

ON THE LEGAL FRONT



Affirmative Action: What's Going On?

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Over the years, the Supreme Court has issued 13 rulings on various categories of Affirmative Action (or AA). These rulings and categories are depicted in Table 1. This column is about the first two rulings (*Regents v. Bakke*, 1978 & *United Steelworkers v. Weber*, 1979) and, at least for now, the most recent one (*Adarand v. Peña*, 1995). It's also about two predicates for AA: the remedial predicate (to correct injustices) and operational needs (diversity as basis for AA). It's also about false starts. It was generally believed that the Supreme Court would review *Hopwood v. Texas* (1996) and/or *Taxman v. Piscataway* (1996); they never did. They granted certiorari to *Adarand v. Slater* (1999) but changed their minds in midstream.¹ Now we have a promise of a Supreme Court review in *Grutter v. Bollinger* (2002). What's going on?

Table 1.

13 Supreme Court AA Rulings By Category of Affirmative Actions

Voluntary AA	<i>Regents v. Bakke</i> (1978), <i>United Steelworkers v. Weber</i> (1979), <i>Wygant v. Jackson</i> (1986), <i>Johnson v. Transportation</i> (1987)
Court Ordered AA	<i>Local 28 (Sheet Metal Workers) v. EEOC</i> (1986), <i>United States v. Paradise</i> (1987)
Court Approved Consent Decrees	<i>Firefighters v. Stotts</i> (1984), <i>Local 93 (Firefighters) v. Cleveland</i> (1986), <i>Martin v. Wilks</i> (1989)
Government Set Asides	<i>Fullilove v. Klutznick</i> (1980), <i>Metro v. FCC</i> (1990), <i>City of Richmond v. Croson</i> (1989), <i>Adarand v. Peña</i> (1995)

¹ See Don Zink's article in the July, 2002 issue of *TIP*.

The Bakke (1978) & Weber (1979) Rulings

Universities (and other entities) have used *Regents v. Bakke* (1978) to justify diversity as an operational need. Under this concept, diversity is viewed as being essential to the success of the entity. In contrast, *United Steelworkers v. Weber* (1979) (and all subsequent Supreme Court AA rulings) features the remedial predicate or the justification needed to use AA to correct egregious racial or gender discrimination violations, such as the pattern or practice of discrimination.

Regents v. Bakke (1978) was a 14th Amendment and Title VI (not Title VII) challenge to a medical school admissions policy. The “Davis Plan” reserved 16 of 100 seats for minorities. Allan Bakke’s charge was that minorities were eligible for any of 100 seats and he was eligible for any of only 84 seats. Interestingly, no single opinion was agreed to by any five justices. Rather, four justices viewed the Davis Plan as an illegal quota under Title VI and four others believed it satisfied moderate scrutiny under the 14th Amendment. These were obviously opposing viewpoints. Seizing the opportunity, Justice Powell took elements from both pluralities and ruled that (a) the Davis Plan contained an illegal quota, but (b) race is one of many factors that *may* be considered in university admissions. Powell then proposed the “Harvard Plan,” which treats race as one of many factors (or “plusses”) in the selection process.

In *Weber*, Kaiser Aluminum required prior craft experience for skilled jobs. Unfortunately, the unions teaching these crafts had a history of excluding blacks (i.e., a pattern or practice violation). As a result, only 5 of 273 skilled workers (1.83%) were black, relative to 39% availability in the local labor force. In response, Kaiser temporarily reserved 50% of all new training slots for blacks. Brian Weber sued when training slots were awarded to less senior black employees. The Supreme Court supported Kaiser because (a) there was an egregious violation and (b) the plan did not “trammel” the rights of white workers (i.e., no job terminations), it was temporary, and it was designed to eliminate a “manifest racial imbalance,” not maintain racial balance.

Adarand v. Pena (1995)

Adarand v. Pena (1995) established uniformity for 5th and 14th Amendment reverse discrimination race-based claims. Previously, the Supreme Court had struck down a municipal set-aside for Minority Business Enterprises (or MBEs) in *City of Richmond v. Croson* (1989), a 14th Amendment case, but then supported a federal MBE program in *Metro v. FCC* (1990), a 5th Amendment case. The Court invoked strict scrutiny in *Croson* and moderate scrutiny in *Metro*.

In a nutshell, to pass strict scrutiny, there must be (a) a compelling interest (or reason) for an intrusive law or policy (such as a set-aside) and (b) a solution narrowly tailored to that interest. The two prongs for moderate

scrutiny are (a) an important government objective served in (b) a substantially related way. For awhile, the *Croson* and *Metro* rulings meant that non-federal governments were held to strict scrutiny rules, whereas the federal government was held to the lighter moderate scrutiny rules, in race-based cases. The Supreme Court's ruling in *Adarand* changed this.

In *Adarand*, a federal Department of Transportation (or DOT) regulation offered extra money to prime contractors willing to subcontract with Disadvantaged Business Enterprises (or DBEs). Adarand Constructors, a white-owned company, lost out to a DBE even though it submitted the low bid. The 10th Circuit, based on *Metro*, upheld the regulation under moderate scrutiny. However, the Supreme Court reversed its prior ruling in *Metro* and ordered the lower courts to reevaluate the DBE program under strict scrutiny. Critically, the Supreme Court did not decide whether the DBE program passed strict scrutiny, only that *all* governments, federal, state and local, must pass strict scrutiny for race-based laws or policies in 5th or 14th Amendment challenges.

Hopwood v. Texas (1996)

Hopwood, a 14th Amendment case, featured a law school admissions policy that favored minorities. Ordinarily, applicants were assigned to one of three categories based on Texas Index scores: "presumptive admit," "discretionary zone," and "presumptive deny." The index scores were based on college GPA and LSAT performance. Critically, minority applicants were assigned to the two higher categories ("presumptive admit" or "discretionary zone") based on lower index scores than nonminority applicants.

All three 5th Circuit judges hearing this case agreed that the "Texas Plan" violated strict scrutiny. However, two of them (Judges DeMoss & Smith) found the plan wanting on *both* prongs of the strict scrutiny test, that it served no compelling interest, *and* it was not narrowly tailored. The third judge (Wiener) agreed it was not narrowly tailored, but disagreed on compelling interest. Judge Wiener wanted to protect the notion that operational needs may constitute a compelling interest.

More importantly, Judges DeMoss and Smith used the occasion to declare that *Bakke* was bad law. In response, Judge Wiener stated that "if *Bakke* is to be declared dead, the Supreme Court, not a three-judge panel of a circuit court, should make the pronouncement." Many observers thought the Supreme Court would accept this invitation by Judge Wiener to decide if *Bakke* was good law, but it did not.

Hindsight suggests the Supreme Court wanted a better case to decide so important an issue. After all, it was not necessary to overturn *Bakke* to strike down the Texas Plan. The Texas Plan, with its race-norming features, was as illegal under *Bakke* as was the original Davis Plan. Stated differently, Justice Powell could have written his 1978 opinion based just as easily on the Texas Plan as on the Davis Plan. Therefore, had *Hopwood* gone to the Supreme

Court, the issue of whether *Bakke* is good law or bad law could have been dodged in favor of a much simpler, less important ruling.

Taxman v. Piscataway (1996)

In *Taxman*, a layoff decision came down to two teachers, one white (Sharon Taxman) and one black (Debra Williams). Taxman and Williams were deemed equally qualified based on seniority and performance evaluations. Therefore, the school board made an “affirmative action” decision to terminate Taxman, thereby applying the “plus” rule from *Bakke* to job termination. Sharon Taxman pleaded her case via Title VII and won at both the district and circuit court levels. At the higher level, the case was heard by an en banc panel of 13 judges from the 3rd Circuit.

The main ruling in this case was expected. The Supreme Court had twice rejected application of AA to job termination. In *Firefighters v. Stotts* (1984), a Title VII case, the Court, citing *Weber*, ruled that job termination is too *trammeling*. In *Wygant v. Jackson* (1986), a 14th Amendment case, the Court ruled that job termination is too *burdensome* on third parties to be narrowly tailored. Additionally, in *Wygant*, the Supreme Court endorsed Title VII language (on trammeling) for strict scrutiny cases. In short, over the years, that which has been too trammeling has failed the second prong in both the *Weber* test (in Title VII) and the strict scrutiny test (in the 5th and 14th Amendments).

Against this background, it was not surprising that 12 of 13 circuit court judges found that job termination failed prong 2 of the *Weber* test.² However, there was also a prong 1 ruling. Speaking for seven other judges, Judge Mannsman ruled that there was no evidence of discrimination, or even a “manifest imbalance,” since black teachers were overrepresented in comparison to the requisite labor pool. The school board attempted to justify its layoff decision based on racial diversity as an operational need, but Judge Mannsman rejected this reasoning as well, ruling that:

While the benefits flowing from diversity in the educational context are significant indeed, we are constrained to hold...that inasmuch as the Board does not even attempt to show that its affirmative action plan was adopted to remedy past discrimination or as a result of a manifest imbalance in the employment of minorities...the Board has failed to satisfy the first prong of the *Weber* test.

Since Title VII applies to federal, state, and local entities, a Supreme Court endorsement of Mannsman’s ruling (limiting *Weber* to remedial predicates) would negate any proof in 5th or 14th Amendment cases that operational needs may serve compelling interests.

² Actually, the 13th Judge noted it was not necessary to rule on prong 2 (narrow tailoring) because the defendant was already a loser on prong 1 (compelling interest).

Fearing a Supreme Court review of *Taxman*, the Justice Department (or DOJ) wrote an amicus brief urging the Supreme Court to let the 3rd Circuit ruling stand (See Sharf, 1998). The DOJ argued that Sharon Taxman deserved to win and that this case was an improper one to decide the much broader issue of whether Title VII can apply to operational needs. Or, as stated in the brief:

The Court of Appeals erred in holding that Title VII precludes *all* non-remedial race-conscious employment decisions. This case, however, does not provide a suitable vehicle for resolving that extraordinarily broad issue. The Court of Appeals' judgment should be affirmed on the ground that petitioner's layoff decision unnecessarily trammled respondent's interests, and the broader question should be reserved for a case in which its resolution is necessary to the outcome and in which the employer's use of race is more representative of the kind of actions taken by state and local governments and by private employers nationwide.

As noted by Sharf and Wolf (1998), *Taxman* originated in George H. Bush's watch. Early on, Bush's DOJ supported Sharon Taxman. However, by the time the 3rd Circuit got the case, Clinton's DOJ wanted out. By this time, the DOJ had established a stake in supporting operational needs as compelling interests in strict scrutiny cases. Therefore, the DOJ wrote its brief to protect its newer position. Of course, the Supreme Court did not review *Taxman*, and the DOJ is (perhaps) no longer under the influence of an administration friendly to issues such as operational needs.

Adarand v. Slater (2000)

As depicted in Table 2, the Supreme Court's ruling in *Adarand v. Pena* (1995) is affectionately known as Adarand III by the 10th Circuit Court. Previously, the Colorado District Court had upheld the at-issue DOT regulation under moderate scrutiny in Adarand I, as had the 10th Circuit in Adarand II. Of course in Adarand III, the Supreme Court told the lower courts to do it again using strict scrutiny rules.

After Adarand III, the district court ruled that the DBE program was *not* narrowly tailored (Adarand IV). However, by the time the 10th Circuit had its second shot at this case, Adarand Constructors had been granted DBE status. Therefore, the 10th Circuit declared the case moot (Adarand V). Next, the Supreme Court (in Adarand VI) reversed Adarand V, forcing the 10th circuit into a strict scrutiny analysis in Adarand VII (or *Adarand v. Slater*; 2000). By this time the DOT had modified the DBE program, enough so, that the 10th Circuit ruled that the new and improved DBE program was now narrowly tailored. Of course, in Adarand VIII, the Supreme Court was in the process of reviewing Adarand VII, but abandoned the case in midstream.

Table 2.

Chronology of Adarand

Adarand I	1992: District Court supports DBE program under moderate scrutiny
Adarand II	1994: 10th Circuit affirms district court ruling in Adarand I
Adarand III	1995: Supreme Court rules for retrial under strict scrutiny
Adarand IV	1997: District Court rules that DBE program is not narrowly tailored
Adarand V	1999: 10th Circuit reverses Adarand IV and declares the case moot
Adarand VI	2000: Supreme Court forces 10th Circuit to make strict scrutiny analysis
Adarand VII	2000: 10th Circuit rules that revised DBE program passes strict scrutiny
Adarand VIII	2002: Supreme Court decides to review Adarand VII but changes its mind

In the entire history of this case, the compelling interest for the DBE program was never in serious doubt; the DOT had early on amassed substantial evidence of a pattern of discrimination against minorities in the construction industry. However, the original DBE program failed on narrow tailoring in Adarand IV and would likely have failed in Adarand VII but for the critical changes made by the DOT in between.

These changes were based on *Adarand v. Pena* (Adarand III), where the Supreme Court outlined six criteria for narrow tailoring (see Table 3). At the time of Adarand III, the DBE program was already strong on flexibility and waivers (Criterion 3), and the estimated numerical goal (i.e., 10%) was deemed in line with the degree of injustice implied by the compelling interest (Criterion 4). However, the original program would have failed on each of the other criteria.

Table 3.

Six Criteria for Narrow Tailoring From Adarand III

Criterion 1	Race-neutral alternative to set-aside programs
Criterion 2	Limits on duration of the set-aside programs
Criterion 3	Flexibility in the rules & existing waiver provisions
Criterion 4	Numerical proportionality relative to compelling interest
Criterion 5	Least possible burden on third parties
Criterion 6	Avoidance of both over and under inclusion

Prior to *Adarand III*, the DOT assumed, without proof, that race-neutral alternatives (Criterion 1) would be futile. Afterwards, the DOT established race-neutral alternatives, including technical assistance with bonding, loans, and bidding, and special programs for start-ups. The DOT also established a 10.5-year lifetime limit on DBE status (Criterion 2), with the requirement to recertify every 3 years. Although there were obvious burdens on nonDBEs (Criterion 5), any firm, minority or otherwise, could prove social and/or economic disadvantage and become a DBE. Additionally, there were built-in protections against automatic inclusion of any group, minority or otherwise.

Criterion 6 requires some elaboration. To begin with, in *Croson*, the Supreme Court chastised the City of Richmond for overinclusion on two grounds. First, it included as MBEs some groups that did not own firms in the city (e.g., Eskimos & Aleuts). Second, there were no geographic boundaries, meaning any MBE in the country could apply. The first issue was no problem for the DOT because DBE status was not race based. However, the geographic problem was immense because the program could include contracts anywhere in the country. The DOT solved this problem by creating state agency supervision of the certification process.

It's unclear why this case was abandoned. Perhaps the Supreme Court believed that the at-issue DBE program was no longer its original self. However, even if this is true, the prescriptions for the DOT program changes were laid down by the Supreme Court itself in *Croson* (1989) and *Adarand* (1995). It would have been nice to know if these prescriptions were correctly addressed.

Grutter v. Bollinger (2002)

Hopwood and *Taxman* were spoiled because the potentially larger issues in both cases were not central to the ultimate rulings rendered; not so in *Grutter*:

Indeed, the only apparent way the University of Michigan can win this case at the highest level is if the Supreme Court affirms that *Bakke* is good law.

The 6th Circuit ruling in *Grutter* was handed down on May 14, 2002 and was followed by a quick *certiorari* pledge. Interestingly, the early fanfare surrounding the University of Michigan was on its undergraduate admissions policies (see Sharf & Wolf, 1998). Clearly, the focus has graduated to the law school admissions policy. The district court struck down the at-issue “Michigan Plan,” but the 6th Circuit, sitting en banc, reversed in a 5–4 ruling.

What makes this case so compelling is that the Michigan plan was crafted in 1992 with the expressed purpose of passing the *Bakke* test. Indeed, colleges and universities across the country have done this very thing. Because the Michigan Plan so closely mirrors Justice Powell’s vision in *Bakke*, there is no apparent wiggle room for the Supreme Court; *Bakke* is good law or bad law, and we will know (hopefully).

The Michigan Plan used objective variables (GPA & LSAT) combined with “soft” variables (recommendation letters, quality of undergraduate school, leadership and work experience, unique talents, etc.) to determine general qualification for admission. Applicants with lower objective scores could, however, gain admission if (a) there was “good reason to be skeptical of an index score-based prediction” and (b) a given student could “help achieve that diversity which has the potential to enrich everyone’s education and thus make a law school class stronger than the sum of its parts.”

On the issue of diversity, the Michigan Plan sought to enroll a “critical mass of underrepresented minority students.” Aside from the general interest of making the “law school class stronger than the sum of its parts,” other reasons supporting “critical mass” were (a) to ensure that minority students would “not feel isolated or like spokespersons for their race,” and (b) that they would not feel “uncomfortable discussing issues freely based on their personal experiences.” Critically, there was no hard and fast objective rule for admissions in general (as in the Texas Index in *Hopwood*) and no fixed percentage goal for the “critical mass” of minority students.

In short, the Michigan Plan had the same strengths as noted earlier in relation to Justice Powell’s “plus” rules. That is, minority status is one of several “plus” factors, there are no goals or timetables, and the compelling interest served is diversity as an operational need, *not* the remedial predicate.

The district court judge who ruled in this case acknowledged that the university “demonstrated that the educational atmosphere at the law school is improved by the presence of students who represent the greatest possible variety of backgrounds and viewpoints.” In other words, he seemed to acknowledge a strong factual predicate for diversity. However, the judge also ruled that:

Achieving a diverse student body is not a compelling state interest because (a) it was not bound by Justice Powell's conclusion in *Bakke*, and (b) achieving a diverse student body cannot be a compelling state interest because the Supreme Court has suggested that the only such interest is remedying specific instances of discrimination.

In contrast, five of the nine 6th Circuit judges reviewing this case overturned the district court judge stating that:

Justice Powell's opinion is binding on this court...and because *Bakke* remains the law until the Supreme Court instructs otherwise, we reject the district court's conclusion and find that the law school has a compelling interest in achieving a diverse student body.

In short, five of nine members of a 6th Circuit panel invited the Supreme Court to decide once in for all if *Bakke* is still good law, and the Supreme Court has accepted. Now, all we have to do is wait for the outcome (assuming there is one).

Conclusions

In 1996, Malos provided *TIP* readers with a scholarly review of scholarly reviews on affirmative action. In his conclusion section, Malos offers the following criticism of race-based affirmative action programs:

If the goal of affirmative action is to reapportion job and wealth such that the economic position of minorities comes to more closely resemble that historically occupied by nonminorities, then race-based affirmative action programs are both under inclusive (many economically disadvantaged individuals are not minorities) and over inclusive (many minorities are not economically disadvantaged). An affirmative action system of socioeconomic preferences to supplant the current system of race-based preferences therefore makes sense.

This criticism does not apply to court-ordered or court-approved AA because such actions involve actual remedies for egregious violations. However it strikes to the core of voluntary AA plans (or AAPs) and government set-asides.

Malos also notes that in his dissenting opinion in *Adarand III*, Justice Stevens stated that AAPs should focus not on racial issues, but instead, on socioeconomic characteristics shared by members of "disadvantaged classes." Interestingly, Justice O'Connor, who wrote the majority opinion in *Adarand III*, criticized Stevens for changing his vote on federal set-aside programs. In fact, Stevens did vote against the federal set-aside program in *Fullilove v. Klutznick* (1980). However, in *Fullilove*, Stevens went through pains to explain his belief that race-based programs cannot work because of the implications of underinclusion (failure to reach poor nonminorities) and

overinclusion (benefits for minorities who are not disadvantaged). Clearly, the new and improved DBE program (in Adarand VII) satisfies both the criticism raised by Malos and the issues raised by Stevens in *Fullilove* (and reiterated in Adarand III).

A final point to consider is that the “soft” variables in the Michigan Plan include, among other things, economic and social disadvantage (i.e., the same variables central to the DBE program in Adarand VII). Of course, the Michigan Plan mixes race-based issues with socioeconomic and social issues; not so in the DBE program.

In short, the Supreme Court missed a major opportunity in Adarand to satisfy criticisms such as those raised by Malos. Whether the Supreme Court does or does not strike down the Michigan Plan, hopefully it will take the opportunity to address the issues of over- and underinclusion and provide a way for voluntary AAPs and set-asides to continue to function. Because there are so many voluntary AAPs and set-aside programs, the alternative is a further slew of messy lawsuits.

References

- Malos, S. (1996). The commentators speak: Emerging trends in the legal analysis of affirmative action. *The Industrial-Organizational Psychologist*, 34(1), 33–39
- Sharf, J. C. (1998). U.S. Justice Department’s Supreme Court amicus brief in Taxman. *The Industrial-Organizational Psychologist*, 35(3), 34–50.
- Sharf, J. C. & Wolf, P. P. (1998). University of Michigan’s affirmative action case: A good bet for the Supreme Court. *The Industrial-Organizational Psychologist*, 35(4), 85.
- Zink, D. L. (2002). Improvidently granted: The Supreme Court hesitates. *The Industrial-Organizational Psychologist*, 39(4), 96–98.

Case Law Citations

- Adarand v. Peña (1995) 115 S.Ct 2097.
- Adarand v. Slater (CA10 2000) 169 F.3d 1292.
- City of Richmond v. Croson (1989) 488 US 469.
- Firefighters of Local Union #1784 v. Stotts (1984) 467 US 561.
- Fullilove v. Klutznick (1980) 448 US 448.
- Grutter v. Bollinger (CA6 2002) <http://laws.findlaw.com/6th/02a0170p.html>.
- Hopwood v. Texas (CA5 1996) 78F.3d 932.
- Johnson v. Transportation Agency, Santa Clara County, CA. (1987) 480 US 616.
- Local 28 of Sheet Metal Workers v. EEOC (1986) 478 US 421.
- Local #93, Int. Assoc. of Firefighters v. City of Cleveland (1986) 478 US 501.
- Martin v. Wilks (1989) 490 US 755.
- Metro Broadcasting, Inc. v. FCC (1990) 111 L.Ed 2d 445.
- Regents of Univ. of California v. Bakke (1978) 438 US 265.
- Taxman v. Piscataway (CA3 1996) 91 F.3d 1547.
- United States v. Paradise (1987) 480 US 149.
- United Steelworkers etc. v. Weber (1979) 443 US 193.
- Wygant v. Jackson Board of Education (1986) 476 US 267.