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## **PREFERENCES IN EMPLOYMENT**

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THIS OUTLINE IS MEANT TO ASSIST IN A GENERAL UNDERSTANDING OF THE CURRENT LAW RELATING TO EMPLOYMENT PREFERENCES. IT IS NOT TO BE REGARDED AS LEGAL ADVICE. COMPANIES OR INDIVIDUALS WITH PARTICULAR QUESTIONS SHOULD SEEK ADVICE OF COUNSEL.

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## I. INTRODUCTION

The United States Supreme Court has on two separate recent occasions attempted to clarify when public entity preferences in recruitment and hiring are permissible. In both instances, plaintiffs used a reverse-discrimination claim as the vehicle to limit “affirmative action” the public entity undertook to advance racial minorities. Given the recent turn towards strictly limiting recruiting and hiring preferences to those programs “narrowly tailored” to remedy the effects of past discrimination, these materials seek to explore what actions public employers may undertake and the effect of these recent Supreme Court decisions on private employers.

In addition, the highly celebrated Ricci case decision from the summer of 2009 is particularly important for even private employers since the decision reminds us again that employers have to prove one of two legal “affirmative defenses” before it is lawful to base employment decisions on race, sex or ethnic origin and even while the employer is trying “to do the right thing.”

### A. Some Preferential Employment Classifications Lawful

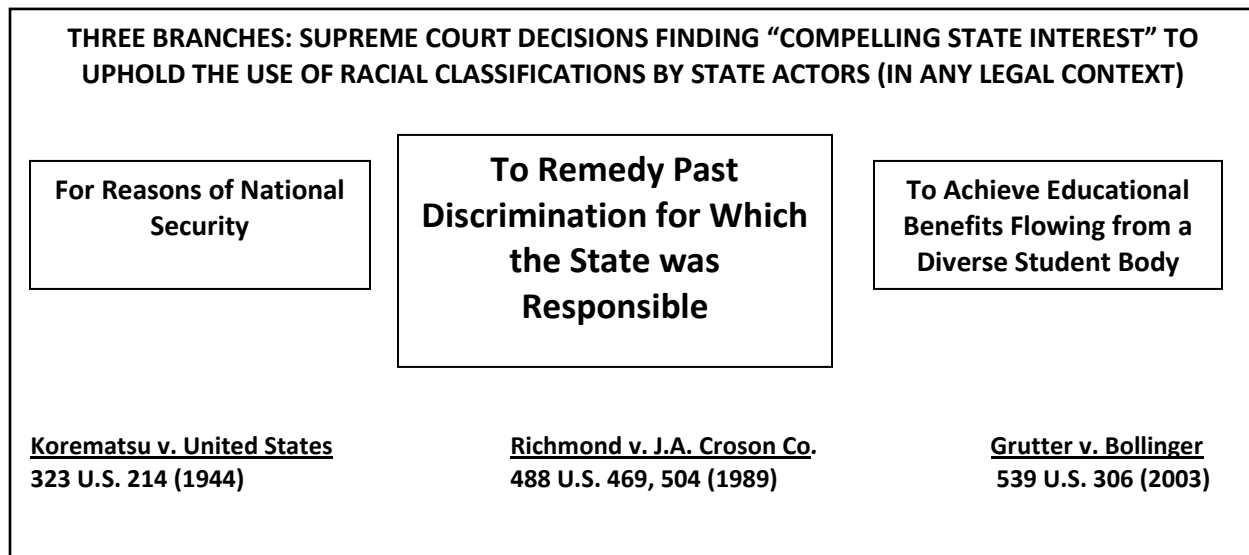
The United States Supreme Court wrote in its decision in the Grutter case that a “*majority* of the [Supreme] Court has validated only two circumstances where . . . a ‘compelling state interest’ can possibly justify racial discrimination by state actors.”<sup>1</sup>

As a result, cases upholding the use of classifications based on race or gender by state actors will typically follow one of the two decisional branches, either (1) a classification is justified by reasons of national security (Korematsu), or (2) a classification is justified to remedy past discrimination for which the state itself was responsible (Croson/Adarand). We now also know, as discussed below, that in the public school admissions context that the geographic diversity of students may also constitute a “compelling state interest.”

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<sup>1</sup> See Grutter, 539 U.S. 306, 349 (2003) (Thomas, J., dissenting).



## II. GENERAL CONCLUSIONS: EMPLOYMENT

The most general conclusion we draw from the decisions identified below is that with a **proper predicate**, private and public employers (other than California public employers covered by Proposition 209) and the courts may lawfully use race, gender and national origin classifications in some limited circumstances in employment and contracting programs. By their very nature, however, preferential classifications involve confessed discrimination. Accordingly, legal counsel must carefully review the use of preferential classifications against the legal standards, discussed in greater detail below, to insure their lawfulness. Public employers must be especially careful when adopting preferential classifications, because they must meet the higher, more limiting standards the United States Constitution imposes to protect against governmental discrimination. Accordingly, as with any discrimination claim, the critical issue is whether the discrimination complained of is “unlawful” discrimination.

By “**proper predicate**” I mean that an employer may only lawfully undertake a preferential classification when it has a legally sufficient rationale to engage in such discrimination on behalf of minorities and/or women. In short, management needs a legally acceptable reason to (lawfully) discriminate.

**A. Three Predicates For Preferential Classifications.** Supreme Court cases have identified three proper predicates” (past discrimination; “important governmental objective”; “manifest imbalance”) in the employment context:

- (1) Who: PUBLIC EMPLOYERS
- Limited by the Equal Protection Clause of the Fourteenth Amendment (states, counties, municipalities, etc.), and
  - The Fifth Amendment (federal government).

What: RACIAL CLASSIFICATIONS

- Subject to “**strict scrutiny**”: i.e., the race or ethnicity-based classification must serve a “compelling governmental interest” and must be “narrowly tailored” to further that interest.
- Justice O’Connor in Wygant indicated that this test may be satisfied by a prima facie showing of unlawful discrimination.<sup>2</sup> The Court has found preferences to meet the compelling government interest requirement where there has been “*persistent*,” “*systematic*,” or “*egregious*” discrimination.<sup>3</sup>

The Court’s decisions in Wygant, Croson, and Adarand hold that use of *racial* classifications for remedial objectives may provide a compelling interest necessary to survive the “strict scrutiny” analysis. A majority of the Court has not ruled, however, whether other nonremedial objectives, such as promoting racial diversity, may constitute a compelling state interest in the employment context, although the Grutter decision now holds that the educational benefits flowing from the diversity of students (in the limited context of school admission policies) suffice in this regard.

In Croson, the Court explained that remedying the identified effects of past discrimination may constitute a compelling interest to justify race-based classifications. 488 U.S. 469, 491-492 (1989). This discrimination could fall into two categories: 1) remedying the effects of the government’s own discrimination;<sup>4</sup> or 2) remedying the effects of discrimination committed by private actors within the government’s jurisdiction, i.e. where the government is a passive participant. Id. Croson requires the government to identify with precision the discrimination to be remedied but rejects, however, the notion that societal discrimination alone is enough. See Croson, 488 U.S. at 505 (“To accept Richmond’s claim that past societal discrimination alone can serve as the basis for rigid racial preferences would be to open the door to competing claims for ‘remedial relief’ for every disadvantaged group.”).<sup>5</sup>

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<sup>2</sup> Wygant v. Jackson Bd. of Education, et al, supra, 476 U.S. at 289-292 (Justice O’Connor concurring in part and concurring in the judgment).

<sup>3</sup> United States v. Paradise, 480 U.S. 149 (1987).

<sup>4</sup> Brackett v. Civil Service Commission, 447 Mass. 233, 244 (2006) [The remedying of past racial discrimination is a compelling State interest as long as there is a “strong basis in evidence for the conclusion that the affirmative action plan at issue serves a remedial purpose with respect to past discrimination”].

<sup>5</sup> The government actors in Wygant, Croson, and Adarand defended their affirmative action programs on remedial grounds. In Adarand, however, Justice Steven’s dissent maintains that the majority’s silence on the use of race for nonremedial objectives does not foreclose the use of “affirmative action” to serve such ends. Adarand Constructors, Inc. v. Pena, No. 93-1841, 1995 U.S. LEXIS 4037, at 74 (U.S. June 12, 1995). Prior to Grutter, 539 U.S. 306, which narrowly constrains the affirmative use of race to the education setting through carefully phrased holdings, the closest the Court had come was Justice Powell’s more broadly worded separate opinion in Regents of the University of California v. Bakke, 438 U.S. 265, 311-314 (1978) (holding that a university has a compelling

(2) Who: PUBLIC EMPLOYERS

- Limited by the Equal Protection Clause of the Fourteenth Amendment (states, counties, municipalities, etc.), and  
The Fifth Amendment (federal government).

What: GENDER CLASSIFICATIONS

- Subject to “**intermediate scrutiny**”:<sup>6</sup> i.e., the gender based classification must serve (1) an important governmental objective, and (2) there must be a “direct substantial relationship between the objective and the means chosen to accomplish the objective”.<sup>7</sup>
- A governmental body may satisfy this test by showing either that it engaged in unlawful discrimination it is seeking to cure or that industry discrimination had occurred to prevent women from full participation in some activity of interest to the government.

(3) Who: PRIVATE AND PUBLIC EMPLOYERS

- Limited by Title VII.

interest to use race as a factor in the admissions process to foster greater diversity). Adarand neither expressly avows or disavows Justice Powell’s opinion in Bakke, but leaves unclear whether and in what settings nonremedial objectives can constitute a compelling interest. See also Kidd v. State of California, et al., 1998 Cal. App. LEXIS 226, \*42 (March 20, 1998) (rejecting plaintiff’s requested remedy seeking to discharge from employment those (minorities) hired due to illegal race-based classifications because (1) those hired were not joined as parties to the action and (2) because equity would be offended by ousting from positions those who innocently obtained them through no fault of their own).

<sup>6</sup> The general rule appears to be that courts apply “intermediate scrutiny” to gender-based preferences, although the United States Supreme Court has not definitively ruled on the issue. Federal Circuit Courts are in conflict on the issue. See, e.g., Coral Const. Co. v. King County, 941 F.2d 910, 931 (9th Cir. 1991) (applying “intermediate scrutiny” to women business enterprise program); Concrete Works of Colorado v. City & Cty. of Denver, 36 F.3d 1513, 1519 (10th Cir. 1994) cert. denied, 514 U.S. 1004 (1995) (same); Ensley Branch, N.A.A.C.P. v. Seibels, 31 F.3d 1548, 1581 (11th Cir. 1994) (applying “intermediate scrutiny” to consent decree employing gender-based remedies); but see, Brunet v. City of Columbus, 1 F.3d 390, 404 (6th Cir. 1993) Reh’g. denied, 1993 U.S. App. LEXIS 25526 (1993) (applying “*strict scrutiny*” to gender-based affirmative action plan).

<sup>7</sup> Coral Const. Co. v. King Co., 941 F.2d 910, 931 (9th Cir. 1991) (citing Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982) (A gender classification education case in which the Supreme Court’s applied the less rigorous “intermediate scrutiny” to strike down the University’s rule barring men from entering a state-supported nursing school. In that case, the Court found unavailing the argument that the school remain women-only because 1) women are not underrepresented as nurses and 2) the argument that single sex education fosters educational benefits was undermined since the school, in fact, allowed men to monitor classes). The United States Court of Appeals for the Ninth Circuit in the Coral Construction case required King County to only show, in the context of a women business enterprise set-aside program, that some degree of discrimination occurred in the construction industry. Id. at 932. “Strict scrutiny”, by contrast, usually requires the government proponent to show governmental involvement, active or passive, in the discrimination it seeks to remedy. Id.

- What: Must identify a MANIFEST IMBALANCE (in “traditionally segregated” workforces) between the pool of available qualified minority/female employees and the use of minority/female employees in the employer’s workforce or must identify **unlawful discrimination** (probably during the relevant statute of limitations period).
- Similar to strict scrutiny’s “narrow tailoring” requirement, the preference must be both “**temporary**” and must not “**unnecessarily trammel**” the legitimate interests of those not subject to the preference.
  - Additionally, the action must do no more than is necessary to attain a balance. In other words, such action CANNOT BE USED TO MAINTAIN A BALANCE.<sup>8</sup>
  - Employer may apparently satisfy showing of “manifest imbalance” by less than a *prima facie* case of unlawful employment discrimination.

Even if the court finds a “**proper predicate**” for the preferential selection at issue, the Court must still find the resulting preference was “narrowly tailored.” In Wygant, for example, the Supreme Court identified hiring and layoff determinations as the two extremes in employment decisions based on race or gender. The Court indicated that hiring preferences are generally justified because the burden to innocent parties is “shared” among non-minorities. In the case of the school board’s layoff plan, however, the use of race was impermissible and not “narrowly tailored” because it forced particular individuals to shoulder the entire burden of achieving racial equality.<sup>9</sup>

#### **Four Important Employment Case Decisions**

Specifically with regard to the employment context, several United States Supreme Court decisions have legitimized the limited use of classifications based on race, gender and national origin, providing much needed guidance for employers seeking to achieve a diverse workforce. In particular, four decisions affecting affirmative action in the employment realm have emerged as the most influential:

- **Johnson**,<sup>10</sup> construing the limitations that Title VII of the 1964 Civil Rights Act imposes on the management discretion of covered *private and public* employers.

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<sup>8</sup> Doe v. Kamehameha Schools, 470 F.3d 827, 840 (9<sup>th</sup> Cir. 2006) [private employers’ affirmative action plans: (1) must respond to a manifest imbalance in the work force; (2) must not unnecessarily trammel the rights of members of the non-preferred class or create an absolute bar to their advancement; and (3) must do no more than is necessary to attain a balance].

<sup>9</sup> Wygant v. Jackson Bd. of Education, et al., *supra*, 476 U.S. at 279-84.

<sup>10</sup> Johnson v. Transportation Agency, Santa Clara County, et al., 480 U.S. 616 (1987). While many people

- **Wygant**,<sup>11</sup> construing the limitations the Equal Protection Clause of the Fourteenth Amendment imposes on the management discretion of *state governments* (including counties and municipalities).
- **Croson**,<sup>12</sup> construing the limitations that the Equal Protection Clause of the Fourteenth Amendment imposes on the management discretion of *state governments*. This minority business enterprise (“MBE”) set-aside case has also become a signal case defining the legality of racial classification of whatever type, including those applicable to employment.
- **Adarand**,<sup>13</sup> construing the limitations the Fifth Amendment (which the Court has interpreted to have an Equal Protection component analogous to that of the Fourteenth Amendment) imposes on the management discretion of the *federal* government (and homogenizing, for the first time in history, the reach of the 5<sup>th</sup> and 14<sup>th</sup> Amendments).

In addition to the limitations the Equal Protection Clause of the Fourteenth Amendment already imposes on their discretion, Proposition 209<sup>14</sup> also limits **California public employers** *voluntarily* undertaking remedial preference programs based on race<sup>15</sup>, even in situations where there is a “compelling government interest”!<sup>16</sup>

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assume this is a post-*Adarand* case addressing employment preferences in the public sector (Santa Clara County (i.e. “Silicon Valley”) is a state entity, of course), it is not because the case arose exclusively under Title VII of the 1964 Civil Rights Act (and not under the 14<sup>th</sup> Amendment to the U.S. Constitution).

<sup>11</sup> Wygant v. Jackson Bd. of Education, et al., 476 U.S. 267 (1986), Reh’g. denied, 478 U.S. 1014 (1986).

<sup>12</sup> City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

<sup>13</sup> Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).

<sup>14</sup> California voters passed Proposition 209 in November 1996 and it states, in relevant part:

“state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity or national origin in the operation of public employment, public education, or public contracting.”

The proposition is now codified as Article I, Section 31(a) of the California Constitution.

<sup>15</sup> Proposition 209 does not limit a covered California public employer from settling, in good faith, a lawsuit challenging as illegal decision-making based on race. See, The Coalition for Economic Equity, et al. v. Wilson, et al., 110 F.3d 1431, 1438 (9th Cir. 1997) cert. denied, 522 U.S. 963 (1997): “But ‘race-specific relief’ is hardly synonymous with preferential treatment on the basis of race. A state may ‘eradicate racial discrimination’ in many ways that do not involve racial preferences. When, for example, a state gives the identified victims of state discrimination jobs or contracts that were wrongly denied them, the beneficiaries are not granted a preference ‘on the basis of their race’ but on the basis that they have been individually wronged.” (citing Coral Constr. Co. v. King County, 941 F.2d 910, 920 (9th Cir. 1991)).

<sup>16</sup> See, Hi-Voltage Wire Works, Inc., v. City of San Jose, 24 Cal. 4th 537 (2000). In Hi-Voltage, the

### III. **RICCI V. DESTEFANO: The Most Recent Preference Case in the Supreme Court**

On June 29, 2009, the United States Supreme Court decided Ricci v. DeStefano, an appeal from the Second Circuit Court of Appeals related to the city of New Haven, Connecticut's refusal to certify promotion examination results based on its perception that the examination created a disparate racial impact that deprived African-American and Hispanic fire fighters promotion on the basis of their race. Writing for the Court, Justice Anthony Kennedy held that a fear of disparate impact litigation was insufficient to permit the city to reject the results of an employment test that was ostensibly job-related and consistent with business necessity, and as to which there was no evidence of an equally valid, less discriminatory testing alternative.<sup>17</sup>

#### A. **Ricci: Facts and Procedural History**

In 2003, the city of New Haven administered examinations to qualify firefighters for promotion to the rank of Lieutenant and/or Captain within its Fire Department. Pursuant to the city charter, in addition to federal and state law, New Haven established a merit system requiring the city to fill vacancies in the classified civil-service ranks with the most qualified individuals, as determined by job-related examination. Pursuant to the Collective Bargaining Agreement between the city and the New Haven firefighters' union, applicants for Lieutenant and Captain positions were screened using written and oral examinations, with the written exam accounting for 60% and the oral exam 40% of an applicant's total score.<sup>18</sup>

118 firefighters took the examination. Based on the results, no African-American candidates were eligible for immediate promotion. 77 candidates completed the examination for Lieutenant (19 of whom were black = @ 25%) and the top 10 candidates (all of whom were white) were eligible for immediate promotion to Lieutenant. 41 candidates completed the examination for Captain (8 of whom were black: @ 20%), and nine candidates were eligible for immediate promotion; 7 Whites and 2 Hispanics. Based on the results, the city met on several occasions to certify the test results and determine whether the test had a disparate impact upon African-Americans. Faced with a threat of litigation from black applicants for hire and promotion, the New Haven city council threw out the results of the examinations.

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California Supreme Court affirmed an appellate court decision striking down San Jose's preferential outreach program for contractors. The court noted that for California public employers, Proposition 209 is somewhat of an interpretive retreat from the more expansive discretion afforded under the Equal Protection Clause of the Fourteenth Amendment. Id. at 562. It was the opinion of the court that by adopting Proposition 209, voters intended to "reinstigate the interpretation of the Civil Rights Act and equal protection that predated Weber and Bakke. . . reflecting the philosophy that 'a preference to any group constitutes inherent inequality [and is] anathema to the very process of democracy.'" Id. at 561. (quoting Price v. Civil Service Com., (1980) 26 Cal. 3d 257, 299 (Mosk, J., dissenting)).

<sup>17</sup> Ricci v. DeStefano, 129 S. Ct. 2658 (2009) [by declining to certify the examination results solely on the basis of how minority candidates did in comparison to White candidates, the U.S. Supreme Court held that the city engaged in "express, race-based decision making" in violation of Title VII. NOTE: In the *Ricci* case, the court did not have to assess how much race or national origin considerations affected the at-issue employment decision: the factual record was clear and not disputed that race and national origin were the "sole" reason for the challenged adverse action.]

<sup>18</sup> Id. at 2665.

Certain White and Hispanic firefighters who would have been promoted based on their test performance then brought suit, alleging disparate treatment in violation of Title VII and violation of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.<sup>19</sup> The District Court of Connecticut granted summary judgment for the city, concluding that the city did not have to certify a test even where the city could not pinpoint any deficiency which might explain how the test caused unlawful disparate impact. Furthermore, the court held that the equal protection claim could not proceed because the city's actions were not based on race since "all applicants took the same test, and the result was the same for all because the test results were discarded and nobody was promoted."<sup>20</sup> The Second Circuit Court of Appeals affirmed in a one paragraph, *per curiam* opinion.<sup>21</sup>

## **B. The Supreme Court Holding in Ricci**

The U.S. Supreme Court rejected the (petitioner) firefighters' arguments that Title VII prohibited an employer from taking race-based adverse employment actions to avoid disparate impact liability. The Court also rejected Respondents' (City of New Haven's) assertion that its good-faith belief that its actions were necessary to comply with Title VII's disparate impact provision was enough to justify race-conscious conduct.<sup>22</sup> Justice Kennedy wrote that both arguments impermissibly ignore Title VII protections: petitioners' (firefighters') position ignored the codification of the disparate impact provision, and respondents' contention belies the foundational prohibition barring employers from taking adverse action because of race. The Court instead adopted a new legal standard it called a "strong basis in evidence" to resolve any conflict between the disparate treatment and disparate impact provisions of Title VII; in other words, the actor must establish a strong basis in evidence that remedial action is necessary, even though it need not have to wait to suffer a lawsuit and an adverse verdict before taking action.<sup>23</sup>

Justice Kennedy found that the City's good faith belief that disparate impact liability existed was insufficient to establish that the test it gave its firefighters was deficient, and that discarding the test was necessary to avoid such imagined liability. The Court noted that even though the test results revealed a statistical disparity in the selection of Hispanic and Black firefighters, that disparity was insufficient evidence of unlawful disparate impact.<sup>24</sup>

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<sup>19</sup> *Id.* at 2672.

<sup>20</sup> Ricci v. DeStefano, 554 F. Supp.2d 142, 161 (D. Conn. 2006).

<sup>21</sup> Ricci v. DeStefano, 530 F.3d 87 (2d Cir. 2008).

<sup>22</sup> Ricci, *supra*, 129 S. Ct. at 2674-2675.

<sup>23</sup> *Id.* at 2676.

<sup>24</sup> *Id.* at 2678 [a prima facie case of disparate impact liability, and nothing more, is far from a strong basis in evidence that the City would be liable under Title VII; claims of disparate impact liability would have to also show that the examinations were not job related and were not consistent with business necessity, or if there existed an equally valid, less-discriminatory alternative that the City refused to adopt]; see also Cleveland Fire Fighters for Fair Hiring Practices v. City of Cleveland, 2009 U.S. Dist. LEXIS 74221 at p. 44 (N.D. Ohio 2009) [the evidence

**C. The “Strong Basis in Evidence” Test is not new With the Ricci decision.**

For example, in striking down the 20 year old “Socially and Economically Disadvantaged Individuals” DoD contracting program, the United States Court of Appeals for the Federal Circuit permanently enjoined it since the Congress did not have a “strong basis in evidence” to conclude that DoD had been even a passive participant in pervasive, nationwide racial discrimination in DoD contracting. Rothe Development Corporation v. Department of Defense and Department of the Air Force, 545 F. 3d 1023 (Fed. Cir. 2008). In February of 2009, the Obama Administration decided not to appeal the decision to the United States Supreme Court.

The decision not to further appeal the case formally ended an over 20 year old program originally spawned in the National Defense Authorization Act of 1987 (10 U.S.C. Section 2323 and more commonly referred to as “Section 1207”) and subsequently extended and passed into law two more times, including most recently in 2006. The 1207 program sought to allocate up to 5% of all DoD contracts (primarily for DoD procurement, R&D, military construction and maintenance contracts) to “socially and economically disadvantaged individuals” as the Small Business Administration defined those terms in section 8(d) of the Small Business Act (15 U.S.C. Section 637(d)). The Small Business Act “presumed” that Black Americans, Asian Americans, Hispanic Americans, and Native Americans were “socially disadvantaged individuals.” Section 1207 also directed DoD to render assistance to “socially disadvantaged individuals” the Small Business Act protected by, among many other things, making advance payments to them and by paying as much as 10% above fair market value for the contracted work.

Here is the Court’s conclusion and remand order to the Federal District Court:

“For the foregoing reasons, we hold that Section 1207, on its face, as reenacted in 2006, violates the equal protection component of the Fifth Amendment right to due process. Because the statute authorizes DoD to afford preferential treatment on the basis of race, we must apply strict scrutiny. And because Congress did not have a ‘strong basis in evidence’ upon which to conclude that DoD was a passive participant in pervasive, nationwide racial discrimination – at least not on the evidence produced by DoD and relied on by the district court in this case – the statute fails strict scrutiny. We reverse the judgment of the district court in part, and remand with instructions to enter a judgment (1) denying Rothe any relief regarding the facial constitutionality of Section 1207 as enacted in 1999 or 2002, (2) declaring that Section 1207 as enacted in 2006 (i.e., the current 10 U.S.C. § 2323) is facially unconstitutional, and (3) enjoining application of the current 10 U.S.C. § 2323.”

The era of doing right “the right way” is now at full speed. Well intentioned, but poorly conceived and/or poorly implemented race conscious employment programs, are prescriptions for liability in the New Millennium.

demonstrated that circumstances beyond the City’s control resulted in the shortfall in hiring needed to satisfy the goals of the Second Amended Consent Decree, not the City’s lack of effort, and as such, there was insufficient evidence of unlawful disparate impact].

#### D. “Real World” Ricci Issues

Below is a list of some issues which arise in everyday Human Resources settings and which, among others, bear reflection in light of the *Ricci* case decision reminder to us that treating applicants and employees differently based on their protected status can be unlawful discrimination.

-The CEO of a public utility wants a “diverse slate” of candidates to consider for a position in the Executive Suite. After interviewing the five candidates the Human Resources VP had forwarded to him, the CEO expresses his dissatisfaction saying to HR: “May we start over? Please send me some better qualified Minorities and Women I may interview”. ***If you are the VP of HR, how should you respond?***

-The VP of HR of a private company pays \$100,000 to commission the creation and deployment of a written and “validated” paper and pencil test for new hire employees. After deploying the test and reviewing the results of the test, the VP of HR is concerned that there is legally significant “adverse impact” as to Black and Hispanic test-takers, as compared to White test-takers, at the “cut-score” (i.e. passing score) the test developer has recommended. The test developer claims it set the “cut score” at the level it did (80 out of 100 questions correct) because the test results data show that there is a “high and statistically significant correlation” between those who are successful on the job and those who pass with a score equal to or above the “cut score” when set at 80. ***If you are the General Counsel, what do you advise the VP of HR when the VP of HR asks whether s/he may now “lower the cut score until the pass rate for Black and Hispanic test-takers is within 2 standard deviations of the pass rate for Whites so “we may avoid class action litigation” and get some line managers now some new hires to keep pushing the business forward during these critical times?”***

-The Director of Diversity for a private company reports that the latest AAP reports that “Minorities” have a 30% “availability” for an entry-level job for which the company has intermittently set “Placement Goals” for minorities over the decades, but that only approximately 20% of all Applicants for the position are Minorities. ***If you are the Director of Recruitment, would it be lawful for you to tell the Diversity Director that your department will redouble its efforts to “beat the bushes harder” and get more Minorities and Women to apply before the selection managers begin to interview next week?***

-The Manager of the Engineering Department of a private company posts a notice announcing the first requisition to open in his department in 2 years for an electrical engineer. After the posting period (14 days) has closed and as the first round of interviews are finishing, the Engineering Manager reviews the emerging evaluations as he receives them. He is heartened to find that two women have applied (among the 48 male applicants) and have now received good evaluations allowing them to go forward to the second and final round of interviews. However, the Engineering Manager becomes concerned that as talented and as competitive as each of these women are, they may not survive the final round of upcoming intensive interviews. The Engineering Manager then comes to HR and reports: “You know, I am eligible for a 5% bonus at the end of the year if I successfully meet my Diversity Hiring Goals in this AAP year. Can you guys in HR send me some more women I may take a look at? In fact, what about Jane in Tarzan’s Department? I heard she was a “walk-on-water” Superstar and can wrestle wild-cats to

the ground? Can't you guys talk her into applying to work with my Group"? *If you are the Director of HR, how do you respond?*

-The CEO surprised everyone with an announcement of yet another deep Reduction-In-Force ("RIF") (10% per department by next week). As the Senior Labor Counsel, you immediately commissioned a statistician to undertake termination "disparity analyses" just like you heard should be done while attending a NELI seminar to determine whether disparities in selection ratios would result from the RIF proposals each department was making. When the proposed RIF lists come in, you observe legally significant disparities in the RIF lists in two departments (one for Blacks (3.6 SDs) and one for Women (2.4 SDs), and if the company were to allow the recommendations of the Departments to go into effect. *May you advise the two at-issue Department Managers to "go back to the drawing board" and forward new proposed termination lists revealing no legally significant disparities in selection rates as between Blacks and Whites and Men and Women, or to at least further reduce (even if not eliminate) the noted impact by considering other alternative termination selection criteria?*

#### **IV. THE SUPREME COURT RULES ON AFFIRMATIVE ACTION IN THE EDUCATION SETTING: DO THE DECISIONS IMPACT THE EMPLOYMENT REALM?**

On June 23, 2003, after some twenty-five years of silence on the constitutionality of employing racial classifications to achieve diversity in the education setting, the Supreme Court decided the Grutter<sup>25</sup> and Gratz cases.<sup>26</sup> The two cases dealt, respectively, with admissions criteria for acceptance to the University of Michigan Law School ("Grutter") and the University of Michigan Undergraduate Program ("Gratz"). In brief, the Court upheld the use of race as a so-called "soft variable" in the admissions equation for the law school, but struck down an admissions process which used race as a much more rigidly applied point-based "plus" factor, without sufficient individualized consideration of each candidate, on the undergraduate level.<sup>27</sup>

In addition to the need for individualized assessment, the two decisions may be important for several reasons, most notably:

1) the Court's embrace of Justice Powell's opinion in Bakke, now formalizing the notion that the educational benefits flowing from a diverse student body constitute a "compelling government interest";

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<sup>25</sup> Grutter v. Bollinger, 539 U.S. 306. Prior to the Grutter and Gratz decisions, the last time the United States Supreme Court spoke on the issue of whether diversity could constitute a compelling interest in admissions in the university setting, sufficient to pass strict scrutiny muster, was in Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

<sup>26</sup> Gratz v. Bollinger, 539 U.S. 244 (2003).

<sup>27</sup> Grutter, 539 U.S. 306; Gratz, 539 U.S. 244.

2) the Court's purchase of the concept of "critical mass" needed to avoid the negative effects of tokenism, stereotyping, and isolation;

3) the Court's reiteration of a broad deference to school administrators to decide that a diverse student population is in the best interest of the institution and its educational mission (invoking, in essence, a deferential and slightly less stringent form of strict scrutiny analysis); and

4) the Court's invocation of temporality, setting an aspirational boundary on the use of race in the admissions process.

Because the language used by the U.S. Supreme Court in the Grutter and Gratz decisions seemed narrowly aimed at the higher educational admissions process, however, an open question remains as to the applicability of the key holdings to employment decisions.<sup>28</sup> As with the Supreme Court's earlier observations concerning the benefits of diversity in Bakke, it is only in the implementation and interpretation of these decisions by subsequent courts that their true, and perhaps greater, impact comes into focus. Toward that end, a more thorough understanding of the facts underlying the decisions, the challenged admissions procedures operating in each instance, and the legal reasoning behind the divergent outcomes is central to predicting whether future application of the holdings may extend beyond the educational domain.

There are two primary open questions. For public sector employers, the question is whether they can seize upon the "critical mass" rationale (use of race to avoid isolation, tokenism and/or stereotyping) to lawfully deploy employment preferences based on race in workplaces where few Blacks work (in the same way the University of Michigan Law School convinced the court that need for such a "critical mass" was a "compelling state interest" in the context of law school admissions)? Similarly, the question for private employers is whether use of the "critical mass" rationale will successfully serve as a substitute in lieu of proving up a "manifest imbalance"?

Imagine, for a moment, a racially diverse private corporation operating exclusively in the United States with a sales force "in parity" with available minorities and women. Next, assume senior management announces a major economic expansion into, let's say, the South American or Pacific Rim markets. Can United States-based Management then choose to hire only Mexicans to be sales personnel in the Mexican marketplace, or only Chinese sales personnel to sell into China? Singaporeans to sell into Singapore? etc. Is Management's felt economic need to have a "critical mass" of Mexican sales personnel, in the above example, a sufficient explanation to reject Whites, African Americans, Asians and Native Americans from the available jobs to sell into Mexico?

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<sup>28</sup> At least one court has held that diversity is a "compelling state interest," in the employment context. In Petit v. City of Chicago, 352 F.3d 1111 (7th Cir. Ill. 2003), the Seventh Circuit held that the city of Chicago had a compelling operational need for a diverse police department given the size of the police force, its charge to protect a racially and ethnically divided major city, and because minority supervisors reduced fears that the police department was hostile to the minority community.

## A. Grutter and Gratz: Facts and Procedural History

In 1996, Barbara Grutter, a white Michigan resident with a 3.8 GPA (on a 4.0 scale) and 161 LSAT score (150 was the then average), applied to the University of Michigan Law School (a top-ranked law school in the U.S.), was wait-listed, and ultimately rejected.<sup>29</sup> In December 1997, Grutter filed suit in the Eastern District of Michigan alleging, among other claims, that she had been “discriminated against . . . on the basis of race” in violation of the Equal Protection Clause of the Fourteenth Amendment and Title VII of the Civil Rights Act of 1964.<sup>30</sup> Following a bench trial on “the extent to which race was a factor in the Law School’s admissions decisions,” the District Court enjoined race-conscious admissions practices at the Law School, concluding that the “asserted interest in assembling a diverse student body was not compelling . . . and is not a remedy for past discrimination.”<sup>31</sup> The United States Court of Appeals for the Sixth Circuit reversed the District Court and vacated the injunction that had issued.<sup>32</sup> The Sixth Circuit reasoned that Bakke was “binding precedent establishing diversity as a compelling state interest.”<sup>33</sup> The Court also found the use of race by the Law School to be “narrowly tailored because race was merely a ‘potential’ plus factor,”<sup>34</sup> and did not operate to automatically or *de facto* guarantee admission. Significantly, the Sixth Circuit avoided the question of whether the use of race in admissions to remedy past discrimination was also a compelling state interest.<sup>35</sup>

Differing conclusions about the constitutionality of racial classifications in admissions seen in the divergent District Court and Court of Appeals decisions in Grutter have been mirrored across the country since the time of the Bakke decision.<sup>36</sup> The United States Supreme Court decided to hear the Grutter case to end the debate among the lower courts over “whether

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<sup>29</sup> Grutter, 539 U.S. at 316. Grutter was initially placed on a waiting list, but the ultimate decision was to deny admission.

<sup>30</sup> Id.; 42 U.S.C. § 2000d. (Prohibition against exclusion from participation in, denial of benefits of, and discrimination under federally assisted programs on ground of race, color, or national origin). The suit was styled as a class action seeking, among other things, that the University be enjoined from discriminating on the basis of race. Id., at \*17-18.

<sup>31</sup> Grutter, 539 U.S. at 321.

<sup>32</sup> Id., at 321; See Grutter v. Bollinger, 288 F.3d 732 (6th Cir. 2002).

<sup>33</sup> Id.

<sup>34</sup> Id., at 320 (emphasis added).

<sup>35</sup> See Grutter v. Bollinger, 288 F.3d 732, 739 n.4 (6th Cir. 2002) (“Because we hold that the Law School has a compelling interest in achieving a diverse student body, we do not address whether the Intervenors’ proffered interest - an interest in remedying past discrimination - is sufficiently compelling for equal protection purposes.”).

<sup>36</sup> Id. (comparing the result in Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996) (refusing to find diversity a compelling interest) with Smith v. University of Wash. Law School, 233 F.3d 1188 (9th Cir. 2000) (finding that diversity is a compelling state interest)).

diversity is a “compelling interest” that can justify the narrowly tailored use of race in selecting applicants for admission to public universities.”<sup>37</sup>

Prior to Grutter’s experience, Jennifer Gratz, a white student, applied for and was denied admission to the University of Michigan’s undergraduate college for the fall 1995 term.<sup>38</sup> In Gratz’s case, the University delayed the decision to deny until April of that year, finding her “less competitive” than other students who it had admitted on first review. A second white student, Patrick Hamacher, experienced the same result when he applied as an undergraduate for the fall of 1997. Michigan first postponed, and later denied Hamacher’s admission, finding that while his “academic credentials [were] in the qualified range, they [were] not at the level needed for first review admission.”<sup>39</sup> In October 1997, Gratz and Hamacher filed a class-action suit in the Eastern District of Michigan against the University of Michigan alleging equal protection and racial discrimination violations.<sup>40</sup> The Gratz District Court found that the University had presented “solid evidence” that diversity produces significant educational benefits, sufficient to constitute a compelling government interest.<sup>41</sup> Moreover, the court found an automatic 20 point award to underrepresented minority applicants to be narrowly tailored, and “not the functional equivalent of a quota,” because minority candidates were not being reviewed in isolation from other applicants but were competing for the same spots.<sup>42</sup> Both sides appealed aspects of the Gratz District Court ruling and the case was argued before the Sixth Circuit *en banc* on the same day as the Grutter appeal. The Grutter Appeals Court upheld the Law School’s use of race to enhance the diversity of admissions as a “compelling state interest,” which use it also found “narrowly tailored.” Despite the fact that the Sixth Circuit Court of Appeals had yet to render its judgment in Gratz, Grutter made application to the United States Supreme Court, which agreed to take both cases and decide, more generally, the “constitutionality of [considering] race in university admissions.”

Accordingly, the record the U.S. Supreme Court received was a District Court decision in Gratz (undergraduate admissions) upholding the University’s use of race and a Court of Appeals decision in Grutter upholding the Law School’s use of race in admissions. The Grutter Court of Appeals thus reversed the Grutter District Court decision. The District Court had entered an

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<sup>37</sup> Grutter, 539 U.S. at 322.

<sup>38</sup> Gratz, 539 U.S. at 249.

<sup>39</sup> Id. at 251.

<sup>40</sup> Id. at 252. Gratz and Hamacher claimed violation of equal protection under the Fourteenth Amendment and racial discrimination in violation of 42 U.S.C. §§ 1981, 1983, and 2000d et seq.

<sup>41</sup> Gratz v. Bollinger, 122 F. Supp. 2d 811, 822-24 (E.D. Mich. 2001).

<sup>42</sup> Id. at 828. The admissions process had, however, changed over the years. A practice of reserving spots for minorities during the 1995-1998 time frame was, in fact, considered by the District Court to be the functional equivalent of a quota, of which Bakke had unreservedly disapproved. Gratz, 2003 U.S. at 253.

injunction finding that the Law School’s desire to have a diversified student body was not a “compelling state interest” and its selection process did not narrowly tailor its use of race.

The Supreme Court eventually decided to hear both Grutter and Gratz, held oral arguments on the same day and then rendered judgment on both cases on June 23, 2003. Although the Court declared student body diversity to be a compelling state interest, it found that only the use of race in the admissions process at the Law School was sufficiently narrowly tailored to withstand the rigors of strict scrutiny analysis. The Grutter and Gratz decisions (to the extent that they illuminate what is sufficiently “narrowly tailored”) stand for the following propositions:

- The educational benefit flowing from student body diversity is a “compelling state interest.”<sup>43</sup>
- Broadly defined bases for diversity exist, including: travel, languages, personal adversity or hardship, community service, successful careers in other fields, along with race.<sup>44</sup>
- To achieve the benefits of diversity, it is constitutional to seek to admit a “critical mass” (i.e. meaningful numbers) of historically underrepresented groups.<sup>45</sup>
- “Some attention to numbers, without more, does not transform a flexible admissions system into a rigid quota.”<sup>46</sup>
- “Narrow tailoring” requires that flexible, non-mechanical, individualized consideration be afforded to every applicant.<sup>47</sup>
- No quotas, no separate admissions track, no insulated competition based on race.<sup>48</sup>
- Race as a “plus factor” is constitutional, so long as the admissions program “ensure[s] that each applicant is evaluated as an individual and not in a way that

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<sup>43</sup> Grutter, 539 U.S. at 342.

<sup>44</sup> Id. at 338.

<sup>45</sup> Id. at 340.

<sup>46</sup> Id. at 337.

<sup>47</sup> Id. at 336.

<sup>48</sup> Id.

makes an applicant's race or ethnicity the defining feature of his or her application."<sup>49</sup>

- Narrow tailoring does not require “exhaustion of every conceivable race-neutral alternative. Nor does it require a university to choose between a reputation for excellence and ensuring a diverse student body. Narrow tailoring merely requires good faith consideration of race-neutral alternatives.”<sup>50</sup>

#### **B. The Admissions Procedures: A Comparison**

Perhaps the best way to understand why the Supreme Court approved of the Law School's flexible use of race in admissions (Grutter), yet declined to uphold the undergraduate process (Gratz), is to compare them directly, as summarized in the charts below.

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<sup>49</sup> Id. at 337-38.

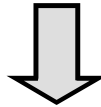
<sup>50</sup> Id. at 339.

# ↑ GRUTTER: THE LAW SCHOOL ADMISSIONS PROCESS ↑

FACTS: 3,500+ applicants for 350 class seats

ADMISSIONS POLICY: Flexible assessment of talents, experiences, and potential “to contribute to the learning of those around them.”

IN PRACTICE



INDIVIDUALIZED ASSESSMENT  
OF EACH CANDIDATE

FACTORS CONSIDERED:

ACADEMICS: GPA and LSAT scores (as important predictors of academic success in law school)

“SOFT VARIABLES”:

- Letters of Recommendation (level of enthusiasm)
- Quality of Undergraduate Institution
- Difficulty of Undergraduate Studies
- Personal Statement
- Essay describing how applicant will contribute to the life and diversity of the Law School.

DIVERSITY POLICY: Aspires to “achieve that diversity which has the potential to enrich everyone’s education”

- **DOES NOT** restrict types of diversity contribution eligible for “substantial weight in the admissions process” (recognizes many possible bases for diversity admissions)
- **DOES NOT** define diversity solely as race or ethnicity
- **DOES** reaffirm longstanding commitment to racial and ethnic diversity (with special reference to inclusion of those groups which have historically suffered discrimination (without which policy, the at-issue Group might not be represented in the student body in “**meaningful numbers**” or achieve “**critical mass**” . . . does not include Asians or Whites).

CRITICAL MASS: Not a “SET” number or percentage

- “Critical Mass” means enrolling meaningful numbers of underrepresented minority students so as to avoid isolation, encourage participation, and prevent students from feeling like the only available “spokespeople” for their race.

# GRATZ: THE UNDERGRADUATE ADMISSIONS PROCESS

**FACTS:** University claims volume of undergraduate applicants make individualized assessment embraced in Grutter impractical; Used 2-Tier Point & Flag System instead.

## THE POINT SYSTEM

A SELECTION INDEX

MAXIMUM 150 POINTS AVAILABLE

100 or more	→Automatically Admit
95-99	→Admit or Postpone
90-94	→Postpone or Admit
75-89	→Delay or Postpone
74 or less	→Delay or Reject

### COMPOSITION OF POINTS

GPA	<b>80</b>	points (4.0=80; 3.0=60; 2.0=40)
ACT/SAT	<b>12</b>	points max
Quality of High School	<b>10</b>	points max
Strength of Curriculum	<b>8</b>	points (down to <b>-4</b> points)
Michigan Residency	<b>10</b>	points
Legacy (Alumni)	<b>4</b>	points
Outstanding Essay	<b>3</b>	points
Personal Achievement, Leadership, or Public Service	<b>5</b>	points
Miscellaneous	<b>20</b>	points granted <b><u>AUTOMATICALLY</u></b> if: <ul style="list-style-type: none"> <li>• Underrepresented minority (African-American, Hispanic or Native American)</li> <li>• Attend predominantly minority/disadvantaged H.S.</li> <li>• Socioeconomic disadvantage</li> <li>• Athletic recruitment</li> <li>• At discretion of Provost</li> </ul>

KEY ISSUE

## THE FLAG SYSTEM

Limited exception to Selection Index; Counselors may flag applications for additional consideration by Admission Review Committee (**ARC**), if applicant:

- Is academically prepared to succeed
- Achieved Selection Index score of at least 80 in-state or 75 out-of-state
- Possesses quality/characteristic important to composition of class such as : high class rank, unique life experiences, challenges, circumstances, interests or talents, socioeconomic disadvantage, and underrepresented race, ethnicity or geography.
- Following review, ARC can admit, defer or deny applicant



# THE ADMISSIONS PROCESS

LAW SCHOOL—GRUTTER

UNDERGRADUATE—GRATZ



**FACTS: 3,500+ applicants for 350 class seats**

**ADMISSION POLICY:** Flexible assessment of talents, experiences, and potential “to contribute to the learning of those around them.”

**IN PRACTICE→INDIVIDUALIZED ASSESSMENT OF EACH CANDIDATE (FACTORS):**

- **Academics:** GPA and LSAT scores (as important, but imperfect, predictors of academic success in law school)
- **“Soft Variables”:**
  - Letters of Recommendation (level of enthusiasm)
  - Quality of Undergraduate Institution
  - Difficulty of Undergraduate Studies
  - Personal Statement
  - Essay describing how applicant will contribute to the life and diversity of the Law School.

**DIVERSITY POLICY:** Aspires to “achieve that diversity which has the potential to enrich everyone’s education”

- **DOES NOT** restrict types of diversity contribution eligible for “substantial weight in the admissions process” (recognizes many possible bases for diversity admissions)
- **DOES NOT** define diversity solely as race or ethnicity
- **DOES** reaffirm longstanding commitment to racial and ethnic diversity (with special reference to inclusion of those groups which historically suffered discrimination without which policy, the at-issue group might not be represented in the student body in “**meaningful numbers**” or achieve “**critical mass**”)
- **DOES NOT** include Asians or Whites.
- “Critical Mass” does not mean a “set” number or percentage
- “Critical Mass” does mean enrolling meaningful numbers of underrepresented minority students so as to avoid isolation, encourage participation, and prevent students from feeling like the only available “spokespeople” for their race.

**FACTS:** University Claims that volume of undergraduate applicants make impractical the kind of individualized assessment embraced in Grutter; Rely instead on 2-Tier Point & Flag System

**POINT SYSTEM→A SELECTION INDEX with MAXIMUM 150 POINTS AVAILABLE**

100 or more	→Automatically Admit
95-99	→Admit or Postpone
90-94	→Postpone or Admit
75-89	→Delay or Postpone
74 or less	→Delay or Reject

- GPA → **80** points (4.0=80; 3.0=60; 2.0=40)
- ACT/SAT → **12** points max
- Quality of High School → **10** points max
- Strength of Curriculum → **8** points (down to -4 points)
- Michigan Residency → **10** points
- Legacy (Alumni) → **4** points
- Outstanding Essay → **3** points
- Personal Achievement Leadership Public Service → **5** points
- Miscellaneous → **20** points granted **automatically** if:
  - Underrepresented minority (African-American, Hispanic or Native American)
  - Attend predominantly minority or disadvantaged H.S.
  - Socioeconomic disadvantage
  - Athletic recruitment
  - At discretion of Provost

**FLAG SYSTEM:** Limited exception to Selection Index; Counselors may flag applications for additional consideration by Admission Review Committee (ARC), if applicant:

- Is academically prepared to succeed
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Unlike the Law School’s flexible, individualized assessment, the undergraduate program adopted a point-based selection index that failed to adequately consider how each candidate would contribute to the university’s diversity.<sup>51</sup> Under that plan, certain minority students were granted an “automatic distribution of 20 points . . . making ‘the factor of race . . . decisive’ for virtually every minimally qualified underrepresented minority applicant.<sup>52</sup> The Court did not find the individualized attention given to “flagged” applicants sufficient to cure the deficient review because 1) the bulk of admissions decisions were made through the selection index, and 2) “individualized review is only provided *after* admissions counselors automatically distribute the . . . “plus” that makes race a decisive factor.”<sup>53</sup>

### C. Grutter and Gratz: Facts and Procedural History

The extension of the concept of diversity as a compelling interest beyond the classroom setting is likely hampered by the Supreme Court’s use of extremely narrow language in the Grutter decision. As defined, the compelling interest is not diversity per se, but “the educational benefits that flow from student body diversity.”<sup>54</sup> The tangible benefits the Court identified (e.g., preparing students for an increasingly diverse workforce and society, as part of the global marketplace) are limited in each and every instance to the educational realm. For example, the Court in Grutter endorsed the cry of retired military officers in favor of diversity in the military officer corps by recognizing a compelling interest only to the extent that the military uses race-conscious policies to ensure diversity in the service academies and ROTC programs, as “education-based” feeder institutions for the officer corp.<sup>55</sup>

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<sup>51</sup> Gratz, 539 U.S. at 255.

<sup>52</sup> Id. (quoting Bakke).

<sup>53</sup> Id. 284.

<sup>54</sup> Grutter, 539 U.S. at 330.

<sup>55</sup> Id., at 330-31. There exists a largely unaddressed implication in the Court’s nod to the military need for diversity in the service academies and ROTC. The Court shows great deference to “high-ranking retired officers and civilian leaders of the United States military” who, “based on [their] decades of experience,” have found that a “highly qualified, racially diverse officer corps . . . is essential to the military’s ability to fulfill its principle mission to provide national security.” Id. at 331 (quoting Brief for Julius W. Becton, Jr. et al. as Amici Curiae 27). Unlike the benefits of diversity that derive “in classroom” in the Law School setting, the military discussion seems to suggest that the compelling interest in diversity *is not* the “in class” benefit but the racial diversity in the officer ranks it hopes to achieve *thereby*. The reasoning suggests that the need for diverse “role models” may be more compelling to the Court than it has previously acknowledged in cases such as Wygant v. Jackson Bd. of Ed., 476 U.S. 267 (1986), Reh’g. denied, 478 U.S. 1014 (1986). One justice, in dissent, pointed out the rejection of faculty role models in Wygant, explicitly noting the reasoning as inconsistent with Grutter: “The Court’s refusal to address Wygant’s rejection of a state interest virtually indistinguishable from that presented by the Law School is perplexing. If the Court defers to the Law School’s judgment that a racially mixed student body confers educational benefits to all, then why would the Wygant Court not defer to the school board’s judgment with respect to the benefits a racially mixed faculty confers?” Grutter, at 348 n.2 (Thomas, J. dissenting). There seems little difference between a need for diverse military officers and the need in Wygant for a diverse faculty.

However, there are some employment law analogs to aspects of the Grutter/Gratz decisions:

<b>GRUTTER/GRATZ</b>	<b>EMPLOYMENT ANALOG</b>
<b>INDIVIDUALIZED ASSESSMENT</b>	<p><b>Johnson v. Transportation Agency, Santa Clara Cty., 480 U.S. 616, 638 (1987)</b></p> <p>Individual Assessment ensures that each candidate “competes with all other qualified applicants”</p>
<b>USE OF RACE IS LIMITED IN DURATION</b>	<p><b>United Steelworkers of America, AFL-CIO v. Weber, 443 U.S. 193, 208 (1979)</b></p> <p>Finally, and a further example of the Kaiser plan's moderate nature, was the fact that it was <i>temporary</i>: “not intended to maintain a racial balance, but simply to eliminate a manifest racial imbalance.”</p>

Yet, other critical aspects of the Grutter/Gratz decisions seem less likely to lend themselves easily to the employment classifications setting

GRUTTER/GRATZ	EMPLOYMENT ANALOG?
<p>CRITICAL MASS (USE OF RACE TO AVOID ISOLATION, TOKENISM AND/OR STEREOTYPING)</p>	<p>No Direct Analog: It Is Uncertain Whether the Courts Will Extend the “Critical Mass” Rationale Decision to Race-based Employment Decisions</p> <ul style="list-style-type: none"> <li>• The desire for diversity or race/gender consciousness in the Employment Realm is typically not INWARD LOOKING (as in the school setting where the benefits are experienced internally, by students within the educational institution)</li> <li>• Rather, Race or Gender Conscious decisions in Employment are historically largely driven by EXTERNAL CONSIDERATIONS (looking outward to the commercial realm and customer preferences)</li> <li>• <u>But see, Diaz v. Pan American World Airways, Inc.</u>, 442 F.2d 385, 389 (5<sup>th</sup> Cir. 1971) (Customer, client, employee or employer preferences and prejudices cannot justify gender discrimination).</li> <li>• The “Critical Mass” license addresses the “compelling state interest” requirement of the Constitution which is <u>not</u> applicable to the private sector. Will courts substitute the “critical mass” license in the private sector in lieu of the current “manifest imbalance” requirement?</li> </ul> <hr/> <ul style="list-style-type: none"> <li>• Does employer need to use race to avoid isolation, tokenism and/or stereotyping?</li> <li>• However, the First Amendment reasoning of <u>Grutter</u> (that a non-diverse environment discourages minority participation in the general marketplace of ideas) does not appear to have a natural parallel in the employment context, or does it?</li> </ul>

The effect of Grutter and Gratz on the employment realm remains an open question; one largely to be resolved through the attempted application of the decisional basis to affirmative

action contexts outside of the education sector. One interesting aspect of the decisions that may prove of some relevance to any employer engaging in such programs, however, is the extent to which it was the Gratz admission process, a process of arguably greater candor, that the Court declined to approve. To the extent that the Undergraduate diversity plan was express in the degree to which being a member of an underrepresented minority is a “plus,” the decision suggests that such automatic, fixed practices are less likely to be considered “narrowly tailored” in constitutional challenges. Rather, every applicant must receive the kind of individualized and flexible, if less candid, consideration that both Grutter and Johnson suggest is an applicant’s due, if race is to be considered at all.



#### **D. Private/Public Sector Law Balkanized**

The law of employment classifications based on race, gender and national origin has recently become more complex because it is now balkanized into different lines of analysis on at least two levels. First, *private* employers enjoy more freedom to undertake classifications in employment for minorities and women than do public sector employers. Second, *public* employers enjoy more freedom to undertake classifications for women than for minorities.

#### **E. Fifth and Fourteenth Amendments Homogenized**

On yet another level, however, the law of race, gender and national origin classifications has become somewhat less complex, given the Supreme Court’s decision in Adarand. The law governing employment preferences had historically divided into three general areas depending upon the actor: 1) federal government; 2) state government (including county and municipal governments); and 3) private employer. The Adarand decision created a single rule of law for all *public sector* racial classifications, including those concerning employment,<sup>56</sup> and regardless

<sup>56</sup> Adarand expressly overturned the Court’s prior decisions in Metro Broadcasting Inc. v. FCC, 497 U.S. 547 (1990) Reh’g. denied, 497 U.S. 1050 (1990) and Fullilove v. Klutznick, 448 U.S. 448 (1980), which had applied a lower standard of judicial review (“intermediate scrutiny”) to federal use of race based preferences.

whether the public employer was a federal or state agency. While Adarand arose in the context of a federal minority business enterprise (“MBE”) set aside program, the Court’s decision clarified that all *racial* classifications upon which the government relies, no matter what level of the federal government or for what purpose, are subject to the highest level of judicial scrutiny (“*strict scrutiny*”) (that is, the federal racial classification at issue must serve a “compelling government interest” and must be “narrowly tailored” to further that interest).

Adarand is an historic Supreme Court case decision in its own right because it now homogenizes the protections of the Fourteenth Amendment’s Equal Protection Clause and such protections the Court has previously interpreted the Fifth Amendment to supply against federal action. In addition, however, Adarand also “raises the bar” for lawful federal *racial* classifications. (Previously, the United States Supreme Court had interpreted the Fifth Amendment to operate to find lawful some *racial* preferences which would have been unlawful had a state or municipal employer taken the same preference limited by the Fourteenth Amendment’s Equal Protection Clause. Despite its potentially far-reaching impact on the use of federal employment classifications, Adarand arose under the Fifth Amendment and therefore does not disturb existing interpretations of Title VII (applicable to private sector employment in the absence of constitutional application and limitation).<sup>57</sup>

#### **F. Private Sector Confused By Public Sector Case Decisions**

It is also important to note from the outset that very few decided cases involve challenges to private employer race, gender or national origin classifications. This is not only because very few private employers undertake such employment classifications, but also because private employers are much more discreet in their use of employment classifications based on race, gender or national origin and because the legal standards, as noted here, are more generous to private (i.e., non-governmental) action.

#### **G. Are OFCCP “Goals” At Risk?**

In addition, it is significant to note that the “strict scrutiny” Adarand compels of preferential racial classifications at the federal level *apparently* does not disturb the existing programs of the Office of Federal Contract Compliance Programs (“OFCCP”) of the United States Department of Labor. Nor do any of the case decisions to date threaten OFCCP’s

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<sup>57</sup> Public employers have a higher, constitutionally imposed burden to meet than private employers to sustain their race, gender and national origin classification, as noted above. Public employers, of course, are limited in the exercise of their management discretion not only by Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. (hereinafter “Title VII”), but also by the United States Constitution. As a result, one would typically expect those suing public employers to sue under the Constitution as their primary challenge and then add the Title VII claim as a “safety” add-on cause of action and to increase the likelihood of winning attorneys’ fees and other damages the constitution may not allow. In particular, the Equal Protection Clause of the Fourteenth Amendment (which guarantees that those within its borders will enjoy the equal protection of its laws) limits state and local governments. Similarly, the United States Supreme Court has interpreted the Equal Protection “component” of the Fifth Amendment to the United States Constitution to limit the discretion of the federal government by extending a guarantee of equal protection to those within its borders.

enforcement of Executive Order 11246 (which prohibits employment discrimination among covered federal contractors and subcontractors based on race, sex, religion, color, and national origin and requires “affirmative action” for minorities and women. (See 41 C.F.R. § 60-1 et. seq.) This is because affirmative action, as practiced pursuant to Executive Order 11246, does not require covered federal contractors or subcontractors to engage in the use of employment preferences. Specifically, the OFCCP has been clear that a covered federal contractor or subcontractor may always employ the “best qualified” candidate for the position in question, even if minorities and women have been “underutilized” in that particular area of employment.<sup>58</sup>

Properly understood, OFCCP goals only establish recruitment pool selection percentages to insure that recruiters have the opportunity to know the size of the available pool of qualified candidates to help inform whether their recruiting efforts are sufficiently comprehensive. In other words, OFCCP’s “Placement Goals” operate in the way of a “quality control check” to help recruiters know if they have successfully recruited to the extent of the availability of the market.

## H. What Is A Preferential Classification?

The only exception to this conclusion would be if the courts were to strike down “good faith efforts” directed only to one or more (but not all) races or to women as violative of the Equal Protection component of the Fifth Amendment, the Fourteenth Amendment, Title VII and/or Proposition 209. Two courts have done so to date. In a pre-Proposition 209 case, Monterey Mechanical Co. v. Wilson, 125 F.3d 702 (9th Cir. 1997) Reh’g. en banc denied, 138 F.3d 1270 (9th Cir. 1998), the United States Court of Appeals for the Ninth Circuit (in San Francisco) struck down California’s minority and women business public contracting set aside statute (California Public Contract Code §10115.1) because it imposed mere race and sex-based good faith outreach efforts.<sup>59</sup>

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<sup>58</sup> See Fox, *OFCCP Best Qualified Standard*, published by the National Employment Law Institute as part of the proceedings of its annual *Affirmative Action Briefing* conducted in four cities across the United States. See also, the testimony of OFCCP Director Shirley J. Wilcher before the Senate Labor Committee on June 15, 1995 (“Are goals a Subterfuge for Quotas? No. The numerical goals component of the affirmative action programs under the Executive Order has never been designed to be, nor may it properly or lawfully be, interpreted as employment quotas or preferential treatment with respect to persons of any color, race, religion, sex or national origin. ‘Goals may not be rigid and inflexible quotas which must be met, but must be targets, reasonably attainable by means of applying every good faith effort to make all aspects of the entire affirmative action program work.’ 41 C.F.R. § 60-2.12(e).) See also, the Brief *Amicus Curiae* of the National Association of Manufacturers filed January 24, 1986 in Local 28 of the Sheet Metal Workers’ International Association, and Local 28 Joint Apprenticeship Committee v. Equal Employment Opportunity Commission, et al., No. 84-1656 distinguishing OFCCP goals as not preferential in contrast to unlawful quotas. See also, OFCCP v. Priester Construction Co., No. 78-OFCCP-11 (Feb. 22, 1983), summarized in 2 Aff. Action Comp. Man (BNA) D:9121 (“goals, unlike quotas, merely require good faith efforts and do not require that one person be preferred over another because of his or her race or sex”); OFCCP v. National Bank of Commerce of San Antonio, No. 77-OFCCP-2 (Dec. 11, 1984), summarized in OFCCP Fed. Contract Compl. Man. (CCH) ¶ 21,223 (same).

<sup>59</sup> That statute required general contractors to subcontract percentages of the work to minority, women, and disabled veteran owned subcontractors, or demonstrate good faith efforts to do so. Their required “goals” were to be “not less than” 15% for minority business enterprises, 5% women and 3% disabled veterans. To count towards

Monterey Mechanical failed to document only one piece of its good faith efforts. Specifically, it neglected to note its good faith efforts and outreach to minorities and women to the institution soliciting the bid: the California Polytechnic State University, San Luis Obispo. As a result, “Cal-Poly” rejected Monterey Mechanical’s over \$21,000,000 bid to upgrade the University’s utilities generation and distribution facilities, despite the fact that it had both the lowest bid and more black and female subcontract participation lined up (but not Asian subcontractors) than had the successful bidder.

In a comparable case, California Superior Court Judge Richard Turrone (sitting in Santa Clara County) also struck down and enjoined a similar City of San Jose Resolution No. 67705 as violative of Proposition 209.<sup>60</sup> Finding the outreach efforts constitutionally flawed, Judge Turrone held:

“It takes little effort to perceive the distinct advantage an MBE business will have under the Resolution compared to non-minority businesses. The former will have the benefit of receiving solicitation and personal contact from the general contractors, who will be encouraging them to participate in the bid, while the latter will be forced to ultimately search out job openings.”

If Monterey Mechanical and/or Hi-Voltage are correctly decided, OFCCP’s compulsion of “good faith efforts” and outreach targeted to specific minority and women’s groups violates the Fourteenth Amendment Equal Protection Clause (and, by express implication, the Fifth Amendment Equal Protection component) although not Proposition 209 since federal law pre-empts state law, if the federal law is otherwise lawful. This observation carries an enormous

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fulfilling the goal, a subcontractor had to have been at least 51% owned and controlled by members of those classes. Alternatively, contractors could have complied by demonstrating “good faith efforts” to meet the “goal”. The statute required a bidder using “good faith” as a means of qualification to contact government agencies and organizations to identify potential subcontractors in the designated classes, advertise in papers “focusing on M/W/DVBEs” and to solicit bids from “potential M/W/DVBE subcontractors and suppliers”. The contractor was also required to document its efforts within two days following the opening of the bids, so as a practical matter the solicitation must have been fully accomplished prior to bidding. Dates, times, organizations contacted, contact names, and phone numbers were “needed to corroborate the information”.

<sup>60</sup> Hi-Voltage Wire Works, Inc. et al. v. City of San Jose, n.5, Case No. CV 768694 (Feb. 9, 1998, Judge Richard C. Turrone, Santa Clara County Superior Court). Resolution No. 67705 required that each general contractor bidding on a city project demonstrate that it was not discriminating against any person or entity on the basis of gender or race by either: (1) satisfying an evidentiary presumption of the appropriate number of MBE/WBE subcontractors or (2) certify that the contractor performed sufficient outreach efforts to attempt to increase minority bids. The outreach option required the contractor to: (1) provide written notice by certified mail, or by fax, of the general contractor’s interest in bidding on the contract, to at least four minority subcontractors in each trade or area or work or supply and (2) to follow up initial solicitations personally or by phone to determine with certainty whether the minority subcontractors were interested (the bidder was required to make at least three attempts at contact and maintain documentation of those efforts) and (3) to negotiate in good faith with the minority firms and maintain a chart demonstrating that it did not unjustifiably reject a bid made by an MBE/WBE subcontractor. As noted above, California’s Sixth Appellate District subsequently affirmed Judge Turrone’s decision. See, Hi-Voltage Wire Works, Inc. v. City of San Jose, 72 Cal. App.4th 600 (Cal.App. 6th Dist. 1999) and the Supreme Court of California affirmed the appellate decision. See, Hi-Voltage Wire Works, Inc. v. City of San Jose, 24 Cal. 4th 537 (2000).

implication, again, if these two decisions are correctly decided: OFCCP’s Executive Order 11246 Affirmative Action Program regulations are rendered virtually wholesale unconstitutional, even while promising the absence of “quotas” or preferential action.

Confusion continues to abound in the public mind as to what is meant by “affirmative action” and by “preferences”. The courts typically do not use such terms, but rather refer to the term “classification” to determine whether limits addressed to race, gender or national origin attach. While the courts are slowly creating a body of common law on this important issue, two federal case decisions have emerged as critical touchstones for analysis. These include Northeastern Florida Contractors v. City of Jacksonville<sup>61</sup> and Bras v. California P.U.C<sup>62</sup>

See also, Kidd v. State of California, 62 Cal. App. 4th 386 (Cal. App. 3d Dist. 1998) (“The term ‘affirmative action’ often leads to unnecessary confusion and misunderstanding because of a failure in advance to agree upon or assume a definition for it . . . . It can be defined either as: (1) a preference for certain persons where there is total equality of objectively ascertained qualifications, or (2) a preference for a person with lower objectively ascertained qualifications, to the corresponding exclusion of persons that are qualified.” (Citing Dawn v. State Personnel Board, 91 Cal. App. 3d 588, 593, n.4 (1979)).

In Kidd, the Court found a State of California Fish and Games Department employment practice known as “supplemental certification” (which allows certain minority and female applicants for positions in the state civil service system to be considered for employment even though they did not place in the top three ranks on the list of eligible candidates) to be in conflict with Proposition 209 merit selection requirements embodied in Article VII, Section 1, subdivision (b) of the California Constitution and separately in violation of California Government Code Section 19057.1 (which specifies ranking certification in the state’s civil service system).

See also, the broad language the court used in The Coalition For Economic Equity v. Wilson, 110 F.2d 1431, 1439-1441, and 1444 (9th Cir. 1997):

“*Any governmental action that classifies persons by race is presumptively unconstitutional and subject to the most exacting judicial scrutiny.*” (emphasis added) (citing Adarand v. Peña, 115 S. Ct. at 2114);

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<sup>61</sup> 508 U.S.656, 113 S. Ct. 2297 (1993). In Northeastern Florida Contractors, the construction set-aside ordinance at issue there changed during the pendency of the litigation and established requirements for “participation goals” ranging from 5% to 16% and providing for five alternative methods for achieving participation goals. [“Nevertheless, the court explained that the replacement of the old statute with the new one did not make the case moot, because the gravamen of petitioner’s complaint is that its members are disadvantaged in their effort to obtain city contracts. The new ordinance may disadvantage them to a lesser degree than the old one, but insofar as it accords preferential treatment to black and female owned contractors it disadvantages them in the same fundamental way.” (Cited in Bras v. California P.U.C.)]

<sup>62</sup> 59 F.3d 869 (9th Cir. 1995), cert. denied, 516 U.S. 1084 (1996) In Bras the Court held “[t]he Code and Order are not immunized from scrutiny because they purport to establish ‘goals’ rather than ‘quotas’. We look to the economic realities of the program rather than the liability attached to it.”

\* \* \*

“Proposition 209 prohibits the State from classifying *individuals* by race or gender”; (emphasis added)

\* \* \*

“The Equal Protection Clause, after all, prohibits a state from denying ‘to any *person* within its jurisdiction the equal protection of the laws.’” (emphasis added)

\* \* \*

“Rather, ‘*any person*, of whatever race, has the right to demand that any governmental actor subject to the constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny” (emphasis added) (citing Croson v. City of Richmond, 488 U.S. at 493 (1989)).

**I. Gender Classification Less Legally Challenged**

Finally, it is significant to note that only “intermediate scrutiny” applies to preferences *public sector* employers may undertake on behalf of *women*. The “strict scrutiny” standard of review only applies to *racial* classifications. Accordingly, three legal standards for preferential classification have now emerged (other than the unique limitations of California’s Proposition 209):

1.	PUBLIC Employer	→	RACIAL Preference	→	“STRICT SCRUTINY”
2.	PUBLIC Employer	→	GENDER Preference	→	“INTERMEDIATE SCRUTINY”
3.	PRIVATE Employer	→	RACE/GENDER Preference	→	“MANIFEST IMBALANCE”/ DISCRIMINATION

**J. A Sliding Scale of Preference Proof: Hiring to Terminations?**

It appears that the federal courts may also be developing a “sliding scale” approach to the quantum of proof the defending employer must put forward to support its preferences. At the bottom of the scale are recruitment and selection preferences,<sup>63</sup> which the courts will most easily find narrowly tailored since these preferences do not displace incumbents and widely disperse the burden to achieve diversity over numerous applicants before they become fixed in a job.<sup>64</sup>

<sup>63</sup> Rudin, *supra*, 420 F.3d at 722 (quoting Duffy v. Wolle, 123 F.3d 1026, 1038-1039 (9<sup>th</sup> Cir. 1997), “an employer’s affirmative efforts to recruit minority and female applicants does not constitute discrimination . . . An inclusive recruitment effort enables employers to generate the largest pool of qualified applicants and helps to ensure that minorities and women are not discriminatorily excluded from employment”).

<sup>64</sup> *See, e.g.,* Peightal v. Metropolitan Dade County, 26 F.3d 1545 (11<sup>th</sup> Cir. 1994) (upholding County’s race-based *hiring* program for firefighter positions under “strict scrutiny” constitutional analysis); United Steelworkers of America v. Weber, 443 U.S. 193 (1979) (upholding under Title VII private employer’s voluntary race-conscious reservation of 50% of openings in entry-level craft *training* programs for African-American workers until percentage of African-American craftworkers was commensurate with the available labor force); *but see, Higgins v. City of Vallejo*, 823 F.2d 351, 360 (9<sup>th</sup> Cir. 1987), *cert. denied* 489 U.S. 1051 (1989) (indicating that a *promotion* preference is *less* burdensome than a hiring preference because an incumbent at least retains employment and hence

Preferences in training programs and promotion decisions fall somewhere in the middle of this spectrum.<sup>65</sup> The higher on the scale of preferences an employer wants to go, the greater the burden of the defending employer to show it has “narrowly tailored” (public employer) or not “unnecessarily trammled” (private employer). This is generally thought to be true because male, non-minority applicants have less of an expectation to obtain employment or have an employer treat them on merit (rather than on account of their race or gender) than do male, non-minority incumbents who employers typically promise they will treat in a nondiscriminatory manner.<sup>66</sup>

## **K. A Comprehensive View of Preferences**

I have developed the below chart, to provoke thought more comprehensively, about which preferences are lawful, or would be lawful.

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retains the ability to compete for the next promotion); Wygant, 476 U.S. at 267 (striking down School Board’s *layoff* protection program favoring minorities over non-minorities as too burdensome on incumbent Whites and thus not “narrowly tailored” under the Fourteenth Amendment). Justice Rehnquist also observed indicator that he found it hard to conceive of a justification sufficiently compelling to ever uphold a layoff quota.

<sup>65</sup> However, see Podberesky v. Kirwan, 38 F.3d 147 (4th Cir. 1994) cert den. 1995 U.S. LEXIS 3511 (U.S. 1995) in which availability of state university race-based scholarships failed constitutional challenge as both lacking “compelling interest” and not “narrowly tailored” (Latino student’s denial of University of Maryland merit scholarship established exclusively for African-American’s violated Fourteenth Amendment). The United States Court of Appeals for the Fourth Circuit held that the University’s poor reputation in the African-American community, underrepresentation of African-Americans, low retention and graduation of African-Americans, and hostile atmosphere on campus to African-American’s were not sufficiently “compelling” to justify a race-based selection process. The Court also found the scholarship program not “narrowly tailored” because (1) it was available only to high achieving African-Americans, including residents of other states, (2) the District Court used the wrong availability pool, and (3) the University failed to show it had tried to solve African-American student retention issues of concern in a race-neutral fashion.

<sup>66</sup> It is important to note current shifts along this sliding scale. Some recent lower court decisions have analogized the promotion situation to layoff decisions and have required more narrow tailoring to justify the burden imposed on individuals failing to receive the promotion. See In re Birmingham Reverse Discrimination Emp. Lit., 20 F.3d 1525 (11th Cir. 1994) Reh’g. en banc denied, 60 F.3d 720 (11th Cir. 1994), cert. denied, 514 U.S. 1065 (1995) (holding that the fire lieutenant promotion provision of the city’s consent decree violated Title VII and the Fourteenth Amendment because it unnecessarily trammled the rights of non-black firefighters by establishing a rigid quota for annual minority promotions); Dallas Firefighters Assn. v. City of Dallas, 885 F.Supp 915 (N.D. Tex. 1995), aff’d in part Rev’d in part, 150 F.3d 438 (5th Cir. 1998) (finding the city’s affirmative action plan, relying on race and gender-conscious promotions, unnecessarily trammled the rights of non-minority firefighters under Title VII and was not narrowly tailored to survive strict scrutiny under the Fourteenth Amendment); but see, Edwards v. City of Houston, 37 F.3d 1097 (5th Cir. 1994) (holding that consent decree remedying past discrimination through increased minority promotions did not violate Title VII or the Fourteenth Amendment). In a further example of the rapid changes in this area, the U.S. Department of Justice brought a reverse discrimination suit against Illinois State University for its janitorial *training* program that excluded White males from participation. See United States v. Illinois State University, No. 95-3067, 944 F.Supp. 714 (C.D. Ill 1996) (filed 3/2/95 in the U.S. District Court in Springfield, Illinois).

Favoring Blacks	Favoring Whites	Favoring Hispanics	Favoring Asians	Favoring Native Americans	Favoring Women	Favoring Men	Favoring Veterans	Favoring the Disabled	Favoring Spouse of Active Duty Military	Favoring those over 40
No*	No*	No*	No*	Could be**	No*	No*	Yes	Yes	Yes	Yes

\*This preference would be unlawful absent a successful affirmative legal defense.

\*\*Title VII/E.O. 11246 allow for an “Indian preference” if the at-issue Native American Applicant/employee lives on “or near” an Indian reservation.

**L. What, Then, Is The Utility And Proper Use Of An Affirmative Action Program?**

The decision of a three judge panel of the United States Court of Appeals for the Fifth Circuit (in New Orleans) in Messer v. Meno, 130 F.3d 130 (5th Cir. 1997) Reh’g. en banc denied, 149 F.3d 1181 (5th Cir. 1998), cert. denied, 142 L. Ed. 2d 657 (1999) is a “must” read for all Human Resources planners and EEO officers. In that case, the court remanded for trial (having found the existence of a “material issue of fact” that negated the availability of summary judgment) on the question of what day-to-day operational role, if any, the Texas Education Agency’s (“TEA”) Affirmative Action Plan (“AAP”) played in hiring, promotion and compensation decisions.

Plaintiff Messer, a white woman, sued TEA based on her sex and race claiming it had denied her salary and promotion opportunities because TEA used its AAP to “balance” the workforce by compensating “underutilized” African American employees more highly and not promoting women, allegedly because they were “overrepresented” in TEA’s workforce.

The trial judge had dismissed Messer’s claim, finding that “the existence of an affirmative action plan” provides a “non-discriminatory rationale” that rebutted any presumption of unlawful discrimination against her. The judge also opined that because “affirmative actions plans are still required for all federal contractors,” “past discrimination and present imbalance cannot be a requirement for constitutionality.”

Reversing the trial court, the Fifth Circuit interpreted the Supreme Court’s Wygant and Croson decisions to insist “upon some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination.” The court also noted the Supreme Court had rejected the notion that a state contractor’s compliance with federal mandates insulates the state from liability for discrimination. See Miller v. Johnson, 515 U.S. 900, 921-23 (1995) (State “compliance with federal anti-discrimination laws cannot justify race-based districting where the challenged [congressional] district was not reasonably necessary under a constitutional reading and application of those laws”). The Fifth Circuit also noted its decision in the Hopwood case,

holding that the racial preference program of a local government unit is subject to “strict scrutiny,” even where the unit had been ordered to adopt it. Hopwood, 78 F.3d at 954.

Significantly, the court framed the issue involving TEA’s actions as follows:

TEA does not attempt to argue on appeal that it could constitutionally make racial preferences in hiring or promoting employees pursuant to its AAPs; rather it argues its AAPs were confined merely to recruitment efforts, and that hiring, promotion, and compensation decisions were based on merit, not race.” Messer, 130 F.3d at 136.

The court then observed:

“As will be seen, both the scope of the AAP’s and their impact on Messer’s employment are subject to genuine dispute. (Footnote omitted.) If the trier of fact finds that the AAP’s affected racial or gender considerations in employment decisions and particularly in Messer’s case, then an appropriate remedy (for Messer) must be fashioned.” Id. at 137.

As such, the decision brings the question squarely into focus for public sector contractors: “What is the utility and proper use of an AAP?” Certain courts hold that evidence an employer followed an affirmative action plan in taking a challenged adverse employment action may constitute direct evidence of unlawful discrimination, thus requiring that the employer prove the affirmative action plan is valid under Title VII and the Equal Protection Clause.<sup>67</sup> Still other courts have found remedying past or present racial discrimination by a state actor is a sufficiently weighty state interest to warrant the remedial use of a carefully constructed affirmative action program, making such affirmative action plans valid as remedial tools for prior unlawful discrimination.<sup>68</sup>

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<sup>67</sup> Humphries v. Pulaski County Special School District, 580 F.3d 688, 694 (8<sup>th</sup> Cir. 2009).

<sup>68</sup> Brackett, *supra*, 447 Mass. at 248. NOTE: Affirmative Action Programs (“AAPs”) federal contractors prepare pursuant to Executive Order 11246 are not so-called “Weber” plans and do not identify “manifest imbalances.” Indeed, EO 11246’s implementing regulations specifically prohibit contractors from converting its “goals” program to one imposing either employment “quotas” or “preferences.” See 41 CFR Section 60-2.16:

(a) Purpose: Placement goals serve as objectives or targets reasonably attainable by means of applying every good faith effort to make all aspects of the entire affirmative action program work. Placement goals also are used to measure progress toward achieving equal employment opportunity. (b) A contractor's determination under Sec. 60-2.15 that a placement goal is required constitutes neither a finding nor an admission of discrimination. \* \* \* (e) In establishing placement goals, the following principles also apply: (1) Placement goals may not be rigid and inflexible quotas, which must be met, nor are they to be considered as either a ceiling or a floor for the employment of particular groups. Quotas are expressly forbidden. (2) In all employment decisions, the contractor must make selections in a nondiscriminatory manner. Placement goals do not provide the contractor with a justification to extend a preference to any individual, select an individual, or adversely affect an individual's employment status, on

As to private employers, the question is no different, although the answer may differ slightly if a “manifest imbalance” existed which justified the use of race or ethnicity in the at-issue employment transaction.

In the Title VII context, the existence of an affirmative action plan can provide a private employer a legitimate, nondiscriminatory rationale for an employer’s decision as contemplated by the analytical framework set forth in McDonnell Douglas.<sup>69</sup> This is provided, however, that the affirmative action plan is valid in that it: (1) responds to a manifest imbalance in the work force; (2) does not “unnecessarily trammel” the rights of members of the non-preferred class or create an absolute bar to advancement; and (3) does no more than necessary to attain a balance.<sup>70</sup> Where a “manifest imbalance” plan is articulated as the basis for the employer’s challenged adverse decision, the burden shifts to the plaintiff to prove that the employer’s justification is pretextual and the plan is invalid.<sup>71</sup>

#### **M. Five Rules To Live By If Undertaking Preferential Classifications**

The law in this area is currently under going rapid change and will experience many developments in coming years. Nonetheless, some general rules have emerged.

##### **1. Public Employers Must “Narrowly Tailor” Any Otherwise Lawful Race, Gender Or National Origin-Based Classification; Private Employers Must Not “Unnecessarily Trammel” The Legitimate Interests Of Others.**

Since Croson, the courts have emphasized to state, county and municipal employers that any racial classifications must be “narrowly tailored”.<sup>72</sup> This includes public employer implementation of an affirmative action plan.<sup>73</sup> The Adarand decision now makes this the legal

the basis of that person's race, color, religion, sex, or national origin. (3) Placement goals do not create set-asides for specific groups, nor are they intended to achieve proportional representation or equal results. (4) Placement goals may not be used to supersede merit selection principles. Affirmative action programs prescribed by the regulations in this part do not require a contractor to hire a person who lacks qualifications to perform the job successfully, or hire a less qualified person in preference to a more qualified one.

<sup>69</sup> Sharkey v. Dixie Electric Membership Corp., 262 Fed. Appx. 598, 603 (5<sup>th</sup> Cir. 2008).

<sup>70</sup> Rudebusch v. Hughes, 313 F.3d 506, 520-521 (9<sup>th</sup> Cir. 2002).

<sup>71</sup> Sharkey, *supra*, 262 Fed. Appx. at 603.

<sup>72</sup> Kohlbeck v. City of Omaha, 447 F.3d 552, 555-556 (8<sup>th</sup> Cir. 2006) [to ensure narrow tailoring, a court needs to conduct a most searching examination requiring the most exact connection between justification and classification; courts look at factors “such as the efficacy of alternative remedies, the flexibility and duration of the race-conscious remedy, the relationship of the numerical goals to the relevant labor market, and the impact of the remedy on third parties”].

<sup>73</sup> Rudin v. Lincoln Land Community College, 420 F.3d 712, 721 [the obligation to engage in some form of affirmative action is permissible to comply with a remedial decree, to remedy any past discrimination on the part of the institution, or as a remedial policy narrowly tailored to meet the goal of remedying the effects of past discrimination in general]; see also United States v. City of New York, 448 F. Supp.2d 397, 438 (E.D.N.Y. 2006) [to

standard for both federal and state government racial classifications. The private sector analog to the “narrowly tailored” requirement is that the private employer not “unnecessarily trammel” the legitimate interests of others not made party to the classification. These concepts give the courts wide latitude to strike down those employment classifications they believe to be too burdensome. In general, these concepts require the employer to determine there is no less burdensome way to satisfy the state’s compelling interest or the private employers’ desire, other than to proceed with a preferential classification.

The open question now is whether the Courts will now uphold, as “narrowly tailored,” employment preference in public sector employment transactions structured to ostensibly achieve a “critical mass” of African American, Hispanic or Native American employees through individualized consideration of candidates.

**a. “Narrow Tailoring” And Not “Trammeling” Means No Layoff Preferences.**

The Supreme Court has not yet upheld any preferential classification for minorities or women in layoff situations.<sup>74</sup> On the sliding scale of interests, layoff preferences are the very hardest to sustain given the public employer’s obligation to “narrowly tailor” the preference at issue, as noted above. Layoff preferences uniquely displace “innocent” Whites and males and conflict with the often rather fixed expectations, especially those of long term incumbents.<sup>75</sup>

**b. “Fix What’s Broke. If It Ain’t Broke, Don’t Fix It”.**

“Narrow Tailoring” and “No Trammeling” require employers to link preferences to the problem (predicate) they seek to cure. For example, if management’s predicate for action is the result of historical hiring imbalances or hiring discrimination, the appropriate remedy is not layoff preferences disfavoring Whites, but rather hiring preferences favoring minorities.<sup>76</sup>

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determine if an affirmative action plan is narrowly tailored, a court must look to: (1) the necessity for the relief and the efficacy of alternative remedies; (2) the flexibility and duration of the relief, including the availability of waiver provisions; (3) the relationship of the numerical goals to the relevant labor market; and (4) the impact of the relief on the rights of third parties].

<sup>74</sup> See, e.g., Wygant v. Jackson Bd. of Education, et al., *supra*, 476 U.S. at 267; Cunico v. Pueblo School Dist., 917 F. 2d 431 (10th Cir. 1990) (school board decision to re-hire black social worker after discharging the most senior white social worker constituted discriminatory action under Title VII and Equal Protection Clause; Tenth Circuit expressed doubt whether in light of Wygant race-conscious layoffs can ever be deemed a narrow means of accomplishing an otherwise legitimate remedial purpose); Valentine v. Smith, 654 F.2d 503, 511 (8th Cir. 1981) *cert. denied*, 454 U.S. 1124 (1981) (“An affirmative action plan insidiously trammels the rights of Whites when it either (i) requires firing Whites to make room for minorities, (ii) deprives present employees of employment rights or benefits they already enjoy, or (iii) completely bars whites from all available positions.”).

<sup>75</sup> Collective bargaining agreements, in particular, may further crystallize the expectations of bargaining unit members that their employer will make employment decisions based on merit or seniority undisturbed by considerations of race or gender.

<sup>76</sup> Compare United States v. City and County of San Francisco, 890 F.2d 1438 (9th Cir. 1989) (consent decree upheld giving hiring and promotion preferences to minority and women in light of history of discrimination in hiring

## 2. “Manifest Imbalance Not Precisely Defined”

The courts have not clearly defined for private employers the term “manifest imbalance in traditionally segregated job classifications.”<sup>77</sup> Courts do note that the “manifest imbalance” factor requires that an affirmative action plan be “temporary.”<sup>78</sup> In Johnson, for example, where the predicate was not discrimination, but rather “underutilization,” women had never historically occupied the road dispatcher position at issue. Thus, the fabled “inexorable zero” was present. Significantly, however, the United States Supreme Court has yet to give guidance regarding how large an imbalance there must be, *and when in time*, to sustain a preference.<sup>79</sup> For example, evidence that an employer “continues to meet” its racial quotas establishes a genuine issue of material fact that precludes summary judgment on the issue that the policy only seeks to attain a racial balance as opposed to maintaining such balance.<sup>80</sup> Given these differences, this raises the question whether gross or mere “underutilization” is sufficient, regardless of how “underutilization” may be defined.<sup>81</sup>

The lower federal courts are also struggling with the related issue of how to properly calculate the labor market availability of minorities and women to determine whether a labor force imbalance exists. The Supreme Court has been clear that the correct comparison is

and promotion) and Higgins v. City of Vallejo, *supra*, 823 F.2d at 351 (hiring preferences upheld due to strong predicate of minority firefighters hiring discrimination), with In re Birmingham Reverse Discrimination Emp. Lit., 20 F.3d at 1543 (rigid, arbitrary and annual 50% promotion quota unnecessarily trammes the rights of non-black firefighters) and Billish v. City of Chicago, 989 F.2d 890, 61 FEP 678, 683 (7th Cir. 1993) [en banc], *cert. denied*, 126 L.Ed. 2d 240 (1993) (summary judgment for city in reverse discrimination suit challenging city’s minority promotion program reversed because “current,” rather than historical, discrimination is required to satisfy the Equal Protection Clause). Billish is a very important case decision because it is one of the few to discuss this “timing of the discrimination” issue.

<sup>77</sup> Race-conscious remedies pursuant to settlement agreements of past discrimination claims appear to be lawful under Title VII and well-grounded in public policy. See, e.g., Marcantel v. State of La., Dep’t of Transp. & Dev., 37 F.3d 197, 202 (5th Cir. 1994) (holding that state’s good faith settlement of discrimination suit constituted legitimate, nondiscriminatory reason to promote black plaintiff employee over white counterpart explaining that any other decision “would discourage settlement and hamper employers in their attempts to redress past discrimination.”).

<sup>78</sup> Doe, *supra*, 470 F.3d at 845.

<sup>79</sup> In one case, for example, an appeals court found that an almost 20% disparity between a minority labor pool of 30% and a minority employer labor force of 11.4% coupled with a Black labor pool of 17% and an employer Black labor force of 7.3% constituted a “manifest imbalance.” Higgins v. City of Vallejo, *supra*. See also, **Attachment 1** Fox, *Employment Preferences in a Nutshell*, which lists the disparities at issue in a number of preferences cases upheld either upon a finding of discrimination or a “manifest imbalance.”

<sup>80</sup> Humphries, *supra*, 580 F.3d at 696.

<sup>81</sup> For a novel application of the “manifest imbalance” requirement, see Smith v. Virginia Commonwealth University, 856 F. Supp. 1088, 1093 (E.D. Va. 1994) *Rev’d*, 84 F.3d 672 (4th Cir. 1996) (rejecting a Title VII challenge to public university’s increase of each female faculty members’ compensation by \$1,354 because average compensation between male and female faculty members in that amount constituted a “manifest imbalance”, even though no manifest imbalance existed in “traditionally segregated job categories” as required under Johnson).

between labor pool availability data and employer workforce data (U.S. v. *Hazelwood*). A number of courts have emphasized, however, that an individual is “qualified” for these statistical disparity cases if he or she merely demonstrates only “minimum qualifications.” The courts will also look to the entire geographical area from which the employer draws its employees. The Supreme Court has additionally made clear that an incorrect comparison is not relevant to the question of employment discrimination.<sup>82</sup>

At least two lower federal courts have also discussed the requirement that availability data be recent or at least depict the employer’s practices as they stood at the time of the alleged discrimination.<sup>83</sup> For example, in a District of Columbia case, the D.C. Circuit Court of Appeals court found that the employer’s current overall utilization of 37% Blacks following a six year period during which over 75% of entering employees were black (where there was a 75% availability of black applicants in 1980 and 64.6% availability in 1984) were the relevant data against which to measure rather than older statistics which showed a racial imbalance. This “current” versus “historical” evidence of discrimination issue is the next important preference litigation issue on the horizon.

### **3. Preferences, If Otherwise Lawful, Must Be Temporary.**

The term “temporary,” however, has no definite time-frame boundaries. (The employer’s estimate in the Weber case, for example, was that its “temporary” (50/50) preference for black craft worker trainees would last for approximately thirty-five years.<sup>84</sup> This estimate emerged given the number of projected opportunities, the 50% Black placement rate and the employer’s desire to maintain the preference until the percentage incumbency of black craft workers approximated their percentage availability.) Rather, temporary means that the preference must end when the problem management sought to repair by resort to the preference is resolved. Typically, this means that the employer preference must end when it eliminates the predicate underutilization (i.e., minority and/or female incumbency is at or near “parity” with availability) or the employer has remedied the predicate discrimination.<sup>85</sup>

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<sup>82</sup> See Wards Cove Packing Co. v. Atonio, 493 U.S. 802 (1989); Johnson v. Transportation Agency, Santa Clara City., supra; Hazelwood School Dist. v. United States, 433 U.S. 299 (1977); Janowiak v. City of South Bend, 836 F.2d 1034 (7th Cir. 1987), cert. denied 489 U.S. 1051 (1989); Higgins v. City of Vallejo, supra; Aiken v. City of Memphis, 37 F.3d 1155, 1164 (6th Cir. 1994) (1981 Consent Decree providing for race-based promotions in police and fire departments may not be narrowly tailored, as Fourteenth Amendment requires, since goals did not appear to bear a sufficiently precise relationship to the “labor market”).

<sup>83</sup> Hammon v. Barry, 826 F.2d 73 (D.C. Cir. 1987), vacated 841 F. 2d 426 (1988), cert. denied sub nom. Barry v. United States, 486 U.S. 1036 (1988). See also, Billish v. City of Chicago, supra, 989 F.2d 890 (“current”, not “historical”, discrimination needed to uphold preference against Equal Protection Clause challenge).

<sup>84</sup> United Steelworkers of America, AFL-CIO v. Weber, et al., 443 U.S. 193, 20 FEP 1 (1979).

<sup>85</sup> In ending a nineteen year consent decree requiring a 50/50 black/white promotion to sergeant ratio in Detroit, the Court of Appeals for the Sixth Circuit noted that “the goal sought of 50% black (and minority) sergeants has been virtually attained.” “Limiting the duration of a race-conscious remedy which clearly impacts adversely upon the (white) plaintiffs is a keystone of a narrowly tailored plan as may be seen by recent Supreme Court

However, Justice Ginsberg expressed her aspirational hope in 2009 in the *Grutter* case that by a quarter century hence (i.e. 2034), “the use of racial preferences will no longer be necessary.”<sup>86</sup> Many pundits have read Justice Ginsberg’s comment as a practical suggestion made as an accommodation to re-assure one of her Supreme Court colleagues otherwise concerned about continuing preferences indefinitely. Regardless how Justice Ginsberg’s “sunsetting” statement is read, it underscores the begrudging and limited permission employers enjoy to deploy preferences if they choose to do so and only as a last resort to remedy prior (probably actionable) discrimination or statistical imbalances between percentage incumbency and availability suggesting unlawfully discriminatory exclusions earlier in history.

#### **4. Discretionary Preferences Are In; Rigid Lock-Step Quotas Are Out.**

The courts often reject the use of rigid lock-step quotas, endorsing instead discretionary preferences imposed following a thoughtful process.<sup>87</sup> Accordingly, the decision-maker must maintain “discretion” or consider a range of choice as between minority and non-minority candidates (i.e. the decision-maker must be able to hire any person from a specified list).<sup>88</sup>

#### **5. Race Or Gender As A “Plus” Factor Works.**

Management strengthens its opportunity to sustain its preference if the race or sex of the applicant is not the dispositive selection factor, but rather is only a “plus” factor in the decision. decisions.” *DPOA v. Young*, 989 F.2d 225, 61 FEP 577, 579 (6th Cir. 1993). See also, *Ensley Branch, N.A.A.C.P. v. Seibels*, 31 F.3d 1548, 1583-84 (11th Cir. 1994) (remanding, in part, with order for district court to rewrite consent decree to include deadlines for the city to design and implement race-neutral selection procedures in local government employment). See also, *Aiken v. City of Memphis*, 37 F.3d 1155, 1164 (6th Cir. 1994) (1981 consent decree providing for race-based promotions in police and fire departments may not be narrowly tailored as required by Fourteenth Amendment since city made no effort to limit duration of remedies).

<sup>86</sup> See *Grutter*, 539 U.S. at 343.

<sup>87</sup> Compare *Higgins v. City of Vallejo*, *supra*, (upholding a discretionary promotion preference) with *Hammon v. Barry*, *supra*, (striking down upon rehearing a 60% “hardcore, cold-on-the-docks quota”). See also, *Mann v. City of Albany, Georgia*, 883 F.2d 999 (11th Cir. 1989) (selection preference for Black assistant police chief position driven by Consent Decree requiring person of opposite race to prior incumbent be given an absolute preference remanded to trial court with instructions to review in light of *Croson*’s criticism of the use of “rigid quotas”). See also, *Gratz v. Bollinger*, 539 U.S. 244 (rejecting the Undergraduate Admissions program’s point-based selection index because it did not sufficiently achieve the kind of “individualized consideration” that the Court held was necessary to survive strict scrutiny in *Grutter*.)

<sup>88</sup> The United States Supreme Court in the *Johnson* case seemed to appreciate very much the discretionary nature of the one-time preference Santa Clara County undertook to select Diane Joyce for the position of road dispatcher in the Transportation Department instead of a slightly more qualified white male. Rather than guaranteeing Ms. Joyce the job because of her gender, the County Affirmative Action Manager approached the County Administrator and suggested Ms. Joyce’s selection in lieu of Mr. Johnson when she heard that the County was on the verge of selecting Mr. Johnson for the position. Arguing that it would be a “plus” factor for the County to integrate the Transportation Department with a woman for the first time in the road dispatcher position and noting Ms. Joyce’s strong qualifications for the position, the County Administrator weighed and balanced the competing considerations and eventually, over a several day period, determined to select Ms. Joyce instead of Mr. Johnson for the position.

Particularly well received are preferences that mirror the Harvard Plan, first approved in Bakke and now formally embraced in Grutter/Gratz.<sup>89</sup> The Harvard Plan considered the minority status of the applicant as one of a number of “plus” factors or “soft variables” in the decision-making process intended to assure (in the education context) a culturally diverse student body. Similarly, in the employment context, the Supreme Court in Johnson credited heavily consideration of not only gender as a plus, but also skills, experience and a history of the exclusion of women.<sup>90</sup>

## V. EMPLOYMENT CLASSIFICATION CASE DECISIONS

### A. United Steelworkers of America, AFL-CIO v. Weber, et al., 443 U.S. 193, 20 FEP 1 (1979).

The United Steelworkers of America (“USWA”) and Kaiser Aluminum & Chemical Corp. (“Kaiser”) entered into a master collective bargaining agreement in 1974 embodying terms of employment for fifteen of Kaiser’s plants. Included in the agreement was an affirmative action plan designed to eliminate conspicuous racial imbalances in Kaiser’s almost exclusively white craft workforces at the time. The plan reserved for black employees fifty percent of the openings in plant craft training programs until the percentage of black craftworkers equaled the percentage of Blacks in the local labor force.

The Weber case arose from the operation of the affirmative action plan at Kaiser’s plant in Gramercy, Louisiana. During the affirmative action plan’s first year of operation, seven black and six white craft-trainees were selected from the plant’s production work force. The most senior of the black trainees had less seniority than several white production workers whose bids for admission were rejected. Brian Weber, one of the white production workers, brought a class action in Federal District Court alleging discrimination against white employees, based on the affirmative action program’s training preference. The suit further alleged violation of subsections 703(a) and (d) of Title VII of the Civil Rights Act of 1964 (the “Act”)<sup>91</sup> which make

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<sup>89</sup> Regents of the University of California v. Bakke, 438 U.S. 265 (1978).

<sup>90</sup> *See also*, United States v. City and County of San Francisco, *supra*, (endorsing use of race as a “plus factor” in hiring).

<sup>91</sup> Section 703(a), 78 Stat. 255, as amended, 86 Stat. 109, 42 U.S.C. § 2000e-2(a), provides:

“(a) . . . It shall be an unlawful employment practice for an employer -

“(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual’s race, color, religion, sex, or national origin; or

“(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex or national origin.”

it unlawful to “discriminate . . . because of . . . race” in hiring and in the selection of apprentices for training programs. 443 U.S. at 193-194.

When the case reached the United States Supreme Court, it set out to determine whether Title VII prohibited private employers and unions from voluntarily agreeing upon bona fide affirmative action plans that accorded racial preferences in the manner and for the purpose provided in the Kaiser-USWA plan. Although the Court warned of the narrowness of its inquiry, it reached a broad-based conclusion that the Title VII prohibition did not condemn all private, voluntary, race-conscious affirmative action plans.

Respondent Weber based his argument on a literal interpretation of Sections 703(a) and (d) of the Act. “Since, the argument [postulates], McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976) . . . settled that Title VII forbids discrimination against Whites as well as Blacks, and since the Kaiser-USWA affirmative action plan operates to discriminate against white employees, it follows that the Kaiser-USWA plan violates Title VII.” 443 U.S. at 201.

After examining the statute’s legislative history and the historical context from which it arose, the Court rejected Weber’s contention outright. It ruled that an interpretation of Title VII that prohibited all race conscious affirmative action completely contravened the purpose of the statute:

“It would be ironic indeed if a law triggered by a Nation’s concern over centuries of racial injustice and intended to improve the lot of those who had ‘been excluded from the American dream for so long,’ 110 Cong. Rec. 6552 (1964) (remarks of Sen. Humphrey) constituted the first legislative prohibition of all, voluntary, private race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy.”

Id. at 204.

Moreover, the Court determined that such a prohibition would augment the powers of the federal government and diminish traditional management prerogatives and, at the same time, impede the attainment of statutory objectives. Id. at 205-207.

Finally, the Court reinforced its conclusion by analyzing the language and legislative history of Section 703(j) of Title VII.<sup>92</sup> The Section provides that nothing contained in Title VII

Section 703(d), 78 Stat. 256, 42 U.S.C. § 2000e-2(d), provides:

“It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.”

<sup>92</sup> Section 703(j) of Title VII, 78 Stat. 257, 42 U.S.C. § 2000e-2(j), provides:

“Nothing contained in this subchapter shall be interpreted to require any employer,

“shall be interpreted to require any employer to grant preferential treatment . . . to any group because of the race . . . of such group on account of” a de facto racial imbalance in an employer’s work force. Id. at 200 (quoting Section 703(j) of Title VIII) (emphasis added). Further, the Court admonished, the Section does not state that nothing in Title VII shall be interpreted to permit voluntary affirmative efforts to correct racial imbalances. Id. As such, the Court concluded, the “natural inference” was that Congress did not intend to forbid all voluntary, race-conscious affirmative action. Id.

The Weber decision implies a three tiered set of guidelines for the structuring and implementation of private voluntary preferences. Justice Blackmun’s concurrence helps to explain these guidelines and indicates that they broadened the prevailing standard justifying preferences voluntarily entered into by employers. Id. at 209-216 (Blackmun, J. concurring).

First, the Court interpreted Title VII as permitting affirmative action by an employer, whenever the job category in question was “traditionally segregated.” Id. at 202. This occurs:

“when there has been a societal history of purposeful exclusion of blacks from the job category resulting in a persistent disparity between the proportion of blacks in the labor force and the proportion of blacks among those who hold jobs within the category.”

Id. at 212.

The Weber standard thus measures an individual employer’s capacity for affirmative action solely in terms of the statistical disparity between employed and unemployed workers. Justice Blackmun explained that, effectively, this disparity is not just the traditional one between the employer’s work force and workers who meet job qualifications, but between the former and the work force as a whole. Id. at 214-5. Since there is a much higher representation of minorities in the general work force, Blackmun opined that Weber permits the redress of discrimination to a greater extent than traditionally allowed by Title VII. Id. at 214.

Second, the program accepted by the Weber Court was, in fact, a moderate one. It did not afford an absolute preference for Blacks and thus did “not unnecessarily trammel the interests of white employees.” Id. at 208. Only half of those accepted to the Kaiser training program were black. (There was an almost 40% availability of Black laborers to be craftworker

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employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.”

trainees). The affirmative action plan was thus found not to totally bar the advancement of white employees.

Lastly, and as a further example of the Kaiser plan's moderate nature, the Court noted the fact that the plan was a temporary one and "not intended to maintain a racial balance, but simply to eliminate a manifest racial imbalance." *Id.* at 208. Again, Justice Blackmun explained that:

"[b]ecause the duration of the program is finite it perhaps will end even before the 'stage of maturity when action along this line is no longer necessary' [*Regents of the University of California v. Bakke*, 438 U.S. 265, 403 (1978)]. And, if the Court has misperceived the political will, it has the assurance that because the question is statutory, Congress may set a different course if it so chooses."

*Id.* at 216.

**B. Firefighters Local Union No. 1784 v. Stotts, et al., 467 U.S. 561, 34 FEP 1702 (1983).**

In 1980, the City of Memphis entered into a consent decree to settle a private Title VII class action suit that black firefighters had filed three years earlier. That suit alleged discrimination in the fire department's hiring and promotion practices. Included in the decree were hiring and promotion "goals" designed to ensure that half of all entry-level job vacancies were filled by Blacks and that twenty percent of all promotions were awarded to Blacks.

Only one year later, however, the city faced an unexpected financial crisis and announced its plan to lay off firefighters according to its "last hired, first fired" seniority system. However, the newly minted consent decree did not address the lay off issue. Because implementation of the lay off plan would have reduced the overall percentage employment of Blacks in the fire department (since there were more Blacks with lower seniority dates than Whites), plaintiffs in the initial suit requested a modification of the 1980 consent decree and injunction to stop the lay off plan. The court responded favorably and over the objection of both the city and the firefighters union, issued an injunction, protecting some black employees who would otherwise have lost their jobs.

The practical effect of the court's injunction was that Whites were required to be laid off, when strict seniority would have dictated they keep their jobs. The city and the union then appealed the injunction to the U.S. Court of Appeals for the Sixth Circuit, focusing particularly on the District Court's finding that the lay off plan was not adopted with the purpose or intent of discriminating on the basis of race. A three-judge panel of the Sixth Circuit subsequently upheld the injunction. The city and the union, joined by the U.S. Department of Justice in its capacity as *amicus curiae*, thereafter appealed to the U.S. Supreme Court seeking a ruling that strict seniority prevailed over judicial notions of fairness in lay offs.

The central issue in the case, as the Supreme Court defined it, was whether "the district court exceeded its powers in entering an injunction requiring white employees to be laid off when the otherwise applicable seniority system would have called for the lay off of black

employees with less seniority.” Although one concurring justice argued that the case dealt solely with whether the district court abused its equitable powers, (Stevens, J. concurring), six justices ruled in favor of the city and struck down the injunction, five of whom relied on an analysis of Title VII to conclude that the injunction was not a “legitimate modification” of the consent decree.

In reaching its six to three decision, with Justices Marshall, Brennan and Blackmun dissenting, the Court relied on two provisions of Title VII.

Justice White, writing for the majority -- and joined in his opinion by Justices Rehnquist, Powell, O’ Connor and Chief Justice Burger -- began the analysis of the case by holding that the district court’s “authority to adopt a consent decree comes only from the statute which the decree is intended to enforce, not from the parties’ consent to the decree.” [Quoting System Federation No. 91 v. Wright, 364 U.S. 642, 651 (1961).] In other words, a federal court is precluded from ordering or accepting relief inconsistent with the type of relief authorized under Title VII. Having so held, the Court next reviewed Title VII to determine what relief is available under the statute and whether the lower court’s injunction ran afoul of the statute’s provisions.

In ruling that the district court had exceeded its authority, the Court first looked to Section 703(h) of Title VII [42 U.S.C. § 2000e-2(h)], which provides that “it is not an unlawful employment practice to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority system, provided that such differences are not the result of an intention to discriminate because of race.” In short, this provision immunizes a seniority system from liability for differences in the treatment of individuals subject to the system so long as it was not established with an intent to discriminate on the basis of race. Because the District Court found no evidence that the original lay off procedure was established with the intent or purpose to discriminate, the Supreme Court concluded that the modification of the consent decree was in conflict with the express provision of Section 703(h).

The Court further noted that, even if the plaintiffs had proven a pattern of discrimination at trial, which they had not,<sup>93</sup> a court would not be free to disregard a legitimate seniority system in fashioning a remedy. The Court underscored the narrow remedial boundaries available to a federal court by noting that this limitation existed despite the strong Title VII policy favoring settlements.

The second and more significant basis for the Court’s ruling was Section 706(g) of Title VII, which spells out the types of equitable relief available to remedy violations of Title VII. In a clear statement of the limited scope of Title VII, the Court held that the purpose of Section 706(g) “is to provide make-whole relief only to those who have been actual victims of discrimination.” (emphasis added).

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<sup>93</sup> The District Court entered no “finding” of discrimination either in 1980, in accepting the consent decree presented to the court by the parties, or in 1981, in issuing the injunction to prevent the lay off from occurring according to strict seniority.

The importance of this aspect of the Court's holding is that in one sentence it seemed to sweep away court-ordered class-based race conscious remedies under Title VII, at least in lay offs and where seniority rights were threatened. The Court made clear, however, that it was not interpreting Title VII to eliminate race conscious remedies entirely. Rightful place (and, presumably, make-whole) relief directed to each victim of race discrimination is, of course, explicitly permitted under Title VII following Stotts. Each identifiable victim of race discrimination would be entitled to be positioned in his or her rightful place in the seniority rankings and be entitled to other make-whole relief such as back pay, where appropriate.

In a corollary holding to the identifiable victim standard, the Supreme Court also clarified the burden of proof for members of a purported class seeking a seniority award by requiring each class member individually to demonstrate that he or she was a victim of the discriminatory practices complained of. "Mere membership in the disadvantaged class," the Court said, "is insufficient to warrant a seniority award; each individual must prove that the discriminatory practice has an impact on him." (citing International Brotherhood of Teamsters v. United States, 431 U.S. 324, 367-371 (1977)).

Finally, however, the Court did note that while lower courts had uniformly refrained from forcing the lay off of innocent Whites hired in place of black victims that had not been hired by reason of discriminatory practices in previous years, it repeated its directive in Teamsters that a Court could "balance the equities" to allow the identifiable black victims of discrimination to displace innocent white incumbents, at least to the extent that those Whites had already laid off.

**C. Wygant, et al. v. Jackson Board of Education, et al.,  
476 U.S. 267, 40 FEP 1321 (1986).**

Ruling for the first time whether, and if so, under what circumstances, state (and local) governments may undertake racial preferences in employment, in Wygant, the Supreme Court established that such preferences would be lawful under the Equal Protection Clause of the Fourteenth Amendment only if (1) justified by a "compelling state purpose" and if (2) the means chosen by the state to effectuate that purpose are "narrowly tailored" to that end. In this case, however, the Court ultimately struck down a 1972 amendment to a collective bargaining agreement between the School Board and its teachers' union. That agreement -- voluntarily entered into by the Board without any finding of employment discrimination against minority teachers -- protected Blacks and other minorities by requiring a sufficient percentage of more senior Whites to be terminated in the event of a layoff, so as to maintain the benefits of a racial balance among the faculty.

A lower federal trial court had upheld the racial preference at issue in Wygant as permissible under the Equal Protection Clause as an attempt to remedy societal discrimination by providing "role models" for minority school children. The U.S. Court of Appeals for the Sixth Circuit (Cincinnati) affirmed for largely the same reasons.

Rejecting the notion that societal discrimination alone was a sufficient predicate to justify a racial classification, Justice Powell, writing for the majority in a 5-4 opinion, noted that "In the absence of particularized findings, a court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future." Such a result was untenable.

Rather, the Court found that the state must have “convincing evidence that remedial action is warranted. That is, it must have sufficient evidence to justify the conclusion that there has been prior discrimination.” Since the School Board could not prove that it had previously discriminated against minorities, it thus failed to provide the requisite “compelling justification.”

The School Board Agreement also failed to pass judicial muster because the Supreme Court found the layoff plan not sufficiently “narrowly tailored” to accomplish purposes that otherwise may have been legitimate. Justices Powell, Burger and Rehnquist found layoff “goals” to be “too intrusive” since they imposed the entire burden of achieving racial equality on particular individuals. Justice O’ Connor, concurring in the judgment but writing separately as to this issue, agreed that the layoff plan was not “narrowly tailored” precisely because the layoff provision acted “to maintain levels of minority hiring that have no relation to remedying [past] employment discrimination.”<sup>94</sup>

Justice White was the fifth justice to concur in the judgment, but did so on the separate ground that the discharge of Whites to make room for Blacks, none of whom had been shown to be a victim of any racial discrimination, violated the Equal Protection Clause.

Future cases challenging affirmative action programs operated by state or local governments can be expected to attack them as lacking sufficient justification and/or as unnecessarily broadly drafted. Because the Supreme Court gave little guidance as to the meaning of these terms, it has thus left to another day the task of defining in detail the line of demarcation between permissible and impermissible state operated affirmative action programs.

A lower federal court has evaluated the teachings of Wygant in light of a very similar factual situation. In Britton v. South Bend Community School Corporation, 819 F.2d 766 (7th Cir. 1987), cert. denied 484 U.S. 925 (1987), a school district, in a collective bargaining agreement, provided a layoff preference for minority teachers. The layoff preference gave the minority teachers super-seniority in that all white teachers had to be laid off before any black teacher. The lower court entered judgment for the school district and plaintiffs appealed. The Seventh Circuit affirmed but a rehearing en banc was granted to review the decision in light of Wygant.

The question in Britton was whether to reverse the case outright and follow Wygant directly or to remand for additional findings of fact. Justice Posner, announcing the judgment of the court, indicated that had the layoff preferences in South Bend been factually identical to those in Wygant, the case should have been remanded to determine whether the lay-off plan was instituted to correct past employment discrimination by the South Bend School District. Posner’s discussion focused on Justice O’Connor’s concurrence in Wygant which stated that layoff preferences may be permissible if necessary to rectify past employment discrimination.

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<sup>94</sup> For the reasons discussed supra in FN 35 (regarding the Supreme Court’s discussion in Grutter of the need for a diverse military officer corps and, by extension, the degree to which that reasoning suggests a reasonable basis for arguing an affirmative need for a diverse faculty), Justice O’ Connor’s assertion in Wygant that the only “compelling interest” is the Croson-founded remedial one may now be called into question.

The layoff preferences at issue in Britton went well beyond those in Wygant in creating an absolute preference for minorities. As a result, South Bend's plan could not pass the "narrowly tailored" analysis strict scrutiny requires of race-conscious decisionmaking.

It should be noted that the Fourteenth Amendment does not apply to private employers and thus the Wygant decision does not alter the Court's prior direction under Title VII in the Weber case, as to private employers seeking to voluntarily impose racial preferences in employment matters. The Wygant decision is also important to companies interested in other business matters involving questions concerning limitations on the power of state and local governments to accomplish racial preferences, especially minority business set-aside programs.

**D. Local 28, et al. v. EEOC, et al., 478 U.S. 421, 41 FEP 107 (1986).**

The facts of the Local 28 case provided strong justification for the imposition of a broad remedy. The defendants -- Local 28 and its Joint Apprenticeship Committee -- had been found guilty of persistent and egregious racial discrimination over a 15-year period and had been held in contempt for their failure to comply with earlier court orders aimed at remedying discriminatory practices. As a contempt remedy, the lower courts ordered the defendants to establish a training fund for minority apprentices, financed through fines paid by the defendants. Also imposed was a 29.23% minority membership goal, which defendants were slated to meet by August 1987.

The principal issue before the Supreme Court was whether the training fund and membership goal, which were concededly designed to benefit minorities who were not *identified* victims of defendants' discrimination, violated Section 706(g) of Title VII [42 U.S.C. § 2000e-5(g)]. The defendants, joined by the Department of Justice, argued that this provision strictly limits the courts to providing relief only to actual, identified victims of discrimination. A majority of the Justices, however, concluded that a court is limited to providing relief to identified victims only when it awards "make whole" relief, such as back pay, competitive seniority, or the award of a specific promotion. The identified victim limitation does not apply when a court requires race-conscious affirmative action, such as the membership goal and the training fund at issue in Local 28, in an effort to remedy the lingering effects of a pattern of discrimination.

The Court suggested that race conscious affirmative relief is appropriate in only three circumstances:

1. Where the defendant has been guilty of a pattern of persistent or egregious discrimination;
2. Where there are lingering effects of the defendant's policy of discrimination, such as the existence of a reputation for discrimination that discourages minorities from applying for employment with a particular employer; or
3. Where race-conscious relief is used as an interim measure in hiring and promotions while non-discriminatory hiring and selection procedures are being devised.

The Court also stressed that any race conscious affirmative relief must be carefully tailored to remedy the particular violation of Title VII at issue. It emphasized that the relief in this case was flexible, temporary, and would have only a minor adverse impact on the expectations of innocent, non-minority members of the union.

The opinion by Justice Brennan was joined by only three other Justices. Justices Rehnquist and Burger dissented. Justice Powell joined in upholding the use of a membership goal and training fund in this case, but on narrow grounds. He emphasized the egregious discrimination practiced by the defendants and found the membership goal lawful only because it was flexible, temporary, related to the percentage of qualified minorities available in the workforce and because the goal and training fund would not substantially trammel the rights and expectations of non-minority employees.

Justice O'Connor concurred in part and dissented in part. At the outset, she indicated her belief that Section 706(g) limited the relief available under Title VII to identified victims. Nevertheless, noting that a majority of the Court has held otherwise, she argued that any race-conscious affirmative relief under Title VII should be limited to the imposition of goals, rather than quotas.

Consistent with the brief I filed as amicus curiae on behalf of the National Association of Manufacturers, Justice O'Connor noted that a goal differs from a quota in two respects. First, an employer is not required to hire unqualified minorities to meet a goal. Second, if an employer, despite good faith efforts, is unable to hire a sufficient number of qualified minorities to meet a goal, the employer is not automatically subject to sanctions. As Justice O'Connor states: "[A] permissible goal should require only a good faith effort on the employer's or union's part to come within a range demarcated by the goal itself." Because Justice O'Connor found the membership goal in this case to be a rigid racial quota, she voted to reverse the court below.

Justice White, in his separate dissent, agreed with the Brennan plurality that Section 706(g) does not, in all circumstances, limit a court to provide relief only to identified victims of discrimination. Like Justice O'Connor, however, Justice White believed the remedy at issue constituted an inflexible quota, patently unlawful under Title VII. Justices Rehnquist and Burger also dissented.

**E. Local No. 93, Int. Assoc. of Fire Fighters, AFL-CIO, C.L.C. v. City of Cleveland, et al., 478 U.S. 501, 41 FEP 139 (1986).**

Ruling in the Local 93 case brought under Title VII against a public (city) employer, the U.S. Supreme Court has held that Title VII does not preclude a federal trial court's entry of a consent decree which may benefit minorities not victims of employment discrimination. The case represented a major victory for employers seeking to voluntarily and flexibly settle employment discrimination lawsuits brought under Title VII by trading goals for other types of discrimination remedies such as those involving back pay or other financial demands.

Significantly, however, the Supreme Court did not address whether the promotion quotas ordered by the trial court were lawful under the Fourteenth Amendment (applicable to state and

local employers) or Title VII. Rather, the Supreme Court remanded the question of the lawfulness of the promotion quotas to the federal trial court.

As noted in the Local 28 case (above #2), unions and the Reagan Administration sought to limit the use of race-conscious remedies in settlement of civil rights cases, arguing that the specific language of the remedies section of Title VII (Section 706(g)) precludes a court from affording race-conscious relief to those other than identified victims of discrimination. The last sentence of § 706(g) provides that:

“[n]o order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.” 42 U.S.C. § 2000e-5(g).

The Local 93 case posed the 706(g) remedies question in the unique context of a consent decree voluntarily entered into between a city employer and a Black and Hispanic civil rights organization (The Vanguard). Lower courts had upheld the promotion preferences specified in the consent decree against challenge from an intervening white-dominated union. The Courts had done so based upon the city’s confessed employment discrimination and willingness to voluntarily resolve its lawsuits.

Noting that Congress intended voluntary compliance to be the preferred means of achieving Title VII’s objectives, the Supreme Court found that consent decrees carry out that congressional objective without running afoul of the additional congressional objective expressed in Section 706(g). The Court went on to hold that consent decrees endorsed by federal courts and providing greater relief than the courts could otherwise have decreed after a Title VII trial, were nonetheless valid. As a result, employers have substantial latitude in fashioning remedies to be contained in consent decrees, regardless of what stage of the litigation they choose to settle using this device.

The principal limitation on this substantial flexibility appears to be that the parties may not agree to take action that conflicts with or violates the statute upon which the complaint invoking the court’s jurisdiction was based. In other words, an employer may not agree in a consent decree to unlawfully discriminate against Whites and then cause a federal court to endorse and immunize that discrimination by entering a consent decree so ordering. Rather, the court merely holds that Section 706(g) of Title VII does not serve as a barrier to entry of a consent decree voluntarily embracing employment discrimination remedies that a federal court could otherwise order.

This decision thus opens the distinct possibility that white employees disgruntled by employer preferences for Blacks (or women) not the victims of the employer’s discrimination will shift their efforts to slow such employer action from challenges to consent decrees

(accomplished typically by intervening in law suits brought under Title VII by Blacks and/or women alleging employer discrimination) to suits in which Whites affirmatively challenge the preferential employer action as discriminatory. This is precisely what occurred in the Wygant case, a “reverse discrimination” suit brought by Wendy Wygant, a white teacher affirmatively challenging her employer’s action as discriminatory.

It thus appears that Whites seeking to challenge preferential employer policies misjudged Section 706(g) to be a restraint on such employer preferences. Instead, like Wendy Wygant, they will likely launch straight-ahead employment discrimination lawsuits under Title VII or the Constitution, or both, where appropriate. In this sense, the Supreme Court appears to be unwilling to stop employer preferences but rather willing to award remedies to those Whites victimized by the employer’s preferential discrimination.

Employers entering into consent decrees to resolve employment discrimination lawsuits brought by minorities and women may thus award remedies to ‘persons not the victims of discrimination’ but must nevertheless continue to be careful not to discriminate against Whites in so doing. As a result, employers continue to walk the tightrope of competing demands between minority and non-minority employees; with only a net of liability to save them from missteps of discrimination against either group.

**F. United States v. Paradise, 480 U.S. 149, 43 FEP 1 (1987).**

Known as the “Alabama state troopers” case, Paradise involved a Constitutional challenge by the U.S. Department of Justice to a quota remedy ordered by a federal district court judge in a class action discrimination suit brought by the NAACP and the Justice Department against the State of Alabama. The District Court found that the state had systematically excluded Blacks from employment in the state trooper service for four decades and had delayed implementation, under court order, of a non-discriminatory promotion process for over a decade. As a result, the District Court ordered the promotion of one black trooper for each white trooper elevated in rank, so long as minimally qualified black candidates were available.

No question existed as to the predicate for the Court’s action. In the thirty-seven year history of the Alabama Department of Public Safety (trooper service), there had *never* been a black trooper. In fact, the only Blacks employed by the patrol had been laborers. Various federal courts had described the discrimination as “pervasive, systematic, and obstinate,” “egregious” and “persistent.” As a result of the overt failings, in 1972 the District Court ordered the Patrol to hire one black trooper for each white trooper hired until Blacks constituted approximately 25% of the state trooper force at all levels: from trooper through captain. Further, the Court prohibited promotion discrimination and specifically directed that non-discriminatory promotion procedures be developed pursuant to supplemental Consent Decrees in 1979 and 1981. In April 1983, the Court expanded its one-for-one hiring quota to require one-for-one promotion of Blacks until such time as the Patrol developed a valid promotional procedure.

The Patrol and the U.S. Department of Justice appealed the order, claiming that the promotion remedy was not “narrowly tailored” to the discrimination predicate and thus violated

the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

Summarily dismissing discussion of the Constitutional standard of review to be applied (which had so split the court analytically in the Wygant case), the Supreme Court upheld the promotion quota in a 5-4 decision. The Court noted that given the level of discrimination identified as the predicate, the relief ordered was permissible regardless of which standard was applied.

With the predicate for action satisfactorily resolved, the Court then determined whether race-conscious remedies were appropriate. The majority decision favorably noted the presence of “several factors, including the necessity for relief and the efficacy of alternative remedies, the flexibility and duration of the relief, including the availability of waiver provisions, the relationship of the numerical goals to the relevant labor market, and the impact of the relief on the rights of third parties.”

The Supreme Court found sufficient necessity for the promotion quota to eliminate the “long-term, open and pervasive” discrimination of Blacks. Second, the quota would ensure expeditious compliance with the 1979 and 1981 consent decrees, by inducing the Department to implement a promotion procedure that would not adversely impact Blacks. The Supreme Court also affirmed the District Court’s rejection of lesser alternatives to the one-for-one quota, indicating that immediate compliance with the Court’s integration orders was an overriding concern.

The Court also found the quota *flexible* in that it did not apply if no qualified black candidate was available. Further, the quota only applied when promotions were needed and did not operate if budget considerations necessitated promotion freezes. Moreover, the quota was temporary in that it was scheduled to expire as soon as the Patrol developed non-discriminatory promotion procedures.

The Supreme Court also rejected the Justice Department’s challenge to a quota percentage (50%) in excess of calculated availability (25%). Noting that the goal was 25% and the 50% placement rate was the speed at which the goal was to be achieved, the Court justified the rate given that “promptness in the administration of relief was plainly justified.”

Finally, the Court found that the quota did not trammel the rights of innocent Whites because it was temporary, and did not provide an absolute bar to white advancement. In fact, the quota required selection from among qualified black candidates, against whom qualified white candidates were still free to compete.

In summary, the Court described the one-for-one quota remedy as an “effective, temporary and flexible measure. It applied only if qualified blacks are available, only if the Department has an objective need to make promotions, and only if the Department fails to implement a promotion procedure that does not have an adverse impact on Blacks. The one-for-one requirement is the product of the considered judgment of the District Court which, with its knowledge of the parties and their resources, properly determined that strong measures were required in light of the Department’s long and shameful record of delay and resistance.”

**G. Johnson v. Transportation Agency, Santa Clara Cty., et al., 480 U.S. 616, 43 FEP 411 (1987).**

Johnson, as previously discussed, has emerged as the leading authority for voluntary affirmative action programs consistent with Title VII. Paul E. Johnson was a white male road maintenance worker who brought a Title VII challenge to Santa Clara County's 1980 promotion of fellow road maintenance worker Diane Joyce to road dispatcher in its transportation department. Although Santa Clara County is a public employer limited by the Constitution, Johnson sought relief only under Title VII and not under the Fourteenth Amendment's Equal Protection Clause. Although Ms. Joyce was slightly less qualified than Mr. Johnson, and despite the fact that the County considered Ms. Joyce's sex as a factor in its promotion decision pursuant to the County's voluntary affirmative action plan, the U.S. Supreme Court upheld the County's selection in a 6-3 decision.

Assessing the legality of the County's gender-conscious plan, in light of its decision in the Weber case, the Court found the following facts critical in upholding the affirmative action plan:<sup>95</sup>

1. Consideration of the sex of the applicants for skilled craft jobs (like the road dispatcher position) was justified by the existence of a "manifest imbalance" that reflected underrepresentation of women in traditionally segregated job categories. (Indeed, Santa Clara County had never previously hired a woman into any of its 238 skilled craft positions.)
2. The Agency Plan was flexible and did not mandate hiring to a specific percentage level. Rather, the Agency's Plan emphasized that its long-term percentage availability goals were not to be taken as guides for actual hiring decisions, "but that supervisors were to consider a host of practical factors in seeking to meet affirmative action objectives, including the fact that in some job categories women were not qualified in numbers comparable to their representation in the labor force."<sup>96</sup>

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<sup>95</sup> The reasoning in Johnson, with regard to 1) underrepresentation, 2) flexibility and individualized assessment, 3) no "quotas" and 4) temporality are virtually identical to the reasoning underscoring the (later) rationales in Grutter and Gratz, discussed in detail supra, § I.

<sup>96</sup> The Court noted that the validity of the plan could have been called into question had it simply "calculated imbalances in all categories according to the proportion of women in the area labor pool, and then directed that hiring be governed solely by those figures. This is because analysis of a more specialized labor pool normally is necessary to determine underrepresentation in some positions. If a Plan failed to take distinctions in qualifications into account in providing guidance for actual employment decisions, it would dictate mere blind hiring by the numbers, for it would hold supervisors to 'achievement of a particular percentage of minority employment or membership . . . regardless of circumstances such as economic conditions or the number of qualified minority applicants. . . .'" Johnson, 480 U.S. at 636 citing Sheet Metal Workers v. EEOC, 478 U.S. 421, 495 (1986) (Justice O'Connor concurring in part and dissenting in part).

3. There was no “trammeling.” This was evidenced by the fact that the Plan did not ‘set aside’ positions for women. Also, the selecting official testified that sex was *but one* of numerous factors he took into account. Furthermore, the Agency Plan required women to compete with all other qualified applicants. White males were not automatically excluded from consideration; and all applicants were able to have their qualifications weighed against those of other applicants.
4. The Agency Plan was temporary. The Plan noted repeatedly that it was intended to “attain” a balanced workforce and not to maintain one.

The majority opinion of the Court summed up the Agency Plan approvingly, as follows:

“We therefore hold that the Agency appropriately took into account as one factor the sex of Diane Joyce in determining that she should be promoted to the road dispatcher position. The decision to do so was made pursuant to an affirmative action plan that represents a moderate, flexible, case-by-case approach to effecting a gradual improvement in the representation of minorities and women in the Agency’s workforce. Such a Plan is fully consistent with Title VII, for it embodies the contribution that voluntary employer action can make in eliminating the vestiges of discrimination in the workplace.”

**H. Adarand Constructors, Inc. v. Pena,  
515 U.S. 200 (1995).**

The *Adarand* case was the U.S. Supreme Court’s decision on affirmative action in the context of federal minority business enterprise (“MBE”) set aside programs. In a 5-4 decision, the Court held that all *racial* classifications imposed by the federal government must be analyzed under a “strict scrutiny” standard of review. In essence, *Adarand* extends to the realm of *federal* preference programs the rule the Court had previously set out in City of Richmond v. J.A. Croson, 488 U.S. 469 (1989) with regard to racial classifications imposed by *state* and *local* governments.

Specifically, *Adarand* involved a constitutional challenge to a United States Department of Transportation program specially compensating those parties receiving prime government contracts, where in turn, they hired subcontractors certified as small businesses controlled by “socially and economically disadvantaged” individuals. The federal act governing the program presumed that members of racial and ethnic minority groups were “socially and economically disadvantaged.”

Adarand Constructors, Inc. is a white-owned construction company that lost a subcontract bid on a federally funded highway construction project in the Denver area to a Latino-owned construction company. Adarand had submitted the lowest bid on the subcontracting project and brought a claim under the Fifth Amendment, arguing that the use of racial classifications violated its Equal Protection component. The District Court granted summary judgment in favor of the Department of Transportation. The United States Court of Appeals for the Tenth Circuit affirmed, applying “intermediate scrutiny” pursuant to Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990) and Fullilove v. Klutznick, 448 U.S. 448 (1980).

Justice O' Connor wrote the majority opinion, reversing the lower courts and remanding the case for evaluation of the MBE program under "strict scrutiny" review. The Adarand decision establishes "strict scrutiny" as the proper standard to evaluate all *race-based* preferences made in the federal sector. The decision overruled Metro Broadcasting to the extent that that case had established a lower standard of review for federal programs employing *racial* classifications. The Adarand decision also limited the Court's earlier decision in Fullilove v. Klutznick which had upheld the use of a race-based construction set-aside, holding that federal racial classifications are subject to the less rigorous standard of "intermediate scrutiny".

The Adarand decision thus affirms the approach first established in City of Richmond v. Croson, subjecting *racial* preferences by state and municipal governments to "strict scrutiny" analysis. Like Croson, the Court in Adarand refused to distinguish between benign and invidious use of racial classifications. The uniform approach for all race-based legislation is that reliance on racial classifications by federal, state or local governments is inherently suspect and subject to the highest level of judicial review (i.e., "strict scrutiny").<sup>97</sup>

In Adarand, the majority also reiterated why it was unwilling to distinguish benign and invidious discrimination: "Despite the surface appeal of holding 'benign' racial classifications to a lower standard . . . 'it may not always be clear that a so-called preference is in fact benign.'" 1995 U.S. LEXIS 4037, at 46 (quoting Regents of California v. Bakke, 438 U.S. 265. 298 (1978)).

Strict Scrutiny requires that racial or ethnic classifications (1) serve a "compelling state interest," and (2) are "narrowly tailored" to serve that end. The majority in Adarand sought to dispel the notion that "strict scrutiny" is "strict in theory, but fatal in fact" when it comes to federally imposed racial classifications. 1995 U.S. LEXIS 4037, at 65. The Court did little, however, to provide further guidance as to "strict scrutiny" analyses in the context of federal affirmative action programs. Indeed, the Court refused to rule whether the MBE set aside program at issue was constitutional, remanding the case to the lower court for further evaluation.

Even after Adarand, government agencies should be able to use race-based legislation to remedy past, identifiable discrimination under the Croson continuum. Justice O' Connor's opinion declared that the federal government may have a compelling interest to act on the basis of race to overcome the "persistence of both the practice and lingering effects of racial *discrimination* against minority groups in this county." Id. Only Justices Scalia and Thomas came anywhere near to suggesting an outright ban of *racial* preferences. Seven justices confirmed that the federal government could legally sustain, under certain circumstances, racial or ethnic classifications.

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<sup>97</sup> But see Justice Ginsburg's dissent in Gratz v. Bollinger, suggesting that benign or beneficial preferences are different-in-kind than those imposed by reason of invidious discrimination: "Our jurisprudence ranks race a 'suspect' category, 'not because [race] is inevitably an impermissible classification, but because it is one which usually, to our national shame, has been drawn for the purpose of maintaining racial inequality' . . . But where race is considered 'for the purpose of achieving equality,' no automatic proscription is in order." 2003 U.S. LEXIS 4801, \*101-02 (June 23, 2003) (Ginsburg, J. dissenting) (quoting Norwalk Core v. Norwalk Redevelopment Agency, 395 F.2d 920, 931-32 (2nd Cir. 1968)).

Adarand leaves open the question whether nonremedial actions (such as those encouraging racial and ethnic diversity) would provide a sufficient predicate to meet Fifth Amendment muster (although the recent Grutter decision now clearly allows that it does, though obviously only within the education context). The Adarand dissent, led by Justice Stevens, argues that the majority's silence on the issue *does not* foreclose race-based legislation for such use. Of course, a majority of the Court has still never held that diversity is a compelling interest justifying the use of preferences outside the admissions context.

With respect to the “narrow tailoring” test, the Court referred to previous racial classification cases for guidance. The Croson decision and lower court decisions applying “strict scrutiny” are now the most applicable precedents if one were to predict the constitutionality of federal racial classification programs. The majority did, however, expressly point out that the Tenth Circuit failed to undertake at least two important “narrow tailoring” inquiries: (1) whether there were any race-neutral alternatives; and (2) whether the program was appropriately limited in duration, lasting no longer than the discriminatory effects it was designed to eliminate. Id. at 65.

Adarand involved government contracting, but it is clear from the Court's decision that the “strict scrutiny” standard applies whenever the federal government voluntarily adopts a racial or ethnic classification as a basis for decision making. The majority's opinion is also important because it now homogenizes previously conflicting standards under Fifth and Fourteenth Amendment Equal Protection analyses.

It is nevertheless important to recognize the limited scope of the Adarand decision. The Court did not address the appropriate level of constitutional review for gender-conscious programs. Although most federal Circuit Courts subject gender preferences to so-called “intermediate scrutiny”, the Supreme Court has not definitively resolved the issue (though Hogan and VMI come close to resolving the issue – in favor of the intermediate standard). Furthermore, Adarand has no direct impact on private sector employment decisions and does not disturb racial preferences undertaken pursuant to Title VII's manifest imbalance standard.

## ATTACHMENT 1

### EMPLOYMENT PREFERENCES IN A NUTSHELL

U.S. Supreme Court Case Name	Issue	Claim	Description	Preference Upheld?
1) <u>United Steelworkers of America v. Weber</u>	Hiring	Title VII	Reverse discrimination challenge: selection to craft training program: 1-for-1 white/black quota  <b>The Imbalance:</b> Available = 39% Blacks Incumbency = 1.8% Blacks (20xΔ)	Yes If: a) predicate (discrimination or persistent manifest imbalance) b) voluntary; c) temporary; and d) no trammeling (1-for-1 quota).
2) <u>Local 28 v. EEOC</u>	Hiring	Title VII	Overt, outrageous, contumacious discrimination in hiring (and transfer) into union  <b>The Imbalance:</b> Available = 29.23% Minority Incumbency = 10.8% Minority (3xΔ)	Yes If: a) predicate (persistent or egregious discrimination); and b) relief carefully tailored to violation.
3) <u>Local 93 v. City of Cleveland</u>	Promotion	Title VII	Does § 706(g) of Title VII (remedies ¶) limit use of race conscious remedies embodied in Consent Decree to promote minority sergeants to lieutenants  <b>The Imbalance:</b> Available = 46% (Local Labor Force) Incumbency = 4.3% (10xΔ)	Yes: Voluntary promotion preference in Consent Decree upheld, but whether Title VII permits promotion preferences left open.

U.S. Supreme Court Case Name	Issue	Claim	Description	Preference Upheld?
4) <u>Johnson v. Santa Clara County</u>	Promotion	Title VII	Reverse discrimination challenge: qualified, but slightly less qualified, woman promoted to road dispatcher position where no woman had ever been placed  <b>The Imbalance:</b> Available = 36.4% Incumbency = 0% (inexorable "0")	Yes If: Weber test applied.
5) <u>U.S. v. Paradise</u>	Promotion	EPC 14th Amendment	1-for-1 promotion quota for black state troopers where history of "pervasive, systemic, egregious and obstinate" discrimination  <b>The Imbalance:</b> Available = 25% Incumbency = 0% (inexorable "0")	Yes If: a) predicate of pervasive discrimination b) temporary; and c) flexible.
6) <u>Wygant v. Jackson School Board</u>	Layoff	14th Amendment /EPC	More senior white female school teacher laid off due to CBA preference to maintain racial percentage of teachers  Incumbency = lay-off	No: a) predicate "compelling state purpose" not shown; and b) preference not "narrowly tailored" to predicate (layoff preference is not cure for hiring discrimination).
7) <u>Stotts v. City of Memphis</u>	Layoff	Title VII	More senior white police officers laid off due to court order in violation of CBA "last hired, first fired" layoff requirement  Incumbency = lay-off	No: a) predicate discrimination not shown; and b) layoff of innocent white incumbents not appropriate.