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One Year Later: Affirmative Action in Federal Government Contracting After  
*Adarand*

# ONE YEAR LATER: AFFIRMATIVE ACTION IN FEDERAL GOVERNMENT CONTRACTING AFTER *ADARAND*

GILBERT J. GINSBURG\*  
JANINE S. BENTON\*\*

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## INTRODUCTION

In the 1989 landmark decision, *City of Richmond v. J.A. Croson Co.*,<sup>1</sup> the United States Supreme Court first applied strict scrutiny review to state and local minority set-aside programs. One year later, the Court issued its decision in *Metro Broadcasting, Inc. v. Federal Communications Commission*.<sup>2</sup> In this ruling, the Court upheld the Federal Communications Commission ("FCC") policies that gave preference to minority broadcasters using a rational basis standard.<sup>3</sup> In *Metro Broadcasting*, the Court affirmed Congress' right to require that a certain number or percentage of broadcasting licenses be set-aside for auction to minorities, stating that the requirement served the important governmental objective of "enhancing broadcast diversity."<sup>4</sup> Ten years before the *Metro Broadcasting* decision, the Court decided *Fullilove v. Klutznick*,<sup>5</sup> in which the Court upheld Congress' inclusion of a ten percent set-aside for minority-owned businesses in the Public Works Employment Act of 1977.<sup>6</sup> In *Fullilove*, the Court explained that "the limited use of racial and ethnic criteria, in the context presented, is a constitutionally permissible means for achieving the congressional objectives."<sup>7</sup>

Throughout the period these three decisions were rendered—and indeed up to the beginning of last year—the law regarding minority business preferences seemed quite clear. When the preference was established by state or local laws, the preference would be reviewed under a strict scrutiny standard.<sup>8</sup> Preferences established by the federal government, pursuant to a law enacted by Congress, however, were not subject to such a demanding standard, and would be upheld if the government had a rational basis for the policy establishing the preference.<sup>9</sup>

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1. 488 U.S. 469 (1989).

2. 497 U.S. 547 (1990).

3. *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 552 (1990).

4. *Id.* at 566-67.

5. 448 U.S. 448 (1980).

6. *Fullilove v. Klutznick*, 448 U.S. 448, 492 (1980).

7. *Id.* at 473 (italics omitted).

8. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-95 (1989) (announcing that state and local race-based programs are reviewed under strict scrutiny standard).

9. See *Fullilove*, 448 U.S. at 483 (holding that Congress' unique remedial power under § 5 of the Fourteenth Amendment supports use of less demanding standard, such as rational basis review, in evaluating federal minority set-aside programs); see also *Metro Broadcasting*, 497 U.S. at 563 (giving deference, under standard of rational basis review, to congressional programs that employ benign racial classifications).

In June of 1995, however, the Court dramatically changed the legal landscape as it then existed. In *Adarand Constructors, Inc. v. Peña*,<sup>10</sup> the Court held that *Croson's* strict scrutiny standard of review applied to all *federal* minority set-aside programs in addition to state and local programs.<sup>11</sup> Indeed, the Court ruled that the strict scrutiny standard should be applied to all federal programs in which race is a factor.<sup>12</sup> In its holding the Court stated:

[A]ll governmental action based on race—a *group* classification long recognized as in most circumstances irrelevant and therefore prohibited . . . should be subjected to detailed judicial inquiry to ensure that the personal right to equal protection of the laws has not been infringed. These ideas have long been central to this Court's understanding of equal protection, and holding benign state and federal racial classifications to different standards does not square with them. [A] free people whose institutions are founded upon the doctrine of equality, should tolerate no retreat from the principle that government may treat people differently because of their race only for the most compelling reasons. Accordingly, we hold today that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.<sup>13</sup>

*Adarand's* immediate result was to place most of the government's set-aside programs under review; at least one has already been suspended.<sup>14</sup> In addition, all race-based programs, including affirmative action employment programs, have been or currently are under review.<sup>15</sup>

Part I of this Article discusses the historical antecedents to *Adarand*; Part II analyzes the decision itself. Part III examines federal programs designed to assist small disadvantaged businesses<sup>16</sup> and surveys the

10. 115 S. Ct. 2097 (1995).

11. *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 2112-13 (1995) (citing *Croson* in extending applicability of strict scrutiny standard to race-based federal subcontracting programs, including those programs purportedly benign or remedial).

12. *See id.* at 2113 (stating that all racial classifications, including those imposed by federal government, must be analyzed under strict scrutiny standard).

13. *Id.* at 2113-14 (citations and quotations omitted).

14. *See infra* notes 200-07 and accompanying text (summarizing Department of Defense's suspension of its "rule of two" minority set-aside program after *Adarand* decision).

15. *See infra* notes 173-98 and accompanying text (commenting on current and proposed changes issued by federal government in response to *Adarand* decision); *see also infra* notes 245-46 and accompanying text (noting reevaluation and suspension of affirmative action programs on state level).

16. In particular, this Article examines the "minority business enterprise" ("MBE") provision of the Public Works Employment Act of 1977 which requires that, absent an administrative

changes to these programs in the wake of *Adarand*. Finally, Part IV discusses the increase in claims concerning federal contracting likely to be brought in the Federal Circuit Court of Appeals in the wake of *Adarand*.

### I. THE HISTORICAL ANTECEDENTS TO ADARAND

In 1980, nine years before *City of Richmond v. J.A. Croson Co.*,<sup>17</sup> the Supreme Court addressed for the first time, in *Fullilove v. Klutznick*,<sup>18</sup> the constitutionality of a federal affirmative action program as a result of a lawsuit challenging the Public Works Employment Act of 1977.<sup>19</sup> This Act amended an older law, the Local Public Works Capital Development and Investment Act of 1976,<sup>20</sup> and authorized increased monetary appropriations for state and local government public work projects to minorities.<sup>21</sup> In *Fullilove*,<sup>22</sup> construction contractors and subcontractors, through their associations, brought suit to enjoin the implementation of section 103(f)(2) of the Public Works Employment Act, a section referred to as "the minority business enterprise" provision ("MBE").<sup>23</sup>

The MBE provision stated that "no grant shall be made under this Act for any local public works project unless the applicant gives satisfactory assurance to the Secretary that at least 10 per centum of the amount of each grant shall be expended for minority business enterprises."<sup>24</sup> The provision defined a minority business enterprise as "a business at least 50 per centum of which is owned by minority group members or, in case of a publicly owned business, at least 51 per centum of the stock of which is owned by minority group members."<sup>25</sup> The MBE provision also defined minority group members as "citizens of the United States who are Negroes,

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waiver, at least 10% of federal funds granted for public works projects must be used to acquire services or supplies from businesses owned and controlled by members of minority groups. Public Works Employment Act of 1977, Pub. L. No. 95-28, 91 Stat. 116 (codified at 42 U.S.C. § 6701).

17. 488 U.S. 469 (1989).

18. 448 U.S. 448 (1980).

19. Pub. L. No. 95-28, 91 Stat. 116 (codified at 42 U.S.C. § 6701).

20. Pub. L. No. 94-369, 90 Stat. 999 (1976) (codified at 42 U.S.C. § 6701), amended by Public Works Employment Act of 1977, Pub. L. No. 95-28, 91 Stat. 116 (codified at 42 U.S.C. § 6701).

21. See 91 Stat. at 117-18 (codified at 42 U.S.C. § 6707) (setting forth standards for allocation of funds to state and local public works projects).

22. 448 U.S. 448 (1980).

23. See *Fullilove v. Klutznick*, 448 U.S. 448, 453-55 (1980) (providing summary of complaint seeking declaratory and injunctive relief to prevent enforcement of MBE provision).

24. *Id.* at 454 (quoting Public Works Employment Act of 1977).

25. *Id.* (quoting Public Works Employment Act of 1977).

Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts."<sup>26</sup> The contractors in *Fullilove* argued that because they did not fall within the definition of minority group members under the MBE provision, they were excluded from certain government grants and hurt economically.<sup>27</sup> Further, the contractors argued that such exclusion violated their right to equal protection under the Equal Protection Clause of the Fourteenth Amendment of the Constitution and the equal protection component of the Due Process Clause of the Fifth Amendment.<sup>28</sup>

The Supreme Court upheld the constitutionality of the MBE provision because "the program does not mandate the allocation of federal funds according to inflexible percentages solely based on race or ethnicity."<sup>29</sup> The Court stated:

[The] program was designed to ensure that, to the extent federal funds were granted under the Public Works Employment Act of 1977, grantees who elect to participate would not employ procurement practices that Congress had decided might result in perpetuation of the effects of prior discrimination which had impaired or foreclosed access by minority businesses to public contracting opportunities.<sup>30</sup>

In analyzing the constitutionality of the MBE decision, the *Fullilove* Court adopted a two-part test to be used for future guidance on the issue of racial classification.<sup>31</sup> The first step inquired "whether the objectives of this legislation are within the power of Congress."<sup>32</sup> If the legislation passes this part of the test, then courts must ask "whether the limited use of racial and ethnic criteria, in the context presented, is a constitutionally permissible means for achieving the congressional objectives and does not violate the equal protection component of the Due Process Clause of the Fifth Amendment."<sup>33</sup>

Finding the Public Works Act of 1977 to be an exercise of Congress' spending power, the Court went on to state that "Congress has frequently employed the Spending Power to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative direc-

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26. *Id.* at 459 (quoting Public Works Employment Act of 1977).

27. *See id.* at 455 (arguing that enforcement of 10% MBE requirement caused economic injury to petitioners' businesses).

28. *Id.*

29. *Id.* at 473.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*



tives.”<sup>34</sup> Further, the Court asserted that it “has repeatedly upheld against constitutional challenge the use of this technique to induce governments and private parties to cooperate voluntarily with federal policy.”<sup>35</sup>

In *City of Richmond v. J.A. Croson Co.*, the Court reviewed a plan adopted by the Richmond City Council, the purpose of which ostensibly was “to ameliorate the effects of past discrimination on the opportunities enjoyed by members of minority groups in our society.”<sup>36</sup> The plan required prime contractors awarded construction contracts to set-aside thirty percent of the dollar amount of the contract to minority businesses.<sup>37</sup> Minorities were defined in the plan as blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts.<sup>38</sup> The geographic scope of the plan was unlimited, allowing qualified minority businesses anywhere in the United States to benefit from the thirty percent set-aside.<sup>39</sup> The city would grant waivers of the set-aside requirement only in exceptional circumstances in which it had been shown that “every feasible attempt has been made to comply” and “sufficient, relevant, qualified Minority Business Enterprises . . . are unavailable or unwilling to participate in the contract to enable meeting the 30% MBE goal.”<sup>40</sup>

In determining that remedial action was necessary, the City Council compared the percentage of blacks in Richmond with the percentage of prime construction contracts awarded to minority businesses.<sup>41</sup> In *Croson*, the Court rejected the minority set-aside policies of the City of Richmond, Virginia, finding the city had presented no evidence of identified discrimination,<sup>42</sup> had “failed to demonstrate a compelling interest in apportioning public contracting opportunities on the basis of race”<sup>43</sup> and that a generalized assertion of past discrimination “has no logical stopping point.”<sup>44</sup> In reaching its decision, the Court held

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34. *Id.* at 474.

35. *Id.*

36. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 476-77 (1989).

37. *Id.* at 477.

38. *Id.* at 478.

39. *Id.*

40. *Id.* at 478-79.

41. *Id.* at 479-80.

42. *Id.* at 505.

43. *Id.*

44. *Id.* at 498 (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 275 (1986)); *see also* *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 613 (1990) (O'Connor, J., dissenting) (quoting *Croson*, 488 U.S. at 498) (reiterating that generalized societal discrimination, without more, does not provide basis for imposing racially classified remedial measures).

that the City's minority set-aside policies were to be subjected to "strict scrutiny," the most stringent review standard utilized by the court.<sup>45</sup>

One year after *Croson*, the Court revisited the issues it had addressed ten years earlier in *Fullilove* when it decided *Metro Broadcasting, Inc. v. Federal Communications Commission*.<sup>46</sup> *Metro Broadcasting* involved "a Fifth Amendment challenge to two race-based policies of the Federal Communications Commission."<sup>47</sup> In this 1990 decision, the Court imposed "a lesser duty on the Federal Government than it does on a State to afford equal protection of the laws."<sup>48</sup>

In *Metro Broadcasting*, the Court tread carefully in order to distinguish its holding from *Croson*.<sup>49</sup> The Court insisted that the Federal Communications Commission's ("FCC") minority ownership programs were benign race-conscious measures that had been mandated by Congress,<sup>50</sup> even though they had not been remedial in nature and had not been designed to compensate victims of past discrimination.<sup>51</sup> Indeed, the Court held that the FCC was justified in giving preferential treatment to minorities in both comparative proceedings for new licenses<sup>52</sup> and "distress sales" of radio stations that have lost the right to hold a broadcasting license.<sup>53</sup> Such policies, ruled the Court, pass constitutional muster as long as they serve an important governmental interest within the power of Congress, are substantially related to the achievement of that interest, and do not "impose *undue* burdens on nonminorities."<sup>54</sup>

In addressing the need for program variety and mixture, the Court held that the FCC's minority ownership policy was a justified means to the goal of achieving "broadcast diversity."<sup>55</sup> The Court went on

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45. *Id.* at 493.

46. 497 U.S. 547 (1990) (considering constitutionality of government minority preference policies).

47. *See Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 2111-12 (1995) (identifying issues raised in *Metro Broadcasting*, 497 U.S. at 564-67).

48. *Adarand*, 115 S. Ct. at 2111 (internal quotations omitted) (stating that Court in *Metro Broadcasting* abandoned principles enunciated in *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954), which held federal and state governments to same constitutional standard of equal protection, by holding that benign federal racial classifications must survive only intermediate scrutiny).

49. *See supra* notes 36-45 and accompanying text (discussing *Croson* decision).

50. *See Metro Broadcasting*, 497 U.S. at 563 (explaining significance of congressional directive of employing and promoting benign racial classifications).

51. *See id.* at 566 (stating that primary purpose of program is to promote programming diversity rather than remedying racial inequities).

52. *Id.* at 597.

53. *See id.* at 598-600 (discussing dynamics of "distress sales" and minority ownership program's effect on such sales).

54. *Id.* at 596-97 (citing *Fullilove v. Klutznick*, 448 U.S. 448, 484 (1980)).

55. *Id.* at 567-68 ("[W]e conclude that the interest in enhancing broadcast diversity is, at the very least, an important governmental objective and is therefore a sufficient basis for the Commission's minority ownership policies.").

to distinguish *Croson* by noting that the question of congressional action was not an issue in that case.<sup>56</sup> Instead, the Court in *Metro Broadcasting* upheld Congress' right to require that a percentage of broadcast licenses be set-aside for auction to minorities, holding that "benign" federal racial classifications need only satisfy intermediate scrutiny, "even if those measures are not 'remedial' in the sense of being designed to compensate victims of past governmental or societal discrimination."<sup>57</sup> Such classifications are constitutionally permissible "to the extent that they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives."<sup>58</sup>

## II. THE ADARAND DECISION

In June 1995, the Supreme Court issued its decision in *Adarand Constructors, Inc. v. Peña*.<sup>59</sup> In this decision, the Court mandated that all racial classifications imposed by any federal, state or local governmental entity, must be reviewed under the strict scrutiny standard.<sup>60</sup> Under this standard, government utilization of such classifications is constitutional only if the utilization is narrowly tailored to further a compelling governmental interest.<sup>61</sup> In announcing this standard for federal programs, the Court expressly overruled two of its prior decisions, *Fullilove v. Klutznick* and *Metro Broadcasting, Inc. v. Federal Communications Commission*.<sup>62</sup> *Adarand* imposed on federal government contracting the same standard of scrutiny applied to state and local government programs as opposed to the lesser standard employed in the earlier cases.<sup>63</sup>

The imposition of this strict scrutiny standard has major implications for federal government contractors and subcontractors.<sup>64</sup> For example, the federal government has developed and applied over the

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56. See *id.* at 565 (finding that *Croson* does not "undermine" Court's rationale in applying intermediate scrutiny to race-conscious federal programs).

57. *Id.* at 564.

58. *Id.* at 565.

59. 115 S. Ct. 2097 (1995).

60. *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 2112-14 (1995).

61. *Id.* at 2113.

62. *Id.* (overruling *Metro Broadcasting's* use of intermediate scrutiny for congressionally-mandated racial classifications); *id.* at 2117 (holding, "to the extent (if any) that *Fullilove* held federal racial classifications to be subject to a less rigorous standard, it is no longer controlling").

63. See *id.* at 2117 (holding that federal racial classifications, like those of state and local governments, must satisfy strict scrutiny to be constitutionally valid).

64. See John F. Harris & Kevin Merida, *Ruling May Sharpen Debate on Preference Politics*, WASH. POST, June 13, 1995, at A6 (discussing *Adarand's* impact on congressional decisions and administrative policy regarding affirmative action).

years an elaborate set of rules and programs to maximize the participation of small disadvantaged businesses ("SDB") in federal contracting.<sup>65</sup> Contracts to SDBs and minority-owned businesses through federal set-aside programs constituted \$10.5 billion out of the \$179.4 billion in contracts awarded by the government in 1993.<sup>66</sup> All such programs now are under review to determine if they meet the *Adarand* test.<sup>67</sup> One program—the Defense Department's "rule of two" set-aside program for small disadvantaged business—has already been suspended.<sup>68</sup> The government, however, has asserted that it has not abandoned the goals of these programs<sup>69</sup> and is committed to furthering them.<sup>70</sup> Some agencies have already promulgated revised rules in light of *Adarand's* strict scrutiny standard.<sup>71</sup>

*Adarand* involved a relatively innocuous SDB subcontracting program.<sup>72</sup> It offered a modest bonus to prime contractors who employed SDB subcontractors.<sup>73</sup> It did not impose a quota or numerical goals for SDB subcontracts.<sup>74</sup> The prime contractor could comply with its contractual obligations even if it did not award any subcontracts to SDBs.<sup>75</sup>

The main issue in *Adarand* was a \$1 million-plus prime contract for a Colorado highway construction project awarded in 1989.<sup>76</sup> This contract had been awarded to Mountain Gravel & Construction Company, a small business contractor, by the Central Federal Lands

65. See *infra* part III (discussing origin of affirmative action initiative in federal government contracting and providing overview of current programs).

66. Harris & Merida, *supra* note 64, at A6.

67. Evaluation of Affirmative Action Programs, Memorandum from The White House to Heads of Executive Departments and Agencies (July 19, 1995), reprinted in DAILY LAB. REP. (BNA) No. 147, at S-45 (Aug. 1, 1995) [hereinafter White House Memo]; see also President William Clinton, Remarks on Affirmative Action at The Rotunda of the National Archives and Records Administration (July 19, 1995) [hereinafter President's Remarks].

68. See 60 Fed. Reg. 54,954 (1995) (to be codified at 48 C.F.R. §§ 219.501 (S-70), 219.502-2-70, 219.502-4, 219.504(b) (i), 219.506, 219.508(e), 219.508-70, 252.219-7002) (suspending portion of Defense Federal Acquisition Regulation Supplement which implements "rule of two" program for small disadvantaged businesses).

69. See *infra* notes 173-98 and accompanying text (discussing proposals of Department of Justice and Clinton Administration for maintaining affirmative action programs after *Adarand*).

70. See *infra* notes 189-98 and accompanying text (discussing Office of Federal Contract Compliance Program's commitment to promotion of racial diversity in federal procurement).

71. See *infra* notes 208-09 and accompanying text (discussing Department of Defense's proposed rule changes to its small disadvantaged business program).

72. See *Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097, 2103-04 (1995) (describing race-based subcontracting program challenged by subcontractor).

73. See *id.* at 2104 (noting that program paid 10% of final subcontract price in excess of the contract percentage goal, not to exceed 1.5% of original contract amount, to contractor who awards subcontract to one certified disadvantaged business enterprise).

74. *Id.*

75. *Id.*

76. See *id.* at 2102 (discussing terms of bid).

Highway Division ("CFLHD"), a part of the United States Department of Transportation ("DOT").<sup>77</sup> Pursuant to section 502 of the Small Business Act,<sup>78</sup> the agency included a "Subcontracting Compensation Clause" addressing the utilization of disadvantaged business enterprises ("DBE") as subcontractors.<sup>79</sup> The relevant portions of this clause, as addressed by the Court, provide:

Monetary compensation is offered for awarding subcontracts to small business concerns owned and controlled by socially and economically disadvantaged individuals.

A small business concern will be considered a DBE after it has been certified as such by the U.S. Small Business Administration or any State Highway Agency. Certification by other Government agencies, counties, or cities may be acceptable on an individual basis provided the Contracting Officer has determined the certifying agency has an acceptable and viable DBE certification program. If the Contractor requests payment under this provision, the Contractor shall furnish the engineer with acceptable evidence of the subcontractor(s) DBE certification and shall furnish one certified copy of the executed subcontract(s).

The Contractor will be paid an amount computed as follows:

1. If a subcontract is awarded to one DBE, 10 percent of the final amount of the approved DBE subcontract, not to exceed 1.5 percent of the original contract amount.
2. If subcontracts are awarded to two or more DBEs, 10 percent of the final amount of the approved DBE subcontracts, not to exceed 2 percent of the original contract amount.<sup>80</sup>

Contracts awarded by DOT agencies are required to include the Subcontracting Compensation Clause.<sup>81</sup> In addition, the clause must include the following statement: "The contractor shall presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities, or any other individual found to be disadvantaged by the [Small Business] Administration pursuant to section 8(a) of the Small Business Act."<sup>82</sup>

77. *Id.*

78. 15 U.S.C. § 644(g) (1994). This provision mandates that federal agencies provide "the maximum practicable opportunity for small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals." *Id.*

79. *Adarand*, 115 S. Ct. at 2103-04.

80. *Id.*

81. *See id.* at 2102 (stating that federal law requires inclusion of subcontracting clauses similar to one contained in DOT's contract).

82. *Id.* (quoting 15 U.S.C. § 637(d)(2), (3)).

After award of the prime contract, Mountain Gravel solicited subcontractor bids for the guardrail portion of the contract.<sup>83</sup> Adarand Constructors, Inc., a Colorado-based highway construction company specializing in guardrail work, submitted the low bid.<sup>84</sup> Another company, Gonzales Construction Company, submitted a bid for a higher dollar amount than Adarand's.<sup>85</sup> Because Mountain Gravel's contract included the Subcontracting Compensation Clause, it would receive additional money if it subcontracted with companies that were certified "as small businesses controlled by socially and economically disadvantaged individuals."<sup>86</sup> Gonzales Construction was a certified DBE<sup>87</sup> and Adarand was not.<sup>88</sup> Mountain Gravel therefore subcontracted with Gonzales Construction, despite the fact that Adarand's bid was lower.<sup>89</sup> Indeed, "Mountain Gravel's Chief Estimator . . . submitted an affidavit stating that Mountain Gravel would have accepted Adarand's bid, had it not been for the additional payment it received by hiring Gonzales instead."<sup>90</sup>

As a result of not receiving the subcontract, Adarand sued DOT, claiming that section 502 of the Small Business Act, which authorized the subcontracting compensation clause, was unconstitutional.<sup>91</sup> The basis of Adarand's claim was that the statute discriminated "on the basis of race in violation of the Federal Government's Fifth Amendment obligation not to deny anyone equal protection of the laws."<sup>92</sup> The statute at issue, the Small Business Act,<sup>93</sup> declares that it is "the policy of the United States that small business concerns, [and] small business concerns owned and controlled by socially and economically disadvantaged individuals, . . . shall have the maximum practicable opportunity to participate in the performance of contracts let by any Federal agency."<sup>94</sup> Further, the Small Business Act "defines socially disadvantaged individuals as those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a

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83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* (internal quotations omitted).

87. The Court noted that the record did not disclose how Gonzales had obtained its certification as a small disadvantaged business. *Id.* at 2104.

88. *Id.* at 2102.

89. *Id.*

90. *Id.*

91. *Id.* at 2104.

92. *Id.* at 2102.

93. Pub. L. No. 85-536, 72 Stat. 384 (1958) (codified as amended at 15 U.S.C. § 631 (1994)).

94. *Adarand*, 115 S. Ct. at 2102 (quoting 15 U.S.C. § 637(d)(1)).

member of a group without regard to their individual qualities.”<sup>95</sup> The Act defines “economically disadvantaged individuals as those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged.”<sup>96</sup> The Act also states that in order to further the policy of the United States with regard to SDBs, it is “[t]he Government-wide goal [to have] participation by small business concerns owned and controlled by socially and economically disadvantaged individuals of not less than [five] percent of the total value of all prime contract and subcontract awards for each fiscal year.”<sup>97</sup> In addition, the head of each federal agency is required “to set agency-specific goals for participation by businesses controlled by socially and economically disadvantaged individuals.”<sup>98</sup>

Adarand claimed that the statute not only violated the “Fifth Amendment obligation not to deny anyone equal protection of the laws,”<sup>99</sup> but, specifically, it violated Adarand’s Fifth Amendment right to receive equal treatment under the law.<sup>100</sup> Adarand lost its case in both the Federal District Court of Colorado and the Tenth Circuit Court of Appeals.<sup>101</sup> The Supreme Court reversed both lower courts.<sup>102</sup>

In *Adarand*, the Court “alter[ed] the playing field in some important respects”<sup>103</sup> by requiring that the standard of scrutiny applied to state and local contracting in *Croson* now be applied to contracting with the federal government.<sup>104</sup> Indeed, the Court mandated that

all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.<sup>105</sup>

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95. *Id.* (internal quotations omitted) (quoting 15 U.S.C. § 637(a)(5)).

96. *Id.* (internal quotations omitted) (quoting 15 U.S.C. § 637(a)(6)(A)).

97. *Id.* (internal quotations omitted) (quoting 15 U.S.C. § 644(g)(1)).

98. *Id.* (internal quotations omitted) (quoting 15 U.S.C. § 644(g)(1)).

99. *Id.*

100. *Id.*

101. *See Adarand Constructors, Inc. v. Skinner*, 790 F. Supp. 240, 245 (D. Colo. 1992) (holding that DBE subcontracting program does not violate Fifth and Fourteenth Amendments), *aff’d sub nom. Adarand Constructors, Inc. v. Pena*, 16 F.3d 1537 (10th Cir. 1994), *rev’d*, 115 S. Ct. 2097 (1995).

102. *See Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097 (1995).

103. *Id.* at 2118.

104. *Id.* at 2113-18 (announcing that all race-based classifications, state and federal, will be subject to strict scrutiny and explaining how holding departs from *Fullilove* and *Metro Broadcasting*).

105. *Id.* at 2113.

Although the decision established a higher level of scrutiny for small disadvantaged or minority set-aside programs at the federal level, the Court expressly stated that it did not intend to eliminate affirmative action programs in government contracting.<sup>106</sup> As Justice O'Connor, writing for the majority, stated:

[The Court] wish[ed] to dispel the notion that strict scrutiny is "strict in theory, but fatal in fact." The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it. *When race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the "narrow tailoring" test this Court has set out in previous cases.*<sup>107</sup>

Justice O'Connor also gave some hope to the Small Business Administration's ("SBA") "8(a) Program" by suggesting that contractors' qualifications as socially and economically disadvantaged under the 8(a) Program are individually evaluated and determined, unlike the DBE contractors under the DOT program involved in *Adarand*.<sup>108</sup>

Justice Scalia, however, in his concurring opinion did not offer such hope to the 8(a) program. Instead, Justice Scalia advocated a more narrow approach than the majority opinion, arguing that the government can never find a compelling interest for race-based classifications designed to remedy past discrimination.<sup>109</sup> He explained:

Individuals who have been wronged by unlawful racial discrimination should be made whole; but under our Constitution there can be no such thing as either a creditor or a debtor race. That concept is alien to the Constitution's focus upon the individual, and its rejection of dispositions based on race, or based on blood. To pursue the concept of racial entitlement—even for the most admirable and benign of purposes—is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race

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106. *See id.* at 2117 (explaining that purpose of strict scrutiny standard is not to preclude affirmative action but to "ensure that courts will consistently give racial classifications that kind of detailed examination, both as to ends and as to means").

107. *Id.* at 2117 (internal citations omitted) (emphasis added). Justice O'Connor added that "[a]s recently as 1987, for example, every Justice of this Court agreed that the Alabama Department of Public Safety's 'pervasive, systematic, and obstinate discriminatory conduct' justified a narrowly tailored race-based remedy." *Id.* (quoting *United States v. Paradise*, 488 U.S. 149, 167 (1987) (plurality opinion)).

108. *See id.* at 2118 (noting several distinctions among government regulatory schemes dealing with economically disadvantaged individuals).

109. *Id.* (Scalia, J., concurring) (citing *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 520 (1989) (Scalia, J., concurring)).



privilege and race hatred. In the eyes of government, we are just one race here. It is American.

It is unlikely, if not impossible, that the challenged program would survive under this understanding of strict scrutiny, but I am content to leave that to be decided on remand.<sup>110</sup>

Justice Scalia, of course, although an essential vote in the *Adarand* majority, was (and is) but a single voice in his views.

The *Adarand* decision dramatically altered the law of affirmative action—indeed so significantly that for almost a year, the federal Government was silent as to its intentions. Finally, on May 23, 1996, the Department of Justice (“DOJ”) issued its “Proposed Reforms to Affirmative Action in Federal Procurement,” discussed below, in which DOJ attempts to reconcile federal affirmative action policies and initiatives with the *Adarand* standards and principles.

### III. FEDERAL AFFIRMATIVE ACTION PROGRAMS

#### A. *Programs in Existence Pre-Adarand*

As Justice O’Connor indicated in *Adarand*, affirmative action programs in federal government contracting “implicate a complex scheme of federal statutes and regulations.”<sup>111</sup> Many of these regulations now must be re-evaluated in light of the Court’s *Adarand* decision. Some of these statutes and regulations are discussed below.

#### 1. *Executive Order 11,246*

Issued by President Lyndon B. Johnson in 1965, Executive Order No. 11,246 (“Executive Order 11,246”) requires federal contractors and subcontractors to include in each government contract a provision stating that the contractor will “take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to race, color, religion, sex or national origin.”<sup>112</sup>

Under Executive Order 11,246, employers who do business with the federal government under contracts or subcontracts in excess of \$10,000 are required to comply with regulations promulgated by the

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110. *Id.* at 2118-19 (Scalia, J., concurring in part and concurring in the judgment) (citations omitted); *see also* U.S. CONST. amend. XIV, § 1 (“[N]or shall any State . . . deny to any person” equal protection of law); *id.* amend. XV, § 1 (prohibiting abandonment of voting right on account of race).

111. *See Adarand*, 115 S. Ct. at 2118 (noting that use of subcontractor compensation schemes implicates numerous “complex regulatory schemes”).

112. Exec. Order No. 11,246, 3 C.F.R. 339, 340 (1964-1965), *reprinted as amended* in 42 U.S.C. § 2000e (1994) [hereinafter Exec. Order 11,246].

Secretary of Labor pursuant to the Executive Order.<sup>113</sup> Section 202 of Executive Order 11,246 requires employers to: (1) not discriminate in employment on the basis of race, color, religion, sex, or national origin; (2) take affirmative action to protect applicants and employees from such discrimination; (3) post conspicuously government-supplied notices containing the provisions of the clause; (4) state in all advertising that applicants will be considered without regard to their race, color, religion, sex, or national origin; (5) send notices to appropriate labor unions advising them of the contractor's commitments under the Executive Order, and post copies of these notices; (6) furnish any material required under the order or regulations, and allow access to this material if the employer's compliance with the regulations is under investigation; (7) allow cancellation or suspension of the contract, debarment, or other sanctions if the employer does not comply with the rules; and (8) include the clause in all subcontracts and enforce it, unless exempted.<sup>114</sup>

Contractors or subcontractors with fifty or more employees and contracts with the federal government worth \$50,000 or more are required under the order to prepare and maintain affirmative action plans.<sup>115</sup> Further, a government contractor must file EEO-1 reports within thirty days of the awarding of its first government contract and must file an annual EEO-1 report on or before March 31 of each subsequent year.<sup>116</sup>

Executive Order 11,246 is enforced by the Office of Federal Contract Compliance Programs ("OFCCP").<sup>117</sup> OFCCP conducts periodic reviews and investigates complaints to ensure compliance with the requirements of the order.<sup>118</sup> OFCCP first attempts to

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113. See 41 C.F.R. § 60-1.4(a) (1995) (requiring that contracting agencies include equal opportunity clause from Executive Order 11,246, "except as otherwise provided"). Transactions of \$10,000 or less are exempted. *Id.* § 60-1.5(a).

114. *Id.* § 60-1.4(a).

115. See *id.* § 60-2.1 (setting out purpose and scope of affirmative action compliance program).

116. *Id.* § 60-1.7(a)(1), (2). EEO-1 reports are promulgated jointly by the Office of Federal Contract Compliance Programs, Equal Employment Opportunity Commission, and Plans for Progress. *Id.* § 60-1.7(a)(1).

117. See *id.* § 60-1.2 (delegating authority and assigning responsibility for implementing order to director). The "director" referred to in the code is the director of the Office of Federal Contract Compliance Programs, the Department of Labor, or anyone to whom the director delegates authority. *Id.* § 60-1.3.

118. See *id.* § 60-1.20(a) (describing compliance reviews as entailing "a comprehensive analysis and evaluation of each aspect of the aforementioned practices, policies, and conditions" of nondiscriminatory and affirmative action programs).

resolve disputed issues through conciliation or a hearing;<sup>119</sup> if this attempt fails, the order authorizes the Secretary of Labor to make the names of non-compliant contractors or unions public, to recommend enforcement actions or criminal proceedings if false information is produced, to cancel or suspend the contract, or to debar the contractor.<sup>120</sup>

## 2. *Small disadvantaged business subcontracting*

### a. *Federal Acquisition Regulation*

The policy to provide small business concerns and SDB concerns the opportunity to participate in federal contracts is set forth in the Federal Acquisition Regulation ("FAR").<sup>121</sup> SDBs are defined as small business concerns which are: (1) at least fifty-one percent unconditionally owned and controlled by socially and economically disadvantaged individuals, or an economically disadvantaged Indian tribe or Native Hawaiian Organization, or at least fifty-one percent of the stock of a publicly owned business is unconditionally owned by socially and economically disadvantaged individuals, an economically disadvantaged Indian tribe or Native Hawaiian Organization; and (2) regularly managed and operated by one or more of such individuals.<sup>122</sup> The policy guidelines encourage prime contractors to carry out the policy in the awarding of subcontracts and to establish procedures to ensure timely payments pursuant to the terms of their subcontracts.<sup>123</sup> Prime contractors must submit a subcontracting plan for small businesses and SDBs setting forth contracting goals to the contracting officer<sup>124</sup> on contracts over \$500,000 (\$1,000,000 for construction contracts).<sup>125</sup>

119. *See id.* § 60-1.20(b) ("Where deficiencies are found to exist [via compliance review], reasonable efforts shall be made to secure compliance through conciliation and persuasion.").

120. Exec. Order 11,246, *supra* note 112, § 209(a) (describing sanctions that Secretary of Labor may impose); *see* 41 C.F.R. § 60-1.26 (1995) (enabling director of OFCCP to institute administrative enforcement proceedings to force compliance or sanctions or both).

121. *See* Federal Acquisition Regulation ("FAR"), 48 C.F.R. § 52.219-8(a) (1995) ("It is the policy of the United States that small business concerns, small business concerns owned by socially and economically disadvantaged individuals, and small business concerns owned and controlled by women shall have the maximum practicable opportunity to participate in [federal contracts].").

122. *Id.* § 52.219-8(c).

123. *See id.* § 52.219-8(a) (stating policy of timely payments for SDB subcontracts); *id.* § 52.219-8(b) (obligating contractor to award subcontracts according to government policy "to the fullest extent consistent with efficient contract performance").

124. *See id.* § 52.219-9(c), (d)(1) (requiring prime contractor to submit contracting plan that includes goals for use of SDBs in terms of percentages of total planned subcontracting dollars).

125. *See* 15 U.S.C. § 637(d)(4) (1994) (stating that solicitation for federal contracts meeting certain threshold requirements must be awarded pursuant to subcontracting plan).

*b. Minority business enterprise prime contracts—the 8(a) Program*

Section 8(a) of the Small Business Act establishes the government's 8(a) Program for small disadvantaged businesses.<sup>126</sup> Under this program, agencies enter into various contracts with the SBA to perform work.<sup>127</sup> The SBA then in turn contracts the work to contractors that are owned and operated by persons presumed or found to be economically and socially disadvantaged.<sup>128</sup> Historically, socially disadvantaged individuals have included African Americans, Hispanic Americans, Native Americans, Eskimos, Asian Pacific Americans, Subcontinental Asian Americans, and certain other minority group members.<sup>129</sup> The 8(a) Program is designed to open participation in government contracting to minority business enterprises.<sup>130</sup> To be considered eligible, the enterprise must be owned and managed by a member of a socially and economically disadvantaged group and be certified by the SBA for participation in the 8(a) Program.<sup>131</sup>

The SBA is authorized to enter into contracts with federal agencies and to subcontract performance of those contracts to small, socially and economically disadvantaged businesses.<sup>132</sup> The Department of Defense ("DOD") participates in this program by offering requirements to the SBA for subcontracting with firms approved by the SBA for participation in its 8(a) Program.<sup>133</sup>

*c. Department of Defense SDB evaluation preferences*

Under the Department of Defense's section 1207 Program, DOD has established a *five percent-per-year* contracting goal for SDBs,

126. Pub. L. No. 85-536, § 8(a), 72 Stat. 384, 389 (1958) (codified as amended at 15 U.S.C. § 637(a)).

127. See 15 U.S.C. § 637(a)(1) (allowing SBA to enter into contracts with government department or agency to provide goods, equipment, or services).

128. See *id.* § 637(a)(1)(B) (empowering SBA to "arrange for the performance of such procurement contracts by negotiating or otherwise letting subcontracts to socially and economically disadvantaged small business concerns . . . as may be necessary to enable the Administration to perform such contracts").

129. See 13 C.F.R. § 124.105(a) (1995) (defining socially disadvantaged individuals as "those who have been subjected to racial or ethnic prejudice or cultural bias because of their identities as members of groups without regard to their individual qualities").

130. See *id.* § 124.1(a)(1) (indicating that 8(a) program is intended to be used exclusively for business development purposes and to help socially and economically disadvantaged small businesses).

131. See *id.* §§ 124.100-109 (setting forth eligibility requirements).

132. *Id.* § 124.1(b).

133. See Department of Defense Federal Acquisition Regulation Supplement ("DFARS"), 48 C.F.R. §§ 219.803, .804, .804-1 (1995) (providing for SBA's 8(a) program in Department of Defense procurements).

historically black colleges and universities, and other minority institutions.<sup>134</sup> In connection with this, DOD also has created a SDB program, which gives an evaluation cost factor, or advantage, of up to ten percent on unrestricted procurements,<sup>135</sup> and provides special technical assistance to SDBs.<sup>136</sup>

The Department of Defense Federal Acquisition Regulation Supplement ("DFARS"), provides that SDBs may be eligible for an evaluative preference in defense procurements.<sup>137</sup> Small disadvantaged businesses obtain an evaluation preference of up to ten percent of the price bid, and this factor may be applied line item by line item if the award can be made in that manner.<sup>138</sup>

*d. Department of Transportation SDB programs*

The DOT's MBE program was the program at issue in *Adarand*.<sup>139</sup> Under this program, the federal government authorizes the use of subcontractor compensation bonuses to prime contractors who use SDBs.<sup>140</sup> The payment is intended to be rough compensation for the prime contractor's expense in monitoring SDBs and providing technical assistance.<sup>141</sup>

The Surface Transportation Assistance Act, now the Intermodal Surface Transportation Efficiency Act ("ISTEA"),<sup>142</sup> is the key program used by DOT for affirmative action.<sup>143</sup> ISTEA requires that ten percent of transportation contracts be allocated to DBEs, unless

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134. *Id.* § 219.000. This part of the DFARS implements 10 U.S.C. § 2323, which sets a goal for the DOD from fiscal years 1987 through 2000. *Id.*

135. *See id.* § 219.70 (setting out evaluation preference program for SDBs).

136. *See id.* § 209.201 (stating general policy of DOD program, which includes technical assistance as way of reaching 5% goal for contract and subcontract awards to SDBs).

137. *See id.* (listing evaluation preference as possible means to reaching DFARS 5%-per-year contracting goal).

138. *See id.* § 219.7002 (setting forth procedures for evaluating preferences for SDB concerns).

139. *See Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097, 2103 (1995) (discussing DOT regulations).

140. *See* 49 C.F.R. §§ 23.41-55 (1995) (delineating elements of DOT financial assistance programs).

141. *See id.* § 23.45 (setting forth components of MBE program). Recipients of DOT financial assistance must develop a policy statement manifesting a commitment to objectives, such as the following: maximum possible use of MBEs; designation of a liaison officer and support staff to administer the program; establishment of procedures to give MBEs the opportunity to compete for contracts or subcontracts; and creation of opportunities for the use of banks owned and controlled by minorities. *Id.* Furthermore, the DOT requires an extensive system of record keeping. *See id.* § 23.49.

142. Pub. L. No. 102-240, 105 Stat. 1914 (1991) (codified as amended in scattered sections of titles 23, 49, and other titles of U.S.C.).

143. *See* 49 C.F.R. pt. 23 subpt. d (1995) (implementing Surface Transportation and Uniform Relocation Assistance Act).

the Secretary of Transportation determines otherwise.<sup>144</sup> The Airport & Airways Improvement Act offers a similar DBE requirement.<sup>145</sup>

### 3. *Preferences for Native American-owned businesses*

Native Americans are presumed by SBA regulations to be socially disadvantaged, a prerequisite for participation in the 8(a) Program.<sup>146</sup> Native Americans also qualify for the minority subcontracting programs set forth in FAR Part 19.7.<sup>147</sup>

In addition to the 8(a) and FAR Programs described above, there are several provisions in federal statutes and regulations which express a preference for doing business with Native Americans and Native American-owned businesses. Under the Indian Self-Determination and Education Assistance Act:<sup>148</sup>

Any contract, subcontract, grant, or subgrant pursuant to this Act . . . or any other Act authorizing Federal contracts with or grants to Indian organizations or for the benefit of Indians, shall require that to the greatest extent feasible . . . preference in the award of subcontracts in connection with the administration of such contracts or grants shall be given to Indian organizations and to Indian-owned economic enterprises.<sup>149</sup>

Section 1452 of title 25 defines Indian-owned economic enterprises as "any Indian-owned (as defined by the Secretary of the Interior) commercial, industrial, or business activity established or organized for the purpose of profit: *Provided*, That such Indian ownership shall constitute not less than 51 per centum of the enterprise."<sup>150</sup> By the Act's express terms, however, this preference for Native Americans applies only to individuals who are members of an Indian tribe.<sup>151</sup> Thus, Indian ancestry alone appears not to be sufficient for participation.

Another program, the Indian Incentive Program,<sup>152</sup> allows additional compensation to federal contractors in an amount equal to five

144. *Id.* § 23.61(a).

145. *See id.* (explaining that provisions apply to both DOT's MBE program and ISTEA).

146. *See* 13 C.F.R. § 124.105(b) (1995) (delineating groups presumed to be socially disadvantaged for purposes of 8(a) program).

147. *See* 48 C.F.R. § 19.703(b) (1995) (defining eligibility requirements for participation in program).

148. 25 U.S.C. §§ 450-458hh (1994).

149. *Id.* § 450e(b).

150. *Id.* § 1452(e).

151. *Id.* § 1452(b) (1994) (defining "Indian" as "any person who is a member of any Indian tribe, band, group, pueblo, or community as recognized by the federal government as eligible for services from the Bureau of Indian Affairs").

152. 48 C.F.R. subpt. 26.1 (1995).

percent of its subcontractors' cost for those subcontractors which are Native American-owned.<sup>153</sup>

Last, the Buy Indian Act<sup>154</sup> provides that "[s]o far as may be practicable Indian labor shall be employed, and purchases of the products (including, but not limited to printing, notwithstanding any law) of Indian industry may be made in open market in the discretion of the Secretary of the Interior."<sup>155</sup>

#### 4. *Mentor-protége program*

Pursuant to section 831 of the National Defense Authorization Act for Fiscal Year 1991,<sup>156</sup> DOD established a pilot program known as the "Mentor-Protége Program."<sup>157</sup> The program's purpose is to provide incentives for major DOD contractors to assist SDBs to enhance their capabilities as subcontractors or suppliers, and to increase SDBs' involvement in government contracts.<sup>158</sup> The large business is designated as "mentor" and the SDB as "protége."<sup>159</sup>

A firm must be awarded DOD contracts and subcontracts of \$100 million or more during the prior fiscal year or meet criteria to be specified in regulations to be considered a mentor.<sup>160</sup> An SDB must be currently eligible for award of a government contract to be a protége.<sup>161</sup> Unlike other SDB assistance programs, the protége firm retains its eligibility for this program until it grows to twice the size limitation of a small business.<sup>162</sup>

#### 5. *Women-owned businesses*

According to the White House's July 19, 1995, *Affirmative Action Review*, women-owned businesses represented only 0.6% of DOD

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153. *See id.* (implementing 25 U.S.C. § 1544).

154. 25 U.S.C. § 47.

155. *Id.*

156. Pub. L. No. 101-510, 104 Stat. 1485 (1990) (codified as amended in scattered sections of 10 U.S.C. and 42 U.S.C.).

157. *Id.* § 831; *see* 48 C.F.R. §§ 219.7100-7105 (1995) (implementing mentor-protége program).

158. 48 C.F.R. § 219.7100 (1995) (stating purpose of mentor-protége program as providing incentives for DOD contractors to assist SDBs).

159. *See id.* § 219.7102(a), (b) (defining mentor business as prime contractor with at least one active subcontracting plan and protége business as SDB eligible to participate in federal contracts).

160. National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, § 831(d), 104 Stat. 1485, 1608 (1990) (codified as amended in scattered sections of 10 U.S.C. and 42 U.S.C.).

161. *Id.* § 831(c)(2).

162. *Id.* § 831(g)(4)(A) (limiting program eligibility to protége businesses which are no more than two times maximum size determined by Small Business Administration to be SDB).

prime awards in 1985 and a mere 1.7% in 1994.<sup>163</sup> However, under the Federal Acquisition Streamlining Act of 1994 ("FASA"),<sup>164</sup> a government-wide goal for participation by small, women-owned business enterprises ("WBE") was established "at not less than 5 percent of the total of all prime contract and subcontracts for each fiscal year."<sup>165</sup> As is evident from White House statistics, prior to FASA, there had been no set-aside for government contracts for WBEs. An economically disadvantaged woman, however, could have attempted to qualify under the 8(a) Program<sup>166</sup> as socially disadvantaged because of gender.<sup>167</sup>

FASA also added WBEs to the same level as SDBs.<sup>168</sup> This means that contractors are now required to negotiate a subcontracting plan with specific small women-owned business goals.<sup>169</sup> This subcontracting plan must "separately" address women-owned small businesses, and liquidated damages may be assessed for failure to make a good faith effort to comply with the subcontracting plan.<sup>170</sup>

Prior to FASA's requirements, there were mere statements of policy without numerical goals for WBEs. In 1979, Executive Order No. 12,138 established the National Women's Business Enterprise Policy, which required agency personnel to strengthen WBEs.<sup>171</sup> The Office of Federal Procurement Policy ("OFPP") implemented this policy by directing that the procurement regulations be changed to encourage contractors to subcontract with women-owned businesses.<sup>172</sup> Although OFPP never established formal goals, most recent contracts for more than \$10,000 have included a FAR clause encouraging contractors to subcontract to WBEs to the maximum extent practicable.

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163. George Stephanopoulos & Christopher Edley, Jr., *Affirmative Action Review: Report to the President* (July 19, 1995), reprinted in *DAILY LAB. REP.* (BNA) No. 139, S-1 (July 20, 1995) [hereinafter *Affirmative Action Review*].

164. Pub. L. No. 103-355, 108 Stat. 3243 (1994) (codified at scattered sections of 15 U.S.C.).

165. See *id.* § 7106(a)(2)(A) (codified at 15 U.S.C. § 644(g)(1)).

166. See *supra* notes 126-33 and accompanying text (describing eligibility requirements for 8(a) program).

167. 13 C.F.R. § 124.105(c)(1)(i) (1995).

168. Pub. L. No. 103-355, § 7106(a)(1), 108 Stat. 3243.

169. 48 C.F.R. § 52.219-9 (implemented by 60 Fed. Reg. 48,265 (1995)).

170. *Id.* § 52.219-16.

171. Exec. Order No. 12,138, 44 Fed. Reg. 29,637 (1979).

172. *Id.* at 29,638.



*B. Changes and Proposed Changes Issued by the Federal Government in the Wake of Adarand*

*1. Department of Justice proposed reforms*

On June 28, 1995, Assistant Attorney General Walter Dellinger issued a Memorandum to General Counsels ("Memorandum") that provides guidelines for federal government agencies reviewing affirmative action programs following *Adarand*.<sup>173</sup> The DOJ Memorandum stated that "Adarand makes it necessary to evaluate federal programs that use race or ethnicity as a basis for decisionmaking to determine if they comport with the strict scrutiny standard."<sup>174</sup> The Memorandum sets forth six factors that agencies must consider to determine whether such programs pass the *Adarand* standard. These factors are as follows: (1) whether the governmental entity considered race-neutral alternatives before implementing a "race-based measure"; (2) whether the program includes a flexible waiver mechanism for individualized consideration of a "particular minority contractor's bid"; (3) whether the program makes race a requirement for eligibility in the program or whether race is just one factor to be considered; (4) what appropriate measure is chosen to numerically compare the target to the number of minorities in the field; (5) the duration of the program and whether it is subject to meaningful periodic review; and (6) what degree and what type of burden is imposed on people who do not belong to racial or ethnic groups.<sup>175</sup> Under *Adarand* and these DOJ guidelines, agency programs that are aimed at minorities must be narrowly tailored to serve a compelling governmental interest.<sup>176</sup> In the Memorandum, however, Assistant Attorney General Dellinger implied that it may be possible to validate federal government programs on the basis of *national* data, that is, "Congress may be able to rely on national findings of discrimination to justify remedial racial and ethnic classifications; it may not have to

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173. Memorandum from the Office of Legal Counsel, U.S. Dep't of Justice, to General Counsels (June 28, 1995), reprinted in DAILY LAB. REP. (BNA) No. 125, at E-1 (June 29, 1995) [hereinafter Justice Dep't Memo].

174. See *id.* at E-11 (concluding that affirmative action programs should not be suspended until reviewed for compliance with *Adarand*).

175. See *id.* at E-6 to E-9 (identifying factors used by courts to determine whether race-based affirmative action program is narrowly tailored). The goal of the narrowly tailored test is to ensure that affirmative action is a "product of careful deliberation and not hasty decisionmaking." *Id.*

176. *Id.*

base such measures on evidence of discrimination in every geographic locale or sector of the economy that is affected."<sup>177</sup>

## 2. *President Clinton's response to Adarand*

### a. *The White House review*

On July 19, 1995, the Clinton Administration released the results of a five-month review of existing affirmative action programs.<sup>178</sup> This ninety-six page White House review recommended the following: (1) creating a uniform certification process for all SDBs (conducted by specially licensed private firms where possible); (2) tightening the economic disadvantage test used to qualify for these programs, and including in this measurement the value of the owner's personal residence and the spouse's assets; (3) applying the 8(a) Program's 9-year graduation limit to all SDB programs; (4) developing objective industry-specific criteria for determining when firms are no longer in need of set-asides; (5) placing caps on the dollar value of contracts, as well as caps on total dollars a firm can receive through set-asides; (6) increasing penalties against "front" companies; and (7) establishing measures to ensure that programs terminate when the affirmative action goals have been met.<sup>179</sup> The report also noted that, although women-owned businesses now receive less than two percent of government contracts, women own one-third of all businesses.<sup>180</sup> As a result of this disparity, the Clinton Administration currently is determining if women-owned business should be made a presumed disadvantaged group.<sup>181</sup>

### b. *The President's directive*

On July 19, 1995, President Clinton responded to *Adarand* by issuing a memorandum to the heads of all federal agencies mandating that an affirmative action program must be eliminated or reformed if it: (1) creates a quota; (2) creates a preference for unqualified

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177. See *id.* at E-1 (discussing possible differences in application of strict scrutiny standard in federal government affirmative action programs as compared to state and local government programs).

178. Affirmative Action Review, *supra* note 163, at S-1.

179. Affirmative Action Review, *supra* note 163, at S-42 (suggesting reforms to federal procurement practices and policies).

180. See Affirmative Action Review, *supra* note 163, at S-36 (presenting statistical evidence indicating that women owned 29.5% of all businesses in 1987 while federal procurement from women-owned firms totalled only 1.6% or \$2.9 billion in fiscal year 1992).

181. *Women Could Eventually Be Included in Set-Asides, Set-Aside Alert*, SMALL BUSINESS PRESS, July 31, 1995, available in LEXIS, MARKET Library, IACNWS File.

individuals; (3) creates reverse discrimination; or (4) continues after its equal opportunity purposes have been achieved.<sup>182</sup>

### 3. *The Federal Acquisition Streamlining Act of 1994*

The FASA was enacted prior to the Supreme Court's decision in *Adarand*, so the act was not a legislative response to the ruling. Under FASA, the Department of Defense's section 1207 Program for SDBs was extended to include the entire government, including civilian agencies.<sup>183</sup> FASA also established a five percent SDB set-aside goal for the Department of Defense, NASA, and the Coast Guard.<sup>184</sup> The program also established a separate five-percent goal for women-owned businesses, the first time numerical goals were established by statute.<sup>185</sup> FASA also calls for development of uniform definitions of small business, small disadvantaged business, and women-owned business for all federal government agencies.<sup>186</sup> OFCCP Deputy Administrator William Coleman has stated that an on-going review by the DOJ has "prompted consideration . . . of a combined SDB and women-owned business definition."<sup>187</sup>

### 4. *The Office of Federal Contract Compliance Programs*

On August 2, 1995, OFCCP issued a notice defending its affirmative action policies under Executive Order 11,246 and *Adarand*.<sup>188</sup> Entitled *OFCCP Notice Reaffirming Affirmative Action Goals in Light of Adarand Decision, Administration Review*, this notice emphasized:

[The OFCCP] reaffirms [its] longstanding policy . . . that affirmative action program goals under Executive Order 11,246 are to be used as a tool to aid in breaking down barriers to equal employment opportunity for women and minorities without impinging on the rights and expectations of other members of the workforce. Affirmative action program goals are not to be used as quotas which must be achieved through race-based and gender-based preferences.<sup>189</sup>

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182. White House Memo, *supra* note 67, at S-42; *see also* President's Remarks, *supra* note 67.

183. Pub. L. No. 103-355, § 7105, 108 Stat. 3369 (1996) (codified at 10 U.S.C. § 2323 (1994)).

184. *Id.*

185. *Id.* § 7106(a)(2)(A), 108 Stat. 3367 (codified at 15 U.S.C. § 644 (1994)).

186. *Id.* § 7107, 108 Stat. 3376 (codified at 41 U.S.C. § 405 (1994)).

187. *Women Could Eventually Be Included in Set-Asides*, *supra* note 181.

188. Office of Federal Contract Compliance Programs, U.S. Dep't Labor Employment Standards Administration, OFCCP Notice Reaffirming Affirmative Action Goals in Light of *Adarand* Decision, Administration Review (Aug. 2, 1995), *reprinted in* DAILY LAB. REP. (BNA) No. 155, at E-1 (Aug. 11, 1995) [hereinafter OFCCP NOTICE].

189. *Id.* at E-1.

Moreover, OFCCP asserted that its "use of numerical goals in affirmative action programs under Executive Order 11,246 meets the standards of fairness"<sup>190</sup> put forth by President Clinton in his Affirmative Action Speech of July 19, 1995.<sup>191</sup> Most striking, however, was the OFCCP's insistence that *Adarand* did not affect its use of numerical goals. The OFCCP stated:

*Adarand* established the judicial standard of review applicable to governmental programs that use racial and ethnic classifications as a basis for decisionmaking. Because the Executive Order program does not require decisionmaking based on race or ethnicity, the standards established in *Adarand* do not apply to the use of goals in Executive Order 11,246 affirmative action programs.<sup>192</sup>

According to OFCCP, the essence of affirmative action programs is the procedure under which federal contractors "analyze their workforce and evaluate their employment practices for the purpose of identifying and correcting any unlawful race-based and sex-based obstacles to equal employment opportunity."<sup>193</sup> But, OFCCP avers, the numerical goals that are set up to correct disparities are "not designed to be . . . quotas with respect to persons of any race, color, religion, sex or national origin," because the regulations prohibit this.<sup>194</sup> "Rather, the goal-setting process in affirmative action planning is used to target and measure the effectiveness of affirmative action efforts to eradicate and prevent discrimination."<sup>195</sup>

OFCCP mandates that an employer is not required to do the following: "1) hire a person who does not have the qualifications needed to perform the job successfully; 2) hire an unqualified person in preference to another applicant who is qualified; or 3) hire a less qualified person in preference to a more qualified person."<sup>196</sup> This is because "[u]nlike preferences and quotas, numerical goals recognize that persons are to be judged on individual ability, and are, therefore, consistent with the principles of merit hiring and promotion."<sup>197</sup>

Most importantly, OFCCP promises:

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190. *Id.*

191. See President's Remarks, *supra* note 67 (articulating standards of fairness as consisting of no quotas in theory or in practice; no illegal discrimination of any kind, including reverse discrimination; no preferences for any job or opportunity for people who are not qualified; and retirement of program after fulfillment of its goals).

192. OFCCP NOTICE, *supra* note 188, at E-1.

193. OFCCP NOTICE, *supra* note 188, at E-1.

194. OFCCP NOTICE, *supra* note 188, at E-2.

195. OFCCP NOTICE, *supra* note 188, at E-2.

196. OFCCP NOTICE, *supra* note 188, at E-2.

197. OFCCP NOTICE, *supra* note 188, at E-2.

A contractor's compliance is measured by whether it has made good faith efforts to meet its goals. Failure to meet goals is not a violation of the Executive Order. Therefore, a contractor that has not met its goals will be found in compliance if it has made good faith efforts.<sup>198</sup>

The OFCCP notice announced it was merely reaffirming its existing interpretation and policy rather than changing it in light of *Adarand*.<sup>199</sup> Enforcement by OFCCP compliance officials "on the ground," however, frequently had gone beyond the passive official policy. The Administrator's reiteration of OFCCP's *non-quota* policy should be helpful in reining in overzealous interpretation and enforcement.

## 5. Department of Defense's response to *Adarand*

### a. Suspension of the "Rule of Two" Program

On October 23, 1995, in the wake of the DOJ's government-wide review of all federal agencies' affirmative action plans, DOD issued a memorandum suspending the use of the "rule of two" set-aside policy for small disadvantaged businesses.<sup>200</sup> Under the rule of two, if two or more SDBs were available and qualified to bid for a DOD prime contract, then that contract had to be set-aside for SDBs, provided that the SDB price was not more than ten percent above the fair market price.<sup>201</sup> The use of the "rule of two" was part of DOD's attempt to comply with the section 1207<sup>202</sup> goal of awarding five percent of its contracts and subcontracts to SDB firms, historically black colleges and universities and other minority institutions.<sup>203</sup> From the rule's promulgation in 1987<sup>204</sup> through the first three quarters of 1995, DOD had awarded \$5.4 billion worth of prime

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198. OFCCP NOTICE, *supra* note 188, at E-2.

199. See OFCCP NOTICE, *supra* note 188, at E-2 (indicating that notice was issued to reaffirm OFCCP's policy on affirmative action goals).

200. See Defense Federal Acquisition Regulation Supplement, 60 Fed. Reg. 54,954 (Oct. 27, 1995) (to be codified at 48 C.F.R. pts. 219, 252) (ordering suspension of SDB set-asides to be effective October 23, 1995).

201. National Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-661, § 1207, 100 Stat. 3816, 3973-74 (1986) (codified as amended 10 U.S.C. § 2301 note (1994)).

202. *Id.*, 100 Stat. at 3973.

203. *Id.*

204. *Id.*, 100 Stat. at 3974.

contracts under section 1207.<sup>205</sup> Of the \$5.4 billion, \$516 million worth of contracts were awarded under the rule of two program.<sup>206</sup>

The DOD memorandum issued by Deputy Secretary of Defense John White stated that the suspension of the "rule of two" did not "reflect any change in the Department's commitment to bring SDBs into the defense industrial base."<sup>207</sup>

#### *b. Defense Acquisition Regulation changes*

On December 14, 1995, DOD proposed four Department of Defense Federal Acquisition Regulation ("DFAR") rule changes that addressed monitoring of SDB subcontracting plans, evaluation preferences, and use of the ten percent price-preference program.<sup>208</sup> Under the ten percent price-preference program, DOD may, if the SDB bidding on the contract requests it, add ten percent to the bid price of an offeror that is not an SDB firm.<sup>209</sup>

#### *c. New DOD regulations*

Two months after suspension of its rule of two program, DOD announced a new program for small disadvantaged businesses.<sup>210</sup> This program, titled "The Industry Thrust Program," will provide information on DOD contract and subcontract possibilities for minorities. This new program will be aimed at the same audience that the "rule of two" addressed: SDBs, women-owned businesses, historically black colleges and universities, and minority institutions.<sup>211</sup> Initially, the program will target environmental, manufacturing, health care, telecommunications, and management information systems companies.<sup>212</sup>

### *6. The New Justice Department Proposed Reforms*

On May 23, 1996, the DOJ issued a long-awaited set of "Proposed Reforms to Affirmative Action in Federal Procurement" ("Proposed Reforms") for the purpose of reforming federal government affirma-

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205. *DOD Suspends Minority Set-Aside Program*, DEF. DAILY, Oct. 24, 1995, available in LEXIS, NEWS Library, DEFPLY File (providing dollar statistics of contracts awarded through rule of two program).

206. *Id.*

207. *Id.*

208. 60 Fed. Reg. 64,135 (Dec. 14, 1995) (to be codified at 48 C.F.R. pts. 215, 219, 236, 242, 252, 253).

209. *Id.* at 64,137.

210. *DOD Announces New Program for SDBs*, 65 FED. CONT. REP. (BNA) 3 (Jan. 22, 1996).

211. *Id.*

212. *Id.*

tive action programs to ensure constitutional compliance with the strict scrutiny standards set out in *Adarand*.<sup>213</sup>

In the Proposed Reforms, DOJ states that recent congressional action, meaning FASA,<sup>214</sup> which extended authority to most federal agencies "to conduct various race-conscious activities," is "credible and constitutionally defensible" because it is backed by persuasive evidence that without some sort of affirmative action "federal contracting would unquestionably reflect the continuing impact of discrimination that has persisted over an extended period."<sup>215</sup> Some of the evidence cited by DOJ includes the numerous *Croson* studies of discrimination that have been performed by state and local governments in the past several years. Citing the extension by Congress of affirmative action authority to all federal agencies through FASA, the Proposed Reforms state that regulations implementing this extension have been delayed because of *Adarand*, but that the Proposed Reforms are intended to provide a basis for the new regulations.<sup>216</sup>

The Proposed Reforms emphasize that the 8(a) program "merits special mention at the outset."<sup>217</sup> It then goes on to draw a distinction between the 8(a) program and general SDB programs. For example, as opposed to the general SDB program, the 8(a) program "is designed to assist the development of businesses owned by socially and economically disadvantaged individuals."<sup>218</sup> The general SDB program, however, is a "procurement program, designed to assist the government in finding firms capable of providing needed services, while at the same time, helping to address the traditional exclusion of minority-owned firms from contracting opportunities."<sup>219</sup>

To strengthen the 8(a) program, the Proposed Reforms set out five major areas in which measures will be implemented intended to strengthen "safeguards against fraud and to ensure that the 8(a) program serves its purpose in assisting the development of businesses owned by individuals who are socially and economically disadvantaged."<sup>220</sup> These areas are: (1) eligibility and certification; (2) benchmark limitations; (3) mechanisms for increasing minority

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213. 61 Fed. Reg. 26,042 (May 23, 1996).

214. Pub. L. No. 103-355, § 7102 (codified at 15 U.S.C. § 644 note (1994)).

215. 61 Fed. Reg. 26,042, 26,042 (May 23, 1996).

216. *Id.*

217. *Id.* at 26,043.

218. *Id.* at 26,042.

219. *Id.* at 26,043.

220. *Id.*

opportunity; (4) the interaction of benchmark limitations and mechanisms; and (5) outreach and technical assistance.<sup>221</sup>

First, under "Eligibility and Certification," the Proposed Reforms state that in a reformed certification process, "[e]ach bid that an SDB submits to an agency, or to a prime contractor seeking to fulfill 8(d) subcontracting obligations, will have to be accompanied by a form certifying that the concern qualifies as a small disadvantaged business under eligibility standards that will be published by the SBA."<sup>222</sup> Although this certification process changes the method now being utilized, the Proposed Reforms state that "[m]embers of designated minority groups seeking to participate in SDB and 8(d) programs will continue to fall within the statutorily mandated presumption of social and economic disadvantage. This presumption is rebuttable as to both forms of disadvantage."<sup>223</sup>

Second, in the section entitled "Benchmark Limits," the Proposed Reforms state that "[a]lthough Congress has made the judgment that affirmative race-conscious measures are needed in federal contracting, the use of race must be narrowly tailored."<sup>224</sup> Consequently, the Proposed Reforms call for a "set of specific guidelines to limit, where appropriate, the use of race-conscious measures in specific areas of federal procurement."<sup>225</sup> And, the Proposed Reforms promise that "limits, or 'benchmarks,' will be set for each industry for the entire Government."<sup>226</sup>

Third, in the section entitled "Mechanisms for Increasing Minority Opportunity," the Proposed Reforms assert that "[u]nder the reformed structure, the federal government will generally have authority . . . to use several race-conscious contracting mechanisms: SBA's 8(a) program; a bidding credit for SDB prime contractors; and an evaluation credit for non-minority prime contractors that use SDBs in subcontracting."<sup>227</sup> In addition, the Government will have a variety of outreach programs to provide more contracting opportunities for SDBs. Thus, the three "mechanisms" for affirmative action in the DOJ Proposed Reforms are the three majority existing affirmative action programs—8(a) sole-source contracting, bid evaluation factors up to ten percent for SDB prime contractors, and evaluation incentives for non-SDB prime contractors to contract to SDBs.

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.* at 26,045.

225. *Id.*

226. *Id.*

227. *Id.* at 26,046.



Fourth, in the section entitled "Interaction of Benchmark Limits and Mechanisms," the Proposed Reforms established:

In determining how benchmark limitations will be used to measure the appropriateness of various forms of race-conscious contracting, the objective has been to develop a system that can operate with a sufficient degree of clarity, consistency and simplicity over the range of federal agencies and contracting activities. Where the use of all available tools, including direct competition and race-neutral outreach and recruitment efforts, results in minority participation below the benchmark, race-based mechanisms will remain available.<sup>228</sup>

The Proposed Reforms then state:

Data regarding minority participation will be reviewed annually, but will include the past three fiscal years of experience. Examining experience over three year stretches should produce a more accurate picture of minority participation, given short-term fluctuations and the fact that the process of bidding and awarding a contract may span more than a single fiscal year.<sup>229</sup>

Finally, in the section entitled "Outreach and Technical Assistance," the Proposed Reforms state that the activities that agencies now use to "make minority firms aware of contracting opportunities" will continue but that "race-conscious measures [should] be used only to the minimum extent necessary to achieve legitimate objectives."<sup>230</sup> The Proposed Reforms set out a partial list of nine suggestions as to how agencies may achieve race-neutral outreach and technical assistance programs that encourage minority participation in outreach and technical assistance programs.<sup>231</sup>

Although it took almost a year to formulate its proposals, DOJ has, in the opinion of the authors, made a serious, good faith and logical effort to meet the "narrow tailoring" prong of the "strict scrutiny" standard. It also has purported to justify its programs under the "compelling interest" prong of the strict scrutiny test. While the narrow tailoring prong may well pass muster, the compelling interest prong is far more difficult to demonstrate and far more vulnerable to attack, in the authors' view, since it requires that present discrimination or current effects of past discrimination be demonstrated throughout the *nationwide* market in which the federal government procures its goods and services.

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228. *Id.*

229. *Id.* at 26,047.

230. *Id.* at 26,048.

231. *Id.* at 26,049.

## 7. Proposed legislation

### a. *The Equal Opportunity Act of 1995*

The Equal Opportunity Act of 1995,<sup>232</sup> sponsored by then-Senate Majority Leader Bob Dole (R-Kan.) and Representative Charles Canady (R-Fla.)<sup>233</sup> proposed the elimination of all preferential programs in the federal government, including the present obligations of federal agencies to set "goals and timetables" for hiring minorities and women.<sup>234</sup> The bill would prohibit the "use of a quota, set-aside, numerical goal, timetable, or other numerical objective,"<sup>235</sup> as well as any preference "based in whole or in part on race, color, national origin, or sex."<sup>236</sup> Instead the bill would require a review of existing policies and regulations by every federal agency within one year of enactment, and modification of all policies and regulations in accordance with the requirements of the act.<sup>237</sup> The bill did provide exemptions for historically black colleges, Indian tribes, combat-related and national security functions, and bona fide occupational qualifications based on sex.<sup>238</sup> The bill also stated that pending cases, contracts, subcontracts, or consent decrees that were already in place at the time of the enactment of the bill or remedies that were available under other federal laws or both, would not be affected by the new law.<sup>239</sup> In addition, the bill proposed that there be recruitment or encouragement of qualified women or minorities for federal employment or for employment by federal contractors or subcontractors, or for bidders on federal contracts "if such recruitment or encouragement does not involve using a numerical objective, or otherwise granting a preference."<sup>240</sup>

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232. S. 1085, 104th Cong., 1st Sess. (1995) [hereinafter Senate Bill].

233. See 141 CONG. REC. S10,831 (daily ed. July 27, 1995) (statement of Rep. Bennett congratulating Sen. Dole and Rep. Canady for introducing Employment Opportunity Act of 1995).

234. See Senate Bill, *supra* note 232, § 8 (stating that bill's purpose is to "prohibit discrimination and preferential treatment on the basis of race, color, national origin, or sex with respect to Federal employment, contracts, and programs").

235. See Senate Bill, *supra* note 232, § 8 (stating that definition of preferential treatment encompasses quotas, set-asides, numerical goals, timetables, and other numerically-based objectives).

236. Senate Bill, *supra* note 232, § 2.

237. Senate Bill, *supra* note 232, § 5.

238. Senate Bill, *supra* note 232, § 4 (providing list of institutions, groups, and government policies exempt from bill).

239. Senate Bill, *supra* note 232, § 7.

240. Senate Bill, *supra* note 232, § 3.

b. *The Gramm Amendment*

On July 20, 1995, Senator Phil Gramm (R-Tex.) offered an amendment that was promptly defeated by a vote of sixty-one to thirty-six.<sup>241</sup> This amendment would have prohibited the use of government funds for any contract set-asides based on race, gender, or national origin.<sup>242</sup> Instead, the Senate adopted an amendment by Senator Patty Murray (D-Wash.) prohibiting the use of funds for any program that results in an award to an unqualified person, reverse discrimination, or quotas, or is inconsistent with the decision in *Adarand*.<sup>243</sup>

8. *State government response*

*Adarand* did not change the standard of review of state or local affirmative action programs.<sup>244</sup> However, following *Adarand*, no less than twenty states have acted or intend to act to limit their affirmative action policies, and sixteen have acted in support of their affirmative action programs.<sup>245</sup> For example, Oregon removed requirements that bidders on state transportation contracts must hire a certain percentage of minority and women owned businesses as subcontractors.<sup>246</sup>

9. *Case law after Adarand*

The case law following *Adarand* largely has involved procedural issues, with the exception of the Fifth Circuit's decision in *Hopwood v. Texas*.<sup>247</sup> The latter decision dealt squarely with the substantive application of the strict scrutiny standard to university admissions, reversing the generally-understood, prevailing Supreme Court precedent of *Regents of University of California v. Bakke*.<sup>248</sup> A discussion of *Hopwood* and other significant cases follows.

241. *Senate Defeats Attempt to Kill Minority Set-Asides, Set-Aside Alert*, SMALL BUSINESS PRESS, July 31, 1995, available in LEXIS, MARKET Library, IACNWS File.

242. *Id.*

243. *Id.*

244. See *supra* part II (discussing effect of *Adarand* decision on race-based affirmative action programs in contracting).

245. *State Legislatures Respond to Affirmative Action Uproar; 20 States Aim to Limit Preferential Policies, 16 to Strengthen*, 33 GOV'T EMPL. REL. REP. (BNA) 1052 (Aug. 14, 1995) (providing overview of legislative activity regarding affirmative action in state hiring and contracting).

246. Thomas J. Madden & Kevin M. Kordziel, *Strict Scrutiny and the Future of Federal Procurement Set-Aside Programs in the Wake of Adarand: Does 'Strict in Theory' Mean 'Fatal in Fact'?*, 64 FED. CONT. REP. (BNA) 6 (Aug. 7, 1995).

247. 78 F.3d 932 (5th Cir.), cert. denied, 116 S. Ct. 2581 (1996).

248. 438 U.S. 265 (1978).

a. *Bras v. California Public Utilities Commission*

In *Bras v. California Public Utilities Commission*,<sup>249</sup> the Court of Appeals for the Ninth Circuit addressed the issue of whether a government contract bidder had standing<sup>250</sup> to challenge the constitutionality of a California statute.<sup>251</sup> The statute in question required utility companies with gross revenues exceeding twenty-five million dollars to submit annual business plans detailing how they would increase the number of contracts with women-owned, minority-owned, and disabled-veteran-owned business enterprises. These plans were required to include "short- and long-term goals and timetables, but not quotas, and . . . methods for encouraging both prime contracts and grantees to engage women, minority, and disabled veteran business enterprises in subcontracts."<sup>252</sup> Under the statute, the Commission had the authority to sanction a utility for failing to make acceptable progress in the hiring of minority businesses.<sup>253</sup>

Mr. Bras was a male architect who had provided services to Pacific Bell for twenty-two years, from 1969 to 1991.<sup>254</sup> In 1991, he was asked to complete a prequalification criteria form, to be used by Pacific Bell to select a group of architectural firms to submit proposals and, if selected, to enter into "improved business partnerships."<sup>255</sup> One of the questions on the form asked if the applicant was currently certified through the Cordoba Corporation Clearing House process for minority/women business enterprise status.<sup>256</sup> Pacific Bell awarded ten points for a "yes" answer and zero points for a "no" answer.<sup>257</sup> Bras answered "no" to the question and ranked sixth,

249. 59 F.3d 869 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 800 (1996).

250. The three requirements for Article III standing are: (1) injury in fact, which means an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical; (2) a causal relationship between the injury and the challenged conduct, which means that the injury fairly can be traced to the challenged action of the defendant, and has not resulted from the independent action of some third party not before the court; and (3) a likelihood that the injury will be redressed by a favorable decision, which means that the prospect of obtaining relief from the injury as a result of a favorable ruling is not too speculative. *Bras v. California Pub. Utils. Comm'n*, 59 F.3d 869, 872 (1995) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559 (1992)), *cert. denied*, 116 S. Ct. 800 (1996).

251. See CAL. PUB. UTIL. CODE §§ 8281-8286 (West 1994) (providing preferences for women and minority business enterprises regarding public utility procurement contracts).

252. *Id.* § 8283(b).

253. See *id.* § 8285 (providing sanctions for falsely representing business ownership as eligible under code).

254. *Bras*, 59 F.3d at 871.

255. *Id.*

256. *Id.*

257. *Id.*

and thus was not selected to submit proposals.<sup>258</sup> He was informed by Pacific Bell that if he had answered "yes," he would have ranked third.<sup>259</sup>

Bras brought a civil rights action against Pacific Bell and the California Public Utilities Commission.<sup>260</sup> He alleged that Pacific Bell discriminated against him on the basis of race and sex in violation of the Equal Protection Clause.<sup>261</sup> He also challenged the California Public Utilities Code and the Commission's General Order on constitutional grounds, and asked for declaratory and permanent injunctive relief forbidding the Commission from implementing the law.<sup>262</sup> Prior to trial, Bras settled with Pacific Bell, but proceeded against the Commission.<sup>263</sup> The United States District Court for the Northern District of California dismissed Bras' claim on summary judgment for lack of standing.<sup>264</sup> The Ninth Circuit reversed and remanded, finding that Bras had standing.<sup>265</sup>

The court first held that because Bras had settled with Pacific Bell and thus only had asked for declaratory and injunctive relief against the Commission, he was required to show a very significant possibility of future harm,<sup>266</sup> not to demonstrate past injury.<sup>267</sup> Bras satisfied the injury-in-fact requirement with a showing that he was "able and ready to bid on contracts and that a discriminatory policy prevent[ed him] from doing so on an equal basis."<sup>268</sup> The denial of equal treatment resulting from the imposition of the barrier erected by the government is the injury in fact, not the future inability to obtain the benefit.<sup>269</sup> The fact that Bras would not be able to bid on another contract with Pacific Bell for several years did not prevent the court from finding that Bras met his burden of showing an "actual or imminent" injury in fact.<sup>270</sup>

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258. *Id.*

259. *Id.* The firm that finished third in the rankings was a minority-owned business. *Id.*

260. *Id.* Bras filed the action pursuant to 42 U.S.C. §§ 1981, 1983, and 1985. *Id.*

261. *Id.*

262. *Id.*

263. *Id.* at 872. Bras' remaining claims were for declaratory and injunctive relief against the Commission. *Id.*

264. *Id.* at 873.

265. *Id.* at 875-76.

266. *Id.* (citing *Coral Constr. v. King County*, 941 F.2d 910, 929 (9th Cir. 1991)).

267. *Id.* at 873.

268. *Id.* (quoting *Northeastern Florida Contractors v. City of Jacksonville*, 113 S. Ct. 2297, 2303 (1993)). The court found that although Pacific Bell had already entered into architectural contracts, Bras could reapply when those existing contracts expired. *Id.*

269. *Id.* (citing *Northeastern Florida*, 113 S. Ct. at 2303).

270. *Id.* (holding that fact "[t]hat Bras can only compete for long-term contracts every several years rather than on a project-by-project basis does not change the analysis").

Second, the causal relationship prong was satisfied even though the challenged regulation did not contain any race or gender specific discriminatory devices.<sup>271</sup> Statutes are not "immunized from scrutiny because they purport to establish 'goals' rather than 'quotas.'"<sup>272</sup> The label attached to the program does not change the standing analysis so long as the plaintiff can show that the ordinance's discriminatory policy prevented him from competing on an equal footing.<sup>273</sup> Citing *Adarand*, as well as other authorities, the court held that goals, not just rigid quotas, can cause such injury in fact.<sup>274</sup>

The court rejected the Commission's argument that the challenged regulations did not require public utilities to adopt discriminatory programs.<sup>275</sup> Rather, the practical effect of requiring the utilities to apply the regulations was to require racial preferences. This message sent by the regulations that racially-neutral outreach programs were insufficient, created a sufficient nexus between Bras's injury and the Commission's actions, and thus established a basis for an Equal Protection Clause claim.<sup>276</sup>

#### b. Challenges to the 8(a) Program

In *C.S. McCrossan Construction Co. v. Cook*,<sup>277</sup> the United States District Court of New Mexico denied a white-owned firm's challenge to the constitutionality of the SBA's 8(a) Program. In this case, McCrossan, a large contractor with revenues of \$50 to \$75 million in 1995, argued that the SDB set-aside contract at the U.S. Army's White Sands Missile Range in New Mexico violated the Equal Protection Clause of the Fifth Amendment.<sup>278</sup> Previously, this contractor had brought the same challenge in a bid protest to the General Accounting Office ("GAO").<sup>279</sup> However, GAO declined to act on the challenge.

As a general matter, GAO stated, it will not address constitutional challenges to federal set-asides in the absence of clear judicial

271. *Id.* at 874-75.

272. *Id.* at 874.

273. *Id.* at 874 ("We look to the economic realities of the program rather than the labels attached to it.").

274. *Id.* at 875 (finding that "goal" or "quota" label attached to program does not affect standing analysis).

275. *Id.* (concluding that challenged regulations "effectively encourag[ed], if not compel[led], Pacific Bell to adopt discriminatory programs").

276. *Id.*

277. *C.S. McCrossan Constr. Co. v. Cook*, No. 95-1345-HB, 1996 WL 310298 (D.N.M. Apr. 2, 1996).

278. *Id.* The claim arose from an indefinite delivery and indefinite quantity road and pavement repair contract with an estimated value of between \$150,000 and \$35,000,000. *Id.*

279. *C.S. McCrossan Constr. Co.*, B-259225, 95-1 C.P.D. ¶ 146, 1995 WL 116790 (1995).

precedent at the federal level. And further, stated GAO, it will not regard *Adarand* as clear judicial precedent, because the Supreme Court's action in the case was to remand to the lower courts for review under the newly announced standard.<sup>280</sup> Accordingly, the GAO will not consider protests of government procurements based on *Adarand*.<sup>281</sup> The GAO thus denied McCrosson's initial bid protest<sup>282</sup> because it is waiting for judicial precedent *on the merits* of a case decided under the *Adarand* strict scrutiny standard.<sup>283</sup>

The *McCrossan* court appears not to have provided such a precedent in its decision. Although the court determined that McCrossan did not lack standing under *Adarand* to challenge "the Government's preferential treatment towards 8(a) program participants in the bidding of the job order contract," it denied McCrossan's motion for a preliminary injunction against the program.<sup>284</sup> In its ruling on the denial, the court held that McCrossan had not demonstrated: (1) that "it will suffer irreparable injury if the requested preliminary injunction is not granted"; (2) that the balance of hardships favor them; (3) that it would be in the public interest if such an injunction were granted (indeed, the court held it would be against the public interest); and (4) that there was "a substantial likelihood of [its] prevailing on the merits."<sup>285</sup>

In 1996, at least three other government contractors brought lawsuits, based on *Adarand*, challenging the constitutionality of the 8(a) program. First, in *Dynalantic Corp. v. United States*,<sup>286</sup> a contractor challenged the government's decision to limit competition for a helicopter simulator contract to 8(a) program participants. Calling it unconstitutional, the contractor, Dynalantic Corp., asserted that *Adarand* applied to this case since "the 8(a) program is a 'race-based' program that excludes Dynalantic from competing for the [present] procurement solely on the basis of race."<sup>287</sup> Dynalantic went on to claim that "as race is allegedly the 'litmus test' under the 8(a)

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280. Elrich Contracting, Inc., B-262015, 95-2 C.P.D. ¶ 71, 1995 WL 493491, at \*1 (1995) ("The Court in *Adarand* simply announced the standard that is to be applied in determining the constitutionality of such programs . . . . Thus whether any particular program is unconstitutional was left to the lower federal courts to determine.").

281. *Id.* (declining to consider allegations in absence of clear precedent on point).

282. *McCrossan*, 1995 WL 116790 at \*2 (1995) (citing JWA Sec. Servs., B-253836, 93-2 C.P.D. ¶ 219 (1993)).

283. See *Elrich*, 1995 WL 493491, at \*1 (noting that *Adarand* did not provide precedent for GAO to determine constitutionality of set-aside program).

284. *Id.*

285. *Id.*

286. *Dynalantic Corp. v. United States*, No. CIV. A. 95-2310(EGS), 1996 WL 475841, at \*1 (D.D.C. May 20, 1996).

287. *Id.* at \*3.

program, any non-minority company—even a non-minority-owned Fortune 500 company—has standing to attack the 8(a) program.”<sup>288</sup> The court, however, found that “for purposes of determining standing, [Dynalantic’s] characterization of the 8(a) program and its efforts to elide [sic] addressing whether it satisfies the race-neutral economic criteria, do not withstand scrutiny.”<sup>289</sup>

In determining that Dynalantic lacked standing to bring this challenge, the court, however, did not rely on *Adarand*. Instead, it relied on a 1974 Fifth Circuit case, *Ray Baillie Trash Hauling, Inc. v. Kleppe*,<sup>290</sup> and identified the Fifth Circuit Court of Appeals as “the only federal appellate court squarely to address the issue of the standing of a party to challenge the constitutionality—on equal protection grounds—of the 8(a) program.”<sup>291</sup>

In *Ray Baillie*, the Fifth Circuit rejected the lower court’s conclusion that the 8(a) program was “unconstitutional because the primary criterion for eligibility [in the program] is race, color, or ethnic origin, and that the plaintiffs have been excluded from consideration because of their race.”<sup>292</sup> Applying the Fifth Circuit’s holding to Dynalantic, the court ruled that Dynalantic lacked standing, stating:

[P]laintiffs have failed to meet . . . [the injury-in fact] requirement with respect to the issue of the SBA’s alleged discrimination in administering the section 8(a) program. The plaintiffs never applied for participation in the section 8(a) program. Furthermore, they do not even contend that they are socially and economically disadvantaged and therefore eligible for participation in the program. Thus, whatever the outcome of the litigation, the plaintiffs will not be directly affected.<sup>293</sup>

Moreover, the court rejected Dynalantic’s reliance on *Adarand*, stating:

*Adarand* . . . is distinguishable in three respects. First, *Adarand* did not address the issue of standing with respect to a suit challenging the constitutionality on equal protection grounds of the 8 (a) program. Second, in *Adarand*, the non-minority plaintiff was permitted to compete for the subcontract at issue. . . . Third, it is unclear by what means the minority contractor that had been

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288. *Id.*

289. *Id.*

290. 477 F.2d 696 (5th Cir. 1973), *cert. denied*, 415 U.S. 914 (1974).

291. *Dynalantic*, 1996 WL 475841, at \*3.

292. *Id.* at \*4 (quoting *Ray Baillie Trash Hauling Inc. v. Kleppe*, 477 F.2d 696, 709 (5th Cir. 1973), *cert. denied*, 415 U.S. 914 (1974)).

293. *Dynalantic*, 1996 WL 475841, at \*4 (quoting *Ray Baillie*, 477 F.2d at 710).



awarded the subcontract at issue in *Adarand*, had been certified as a socially and economically disadvantaged business.<sup>294</sup>

The court further distinguished *Adarand*, by stating:

While the record in *Adarand* does not disclose clearly that the certification procedure utilized by that the certification procedure utilized by that minority contractor lacked any race-neutral assessment of an applicant's disadvantaged status as the Supreme Court recognized in *Adarand*.<sup>295</sup>

In two other 1996 cases, *SRS Technologies, Inc. v. United States*,<sup>296</sup> and *Ellsworth Associates, Inc. v. United States*,<sup>297</sup> courts rejected constitutional challenges brought by contractors against the 8(a) program. In each case, the court found that the contractor lacked standing to bring such an action.

In *SRS*, a minority-owned contractor claimed it had lost an award for an 8(a) contract because of its lack of racial minority status. Therefore, it argued, because awards of contracts under the 8(a) program are based on race, *Adarand* demands that the program be subjected to strict scrutiny. The court, however, dismissed the challenge, pointing out that the contractor, *SRS Technologies, Inc.*, lacked standing since its "injury," that is, the loss of the contract, was not because of race, but because it was not economically disadvantaged. Indeed, the contractor had recently been decertified as an SDB contractor by the SBA because the net worth of the owner of the company was \$3 million.<sup>298</sup>

Similarly, in *Ellsworth Associates*,<sup>299</sup> a contractor challenged the 8(a) program as unconstitutional under the standard set in *Adarand*. In this case, the court ruled that the contractor lacked standing because it had participated in the 8(a) program for the maximum amount of time allowed under the regulation—nine years—and therefore was ineligible to compete for 8(a) contracts. Thus the contractor could show on injury since it had not lost the contract over race, but had lost because of its ineligibility.

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294. *Id.* at \*6 (quoting *Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097, 2104, 2118 (1995)).

295. *Id.* at \*7.

296. Civ. A. No. 95-1792-A (E.D. Virginia).

297. 926 F. Supp. 207 (D.D.C. 1996).

298. *See SRS Technologies, Inc. v. United States*, 894 F. Supp. 8, 11 (D.D.C. 1995).

299. 926 F. Supp. 207 (D.D.C. 1996).

c. *Bid protests at the General Accounting Office*

In *PI Construction Corp.*,<sup>300</sup> a small disadvantaged business challenged the Secretary of Defense's suspension of certain set-aside provisions of the Defense Federal Acquisition Regulation Supplement<sup>301</sup> in light of *Adarand*.<sup>302</sup> The challenge was based on the grounds that proposals had been received.<sup>303</sup> The GAO dismissed the protest, holding that a request for proposals can be amended at any time prior to award.<sup>304</sup> It did not reach the issue of whether, in light of *Adarand*, set-aside provisions run afoul of equal protection laws.<sup>305</sup>

In *Advanced Engineering & Research Associates, Inc.*,<sup>306</sup> the GAO refused to consider a protest based on the alleged unconstitutionality of an Air Force SDB set-aside.<sup>307</sup> In *Elrich Contracting, Inc.*<sup>308</sup> the same was true of a challenge to a Department of Defense set-aside.<sup>309</sup> In both cases, the GAO held that *Adarand* did not provide the precedent for determining the constitutionality of set-aside programs.<sup>310</sup> *Adarand*, according to the GAO, merely announced the standard that is to be applied in determining the constitutionality of such programs, but did not decide whether these types of programs are unconstitutional.<sup>311</sup>

d. *The Hopwood case*

In *Hopwood v. Texas*,<sup>312</sup> the Fifth Circuit Court of Appeals addressed whether the Fourteenth Amendment permitted the University of Texas School of Law ("the Law School") to discriminate in favor of certain minorities, to the detriment of whites and "non-preferred" minorities, with regard to the admission process.<sup>313</sup> In deciding that it did not, the court reviewed the process under the "strict scrutiny"

300. B-270576.2, 95-2 C.P.D. ¶ 270, 1995 WL 744792 (1995).

301. See *supra* notes 200-07 and accompanying text.

302. *PI Constr. Corp.*, B-270576.2, 95-2 C.P.D. ¶ 270, 1995 WL 744792 (1995).

303. *Id.* at \*1.

304. *Id.* at \*2.

305. *Id.* at \*1-2.

306. B-261377.2, B-261377.3, B-261377.4, 95-2 C.P.D. ¶ 156, 1995 WL 578227 (1995).

307. *Advanced Eng'g & Research Assocs.*, B-261377.2, B-261377.3, B-261377.4, 95-2 C.P.D. ¶ 156, at 4 n.3, 1995 WL 578227, at \*1 (1995).

308. B-262015, 95-1 C.P.D. ¶ 71, 1995 WL 493491 (1995).

309. *Elrich Contracting, Inc.*, B-262015, 95-2 C.P.D. ¶ 71, at 2, 1995 WL 493491, at \*1 (1995).

310. *Id.*; *Advanced Eng'g*, 95-2 C.P.D. ¶ 156, at 4 n.3, 1995 WL 578227, at \*1.

311. See *supra* notes 280-83 and accompanying text (explaining GAO's unwillingness to view *Adarand* as clear judicial precedent regarding constitutionality of set-aside programs).

312. 78 F.3d 932 (5th Cir.), *cert. denied*, 116 S. Ct. 2581 (1996).

313. *Hopwood v. Texas*, 78 F.3d 932, 934 (5th Cir.), *cert. denied*, 116 S. Ct. 2581 (1996).

standard.<sup>314</sup> In holding against the Law School, the court stated that, giving racial preferences to applicants for admission to the Law School in order to achieve a goal of diversity in a student body, is not sufficient to withstand "strict scrutiny."<sup>315</sup>

*i. Facts of the case*

In the admission process, the Law School used a formula entitled the Texas Index ("TI").<sup>316</sup> This TI was the composite of the undergraduate GPA and the LSAT score for each applicant.<sup>317</sup> Based largely on these scores, applicants were ranked and placed into one of three categories: "presumptive admit," "presumptive deny," or a "discretionary zone."<sup>318</sup> Aside from evaluation factors such as undergraduate major, school attended, experiences and background of the applicant, the Law School also evaluated applicants on the basis of race.<sup>319</sup> Specific minorities, Mexican-Americans and blacks, were given preferential treatment.<sup>320</sup> In March 1992, the presumptive admit score for whites and non-preferred minorities (Texas residents) was 199, and that for minorities was 189.<sup>321</sup> The presumptive denial score for non-minorities was 192, while that for minorities was 179.<sup>322</sup> In other words, a minority with a TI score of 189 would almost definitely be admitted whereas a non-minority with this score would almost definitely be rejected. More to the point, of the applicants who fell within the 189-192 range, 100% of blacks, 90% of Mexican-Americans, and 6% of whites were admitted.<sup>323</sup>

As well as lowering the standards of admission for blacks and Mexican-Americans, the school also color-coded the application forms according to race.<sup>324</sup> In addition, non-minority applications were reviewed in stacks of thirty, and each minority application was reviewed individually.<sup>325</sup> Furthermore, the school maintained waiting lists which divided the applicants both by race and by

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314. *Id.* at 938.

315. *Id.* at 944.

316. *Id.* at 935.

317. *Id.*

318. *Id.*

319. *Id.* at 937.

320. *Id.* at 938, 936.

321. *Id.* at 936.

322. *Id.*

323. *Id.* at 937.

324. *Id.*

325. *Id.* at 936.

residence.<sup>326</sup> This permitted many of the minority students not admitted to be placed on a "minority-only" waiting list.<sup>327</sup>

All four plaintiffs in *Hopwood* applied for admission to the Law School class entering in 1992.<sup>328</sup> All four were considered to be in the discretionary zone.<sup>329</sup> Claiming injury, the plaintiffs brought suit against the Law School under the Equal Protection Clause of the Fourteenth Amendment.<sup>330</sup> In addition, the plaintiffs claimed derivative statutory violations of 42 U.S.C. §§ 1981 and 1983 and of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 200d ("Title VI").<sup>331</sup> Seeking injunctive and declaratory relief, as well as compensatory and punitive damages, the plaintiffs charged that they "were subjected to unconstitutional racial discrimination."<sup>332</sup>

The Law School responded to these charges by arguing that the admissions process was designed to meet the "aspiration" (or goal) of having an entering class comprised of 10% Mexican Americans and 5% blacks.<sup>333</sup>

### *ii. Analysis*

In ruling against the Law School, the Fifth Circuit refused to follow the generally-held view of Justice Powell, writing for the plurality in *Regents of University of California v. Bakke*.<sup>334</sup> In *Bakke*, the Supreme Court appeared to recognize that a university could legitimately assert the desirability of a goal of a racially diverse student body.<sup>335</sup> In its rejection of *Bakke*, the Fifth Circuit relied on *Croson* for the proposition that

[a]bsent searching judicial inquiry into the justifications for such race-based measures, there is simply no way of determining what classifications are "benign" or "remedial" and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. Indeed, the purpose of strict scrutiny is to "smoke out" illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen "fit" this compelling goal so closely that there is little or no

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326. *Id.* at 938.

327. *Id.*

328. *Id.*

329. *Id.*

330. *Id.*

331. *Id.*

332. *Id.*

333. *Id.* at 937.

334. *Id.* at 944.

335. *Id.* at 944-45.

possibility that the motive for the classification was illegitimate racial . . . .<sup>336</sup>

Applying such a strict scrutiny standard, the *Hopwood* court held that "any consideration of race or ethnicity by the Law School for the purpose of achieving a diverse student body is not a compelling interest under the Fourteenth Amendment."<sup>337</sup> Indeed, the court went on to say:

The use of race, in and of itself, to choose students simply achieves a student body that looks different. Such a criterion is no more rational on its own terms than would be choices based upon the physical size or blood type of the applicants.<sup>338</sup>

Thus, the court concluded that "the use of ethnic diversity simply to achieve racial heterogeneity" is unconstitutional.<sup>339</sup>

The court, however, did not completely rule out the use of race in the application process. For example, if *individual*, rather than stereotyped qualities, are considered in obtaining a diverse student body, then a state university may consider race in the application process in the same way it would an applicant's ability to play an instrument or to speak a foreign language.<sup>340</sup> The court noted that it was rejecting, under the strict scrutiny standard, the assumption that, by virtue of belonging to a specified racial group, an individual will possess certain characteristics.<sup>341</sup> Indeed, the court noted that "diversity" can come in many forms and that applicants must be reviewed individually rather than by category of race in order to truly promote diversity.<sup>342</sup>

Unexpectedly, the Supreme Court denied certiorari in the case on July 1, 1996.<sup>343</sup> Perhaps the Court was not yet ready to address the issue of strict scrutiny in the context of educational institution admissions.

#### IV. THE EFFECT ON THE FEDERAL CIRCUIT

The docket of the Court of Appeals for the Federal Circuit ("Federal Circuit") will be significantly affected by the *Adarand* decision. This is because the Federal Circuit is the appellate review

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336. *Id.* at 940 (citing *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989)).

337. *Id.* at 944.

338. *Id.* at 945.

339. *Id.* at 946-47.

340. *Id.* at 945.

341. *Id.* at 946.

342. *Id.*

343. *Texas v. Hopwood*, 116 S. Ct. 2581 (1996).

body for most federal government contract bid protests.<sup>344</sup> Bid protests may be filed with the GAO, the Court of Federal Claims, and federal district courts.<sup>345</sup> Appeals from the Court of Federal Claims can be brought in the Federal Circuit.<sup>346</sup> Adverse decisions from the GAO can be relitigated in the Court of Federal Claims prior to award.<sup>347</sup> In light of the GAO's determination *not* to regard *Adarand* as a substantive judicial precedent,<sup>348</sup> government contractors who wish to challenge race-based affirmative action programs will have to do so in court. The anticipation is that much precedent will be made by the Federal Circuit, which has the greatest expertise in government contracts of any appellate court.

Until now, the Federal Circuit has not been faced with *Adarand*-type issues, i.e., issues relating to the legality of SDB set-asides, 8(a) sole source contract awards, and other race-based preferences. All of its decisions to date which have involved SDB contracts pertained to other issues, not whether the SDB set-aside or preference was legal.<sup>349</sup>

That will certainly change. The Supreme Court in *Adarand* has made vulnerable all government SDB set-aside and preference programs. Every procurement involving such a preference is a fair target for litigation. Moreover, because the GAO has finessed the decision-making on the legality of such preferences to the courts, all challenges now must be made in court. The Court of Federal Claims and the Federal Circuit are expected to be very busy with such cases in the next few years.

### CONCLUSION

The Supreme Court in *Adarand* dramatically altered the existing law regarding federal affirmative action programs by changing the standard of review of race-based affirmative action programs to that of strict scrutiny. The Court, however, left it to the lower courts

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344. 28 U.S.C. § 1295 (1994) (giving Federal Circuit appellate jurisdiction over government contract cases).

345. *Id.* § 1491; see *Scanwell Labs. v. Shaffer*, 424 F.2d 859, 875 & n.19 (D.C. Cir. 1970).

346. 28 U.S.C. § 798.

347. *Id.* § 2510.

348. See *supra* notes 286-97 and accompanying text.

349. See, e.g., *New Am. Shipbuilders, Inc. v. United States*, 871 F.2d 1077, 1080 (Fed. Cir. 1989) (holding that no implied contract existed where SBA regional administrator who approved grant exceeded his authority); *Centron Corp. v. United States*, 585 F.2d 982, 985 (Ct. Cl. 1978) (finding that creditor did not acquire rights against SBA by informing SBA of its contractual arrangements with 8(a) contractor or otherwise where 8(a) contracting assignment of portion of contract proceeds to creditor did not satisfy Assignment of Claims Act of 1940).

(including the Federal Circuit) to rule on the constitutionality of individual programs.

The Justice Department, through its Proposed Reforms, has attempted to reconcile Federal affirmative action programs with the *Adarand* strict scrutiny standard and its prongs of "narrow tailoring" of remedies to further a "compelling governmental interest."

The Justice Department has made a serious effort, which may be sufficient, to bring the government's affirmative action programs in government procurement under the "narrow tailoring" prong. However, the biggest challenge facing the federal government is to meet the "compelling governmental interest" prong, i.e., to justify the need for its affirmative action programs in the first place. How can the federal government demonstrate the existence of prior racial discrimination, the current effects of which justify the use of race-based preferences today? Since the Supreme Court's decision in *Croson*, various state and local governments have commissioned and relied upon "*Croson* analyses," that is, studies tracking the historical racial discrimination and current efforts justifying the government's affirmative action program(s). These studies, by and large, have been effective in establishing the factual predicate for the programs in localities. It is a long way, however, from a study of a county or school district to one covering the entire country. We believe that the federal government will try to "piggy-back" onto the existing *Croson* analyses around the country which have demonstrated the requisite historical discrimination in many localities by either extrapolating from them to the entire country or filling in the gaps through *Croson* analyses of localities which have not yet been surveyed. Of course, the federal government itself will have to independently review existing, as well as new *Croson* analyses to determine that they demonstrate present effects of past discrimination against a uniform standard of acceptability. We believe that by establishing a percentage rate for *Croson* analyses which demonstrate present effects of past discrimination as against those that do not, and factoring in the percentage of the nation's population covered by *Croson* analyses, the federal government can use statistics to extrapolate the existence of present effects of past discrimination in the vast majority of the United States. Whether the percentage of the country covered by *Croson* analyses and the percentage of affirmative determinations of present effects of past discrimination among the *Croson* analyses is sufficient to enable the statistical extrapolation to the entire country is beyond the scope of this Article. However, as additional *Croson* analyses are commissioned and conducted, the percentage of the population covered will

continue to grow. Thus, as cases challenging the factual underpinnings of federal affirmative action work their way up to the Supreme Court, the statistical case will become stronger.

In any case, the next six months to a year will be very interesting.