MITCHELL | HAMLINE School of Law

William Mitchell Law Review

Volume 22 | Issue 1 Article 12

1996

The Political Assault on Affirmative Action: Undermining Forty Years of Progress Toward Equality

Gerald W. Heaney

THE POLITICAL ASSAULT ON AFFIRMATIVE ACTION: UNDERMINING FORTY YEARS OF PROGRESS TOWARD EQUALITY

The Honorable Gerald W. Heaney†

It is not news that affirmative action is under attack; several presidential candidates, a majority of the United States Supreme Court, and numerous members of Congress have all taken their shots. What is noteworthy, however, is that this attack by our political leadership marks a dramatic and important shift. Over the past fifty years, affirmative action has enjoyed the support of all three branches of our federal government. This political leadership led the way for millions of women, African Americans, Hispanics and other minorities to take their place in academia and the workplace as talented contributors. More important than any single congressional act, executive order, or court decision, this commitment by our political leadership had set the standard for individual decisionmakers at all levels of government, business and academia. This is where progress was achieved. However, without this political leadership, the momentum of forty years is undermined.

In my view, affirmative action is nothing more and nothing less than a national policy to bring life to our founding principle: "[T]hat all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."[1] So important was this ideal that at Gettysburg Abraham Lincoln repeated these words as the basis for enduring the destruction wrought by the Civil War. Affirmative action is the very essence of our democracy. It is a promise to *all* of us that we will have an equal opportunity for an education, a job, and a home, and that action will be taken to ensure that the promise becomes reality.

One of many examples of this recent assault is the Supreme Court's decision in *Adarand Constructors, Inc. v. Pena*.[2] The

† Senior Circuit Judge, United States Court of Appeals for the Eighth Circuit.

1. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).
2. 115 S. Ct. 2097 (1995).

opinion, concurrences, and dissents filed by the Justices illustrate the loss of consensus with respect to what had been a national goal. I would not be as concerned with the specific result in *Adarand*, or by legislative proposals that are currently being considered to limit affirmative action, if these same leaders were clear that they continued to support the underlying goal of equality of opportunity. Unhappily, rather than characterizing these changes as refinements of the manner by which the goal is achieved, many people state unequivocally, "We must get rid of affirmative action."

Before focusing on the recent *Adarand* decision as an example of this political shift, I will briefly outline the extent of the past leadership on affirmative action within all three branches of federal government and the nature of its success. I will also examine the character and causes of the rising opposition to the idea of affirmative action which has, at least in part, caused some of our political leaders to reverse course. Finally, I will briefly discuss a few of the opinions filed in *Adarand*. These opinions, along with a memorandum prepared by the Justice Department in response to the *Adarand* decision, offer insight into the problems presented faced by our society as well as the issues that remain to be resolved.

From early in our nation's history, discrimination against African Americans was the order of the day. The institution of slavery accompanied early colonists. Even after the abolition of slavery in 1865, the next 100 years of our national history were marked by the denial to black men, women and children of the opportunity to attend public schools with white children, to work in many jobs, or to live where they desired. Not until 1941, when persons of color were needed in the war effort, were the first steps taken against segregation. In that year, Franklin D. Roosevelt issued an executive order[3] declaring it the policy of the United States to encourage full participation in the national defense program by all citizens regardless of race, creed, color or national origin. In the belief that the democratic way of life could be successfully defended only with the help and support

3. Exec. Order No. 8802, 6 Fed. Reg. 3109 (1941) (ordering all government agencies and departments to use special measures to assure vocational and training programs grant admission without discriminating on the basis of race, creed, color or national origin).

of all citizens, that order declared it the duty of employers and labor organizations to provide for the full and equitable participation of *all* workers in the defense industry. That order was followed by another in 1943,[4] which established a committee on fair employment practices with the goal of eliminating discrimination in employment. Thus, more than fifty-five years ago our political leadership took the first steps toward implementing the promise of equality.

In 1948, Hubert H. Humphrey, then mayor of Minneapolis and a leader in the civil rights movement, made an historic address to the Democratic National Convention calling for equal opportunity in employment for all persons.[5] While Humphrey's speech was successful at the convention, it came to divide the Democratic Party and cost Humphrey southern support in his bid for the presidency twenty years later. As a result, he narrowly lost his 1968 bid for the presidency to Richard Nixon. All polls indicate that the Democratic Party's support of affirmative action continues to cost it millions of votes in the South.

In 1954, the Supreme Court took its first meaningful step to ensure equality of opportunity. In a stunning decision, *Brown v. Board of Education*[6] reversed the long-standing doctrine[7] that separate public facilities could meet constitutional standards. From the *Brown* decision until the late 1980s, the Supreme Court gave unflinching support to equality of opportunity in all facets of American life.

Following the lead of President Roosevelt, Presidents Truman and Kennedy issued executive orders of their own renewing the commitment of the United States to equal

---

4. Exec. Order No. 9346, 8 Fed. Reg. 7183 (1943) (reaffirming the policy of the United States to bar discrimination in the employment of any person in war industries or government by reason of race, creed, color or national origin).

5. Hubert H. Humphrey stated:

> There are those who say—this issue of civil rights is an infringement on the states' rights. The time has arrived for the Democratic Party to get out of the shadow of states' rights and walk forthrightly into the bright sunshine of human rights. . . .
>
> For all of us here, for the millions who have sent us, for the whole two billion members of the human family—our land is now, more than ever, the last best hope on earth. I know that we can—I know that we shall begin here the full realization of that hope—that promise of a land where all men are free and equal, and each man uses his freedom wisely and well.

DAN COHEN, UNDEFEATED: THE LIFE OF HUBERT H. HUMPHREY 144 (1978).

6. 347 U.S. 483 (1954).

7. This doctrine was enunciated in Plessy v. Ferguson, 163 U.S. 537 (1896).

opportunity in employment.[8] Each order was more comprehensive than that which it succeeded, and each provided for implementing mechanisms to ensure that equal opportunity in employment was more than just policy but became reality.

Notwithstanding the executive orders and the Supreme Court's decision in *Brown*, only limited progress was made toward providing jobs and opportunities in the marketplace for African Americans and other minorities. As a result, tensions within the African American community continued to rise and, on August 28, 1963, the civil rights community sponsored a march on Washington, D.C. demanding strong civil rights legislation. On that occasion, the Reverend Martin Luther King made his memorable "I Have a Dream" speech. Dr. King proclaimed that 100 years after the Emancipation Proclamation, "the Negro still is not free."[9]

In 1964, the Civil Rights Act was passed under the bipartisan leadership of Senator Everett Dirkson of Illinois and Senator Humphrey.[10] Republicans and Democrats joined forces to overcome a filibuster led by Senator Strom Thurmond of South Carolina. Title VII of the Act not only prohibited discrimination in employment on the basis of race, color, religion or national origin but, for the first time, prohibited discrimination on the basis of gender as well.[11] The following year, President Johnson followed up the Civil Rights Act with Executive Order No.

---

8. Exec. Order No. 10,308, 16 Fed. Reg. 12,303 (1951) (establishing the Committee on Government Contract Compliance to examine and study the rules, procedures, and practices of the contracting agencies of the government to ensure they comply with government contract provisions prohibiting discrimination against any employee or applicant for employment because of race, color, creed or national origin); Exec. Order No. 10,925, 26 Fed. Reg. 1977 (1961) (establishing the President's Committee on Equal Employment Opportunity).

9. Dr. King stated:

> The Negro still is not free; one hundred years later, the life of the Negro is still sadly crippled by the manacles of segregation and the chains of discrimination; one hundred years later, the Negro lives on a lonely island of poverty in the midst of a vast ocean of material prosperity; one hundred years later, the Negro is still languished in the corners of American society and finds himself in exile in his own land . . . .

JUAN WILLIAMS, EYES ON THE PRIZE: AMERICA'S CIVIL RIGHTS YEARS, 1954-1965 203-04 (1987).

10. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241.

11. Title VII, Civil Rights Act of 1964, Pub. L. No. 88-352, § 701, 78 Stat. 241.

11,246.[12] This order, by far the most comprehensive issued by any president, still plays a prominent role in the legal support for affirmative action. The commitment to affirmative action continued in the executive branch during the administrations of Presidents Nixon and Ford, and in the judicial branch under the leadership of Chief Justices Warren and Burger.[13]

As a result of this leadership, the people of this nation came to understand the extent of our national commitment to equality of opportunity in academics and the marketplace; its unwavering character made clear that this policy would be implemented. The example set by the political leadership produced a moral suasion that extended beyond the purview of the laws, executive orders, and court decisions. This development was vital. Without individuals making choices and taking action in furtherance of the aims embodied by affirmative action, there would have been only modest success for a promise propelled solely by federal programs.

My greatest concerns now are not the specific changes made by the recent *Adarand* decision, but that the judiciary, along with the other branches, appears posed to weaken the commitment to equality of opportunity. This is particularly apparent in the rhetoric of the presidential candidates and many congressional leaders. In addition to the rollback of the legal framework that would accompany any legislative or executive action, such rhetoric signals to the nation the dilution of our goal. Undoubtedly, such a signal will influence the same daily decisionmakers

---

12. Exec. Order No. 11,246, 30 Fed. Reg. 12,319 (1965) (prohibiting all discrimination in government agencies).

13. In 1971 the late Chief Justice Warren Burger, writing for the Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), concluded that residual discrimination arising from prior employment practices was not insulated from remedial action. The facts were that after the Civil Rights Act was passed, the Duke Power Company, which had denied employment to African Americans in all but one department, instituted a high school completion requirement and a general intelligence test as conditions of employment. The Court held:

> The facts of this case demonstrate the inadequacy of broad and general testing devices as well as the infirmity of using diplomas or degrees as fixed measures of capability. History is filled with examples of men and women who rendered highly effective performance without the conventional badges of accomplishment in terms of certificates, diplomas, or degrees. Diplomas and tests are useful servants, but Congress has mandated the commonsense proposition that they are not to become masters of reality.

Id. at 433.

who had provided the momentum for our progress.

Let us examine for a moment a few results of our national commitment to equality. When I attended the University of Minnesota Law School from 1937 through 1941, there was only one woman in our class, Lorraine O'Donnell. In contrast, when I attended the graduation at the law school a few months ago, I was pleased to note that forty-five percent of the graduates were women. The class valedictorian was a woman. In the span of fifty-four years, women have demonstrated their capacity for success when given an opportunity. Do we really believe that women would have been given this opportunity had our national leadership not been publicly committed to a program of affirmative action?

When I served in the United States Army from 1942 through 1945, African Americans were not permitted to serve in combat units with white men. To be sure, they could serve as MPs and supply personnel, and segregated black combat units performed magnificently in battle. Today African Americans and other people of color proudly serve in every branch of our armed services. The fact is, without people of color in our military, it is doubtful that we would have an effective defense force. Moreover, military service has provided minorities with a source of skills and training that would have not been otherwise available for them. Do we really believe that minorities would have been given the opportunity to enhance the effectiveness of our armed forces had our national leadership not been publicly committed to a program of affirmative action?

What was true of African Americans in World War II was equally true with respect to women. In that war, women were either nurses or clerical workers. Now women have gained the right to serve in our armed forces and do so successfully. Indeed, within the last few months, the number one cadet at West Point was a woman. Do we really believe that women would have been given the opportunity to enhance the effectiveness of our armed forces had our national leadership not been publicly committed to a program of affirmative action?

What is true with respect to government employment is also true with respect to employment in the private sector. As a result of the commitment to affirmative action, millions of women and people of color now hold jobs that were formerly reserved for white men. To illustrate just one indication of the

benefits produced by these changes, our work force is more productive today than at any time in our history.[14] Acknowledging that diversity has enhanced rather than diminished productivity, executives have made diversity in the work force a priority. Although these same executives were initially reluctant to follow the political lead, they have come to understand, arguably better than their political counterparts, that unless they bring women and minorities are permitted to contribute, American businesses will not be able to succeed in a competitive global economy. Today nearly every major employer in the United States now has an affirmative action program.

Of course, not all has been sweetness and light with affirmative action. Dissenting voices, first heard in the 1970s, emboldened opponents of affirmative action to the point that in 1985, Assistant Attorney General W. Bradford Reynolds attempted to eliminate President Johnson's Executive Order 11,246. This plot was leaked to the press, however, and abandoned as a result of the public outcry that followed.[15] In two 1989 decisions, the Supreme Court for the first time placed limits on efforts to fight racial discrimination in employment.[16] Both decisions were later undone by Congress with the Civil Rights Act of 1991.[17] Since then the opposition to affirmative action within the political arena has grown dramatically; several presidential candidates promise to repeal all affirmative action plans if elected and many congressmen and senators express similar attitudes.

What has precipitated this turnabout? In part, the change can be explained as political expediency. The perception among many white men is that women and minorities have been given unfair preferential treatment. Similarly, many small businessmen share the fear of reverse discrimination. This perception originated and is perpetuated largely through anecdotal evidence

14. U.S. DEP'T OF COMMERCE, SURVEY OF CURRENT BUSINESS (1993).

15. Gerald Boyd, *Goals for Hiring to Stay in Place*, N.Y. TIMES, August 25, 1986, at A1.

16. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) (5-4 decision) (limiting the standard required to demonstrate a prima facie case of Title VII); *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) (5-4 decision) (restricting the application of 42 U.S.C. § 1981 to discriminatory conduct affecting a minority employee's right to contract, not discriminatory conduct affecting the enforcement of the contract).

17. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified in scattered sections of 2, 29, and 42 of U.S.C.) (codifying that Title VII relief is available in cases of disparate impact or mixed motives).

that is widely reported in the conservative press and on conservative talk shows. The statistics, however, do not bear out the anecdotal evidence of widespread reverse discrimination. The fact is that of the 90,000 annual complaints of employment discrimination based on race, ethnicity, or gender, less than three percent are for reverse discrimination.[18] Moreover, where cases of discrimination against white males are found, relief is provided by the same legal system that protects the rights of minorities.

The most obvious culprit, however, in the ebb of political support for affirmative action is the economic changes that have accompanied the restructuring of American industry since 1960. Not only has manufacturing moved abroad, but American industries have reorganized and downsized. As a result, many men who held good jobs with high wages and excellent fringe benefits in the steel industry, in the automobile industry, and in other manufacturing industries are now looking at jobs that may pay one-third of what they or their fathers had earned. Additionally, these men now have to compete with women, African Americans, Hispanics, and other minorities.

Let me cite an example from the area in which I live. In the mid 1970s, the taconite industry employed approximately 15,000 men in northeastern Minnesota. These men earned nearly $50,000 per year in current dollars. Now the taconite industry employs 6,000 persons. Of these 6,000 employees, many are women. In rough terms, this means that 9,000 young men from the Minnesota Iron Range, who had expected to follow in the footsteps of their grandfathers and fathers, are not able to get jobs in the taconite industry. Instead, they are unhappily competing for jobs that pay from five to ten dollars per hour. While the restructuring in response to global market forces seems beyond their control, policies that provide a preference for women or minorities make an easy target to pin their frustrations.

What is true on the Minnesota Iron Range is equally true throughout the country. The younger generations of men simply do not understand why they cannot have the jobs handed down from their grandfathers to their fathers. Instead, they are

18. *Give All Americans a Chance . . .*, WASH. POST, July 20, 1995, at A13 (excerpts of President Clinton's remarks on affirmative action).

forced to compete for less desirable jobs against a broader group of people. I understand their feelings. Indeed, in my own case, and more than likely in your own, every summer job I had during high school and college was obtained through a relative, a friend, or a neighbor. Without a doubt, this practice continues today and will continue tomorrow. It cannot be denied, however, that this practice has a substantial effect in enhancing opportunities for young white men.

No one can blame a parent or a grandparent for helping their children or grandchildren. But, given the effect that this help produces, one cannot reasonably argue that affirmative action somehow deprives white males of their legitimate expectations. Today's white males cannot claim to inherit as their birth right jobs secured due to their fathers' and grandfathers' status as white males. Rather, white males, as with all others, may only claim an equal opportunity. The human desire to pass on advantages to one's children, however benign in its individual intent, threatens to perpetuate the imbalance left by the discriminatory practices of our past. No one suggests that this desire should or could be curtailed, but given the significance of its impact, it is disingenuous to call for a "color-blind" system in which the status quo is left unaltered. Instead, society has chosen to provide a slight counterbalance as a remedy. Affirmative action provides the same opportunity for minorities that white Americans seek for their own children and grandchildren.

Finally, having reviewed the merits of affirmative action, I wish to discuss one of the more prominent examples of our nation's recent change of heart. On June 12, 1995, the Supreme Court handed down a five-to-four decision setting forth a new standard for assessing the constitutionality of federal affirmative action programs.[19] In *Adarand*, the Court considered a Department of Transportation practice that provided contractors with a financial incentive to hire subcontractors certified as small businesses controlled by socially and economically disadvantaged individuals.[20] The controversial aspect of this practice was that women and certain minority groups were presumed to qualify for the socially and economically disadvantaged status. In the case

19. Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995).
20. *See id.* at 2102.

before the Court, the prime contractor awarded a subcontract to a minority-owned company despite the fact that Adarand Constructors submitted the lowest bid.[21] Adarand filed suit claiming that the race-based presumptions violated the equal protection component of the Fifth Amendment's Due Process Clause. Assessing the constitutionality of the federal race-based action under a "lenient" standard resembling intermediate scrutiny, the district court granted summary judgment for the Secretary of Transportation.[22] The court of appeals affirmed.[23]

In an opinion written by Justice O'Connor, the Supreme Court vacated the lower courts' decisions and held that all race classifications, whether made by federal or state government, would be reviewed by the federal courts under the strictest standard of scrutiny.[24] As such, to survive judicial review, any classification must not only serve a *compelling* governmental interest, but must be narrowly tailored to further that interest.[25] The Court then remanded the case to the court of appeals to determine whether the strict scrutiny standard required by the opinion had been met.

Justice Thomas filed a concurring opinion in which he stated that benign motivations or good intentions are irrelevant in determining whether a governmental classification meets constitutional standards.[26] Justice Stevens, in dissent, sharply

---

21. *Id.*
22. Adarand Constructors, Inc. v. Skinner, 790 F. Supp. 240 (D. Colo. 1992).
23. Adarand Constructors, Inc. v. Pena, 16 F.3d 1537 (10th Cir. 1994).
24. *Adarand*, 115 S. Ct. at 2100.
25. *See id.* at 2101. Justice O'Connor stated:

> It is not true that strict scrutiny is strict in theory, but fatal in fact. Government is not disqualified from acting in response to the unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country. When race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the "narrow tailoring" test set out in this Court's previous cases.

Id.

26. *See id.* at 2119 (Thomas, J., concurring). Justice Thomas stated in his concurring opinion:

> That these programs may have been motivated, in part, by good intentions cannot provide refuge from the principle that under our Constitution, the government may not make distinctions on the basis of race. As far as the Constitution is concerned, it is irrelevant whether a government's racial classifications are drawn by those who wish to oppress a race or by those who have a sincere desire to help those thought to be disadvantaged. There can be no doubt that the paternalism that appears to lie at the heart of this program is at war with the principle of inherent equality that underlies and

disagreed with Justice Thomas, stating that there is no moral equivalence between a policy designed to protect a caste system and one which seeks to eradicate it.[27] Justice Stevens also noted the inconsistency with existing case law whereby courts would apply a stricter standard to cases involving racial classifications than to cases involving gender classifications.[28]

What should be most troubling to any American who supports the principle of equality of opportunity is that not a single Justice in the majority expressed support for affirmative action. It remained for the dissenting Justice Ginsburg to set forth a clear rationale for affirmative action. She said that the persistence of racial inequality requires Congress to act affirmatively, "not only to end discrimination, but also to counteract discrimination's lingering effects."[29]

---

infuses our Constitution.

Id. He added:

> [T]here can be no doubt that racial paternalism and its unintended consequences can be as poisonous and pernicious as any other form of discrimination. So-called "benign" discrimination teaches many that because of chronic and apparently immutable handicaps, minorities cannot compete with them without their patronizing indulgence. Inevitably, such programs engender attitudes of superiority or, alternatively, provoke resentment among those who believe that they have been wronged by the government's use of race. These programs stamp minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are "entitled" to preferences.

Id.

27. *See id.* at 2120 (Stevens, J., dissenting). Justice Stevens stated:

> There is no moral or constitutional equivalence between a policy that is designed to perpetuate a caste system and one that seeks to eradicate racial subordination. Invidious discrimination is an engine of oppression, subjugating a disfavored group to enhance or maintain the power of the majority. Remedial race-based preferences reflect the opposite impulse: a desire to foster equality in society. No sensible conception of the Government's constitutional obligation to "govern impartially," should ignore this distinction.

Id. (citation omitted).

28. *See id.* at 2122.

29. *Id.* at 2135 (Ginsburg, J., dissenting). Justice Ginsburg wrote:

> The statutes and regulations at issue, as the Court indicates, were adopted by the political branches in response to an "unfortunate reality": "[t]he unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country." The United States suffers from those lingering effects because, for most of our Nation's history, the idea that "we are just one race," was not embraced. For generations, our lawmakers and judges were unprepared to say that there is in this land no superior race, no race inferior to any other.
>
> . . . .
>
> The divisions in this difficult case should not obscure the Court's recognition of the persistence of racial inequality and a majority's acknowledgment of Congress' authority to act affirmatively, not only to end discrimina-

Ironically, the *Adarand* decision, which casts doubt on the constitutionality of many affirmative action programs, was released during the same week that the Southern Baptist Convention apologized to African Americans for their role in perpetuating slavery and segregation. Why is it that at the very time people of goodwill are opening their hearts, their minds, and their arms to their black neighbors, some leaders are moving in the opposite direction?

Although I am reluctant to speculate on the legal ramifications of the *Adarand* decision, as undoubtedly our Court will be hearing cases on this question in the near future, I will share a Justice Department memorandum[30] outlining its perceptions of the extent of the Supreme Court's shift on affirmative action, as well as the important issues that have yet to be answered. The significant points in the Justice Department memorandum are these:

1. While Justices Scalia and Thomas appear to categorically oppose race-based government affirmative action, a majority of the Court acknowledged that the practice and lingering effects of racial discrimination may justify the use of race-based remedial measures in certain circumstances.

2. The extent to which diversity itself is a permissible justification for affirmative action is uncertain. The memorandum notes the sharp disagreement among the Justices. To the extent that diversity itself may not be a permissible justification,

---

> tion, but also to counteract discrimination's lingering effects. Those effects, reflective of a system of racial caste only recently ended, are evident in our workplaces, markets, and neighborhoods. Job applicants with identical resumes, qualifications, and interview styles still experience different receptions, depending on their race. White and African-American consumers still encounter different deals. People of color looking for housing still face discriminatory treatment by landlords, real estate agents, and mortgage lenders. Minority entrepreneurs sometimes fail to gain contracts though they are the low bidders, and they are sometimes refused work even after winning contracts. Bias both conscious and unconscious, reflecting traditional and unexamined habits of thought, keeps up barriers that must come down if equal opportunity and nondiscrimination are ever genuinely to become this country's law and practice.
>
> Given this history and its practical consequences, Congress surely can conclude that a carefully designed affirmative action program may help to realize, finally, the "equal protection of the laws" the Fourteenth Amendment has promised since 1868.

Id. at 2134-36 (citations omitted).

30. U.S. Dep't of Justice, *Justice Dep't Memorandum on Supreme Court's Adarand Decision*, 1995 DAILY LAB. REP. 125, at d33 (from Asst. Atty. Gen. Walter Dellinger to General Counsels).

the government should seek some further objective beyond diversity, such as enrichment of academic experience or offering a variety of perspectives in other endeavors.[31] It is unclear to me, however, that the Supreme Court has disavowed diversity as a legitimate basis for federal affirmative action programs. I hope this is not the case.

3. *Adarand* is not confined to contracting, but is applicable to any race-based classification as a basis for decisionmaking. *Adarand*, however, does not contemplate actions taken prior to a decision: outreach and recruitment efforts are not subject to the *Adarand* standards.

4. *Adarand* did not address the appropriate constitutional standard of review for affirmative action programs that use gender classifications as a basis for decisionmaking. All circuits of the federal judiciary, except the Sixth Circuit, continue to apply *intermediate scrutiny* to affirmative action measures that benefit women. One could hope that the Supreme Court would recognize the inconsistency of *Adarand* with the standard applied to gender classifications and return to applying an intermediate standard in both cases.

5. Finally, a question remains as to whether courts should give greater deference to Congress than to state and local governments when evaluating the congressional findings which form the justification for federal affirmative action programs. The Department of Justice suggests that the Supreme Court would hold that greater deference to Congress is proper in light of the broad congressional powers granted by the Constitution to remedy discrimination.

It remains my view that even under *Adarand*, carefully designed federal affirmative action programs can be sustained. Furthermore, when read strictly, *Adarand* does not affect the ability of private employers or businesses to continue policies designed to bring more women and minorities into the work force. Thus, private employers can continue to recruit women and minorities and give them preferential treatment, so long as private employers do not overtly discriminate against more

31. *See, e.g., Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 314 (1978) (writing for the Court, Powell, J. noted "the interest of diversity is compelling in the context of a university's admissions program . . . ."); *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990).

qualified, white males in the process. I can say categorically that the court on which I have sat for nearly thirty years has never required an employer, public or private, to hire an unqualified person. The more important question, however, is whether private employers will continue their present efforts to diversify despite the equivocation by our political and legal leadership. I believe if businesses want to remain competitive in the global economy, they must develop all of the talent that they can recruit.

I want to close by sharing with you my deeply held belief that nothing is more important to the survival of our democracy than a lasting commitment to equality of opportunity for all Americans. Unfortunately, racism is alive and well in the United States. There are many among us who have used and will continue to use race for personal or political benefit. Thus, we need an effective and continuing program of affirmative action not only for the benefit of women, African Americans, Hispanics, Asians, and Native Americans, but for the benefit of all Americans and for our beloved nation. To effectuate this goal of equality of opportunity, our society and its leaders must continually reiterate its importance. The alternative to affirmative action is not a utopia of meritocracy blind to race and gender, but a continuation of the old regime of societal preferences. The alternative will ensure a nation divided by race; we need only listen to the evening news or read the morning paper to understand the consequences of such division. The political damage cannot be overstated. Over the past two years, Europe has demonstrated the consequences of a nation destroyed by ethnic conflict. We cannot permit that to happen. Individually and collectively, we must recommit ourselves to the promise that every American have the opportunity to achieve his or her inalienable right to life, liberty, and the pursuit of happiness.