The *Adarand* Case: Now Narrowly Tailored to Prevent Monopoly and Competition

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This essay is adapted from the debate series "Controversial Decisions of the 1994-95 Supreme Court Term: *Adarand Constructors, Inc. v. Pena*"

[Justice] Stevens states that [Adarand] was not decided in accordance with controlling precedent but was a "disconcerting lecture about the evils of governmental racial classifications."

There were those among them who were refined and very well educated, and large numbers had good sense and sound morals. A minority report to the Convention of Slaveholders in Baltimore, Maryland, in 1859, stated that free Negroes were monopolizing the labor market in hotels, and that they were serving as barbers, coachmen, draymen, steamboat waiters and sailors. They were reported as causing considerable concern because they lessened the opportunities of the white mechanics to obtain work. It was said that if emancipation continued, others, such as doctors, lawyers, merchants, clerks, newspaper editors and publishers, would begin to feel the effects of free Negro competition.[1]

I. Introduction

Although the paragraph was written over 130 years ago, this viewpoint still exists, perhaps unconsciously, today. There are many reasons affirmative action has been recently subjected to scorn and attack, including a fear of competition and the fear that minorities will monopolize the labor market. To affirmative action opponents, affirmative action is now synonymous with reverse discrimination.

People in society view affirmative action in many different ways. Some view affirmative action in the context of employment and labor distribution as a threat because it is a "taking" of opportunities to which they are "entitled." Others view it as either a handout to the unworthy that has weakened the quality of the "American work ethic," or as an open door that has been closed by a gatekeeper who was either unaware, or aware and intended to keep the gate shut for the good of our society. While some no longer need affirmative action, others never needed it and want it to go away quickly, believing it creates yet another negative stereotype for minorities. Still others think we have never acted affirmatively at all.

Adarand Constructors, Inc. v. Pena,[2] cannot be discussed effectively without examining the jurisprudential history of affirmative action. This essay begins in Part II with a brief examination of the legal history of race relations that led to the creation of affirmative action. This historical review is critical because, if plaintiffs had a social conscience and understood why affirmative action is necessary, fewer, if any, of these lawsuits would get filed.

The dissent in *Adarand* explains the history of our social ills that were the catalyst to affirmative action programs which tried to equalize the distribution of labor and employment in America.

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Part III focuses on the dissent written by Justice John Paul Stevens, who expresses my position in the debate regarding *Adarand*, affirmative action, and the "strict scrutiny" standard of review.

II. Legal History of Race Relations that Led to the Creation of Affirmative Action Programs

It is estimated that $350 billion worth of property and labor has been taken away from African Americans because of racial discrimination and the institution of slavery.[3] I need not engage in a drawn out analysis of slavery and the continuing impact it has on the economic status of African Americans. The Constitution did not have non-freeholders, women, or blacks—all of whom were denied political participation in the new "democracy"[4]—in mind when "We the people" was penned. Slaves and free blacks were subordinate to whites and had few constitutional protections. They encountered travel restrictions, limitations on franchise, bans against interracial marriage, and other discriminatory acts promulgated by legislation.[5]

Even the judiciary stated that slaves were not citizens. In *Dred Scott v. Sandford*,[6] the Supreme Court addressed the issue of whether a slave who traveled to a non-slave state or territory acquired free status. Chief Justice Taney, writing for the Court in this pro-slavery decision, held that because the plaintiff was black, he was not a citizen. Without citizenship status, the Court lacked diversity jurisdiction, thus the plaintiff could not sue in federal court.[7] This decision fueled the slavery debate and was a major impetus for the Civil War.[8]

After the Civil War, racial divisions and open discrimination were imposed *de jure*. The "separate but equal" doctrine excluded blacks from fully competing and participating in all aspects of American society: the labor market, education, public accommodations. In essence, blacks had no social or political autonomy. *Plessy v. Ferguson*[9] upheld the conviction of a black man for sitting in the "white car" of a train in violation of a Louisiana statute. This institutionalized, systematic belief in the subordination, discrimination, and exclusion of blacks would cost the American society dearly and is one of the reasons for affirmative action today.

During the first half of this century, Jim Crow laws furthered subordination and discrimination in the areas of education, employment, and labor. Black schools were underfunded and few employment opportunities existed for blacks, especially in professional jobs.[10] White-owned companies refused to hire blacks. When blacks were hired, they were mistreated by trade unions and federal administrative agencies.

In 1941, however, the government began to recognize the problems discrimination posed to blacks. President Roosevelt issued Executive Order No. 8802, which prohibited employment discrimination in the defense industry and federal government based on race, color, creed, or national origin.[11] This order, however, was merely a statement and lacked guidelines for implementation. In 1954, the Supreme Court finally decided that segregation in schools was "inherently unequal."[12] Despite this decision in *Brown v. Board of Education*,[13] there were few advancements in the employment sector for blacks.[14]

The term "affirmative action" was first used by the government when President Kennedy issued Executive Order No. 10925.[15] All companies doing business with the federal government were required to take positive steps to ensure that employees were hired and treated fairly without respect to race, creed, color, or national origin. The order, however, had little impact because it provided no penalties for those failing to comply.[16]

President Johnson's Executive Order No. 11,246 had more teeth. It reiterated the ideals of the previous order, gave the Secretary of Labor the authority to enforce the order's provisions, and required every administrative agency and executive department to reach the goal of equal employment opportunity through the establishment of an "affirmative action program." One of these programs is now at issue in the *Adarand* case.

III. The *Adarand* Dissent

The historical events leading to the creation of affirmative action programs are discussed in this article from the point of view of African Americans—as opposed to other minority groups—only because so much case law and literature is available. All of the concepts of inequality, insubordination, and discrimination apply to any group of minorities that have suffered in the past from economic, labor, and employment discrimination, aside from the issue of slavery.

Adarand involved a $100,000 contract to repair guardrails along a federal highway. The Department of Transportation, through an affirmative action program, provided cash incentives to prime contractors who subcontracted with minority firms. Although Randy Pech, the white owner of Adarand Constructors, submitted the lowest bid to do the guardrail work, the contract was awarded to a Hispanic-owned firm. Pech filed suit challenging various aspects of the Department of Transportation's affirmative action program.[17]

Contractors compete for work through a bid process. Undoubtedly, Pech felt the affirmative action program that gave bonus incentives for subcontracting with minority-owned firms created unfair competition. Perhaps he could have borrowed the sentiments of the minority report of the 1859 Convention of Slaveholders in Baltimore, Maryland, and given the sentiments a 1990s twist. Replacing the word "Negroes" with "minorities" and "mechanics" with "contractors," Pech's statement may read, "free [Minorities] are monopolizing the labor market . . . . I report they cause considerable concern because they lessen the opportunities of white [contractors] to obtain work."[18]

Pech was not concerned that discrimination against minorities created the affirmative action program he challenges, or that the groups the program assists did not have the opportunity in the past to compete simply because of their race. He feels wrongfully denied in the same way that Hispanics, African Americans, and women felt denied prior to the implementation of affirmative action programs.

Pech lost at both the district court level in 1992 and in the Tenth Circuit in 1994. The Supreme Court, however, with its new lineup of Justices, garnered a five-Justice majority to create a major turnaround in the Court's position on affirmative action programs.[19] The Court departed from recent precedent established in *Metro Broadcasting v. FCC*.[20] In *Metro*, the Court voted five-to-four to uphold an FCC program that gave broadcast licenses on preferential terms to blacks, Hispanics, and other minorities.

Prior to the *Metro* decision, the Court's decision in *Fullilove v. Klutznick*[21] was interpreted to give Congress and federal agencies broad authority to reserve some contracts and grants for minorities and women, not merely to remedy past discrimination but also to obtain more open-ended goals of achieving diversity.

I agree with the *Adarand* dissent written by Justice John Paul Stevens.[22] Stevens states that the case was not decided in accordance with controlling precedent but was a "disconcerting lecture about the evils of governmental racial classifications."[23] Stevens and I believe that the Court had a duty to affirm the Tenth Circuit's decision, which held that an intermediate scrutiny analysis should apply to the facts of this case. Stevens writes,

> A court should be wary of a governmental decision that relies upon a racial classification. 'Because racial characteristics so seldom provide a relevant basis for disparate treatment, and because classifications based on race are potentially so harmful to the entire body politic,' a reviewing court must satisfy itself that the reasons for any such classification are 'clearly identified and unquestionably legitimate.' As the opinions in *Fullilove* demonstrate, substantial agreement on the standard to be applied in deciding difficult cases does not necessarily lead to agreement on how those cases actually should or will be resolved .... The Court's concept of 'consistency' assumes that there is no significant difference between a decision by the majority to impose a special burden on the members of a minority race and a decision by the majority to provide a benefit to certain members of that minority notwithstanding its incidental burden on some members of the majority. There is no moral or constitutional equivalence between a policy that is designed to perpetuate a caste system and one that seeks to eradicate racial subordination. Invidious discrimination is an engine of oppression, subjugating a disfavored group to enhance or maintain the power of the majority. Remedial race-based preferences reflect the opposite impulse: a desire to foster equality in society.[24]

This desire is indeed the only objective affirmative action programs were designed to accomplish. On the issue of consistency, Stevens points out beautiful ironies:

> The consistency that the Court espouses would disregard the difference between a "No Trespassing" sign and a welcome mat. It would treat a Dixiecrat Senator's decision to vote against Thurgood Marshall's confirmation in order to keep an African American off the Supreme Court as on a par with President Johnsons's evaluation of his nominee's race as a positive factor. It would equate a law that made black citizens ineligible for military service with a program aimed at recruiting black soldiers. An attempt by the majority to exclude members of a minority race from a regulated market is fundamentally different from a subsidy that enables a relatively small group of newcomers to enter that market. An interest in "consistency" does not justify treating differences as though they were similarities.[25]

Stevens makes equally sound arguments about invidious and benign discrimination, the constitutionally correct theory of applying different standards to state and federal actions, and the application and implementation of affirmative action programs. He scolds the majority by pointing out that

> Ironically, after all of the time, effort, and paper this Court has expended in differentiating between federal and state affirmative action, the majority today virtually ignores the issue. It provides not a word of direct explanation for its sudden and enormous departure from the reasoning in past cases. Such silence, however, cannot erase the difference between Congress' institutional competence and constitutional authority to overcome historic racial subjugation and the States' lesser power to do so.[26]

This is particularly problematic because the *Adarand* decision makes "strict scrutiny" the standard for *all* programs at the local, state, and federal level. According to Stevens there were good reasons for applying the different levels of scrutiny— rational basis,[27] intermediate, [28] and strict [29]—in different circumstances. He

quotes Justice Scalia's explanation in *Richmond v. J.A. Croson Co.*[30] that a "sound distinction between federal and state (or local) action based on race rests not only upon the substance of the Civil War Amendments, but upon social reality and governmental theory."[31] Stevens concludes by writing,

> My skeptical scrutiny of the Court's opinion leaves me in dissent. The majority's concept of consistency ignores a difference, fundamental to the idea of equal protection, between oppression and assistance. The majority's concept of 'congruence' ignores a difference, fundamental to our constitutional system, between the Federal Government and the States. And the majority's concept of stare decisis ignores the force of binding precedent.[32]

In my opinion, both the dissent and the majority opinions are lectures about racial classifications. The only difference is that Stevens's is not disconcerting.

The result in *Adarand* could have only been reached by this configuration of the Court. Stopping short of a definitive ruling on federal affirmative action, *Adarand* did not declare the program directly at issue unconstitutional. Instead, the Supreme Court remanded the case for application of the strict scrutiny test.

Opponents say the program challenged in *Adarand* cannot withstand strict scrutiny. As recent experience in the federal courts suggests, the strict scrutiny test is usually fatal for race-based programs. Proponents say it can pass muster because, as a narrowly tailored program, the qualifying criteria of the race-conscious subcontracting compensation clause (SCC) program is not limited to members of racial minority groups. Because eligibility is based on economic disadvantage, non-minority-owned businesses also are eligible to participate. The SCC program is not overinclusive because minority businesses that do not satisfy the economic criteria cannot qualify for disadvantaged business enterprise (DBE) status. Furthermore, the SCC program is "appropriately limited in extent and duration" because federal procurement and construction contracting practices are subject to regular "reassessment and reevaluation by Congress."[33] It is now up to the Tenth Circuit to decide whether the program is "narrowly tailored" enough to withstand strict scrutiny. Proponents and opponents alike anxiously await the decision.

Notes

1. CHARLES H. WESLEY & PATRICIA W. ROMERO, INTERNATIONAL LIBRARY OF NEGRO LIFE AND HISTORY, NEGRO AMERICANS IN THE CIVIL WAR, FROM SLAVERY TO CITIZENSHIP 19 (1968).
2. 115 S. Ct. 2097 (1995).
3. Gerald S. Janoff, *Adarand Constructors, Inc. v. Pena: The Supreme Court to Decide the Fate of Affirmative Action*, 69 TUL. L. REV. 997, 1010 (1994).
4. *Id.* at 1003.
5. *Id.* at 1004.
6. 60 U.S. 393 (1856).
7. Janoff, *supra* note 3, at 1005.
8. *Id.*
9. 163 U.S. 537 (1896).
10. Janoff, *supra* note 3, at 1006.
11. *Affirmative Action After Adarand*, 68 Lab. Rel. Rep. (BNA) 5-16 (Supp. Aug. 7, 1995).
12. Brown v. Topeka Bd. of Educ., 349 U.S. 294 (1954).
13. *Id.*
14. Janoff, *supra* note 3, at 1007 (Executive Order No. 10925 was issued on March 6, 1961).
15. *Id.*
16. *Id.*
17. Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2102 (1995).
18. *See* WESLEY & ROMERO, *supra* note 1.
19. David G. Savage, *The Court Mandates 'Strict Scrutiny' for All Official Race-Based Programs*, 81 A.B.A.J. 42 (Aug. 1995).
20. 497 U.S. 547 (1990).
21. 448 U.S. 448 (1980).
22. Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2120 (1995) (joined by Ginsburg, J., Souter, J., and Breyer, J., dissenting).
23. *Id.*
24. *Id.*
25. *Id.* at 2121.
26. *Id.* at 2125.
27. When rational basis scrutiny is applied, the Court will uphold the statute unless it finds that there is no rational relationship between the means used and a legitimate legislative objective. Courts apply this test with deference to the decisionmaker.
28. If intermediate scrutiny is applied, the Court will examine whether the disputed scheme has a substantial relationship to an important governmental interest.
29. Under the strict scrutiny test, the Court will determine whether the challenged provision is narrowly tailored to achieve a compelling governmental interest.
30. 488 U.S. 469 (1989).
31. Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2124 (1995).
32. *Id.* at 2131.

33. Adarand Constructors, Inc. v. Pena, 16 F.3d 1537, 1547 (10th Cir. 1994) (quoting Fullilove v. Klutznick, 448 U.S. 448, 489(1980)).