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Federal Affirmative Action After *Adarand Constructors, Inc. v. Pena*

The ideal of racial equality has been a part of American history and politics since the dispute over slavery that led to the Civil War and the subsequent passage of the Thirteenth, Fourteenth, and Fifteenth Amendments.¹ Despite the long history of that ideal, many still believe that “[w]e live in a world of racial inequality”² to this day. Affirmative action³ is one method by which legislatures and other governmental bodies at local, state, and federal levels have sought to achieve racial equality. Most of these attempts, however, have met with “fundamental disputes over the nature of the legal

1. The Thirteenth Amendment provides for the abolition of slavery. U.S. CONST. amend. XIII. The Fourteenth Amendment provides for, among other things, equal protection of the laws and due process of law. U.S. CONST. amend. XIV. The Fifteenth Amendment deals with voting rights. U.S. CONST. amend. XV.

2. T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1060, 1065 (1991). Aleinikoff continued:

In almost every important category, blacks as a group are worse off than whites. Compared to whites, blacks have higher rates of unemployment, lower family incomes, lower life expectancy, higher rates of infant mortality, higher rates of crime victimization, and higher rates of teenage pregnancies and single-parent households. Blacks are less likely to go to college, and those who matriculate are less likely to graduate. Blacks are underrepresented in the professions, in the academy, and in the national government.

Id. at 1065-66 (citing A COMMON DESTINY: BLACKS & AMERICAN SOCIETY 3-32 (Gerald Jaynes & Robin M. Williams, Jr. eds., 1989)).

3. In discussing “affirmative action,” Professor Aleinikoff refers to “race-conscious programs and policies aimed at ameliorating the continuing social and economic consequences of several centuries of American racism.” *Id.* at 1060. Another scholar defines affirmative action as “giving blacks marginal preferment in decision-making in [education, the workplace and government].” Geoffrey C. Hazard, Jr., *Permissive Affirmative Action for the Benefit of Blacks*, 1987 U. ILL. L. REV. 379, 379. George Rutherglen provides a little more detail with respect to affirmative action in the employment context:

Most affirmative action plans are framed as a long-term goal to be achieved according to a short-term ratio. The long-term goal usually is to increase the proportion of workers from a specified minority group in a particular job until it matches the proportion of those workers in the relevant labor market. A typical goal might be to increase the proportion of black workers in a particular job until it reaches twenty percent. Such long-term goals usually are achieved by hiring or promoting black workers over the short term in some higher proportion, for instance, fifty percent.

George Rutherglen, *After Affirmative Action: Conditions and Consequences of Ending Preferences in Employment*, 1992 U. ILL. L. REV. 339, 343-44. Affirmative action is also often referred to as “benign” racial classification. See *infra* note 49.

prohibitions against discrimination."⁴ Whenever such disputes have reached the United States Supreme Court, beginning with *Regents of the University of California v. Bakke*,⁵ the Court has had to decide the extent to which race-based distinctions were allowable in order to achieve a "colorblind society."⁶ After two decades without a consensus on the Court, illustrated by plurality decisions and sharp dissents,⁷ the Court overturned its own recent precedent⁸ and held, in *Adarand Constructors, Inc. v. Peña*,⁹ that federal affirmative action programs are subject to strict scrutiny. In *Adarand*, the Court reviewed laws that require federal agencies to provide incentives to contractors for hiring subcontractors owned by socially and economically disadvantaged individuals, and which presume that minorities are such disadvantaged individuals.¹⁰ Although the Court remanded to the lower court as to the constitutionality of the laws at issue, the majority nevertheless indicated that the test to be applied to determine the constitutionality of affirmative action measures is the familiar strict scrutiny test, which holds that laws "are constitutional only if they are narrowly tailored measures that further compelling governmental interests."¹¹

The decision comes as no surprise in view of the present political climate in the United States, characterized by anti-affirmative action initiatives such as the proposed Civil Rights Restoration Act of 1995,¹² the proposed Equal Opportunity Act of 1995,¹³ the Univer-

4. Rutherglen, *supra* note 3, at 339.

5. 438 U.S. 265 (1978).

6. Aleinikoff, *supra* note 2, at 1062. Aleinikoff explains that the "norm of colorblindness is invariably traced to Justice Harlan's dissent in *Plessy v. Ferguson*." *Id.* at 1062-63 (citing *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)).

7. See *infra* notes 86-187 and accompanying text (discussing the case history of affirmative action).

8. See *infra* notes 172-87 and accompanying text (discussing *Metro Broadcasting, Inc. v. FCC*, 499 U.S. 547 (1990)).

9. 115 S. Ct. 2097 (1995).

10. 15 U.S.C. §§ 637(d)(2), (3) (1994). The term "minorities" includes Black Americans, Hispanic Americans, Native Americans, and Asian Pacific Americans. *Id.* § 637(d)(3)(C).

11. *Adarand*, 115 S. Ct. at 2113. This is strict scrutiny, which, although not clearly defined, the Court first conceived in *Korematsu v. United States*, 323 U.S. 214, 216 (1944) ("[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. . . . [C]ourts must subject [these restrictions] to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions.").

12. S. 26, 104th Cong., 1st Sess. (1995). The proposal would end the use of racial and gender preferences (such as quotas, set-asides, and numerical goals or objectives) by the federal government in hiring or promoting federal workers or granting federal contracts;

sity of California Board of Regents' decision to eliminate affirmative action from its admissions programs,¹⁴ and the proposed California Civil Rights Initiative.¹⁵ *Adarand's* requirement that strict scrutiny be applied to review federal affirmative action programs severely limits the federal government's ability to use race-based measures to achieve racial equality. The decision's effect on the future of affirmative action remains unclear, however, because like so many of its predecessors, it illustrates the Court's ambivalence about the subject and gives little guidance to lower courts that must answer the question of whether any affirmative action programs remain constitutionally permissible.

After discussing the facts of the *Adarand* case,¹⁶ this Note explains the Court's decision and reasoning.¹⁷ Following this case summary, the Note traces the standard of review for racial classifications as it has evolved in the Supreme Court's five major affirmative action decisions.¹⁸ The Note then analyzes what the *Adarand* opinion provides in terms of guidance about federal affirmative action,¹⁹ what questions it leaves unanswered,²⁰ and, finally, what the future of affirmative action may hold.²¹ In conclusion, the Note suggests that the decision represents the beginning of the end of affirmative action, but without further

prohibit the federal government from encouraging or requiring contractors to utilize racial or gender preferences with respect to their employees, suppliers, or subcontractors; and only allow affirmative action in recruitment efforts as long as racial and gender preferences are not used. A similar bill, called the "Civil Rights Act of 1995," is being considered for introduction by Rep. Charles T. Canady (R-Fla.). Abigail Thernstrom, *A Class Backwards Idea: Why Affirmative Action for the Needy Won't Work*, WASH. POST, June 11, 1995, at C1.

13. S. 1085, H.R. 2128, 104th Cong., 1st Sess. (1995). The bills provide that the federal government may not grant race or gender preferences in federal contracts, employment, or other programs or activities. *Id.*

14. B. Drummond Ayres, Jr., *California Board Ends Preferences in College System*, N.Y. TIMES, July 21, 1995, at A1 (late ed.). The Regents voted 14 to 10 to "stop admitting students, hiring professors and awarding contracts on the basis of race and sex." *Id.*

15. This initiative would "forbid[] the state to use race, sex, color, ethnicity or national origin as a criterion for either discriminating against, or granting preferential treatment to, any individual or group in employment, contracts, and education." K.L. Billingsley, *California Civil Rights Initiative Targets Affirmative Action*, WASH. TIMES, Jan. 9, 1995, at A3.

16. See *infra* notes 23-35 and accompanying text.

17. See *infra* notes 36-85 and accompanying text.

18. See *infra* notes 86-187 and accompanying text.

19. See *infra* notes 200-16 and accompanying text.

20. See *infra* notes 217-37 and accompanying text.

21. See *infra* notes 238-59 and accompanying text.

clarification, the law remains sufficiently uncertain to allow limited efforts at affirmative action by the federal government.²²

Adarand Constructors, Inc., a highway subcontractor, submitted a bid for guardrail work to Mountain Gravel & Construction Company, a contractor that had won the prime contract for a highway construction project in Colorado in 1989.²³ Although Adarand's bid was the lowest, the contract went to Gonzales Construction Company, a company certified as a disadvantaged business enterprise because of its owner's minority status. This status allowed Mountain Gravel to receive additional compensation from the government.²⁴ Adarand challenged the law requiring federal agency contracts to include such provisions for disadvantaged subcontractors,²⁵ claiming that the law

22. See *infra* notes 260-70 and accompanying text.

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

24. *Id.* Pursuant to the prime contract between the Central Federal Lands Highway Division and Mountain Gravel & Construction Company, the contractor, Mountain Gravel, would be compensated with an additional 10% of the final amount of the respective subcontracts (not to exceed 2% of the original contract amount) for hiring one or more disadvantaged business enterprises. *Id.* at 2104.

25. *Id.* at 2102. According to the *Adarand* Court, the federal laws at issue constitute "a complex scheme of federal statutes and regulations." *Id.* The Small Business Act sets out the federal government's objective of maximizing the opportunities of small companies owned by socially or economically disadvantaged individuals. Pub. L. No. 85-536, 72 Stat. 384, (codified as amended at 15 U.S.C. §§ 631-650 (1994)). The provisions of the Act state, in relevant part: "It is the policy of the United States that . . . small business concerns owned and controlled by socially and economically disadvantaged individuals, shall have the maximum practicable opportunity to participate in the performance of contracts let by any Federal agency." *Id.* § 637(d)(1). "Socially disadvantaged individuals" are defined 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," *id.* § 637(a)(5); and "economically disadvantaged individuals" means "those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged," *id.* § 637(a)(6)(A).

The Small Business Administration has further regulated this area. The *Adarand* Court found two of the Administration's programs implementing the statutory directives of the Small Business Act relevant to its conclusion. *Adarand*, 115 S. Ct. at 2102. First, the Court explained that the 8(a) program,

available to small businesses controlled by socially and economically disadvantaged individuals . . . confers a wide range of benefits on participating businesses, one of which is automatic eligibility for subcontractor compensation provisions of the kind at issue in this case.

Id. at 2102-03 (citations omitted).

In contrast, the Court explained that the 8(d) program applies only to subcontracting programs. *Id.* at 2103. Both programs presume social disadvantage for certain minorities, *id.* (citing 13 C.F.R. §§ 124.105(b)(1), 124.106(b) (1994)), and the 8(d) program also allows a presumption of economic disadvantage for minorities, *id.* (citing 48 C.F.R. §§ 19.001, 19.703(a)(2) (1994)). Both presumptions are rebuttable by third parties who show that the

discriminates on the basis of race in violation of constitutional equal protection guarantees.²⁶

The United States District Court for the District of Colorado granted the government's motion for summary judgment,²⁷ distinguishing the case from *City of Richmond v. J.A. Croson Co.*²⁸ by explaining that *Adarand* dealt with federal, as opposed to state or local, affirmative action.²⁹ The court used intermediate scrutiny under *Fullilove v. Klutznick*³⁰ to analyze the laws at issue.³¹ The Court of Appeals for the Tenth Circuit affirmed the district court's decision to analyze the laws under intermediate scrutiny,³² holding that *Fullilove*,³³ rather than *Croson*,³⁴ was controlling.³⁵ The United States Supreme Court granted certiorari.

Justice O'Connor's majority opinion³⁶ first discussed petitioner *Adarand*'s standing³⁷ before addressing the application of the Fifth and Fourteenth Amendments to the case.³⁸ Next, the opinion

individual is not, in fact, disadvantaged. *Id.* (citing 13 C.F.R. §§ 124.111(c)-(d), 124.601-124.609 (1994)). Further, the Surface Transportation and Uniform Relocation Assistance Act of 1987 requires that at least 10% of appropriated Department of Transportation funds be expended on small businesses controlled by socially and economically disadvantaged individuals. *Id.* (citing Pub. L. No. 100-17, § 106(c)(1), 101 Stat. 132, 145 (1987)). The Act adopts the Small Business Administration's race presumptions. *Id.* (citing Pub. L. No. 100-17, § 106(c)(1), 101 Stat. 146 (1987)).

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

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

28. 488 U.S. 469 (1989); see *infra* notes 155-71 and accompanying text.

29. *Adarand*, 790 F. Supp. at 243-44.

30. 448 U.S. 448 (1980); see *infra* notes 115-31 and accompanying text.

31. *Adarand*, 790 F. Supp. at 244-45. In order to pass intermediate scrutiny, the government must have an important interest in the affirmative action measure, and the measure had to be substantially related to that interest. *Id.*

32. *Adarand Constructors, Inc. v. Pena*, 16 F.3d 1537, 1545 (10th Cir. 1994), *rev'd*, 115 S. Ct. 2097 (1995).

33. 448 U.S. 448 (1980).

34. 488 U.S. 469 (1989).

35. *Adarand*, 16 F.3d at 1543. The court of appeals further concluded that "the federal government, acting under congressional authority, can engage more freely in affirmative action than states and localities." *Id.* at 1545 (citing *Ellis v. Skinner*, 961 F.2d 912, 915-16 (10th Cir.), *cert. denied sub nom. Ellis v. Card*, 113 S. Ct. 374 (1992)).

36. Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas joined in the majority opinion. *Adarand*, 115 S. Ct. at 2101.

37. *Id.* at 2104-05. Justice O'Connor found that the high likelihood that *Adarand* will again bid on federal subcontracts and lose to disadvantaged subcontractors gave *Adarand* standing to seek declaratory and injunctive relief against future use of discriminatory compensation clauses. *Id.* at 2105.

38. *Id.* at 2105-08. The Court noted that, despite the fact that the Fifth Amendment was once perceived as not containing an equal protection component, *id.* at 2106 (citing *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)), cases after 1964 "treat[ed] the equal

provided a case history of affirmative action, presenting the Court's recent decisions in cases involving racial classifications designed to benefit groups that have suffered from past discrimination.³⁹ The opinion began by discussing the 1978 case *Regents of the University of California v. Bakke*.⁴⁰ From *Bakke* and *Fullilove v. Klutznick*⁴¹ to *Wygant v. Jackson Board of Education*,⁴² the Court wavered between intermediate and strict scrutiny and failed to produce a majority opinion.⁴³ Justice O'Connor stated that this "left unresolved the proper analysis for remedial race-based governmental action."⁴⁴ She stated that, in *City of Richmond v. J.A. Croson Co.*,⁴⁵ the Court "resolved the issue, at least in part," when a majority held that strict scrutiny should be applied to racial classifications whether they benefited or burdened the particular group.⁴⁶ She then pointed out, however, that *Croson* only applied to local and state action, because Section 5 of the Fourteenth Amendment may give Congress broader powers,⁴⁷ and that the Court had held in *Metro Broadcasting, Inc. v.*

protection obligations imposed by the Fifth and Fourteenth Amendments as indistinguishable." *Id.* at 2107 (noting that the turning point occurred with *McLaughlin v. Florida*, 379 U.S. 184 (1964)). Thus, while *Adarand's* claim arose under the Fifth Amendment, which does not have an explicit equal protection clause such as the one found in the Fourteenth Amendment, the analysis, according to the majority, should be the same under both. *Adarand*, 115 S. Ct. at 2106-08.

39. *Adarand*, 115 S. Ct. at 2108.

40. 438 U.S. 265 (1978) (striking down a university affirmative action program that reserved spaces for minorities in medical school classes). For a full discussion of *Bakke*, see *infra* notes 94-114 and accompanying text.

41. 448 U.S. 448 (1980) (upholding a federal set-aside program of public works projects to minority-owned businesses). For a full discussion of *Fullilove*, see *infra* notes 115-31 and accompanying text.

42. 476 U.S. 267 (1986) (striking down a race-based preference in the layoffs of teachers). For a full discussion of *Wygant*, see *infra* notes 132-54 and accompanying text.

43. *Adarand*, 115 S. Ct. at 2108-10.

44. *Id.* at 2109.

45. 488 U.S. 469 (1989) (applying strict scrutiny to strike down a city government's minority subcontractor set-aside). For a full discussion of *Croson*, see *infra* notes 155-71 and accompanying text.

46. *Adarand*, 115 S. Ct. at 2110.

47. *Id.* Section 5 of the Fourteenth Amendment states, "The Congress shall have the power to enforce by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5. The Court used this part of the Fourteenth Amendment to allow the federal government to exercise more power in the realm of affirmative action than the state or local governments. See *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 563 (1990); *Fullilove v. Klutznick*, 448 U.S. 448, 472-73 (1980). For further discussion of § 5 as applied in these two cases, see *infra* notes 119-21, 175-77 and accompanying text; for an early case expounding the § 5 concept see *Katzenbach v. Morgan*, 384 U.S. 641, 650-51 (1966).

FCC⁴⁸ "that 'benign' federal racial classifications need only satisfy intermediate scrutiny."⁴⁹

Writing for the *Adarand* majority, Justice O'Connor then defended the Court's decision to depart from the *Metro Broadcasting* analysis, indicating that *Metro Broadcasting* itself represented a departure from precedent since (1) it rejected *Croson*'s explanation of why strict scrutiny of governmental racial discrimination is necessary, and (2) it

squarely rejected one of the three propositions established by the Court's earlier equal protection cases, namely congruence between the standards applicable to federal and state racial classifications, and in so doing also undermined the other two—skepticism of all racial classifications, and consistency of treatment irrespective of the race of the burdened or benefited group.⁵⁰

The opinion then stressed that "the Fifth and Fourteenth Amendments to the Constitution protect *persons*, not *groups*. It follows from that principle that all governmental action based on race

48. 497 U.S. 547 (1990). For further discussion of *Metro Broadcasting*, see *infra* notes 172-87.

49. *Adarand*, 115 S. Ct. at 2111-12 (citing *Metro Broadcasting*, 497 U.S. at 564-65). The term "benign racial classifications" is essentially a synonym for affirmative action. See, e.g., John Hart Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723, 727 (1974) (describing benign racial classification as situations in which "White people have decided to favor Black people at the expense of White people"); Kent Greenawalt, *Judicial Scrutiny of 'Benign' Racial Preference in Law School Admissions*, 75 COLUM. L. REV. 559, 559 (1975) (equating benign racial classifications with "racial preferences for . . . members of minority groups . . . at the expense of non-minority [persons]"). The Supreme Court of Washington stated that racial classifications are "benign" if they are "being used to redress the effects of past discrimination," and if "the persons normally stigmatized by racial classifications are being benefited." *DeFunis v. Odegaard*, 507 P.2d 1169, 1182, *cert. granted and appeal dismissed*, 414 U.S. 1035 (1973), *vacated as moot*, 416 U.S. 312 (1974) (per curiam). In his dissent in *Adarand*, Justice Stevens distinguished "benign" classifications from "invidious" discrimination, labeling the former "a decision by the majority to provide a benefit to certain members of [the] minority notwithstanding its incidental burden on some members of the majority." *Adarand*, 115 S. Ct. at 2120 (Stevens, J., dissenting).

50. *Adarand*, 115 S. Ct. at 2112. Justice O'Connor stated earlier in the opinion that "the Court's cases through *Croson* had established three general propositions with respect to governmental racial classifications." *Id.* at 2111. First, "skepticism" requires that any racial classification is suspect and must be subject to a searching examination. *Id.* (citing *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 273 (1986)). Second, "consistency" stands for the proposition that it is irrelevant whether the classification burdens or benefits the classified group; all racial classifications are due the same strict scrutiny. *Id.* (citing *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 494 (1989)). Third, "congruence" provides for an identical analysis of state and federal racial classifications. *Id.* (citing *Buckley v. Valeo*, 424 U.S. 1, 93 (1975)).

... should be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed."⁵¹ The Court held that all racial classifications were subject to strict scrutiny and expressly overruled *Metro Broadcasting* to the extent that it is inconsistent with that holding.⁵²

The *Adarand* majority then stated that the purpose of strict scrutiny is to "distinguish legitimate from illegitimate uses of race in governmental decisionmaking."⁵³ Rejecting the idea that benign and burdensome racial classifications should be subject to different standards of review,⁵⁴ the Court stated that racial classifications are "inevitably perceived by many as resting on an assumption that those who are granted this special preference are less qualified in some respect that is identified purely by their race," and that such laws "can only exacerbate rather than reduce racial prejudice."⁵⁵ For that reason, the Court noted, racial classifications can be acceptable only if "*Congress clearly articulates the need and basis for a racial classification, and also tailors the classification to its justification.*"⁵⁶ Also, regardless of whether the classification is benign or burdensome, the government causes harm to some people whenever it discriminates on the basis of race, and strict scrutiny must be used to determine whether that harm is justified.⁵⁷ The Court then rejected the notion that state and federal classifications should be reviewed under different standards⁵⁸ but declined to address the "authority § 5 of the Fourteenth Amendment confers upon Congress to deal with the

51. *Id.* at 2112-13.

52. *Id.* at 2113. In a section of the opinion joined only by Justice Kennedy, Justice O'Connor further justified overruling *Metro Broadcasting* because (1) it departed from precedent, (2) it was a frequently criticized decision, and (3) it was recent enough that it had not yet been integrated into the law. *Id.* at 2114-16.

53. *Id.* at 2113.

54. *Id.* at 2113-14. In this section, the Court addressed some of the criticisms of the majority position that Justice Stevens brought up in his dissent. These include the notion that burdensome classifications should receive different treatment than benign classifications, the difference between the powers of state and federal legislatures, and the doctrinal problems inherent in rejecting the *Metro Broadcasting* precedent. See *infra* notes 66-77 and accompanying text.

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

56. *Id.*

57. *Id.* at 2114.

58. Justice Stevens' dissent advocated this idea of different standards for state versus federal classifications. See *infra* notes 69-73 and accompanying text.

problem of racial discrimination, and the extent to which the courts should defer to Congress' exercise of that authority."⁵⁹

Finally, the Court remanded the case to the lower courts for consideration of the facts under strict scrutiny,⁶⁰ but emphasized its rejection of "the notion that strict scrutiny is 'strict in theory, but fatal in fact.'"⁶¹ The Court seemingly left some room for affirmative action by recognizing that racial discrimination still exists in America.⁶²

In his concurring opinion, Justice Scalia explained that, unlike the majority, he believed "government can never have a 'compelling interest' in discriminating on the basis of race,"⁶³ and that "it is unlikely, if not impossible, that the challenged program would survive under this understanding of strict scrutiny."⁶⁴ Justice Thomas, writing a separate concurrence, stated that

it is irrelevant whether a government's racial classifications are drawn by those who wish to oppress a race or by those who have a sincere desire to help those thought to be disadvantaged. . . .

. . . So-called "benign" discrimination teaches many that because of chronic and apparently immutable handicaps, minorities cannot compete with them without their patronizing indulgence. . . . These programs stamp minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are "entitled" to preferences.⁶⁵

Justice Stevens, joined by Justice Ginsburg, wrote the first of three dissenting opinions.⁶⁶ While agreeing with the majority that the Court should be skeptical of racial classifications, Justice Stevens found that there is a difference between classifications resulting in a

59. *Adarand*, 115 S. Ct. at 2114. See *supra* note 47 for a brief discussion of § 5 of the Fourteenth Amendment.

60. *Adarand*, 115 S. Ct. at 2118.

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

62. *Adarand*, 115 S. Ct. at 2117; see also *infra* note 209 and accompanying text (quoting Justice O'Connor's statement that racial discrimination persists).

63. *Adarand*, 115 S. Ct. at 2118 (Scalia, J., concurring in part and concurring in the judgment). Justice Scalia joined the majority "except insofar as it may be inconsistent with" his concurring opinion. *Id.* (Scalia, J., concurring in part and concurring in the judgment).

64. *Id.* at 2119 (Scalia, J., concurring in part and concurring in the judgment).

65. *Id.* (Thomas, J., concurring in part and concurring in the judgment).

66. *Id.* at 2120-23 (Stevens, J., dissenting).

benefit to the minority and those resulting in a burden.⁶⁷ He 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. . . . The consistency that the Court espouses would disregard the difference between a 'No Trespassing' sign and a welcome mat."⁶⁸

Justice Stevens then addressed some "important practical and legal differences between federal and state or local decision-makers."⁶⁹ He pointed out that Section 5 of the Fourteenth Amendment requires the Court to defer to Congress in light of its " 'institutional competence.' "⁷⁰ Justice Stevens noted that racial discrimination is more likely to occur at the state and local level than at the federal level, and that federal affirmative action is more acceptable because it is approved by representatives of the entire nation.⁷¹ He also emphasized Justice O'Connor's inconsistency on this issue, pointing out that her *Croson* opinion supported the idea that Congress has powers not possessed by the states.⁷² He then stated that "[t]he Fourteenth Amendment directly empowers Congress at the same time it expressly limits the States. This is no accident. It represents our Nation's consensus, achieved after hard experience throughout our sorry history of race relations, that the Federal Government must be the primary defender of racial minorities."⁷³

Finally, Justice Stevens addressed *Metro Broadcasting*⁷⁴ and found that it did not conflict with *Croson* and the preceding line of cases because it presented different issues.⁷⁵ Instead, he concluded that *Fullilove*⁷⁶ should govern the result in the *Adarand* case.⁷⁷

67. *Id.* (Stevens, J., dissenting).

68. *Id.* at 2120-21 (Stevens, J., dissenting).

69. *Id.* at 2123 (Stevens, J., dissenting).

70. *Id.* at 2124 (Stevens, J., dissenting) (quoting *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 563 (1990)).

71. *Id.* at 2125 (Stevens, J., dissenting).

72. *See infra* note 223 and accompanying text (quoting relevant statement from *Croson*).

73. *Adarand*, 115 S. Ct. at 2126 (Stevens, J., dissenting) (footnote omitted).

74. 497 U.S. 547 (1990).

75. *Adarand*, 115 S. Ct. at 2127 (Stevens, J., dissenting).

76. 448 U.S. 448 (1980).

77. *Adarand*, 115 S. Ct. at 2128 (Stevens, J., dissenting). Justice Stevens argued that legislation upheld in *Fullilove*, which used race as the sole criterion for receipt of public contracts, is far more objectionable than the laws at issue in *Adarand*, which addressed social and economic disadvantage in addition to racial characteristics. *Id.* (Stevens, J., dissenting). Justice Stevens noted other distinguishing factors which would indicate that the *Adarand* laws should be upheld. First, under those laws, businesses that "were once

Justice Souter dissented, joined by Justices Ginsburg and Breyer.⁷⁸ He agreed with Justice Stevens that stare decisis compelled the application of *Fullilove*, under which the laws at issue in *Adarand* would pass muster.⁷⁹ He added that "a majority of the Court today reiterates that there are circumstances in which Government may, consistently with the Constitution, adopt programs aimed at remedying the effects of past invidious discrimination."⁸⁰

Finally, Justice Ginsburg dissented, joined by Justice Breyer.⁸¹ She found that the Court's intervention in the case was unnecessary because of the political attention currently being paid to affirmative action.⁸² She also agreed with Justice Stevens that decisions evaluating federal programs in light of the Fourteenth Amendment should receive judicial deference.⁸³ She reemphasized the majority's statement that strict scrutiny is not "fatal in fact," and that the majority opinion properly calls for a searching review "to distinguish legitimate from illegitimate uses of race in governmental decision-making."⁸⁴ Justice Ginsburg concluded: "While I would not disturb the programs challenged in this case, and would leave their improvement to the political branches, I see today's decision as one that allows our precedent to evolve, still to be informed by and responsive to changing conditions."⁸⁵

disadvantaged but have since become successful" could lose their status as Disadvantaged Business Enterprises, so that they would not unfairly benefit from the program. *Id.* at 2129-30 (Stevens, J., dissenting). Second, Justice Stevens pointed out that the programs challenged in *Adarand* did not involve quotas or numerical requirements, but simply gave an incentive to hire the minority, leaving the contractor a choice of whom to hire as a subcontractor. *Id.* at 2130 (Stevens, J., dissenting).

78. *Id.* at 2131. (Souter, J., dissenting). Justice Souter first noted that *Adarand* Constructors primarily wanted a ruling that a specific finding of discrimination had to be made before the subcontractor clause would be permissible, and that the Court's discussion of the standard of review for racial classifications was unnecessary. *Id.* (Souter, J., dissenting).

79. *Id.* at 2132 (Souter, J., dissenting). In fact, Justice Souter cited to a section of the *Fullilove* opinion that traced the legislative history of SBA § 8 and described it as a remedial provision. *Id.* at 2131 (Souter, J., dissenting) (citing *Fullilove*, 448 U.S. at 465-66). He then noted that *Fullilove* had justified statutes that provided remedies for past discrimination, and that no issue had come before the Court since to change that aspect of the *Fullilove* decision. *Id.* (Souter, J., dissenting).

80. *Id.* at 2133 (Souter, J., dissenting).

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

82. *Id.* at 2134 (Ginsburg, J., dissenting).

83. *Id.* (Ginsburg, J., dissenting) (quoting *id.* at 2126 (Stevens, J., dissenting)).

84. *Id.* at 2136 (Ginsburg, J., dissenting) (citations omitted).

85. *Id.* (Ginsburg, J., dissenting).

As the number of opinions in *Adarand* illustrates, a great deal of disagreement remains among the members of the Court on the issue of affirmative action. A similar lack of consensus as to the proper standard of review for benign racial classifications plagues the case history of this area. The first three important affirmative action cases⁸⁶—*Regents of the University of California v. Bakke*,⁸⁷ *Fullilove v. Klutznick*,⁸⁸ and *Wygant v. Jackson Board of Education*⁸⁹—failed to produce majority opinions or a clear standard of review for affirmative action. Later cases, specifically *City of Richmond v. J.A. Croson Co.*⁹⁰ and *Metro Broadcasting, Inc. v. FCC*,⁹¹ provided majority decisions but still contained sharp dissents,⁹² and the intermediate scrutiny standard put forth in *Metro Broadcasting* was rejected in *Adarand* just five years after it was announced.⁹³

The first case in which the Supreme Court addressed the constitutionality of governmental affirmative action was *Regents of the University of California v. Bakke*.⁹⁴ In that case, a white male, denied admission to the medical school at the University of California at Davis, challenged the school's special admission program which reserved sixteen of 100 spaces in each class for disadvantaged minority students.⁹⁵ Petitioner Allan Bakke alleged that the University's policy discriminated on the basis of race and thus violated his rights under the Equal Protection Clause of the Fourteenth Amendment.⁹⁶ Although the Court ordered Bakke's admission to the school,⁹⁷ the case produced no majority opinion with regard to the standard under which courts should review such programs. Instead, a plurality called

86. In the interest of clarity and brevity, this Note discusses only that line of cases in which governmental entities imposed racial classifications in the name of affirmative action. For a brief summary of case law dealing with private affirmative action such as union agreements and consent decrees, see Daron S. Fitch, Note, *The Aftermath of Croson: A Blueprint for a Constitutionally Permissible Minority Set-Aside Program*, 53 OHIO ST. L.J. 555, 559-69 (1992).

87. 438 U.S. 265 (1978); see *infra* notes 94-114 and accompanying text.

88. 448 U.S. 448 (1980); see *infra* notes 115-31 and accompanying text.

89. 476 U.S. 267 (1986); see *infra* notes 132-54 and accompanying text.

90. 488 U.S. 469 (1989); see *infra* notes 155-71 and accompanying text.

91. 497 U.S. 547 (1990); see *infra* notes 172-87 and accompanying text.

92. See *infra* notes 169-71, 180-87 and accompanying text.

93. See *supra* notes 50-52 and accompanying text.

94. 438 U.S. 265 (1978).

95. *Id.* at 269-77.

96. *Id.* at 277-78.

97. *Id.* at 320.

for strict scrutiny in evaluating the program,⁹⁸ but five justices agreed that race may be considered as a factor in making admissions decisions.⁹⁹

Announcing the judgment of the Court in *Bakke*, Justice Powell rejected the notion that there is any difference between racial classifications benefiting and burdening minorities, because "[t]he guarantees of the Fourteenth Amendment extend to all persons. . . . 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."¹⁰⁰ Calling for strict scrutiny analysis when racial or ethnic discrimination is at issue, Justice Powell argued that the only constitutional compelling purpose for racially preferential classifications was that of remedying past racial or ethnic harms.¹⁰¹ Since there had been no finding of such harm in *Bakke*, the program could not withstand strict scrutiny.¹⁰² Justice Powell also addressed the means to achieve the end and especially rejected quotas, such as the one in the admissions process in this case, as an acceptably tailored measure.¹⁰³

Justices Brennan, White, Marshall, and Blackmun concurred in the judgment but dissented in part.¹⁰⁴ This plurality, while agreeing with Justice Powell that strict scrutiny should be applied to all racial

98. *Id.* at 357 (Brennan, White, Marshall, Blackmun, JJ., concurring in the judgment in part and dissenting in part).

99. *Id.* at 315-16 (opinion of Powell, J.); *id.* at 325 (Brennan, White, Marshall, Blackmun, JJ., concurring in the judgment in part and dissenting in part).

100. *Id.* at 289-90.

101. *See id.* at 291, 306-20. Justice Powell stated that "[r]acial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination." *Id.* at 291. The test that Justice Powell considered appropriate required that the burden of racial and ethnic discrimination must be "precisely tailored to serve a compelling governmental interest." *Id.* at 299. The only measures that could pass this test, according to Justice Powell, were those remedial efforts that were in response to proven constitutional or statutory violations, "resulting in identified, race-based injuries to individuals held entitled to the preference." *Id.* at 301-02.

102. *Id.* at 309. The University's other purposes in instituting the racial classifications had been to deliver improved health care to underserved communities and to attain a diverse student body. *Id.* at 310-11. The first could potentially have been a compelling interest, but no evidence existed in the record regarding that need. *Id.* at 310. The second, non-remedial goal of diversity was an appropriate goal for a university, *id.* at 311-12, but it should be only one of many factors relevant in the admissions process, *id.* at 314.

103. *Id.* at 316. He stated that "the assignment of a fixed number of places to a minority group is not a necessary means" toward the end of eliminating the effects of past discrimination. *Id.*

104. *Id.* at 324 (Brennan, White, Marshall, Blackmun, JJ., concurring in the judgment in part and dissenting in part).

classifications,¹⁰⁵ felt that such classifications could survive strict scrutiny if no less restrictive measure is available.¹⁰⁶

Writing a separate opinion concurring in the judgment that a university may consider the race of an applicant as a factor in admissions,¹⁰⁷ Justice Marshall discussed the history of racial discrimination in the United States at length.¹⁰⁸ He pointed out that "bringing the Negro into the mainstream of American life should be a state interest of the highest order,"¹⁰⁹ and that the Fourteenth Amendment "was not intended to prohibit measures designed to remedy the effects of the Nation's past treatment of Negroes."¹¹⁰ While Justice Marshall did not specifically address an appropriate standard of review, his opinion indicates his belief that the Court should permit benign or remedial racial classifications.

In a short separate opinion, Justice Blackmun agreed with Justice Marshall that racial inequality continued to be a significant social force in the United States.¹¹¹ While he joined the Brennan plurality¹¹² in its application of strict scrutiny, he stressed that affirmative action and the tension it creates "is part of the [Fourteenth] Amendment's very nature until complete equality is achieved."¹¹³ He concluded that "[i]n order to get beyond racism,

105. *Id.* at 357-61 (Brennan, White, Marshall, Blackmun, JJ., concurring in the judgment in part and dissenting in part). The plurality argued that even benign racial classifications could be misused, and that the mere claim that a racial classification is benign and remedial alone will not be sufficient. *Id.* (Brennan, White, Marshall, Blackmun, JJ., concurring in the judgment in part and dissenting in part).

106. *Id.* at 356-57 (Brennan, White, Marshall, Blackmun, JJ., concurring in the judgment in part and dissenting in part). Despite the application of strict scrutiny, the Brennan opinion found that the University's interest in remedying the effects of past social discrimination was sufficient, *id.* at 362 (Brennan, White, Marshall, Blackmun, JJ., concurring in the judgment in part and dissenting in part), and that the program was sufficiently narrowly tailored to meet this remedial goal, *id.* at 373-78 (Brennan, White, Marshall, Blackmun, JJ., concurring in the judgment in part and dissenting in part).

107. *Id.* at 387 (opinion of Marshall, J.). The separate opinion by Justice White which precedes that of Justice Marshall in the case is not discussed here, because it does not address the equal protection issue, but, rather, analyzes the case based on Title VI of the Civil Rights Act of 1964. *Id.* at 379-87 (opinion of White, J.).

108. *Id.* at 387-96 (opinion of Marshall, J.).

109. *Id.* at 396 (opinion of Marshall, J.).

110. *Id.* at 396-97 (opinion of Marshall, J.). Justice Marshall continued, stating that "[t]he Congress that passed the Fourteenth Amendment is the same Congress that passed the 1866 Freedmen's Bureau Act, an Act that provided many of its benefits only to Negroes." *Id.* at 397 (opinion of Marshall, J.) (citing ch. 200, 14 Stat. 173 (1866)).

111. *Id.* at 403-04. (opinion of Blackmun, J.).

112. See *supra* notes 104-06 and accompanying text.

113. *Bakke*, 438 U.S. at 405 (opinion of Blackmun, J.).

we must first take account of race. . . . And in order to treat some persons equally, we must treat them differently.”¹¹⁴

Two years after *Bakke*, the Supreme Court again reviewed an affirmative action program in *Fullilove v. Klutznick*,¹¹⁵ but failed to deliver a majority opinion regarding the standard of review to be applied to such programs. In *Fullilove*, the Court upheld a set-aside program requiring ten percent of all federal grants for local public works projects to go to minority-owned businesses, in accordance with the Public Works Employment Act of 1977.¹¹⁶ Chief Justice Burger announced the judgment of the Court and was joined by Justices White and Powell.¹¹⁷ After a thorough discussion of the history of racism in the construction business,¹¹⁸ he stated that while a racially discriminatory program “calls for close examination,” deference was due Congress because it is “a co-equal branch charged by the Constitution with the power to ‘provide for the . . . general [w]elfare of the United States’ and ‘to enforce, by appropriate legislation,’ the

114. *Id.* at 407 (opinion of Blackmun, J.). The opinion of Justice Stevens, joined by Chief Justice Burger and Justice Stewart is not discussed here, because it does not address the standard of review. *Id.* at 408-21 (Stevens, J., concurring in the judgment in part and dissenting in part).

115. 448 U.S. 448 (1980) (plurality opinion).

116. *Id.* at 453 (plurality opinion) (citing Pub. L. No. 95-28, 91 Stat. 116 (1977)).

117. *Id.* (plurality opinion).

118. *Id.* at 459-72 (plurality opinion). For example, the opinion discussed the hearings that Congress conducted before passing the laws at issue in the case, in which supporters of the [minority business enterprise] amendment echoed the sponsor's concern that a number of factors, difficult to isolate or quantify, seemed to impair access by minority businesses to public contracting opportunities. Representative Conyers of Michigan spoke of the frustration of the existing situation, in which, due to the intricacies of the bidding process and through no fault of their own, minority contractors and businessmen were unable to gain access to government contracting opportunities.

Id. at 461 (plurality opinion) (citing 123 CONG. REC. 5330 (1977) (remarks of Rep. Conyers)). Chief Justice Burger further stated that, in the construction industry, participation by minority business account[ed] for an inordinately small percentage of government contracting. The causes of this disparity were perceived as involving the longstanding existence and maintenance of barriers impairing access by minority enterprises to public contracting opportunities, or sometimes as involving more direct discrimination, but not as relating to lack—as Senator Brooke put it—“of capable and qualified minority enterprises who are ready and willing to work.”

Id. at 462-63 (citing 123 CONG. REC. 7156 (1977) (remarks of Sen. Brooke)). Justice Souter pointed out in *Adarand* that the same facts still apply to federal government contracts today, and that the provisions at issue in *Adarand* should be upheld as well. *Adarand*, 115 S. Ct. at 2131 (Souter, J., dissenting).

equal protection guarantees of the Fourteenth Amendment."¹¹⁹ The proper test, according to Chief Justice Burger, differed from both strict scrutiny and from Justice Powell's test in *Bakke*,¹²⁰ and would have the Court

inquire whether the *objectives* of this legislation are within the power of Congress. If so, we must go on to decide whether the limited use of racial and ethnic criteria, in the context presented, is a constitutionally permissible *means* for achieving the congressional objectives and does not violate the equal protection component of the Due Process Clause of the Fifth Amendment.¹²¹

Chief Justice Burger and Justices White and Powell concluded that the program should survive under this test because the minority business enterprise legislation was a sufficiently narrowly tailored exercise of the congressional spending and commerce powers.¹²²

Justice Powell wrote a concurring opinion, setting out the analysis under the standard he proposed two years earlier in *Bakke*.¹²³ Again, he concluded that the federal set-aside passed the test, based on the compelling interest of "ameliorating the disabling effects of identified discrimination"¹²⁴ in the construction industry.

Justices Brennan, Marshall, and Blackmun concurred but found that the appropriate standard to review benign racial classifications is intermediate scrutiny.¹²⁵ They described this intermediate scrutiny inquiry in classic terms: "whether racial classifications designed to further remedial purposes serve important governmental objectives and are substantially related to achievement of those objectives."¹²⁶

In their *Fullilove* dissent, Justices Stewart and Rehnquist expressed the opinion that all affirmative action is unconstitutional,

119. *Fullilove*, 448 U.S. at 472 (plurality opinion) (citing U.S. CONST. art. I, § 8, cl. 1; amend. XIV, § 5).

120. 438 U.S. 265 (1978).

121. *Fullilove*, 448 U.S. at 473 (plurality opinion).

122. *Id.* at 473-92 (plurality opinion) (citing U.S. CONST. Art. I, § 8, cls. 1, 3). Also, while the opinion "does not adopt, either expressly or implicitly, the formulas of analysis articulated in such cases as *University of California Regents v. Bakke* . . . [the *Fullilove*] analysis demonstrates that the . . . provision would survive judicial review under either 'test' articulated in the several *Bakke* opinions." *Id.* at 492 (plurality opinion) (citing *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978)).

123. *Id.* at 496 (Powell, J., concurring) (citing *Bakke*, 438 U.S. at 299, 305; see also *supra* note 101 (setting out the standard that racial classifications must be narrowly tailored to serve a compelling governmental interest)).

124. *Fullilove*, 448 U.S. at 497 (Powell, J., concurring).

125. *Id.* at 519 (Marshall, J., concurring in the judgment).

126. *Id.* (Marshall, J., concurring in the judgment).

stating that "[t]he equal protection standard of the Constitution . . . absolutely prohibits invidious discrimination by government,"¹²⁷ and that "racial discrimination is by definition invidious discrimination."¹²⁸ The opinion stated that while Congress deserves deference under Section 5 of the Fourteenth Amendment, "Congress must obey the Constitution just as the legislatures of all the States must obey the Constitution."¹²⁹

Finally, Justice Stevens also dissented, but he rejected the argument that no racial classification can be constitutional.¹³⁰ He implicitly supported the strict scrutiny standard by stating that the relevant statute violated equal protection because it was not narrowly tailored; that is, it did not specifically deal with a class distinguished by certain characteristics that made them the victims of unfair treatment in the past and less able to compete in the future.¹³¹

In 1986, members of the Supreme Court again failed to agree on a standard of review for affirmative action in *Wygant v. Jackson Board of Education*,¹³² in which a plurality used strict scrutiny to strike down a race-based preference in the layoffs of teachers.¹³³ Following a compromise between a school board and teachers' union providing that layoffs would be conducted based on a seniority system, but that no greater proportion of minority teachers would be laid off than the current percentage of minority teachers employed,¹³⁴ several non-minority teachers challenged the constitutionality of the plan when they were subsequently laid off.¹³⁵

127. *Id.* at 523 (Stewart, J., dissenting).

128. *Id.* at 526 (Stewart, J., dissenting). Justice Scalia echoed this sentiment in *Adarand*. See *supra* note 63 and accompanying text.

129. *Fullilove*, 448 U.S. at 526 (Stewart, J., dissenting).

130. *Id.* at 548 (Stevens, J., dissenting).

131. *Id.* at 552-53 (Stevens, J., dissenting).

132. 476 U.S. 267 (1986) (plurality opinion).

133. *Id.* at 279-83 (plurality opinion).

134. *Id.* at 299 (Marshall, J., dissenting). Therefore, "each group would shoulder a portion of that burden equal to its portion of the faculty. Thus, the overall percentage of minorities on the faculty would remain constant." *Id.* (Marshall, J., dissenting). However, "when layoffs became necessary in 1974, it was evident that adherence to the [compromise] would result in the layoff of tenured non-minority teachers while minority teachers on probationary status were retained." *Id.* at 271 (plurality opinion). When the school board decided not to comply with the compromise, but, rather, to lay off according to the straight seniority system, several minority teachers who were laid off sued, and the Court directed the school board to comply with the plan. *Id.* at 272 (plurality opinion).

135. *Id.* at 271-72 (plurality opinion).

Justice Powell, announcing the plurality opinion in *Wygant*,¹³⁶ found that the school board's race-based layoff plan did not survive strict scrutiny because the interest in providing minority role models for students in order to alleviate the effects of societal discrimination was not a sufficiently compelling goal.¹³⁷ He reasoned that the burden of layoffs was much heavier than that imposed by hiring based on race, so that the layoff plan was not sufficiently narrowly tailored to meet the government's interest.¹³⁸ Although the plurality denied that strict scrutiny was met in *Wygant*, it nevertheless acknowledged that a public employer could take race into account if "a strong basis in evidence" suggested that prior discrimination by the government unit was involved.¹³⁹

Justice O'Connor, in her concurring opinion, agreed with the plurality's strict scrutiny standard of review, but expressed a slightly more generous view of the circumstances under which an interest would be sufficiently compelling to pass the test¹⁴⁰ than had Justice Powell.¹⁴¹ She argued that:

remedying past or present racial discrimination by a state actor is a sufficiently weighty state interest to warrant the remedial use of a carefully constructed affirmative action program. This remedial purpose need not be accompanied by contemporaneous findings of actual discrimination to be accepted as legitimate as long as the public actor has a firm basis for believing that remedial action is required.¹⁴²

Justice O'Connor also indicated that promoting racial diversity may be a compelling interest in the context of higher education,¹⁴³ but that general societal discrimination cannot be sufficiently compelling.¹⁴⁴

136. *Id.* at 269 (plurality opinion). Justice Powell was joined by Chief Justice Burger and Justices Rehnquist and O'Connor. *Id.* (plurality opinion).

137. *Id.* at 274-75 (plurality opinion).

138. *Id.* at 282-83 (plurality opinion).

139. *Id.* at 277 (plurality opinion).

140. *Id.* at 286 (O'Connor, J., concurring).

141. See *supra* notes 123-24 and accompanying text.

142. *Wygant*, 476 U.S. at 286 (O'Connor, J., concurring). As an example of sufficient evidence, Justice O'Connor suggested "demonstrable evidence of a disparity between the percentage of qualified blacks on a school's teaching staff and the percentage of qualified minorities in the relevant labor pool." *Id.* at 292 (O'Connor, J., concurring).

143. *Id.* at 286 (O'Connor, J., concurring). Justice O'Connor here reviewed the different standards and chose to subscribe to that of Justice Powell in *Bakke*. *Id.* (O'Connor, J., concurring).

144. *Id.* at 288 (O'Connor, J., concurring). Justice O'Connor defined "societal discrimination" as "discrimination not traceable to [the governmental agency's] own actions." *Id.* (O'Connor, J., concurring). Justice White authored a third opinion in the

Justice Marshall wrote a dissenting opinion in which Justices Brennan and Blackmun joined.¹⁴⁵ He first pointed out that the Court had thus far been unable to agree on a standard of review for affirmative action programs.¹⁴⁶ He then reiterated his stance from *Bakke*¹⁴⁷ that intermediate scrutiny is the appropriate choice,¹⁴⁸ but stated that this provision would pass review under any standard.¹⁴⁹

Justice Stevens also dissented.¹⁵⁰ Like Justice White,¹⁵¹ he did not expressly state what standard of scrutiny he would apply. He did propose, however, yet another test for race-based classifications that allowed this program to pass and, thus, did not appear to be as restrictive as strict scrutiny. Justice Stevens stated that the Court "should first ask whether the Board's action advances the public interest in educating children for the future."¹⁵² The next step in Justice Stevens' test was to "consider whether that public interest, and the manner in which it is pursued, justifies any adverse effects on the disadvantaged group."¹⁵³ Justice Stevens also pointed out that "in our present society, race is not always irrelevant to sound governmental decisionmaking."¹⁵⁴

In 1989, the Court produced its first majority opinion in this area with *City of Richmond v. J.A. Croson Co.*¹⁵⁵ That opinion, however, only involved state and local affirmative action programs and did not address the standard for federal programs.¹⁵⁶ In *Croson*, the Court

case, in which he stated that the layoffs of non-minorities in order to integrate the workforce could never be permissible. *Id.* at 295 (White, J., concurring). He stated that laying off whites in order to keep blacks working was not justified by any interests asserted by the school and could not be "save[d] . . . from the strictures of the Equal Protection Clause." *Id.* at 295 (White, J., concurring in the judgment). Justice White did not expressly state which standard of review was appropriate.

145. *Id.* at 295 (Marshall, J., dissenting).

146. *Id.* at 301 (Marshall, J., dissenting).

147. 438 U.S. 265 (1978).

148. *Wygant*, 476 U.S. at 301-02 (Marshall, J., dissenting) (citing *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 359 (1978) (opinion of Marshall, J.)).

149. *Id.* at 303 (Marshall, J., dissenting).

150. *Id.* at 313 (Stevens, J., dissenting).

151. See *supra* note 144.

152. *Wygant*, 476 U.S. at 313 (Stevens, J., dissenting). This clearly is a lower standard than the requirement of evidence of past discrimination.

153. *Id.* (Stevens, J., dissenting). This test is much broader and less strict than the narrow tailoring requirement.

154. *Id.* at 314 (Stevens, J., dissenting).

155. 488 U.S. 469 (1989).

156. *Id.* at 490-91 (distinguishing the case from *Fullilove* because it deals with state and local measures rather than federal legislation); *Adarand*, 115 S. Ct. at 2110 (stating that

dealt with a requirement of the city of Richmond that all prime contractors to whom the city awarded contracts subcontract at least thirty percent of the total contract dollar amount to minority-owned and controlled businesses.¹⁵⁷

Justice O'Connor, writing for the majority, first rejected the argument that *Fullilove v. Klutznick*¹⁵⁸ should compel the Court to uphold the Richmond city contract award program, explaining that the case was not applicable since it dealt with a federal, rather than a local, affirmative action program.¹⁵⁹ Justice O'Connor noted that "[w]hat appellant ignores is that Congress, unlike any State or political subdivision, has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment."¹⁶⁰ Agreeing with the *Wygant* plurality, Justice O'Connor further explained that the same standard should apply regardless of whether the classification is benign or burdensome to the minority.¹⁶¹ She then reiterated the *Wygant* requirements for a "compelling interest,"¹⁶² stating that a "generalized assertion that there has been past discrimination in an entire industry provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy."¹⁶³ She concluded by suggesting that a state or local entity can take action "to rectify the effects of identified discrimination" by ending discriminatory exclusion if a "significant statistical disparity" exists in the industry, dealing with individual instances of racially motivated refusals to employ minority contractors, or employing race-neutral devices to increase accessibility of city contracts to all races.¹⁶⁴

Croson required strict scrutiny of race-based action by state and local governments but did not declare the standard of review for similar federal legislation).

157. *Croson*, 488 U.S. at 477-78.

158. 448 U.S. 448 (1980).

159. *Croson*, 488 U.S. at 486-91. This opinion was joined in various parts by Chief Justice Rehnquist, and Justices White, Stevens, and Kennedy. *Id.* at 475.

160. *Id.* at 490. Justice O'Connor was referring to § 5 of the Fourteenth Amendment. See *supra* note 47. Justice O'Connor then engaged in a lengthy discussion about why § 5 compels a different result for state and local programs than for those instituted by the federal government. *Croson*, 488 U.S. at 490-93.

161. *Croson*, 488 U.S. at 494 (citing *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 279-80 (1986) (plurality opinion)).

162. *Wygant*, 476 U.S. at 274-75; see *supra* notes 136-44 and accompanying text (discussing the circumstances under which an interest would be sufficiently compelling to withstand the challenge of strict scrutiny review).

163. *Croson*, 488 U.S. at 498.

164. *Id.* at 509. The Court gave several examples of such race-neutral devices, including "[s]implification of bidding procedures, relaxation of bonding requirements, and training and financial aid for disadvantaged entrepreneurs of all races." *Id.* at 509-10.

Although the *Croson* majority opinion was a step toward a workable constitutional analysis for affirmative action cases, the Court's continuing lack of consensus is illustrated by the five additional opinions in the case. Justice Stevens concurred in part and in the judgment, but took a more lenient position, stating that he disagreed with the idea "that a governmental decision that rests on racial classifications is never permissible except as a remedy for a past wrong."¹⁶⁵ Justice Kennedy, on the other hand, leaned toward a stricter interpretation of the Equal Protection Clause by rejecting the notion that Section 5 of the Fourteenth Amendment gives the federal government increased power to institute affirmative action.¹⁶⁶

Justice Scalia concurred only in the judgment and set out his more narrow view of strict scrutiny, stating that the only time states may "act by race" is when it is "necessary to eliminate their own maintenance of a system of unlawful racial classification."¹⁶⁷ According to Justice Scalia, even in cases of identified discrimination in the construction industry, the government could use only race-neutral measures.¹⁶⁸

Justice Marshall dissented, with Justices Brennan and Blackmun joining, and found that the Richmond program was virtually identical to the one in *Fullilove v. Klutznick* and thus should be upheld under intermediate scrutiny.¹⁶⁹ He chastised the majority for regarding racial discrimination "as largely a phenomenon of the past" and for their apparent belief that "government bodies need no longer preoccupy themselves with rectifying racial injustice."¹⁷⁰ Finally, he found that Section 5 of the Fourteenth Amendment was not intended as a limit on states' powers to accomplish the aims of the Civil War Amendments, but rather gave Congress federal power at a time when that power was not as accepted as it is today.¹⁷¹

In 1990, the Court seemed to answer the question remaining after *Croson*—that of the appropriate standard of review for federal

165. *Id.* at 511 (Stevens, J., concurring in part and concurring in the judgment).

166. *See id.* at 518-19 (Kennedy, J., concurring in part and concurring in the judgment).

167. *Id.* at 524 (Scalia, J., concurring in the judgment).

168. *Id.* at 526 (Scalia, J., concurring in the judgment).

169. *Id.* at 528-36 (Marshall, J., dissenting).

170. *Id.* at 552 (Marshall, J., dissenting).

171. *Id.* at 559-61 (Marshall, J., dissenting). The final dissent, written by Justice Blackmun and joined by Justice Brennan, stated that this opinion represented a regression for the Court, and that Richmond deserved praise for taking action against discrimination, especially in light of its long history of racial discrimination. *Id.* at 561-62 (Blackmun, J., dissenting).

affirmative action programs. In *Metro Broadcasting, Inc. v. FCC*,¹⁷² the Court held that federal affirmative action programs should be reviewed under a more lenient standard than the strict scrutiny applied to local or state affirmative action measures.¹⁷³ In *Metro Broadcasting*, the Court was asked to judge the constitutionality of: (1) the FCC's use of minority ownership and management as one of six factors to be considered in the distribution of radio and television broadcast licenses, and (2) the provision allowing a broadcaster whose license is up for review or revocation to sell only to a minority enterprise.¹⁷⁴

Justice Brennan's majority opinion in the case first addressed the deference owed to Congress¹⁷⁵ and held that intermediate scrutiny is appropriate when the racial preferences are "adopted by an administrative agency at the explicit direction of Congress."¹⁷⁶ Thus, the program's requirements must "serve [an] important governmental objective . . . [and be] substantially related to the achievement of that objective."¹⁷⁷ The Court further held that the non-remedial goal of achieving broadcast diversity is an important governmental objective.¹⁷⁸ In addition to relying on the powers of Congress, the Court implicitly distinguished benign race-conscious programs from those that burden minorities and held that benign programs that pass intermediate scrutiny are constitutional.¹⁷⁹

Justice O'Connor dissented and was joined by Chief Justice Rehnquist and Justices Scalia and Kennedy.¹⁸⁰ The dissent concluded that strict scrutiny should be applied because "the Constitution's equal protection guarantees extend equally to all

172. 497 U.S. 547 (1990).

173. *Id.* at 564-65.

174. *Id.* at 556-58. These FCC policies were created in 1978 to achieve the goal of diversity of programming in the Communications Act of 1934, 47 U.S.C. §§ 151-55, 201-21, 301-29, 401-16, 501-05, 601, 609 (1988). They were announced in the FCC's *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 F.C.C.2d 979, 982-83 (1978).

175. *Id.* at 563. He stated that Congress was "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.* (citing *Fullilove v. Klutznick*, 448 U.S. 448, 472 (1980)).

176. *Id.* at 563.

177. *Id.* at 566.

178. *Id.*

179. *Id.* at 596-97. In the lone concurrence in *Metro Broadcasting*, Justice Stevens restated his *Croson* position rejecting the proposition that "a governmental decision that rests on racial classification is never permissible except as a remedy for a past wrong." *Id.* at 601 (Stevens, J., concurring).

180. *Id.* at 602 (O'Connor, J., dissenting).

citizens.”¹⁸¹ The justices rejected the majority’s finding that Section 5 of the Fourteenth Amendment gives Congress more power in this situation, stating that “it would be unthinkable that the same Constitution would impose a lesser duty on the federal government.”¹⁸² Justice O’Connor then distinguished the *Fullilove* holding that Section 5 gives Congress unique remedial powers, expounding the novel idea that “Section 5 empowers Congress to act respecting the States, and of course this case concerns only the administration of federal programs by federal officials.”¹⁸³ Justice O’Connor also addressed the majority’s treatment of “benign” racial classifications, stating that the expression is a “contradiction in terms” and that all “[g]overnmental distinctions among citizens based on race or ethnicity, even in the rare circumstances permitted by our cases, exact costs and carry substantial dangers.”¹⁸⁴

Finally, Justice Kennedy dissented, joined by Justice Scalia. Comparing the interest in *Plessy v. Ferguson*¹⁸⁵ of train passengers’ riding comfort to the FCC’s interest of the media audiences’ listening pleasure, and pointing out that the *Plessy* Court, too, thought that the classifications were benign, he indicated that applying intermediate scrutiny gives the courts too much power.¹⁸⁶ Justice Kennedy stated that allowing courts to become a “case-by-case arbiter of when it is desirable and benign for the Government to disfavor some citizens and favor others based on the color of their skin” is dangerous and moves the Court from “‘separate but equal’ to ‘unequal but benign.’”¹⁸⁷

The history of affirmative action in the Supreme Court reveals little consensus on the subject of a standard of review. In the first three decisions, *Bakke*,¹⁸⁸ *Fullilove*,¹⁸⁹ and *Wygant*,¹⁹⁰ the Court

181. *Id.* at 602-03 (O’Connor, J., dissenting).

182. *Id.* at 604 (O’Connor, J., dissenting) (citing *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954)).

183. *Id.* at 605-06 (O’Connor, J., dissenting).

184. *Id.* at 609 (O’Connor, J., dissenting). This opinion is consistent with Justice O’Connor’s plurality opinion in *Croson*. See *supra* note 161 and accompanying text.

185. 163 U.S. 537 (1896). This decision, which held that train cars could be de jure segregated because the Equal Protection Clause was not violated as long as facilities were “separate but equal,” was subsequently overturned in *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

186. *Metro Broadcasting*, 497 U.S. at 632 (Kennedy, J., dissenting).

187. *Id.* at 637-38 (Kennedy, J., dissenting).

188. 438 U.S. 265 (1978); see *supra* notes 94-114 and accompanying text.

189. 448 U.S. 448 (1980); see *supra* notes 115-31 and accompanying text.

190. 476 U.S. 267 (1986); see *supra* notes 132-54 and accompanying text.

failed to produce majority opinions regarding a standard,¹⁹¹ and each case consisted of several opinions espousing different standards.¹⁹² While *Croson*¹⁹³ and *Metro Broadcasting* appeared to establish some guidance,¹⁹⁴ each of those cases resulted in several separate opinions, with disagreement on the appropriate standards for benign racial classifications¹⁹⁵ and for federal, as opposed to state, classifications.¹⁹⁶

Following the Court's numerous conflicting approaches to the appropriate standard of review in affirmative action cases, *Adarand Constructors, Inc. v. Peña*¹⁹⁷ further complicated the issue because the Court overturned its own decision¹⁹⁸ in *Metro Broadcasting* to apply strict scrutiny to all federal affirmative action programs.¹⁹⁹ *Adarand* seems to broadly restrict affirmative action programs because its use of the term "racial classification" throughout the opinion appears to refer to all affirmative action programs, not merely contracting provisions.²⁰⁰ Since the laws in question deal with financial incentives to hire minority subcontractors, the decision also extends to all racial classifications, as opposed to just quotas or set-asides.²⁰¹ *Adarand* does not, however, appear to apply to "mere outreach and recruitment efforts,"²⁰² nor does it apply to gender

191. See *supra* notes 97-99, 115, 132-33 and accompanying text.

192. See *supra* notes 98-114, 119-31, 136-54 and accompanying text.

193. 488 U.S. 469 (1989); see *supra* notes 155-71 and accompanying text.

194. 497 U.S. 547 (1990); see *supra* notes 172-87 and accompanying text.

195. See *supra* notes 161, 179, 184, 186-87 and accompanying text.

196. See *supra* notes 159-60, 166, 171, 175-77, 182-83 and accompanying text.

197. 115 S. Ct. 2097 (1995).

198. Justice O'Connor's majority opinion in *Adarand* addressed the factors necessary to overturn a decision. She cited *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984), for the proposition that any departure from precedent demands justification, and pointed out that *Helvering v. Hallock*, 309 U.S. 106, 119 (1940), indicates that it is acceptable to overturn a recent decision when it collides with prior, more established doctrine. *Adarand*, 115 S. Ct. at 2114-15. She further rejected the application of guidelines regarding the overturning of stare decisis set forth in *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2808-09 (1992), because those guidelines dealt with cases "integrated into the fabric of the law," not recent decisions like *Metro Broadcasting*. *Adarand*, 115 S. Ct. at 2116.

199. 497 U.S. 547 (1990); see *supra* note 56-57 and accompanying text.

200. Memorandum from Walter Dellinger, Assistant Attorney General, to General Counsels E-3 (June 28, 1995) (reproduced in 1995 DAILY LAB. REP. E1 (June 29, 1995)) [hereinafter Justice Department Memo] ("[I]t is clear from the Supreme Court's decision that the strict scrutiny standard of review applies whenever the federal government voluntarily adopts a racial or ethnic classification as a basis for decisionmaking.").

201. *Id.* ("*Adarand* was not a 'quota' case: its standards will apply to any classification that makes race or ethnicity a basis for decisionmaking.").

202. *Id.*

cases.²⁰³ Furthermore, Justice O'Connor explicitly stated that the case "concerns only classifications based explicitly on race, and . . . [not] laws that, although facially neutral, result in racially disproportionate impact. and are motivated by a racially discriminatory purpose."²⁰⁴

Broad in scope, the *Adarand* decision compels the application of strict scrutiny for all federal affirmative action programs. The majority's use of the "consistency" principle²⁰⁵ means that the distinction between benign and burdensome racial classifications will no longer affect the standard of review.²⁰⁶ Justice O'Connor criticized the *Metro Broadcasting* conclusion that courts should test benign measures under intermediate scrutiny because "[a]bsent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority."²⁰⁷

While the majority decision damages affirmative action, only two Justices, Scalia and Thomas, supported an outright ban on such programs.²⁰⁸ The other three justices in the majority and all four dissenters left at least some room for race-based action. Chief Justice Rehnquist and Justice Kennedy joined the part of Justice O'Connor's majority opinion that states:

[W]e wish to dispel the notion that strict scrutiny is "strict in theory, but fatal in fact." The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it.²⁰⁹

Dissenting Justices Stevens and Ginsburg indicated they believed that a benign racial classification should be subject to the lesser standard of intermediate scrutiny.²¹⁰ Finally, in a separate dissent, Justice

203. *Id.*

204. *Adarand*, 115 S. Ct. at 2105.

205. *See supra* note 50 (outlining Justice O'Connor's derivation of three general principles for governmental race classifications).

206. *Adarand*, 115 S. Ct. at 2111; *see supra* note 49 (defining benign racial classifications).

207. *Adarand*, 115 S. Ct. at 2112 (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion)).

208. *Id.*; *see supra* notes 63-65 and accompanying text.

209. *Adarand*, 115 S. Ct. at 2117 (citation omitted).

210. *Id.* at 2120 (Stevens, J., dissenting).

Souter indicated his approval of programs meant to remedy the effects of past invidious discrimination.²¹¹

The decision also provides a renewed look at the difficulties the Court has had in dealing with affirmative action programs. The six separate *Adarand* opinions²¹² demonstrate that, despite its majority decision, the Court failed to resolve those differences. Justice O'Connor's majority opinion characterized some of those problems. In this opinion, Justice O'Connor clearly supported the ideal of a color-blind society,²¹³ but she also seemed to believe that, in reality, racial discrimination is still prevalent in American life.²¹⁴ One legal scholar sums up the Court's difficulties this way: "The courts generally perceive that there is persistent and persuasive racial bias against blacks—'societal discrimination'—but they also recognize that the majority of ordinary white people does not share that perception,"²¹⁵ and "affirmative action regulation can clearly be justified from a paternal vantage point, but is difficult or impossible to justify from the position of equality among ordinary citizens For this reason, justification of affirmative action regulation seems destined to remain confused."²¹⁶

Although *Adarand* provides a new standard of review for federal affirmative action, it lacks a great deal in terms of guidance for lower courts. Specifically, the decision leaves open two questions. First, the Court did not deal with the extent of deference owed to Congress by virtue of Section 5 of the Fourteenth Amendment. Second, the Court gave little guidance regarding the circumstances and provisions, if any,

211. *Id.* at 2133 (Souter, J., dissenting).

212. *See supra* notes 36-85 and accompanying text.

213. *Adarand*, 115 S. Ct. at 2113 ("A free people whose institutions are founded upon the doctrine of equality, should tolerate no retreat from the principle that government may treat people differently because of their race only for the most compelling reasons.") (citation omitted).

214. *See supra* text accompanying note 209. Justice Marshall referred to this problem when he accused the majority in *Croson* of "constitutionalizing its wishful thinking" by believing that racial discrimination is a thing of the past. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 552-53 (1989) (Marshall, J., dissenting).

215. Hazard, *supra* note 3, at 399.

216. *Id.* at 381. Hazard also pointed out that the Court cannot act on a general perception of society:

The courts cannot proceed on the basis of a social reality they perceive but which the majority of the citizenry either does not perceive or refuses to acknowledge. . . . The rules of procedure allow a court to "know" only those things that are in the record Legally unprovable discrimination cannot be built into a record on appeal and courts cannot take judicial notice of that which is commonly denied.

Id. at 396-97.

that would allow an affirmative action program to survive under the current standard.

A superficial reading of *Adarand* seems to indicate that the Court's decision to review federal affirmative action under strict scrutiny puts the federal government's power to promulgate such measures on the same footing as that of state and local governments. Indeed, by overturning *Metro Broadcasting*,²¹⁷ the Court implied that Section 5 of the Fourteenth Amendment²¹⁸ does not entitle Congress the deference *Fullilove* suggests.²¹⁹ The Court, however, did not go so far as to reject expressly the notion that Section 5 gives Congress, but not the states, some increased power to institute race-based measures in support of the Fourteenth Amendment. Instead, the *Adarand* majority declined to discuss how much deference, if any, is owed to Congress, stating only that the Court need not address the past differences in opinion among the justices regarding the authority that Section 5 confers.²²⁰ Justice Souter, on the other hand, expressly stated his belief that Section 5 still has a role in the evaluation of affirmative action:

[I]t is also worth noting that nothing in today's opinion implies any view of Congress's § 5 power and the deference due its exercise that differs from the views expressed by the *Fullilove* plurality. . . . Thus, today'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.²²¹

Justice Stevens pointed out various instances in which the Court expressly stated that affirmative action at the state and federal levels is to be treated differently,²²² and he accused Justice O'Connor of vacillating on the issue, quoting her statement in *Croson* that "Congress, unlike any State or political subdivision, has a specific

217. 497 U.S. 547 (1990) (holding that intermediate scrutiny should be applicable to federal affirmative action programs).

218. See *supra* note 47 for a discussion of § 5.

219. 448 U.S. 448, 472 (1980) (plurality opinion); see *supra* note 119 and accompanying text for Chief Justice Burger's statement regarding § 5.

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

221. *Id.* at 2133 (Souter, J., dissenting).

222. *Id.* at 2123-25 (Stevens, J., dissenting) (citing *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 563 (1990) (referring to the "institutional competence" of Congress); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 520-24 (1989) (Scalia, J., concurring) (discussing the "sound distinction between federal and state (or local) action based on race"); *Fullilove v. Klutznick*, 448 U.S. 448, 472 (1980) (referring to the "appropriate deference to the Congress"))).

constitutional mandate to enforce . . . the Fourteenth Amendment. The power to 'enforce' may at times also include the power to define situations which Congress determines threaten principles of equality and to adopt prophylactic rules to deal with those situations."²²³ He also stated:

Ironically, after all of the time, effort, and paper this Court has expended in differentiating between federal and state affirmative action, the majority today virtually ignores the issue. . . . Such silence, however, cannot erase the difference between Congress' institutional competence and constitutional authority to overcome historic racial subjugation and the States' lesser power to do so.²²⁴

In a reaction to the *Adarand* decision, an assistant U.S. Attorney General interpreted the Court's decision as leaving "open the possibility that, even under strict scrutiny, programs statutorily prescribed by Congress may be entitled to greater deference than programs adopted by state and local governments."²²⁵ He stated that "[t]he Court in *Adarand* hinted that at least where a federal affirmative action program is congressionally mandated, the *Croson* standards might apply somewhat more loosely."²²⁶

While acknowledging the continuing existence of racial discrimination and stating that some government action to address it is permissible,²²⁷ the *Adarand* opinion also failed to give clear guidance as to just what an affirmative action program would need to survive strict scrutiny. The past is an unreliable guide—while the Court has indicated in various cases what can justify governmental action based on race, those statements provide little help because the Court had not agreed on a standard of review²²⁸ and has

223. *Adarand*, 115 S. Ct. at 2124 (Stevens, J., dissenting) (quoting *Croson*, 488 U.S. at 490 (plurality opinion) (citations omitted)).

224. *Id.* at 2125 (Stevens, J., dissenting).

225. Justice Department Memo, *supra* note 200, at E-3.

226. *Id.* at E-10. Assistant U.S. Attorney General Dellinger continued:

The Court . . . cite[d] the opinions of various Justices in *Fullilove*, *Croson*, and *Metro Broadcasting* concerning the significance of Congress' express constitutional power to enforce the antidiscrimination guarantees of the Thirteenth and Fourteenth Amendments Some of those opinions indicate that even under strict scrutiny, Congress does not have to make findings of discrimination with the same degree of precision as a state or local government, and that Congress may be entitled to some latitude with respect to its selection of the means to the end of remedying discrimination.

Id.

227. *Adarand*, 115 S. Ct. at 2117; see *supra* note 209 and accompanying text.

228. See *supra* notes 86-187 and accompanying text.

contradicted itself from one opinion to the next.²²⁹ And while "*Adarand* basically extends the *Croson* rules of affirmative action to the federal level,"²³⁰ *Croson* has drawn criticism for providing little guidance on what, and how much, evidence is needed to justify a compelling government interest. For example, *Croson* did not determine whether the government may "introduce statistical evidence showing that the pool of qualified minorities would have been larger 'but for' the discrimination that is to be remedied."²³¹ It did not discuss the value of anecdotal evidence, and it omitted discussion about the burden of persuasion regarding the constitutionality of affirmative action programs.²³² Finally, *Croson* did not "resolve whether a government must have sufficient evidence of discrimination at hand before it adopts a racial classification or whether 'post-hoc' evidence of discrimination may be used to justify the classification at a later date."²³³ Despite the criticism, the *Adarand* Court failed to provide any more guidance regarding the evidence needed. Furthermore, the Court in both *Croson* and *Adarand* left unanswered the question of "if and when affirmative action may be adopted for 'nonremedial' objectives, such as promoting racial diversity and

229. Compare *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 566 (1990) (holding that the nonremedial goal of enhancing broadcast diversity is a compelling governmental interest) with *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 300-02 (1978) (illustrating that the only cases in which racial preferences have been approved in the past have been those remedial uses where they were in response to proven constitutional or statutory violations). Compare *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 498 (1989) (stating that "a generalized assertion that there has been past discrimination in an entire industry" does not justify government action) and *id.* at 501-03 (stating that a statistical disparity in the racial representation in the construction industry may be sufficient proof of a compelling interest) with *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986) (holding that "some showing of prior discrimination by the governmental unit involved" is necessary before racial classifications may be used to remedy such discrimination).

230. Justice Department Memo, *supra* note 200, at E-3.

231. *Id.* at E-5.

232. *Id.*

233. *Id.*; see also Nina Farber, Comment, *Justifying Affirmative Action After City of Richmond v. J.A. Croson: The Court Needs a Standard for Proving Past Discrimination*, 56 BROOK. L. REV. 975, 976 (1990) ("The question the *Croson* Court failed to address is what standard should be adopted for determining the existence of discrimination. . . . [T]he decision merely describes an 'outer perimeter of unacceptable behavior.' "); Lori Jayne Hoffman, Comment, *Fatal in Fact: An Analysis of the Application of the Compelling Governmental Interest Leg of Strict Scrutiny in City of Richmond v. J.A. Croson Co.*, 70 B.U. L. REV. 889, 892 (1990) ("The majority . . . failed to reach a consensus as to the quantum of evidence sufficient to find a compelling governmental interest in an affirmative action program.").

inclusion."²³⁴ Because *Adarand* was based on a law justified by remedial goals, the majority was silent on this issue.²³⁵ In *Metro Broadcasting*, however, the Court upheld a federal affirmative action program based on the nonremedial goal of enhancing broadcast diversity,²³⁶ but it decided that case under intermediate, rather than strict, scrutiny. Nevertheless, Justice Stevens indicated that the *Metro Broadcasting* holding is still relevant after *Adarand*:

The majority today overrules *Metro Broadcasting* only insofar as it is "inconsistent with [the] holding" that strict scrutiny applies to "benign" racial classifications promulgated by the Federal Government. The proposition that fostering diversity may provide a sufficient interest to justify such a program is *not* inconsistent with the Court's holding today.²³⁷

This question, however, may remain until the Court has cause to decide, under strict scrutiny, the constitutionality of an affirmative action program based on nonremedial goals.

Since the decision gives little guidance beyond the strict scrutiny standard, one must look to previous cases in order to predict the future of affirmative action post-*Adarand*. Over the years, these have identified a number of criteria that, if met, will make it more likely that a program will survive strict scrutiny. Certainly, the fact that a program is a remedial measure is an important factor.²³⁸ There are,

234. Justice Department Memo, *supra* note 200, at E-5.

235. *Id.*

236. *Metro Broadcasting Inc. v. FCC*, 497 U.S. 547, 566 (1990).

237. *Adarand*, 115 S. Ct. at 2127 (Stevens, J., dissenting). For a discussion of the Court's past treatment of nonremedial goals, see Justice Department Memo, *supra* note 200, at E-5 to E-6. Assistant Attorney General Dellinger wrote:

[T]here has never been a majority opinion for the Supreme Court that addresses the question [of nonremedial goals]. The closest the Court has come in that regard is Justice Powell's separate opinion in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), which said that a university has a compelling interest in taking the race of applicants into account in its admissions process in order to foster greater diversity among the student body.

Id. at E-5. Assistant Attorney General Dellinger continued:

On the other hand, portions of Justice O'Connor's opinion in *Croson* and her dissenting opinion in *Metro Broadcasting* appear to cast doubt on the validity of nonremedial affirmative action programs. . . . [But n]owhere in her *Croson* and *Metro Broadcasting* opinions did Justice O'Connor expressly disavow Justice Powell's opinion in *Bakke*. Accordingly, lower courts have assumed that Justice O'Connor did not intend to discard *Bakke*.

Id. at E-5 to E-6.

238. *Fullilove v. Klutznick*, 448 U.S. 448, 497 (1980) (Powell, J., concurring) ("[T]his Court has never approved race-conscious remedies absent . . . findings of constitutional or legislative violations."); see also *supra* notes 101, 142 and accompanying text.

however, several other factors that have been explicitly or implicitly included in the several cases.

For example, one *Bakke* plurality²³⁹ advocated strict scrutiny for racial classifications.²⁴⁰ In discussing reasons why the University of California's program should survive that standard, the opinion indicated at least three factors or circumstances that facilitate an affirmative action program's survival under strict scrutiny. First, the opinion stated that it is in the program's favor that it does not "stigmatiz[e] the program's beneficiaries or their race as inferior."²⁴¹ Second, no race-neutral way was available to achieve the same goals "in the foreseeable future."²⁴² Moreover, the fact that the school did not "simply equate minority status with disadvantage," but rather "consider[ed] on an individual basis each applicant's personal history to determine whether he or she has likely been disadvantaged by racial discrimination,"²⁴³ was a third positive factor. In *Fullilove*, Justice Powell noted the "factors upon which the Courts of Appeals have relied," such as "(i) the efficacy of alternative remedies; (ii) the planned duration of the remedy; (iii) the relationship between the percentage of minority workers to be employed and the percentage of minority group members in the relevant population or work force; and (iv) the availability of waiver provisions."²⁴⁴ Further, in *Wygant*, the plurality that struck down the program and the dissent by Justice Marshall indicated that programs that "take race into account,"²⁴⁵ and those in which "[r]ace is a factor,"²⁴⁶ are preferable to those that consist of quotas or set-asides. Also, four justices in *Wygant* indicated that the burden suffered by the non-minority as a result of minority preference is an important consideration.²⁴⁷ In *Croson*, Justice O'Connor's opinion indicated that

239. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 262, 324 (1978) (Brennan, White, Marshall, Blackmun, JJ., concurring in the judgment in part and dissenting in part).

240. *Id.* at 358-61 (Brennan, White, Marshall, Blackmun, JJ., concurring in the judgment in part and dissenting in part); see *supra* note 98 and accompanying text.

241. *Bakke*, 438 U.S. at 375 (Brennan, White, Marshall, Blackmun, JJ., concurring in the judgment in part and dissenting in part).

242. *Id.* at 376 (Brennan, White, Marshall, Blackmun, JJ., concurring in the judgment in part and dissenting in part).

243. *Id.* at 377 (Brennan, White, Marshall, Blackmun, JJ., concurring in the judgment in part and dissenting in part). This factor seems to indicate that the presumption of disadvantage in the *Adarand* laws may not pass muster so easily.

244. *Fullilove v. Klutznick*, 448 U.S. 448, 510-11 (1980) (Powell, J., concurring) (citations omitted).

245. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 (1986) (plurality opinion).

246. *Id.* at 309 (Marshall, J., dissenting).

247. *Id.* at 280-82 (plurality opinion); *id.* at 313 (Stevens, J., dissenting).

the more specific the evidence of past discrimination, the more likely a program would pass muster,²⁴⁸ and she stated that "a generalized assertion that there has been past discrimination in an entire industry" is not a sufficiently compelling goal or rationale for an affirmative action program.²⁴⁹ She then stated that one example of evidence proving past discrimination is "a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality."²⁵⁰ She also emphasized the importance of first considering race-neutral measures.²⁵¹ Justice O'Connor again discussed favorable factors in *Metro Broadcasting*, stating that it would be better to favor minorities, if at all, on "a case-by-case determination," or if there is a waiver provision, and if race-neutral means have been exhausted.²⁵²

A second way to determine what might allow a program to survive strict scrutiny is to look at a race-related case decided just seventeen days after *Adarand*. In *Miller v. Johnson*,²⁵³ the Court used strict scrutiny to declare unconstitutional a Georgia electoral district based primarily on race.²⁵⁴ Like *Adarand*, *Miller* suggests that this Court is fairly serious about eliminating most racial classifications, but the Court articulated several factors that, if satisfied, might have allowed the electoral district to survive.²⁵⁵ The *Miller* Court indicated that race-neutral classifications that only have a disparate, or increased, impact on race are most likely to be upheld.²⁵⁶ The Court also emphasized that remedial goals will generally provide a compelling interest, stating that "[t]here is a 'significant state interest in eradicating the effects of past racial discrimination.'"²⁵⁷ Further, the Court held that race may be a

248. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 492 (1989) (plurality opinion). The factors that come out of this case are especially enlightening because they were articulated by some of the same justices who were in the *Adarand* majority.

249. *Id.* at 498 (opinion of the Court).

250. *Id.* at 509 (plurality opinion).

251. *Id.* at 507 (opinion of the Court), 509-10 (plurality opinion).

252. *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 621-22 (1990) (O'Connor, J., dissenting).

253. 115 S. Ct. 2475 (1995).

254. *Id.* at 2482-94.

255. *Id.* at 2488-90.

256. *Id.* at 2490 (stating that "[a] State is free to recognize communities that have a particular racial makeup, provided its action is directed toward some common thread of relevant interests").

257. *Id.* (quoting *Shaw v. Reno*, 113 S. Ct. 2816, 2831 (1993)).

factor in the redistricting process, but it may not be the predominant factor.²⁵⁸

To summarize, the Court's various decisions dealing with race-based classifications have identified the following factors as relevant in deciding whether or not the classification can survive strict scrutiny:²⁵⁹ (1) remedial as opposed to nonremedial programs; (2) the stigma the minority endures as a result of the classification; (3) the consideration of race-neutral alternatives; (4) the individual or case-by-case analysis of the preferential treatment is preferred to a quota or set-aside; (5) the temporary nature of the remedy; (6) the burden the non-minority experiences as a result of the classification; (7) the statistical evidence used to prove past discrimination; and (8) race as a "plus" factor in decisionmaking as opposed to a quota or set-aside.

The *Adarand* decision, then, severely limits affirmative action programs. It applies to federal affirmative action programs a standard under which no benign racial classification has ever been upheld by the Supreme Court.²⁶⁰ In addition, the political climate today seems to indicate that affirmative action will be eliminated, if not by the judiciary, then by the legislature.²⁶¹

By imposing the strict scrutiny standard and by ignoring any authority that the federal government may have under Section 5 of the Fourteenth Amendment,²⁶² the *Adarand* Court illustrated a strong skepticism of the federal government and its vast powers. This was also demonstrated by the Court's conclusion in *Johnson v.*

258. *Id.* at 2488. The Court stated

Redistricting legislatures will, for example, almost always be aware of racial demographics; but it does not follow that race predominates in the redistricting process. . . . The plaintiff's burden is to show . . . that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district.

Id. (citations omitted).

259. See also Justice Department Memo, *supra* note 200, at E-4 to E-9 (discussing the detailed requirements of the compelling interest and narrow tailoring prongs of strict scrutiny, and some factors which will allow programs to pass).

260. See, e.g., Thomas J. Madden & Kevin M. Kordziel, *Strict Scrutiny and the Future of Federal Procurement Set-Aside Programs in the Wake of Adarand: Does 'Strict in Theory' Mean 'Fatal in Fact'?*, 64 FED. CONT. REP. (BNA) 133, 135 (Aug. 7, 1995) ("[The strict scrutiny test] is nearly impossible to overcome. Not since 1944 has the Supreme Court approved a race-based classification that was subject to review under the strict scrutiny standard.") (citing *Korematsu v. United States*, 323 U.S. 214 (1944)).

261. See *supra* notes 12-15 and accompanying text.

262. See *supra* note 59 and accompanying text.

*Miller*²⁶³ that the Justice Department's requirement of more majority-minority districts was not a compelling interest.²⁶⁴ *Adarand* further conveyed the increasing interest of the Court in finally achieving a colorblind society: "In the eyes of government, we are just one race here. It is American."²⁶⁵ Justice Blackmun articulated that goal, but also foresaw the potential difficulty in achieving it, when he stated in *Bakke* that

the time will come when an 'affirmative action' program is unnecessary and is, in truth, only a relic of the past. I would hope that we could reach this stage within a decade at the most. But the story of *Brown v. Board of Education*, decided almost a quarter of a century ago, suggests that that hope is a slim one.²⁶⁶

Sixteen years after that statement, "we are not . . . a colorblind society, and . . . race has a deep social significance that continues to disadvantage blacks and other Americans of color."²⁶⁷

Forcing the judicial standards of a colorblind society on the society in which we live probably will not make that society a reality any faster. Professor Aleinikoff has persuasively argued that "[w]hile the legal strategy of colorblindness achieved great victories in the past, it has now become an impediment in the struggle to end racial inequality."²⁶⁸

The *Adarand* decision, however, was sufficiently vague on the questions of Section 5 of the Fourteenth Amendment—and the circumstances under which affirmative action can survive—that the law remains uncertain enough to allow the federal government to maintain some type of affirmative action programs. There remains, of course, the alternative of creating race-neutral programs with the

263. 115 S. Ct. 2475 (1995).

264. *Id.* at 2491.

265. *Adarand*, 115 S. Ct. at 2119. This colorblind ideal is also illustrated in *Miller v. Johnson*, 115 S. Ct. 2475 (1995), in which the Court stated that " '[r]acial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire.' " *Id.* at 2486 (quoting *Shaw v. Reno*, 113 S. Ct. 2816, 2832 (1993)).

266. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 403 (1979) (opinion of Blackmun, J.) (citing *Brown v. Board of Educ.*, 347 U.S. 483 (1954)).

267. Aleinikoff, *supra* note 2, at 1062.

268. *Id.* Professor Aleinikoff goes so far as to suggest that in today's society, a "remedial regime predicated on colorblindness will have little influence at this deep level of social and legal consciousness because it cannot adequately challenge white attitudes or recognize a role for black self-definition. . . . [A] norm of colorblindness supports racial domination." *Id.*

same goals. Until the Court revisits this issue, however, or Congress passes one of the proposed bills that would end the use of racial preferences,²⁶⁹ and as long as the program is designed with the relevant factors²⁷⁰ in mind, *Adarand* has left a narrow crack in the door so that the federal government should be able to maintain limited race-based measures to assist minorities in escaping the continuing effects of past discrimination.

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269. *See supra* notes 12-15 and accompanying text.

270. *See supra* notes 238-59 and accompanying text.

