal procurement agencies are as subject to strict scrutiny as are white supremacy laws enacted by state legislatures. This decision also has meaning for non-set aside programs such as the employment goals and timetables program imposed on federal contractors under Executive Order 11246.

However, since *Adarand* involves the application of the equal protection component of the Fifth Amendment to governmental action, its holding does not directly limit *Weber* and *Johnson* which deal with the lawfulness under Title VII of the Civil Rights Act of 1964 of voluntary affirmative action undertaken by employers.[5]

Nevertheless, the division of the Court in *Adarand* may well be indicative of how the Court will split in affirmative action cases arising under federal statutes as well as under the Constitution. Certainly that division makes it unlikely that a majority of the present Court can be obtained in support of voluntary or mandated affirmative action that does not include Justice O'Connor, the author of the Court's opinion in *Adarand*. It is, of course, possible that Justice Kennedy might provide the fifth vote needed, but he has tended to align himself with Justice O'Connor on affirmative action issues[6] and has been somewhat more conservative than she on these and related EEO issues.[7]

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[1] Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995).

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

[3] Johnson v. Transportation Agency of Santa Clara County, 480 U.S. 616 (1987).

[4] Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990).

[5] *But see* discussion *infra* at page 258 for Justice O'Connor's view that the standard for judging the lawfulness of affirmative action by public employers is the same under Title VII as it is under the equal protection clause.

[6] Justice Kennedy joined in Justice O'Connor's dissent in *Metro Broadcasting*, 497 U.S. at 602, and he agreed with most of her opinion for the Court in Richmond v. Croson, 488 U.S. 469, 518 (1989).

[7] *See* Justice Kennedy's concurrence in *Croson*, 488 U.S. at 518, and his dissent in Price Waterhouse v. Hopkins, 490 U.S. 228, 279 (1989).

In deciding what this means for affirmative action, three questions need to be answered:

1. What is the difference between the scope of lawful affirmative action as set forth by Justice Brennan in *Johnson* and the more limited scope that Justice O'Connor indicated she supported in her concurrence in that case?
2. Is it likely that Justice O'Connor will now accept Justice Brennan's opinion for the Court in *Johnson* because of *stare decisis*, even though she disagreed with it in her concurrence?
3. Are there any other significant differences between the opinions of Justice Brennan and Justice O'Connor on affirmative action issues and how are they likely to be resolved?

I. THE BRENNAN/O'CONNOR OPINIONS IN *JOHNSON*

Justice Brennan's opinion in *Johnson* reaffirmed the Court's decision in *Weber* that race conscious action could be taken to "eliminate manifest racial imbalances in traditionally segregated job categories" as long as such action did not "unnecessarily trammel the interests of the white employees."[8] *Johnson* not only repudiated the contention that race conscious action is only lawful when it benefits identifiable victims of discrimination, but it also upheld such action for the benefit of women as well as for minorities.

Justice O'Connor concurred in the judgment in *Johnson*, but she criticized the "expansive and ill defined approach to affirmative action by public employers"[9] in Justice Brennan's opinion, and she set forth her own more limited view of the circumstances under which voluntary affirmative action was lawful under Title VII and the equal protection clause.

Justice O'Connor declared that under either the statute or the Constitution, a public employer wanting to take voluntary affirmative action to increase its utilization of minorities "must have . . . a firm basis for believing that remedial action was required."[10] She went on to say, as she had in her concurring opinion in *Wygant*,[11] that evidence of societal discrimination was not sufficient to justify an employer's considering race in making employment decisions. Instead in her view, such a "firm basis" would exist if the employer could "point to a statistical disparity sufficient to support a prima facie claim under Title VII by the employee beneficiaries of the affirmative action plan of a pattern or practice claim of discrimination."[12]

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[8] 480 U.S. at 628-30.
[9] *Id.* at 648.
[10] *Id.* at 649.
[11] Wygant v. Jackson Board of Education, 476 U.S. 267 at 288 (1986).
[12] 480 U.S. at 649.

Justice O'Connor made clear that she would not require employers to prove that they were currently discriminating or even that they had discriminated in the past. She recognized that such requirements "would discourage voluntary efforts to remedy apparent discrimination."[13]

She would, however, insist that an employer justifying affirmative action point to statistical evidence relevant to the jobs at issue. As she explained in *Johnson* "only a goal that takes into account the number of women and minorities qualified for the relevant position could satisfy the requirement that an affirmative action plan be remedial."[14]

A close reading of the Brennan/O'Connor opinions in *Johnson*, leaves at least this reader unsure how much more specific statistical evidence Justice O'Connor would require to justify affirmative action than Justice Brennan would have done. Also, while Justice O'Connor would require evidence (but not conclusive proof) of discrimination by the employer taking the affirmative action, it is not clear from Justice O'Connor's own analysis where she finds such evidence in *Weber* against the employer and the union whose affirmative action plan was being challenged. In practice, her requirement of a prima facie case may require no more involvement by employers in past discrimination than their hiring qualified white men who received training or experience that *others* denied to minorities and women.

As such this may be close to the "arguable violation" standard that Kaiser Aluminum argued for in the *Weber* case and that Justice Blackmun indicated he would have preferred.[15] If so, it should not be a significant deterrent to employers considering affirmative action.

There is one further concern about Justice O'Connor's prima facie standard and that is whether it would prevent employers from continuing affirmative action when they have not yet reached parity, but where their hiring or promotions during all of the current limitations period has been at or above the availability of minorities and women. As one who favors continued affirmative action in such cases I suggest that Justice O'Connor's opinion focuses on the need to ensure that affirmative action is "remedial."[16] While she finds a "firm basis" for such action where a prima facie case exists, such a basis may also be found where a "manifest statistical imbalance in traditionally segregated job classification" is no longer being perpetuated, but has only partially been corrected.

Nevertheless, one should not assume that Justice O'Connor will necessarily support consideration of race or sex goals until full parity is achieved. She has repeatedly observed that "it is completely unrealistic

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[13] *Id.* at 652.

[14] *Id.* at 654.

[15] 443 U.S. at 212.

[16] *See supra* note 8 at 649.

to assume that individuals of each race will gravitate with mathematical exactitude to each employer or union absent unlawful discrimination."[17] Since she also believes that "[e]ven . . . flexible goals . . . may trammel unnecessarily the rights of non minorities,"[18] she may not find sufficient justification for continuing race and sex-conscious hiring or promotions once minorities or women are employed at sixty-five to eighty percent of their percentage of the relevant labor pool.

Also problematic may be Justice O'Connor's belief that the same standards should apply to judging the lawfulness of affirmative action under Title VII and under the equal protection clause. While she made this statement in her concurring opinion in *Johnson*, where the defendant was a public employer,[19] there is no basis for imposing a different standard of justification for affirmative action by private employers under Title VII than is imposed on public employers by that same statute.

Accordingly, under Justice O'Connor's approach private employers may need to give more attention than many have to date to the "narrow tailoring" of their affirmative action plans and specifically to a search for less race and sex-conscious plans which might be effective in correcting work force imbalance.

II. *STARE DECISIS*

Justice O'Connor was unwilling to follow *Metro Broadcasting* in *Adarand* for two principal reasons: first, because she does not consider that adherence to precedent is rigidly required in constitutional cases,[20] and secondly because she considered that *stare decisis* is better served by following the earlier "intrinsically sounder" interpretations of the Equal Protection clause from which *Metro Broadcasting* departed than by following the more recent decision.[21]

Cases involving the precedential effect of *Weber* and *Johnson* will involve statutory, not constitutional issues, so *stare decisis* may be a more substantial consideration to Justice O'Connor in such cases than it was in *Adarand*. Nevertheless, Justice O'Connor did not approach *Weber* in the *Johnson* case with quite the deference that Justice Stevens did.[22]

Accordingly, when another opportunity to revisit that subject is before the Court, it seems unlikely that Justice O'Connor will consider herself bound to follow Justice Brennan's opinion in *Johnson* and to

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[17] *Sheet Metal Workers*, 478 U.S. 421 at 494; *Paradise*, 480 U.S. 149 at 197; *Johnson*, 480 U.S. 616 at 654.

[18] *Sheet Metal Workers*, 480 U.S. 421 at 197.

[19] *Id.*

[20] *Adarand*, 115 S. Ct. 2097 citing Arizona v. Rumsey, 467 U.S. 203, 212 (1986).

[21] *Id.* Citing Justice Frankfurter's opinion in Helvering v. Hallock, 309 U.S. 106, 119 (1940).

[22] *Compare* 480 U.S. at 642-47 with *id.* at 647-57.

suppress the views she set forth in her own concurring opinion in that case.

Therefore the differences in the Brennan/O'Connor opinions described above may well become relevant and significant.

III. Other Significant Differences

Justice O'Connor has also expressed her disagreement with Justice Brennan on one other issue involving voluntary affirmative action and on two issues involving Court-imposed affirmative action.

The issue in regard to voluntary affirmative action is who has the burden of proof when a plan is challenged. In *Johnson* Justice Brennan stated that the burden was on the challenger,[23] and Justice O'Connor did not disagree with him.[24]

However, Justice O'Connor changed her opinion when the Court in the *Price Waterhouse* case[25] held that once a plaintiff proves that an illegitimate factor was considered in an employment decision, the burden then shifts to the employer to prove that the same decision would have been made even if there had been no discrimination. In his plurality opinion in *Price Waterhouse*, Justice Brennan sought to exclude "the special context of affirmative action,"[26] from being affected by that decision. Justice O'Connor who concurred in the judgment, agreed, however, with Justice Kennedy's dissent that the decision to shift the burden of proof to the defendant when discrimination is a substantial motivating factor is as applicable to the defense of an affirmative action plan as it is to the defense of any other charge of intentional discrimination.[27]

The two issues of Court-imposed affirmative action on which Justice O'Connor disagreed with Justice Brennan concerned the lawfulness under Title VII and the Fourteenth Amendment of quota-like orders imposed on recalcitrant defendants. In the *Sheet Metal Workers* case,[28] the trial court had imposed a minority membership goal that the union was to reach by a certain date or heavy fines would be imposed on it. The union was also required to establish a fund to provide benefits for minority apprentices, but not for non-minority apprentices.

Justice Brennan and the plurality for which he wrote considered these orders reasonable under the circumstances and not in violation of the anti-quota provision of Title VII: Section 703(j). They interpreted

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[23] *Id.* at 626-27.

[24] *Id.* 647-57. In her concurring opinion in *Wygant*, Justice O'Connor had stated that the challenger had the burden of proof in claiming that an affirmative action plan violated the equal protection clause. 476 U.S. 267 at 292-93.

[25] Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

[26] *Id.* at 239 n.3.

[27] *Id.* at 279, citing 490 U.S., at 293 n. 4.

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

that section as not limiting the remedial powers of courts, but only as protecting employers and unions from being found in violation of the statute simply because of a racial imbalance in their work force or membership.

While Justice O'Connor concurred in part of the Court's judgment in the *Sheet Metal Workers* case,[29] she dissented insofar as the judgment upheld the membership goal and the fund order. She considered that these orders operated "not as goals but as racial quotas which run counter to §703(j). . .and are thus impermissible under §706(g)."[30]

In her opinion, "racial quotas are impermissible as a means of enforcing Title VII, and. . .even racial preferences short of quotas should be used only where clearly necessary if these preferences would benefit non-victims at the expense of innocent non-minority workers."[31]

Justice O'Connor criticized Justice Brennan's plurality opinion for offering "little guidance as to what separates an impermissible quota from a permissible goal."[32] She found more help in a 1973 memorandum adopted by EEOC and the Departments of Labor and Justice which stated that a goal is "a numerical objective, fixed realistically in terms of the number of vacancies expected and the number of qualified applicants available in the relevant job market" and that "an employer's failure to meet a goal despite good faith effort 'is not subject to sanction because [the employer] is not expected to displace existing employees or to hire unneeded employees to meet [the] goal.'"[33]

Despite the union's "egregious" violations of Title VII and its sometimes "inexcusable recalcitrance" in responding to earlier orders of the District Court,[34] Justice O'Connor refused to support the membership goal because it required the union's membership to mirror the relevant labor pool by a specific date "without regard to variables such as the numbers of qualified minority applicants available or the number of new apprentices needed" and because the union and its joint apprenticeship committee faced fines that "will threaten their very existence" if this goal was not attained.[35]

Paradise[36] presented a similar situation where a one black to one white goal had been imposed on the promotion of highway troopers by the Alabama Department of Public Safety. This goal, which was challenged under the equal protection clause of the Fourteenth Amendment, was upheld by the Supreme Court, and Justice Brennan again

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[29] *Id.* at 489.
[30] *Id.* at 490.
[31] *Id.* at 493.
[32] *Id.* at 494.
[33] *Id.* at 496.
[34] *Id.* at 497.
[35] *Id.* at 497.
[36] United States v. Paradise, 480 U.S. 149 (1987).

announced the judgment of the Court and presented an opinion for a plurality of the justices.

Justice O'Connor neither joined in that opinion nor concurred in the Court's judgment. She acknowledged the "pervasive, systematic and obstinate discriminatory conduct" of the Alabama department,[37] but noted that the District Court was obligated to fashion a remedy that was narrowly tailored to end that department's "egregious history of discrimination."[38] Because she considered that the Court was adopting a "standardless view of 'narrowly tailored' far less stringent than that required by strict scrutiny," Justice O'Connor dissented.[39]

In her dissenting opinion Justice O'Connor set forth the reasons why she believed that the one-for-one promotional goal was not as narrowly tailored as it should have been. One of these was the fact that the one-for-one goal far exceeded the percentage of blacks in the trooper force.[40] While conceding that "the percentage of minority individuals benefitted by a racial goal may . . . exceed the percentage of minority group members in the relevant work force,"[41] Justice O'Connor declared that "protection of the rights of non-minority workers demands that a racial goal not substantially exceed the percentage of minority group members in the relevant. . .work force absent compelling justification."[42]

Justice O'Connor did not find such a compelling justification in this case. Moreover, she concluded that the District Court had imposed its one-for-one goal without considering whether there was any alternative means of forcing the Alabama department to develop a promotional process that did not have an adverse impact on black troopers. Because of this and the fact that she found at least two alternatives that would have a lesser effect on the rights of non-minority troopers, appointment of a trustee to develop the desired procedure and stiff fines or other penalties for contempt, Justice O'Connor dissented.[43]

Since Justice Brennan's opinions in *Price Waterhouse*, *Sheet Metal Workers*, and *Paradise* were all plurality opinions rather than opinions of a majority of the Court, Justice O'Connor can be expected to reassert the positions she set forth in her opinions in those cases.

IV. CONCLUSION

Justice O'Connor clearly regards the lawfulness of affirmative action as more circumscribed than Justice Brennan did. However, she has

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[37] *Id.* at 196.
[38] *Id.*
[39] *Id.* at 197.
[40] *Id.* at 198-99.
[41] *Id.* at 199.
[42] *Id.*
[43] *Id.* at 199-200.

supported race and sex goals which benefit non-victims of discrimination and she does not require findings that the discrimination being remedied was committed by the employers or unions taking the affirmative action.

While she probably will require that recidivists such as the Sheet Metal Workers and the Alabama Department of Public Safety be treated with more care than Justice Brennan required, she seems ultimately prepared to support what truly needs to be done to end discrimination, whether that be fines, flexible goals, or other measures.

So affirmative action not only is alive in the Supreme Court, but seems likely to remain in that condition, even though it faces a stunted existence. Moreover, legislation limiting affirmative action, such as the Dole-Canady bill, seems unlikely to pass both houses in its present form, much less override a presidential veto.

In this situation President Clinton has proposed that we mend affirmative action, rather than end it. That seems to me to be a good idea, but I would go further than just insisting that unqualified workers not be promoted, that white males not be excluded from consideration when that is feasible, and that race and sex not be used to maintain parity once it is achieved.

Let me suggest three additional possibilities:

The interests of non-minorities are obviously more impacted by preferences that cause them to be laid off than by those that deny them hiring opportunities. Promotional opportunities are more difficult to categorize. Some, such as the position at stake in *Johnson*, may soon be followed by other openings for which those denied the earlier opportunity can compete.[44] Others may be more one of a kind and the heir apparent may have been identified some time ago. Also, the differences among candidates may range from marginal to "head and shoulders." Prudence, as well as fairness, suggests that strong expectations or substantial superiority should generally not be overridden by affirmative action goals in making promotional decisions.

Some set asides may be required by the nature of the selection process; for example, in *Weber*, selections were controlled by seniority except for affirmative action concerns. However, where subjective judgments are being made, exclusion of white males from consideration for any vacancies may be considered too quota-like even if an employer is not on pace to meet his goals. An alternative approach worth considering is to provide in such cases that white males may be selected only after a reviewing official is satisfied that good faith efforts have been taken to recruit and consider minorities and women.

Interim goals beyond availability make sense when the number of openings is small and the imbalance is great. In deciding how much of

[44] 480 U.S. 616 at 638.

a multiplier to apply in such situations, consideration should be given not only to the ability to find the numbers of qualified minorities and women needed, but also to the extent that opportunities for white males are being compressed. Obviously the compression is greater when an employer has both minority and female goals than when it has only one of those goals.

Actions such as these may help to avoid certain aspects of affirmative action that some have criticized. I hope they will contribute to the continuation of this process.

In my opinion affirmative action has contributed greatly to our progress as a nation in increasing the utilization of minorities and women. It has done so without undue trammeling on the interests of white males, without requiring employers and unions to change their selection procedures, and without requiring the use of significant governmental resources.

It seems ironic that a Congress intent on reducing the size of government and eliminating or changing things that are not functional, should be trying to dismantle something that is as effective as affirmative action has been.