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Surviving Strict Scrutiny: Upholding Federal Affirmative Action After *Adarand Constructors, Inc. v. Pena*

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The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it.[1]

Justice Sandra Day O'Connor

INTRODUCTION

On June 12, 1995, in *Adarand Constructors, Inc. v. Pena*,[2] a majority of the Supreme Court redefined the constitutional standard of review for federal affirmative action programs.[3] The

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1. Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2117 (1995).

2. *Id.* at 2097.

3. The term "affirmative action" was first used by President Kennedy in 1961 in Executive Order No. 10925 which required federal contractors to take "affirmative action" to "promote and ensure equal opportunity for all qualified persons, without regard to race." Exec. Order No. 10,925, 3 C.F.R. 448, 450 (1961). Affirmative action was given an expanded meaning in 1965 by President Johnson through Executive Order 11246. Exec. Order No. 11,246, 3 C.F.R. 339, 340 (1964-1965), *reprinted in* 42 U.S.C. § 2000e (1994). This mandate required that all government contracts include a provision which stated that:

> The contractor will not discriminate against any employee or applicant for employment because of race, creed, color, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin.

The difference between the two executive orders was that President Johnson's *required* employers to use race in its employment decisionmaking process. *See* Daniel A. Farber, *The Outmoded Debate over Affirmative Action*, 82 CAL. L. REV. 893 (1994); *see also* Hugh Davis Graham, *The Origins of Affirmative Action: Civil Rights and the Regulatory State*, 523 ANNALS AM. ACAD. POL. & SOC. SCI. 50, 53-57 (1992).

For purposes of this Comment, the term affirmative action means all programs and policies that employ racial classifications aimed at increasing minority participation and representation in all aspects of American life—including education, employment, housing, and government contracting. While affirmative action additionally seeks to increase participation by women as well, this Comment is limited to racial, and not gender, clas-

Court's redetermination of the issue concludes a jurisprudential debate that has lasted almost two decades.[4] The decision reflects the recent political debate over, and the backlash directed towards, affirmative action programs.[5] These programs are de-

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sifications. For a discussion of gender and equal protection analysis see George P. Choundas, *Neither Equal Nor Protected: The Invisible Law of Equal Protection, The Legal Invisibility of its Gender-Based Victims*, 44 EMORY L.J. 1069 (1995); Sandra L. Rierson, *Race and Gender Discrimination: A Historical Case For Equal Treatment Under the Fourteenth Amendment*, 1 DUKE J. GEN. L. POL'Y 89 (1994); Kevin A. Ashley, *When Worlds Collide: Peremptory Challenges, Gender, and Intermediate Scrutiny in* J.E.B. v. Alabama, 46 FLA. L. REV. 261, 271-82 (1994); Holly Dyer, *Gender-Based Affirmative Action: Where Does it Fit in the Tiered Scheme of Equal Protection Scrutiny?*, 41 KAN. L. REV. 591 (1993).

4. The Court first addressed the constitutionality of racial minority preferences in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). In *Bakke*, the Court produced the first of several plurality opinions concerning affirmative action programs. *Id.* In the following twelve years, the Court revisited the issue in *Fullilove v. Klutznick*, 448 U.S. 448 (1980), *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), *United States v. Paradise*, 480 U.S. 149 (1987), *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), and *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990). The various opinions reflect the debate over the proper standard of constitutional review for affirmative action programs that use race as a basis for decisionmaking. The dividing question was which level of equal protection review should be applied to determine the constitutionality of these programs. Essentially, in equal protection jurisprudence there are three levels of judicial scrutiny - "rational basis" review, "intermediate scrutiny", and "strict scrutiny." GERALD GUNTHER, CONSTITUTIONAL LAW 601-08 (12th ed. 1991). Each test involves a different amount of deference given to the law maker. *Id.* at 601. With respect to benign racial classifications, the debate has been whether "strict scrutiny" or "intermediate scrutiny" should be applied when determining the constitutionality of such programs. Strict scrutiny requires that the programs be narrowly tailored to serve a significant governmental interest. *See, e.g.*, *Wygant*, 476 U.S. at 274; *Croson*, 488 U.S. at 494. Intermediate scrutiny requires that the programs only be substantially related to serve an important governmental objective. *See, e.g.*, *Fullilove*, 448 U.S. at 519 (Marshall, J., concurring); *Metro Broadcasting*, 497 U.S. at 565. While the debate may seem to be one of semantics, the standards produce very different results. Programs that are subjected to intermediate scrutiny have a better chance of being upheld because the judicial inquiry into them is not as probative. Strict scrutiny, on the other hand, can often mean the death of whatever legislative action is being examined. *See* GUNTHER, *supra*, at 608-819; *see also infra* notes 182-86 and accompanying text. *But see infra* note 199.

5. This Comment does not seek to analyze the affirmative action debate. Much has already been written on this issue. For a discussion of the debate see Gerald S. Janoff, Comment, Adarand Constructors, Inc. v. Pena: *The Supreme Court to Decide the Fate of Affirmative Action*, 69 TUL. L. REV. 997, 1009-16 (1995); John E. Morrison, *Colorblindness, Individuality, and Merit: An Analysis of the Rhetoric Against Affirmative Action*, 79 IOWA L. REV. 313 (1994); RACIAL PREFERENCE AND RACIAL JUSTICE: THE NEW AFFIRMATIVE ACTION CONTROVERSY (Russell Nieli ed., 1991) [hereinafter RACIAL PREFERENCE]; JOHN C. LIVINGSTON, FAIR GAME? INEQUALITY AND AFFIRMATIVE ACTION (1979); John H. Ely, *The Constitutionality of Reverse Discrimination*, 41 U. CHI. L. REV. 723, 727-41 (1974); Martin H. Redish, *Preferential Law School Admissions and the Equal Protection Clause: An Analysis of the Competing Arguments*, 22 UCLA L. REV. 343 (1974).

In addition, many commentators are evaluating the economic, social, ethical, and

signed to increase minority participation and representation in employment, housing, education, and various nation-wide industries, such as federal contracting and communications.

In *Adarand*, the Supreme Court addressed the constitutionality of one such program. The Small Business Act[6] employs racial classifications aimed at increasing the participation of Minority Business Enterprises (MBEs) and Disadvantaged Business Enterprises (DBEs).[7] The Court determined that all af-

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psychological effects of such programs. *See, e.g.*, Russell J. Summers, *Attitudes Toward Different Methods of Affirmative Action*, 25 J. APPLIED SOC. PYSCHOL. 1090, 1090-1104 (1995) [hereinafter Summers, *Attitudes*]; Rupert W. Nacoste & Beth Hummels, *Affirmative Action and the Behavior of Decision Makers*, 24 J. APPLIED SOC. PSYCHOL. 595, 595-613 (1994); David A. Kravitz & Judith Platania, *Attitudes and Beliefs About Affirmative Action: Effects of Target and of Respondent Sex and Ethnicity*, 78 J. APPLIED PSYCHOL. 928, 928-38 (1993); Madeline E. Heilman et al., *Presumed Incompetent? Stigmatization and Affirmative Action Efforts*, 77 J. APPLIED PSYCHOL. 536, 536-44 (1992); Larry W. Taylor et al., *Some New Historical Evidence on the Impact of Affirmative Action: Detroit, 1972*, 21 REV. BLACK POL. ECON. 81, 81-98 (1992); Shelly J. Lundberg, *The Enforcement of Equal Opportunity Laws Under Imperfect Information: Affirmative Action and Alternatives*, 106 Q. J. ECON. 309, 309-26 (1991); Russell J. Summers, *The Influence of Affirmative Action on Perceptions of a Beneficiary's Qualifications*, 21 J. APPLIED SOC. PYSCHOL. 1265, 1265-76 (1991)[hereinafter Summers, *Influence*]; Michael Levin, *Implications of Race and Sex Differences for Compensatory Affirmative Action and the Concept of Discrimination*, 15 J. SOC. POL. ECON. STUD. 175, 175-212 (1990).

Since its inception, affirmative action has been a highly controversial issue. In recent years, however, it has received considerable political attention. United States Senator Phil Gramm and California Governor Pete Wilson have led attacks on affirmative action. Mary Lenz, *Handling of Hot Issue Burns Sibley*, HOUS. POST, Mar. 19, 1995, at A37. In addition, anti-affirmative action initiatives have been introduced in both Houses of Congress. *See, e.g.*, Civil Rights Restoration Act of 1995, S. 26, 104th Cong., 1st Sess. (1995); Equal Opportunity Act of 1995, S. 1085, H.R. 2128, 104th Cong., 1st Sess. (1995) (both of which would prohibit the federal government from utilizing any racial or gender classifications in employment or contracting). Furthermore, in the November 1996 election, citizens of California expressed their support at the ballot box for a proposed amendment to the California Constitution, entitled the California Civil Rights Initiative (Proposition 209). Dave Lesher, *Battle Over Prop. 209 Moves to the Courts*, L.A. TIMES, Nov. 7, 1996, at A1. Proposition 209 would prohibit all California state and local governments from "grant[ing] 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." Bill Jones, Secretary of State, Proposition 209, in California Ballot Pamphlet, General Election, Nov. 5, 1996. *See* Vikram D. Amar & Evan H. Caminker, *Equal Protection, Unequal Political Burdens, and the CCRI*, 23 HASTINGS CONST. L.Q. 1019 (1996); Erwin Chereminsky, *The Impact of the Proposed California Civil Rights Initiative*, 23 HASTINGS CONST. L.Q. 999 (1996); Neil Gotanda, *Failure of the Color-Blind Vision: Race, Ethnicity, and the California Civil Rights Initiative*, 23 HASTINGS CONST. L.Q. 1135 (1996) for an analysis of the California Civil Rights Initiative and its possible effects.

6. 15 U.S.C. §§ 631-656 (1994).

7. For a detailed analysis of the Small Business Act see *infra* notes 92-97 and accompanying text. *See also* Major Thomas J. Hasty, III, *Minority Business Enterprise De-*

firmative action programs, including the Small Business Act, must be reviewed under strict scrutiny analysis.[8] Justice O'Connor, writing for the majority, stated that such programs, whether enacted by a municipality, state, or Congress, must be "narrowly tailored measures that further compelling governmental interests."[9]

The application of the strict scrutiny standard to affirmative action programs seems to strike fear in the hearts of those who fully support such programs. Since the *Adarand* decision, commentators have predicted an end to affirmative action programs which utilize racial classifications designed to benefit minorities.[10] The label "strict scrutiny" has been characterized as "strict in theory, but fatal in fact."[11] Quite simply, this means that most legislative action subjected to this highest standard of review is usually struck down. However, such a panic reaction to the Court's decision in *Adarand* ignores the possibility of upholding affirmative action programs using the language of the Majority and the cases upon which it relies to derive at its conclusion.[12] In fact, strict scrutiny of Congressional race-based relief will not be "fatal in fact" because of the long established recognition that Congress should be afforded more deference than state and local governments in enacting such programs.[13]

This note will focus on the decision in *Adarand* and discuss the strict scrutiny standard the Court applied to federal affirmative action programs.[14] Part I will briefly examine the history of

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velopment and the Small Business Administration's 8(A) Program: Past, Present, and (Is There a) Future?, 145 MIL. L. REV. 1 (1994).

8. *Adarand*, 115 S. Ct. at 2113.

9. *Id.*

10. *See* E'Vinski Davis, Adarand Constructors, Inc. v. Pena: *Turning Back the Clock on Minority Set-Asides*, 23 S.U. L. REV. 79, 91 (1995) ("[T]he *Adarand* decision both heightened the level of equal protection scrutiny afforded to federal affirmative action programs and placed a legal damper on the future of minority set-asides."); Kenneth A. Martin et al., *Is This the End of Federal Minority Contracting?*, 42 FED. LAW. 44, 48 (1995) ("Federal Minority contracting preference programs stand on the brink of extinction."). *See also Adarand*, 115 S. Ct. at 2120 n.1 (Stevens, J., dissenting) ("[Strict scrutiny] has usually been understood to spell the death of any governmental action to which a court may apply it.").

11. *Fullilove*, 448 U.S. at 519 (Marshall, J., concurring).

12. *See infra* Part III.

13. *See infra* Part III.

14. The purpose of this Comment is not to criticize or applaud the *Adarand* decision. This Comment instead attempts to analyze the decision as it has been written and discuss the ways in which it can be used to uphold federal affirmative action programs in light of the strict scrutiny standard. For a discussion of how contemporary social science studies, which investigate the nature and psychology of racial biases, can be used to justify and design affirmative action programs, see Donald L. Beschle, *"You've Got to*

the Supreme Court's equal protection analysis of race-conscious programs.[15] Part II will analyze the *Adarand* decision, and include a discussion of the concurring and dissenting opinions.[16] Part III will conclude the discussion by arguing that the strict scrutiny standard, as applied by the Court at the federal level, does not mean the death of affirmative action measures enacted by Congress.[17]

I. HISTORICAL OVERVIEW OF AFFIRMATIVE ACTION AND THE SUPREME COURT

The *Adarand* case does not present an issue of first impression for the Supreme Court. Since 1978, the Court has heard several cases concerning the constitutionality of affirmative action programs.[18] The cases were brought by non-minorities who claimed that race-conscious remedies violated their equal protection rights afforded by the Fifth[19] and Fourteenth[20] Amendments

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be Carefully Taught": Justifying Affirmative Action After Croson *and* Adarand, 74 N.C. L. REV. 1141 (1996). For an applause of the *Adarand* decision see Brian C. Eades, *The United States Supreme Court Goes Color-Blind:* Adarand Constructors, Inc. v. Pena, 29 CREIGHTON L. REV. 771, 779-809 (1996) (concluding that the decision recognizes correctly that affirmative action and equal protection are inconsistent); Stephen C. Minnich, Comment, Adarand Constructors, Inc. v. Pena—*A Strict Scrutiny of Affirmative Action*, 46 CASE W. RES. L. REV. 279 (1995) (stating that *Adarand* refreshingly consolidates equal protection jurisprudence concerning racial classifications). For a criticism of the Court's holding see Davis, *supra* note 10 (arguing that the Court should have adhered to precedent and not overruled *Metro Broadcasting*); *The Supreme Court, 1995 Term—Leading Cases*, 109 HARV. L. REV. 111, 151 (1995) (concluding that the Court in *Adarand* "imposed an artificial symmetry on equal protection jurisprudence by using . . . abstract concepts . . . , while it disregarded the text of the Fourteenth Amendment, the historical relationship between race and federalism, and current social and political realities.") [hereinafter *Leading Cases*]; *see also* Frank S. Ravitch, *Creating Chaos in the Name of Consistency: Affirmative Action and the Odd Legacy of* Adarand Constructors, Inc. v. Pena, 101 DICK. L. REV. ___ (1997).

15. *See infra* Part I.

16. *See infra* Part II.

17. *See infra* Part III.

18. *See, e.g.*, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978); Fullilove v. Klutznick, 448 U.S. 448 (1980); Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990).

19. The Fifth Amendment of the Constitution provides in relevant part that: "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. V. See Kenneth L. Karst, *The Fifth Amendment's Guarantee of Equal Protection*, 55 N.C. L. REV. 541 (1977), for a discussion of the equal protection component of the Fifth Amendment.

20. The Fourteenth Amendment to the Constitution states that: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST.

of the United States Constitution.[21] The various decisions produced by the Court in this arena reflect the difficulty in determining the constitutional validity of affirmative action programs that utilize racial classifications.[22]

The jurisprudential debate has revolved around determining the proper standard of review for such programs. While the Court has agreed that some heightened level of review was required, it could not decide whether intermediate or strict scrutiny applied.[23] In order to understand the background and implications of the *Adarand* decision, it is necessary to understand the Court's past decisions and prior case law concerning the constitutionality of invidious and benign racial classifications.

A. *Invidious Classifications and Equal Protection Under the Fifth Amendment*

In 1943, the Supreme Court addressed a Fifth Amendment equal protection challenge to a governmental racial classification for the first time. In *Hirabayashi v. United States*,[24] the Court considered the constitutionality of a curfew applicable only to those citizens of Japanese ancestry.[25] In upholding the curfew, the Court found that the Fifth Amendment "contain[ed] no equal protection clause and it restrain[ed] only such discriminatory legislation by Congress as amounts to a denial of due process."[26]

Similarly, in *Korematsu v. United States*,[27] the Supreme Court considered the constitutionality of a wartime measure which completely excluded persons of Japanese ancestry from particular geographical areas. The decision noted that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect,"[28] and courts must subject such restric-

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amend. XIV, § 1.

21. For purposes of this Comment, "non-minorities" refers to those individuals who did not qualify under affirmative action programs intended to benefit racial minorities and women. Usually this means white males—the petitioners in *Adarand*, *Metro Broadcasting*, *Croson*, *Wygant*, *Paradise*, *Fullilove*, and *Bakke* were all white males or companies owned and controlled by white males.

22. *See supra* text accompanying note 4.

23. For a definition of intermediate and strict scrutiny standards see discussion *supra* note 4.

24. 320 U.S. 81 (1943).

25. *Id.* at 83.

26. *Id.* at 100 (citing Detroit Bank v. United States, 317 U.S. 329, 337-38 (1943)).

27. 323 U.S. 214 (1944).

28. *Id.* at 216.

tions to rigorous analysis.[29] However, the Court went on to hold that the exclusionary provision was within the federal government's power given the perceived wartime threat.[30]

By 1954, the Court began to question whether any difference existed between Congressional and state power to adopt discriminatory race-based measures. In *Bolling v. Sharpe*,[31] the Court considered a Fifth Amendment challenge to the District of Columbia's school desegregation policies.[32] The Court noted that "'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of the law'. . . ."[33] However, relying on its decision in *Brown v. Board of Education*,[34] the Court found that since states were prohibited from operating segregated schools, the Constitution required that the same hold true for the Federal Government.[35]

From 1975 to 1987, the Court's decisions continued to indicate a trend towards similar analyses of equal protection claims under the Fifth and Fourteenth Amendments. The Supreme Court was ensuring that states and the federal government be similarly restricted from violating the equal protection rights of minorities. This is evidenced by the fact that most of the cases involved challenges to racial classifications which burdened minorities.[36] Thus, the Court required that minorities be protected from invidious discrimination by any governmental actor—whether it be federal, state or local. However, it wasn't until

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29. *Id.*

30. *Id.* at 218-19. The decision in *Korematsu*, and the race-based exclusionary provision it upheld, have been highly criticized by many commentators for their obvious invidious discriminatory effects. *See, e.g.*, Eugene V. Rostow, *The Japanese American Cases—A Disaster*, 54 YALE L.J. 489 (1945); PETER H. IRONS, JUSTICE AT WAR (1983). The decision was vacated in 1984 in *Korematsu v. United States*, 584 F. Supp. 1406 (N.D. Cal. 1984), but it continues to be cited for its propositions concerning the strict scrutiny standard and Congress' power during wartime. GUNTHER, *supra* note 4, at 639 n.5.

31. 347 U.S. 497 (1954).

32. *Id.* at 498.

33. *Id.* at 499.

34. 347 U.S. 483 (1954).

35. *Bolling*, 347 U.S. at 500. The Court stated that because "the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government." *Id.*

36. *See, e.g.*, United States v. Paradise, 480 U.S. 149, 166 n.16 (1987) (Brennan, J., plurality) ("the reach of the equal protection guarantee of the Fifth Amendment is coextensive with that of the Fourteenth"); Buckley v. Valeo, 424 U.S. 1, 93 (1976) ("Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment."); Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975) ("This Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment.").

1978 that the Court addressed the issue of whether race-based remedial measures, intended to benefit minorities, should be held to the same standard of review.

B. *The Court's Inability to Adopt a Standard of Review for Affirmative Action*

From 1978 to 1989, the Court addressed the constitutionality of race-conscious programs designed to benefit minorities. In *Regents of the University of California v. Bakke*,[37] the Court examined whether a state-run medical school's admission policy of reserving a specific number of seats for minorities violated the equal protection rights of non-minorities.[38] In *Bakke*, a white medical school applicant challenged the admissions policy after he was twice denied admission to the school, even though his qualifications outranked many of those admitted in the respective minority seats.[39] Although the Court did not produce a majority opinion concerning the proper standard of constitutional review, it did find that the admissions plan could not be upheld.[40] Justice Powell, in his plurality opinion, stated that "the guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color."[41] A majority of the justices, including Powell, did find that diversity of a student body in higher education was a constitutionally permissible purpose.[42] The Majority, however, could not agree on a proper standard of review.[43]

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37. 438 U.S. 265 (1978).

38. *Id.*

39. *Id.* at 276-77.

40. *Id.* at 319-20. For a discussion of the *Bakke* decision, see Adolphus Levi Williams, Jr., *A Critical Analysis of the* Bakke *Case*, 16 S.U. L. REV. 129 (1989); *see also* Stanley Mosk, *For* Bakke, *in* RACIAL PREFERENCE, *supra* note 5, at 161, 161-66 (arguing that strict scrutiny is the appropriate standard of review for the admissions program); Richard B. Sobol, *Against* Bakke, *in* RACIAL PREFERENCE, *supra* note 5, at 169, 169-74 (stating that the lower court's characterization of affirmative action programs as "inherently suspect" was inappropriate considering their benign purposes); Ronald Dworkin, *Are Quotas Unfair?*, *in* RACIAL PREFERENCE, *supra* note 5, at 177, 177-90 (defending the special admissions plan at issue in *Bakke*).

41. *Bakke*, 438 U.S. at 289-90.

42. *Id.* at 312. "The freedom of a university to make its own judgments as to education includes the selection of its student body . . . . The atmosphere of 'speculation, experiment, and creation' - so essential to the quality of higher education - is widely believed to be promoted by a diverse student body." *Id.* at 326 (Brennan, White, Marshall, and Blackmun, JJ., concurring in judgment in part and dissenting).

43. Four Justices agreed on an intermediate standard of review (Brennan, White, Marshall, and Blackmun, J.J., concurring in judgment in part and dissenting in part), while four others thought the case should be decided on statutory grounds (Stevens, J.,

Two years later the Court addressed the constitutionality of a minority set-aside program in *Fullilove v. Klutznick*.[44] The Court examined the Public Works Employment Act of 1977,[45] which provided for the distribution of federal funds to state and local governments for public works projects.[46] The statute required that such grants only be distributed if there were assurances that at least 10 percent of the dollar value of the contract would be subcontracted to certified MBEs.[47] Once again, as in *Bakke*, there was no majority opinion for the Court.

Then Chief Justice Burger, joined by Justices White and Powell, found that the program would satisfy either strict or intermediate scrutiny.[48] Stressing Congress' broad remedial powers under Section Five of the Fourteenth Amendment,[49] Chief Justice Burger found that Congress was empowered to identify and remedy past discrimination through MBE set-aside programs.[50] However, the Court stated that "[a]ny preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees."[51] Moreover, in upholding the program, the Court found that it was strictly remedial in nature, imposed a relatively light burden on non-minorities, and included a waiver provision when no MBEs were available.[52]

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joined by Burger, C.J., Stewart, and Rehnquist J.J., concurring in judgment in part and dissenting in part).

44. 448 U.S. 448 (1980).

45. 42 U.S.C. §§ 6701-6736 (1994).

46. *Fullilove*, 448 U.S. at 453. For an in-depth analysis of the facts and implications of *Fullilove*, see Drew S. Days, Fullilove, 96 YALE L.J. 453 (1987); John E. Richards, *Equal Protection and Racial Quotas: Where Does* Fullilove v. Klutznick *Leave Us?*, 33 BAYLOR L. REV. 601 (1981).

47. *Fullilove*, 448 U.S. at 454 (citing 42 U.S.C. § 6705(f)(2) (1988)).

48. *Id.* at 492.

49. Section Five of the Fourteenth Amendment states "Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5.

50. *Fullilove*, 448 U.S. at 472-73. Chief Justice Burger stated:

> A program that employs racial or ethnic criteria, even in a remedial context, calls for close examination; yet we are bound to approach our task with appropriate deference to Congress, a co-equal branch charged by the Constitution with the power to "provide for the . . . general Welfare of the United States" and "to enforce, by appropriate legislation," the equal protection guarantees of the Fourteenth Amendment.

Id. at 472. (quoting U.S. CONST. art. I, § 8, cl. 1 and U.S. CONST. amend. XIV, § 5.).

51. *Fullilove*, 448 U.S. at 491.

52. *Id.* at 487-88. Thus, the Court determined that, because of these qualities, the program withstood the "sufficiently" or "narrowly tailored" leg of either the intermediate or strict scrutiny standard. *Id.*

The *Fullilove* Court directly upheld Congress' power to use race-conscious remedial measures to eradicate the effects of racial discrimination and to prevent the recurrence of that discrimination.[53] However, it could not decide on an appropriate standard of review.[54] Justice Powell, in a concurring opinion, reaffirmed that all racial classifications should be held to the strict scrutiny standard, thus reiterating his position taken in *Bakke*.[55] Applying the standard in a more lenient fashion, he explained that the test's compelling interest leg could be satisfied if the appropriate governmental authority found instances of illegal discrimination.[56] Supporting this position, Justice Powell stated that "[g]overnment does have a legitimate interest in ameliorating the disabling effects of identified discrimination."[57] Furthermore, he asserted that these findings could be gathered from previous enactments of legislation and by an examination of "the total contemporary record of congressional action dealing with the problems of racial discrimination against minority business enterprises."[58]

In 1986, the Court was provided with another opportunity to decide the appropriate standard of review for determining the constitutionality of affirmative action programs. In *Wygant v. Jackson Board of Education*,[59] the Court was called on to determine the constitutional validity of a race-based lay-off provision, which gave preferential treatment to minorities.[60] Once again, it could not reach a consensus on the applicable standard of review.

Writing for the plurality, Justice Powell concluded that in order for the race based program to pass constitutional muster,

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53. *Id.* at 490.

54. *Id.* at 517-22. Justices Marshall's concurring opinion, joined by Justices Brennan and Blackmun, stated that intermediate scrutiny should be the appropriate standard of review for affirmative action programs. *Id.*

55. *Id.* at 496 (Powell, J., concurring).

56. *Id.* at 498-99, 502. "[T]he National Legislature is competent to find constitutional and statutory violations. [It] properly may - and indeed must - address directly the problems of discrimination in our society." *Id.* at 499.

57. *Id.* at 497.

58. *Id.* at 503.

59. 476 U.S. 267 (1986).

60. For an in-depth analysis of the facts, holdings, and effect of *Wygant*, see Richard J. Cairns, Wygant v. Jackson Bd. of Educ.—*A Question of Layoffs*, 8 PACE L. REV. 159 (1988); Joanne C. Ferriot, Wygant v. Jackson Board of Education: *Some More Equally Protected Than Others*, 32 LOY. L. REV. 1045 (1987); Deborah E. Klein, Wygant v. Jackson Board of Education: *Affirmative Action and the Innocent Party*, 18 U. TOL. L. REV. 519 (1987); Maureen T. Shine, *Reverse Discrimination*: Wygant v. Jackson Board of Education, *Affirmative Action Versus Seniority Rights*, 55 UMKC L. REV. 698 (1987).

it would have to withstand strict, and not intermediate scrutiny, analysis.[61] Accordingly, the proper two part inquiry was "whether the layoff provision [wa]s supported by a compelling state purpose and whether the means chosen to accomplish that purpose [was] narrowly tailored."[62] Furthermore, the plurality asserted that adequate evidence of past discrimination needed to be offered to justify any program's adoption.[63] Moreover, the Court determined that "[s]ocietal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy."[64] Even though *Wygant* did not produce a majority opinion, it marked the beginning of the Court's adoption of strict scrutiny analysis of affirmative action programs.[65]

C. *The Court Finally Produces Majority Opinions Concerning Affirmative Action*

The Supreme Court had yet to produce a majority opinion outlining the appropriate constitutional standard of review for affirmative action programs. Finally, in 1989, the Court in *City of Richmond v. J.A. Croson Co.*,[66] explicitly stated that the strict scrutiny standard applied to state and local affirmative action programs.[67] The Court reviewed a Virginia MBE utilization ordinance which required all non-minority owned prime contractors who were awarded city contracts to subcontract a minimum of 30 percent of the dollar amount of the contract to one or more MBEs.[68] The Court's Majority concluded that Fourteenth Amendment challenges to state and local set-aside programs need to be analyzed using the highest judicial scrutiny. Reaf-

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61. *Wygant*, 476 U.S. at 273.

62. *Id.* at 274.

63. *Id.* at 277. The Court stated that a "public employer . . . must ensure that, before it embarks on an affirmative-action program . . . it must have sufficient evidence to justify the conclusion that there has been prior discrimination." *Id.*

64. *Id.* at 276.

65. It should be noted that at issue in *Wygant* was a local school board's collective bargaining agreement, which included a remedial racial classification. Thus, the Court was beginning to adopt strict scrutiny as the appropriate standard of constitutional review for state and local affirmative action, and not Congressionally mandated programs. In essence, *Wygant* laid the groundwork for the Court's decision in *Croson*. *See infra* notes 66-70 and accompanying text.

66. 488 U.S. 469 (1989).

67. *Id.* at 494. For a thorough analysis of the facts and implications of the *Croson* decision, see Nicole Duncan, Croson *Revisited: A Legacy of Uncertainty in the Application of Strict Scrutiny*, 26 COLUM. HUM. RTS. L. REV. 679 (1995); David P. Stoelting, Note, 58 U. CIN. L. REV. 1097 (1990); Michel Rosenfeld, *Decoding* Richmond: *Affirmative Action and the Elusive Meaning of Constitutional Equality*, 87 MICH. L. REV. 1729 (1989).

68. *Croson*, 488 U.S. at 477.

firming its plurality decision in *Wygant*, the Court stated that the "purpose of strict scrutiny is to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant the use of a highly suspect tool."[69] Furthermore, the Court concluded that Richmond's set-aside did not meet either prong of the strict scrutiny standard, and thereby invalidated the set-aside law as unconstitutional.[70]

Croson marked the first time a majority of the Court decided strict scrutiny was the appropriate standard of review for state and local affirmative action programs.[71] The Court expressly limited its decision to Fourteenth Amendment challenges to state race-conscious remedial actions.[72] The Court in *Croson* distinguished *Fullilove* on the basis that Congressional power pursuant to Section Five of the Fourteenth Amendment was not held by state or local governments.[73] Thus, states were not afforded the same discretion as Congress to redress the effects of societal discrimination.[74]

In 1990, the Court again addressed the constitutionality of a federal MBE set-aside when it reviewed two policies adopted by the Federal Communications Commission (FCC) in *Metro Broadcasting, Inc. v. Federal Communications Commission*.[75] In determining whether the race-conscious provisions violated the Fifth Amendment's equal protection guarantee, the Court drew a distinction between "benign" and "invidious" racial classifications. The five judge majority[76] then held that benign race-

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69. *Id.* at 493.

70. *Id.* at 494.

71. *Id.*

72. *Id.* at 489-91. The majority in *Croson* engaged in a lengthy discussion about Congressional power to enact appropriate remedies to combat discrimination. Because the authority came from Section Five of the Fourteenth Amendment, state and local governments could not be afforded the same power. *Id.* at 490-93.

73. *Id.* at 490-91 ("Congress, unlike any State or political subdivision, has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment . . . . Thus, our treatment of an exercise of congressional power in *Fullilove* cannot be dispositive here.").

74. *Id.*

75. 497 U.S. 547 (1990). Several commentators have analyzed the facts, opinions, and effects of the Court's decision in *Metro Broadcasting*. *See, e.g.*, Sally Morris, *One More Battle in the Ongoing War Over Affirmative Action*: Metro Broadcasting, Inc. v. FCC, 26 NEW ENG. L. REV. 921 (1992); Samuel L. Starks, *Understanding Government Affirmative Action and* Metro Broadcasting, Inc. v. FCC, 41 DUKE L.J. 933 (1992); Michael B. Bressman, Recent Development, 14 HARV. J.L. & PUB. POL'Y 259 (1991); Michel Rosenfeld, Metro Broadcasting, Inc. v. FCC: *Affirmative Action at the Crossroads of Constitutional Liberty and Equality*, 38 UCLA L. REV. 583 (1991).

76. Justices Brennan, White, Marshall, Blackmun, and Stevens constituted the majority. *Metro Broadcasting*, 497 U.S. at 550.

conscious measures should be analyzed by an intermediate level of scrutiny, even if they were not remedial in nature.[77] The Majority found that deference was due to Congress to enact such measures, based on its consideration of appropriate factual findings and available alternatives.[78] Justice Stevens filed a concurring opinion where he restated the proposition that race conscious classifications are only appropriate if "clearly identified and unquestionably legitimate."[79]

Four Justices dissented,[80] claiming that the Court should use "a most searching examination" to determine the constitutionality of the programs and thus apply strict, not intermediate, scrutiny.[81] The dissent distinguished *Fullilove*, which involved Congressional power, by noting that the case at bar involved a federal agency, and therefore did not implicate Section Five of the Fourteenth Amendment.[82] Additionally, the dissent stated that even under intermediate scrutiny, the FCC program at issue would not withstand such analysis because less intrusive race-neutral alternatives were available.[83]

Most recently, on June 12, 1995, the Supreme Court was called upon again to consider the appropriate standard of review for federal affirmative action programs in *Adarand Constructors, Inc. v. Pena*. The Court's purview of case history regarding affirmative action stretched across a spectrum of standards of review.[84] As the law stood before *Adarand* was decided, state and local affirmative action programs needed to be strictly scrutinized to determine if such programs were narrowly tailored to achieve a significant governmental interest.[85] Federal programs, on the other hand, only had to survive intermediate scrutiny, which required that affirmative action programs serve important governmental objectives and were substantially related to

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77. *Id.* at 564-65.

78. *Id.* at 569-83. "[W]e must pay close attention to the expertise of the Commission and the factfinding of Congress when analyzing the nexus between minority ownership and programming diversity. With respect to this complex empirical question, we are required to give great weight to the decisions of Congress." (internal quotations omitted). *Id.* at 569.

79. *Id.* at 601 (Stevens, J., concurring) (quoting *Fullilove*, 448 U.S. at 534-35 (Stevens, J., dissenting)).

80. Justices O'Connor, Rehnquist, Kennedy, and Scalia dissented. *Id.*

81. *Id.*

82. *Id.* at 605-06.

83. *Id.* at 622, 630. Thus, the dissent claimed the FCC program was not substantially related to the stated interest, and failed the second prong of the intermediate scrutiny standard. *Id.*

84. *See supra* notes 37-79 and accompanying text.

85. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989).

achievement of that objective.[86] The difference was grounded in the fact that Congress, unlike state and local governments, had the express authority under Section Five of the Fourteenth Amendment to remedy past discrimination.[87]

The *Adarand* decision, however, has significantly altered the constitutional standard of review.[88] The Court could have determined that *Fullilove* and *Metro Broadcasting* provided the precedential authority requiring that all federal affirmative action programs, including the Small Business Act, be held to an intermediate level of scrutiny.[89] *Fullilove* and *Metro Broadcasting* were, after all, the leading cases which addressed Congressional authority to enact race-conscious remedial programs. However, the Court in *Adarand* held that federal affirmative action programs needed to be strictly scrutinized,[90] and therefore it overruled *Fullilove* and *Metro Broadcasting* to the extent both cases held otherwise.[91]

II. ADARAND CONSTRUCTORS, INC. V. PENA

A. *Factual Predicate and Statutory Scheme*

In *Adarand* the Supreme Court was called on to investigate and determine the constitutionality of the Small Business Act.[92] In the last twenty-five years, the Act has significantly expanded its focus to address the concerns of small businesses owned and controlled by socially and economically disadvantaged individuals.[93] Section 502 of the Act provides the statutory mandate for federal agencies to establish utilization goals for DBEs in federal procurement contracting.[94]

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86. *Metro Broadcasting*, 497 U.S. at 565.

87. *See supra* notes 70-72 and accompanying text.

88. *See infra* Part III.B.

89. *See Adarand*, 115 S. Ct. at 2126-28 (Stevens, J., dissenting).

90. *Id.* at 2113.

91. *Id.*

92. 15 U.S.C. §§ 631-656 (1994). In 1958, Congress enacted the Act to address the concerns of small businesses. The Act created the Small Business Administration to implement the statutory directives. *Id.* § 633.

93. In 1971, President Nixon directed federal agencies, in conjunction with the SBA, to include minority business enterprises in small business contracting opportunities. *See* Exec. Order No. 11,625, 3 C.F.R. 616 (1971-1975).

94. 15 U.S.C. § 644 (1994). Section 502 requires all federal agencies to establish specific annual goals for small disadvantaged business participation in federal procurement contracts. *Id.* § 644(g)(2). This goal has been established at 5 percent of the total value of all contracts awarded. *Id.* § 644(g)(1).

Section 502 of the Small Business Act provides that:

(1) The President shall annually establish Government-wide goals for pro-

The primary way by which agencies meet these participation goals is through the SBA's 8(a) disadvantaged business program.[95] This program confers a variety of benefits on participants, one of which includes automatic eligibility for subcontractor compensation clauses (SCC). These clauses appear in most federal contracts. Under an SCC, prime contractors who award at least 10 percent of the dollar amount of a contract to DBEs[96] receive financial benefits.[97]

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curement contracts awarded to small business concerns [and] small business concerns owned and controlled by socially and economically disadvantaged individuals. . . . The Government-wide goal for participation by small business concerns shall be established at not less than 20 percent of the total value of all prime contract awards for each fiscal year. The Government-wide goal for participation by small business concerns owned and controlled by socially and economically disadvantaged individuals shall be established at not less than 5 percent of the total value of all prime contract and subcontract awards for each fiscal year. . . . Notwithstanding the Government-wide goal, each agency shall have an annual goal that presents, for that agency, the maximum practicable opportunity for small business concerns [and] small business concerns owned and controlled by socially and economically disadvantaged individuals. . . to participate in the performance of contracts let by such agency. The Administration and the Administrator of the Office of Federal Procurement Policy shall, when exercising their authority pursuant to paragraph (2), insure that the cumulative annual prime contract goals for all agencies meet or exceed the annual Government-wide prime contract goal established by the President pursuant to this paragraph.

(2) The head of each Federal agency shall, after consultation with the Administration, establish goals for the participation by small business concerns [and] by small business concerns owned and controlled by socially and economically disadvantaged individuals. . . in procurement contracts of such agency. Goals established under this subsection shall be jointly established by the Administration and the head of each Federal agency and shall realistically reflect the potential of small business concerns [and] small business concerns owned and controlled by socially and economically disadvantaged individuals. . . to perform such contracts and to perform subcontracts under such contracts. . . .

Id. § 644(g)(1)-(2).

95. The Small Business Act's 8(a) program, and its history, are extensively detailed and discussed in Hasty, *supra* note 7.

96. In order to participate in the SBA program, a DBE must be annually certified as socially and economically disadvantaged. The Act defines "socially disadvantaged individuals" as "those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities", 15 U.S.C. § 637(a)(5) (1994), and it defines "economically disadvantaged individuals" as "those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business who are not socially disadvantaged." *Id.* § 637(a)(6)(A). In addition, the business must be at least 51 percent owned and controlled by such an individual to qualify for the program. 13 C.F.R. § 124.103 (1996). The SBA presumes that African-Americans, Hispanic-Americans, Native-Americans, Asian Pacific Americans, and Subcontinent Asian Americans are socially disadvantaged for

The Central Federal Lands Highway Division (CFLHD), a regional office of the Federal Lands Highway Division, utilizes a SCC in its contracts. In 1989, Mountain Gravel & Construction Company, a prime contractor, was awarded a federal contract for the construction of a highway in the state of Colorado by the CFLHD.[98] It then began accepting bids for the guardrail portion of the contract. Among the bidders were two subcontractors - Adarand Constructors, a Colorado guardrail company owned and controlled by a white male, and Gonzales Construction Company, a certified DBE.[99] Although Adarand underbid Gonzales by 800 dollars, Gonzales was awarded the contract.[100] By doing so, Mountain Gravel received a financial bonus of $10,000 under the SCC.[101]

Adarand filed suit in U.S. District Court for the District of Colorado claiming, inter alia, that the Small Business Act violated Adarand's right to equal protection guaranteed by the Fifth Amendment to the Constitution.[102] The District Court granted the Government's motion for summary judgment.[103] The Tenth Circuit affirmed the District Court's decision.[104] It relied on *Fullilove*,[105] *Croson*,[106] and *Metro Broadcasting*,[107] and determined that intermediate scrutiny applied to challenges against federal affirmative action programs.[108] In upholding the District Court's decision, the Tenth Circuit held that the portion of the

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purposes of the program. *Id.* § 124.105(b). This presumption is rebuttable if a third party comes forward with "clear and convincing evidence" showing that the participant is neither socially nor economically disadvantaged. *Id.* § 124.111(c)-(d), 124.601-124.609. In addition, non-minority owned small businesses can qualify as DBEs if they otherwise meet the requirements of an economically disadvantaged individual. 15 U.S.C. § 637(a) (1994).

97. Adarand Constructors, Inc. v. Pena, 16 F.3d 1537, 1540 (10th Cir. 1994). Thus, if a prime contractor awards subcontracts to one DBE, he or she is eligible to receive up to 1.5 percent of the value of the original contract as a bonus. Additionally, if a contractor awards subcontracts to two or more DBEs, he or she is eligible to receive up to 2 percent of the value of the original contract. *Id.*

98. *Adarand*, 115 S. Ct. at 2102.

99. *Id.*

100. *Id.*

101. *Adarand*, 16 F.3d at 1542.

102. Adarand Constructors, Inc. v. Skinner, 790 F. Supp. 240 (D. Colo. 1992), *aff'd sub nom.* Adarand Constructors, Inc. v. Pena, 16 F.3d 1537 (10th Cir. 1994), *vacated* 115 S. Ct. 2097 (1995).

103. *Id.* at 245.

104. *Adarand*, 16 F.3d at 1547.

105. 448 U.S. 448 (1980).

106. 488 U.S. 469 (1989).

107. 497 U.S. 547 (1990).

108. *Adarand*, 16 F.3d at 1537.

Small Business Act in question would withstand such analysis.[109] Adarand appealed this decision.[110] The Supreme Court granted certiorari[111] to reexamine the appropriate standard of review for federal affirmative action programs.

In *Adarand Constructors, Inc. v. Pena*,[112] the Supreme Court found that the Court of Appeals applied the wrong standard of review when it analyzed the program. It then held that all affirmative action programs, including the Small Business Act, needed to be reviewed under the strict scrutiny standard.[113] Because neither lower court used this standard, the Supreme Court remanded the case, with instructions to analyze the program using strict scrutiny analysis.[114]

B. *Majority Opinion*

Justice O'Connor, writing for the majority, concluded that the strict scrutiny standard applied to all governmental racial classifications.[115] She began the Court's equal protection analysis by examining the history of the Court's interpretation of the Fifth Amendment and the rights it protects. By analyzing cases such as *Hirabayashi*[116] and *Korematsu*,[117] Justice O'Connor illustrated how deference to Congressional power can lead to the "most unfortunate results."[118] Subsequently, she cited a variety of cases which stood for the proposition that no distinction existed between equal protection analysis under the Fifth and Fourteenth Amendments.[119]

Having established this principle, Justice O'Connor dis-

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109. *Id.*

110. *Adarand*, 115 S. Ct. at 2104.

111. Adarand Constructors, Inc. v. Pena, 16 F.3d 1540 (10th Cir. 1994), *cert. granted*, 115 S. Ct. 41 (1994).

112. *Adarand*, 115 S. Ct. 2097.

113. *Id.* at 2113.

114. *Id.* at 2118. For a discussion of the possible outcome of *Adarand* on remand, see Jerome R. Watson & Akinyale Harrison, *Government Contracting: Affirmative Action After* Adarand, 74 MICH. BUS. L.J. 1162 (1995) (stating that on remand, the government's Small Business Act will withstand strict scrutiny.). *See also Adarand*, 115 S. Ct. at 2128-30 (Stevens, J., dissenting); *Adarand*, 115 S. Ct. at 2132 (Souter, J., dissenting).

115. *Id.* at 2113 ("[W]e hold today that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny.").

116. 320 U.S. 81 (1943).

117. 323 U.S. 214 (1944). *See also supra* note 30 and accompanying text.

118. *Adarand*, 115 S. Ct. at 2016.

119. *Id.* at 2107-08 (citing United States v. Paradise, 480 U.S. 149 (1987); McLaughlin v. Florida, 379 U.S. 184 (1964); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Bolling v. Sharpe, 347 U.S. 497 (1954)). *See supra* note 36.

cussed the Court's recent decisions on affirmative action.[120] She pulled from both majority and dissenting opinions various Justices' conclusions that strict scrutiny should apply.[121] Relying heavily on *Wygant* and *Croson*, two cases involving state and not federal actors, she delineated the legal reasoning and policy considerations behind the use of the standard.[122] From these cases, the Court concluded that three general propositions in regard to governmental racial classification had emerged from the Court: skepticism, consistency, and congruence.[123]

Skepticism was evidenced by the Court's history of labeling racial classifications as "inherently suspect"[124] and "odious to a free people."[125] Consistency required that equal protection analysis "not depend[] on the race of those burdened or benefitted by a particular classification."[126] Finally, congruence in the application of equal protection between the federal and state governments was necessary to ensure that "any governmental actor subject to the Constitution justify any racial classification . . . under the strictest judicial scrutiny."[127]

Justice O'Connor then turned to *Metro Broadcasting* and explained how its holding "turned its back on *Croson*"[128] and "squarely rejected"[129] the three precedential propositions.[130] Moreover, Justice O'Connor stated that by holding benign federal racial classifications to an intermediate level of scrutiny, the decision in *Metro Broadcasting* was "a significant departure from much of what had come before it."[131] In addition, the fact that the Court in *Metro Broadcasting* did not outline any test to determine what was in fact a benign racial classification further undermined its authority.[132]

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120. *Adarand,* 115 S. Ct. at 2108-11.

121. *Id.* at 2109-12.

122. *Id.* Justice O'Connor relied heavily on Justice Powell's plurality opinion in *Wygant* to demonstrate why the Court was adopting strict scrutiny. For instance, she stated that "the level of scrutiny does not change merely because the challenged classification operates against a group that historically has not been subject to governmental discrimination." *Id.* at 2109 (quoting *Wygant*, 476 U.S. at 273 (Powell, J., plurality)).

123. *Id.* at 2111-12.

124. *Id.* at 2111 (quoting McLaughlin v. Florida, 379 U.S. 184, 192 (1964)).

125. *Id.* (quoting Hirabayashi v. United States, 320 U.S. 81, 100 (1943)).

126. *Id.* (quoting City of Richmond v. J.A. Croson Co., 488 U.S. 469, 494 (1989)).

127. *Id.* at 2111.

128. *Id.* at 2112.

129. *Id.*

130. *Id.*

131. *Id.* at 2112.

132. *Id.* The Court in *Metro Broadcasting* stated that "an examination of the legislative scheme and its history . . . will separate benign measures from other types of racial

Subsequently, the Court's opinion departed into a discussion of stare decisis, and an analysis of when adherence to it is not necessary. The Court stated that when adhering to precedent "involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience," the Court is not required to follow it.[133] Justice O'Connor then concluded that *Metro Broadcasting* did collide with prior doctrine.[134] Thus, *Metro Broadcasting* was overruled as an aberration in equal protection jurisprudence.[135]

The majority concluded by dismissing the notion that it was implicitly holding all affirmative action measures employing racial or ethnic classifications unconstitutional.[136] Rejecting the criticism that strict scrutiny was " 'strict in theory, but fatal in fact,' "[137] Justice O'Connor declared that "[t]he unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it."[138] In addition, the Court explicitly stated that to the extent that programs are based on disadvantage, as opposed to race, they are subjected only to "the most relaxed judicial scrutiny."[139]

The Court did not decide whether the SCC contractual provision violated the strict scrutiny standard, but instead remanded the case back to the Tenth Circuit for that determination.[140] It provided the Court of Appeals some guidance in making the determination, by explaining that it should look to whether there were any considerations of race-neutral alternatives, and whether the provision was "appropriately limited" in

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classification." Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 564 n.12 (1990) (internal quotations omitted).

133. *Adarand*, 115 S. Ct. at 2115 (quoting Helvering v. Hallock, 309 U.S. 106 (1940)).

134. *Id.* at 2117 ("*Metro Broadcasting's* untenable distinction between state and federal racial classifications lacks support in our precedent, and undermines the fundamental principle of equal protection as a personal right.").

135. *Id.* at 2113.

136. *Id.* at 2118.

137. *Id.* at 2117 (quoting Fullilove v. Klutznick, 448 U.S. 448, 519 (1980) (Marshall, J., concurring)).

138. *Id.*

139. *Id.* at 2105.

140. *Id.* at 2118 ("The question whether any of the ways in which the Government uses subcontractor compensation clauses can survive strict scrutiny, and any relevant distinctions such as these may have to that question, should be addressed in the first instance by the lower courts.").

scope and duration.[141]

C. *Concurring Opinions*

Justices Scalia and Thomas both filed separate opinions whereby they concurred in part and concurred in the judgment.[142] Both Justices would have taken a more severe stance with respect to the constitutionality of affirmative action measures using race as a basis for decisionmaking.[143]

Justice Scalia, following his previous opinions on affirmative action, stated that the "government can never have a compelling interest in discriminating on the basis of race to make-up for past racial discrimination."[144] Although he agreed with the majority that strict scrutiny was the only proper standard of review for affirmative action programs, he disagreed with O'Connor's assertion that government can have an interest in adopting race-conscious remedial relief in certain circumstances.[145] He stated that "under our Constitution there can be no such thing as either a creditor or a debtor race."[146] Thus, Scalia would have virtually eliminated any future use of affirmative action measures by any governmental agency.

Justice Thomas also filed a concurring opinion in which he agreed with the majority that strict scrutiny was the proper test to determine the constitutionality of affirmative action programs.[147] He wrote separately to express his view that "there is [no] racial paternalism exception to the principle of equal protection . . . . [and that such paternalism] can be as poisonous and pernicious as any other form of discrimination."[148] He concluded that affirmative action programs, even if adopted with the best of intentions, "stamp minorities with a badge of inferiority and may cause them to develop dependence or to adopt an

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141. *Id.* Interestingly enough, the Court did not give guidance to the lower court in applying what will prove to be the more difficult part—whether the programs are supported by sufficient evidence to justify a compelling state interest. *See infra* Part III.B.

142. *Id.* at 2118-19.

143. *Id.*

144. *Id.* at 2118 (Scalia, J., concurring in part and concurring in the judgment). Justice Scalia relied on his concurrence in *Croson* where he first stated the position that "those who believe that racial preferences can help to 'even the score' display, and reinforce, a manner of thinking by race that was the source of the injustice and that will, if it endures within our society, be the source of more injustice still." *Croson*, 488 U.S. 469, 527-28.

145. *Adarand*, 115 S. Ct. at 2118-19.

146. *Id.* at 2118.

147. *Id.* at 2119 (Thomas, J., concurring in part and concurring in the judgment).

148. *Id.*

attitude that they are 'entitled' to preferences."[149] As such, he too would have virtually held all remedial race-conscious programs unconstitutional.

D. *Dissenting Opinions*

Justices Stevens, Souter, Ginsburg, and Breyer dissented. Justices Stevens, Souter, and Ginsburg each wrote separate dissenting opinions with differing views and analyses. However, most dissenters agreed that there was indeed a constitutional distinction between racial and ethnic classifications designed to aid minorities and those that discriminate against them.[150] Justice Stevens filed a lengthy dissent in which he criticized the majority's use of "consistency" and "congruence" to reach a decision which "deliver[ed] a disconcerting lecture about the evils of governmental racial classifications."[151] While he "welcome[d]" the Court's idea of skepticism with respect to all racial classifications,[152] he disagreed with the majority's analysis and application (or inapplication) of stare decisis.[153]

Justice Stevens first questioned the majority's inability to distinguish between benign and invidious forms of discrimination.[154] He noted that the Court's use of "consistency" would treat a law which forbid African-Americans from serving in the military the same as a law that was designed to recruit African-American soldiers.[155] As such, Justice Stevens found that the

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149. *Id.* The assertions made by Justice Thomas concerning the effects of affirmative action are the subject of sociological and psychological debate. For an analysis of these propositions, see, for example, Summers, *Attitudes*, *supra* note 5; Heilman, *supra* note 5; Summers, *Influence*, *supra* note 5.

150. For instance, Justice Stevens stated that "[t]here 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." *Adarand*, 115 S. Ct. at 2120 (Stevens, J., dissenting).

151. *Id.*

152. *Id.* Justice Stevens quoted his *Fullilove* opinion, where he first stated that "racial characteristics so seldom provide a relevant basis for disparate treatment . . . ." *Id.* (quoting *Fullilove*, 448 U.S. at 533-34 (Stevens, J., dissenting)).

153. *Id.* at 2126-28. Justice Stevens stated that "[t]he Court's concept of *stare decisis* treats some of the language we have used in explaining our decisions as though it were more important than our actual holdings. In my opinion that treatment is incorrect." *Id.* at 2126 (Stevens, J., dissenting).

154. *Id.* at 2121-22. He asserted that there is a distinct "difference between a 'No Trespassing' sign and a 'welcome mat.'" *Id.* at 2121 (Stevens, J., dissenting).

155. *Id.* Justice Stevens also suggested that the Majority would treat a "Dixiecrat Senator's decision to vote against Thurgood Marshall's confirmation in order to keep African Americans off the Supreme Court as on par with President Johnson's evaluation of his nominee's race as a positive factor." *Id.*

Majority's desire for consistent application of legal doctrine "does not justify treating differences as though they were similarities."[156]

Justice Stevens also criticized the Court's concept of "congruence," stating that "[it] assumes that there is no significant difference between a decision by the Congress of the United States to adopt an affirmative action program and such a decision by a State or a municipality."[157] He quoted several passages of previous affirmative action cases to show how those Justices, who themselves joined in the Majority in *Adarand*, previously endorsed and recognized the significant distinction.[158] Furthermore, Justice Stevens contended that "[i]ronically 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."[159] Finally, in his discussion of stare decisis, Justice Stevens argued that the Court's decision was an "unjustified departure from settled law",[160] namely *Fullilove* and *Metro Broadcasting*, which upheld affirmative action programs in deference to Congress.[161]

Justice Souter filed a dissenting opinion in which he agreed that the decision in *Fullilove* was controlling, and as such, believed the Court should have applied the principles outlined in it.[162] Additionally, he stated that the program should have been upheld because the petitioner in *Adarand* failed to "identify any of the factual premises on which *Fullilove* rested."[163] In an optimistic discussion, Justice Souter relied on Justice Powell's opinion in *Fullilove*[164] and stated that the program at issue here would survive the Court's opinion and strict scrutiny analysis on remand.[165]

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156. *Id.*

157. *Id.* at 2123.

158. *Id.* at 2127. Justice Stevens stated that "[a]lthough members of today's majority trumpeted the importance of that distinction in *Croson*, they now reject it in the name of 'congruence.'" *Id.* Specifically, Justice Stevens referred to Justice O'Connor's majority opinion and Justice Scalia's concurring opinion in *Croson*, both of which described and emphasized the basis for such a distinction. *Id.*

159. *Id.*

160. *Id.* at 2127.

161. *Id.*

162. *Id.* at 2131 (Souter, J., dissenting).

163. *Id.*

164. *Id.* at 2131-32 (citing Fullilove v. Klutznick, 448 U.S. 448, 495-517 (1980) (Powell, J., concurring)). Justice Powell found that the statute in *Fullilove* would even have survived strict scrutiny analysis. *Fullilove*, 448 U.S. at 515.

165. *See Adarand*, 115 S. Ct. at 2132 (because "the statutes in question . . . are substantially better tailored to the harm being remedied than the statute endorsed in *Fulli-*

Justice Ginsburg, in her dissent, attempted to both find common ground among all the opinions, as well as quash fears of its implications for affirmative action programs.[166] She emphasized the perceived consensus among the majority and dissenting opinions that Congress has a legitimate interest in remedying the effects of past discrimination that still persist in America.[167] Ginsburg also agreed that the Majority's use of strict scrutiny should not necessarily be fatal to affirmative action programs enacted by Congress because of the level of deference afforded to it in previous case law.[168]

III. STRICT SCRUTINY APPLIED TO FEDERAL AFFIRMATIVE ACTION

Adarand expressly adopted the strict scrutiny standard for all affirmative action programs using racial classifications as a basis for decisionmaking.[169] These programs will withstand strict scrutiny if it can be shown that they are "narrowly tailored" to "serve a compelling governmental interest."[170] The strict scrutiny standard adopted in *Adarand* is facially similar to that which was adopted in *Croson*. However, its application should not be the same.[171] The Court in *Adarand* left open the possibility that, even under strict scrutiny, Congress may be entitled to greater deference than state and local governments to adopt programs employing racial classifications.[172] As such, the difficulty of withstanding both the compelling governmental interest and narrow tailoring legs of strict scrutiny may not be encountered to the same degree when lower courts are called on to apply the standard.

On remand, the Court of Appeals will need to determine the constitutionality of the federal SCC provision of the Small Busi-

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love [they would] pass muster under Fifth Amendment due process and Fourteenth Amendment equal protection.").

166. *Id.* at 2134-36 (Ginsburg, J., dissenting).

167. *Id.* at 2135. Justice Ginsburg cited several recent reports which demonstrated a difference, based on race, of minorities' inability to obtain employment, housing, and government contracts due to "conscious" and "unconscious" biases that perpetuate the barriers of exclusion. *Id.* at 2135 nn.3-6. For a discussion on why affirmative action programs are still a necessity, given the current social and political climate, see T. Alexander Aleinikoff, *A Case For Race-Consciousness*, 91 COLUM. L. REV. 1060 (1991).

168. *Adarand*, 115 S. Ct. at 2136. Justice Ginsburg stated that "today's decision [is] one that allows our precedent to evolve, still to be informed by and responsive to changing conditions." *Id. See also infra* Part III.B.

169. *Adarand*, 115 S. Ct. at 2117.

170. *Id.*

171. *See infra* Part III.B.

172. *Adarand*, 115 S. Ct. at 2114.

ness Act. In doing so, it will apply the strict scrutiny standard outlined by the Court in *Adarand*.[173] This standard need not, and should not, be applied the same way in which it has been applied to state and local programs.

A. *Strict Scrutiny at the State and Local Levels*

Since the Supreme Court's 1989 *Croson* decision, numerous state and local affirmative action programs and MBE utilization measures have come under constitutional attack.[174] Federal courts applying the strict scrutiny standard outlined in *Croson* have, in most cases, struck down those programs.[175] Most programs under *Croson* do not meet either requirement of the strict scrutiny standard.[176]

The first leg of the strict scrutiny test requires governments to enact programs based on a "compelling interest."[177] At state and local government levels, this has included an interest in remedying the effects of its own discriminatory practices, as well as those to practices to which it had become a "passive participant."[178] However, the discrimination to be remedied must be identified with particularity and supported by specific evidence.[179] Thus, general assertions of "[s]ocietal discrimination, without more, [are] too amorphous a basis for imposing a racially classified remedy."[180] Instead there must be evidence of a "prima facie case of a constitutional violation" of the rights of minorities in a particular geographic area and industry.[181]

Federal Courts applying this leg of the standard have had difficulty in finding what they perceive to be the required evidence of discrimination to support the adoption of a race-conscious remedy.[182] Thus, cases analyzing this part of the strict

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173. For a breakdown of the possible outcome of *Adarand*, see Watson & Harrison, *supra* note 114.

174. For an analysis of the implications and effect of *Croson*, see Janice R. Franke, *Defining the Parameters of Permissible State and Local Affirmative Action Programs*, 24 GOLDEN GATE U. L. REV. 387 (1994); Duncan, *supra* note 67; *see also infra* note 182.

175. *See* Franke, *supra* note 174, at 402 ("In general, state and local set-aside programs have not fared well under judicial application of the *Croson* standards."). *See also infra* note 182.

176. *See infra* note 182.

177. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 485-86 (1989).

178. *Id.* at 492.

179. *Id.* at 497.

180. *Id.* (quoting Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 277 (1986)).

181. *Id.* at 500.

182. *See, e.g.*, O'Donnell Constr. Co. v. District of Columbia, 963 F.2d 420 (D.C. Cir. 1992) (finding that the District's Minority Contracting Act, which imposed a goal of

scrutiny requirement often involve an in-depth investigation into the programs at issue. This investigation includes examining the legislative histories of such programs to determine if the programs were enacted based on specific evidence of discrimination. Statistics concerning local construction and hiring practices, as well as the availability of qualified MBEs in the region permeate the decisions.[183] In most instances, courts have held that the statistics do not justify the adoption of the race-conscious remedial measures,[184] and then dismiss the proffered evidence as "anecdotal" and insufficient.[185]

The second leg of the strict scrutiny standard requires affirmative action programs to be "narrowly tailored" to remedy the identified discrimination.[186] This ensures that the programs were enacted after careful consideration and deliberation, and that the possibility of less intrusive or race-neutral alternatives has been exhausted. The factors taken into account typically include: (1) whether the government considered race-neutral alternatives before adopting the program;[187] (2) the flexibility and scope of the program; and whether there is a waiver mechanism within it;[188] (3) the relationship of the numerical target of the program with the relevant labor market;[189] (4) the duration of the program and whether it is subject to periodic review;[190] and

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awarding 35 percent of its contracts to certified MBEs was unconstitutional); Associated Gen. Contractors v. City of New Haven, 791 F. Supp. 941 (D. Conn. 1992) (finding that a renewal to a set-aside based on disadvantaged status, where minorities were presumed to be disadvantaged, met neither prong of the *Croson* standard); Concrete Gen. v. Washington Suburban Sanitary Comm'n, 779 F. Supp. 370 (D. Md. 1991) (invalidating a Minority Procurement Policy which was not supported by sufficient evidence of discrimination); Buddie Contracting Co. v. City of Elyria, 773 F. Supp. 1018 (N.D. Ohio 1991) (overturning an MBE set-aside designed to include women and minorities in city contracting opportunities); Main Line Paving Co. v. Board of Educ., 725 F. Supp. 1349 (E.D. Pa. 1989) (finding that the evidentiary basis of an MBE set-aside aimed at increasing minority participation in a school district's contracting opportunities was insufficient to justify adoption of affirmative action plan).

183. *See* Duncan, *supra* note 67, at 698 (stating that the District Court's opinion in *O'Donnell* involved discussion of " 'detailed testimony and voluminous data from governmental and industrial representatives, including Committee members and staff, federal agencies, finance and bonding industries, minority organizations, minority contractors, and non-minority and large contracting firm representatives' "). *Id.* (quoting *O'Donnell*, 762 F. Supp. at 358).

184. *See supra* note 182.

185. *See* Duncan, *supra* note 67, at 698. *But see infra* note 199.

186. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 507 (1989).

187. *Id.*

188. *Id.* at 508.

189. *Id.* at 506.

190. Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2118 (1995). *See also* Local

(5) the degree and type of burden on non-minorities caused by the program.[191]

Application of this leg of the strict scrutiny standard has also resulted in invalidating affirmative action programs. Most often, discussion of this leg of the standard is limited because the court has already held that the program failed to satisfy the compelling interest leg. However, some inferences can be drawn concerning its application at the state and local level.

In some cases, courts found that the lack of a sunset provision in the program, which would have limited the duration of the remedy, proved fatal to it.[192] Moreover, courts also found that, when examining the legislative histories, race-neutral alternatives were not considered.[193] As such, the affirmative action programs were premature.[194] In addition, another problem federal courts have found in these programs is the over-inclusiveness of particular racial minorities. For instance, in *O'Donnell Construction Co. v. District of Columbia*,[195] the court found it unsettling that no evidence was offered concerning the discrimination of any other minority group aside from African-Americans. Therefore, the fact that Asian-Americans, Hispanic-Americans, Native Americans, and Pacific Islander Americans were included in the MBE set-aside deemed the program insufficiently tailored.[196]

An analysis of the application of strict scrutiny at the local level certainly would lead many to believe that strict scrutiny is

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28 of Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421, 487 (1986) (Powell, J., concurring) (race-based hiring goal was narrowly tailored in part because it was not "imposed as a permanent requirement, but [was] of limited duration").

191. Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 282-83 (1986) (stating that race-based lay-off practices impose a greater burden on non-minorities than raced-based promotions and hiring practices, because "denial of a future employment opportunity is not as intrusive as loss of an existing job").

192. *See, e.g.*, O'Donnell Constr. Co. v. District of Columbia, 963 F.2d 420, 427-28 (D.C. Cir. 1992). *See also* Davis v. City of San Francisco, 890 F.2d 1438 (9th Cir. 1989) (finding plan at issue was overall narrowly tailored, but needed to be more limited in duration).

193. *See, e.g.*, Buddie Contracting Co. v. City of Elyria, 773 F. Supp. 1018, 1031-32 (N.D. Ohio 1991) (city's failure to consider race-neutral means to accomplish its goal proved fatal to the narrow tailoring requirement).

194. *See* Main Line Paving Co. v. Board of Educ., 725 F. Supp. 1349, 1361-62 (E.D. Pa. 1989). The court in *Main Line Paving* reasoned that race-neutral alternatives, which could include lowering bonding requirements or abandoning bidders lists, needed to be considered first before the Philadelphia school board implemented the MBE set-aside. *Id.* at 1362.

195. 963 F.2d 420 (D.C. Cir. 1992).

196. *Id.* at 422, 427-28.

"strict in theory, but fatal in fact."[197] At the state and local level this can be attributed in part to the fact that states do not have the "positive grant of legislative power"[198] conferred on Congress through Section Five of the Fourteenth Amendment. Therefore, states' abilities to remedy the effects of past discrimination are not as extensive as Congress'.[199] However, the future application of the same language of the strict scrutiny standard to Congressional race-conscious relief should not be as fatal as it has been at the municipal and state level.

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197. *See supra* notes 10-11 and accompanying text.

198. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 491 (1989) (quoting Katzenbach v. Morgan, 384 U.S. 641, 651 (1966)).

199. *Id.* at 490. It is important to note that not all programs investigated after *Croson* were struck down. It is possible to withstand strict scrutiny at the state and local level, provided that the governmental authority has found sufficient evidence of discrimination and appropriately created a narrow remedy. *See, e.g.*, Peightal v. Metropolitan Dade County, 26 F.3d 1545 (11th Cir. 1994) (affirmative action plan intended to recruit minorities in Dade County Fire Department was justified by sufficient evidence to demonstrate a compelling state interest and was narrowly tailored because race-neutral alternatives had been considered, it was not overinclusive, and it did not unduly burden non-minorities); Vogel v. City of Cincinnati, 959 F.2d 594 (6th Cir. 1992) (upholding city police department's affirmative action hiring policy, entered into as part of a consent decree, because city had strong basis in evidence to conclude that remedial action was necessary); Associated Gen. Contractors of Cal. v. Coalition for Econ. Equal., 950 F.2d 1401 (9th Cir. 1991) (denying contractor's motion for preliminary injunction based on the unlikely success on the merits of its equal protection claim against a city ordinance giving bid preference to MBEs); Stuart v. Roache, 951 F.2d 446 (1st Cir. 1991) (race-conscious promotions based upon a consent decree between police department and association of African-American officers were both narrowly tailored and justified by a compelling state interest); Davis v. City of San Francisco, 890 F.2d 1438 (9th Cir. 1989) (finding that evidence was sufficient to support court-ordered race-based hiring in city fire department, and plan was narrowly tailored); Vaughns v. Board of Educ., 742 F. Supp. 1275 (D. Md. 1990) *aff'd*, 977 F.2d 574 (1993) (stating that school board's faculty assignment policy which included a seniority override goal would withstand strict scrutiny analysis).

In addition, courts applying the strict scrutiny standard outlined in *Croson* have found that a question of fact existed precluding summary judgment in favor of a party claiming equal protection violations. *See, e.g.*, Concrete Works of Colo. v. City of Denver, 36 F.3d 1513 (10th Cir. 1994), *cert. denied*, 115 S. Ct. 1315 (1995) (finding that a question of fact existed as to nature and extent of evidence justifying adoption of city's minority contractor preference ordinance, precluding summary judgment); Contractors Ass'n of E. Pa. v. City of Phila., 6 F.3d 990 (3d Cir. 1993) (finding that summary judgment in favor of contractors was improper given the City's demonstration that sufficient statistical evidence was presented to justify compelling state interest and question of fact existed as to whether plan was narrowly tailored); Cone Corp. v. Hillsborough County, 908 F.2d 908 (11th Cir. 1990) (material fact existed as to whether county's MBE utilization law violated equal protection). In *Cone*, the Court stated that "[t]he statistics gleaned from . . . studies provide a prima facie case of discrimination sufficient to clear the summary judgment hurdle." *Id.* at 915.

B. *Strict Scrutiny at the Federal Level*

Strict scrutiny under *Adarand* may prove to be a "kindler-gentler"[200] examination of affirmative action programs. The Court in *Adarand* stopped clear of declaring an outright constitutional ban on affirmative action programs.[201] Justice O'Connor's majority opinion stated that "[w]hen race-based action is necessary to further a compelling governmental interest, such action is within constitutional constraints if it satisfies the narrow tailoring test this court has set out in previous cases."[202] Thus, while some commentators have criticized the Court's holding as an improper departure from precedent,[203] and thus an end affirmative action,[204] such a fearful reaction to the Court's holding overlooks the possibility of upholding federal programs using the *Adarand* Majority's own language as well as the precedent upon which it relied to arrive at its conclusion.[205]

1. *Identifying a Federal Compelling Interest.* In *Adarand*, the Majority stated that the government was not "disqualified from acting in response to" racial discrimination.[206] In fact, Congress has a clear constitutional mandate in Section Five of the Fourteenth Amendment to enforce the equal protection rights that Amendment guarantees.[207] Because of this mandate, courts, including the Supreme Court, have long recognized a certain level of deference that should be afforded Congress when enforcing equal protection guarantees.

The Supreme Court, in *Fullilove*,[208] *Croson*,[209] and *Metro*

200. Charles J. Falletta, Recent Case, 6 SETON HALL CONST. L.J. 295, 330 (1995).

201. Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2117 (1995). It is also important to note that the majority opinion did not include the views expressed by either Justices Scalia or Thomas. These concurring opinions would have virtually banned all future use of governmental racial classifications. *See supra* Part II.C. Thus, a majority of the Court clearly does not advocate for the elimination of affirmative action programs.

202. *Adarand*, 115 S. Ct. at 2117.

203. *See Leading Cases*, *supra* note 14, at 156.

204. *See supra* notes 10-11 and accompanying text.

205. In addition, while strict scrutiny is an extremely high hurdle to overcome, it does not always mean an end to the program being examined. *See supra* note 199.

206. *Adarand*, 115 S. Ct. at 2117.

207. "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5. The Supreme Court has read the Fourteenth Amendment to bestow upon Congress certain powers, while at the same time limiting the powers of the states. In *Katzenbach v. Morgan*, 384 U.S. 641 (1966), the Supreme Court stated that Congress had the authority, under Section Five of the Fourteenth Amendment, to enact remedial legislation even if a constitutional violation had not been found of Section 1. *Id.* at 648.

208. In *Fullilove*, the court stated that "[i]t is fundamental that in no organ of gov-

Broadcasting,[210] recognized the unique power of Congress in this regard. In fact, in each of these cases, the Court engaged in a discussion concerning the differences between state and local governments' and Congress' power to adopt appropriate legislation to address racial discrimination.[211] Taken together these cases, and the various Justices opinions, recognize 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."[212]

In *Adarand*, Justice O'Connor explicitly stated that the Court's previous holdings and opinions concerning the positive grant of Congressional power to combat the problem of racial discrimination was not implicated in the *Adarand* decision.[213]

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ernment, state or federal, does there repose a more comprehensive remedial power than in the Congress, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees." Fullilove v. Klutznick, 448 U.S. 448, 483 (1980). In addition, Justices Powell and Burger, in their opinions in *Fullilove*, explained that deference was due to Congress in light of their powers under the Commerce Clause, the Spending Clause, and the Civil War Amendments. *See id.* at 473-78. Moreover, in *Fullilove*, Justice Powell's concurrence, applying the strict scrutiny standard he delineated in *Bakke*, found that "[t]he Government does have a legitimate interest in ameliorating the disabling effects of identified discrimination." *Id.* at 497. He also stated the "[t]he history of this Court's review of congressional action demonstrates beyond question that the National Legislature is competent to find constitutional and statutory violations. Unlike the Regents of the University of California, Congress properly may - and indeed must - address directly the problems of discrimination in our society." *Id.* at 499.

209. Justice O'Connor, in her plurality opinion in *Croson*, stated that Congress may have more latitude than state and local governments to find a compelling governmental interest. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 491 (1989). In addition, she stated that "Congress, unlike any State or political subdivision, has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment. The Civil War Amendments themselves worked a dramatic change in the balance between congressional and state power over matters of race." *Id.* at 490. *See also Adarand*, 115 S. Ct. at 2124 (Stevens, J., dissenting).

210. In *Metro Broadcasting*, the Court identified the "institutional competence" of Congress in fostering racial diversity in broadcasting. Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 563 (1990). In addition, the Court reaffirmed its propositions in *Fullilove* by restating that:

> [W]hen a program employing a benign racial classification is adopted . . . at the explicit direction of Congress, we are "bound to approach our task with appropriate deference to the Congress, a co-equal branch charged by the Constitution with the power to 'provide for the . . . general Welfare of the United States' and 'to enforce by appropriate legislation,' the equal protection guarantees of the Fourteenth Amendment."

Id. at 563 (quoting *Fullilove*, 448 U.S. at 472).

211. *See supra* notes 50, 72-73, 78, 82 and accompanying text.

212. *Croson*, 488 U.S. at 522 (Scalia, J., concurring).

213. The Majority stated that:

> [i]t is true that various members of this Court have taken different views of

Additionally, Justice O'Connor dispelled the suggestion, averred by Justice Stevens in his dissent, that the members of the Majority in *Adarand* were altering their previous views on this Congressional authority.[214]

Therefore, Section Five of the Fourteenth Amendment, and the powers it bestows upon Congress to "enforce [] by appropriate legislation"[215] the mandates of equal protection have not been disturbed by *Adarand*.[216] An analysis of this power shows that, up until and including *Adarand*, the deference afforded Congress allows it to enact race-conscious remedial measures without the same limits placed on local and state governments.[217] Congress' power to combat racial discrimination would be emasculated if it were required to proffer an equivalent amount of evidence as states when utilizing racial classifications as a basis for decisionmaking. Therefore, when applying the compelling interest leg to federal affirmative action programs, courts should grant deference to Congress' findings concerning its need to remedy the effects of prior and present discriminatory practices.

2. *The Narrow Tailoring at the Federal Level.* The narrowly tailored leg of strict scrutiny, unlike the compelling interest leg, will most likely be applied in the same manner at the federal level as it is at the state and local levels.[218] For instance, the Majority in *Adarand* gave guidance to the lower court on remand concerning this part of strict scrutiny. It stated that the lower court, when examining the SCC provision of the Small Business Act, should determine whether there was "any consideration of race-neutral means to increase minority business par-

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> the authority § 5 of the Fourteenth Amendment confers upon Congress to deal with the problem of racial discrimination, and the extent to which courts should defer to Congress' exercise of that authority. We need not, and do not, address these differences today.

Adarand, 115 S. Ct. at 2114.

214. *Id.* In response to Justice Stevens' dissent in *Adarand*, where he questioned the Court's application of stare decisis with respect to the Congressional authority to combat racial discrimination, Justice O'Connor stated that "it is enough to observe that Justice Stevens' suggestion that any member of this Court has repudiated in this case his or her previously expressed views on the subject, . . . is incorrect." *Id.*

215. U.S. CONST. amend. XIV, § 5.

216. *See supra* notes 206-14; *see also* 115 S. Ct. at 2133 (Souter, J., dissenting) ("[T]oday's decision should leave § 5 exactly where it is as the source of an interest of the national government sufficiently important to satisfy the corresponding requirement of the strict scrutiny test.").

217. *See supra* notes 208-10.

218. *See infra* text accompanying notes 186-96.

ticipation in government contracting."[219] In addition, Justice O'Connor stated that the court should ensure that the program "was appropriately limited such that it 'will not last longer than the discriminatory effects it is designed to eliminate'."[220] It seems clear that, like the courts applying *Croson*, these two factors are significant in determining the validity of affirmative action measures even at the federal level.

In addition, determining whether a certain program is narrowly tailored does not seem to implicate the same broad powers of the Fourteenth Amendment or the necessary deference granted to Congress. The narrow tailoring requirement ensures that the means chosen by the government fit the ends it wishes to accomplish.[221] Deference owed to Congress implicates its ability to identify and redress past discrimination.[222] It does not, however, mean that Congress can choose any means necessary to fulfill this obligation.[223] Therefore, application of this component certainly will involve very similar analyses to either local, state or federal programs.

CONCLUSION

In conclusion, *Adarand* does not mean the end of federal affirmative action. Lower courts applying strict scrutiny to federal affirmative action programs must give deference to Congressional power to redress discrimination and its continued effects on minorities. Thus, on remand, the Court of Appeals is not precluded from finding that the SBA's Subcontractors Compensation Clause is a constitutional extension of Congress' powers. In fact, absent any problems of narrow tailoring, the Court of Appeals should uphold the program at issue.

Even if strict scrutiny is applied by federal courts to rid many affirmative action programs of racial classifications, this also may not mean the end of preferences aimed at improving minority participation in American industries, education, employment, or contracting. The racial classifications used in the programs could be substituted or narrowed to only include economic disadvantage as a basis for decisionmaking. Justice O'Connor stated in *Adarand* that programs based on disadvan-

219. *Adarand*, 115 S. Ct. at 2118 (internal quotations omitted).

220. *Id.* (quoting Fullilove v. Klutznick, 448 U.S. 448, 513 (1980)).

221. *See supra* text accompanying notes 191-201.

222. *See supra* Part III.B.1.

223. In fact, Section Five of the Fourteenth Amendment states that Congress can enforce the provisions of the amendment only "by appropriate legislation." U.S. CONST. amend. XIV, § 5.

tage, rather than race, are "subject only to the most relaxed judicial scrutiny."[224] Thus, so long as affirmative action programs are based on economics instead of race, they will be upheld.[225] While the reach of affirmative action measures designed to assist the "economic disadvantaged" may not be as extensive as those using race, the impact on racial minorities will be apparent. So long as minorities continue to be discriminated against, and kept out of the economic circles of federal contracting and employment, they will be able to receive the benefits of affirmative action measures based on economic disadvantage status.[226]

While the wake of *Adarand* may not resemble the wake of *Croson*, there remain several unanswered questions by the Majority's opinion. First, what is the fate of intermediate scrutiny? Gender classifications are still primarily held to that standard. As such, what effect, if any, will *Adarand*, and its doctrinal analysis concerning lines drawn on immutable characteristics, have on gender classifications that use a person's sex as a basis for decisionmaking?[227]

There is also the possibility that *Adarand* will be overruled as an aberration. This depends on the makeup of the Court in the future. The decisions in *Adarand*, *Metro Broadcasting*, *Croson*, and *Fullilove* were all 5-4 decisions. Thus, the political realities involved in presidential nominations, and how they have affected equal protection jurisprudence, cannot be ignored.

One thing does seem obvious, however. "[T]here will be some interpretive forks in the road before the significance of strict scrutiny for congressional remedial statutes becomes en-

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224. *Adarand*, 115 S. Ct. at 2105. "The Government urges that the Subcontracting Compensation Clause program is a program based on disadvantage, not on race, and thus that it is subject only to the most relaxed judicial scrutiny. To the extent that the statutes and regulations involved in this case are race neutral, we agree." (internal quotations omitted). *Id.*

225. Provided, however, that they otherwise meet the requirements of "the most relaxed judicial scrutiny." *Id.* This could also mean that even if the SBA's 8(a) program here was found to be unconstitutional in the lower court because of its use of race as a presumption to disadvantage, that does not mean the program will be erased from the United States Code. Instead, it would have to use economic disadvantage, not race, as its determining factor.

226. However, the problems associated with racial discrimination, as pointed out by Justice Ginsburg in her dissent, have nothing to do with economic status. Thus, if affirmative action is stripped of its ability to address racial discrimination, economically sound minorities will not be compensated or remedied for their continued marginalization. *Adarand*, 115 S. Ct. at 2134-36. *See also supra* note 167 and accompanying text.

227. For a discussion of how *Adarand* will effect equal protection jurisprudence with respect to gender classifications, as well as those based on disability, see Ravitch, *supra* note 14.

tirely clear."[228]

228. *Adarand*, 115 S. Ct. at 2132 (Souter, J., dissenting).