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NOTES

STRICT IN THEORY, NOT FATAL IN FACT:¹ AN ANALYSIS OF FEDERAL AFFIRMATIVE ACTION PROGRAMS IN THE WAKE OF *ADARAND V. PENA*

The civil rights movement of the 1960s sparked a political and societal realization that discrimination based on immutable characteristics such as race was wrong.² In particular, racial equality

¹ Gerald Gunther, *The Supreme Court, 1971 Term—Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972). In analyzing the Supreme Court's reluctance to uphold legislation under the strict scrutiny standard of review, Gunther characterized strict scrutiny as "strict in theory, but fatal in fact." *Id.*; *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 2117 (1995). The Court sought "to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'" *Id.* Justice O'Connor expressly stated that racial discrimination is still an "unfortunate reality, and government is not disqualified from acting in response to it." *Id.* There have been times when the Court has upheld legislation under strict scrutiny. *See, e.g., Roe v. Wade*, 410 U.S. 113, 163-65 (1973). In *Roe*, the Court analyzed and upheld state bans on post-viability abortions under strict scrutiny. *Id.*; *Korematsu v. United States*, 323 U.S. 214, 219 (1944). Following the attack on Pearl Harbor, the Court strictly scrutinized and sustained a military order excluding Americans of Japanese origin from designated Pacific Coast areas. *Id.*; *Hirabayashi v. United States*, 320 U.S. 81, 92 (1943). Under strict scrutiny, the Court upheld a military curfew order detaining persons of Japanese ancestry on the Pacific Coast during World War II. *Id.*

² *See* Dena S. Davis, *Ironic Encounter: African-Americans, American Jews, and the Church-State Relationship*, 43 CATH. U. L. REV. 109, 132-33 (1993). This article quoted Jesse Jackson who intimated that Rosa Parks' refusal to relinquish her seat on a segregated bus motivated Dr. Martin Luther King, Jr. and the black church to organize boycotts. *Id.* In effect, these boycotts marked the beginning of the Civil Rights Movement. *Id.*; Daniel Gyebi, *A Tribute to Courage on the Fortieth Anniversary of Brown v. Board of Educ.*, 38

became a prominent issue in American politics and to the American people.³ As a result, the three branches of the federal government aggressively sought to eradicate decades of institutional discrimination by implementing new policies to combat old prejudices.⁴

Congress responded to the movement by enacting the Civil Rights Act of 1964.⁵ Title VII of the Civil Rights Act expressly prohibits discrimination based on race, color, religion, national origin,

How. L.J. 23, 27 (1994). Gyebi discussed that the police responded to civil rights demonstrators participating in the Birmingham protests with fire hoses, arrests, clubs, and jail terms. *Id.* Further, African-American children at the demonstrations were attacked by ferocious police dogs. *Id.* This scene from Alabama was depicted on national television and shocked the nation's conscience. *Id.* For many Americans, this was the first time they witnessed the extreme racial violence occurring in the South. *Id.* These scenes sparked an awareness of existing racial inequality and gathered support for the civil rights movement. *Id.*; David B. Oppenheimer, *Kennedy, King, Shuttlesworth and Walker: The Events Leading to the Introduction of the Civil Rights Act of 1964*, 29 U.S.F. L. REV. 645, 645-47 (1995). Americans were horrified as they watched the violent police reaction to African-American children kneeling in prayer during the Birmingham protests. *Id.* The Civil Rights Act of 1964 was a direct response by President Kennedy to the Birmingham protests. *Id.* See generally ROBERT WEISBROT, *FREEDOM BOUND: A HISTORY OF AMERICA'S CIVIL RIGHTS MOVEMENT* 45-85 (Norton Page ed., Penguin Books 1991). Weisbrot explains that television coverage of police brutality toward African-Americans in Alabama stirred indignation among Americans who had long been complacent about racism. *Id.* This provided the civil rights movement with the urgency it needed. *Id.*

³ See Deborah Ramirez, *Multicultural Empowerment: It's Not Just Black and White Anymore*, 47 STAN. L. REV. 957, 958 (1995). This article portrays the 1960s as a decade striving to end "nearly a century of legislative and judicial decisionmaking that tolerated, and at times, even mandated different . . . treatment of citizens solely on the basis of skin color." *Id.*; Suzanne Sangree, *Title VII Prohibitions Against Hostile Environment Sexual Harassment and the First Amendment: No Collision in Sight*, 47 RUTGERS L. REV. 461, 481 (1995). Sangree states that the Civil Rights Act of 1964 was enacted in response to a popular demand for constitutional equality protection for African-Americans. *Id.*

⁴ See, e.g., Civil Rights Act of 1964, 42 U.S.C. § 2000(a) (1988); *Loving v. Virginia*, 388 U.S. 1, 8-12 (1967) (holding that state law prohibiting interracial marriages violated Equal Protection Clause); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 257-58 (1964) (applying commerce clause to restrict racial discrimination because such "moral and social wrong" obstructed interstate commerce); Exec. Order No. 10,925, 26 Fed. Reg. 1977 (1961) (prohibiting contractors from applying racially discriminatory employment practices); Validity of Executive Order Prohibiting Government Contractors from Discriminating in Employment Practices on Grounds of Race, Color, Religion or National Origin, 42 Op. Att'y Gen. 97, 103 (1961) (arguing validity of Presidential authority to proscribe racially discriminatory employment practices in construction industry). See generally NJOLE V. BENOKRAITIS & JOE R. FEAGIN, *AFFIRMATIVE ACTION AND EQUAL OPPORTUNITY: ACTION, INACTION AND REACTION* 7-24 (Westview Press 1978) (detailing executive, legislative, and judicial attempts to eradicate race discrimination during 1960s).

⁵ Civil Rights Act of 1964, 42 U.S.C. §§ 2000(a)-(h) (1988 & Supp. V 1993) (prohibiting racial restrictions in voting, commerce, education, and employment as prerequisite to receive federal funding); see Nicole L. Gueron, Note, *An Idea Whose Time Has Come: A Comparative Procedural History of the Civil Rights Acts of 1960, 1964 and 1991*, 104 YALE L.J. 1201, 1215-22 (1995) (outlining procedural history of Civil Rights Act of 1964). See generally ROBERT D. LOEVY, *TO END ALL SEGREGATION: THE POLITICS OF THE PASSAGE OF THE CIVIL RIGHTS AMENDMENT OF 1964* 1-3 (1990) (stating that Civil Rights Act was "landmark legislation" which turned country from "legal segregation" to "racial integration"); CHARLES WHALEN & BARBARA WHALEN, *THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964*

or sex.⁶ The Act provided the necessary legal foundation on which discrimination claims could be based and became an integral mechanism in the battle for equal rights.⁷

The United States Supreme Court, led by Chief Justice Earl Warren,⁸ also took an active role in protecting individual rights.⁹ Civil rights organizations, unable to achieve equality through the political process, petitioned the Court for redress.¹⁰ When inter-

CIVIL RIGHTS ACT 100-48, 194-229 (1985) (detailing legislative history that culminated in Act).

⁶ 42 U.S.C. § 2000-2(a).

⁷ See, e.g., *Newman v. Piggie Park Enters.*, 390 U.S. 400, 401, 403 (1968) (per curiam) (holding that drive-in restaurant near interstate highway was within scope of Civil Rights Act of 1964); *City of Greenwood v. Peacock*, 384 U.S. 808, 828 (1966) (noting exercise of right to equal accommodation by not subjecting African-Americans to trespass prosecution); *Georgia v. Rachel*, 384 U.S. 780, 793, 804-06 (1966) (holding that threat of state prosecution because African-American attempted to obtain services at public accommodation denied federal civil rights and warranted removal of case to federal court); *Blow v. North Carolina*, 379 U.S. 684, 685-86 (1965) (per curiam) (holding that violation of Civil Rights Act of 1964 occurred when motel and adjoining restaurant on interstate highway advertised on billboards and radio, and posted restaurant menu in motel); *Hamm v. City of Rock Hill*, 379 U.S. 306, 308 (1964) (vacating convictions for sit-ins based on state trespass statutes because Act forbids discrimination in places of public accommodation); *Katzenbach v. McClung*, 379 U.S. 294, 304-05 (1964) (upholding Title II of Civil Rights Act under Commerce Clause); *Heart of Atlanta Motel*, 379 U.S. at 261 (confirming that Civil Rights Act of 1964 is within Congress's Commerce Clause authority); see also *Newman*, 390 U.S. at 401 (stating that private litigation would be necessary to secure compliance with Civil Rights Act).

⁸ See generally LEONARD W. LEVY, *THE SUPREME COURT UNDER EARL WARREN* 73-107 (Quadrangle Books 1972) (examining Earl Warren's effect on Supreme Court jurisprudence); ARNOLD S. RICE, *THE WARREN COURT, 1953-1969* 53-207 (Associated Faculty Press 1987) (detailing decisions of Warren Court); JOHN D. WEAVER, *WARREN: THE MAN, THE ERA 201-18* (1967) (discussing Earl Warren and his tenure on Supreme Court).

⁹ See, e.g., *Loving v. Virginia*, 388 U.S. 1, 8-12 (1967) (holding that prohibition of interracial marriage violated Equal Protection Clause); *Miranda v. Arizona*, 384 U.S. 436, 470-72 (1966) (requiring police to inform individuals in custody of constitutional right to counsel and privilege against self-incrimination); *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965) (establishing marital privacy right in contraception use); *Reynolds v. Sims*, 377 U.S. 533, 568 (1964) (concluding that state legislature apportionment based on race violated Equal Protection Clause); see Gyebi, *supra* note 2, at 37-40 (discussing Chief Justice Earl Warren's instrumental role in promoting justice by advancing civil rights during tenure on Court). See generally ARCHIBALD COX, *THE COURT AND THE CONSTITUTION* 177-183 (Houghton Mifflin Co. 1987) (recognizing Warren Court as instrument of reform by initiating changes in social and political order); G. Sidney Buchanan, *A Very Rational Court*, 30 HOUS. L. REV. 1509, 1558-60 (1993) (stating that Warren Court focused on three fundamental rights, right of interstate mobility, right of equal access to political process and right to equal access in judicial process during criminal proceedings); John E. Nowak, *The Rise and Fall of Supreme Court Concern for Racial Minorities*, 36 WM. & MARY L. REV. 345, 405 (1995) (noting commitment of Warren Court in protecting racial minorities from discrimination); David O'Brien, *Rehnquist Tilt: Court No Longer Willing to Confront Issues of Racism*, DALLAS MORNING NEWS, July 9, 1995, at J5 (explaining that landmark *Brown v. Board of Educ.* decision began era led by Earl Warren's court that lent legitimacy to civil rights movement).

¹⁰ See, e.g., *NAACP v. Alabama*, 377 U.S. 288, 305 (1964) (holding that failure to properly register as foreign corporation to do business in state did not warrant permanent ouster of association from state); *NAACP v. Button*, 371 U.S. 415, 428-29 (1963) (rendering

preting the law, the Court exhibited a concern for minorities and responded to their plight.¹¹

In 1965, President Lyndon B. Johnson issued Executive Order No. 11,246 to further the movement toward equality among the races.¹² The Order required federal contractors to affirmatively recruit and employ racial minorities.¹³ The ideals expressed by President Johnson were implemented by President Richard M. Nixon when he approved the Philadelphia Plan, the first modern affirmative action program.¹⁴ The Philadelphia Plan responded to bla-

activities of NAACP modes of expression and association protected by First and Fourteenth Amendments which state may not prohibit as "improper solicitations of legal business"; *NAACP v. Alabama*, 360 U.S. 240, 244-45 (1959) (foreclosing Alabama Supreme Court from reexamining grounds of disposition once it had held that association satisfactorily complied with Court Order); *NAACP v. Alabama*, 357 U.S. 449, 462 (1958) (holding that order requiring NAACP to produce records including names and addresses of members denied due process right to freedom of association).

¹¹ See *Jones v. Mayer*, 392 U.S. 409, 423 (1968) (holding that statute providing all citizens with right to purchase, lease, sell, hold and convey real and personal property barred all public and private racial discrimination in sale or rental of property); *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 666 (1966) (holding Virginia's poll tax which implemented discriminatory voter qualifications violative of Equal Protection Clause and thus unconstitutional); *Lombard v. Louisiana*, 373 U.S. 267, 273-74 (1963) (holding that where city police chiefs official command directed continuance of segregated service in private restaurants, trespass convictions resulting from attempts of Negroes to be served in privately owned restaurant could not stand); *Boynton v. Virginia*, 364 U.S. 454, 457-61 (1960) (holding that discrimination in food service industry based on color constituted violation of federal rights under Interstate Commerce Act).

¹² Exec. Order No. 11,246, 3 C.F.R. 339 (1964-1965), reprinted in 42 U.S.C. § 2000(e) (Supp. I 1989) (banning discrimination by federal contractors based on race, color, religion, sex or national origin); accord President Nixon's State of the Union Message, 7 WEEKLY COMP. PRES. DOC. 89, 93 (Jan. 23, 1971) (stating "[n]either the President nor the Congress nor the conscience of this nation can permit money which comes from all the people to be used in a way that discriminates against some of the people"); see also BENOKRAITIS & FEAGIN, *supra* note 4, at 11-12, 23 (suggesting that Executive Order 11,246 provided basis for affirmative action programs); Karen S. Bryan, Note, *Recovery of Back Pay Under Executive Order 11,246*, 52 S. CAL. L. REV. 767, 768-69 (1979) (explaining that Executive Order 11,246 sparked series of race conscious legislation to assure equal opportunity and combat discrimination); Peter G. Nash, Note, *Affirmative Action Under Executive Order 11,246*, 46 N.Y.U. L. REV. 225, 225-31 (1971) (detailing history and effect of Executive Order 11,246 in implementing government-initiated affirmative action programs). But see Andree K. Blumstein, Note, *Doing Good the Wrong Way: The Case for Delimiting Presidential Power Under Executive Order No. 11,246*, 33 VAND. L. REV. 921, 927-28 (1980) (suggesting President lacks authority to implement Executive Order 11,246).

¹³ Exec. Order No. 11,246, 3 C.F.R. 339 (1964-1965), reprinted in 42 U.S.C. § 2000(e) (Supp. I 1989); see also BENOKRAITIS & FEAGIN, *supra* note 4, at 23 (stating that President Johnson's Executive Order required all federal contracts to include clause agreeing "not to discriminate against any employee or applicant for employment because of race, color, religion or national origin").

¹⁴ See *Contractors Ass'n of E. Pa. v. Secretary of Lab.*, 442 F.2d 159, 171, 176 (3d Cir.), cert denied, 404 U.S. 854 (1971). The Court upheld the validity of the Philadelphia Plan by rejecting statutory and constitutional challenges to Executive Order No. 11,246 and concluding that the Plan was within the implied authority of President. *Id.*; see also 118 CONG. REC. 1661 (1972). Senator Erwin opposed the Philadelphia Plan and introduced an amendment in Congress that sought to prevent any federal agency or officer of the United States

tant segregation and discrimination within the construction industry by creating minority hiring goals and timetables to promote racial equality.¹⁵

Within the past thirty years, the commitment to racial equality displayed by the American public in the 1960s has transformed into a backlash against affirmative action.¹⁶ The same three

from requiring an employer to practice reverse discrimination by employing persons of a particular race in either "fixed or variable numbers, proportions, percentages, quotas, goals or ranges." *Id.* This amendment was overwhelmingly rejected by Congress indicating its support for the Philadelphia Plan. *Id.* Senator Javitz opposed the amendment and stated that a vote for the amendment would dismantle Executive Order No. 11,246 and deprive courts of the opportunity to order affirmative action under Title VII as necessary to correct a history of unjust and illegal discrimination. *Id.* at 1664-65; Daniel A. Farber, *The Outmoded Debate Over Affirmative Action*, 82 CAL. L. REV. 893, 896 (1994). This article noted that Nixon was successful in campaigning against Senate attempts to dismantle the Philadelphia Plan. *Id.*; Daniel A. Farber & Philip P. Frickey, *Is Caroleene Products Dead? Reflections on Affirmative Action and the Dynamics of Civil Rights Legislation*, 79 CAL. L. REV. 685, 712-23 (1991). It is indicated that President Nixon supported the Philadelphia Plan for three reasons: (1) the Plan was initiated by the Secretary of Labor who was a strong believer in civil rights; (2) the President was in need of liberal support, and (3) it was seen as an opportunity to wedge organized labor away from civil rights. *Id.*; James E. Jones, Jr., *The Genesis and Present Status of Affirmative Action in Employment: Economic, Legal and Political Realities*, 70 IOWA L. REV. 901, 910-11 (1985). Jones recognizes that the political appeal of the Philadelphia Plan is what motivated President Nixon to take on a Democratic Congress in order to have Plan approved. *Id.*; James E. Jones, Jr., *The Origins of Affirmative Action*, 21 U.C. DAVIS L. REV. 383, 393-94 (1988). It is discussed that the Philadelphia Plan implemented during President Nixon's presidency was significant because it provided a framework and articulated standards for future affirmative action programs. *Id.*; David L. Rose, *Twenty-Five Years Later: Where Do We Stand on Equal Employment Opportunity Law Enforcement?*, 42 VAND. L. REV. 1121, 1141-43 (1989). Rose states that President Nixon staunchly supported Philadelphia Plan and its efforts to achieve nondiscrimination in government contract hiring. *Id.*; Robert P. Schuwerk, Comment, *The Philadelphia Plan: A Study in the Dynamics of Executive Power*, 39 U. CHI. L. REV. 723, 739-750 (1972). This article outlines original criticisms of Philadelphia Plan which were modified by Nixon's administration before suggesting it as a means of remedying past discrimination. *Id.* See generally HUGH D. GRAHAM, *THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY 1960-1972*, 284-97 (1990).

¹⁵ See *supra* notes 13-14 and accompanying text. The implementation of the Philadelphia Plan is discussed. *Id.*; Farber & Frickey, *supra* note 14, at 712-13. It is explained that the Philadelphia Plan helped minorities by requiring contractors to increase recruitment of minorities and women, establish goals and timetables for hiring underrepresented and promote female and minority candidates. *Id.*; see also *Federal Affirmative Action Provisions*, PORTLAND OREGONIAN, June 13, 1995, at A14. Affirmative action provisions based on race, ethnicity or gender fall into three categories consisting of those that encourage diverse hiring and contracting, those that set numerical goals and quotas and those that give preferences to members of various groups. *Id.*; Linda Feldman, *Affirmative Action 101: What the Lingo Means*, CHRISTIAN SCI. MONITOR, July 25, 1995, at 3. A quota is a "rigid numerical requirement, which is totally unresponsive to supply or merit." *Id.* The article defines "goals and timetables" as federal programs that encourage specific participation by minorities and women. *Id.* Moreover, a set-aside is similar to a quota. *Id.* While the term preference has no formal meaning, it includes government programs structured to promote greater minority and women's participation. *Id.*

¹⁶ See Ernesto V. Portillo, *Is There A Democratic Process to Establish Equality?*, TUSCON CITIZEN, June 21, 1995, at 7A. Thirty years ago our government was committed to end violations of civil rights, but now Supreme Court decisions cast doubt on the legality of programs enacted to achieve that goal. *Id.*; see also *The Civil Rights Cases*, 109 U.S. 3, 25

branches of government have collectively reversed the progress of their predecessors by curtailing many forms of minority preference programs.¹⁷ In particular, recent Supreme Court opinions have evidenced a bold activism in the Court's reexamination of its position on affirmative action and other major social issues.¹⁸ The Supreme Court implemented "strict scrutiny" as the applicable level of review for all federal race-based preference programs, in its recent decision, *Adarand Constructors, Inc. v. Pena*.¹⁹

This Note will analyze the future of affirmative action programs within the constitutional framework promulgated by the Supreme

(1883). It is recognized that there must be some point in time when a black man takes the rank of "mere citizen" and ceases being the "special favorite of the laws." *Id.*; Marcia Coyle, *An Emboldened Majority Breaks Ground: Although the Center Wavered, the Court's Rulings Had a Big Effect on Race, Religion and Federalism*, NAT'L L.J., July 31, 1995, at C2. Coyle discussed the "conservative counter-revolution" created by the Rehnquist Court. *Id.*; Bruce Fein, *End in Sight for Racial Politics?*, WASH. TIMES, June 14, 1995, at A20. Fein suggested that a conflict between the beneficial goals of affirmative action and American ideologies of equality existed. *Id.* He felt that special preferences for minorities have dominated civil rights for the entire adult lives of voters 18 to 40 years old and intimated that Americans do not feel moral guilt over Jim Crow laws or the disgrace of Little Rock in 1958. *Id.* Fein assessed that many Americans refuse to pay reparation to minorities who bear no scars from historical discrimination. *Id.*; Herman Schwartz, *Whose Affirmative Action? The Court Ruling The Blind Spot in Strict Scrutiny*, L.A. TIMES, June 18, 1995, at 1. The current wave of conservatism in the Court can be analogized to post-Reconstruction conservatism of the 1880s. *Id.* During the 1880s, the nation was preoccupied with entry into the industrial age and was tired of Reconstruction idealism, as evidenced by *The Civil Rights Cases*, and legally sanctioned discrimination and repression of black Americans. *Id.* Today, many Americans are tired of compensating for the mistakes of their forbearers. *Id.* At a time when Americans are faced with economic insecurity, they are no longer concerned with racial tensions. *Id.* See generally BENOKRAITIS & FEAGIN, *supra* note 4, at 7-24; FREDERICK R. LYNCH, *INVISIBLE VICTIMS: WHITE MALES AND THE CRISIS OF AFFIRMATIVE ACTION* 165-82 (1991). Lynch examines the use and effects of racial preferences in restructuring American society. *Id.*

¹⁷ See, e.g., *Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097, 2112 (1995) (ruling that race-based preference programs are subject to strict scrutiny); *Dole Aims at Affirmative Action; Bill to End Federal, Racial and Gender Preferences Goes Beyond Court Ruling*, WASH. POST, July 28, 1995, at A10 (introducing Equal Opportunity Act of 1995 designed to eliminate all forms of racial preferences); *President Clinton's Remarks on Affirmative Action at the National Archives*, U.S. NEWSWIRE, July 19, 1995 (indicating his support for affirmative action and stating that some programs need to be analyzed to ensure that affirmative action is working in manner in which it was intended).

¹⁸ See, e.g., *Rosenberger v. Rector*, 115 S. Ct. 2510, 2525 (1995) (holding that state universities cannot prohibit funding of religious publication when other student publications receive funds and upholding direct funding to private religious activities for first time); *Miller v. Johnson*, 115 S. Ct. 2475, 2493 (1995) (holding that race cannot be primary factor in drawing election district boundaries); *Sandin v. Connor*, 115 S. Ct. 2293, 2302 (1995) (making it substantially more difficult for prisoners to bring suits challenging conditions of imprisonment); *Missouri v. Jenkins*, 115 S. Ct. 2038, 2041 (1995) (holding that federal courts exceeded their authority in fashioning desegregation remedy); *United States v. Lopez*, 115 S. Ct. 1624, 1634 (1995) (holding that Gun-Free School Zone Act, making it federal offense to knowingly possess firearm in school zone, exceeded Congress' Commerce Clause authority because possession of firearm in local school zone was not economic activity that substantially affected interstate commerce).

¹⁹ 115 S. Ct. 2097, 2118 (1995).

Court in the *Adarand* decision. Part One will review *Adarand* and focus on the new constitutional standard for race-based preference programs. The application of "strict scrutiny" to affirmative action programs will be examined. Part Two will trace the Supreme Court's activist trend and address the ramifications of *Adarand* within the current political climate. The composition of the Court and the political climate will effect the manner in which the strict scrutiny standard is employed. Finally, Part Three will discuss the future of affirmative action in the wake of *Adarand*. Specific programs will be examined to illustrate programs that can survive strict scrutiny. This Note will conclude that federal affirmative action programs have the potential to survive strict scrutiny if specific evidence of past discrimination is available and the implemented remedy is sufficiently narrowly tailored to address such instances of discrimination.

I. *ADARAND CONSTRUCTORS, INC. V. PENA*: STRICT SCRUTINY IS THE NEW STANDARD FOR FEDERAL PREFERENCE PROGRAMS

The Surface Transportation and Uniform Relocation Assistance Act of 1987²⁰ ("STURAA") creates a framework under which general contractors become eligible to receive monetary incentives for hiring disadvantaged individuals.²¹ STURAA mandates that at least ten percent of the funds appropriated for highway projects shall be expended on small businesses owned and controlled by individuals who are socially and economically disadvantaged.²² The statute presumes that women and minorities are disadvan-

²⁰ Pub. L. No. 100-17, 101 Stat. 144 (1987).

²¹ *Id.* STURAA authorizes appropriations from the Highway Trust Fund by fiscal year for qualified "disadvantaged business enterprises" ("DBE") of not less than 10% of appropriations. *Id.*

²² See *id.* STURAA adopts the Small Business Act's ("S.B.A.") definition of a "socially and economically disadvantaged individual." *Id.*; 15 U.S.C. § 644(g)(1) (1988). The SBA applies to all federal procurement activities and requires the President to set an annual goal of not less than five percent for small businesses owned and controlled by "socially and economically disadvantaged individuals." *Id.* The statute further requires each agency to establish individual goals for its contracts. *Id.*; 15 U.S.C. § 637(a)(5). The phrase "socially disadvantaged individuals" means "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.*; 15 U.S.C. § 637(a)(6). Section 637 defines "economically disadvantaged individuals" as "those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business who are not socially disadvantaged." *Id.*

taged.²³ Thus, if a prime contractor follows these guidelines by awarding at least ten percent of its subcontracts to women or minorities, it qualifies to receive cash bonuses from the federal government.²⁴

Adarand Constructors, Inc. ("Adarand"), a highway construction company owned by a white male, specialized in the installation of highway guardrail systems and highway signs.²⁵ Although Adarand submitted the low bid on a subcontract to build guardrails on a federal highway, the general contractor awarded the subcontract to a minority-owned company.²⁶ The general contractor received a \$10,000 federally-funded cash bonus pursuant to STURRA when it chose a disadvantaged minority-owned subcontractor over the lowest bidder.²⁷ Adarand subsequently filed suit against federal officials,²⁸ claiming that race-based presumptions violate the Equal Protection Clause.²⁹

²³ See 15 U.S.C. § 637(d)(3)(c). In accordance with SBA guidelines, "Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities, or any other individual found to be disadvantaged by the Administration pursuant to section 8(a) of the Small Business Act" are presumptively regarded as socially and economically disadvantaged. *Id.*

²⁴ *Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097, 2103 (1995). 115 S. Ct. at 2103. The Court noted that the Federal Construction Procurement Program is authorized by section 644(g) of the SBA and is funded by section 106(a)(8) of the STURAA of 1987. *Id.* The program requires the Department of Transportation to appropriate contract funds through disadvantaged businesses under a clause entitled "Subcontracting Compensation Clause." *Id.* at 2102-03. Compensation is available to a prime contractor under this clause when at least 10% of the prime contract amount is expended on one or more disadvantaged subcontractors. *Id.* at 2103.

²⁵ *Adarand*, 115 S. Ct. at 2102.

²⁶ See *id.* at 2101. The Adarand construction company was owned by a white male and was not federally certified as a "small business controlled by 'socially and economically disadvantaged individuals.'" *Id.*

²⁷ See Petitioner's Brief at 11, *Adarand* (No. 93-1841). The Central Federal Lands Highway Division solicited bids on August 10, 1989 for the construction of a 4.7 mile section of highway at the San Juan National Forest (the West Dolores Project). *Id.* at 8. The Subcontractors Compensation Clause ("SCC") was included in § 108 of the contract for the West Dolores Project. *Id.* at 9. Under the SCC provision, the size of the bonus offered to the prime contractor was equal to 10% of the final amount of the DBE subcontracts, not to exceed 2% of the final prime contract amount. *Id.* at 10. In this case, the prime contractor was entitled to compensation of approximately \$10,000, 10% of the \$104,800 subcontract price. *Id.*

²⁸ See *Adarand Constructors, Inc. v. Skinner*, 790 F. Supp 240, 245 (D. Colo. 1992) (holding that STURAA did not violate Fifth and Fourteenth Amendments and granting defendant's motion for summary judgment), *aff'd*, 16 F.3d 1537 (10th Cir. 1994), *vacated*, 115 S. Ct. 2097 (1995).

²⁹ See *id.* at 244; see also U.S. CONST. amend. V. The Fifth Amendment states that "no person shall be deprived of life, liberty or property without due process of law." *Id.*; U.S. CONST. amend. XIV. The Fourteenth Amendment provides that "no state shall deprive any person of life liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." *Id.*

A. Federal Government Procurement Programs

Congress introduced federal construction procurement programs to overcome discriminatory contract awards which precluded companies owned by women and minorities from competing in the marketplace.³⁰ These federal programs were implemented to combat decades of institutional discrimination which prevented many minorities from establishing the political and personal connections necessary to win contracts.³¹ Accordingly, these federal programs aimed to "level the playing field" and provide prior victims of professional discrimination an opportunity to prove themselves.³²

B. Petitioner's Argument

Adarand argued that the use of race as a determining factor in awarding federal construction procurement contracts violated the

³⁰ See *Small Business Problems: Hearings Before the House Comm. on Small Business*, 100th Cong., 1st Sess. (1987). The issue of minority disadvantage in federal contracting caused by racial discrimination has been examined repeatedly by Congress. *Id.* Consistently, Congress has found that those disadvantages still exist. *Id.* Based on this knowledge, the SBA has continued or expanded upon social disadvantage based on race. *Id.*; see also Pub. L. No. 96-302, § 118, 94 Stat. 840 (1980); Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, § 18105, 100 Stat. 370 (1986); Business Opportunity Development Reform Act, Pub. L. No. 100-656, §§ 101, 207, 102 Stat. 3853, 3861-62 (1988); 133 CONG. REC. 33, 314-33, 315 (1987) (commenting on House Report No. 1807). When Congress amended the SBA in 1988 to add the disadvantaged business enterprise goals, it reaffirmed that the SBA's disadvantaged business contracting program is "the most significant effort of the Federal Government to reduce the effects of discrimination in entrepreneurial endeavors." *Id.* The House Committee on Small Business specifically found that "discrimination and the present effects of past discrimination" continue to hinder minority business development and that an increase in the effectiveness of the SBA was necessary "to redress the effects of discrimination on entrepreneurial endeavors."

³¹ See H.R. REP. No. 460, 100th Cong., 1st Sess., at 18 (1987). The House Committee Report concluded that the lack of minority participation in federal procurement was the result of both present and past discrimination. *Id.*; Cindy Richards, *Affirmative Action Has Work to Do*, CHI. SUN-TIMES, June 16, 1995, at 37. Since hiring is a risky process, "companies hire people they know, or people who have been recommended by people they know." *Id.* This places minorities at a disadvantage because they have traditionally been unable to make necessary business contacts. *Id.* Unless a company is "forced by law or motivated by bonuses, they are not likely to look beyond their regular circle." *Id.* See generally Paul Brest & Miranda Oshige, *Affirmative Action for Whom?*, 47 STAN. L. REV. 885, 861 n.43 (1995). A commitment to affirmative action programs may counteract practices that have a disparate impact on members of minority groups such as undue reliance on "old boy networks" for information about applicants or appointments. *Id.*

³² See Richards, *supra* note 31, at 37. Richards reports that "[o]nce minorities and women are in the door, color and gender become irrelevant . . . [i]f the company can't perform satisfactorily, it won't get the next contract." *Id.* Affirmative action is designed to break down the "old boy network" by widening the pool of qualified candidates and creating an environment in which merit can prevail. *Id.* Minorities tend not to be part of the same social circles as those who hire and provide capital, and therefore lack the connections necessary to compete effectively for jobs and funding. *Id.*

Equal Protection component of the Fifth Amendment's Due Process Clause.³³ Adarand asserted that the equal protection analysis of a federal law permitting race-based exclusions necessitated judicial review under the strict scrutiny standard³⁴ to determine its constitutionality.³⁵ The United States Court of Appeals for the Tenth Circuit held the law constitutional.³⁶ The Circuit Court refused to apply the strict scrutiny standard, instead affirming the United States District Court for the District of Colorado's applica-

³³ *Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097, 2101 (1995); see *United States v. Paradise*, 580 U.S. 149, 166 n.16 (1987) (noting that Equal Protection component of Due Process Clause of Fifth Amendment is coextensive with Fourteenth Amendment); *Weinberger v. Weisenfeld*, 420 U.S. 636, 638 n.2 (1975) (stating that equal protection analysis is same under Fifth and Fourteenth Amendments); *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954) (finding that Due Process Clause of Fifth Amendment imposes same equal protection requirements on federal government as Equal Protection Clause of Fourteenth Amendment imposes on state government).

³⁴ See *Madsen v. Women's Health Ctr.*, 114 S. Ct. 2516, 2525 (1994) (explaining that under strict scrutiny Court determines whether restriction is necessary to serve compelling governmental interest and if it is narrowly drawn to achieve that end); *Metro Broadcasting v. FCC*, 110 S. Ct. 2997, 3029 (1990) (O'Connor, J., dissenting) (noting that strict scrutiny requires statute to be "narrowly tailored to achieve a compelling governmental interest" in order to pass constitutional muster); *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (stating that strict scrutiny requires that there be compelling state interest to enact law and that it be narrowly drawn to serve that purpose); *Equality Found., Inc. v. Cincinnati*, 860 F. Supp. 417, 429 (S.D. Ohio, 1994) (explaining that there are three standards of constitutional review used in equal protection analysis: rational basis standard, intermediate scrutiny and strict scrutiny); cf. *Nordlinger v. Hahn*, 505 U.S. 1, 15 (1992) (stating that under rational basis review legislature need not articulate purpose or rationale supporting its classification); *United States v. Carolene Products*, 304 U.S. 144, 145-46 (1938) (holding that under rational basis test law will be upheld if "the classifications are rationally related to a legitimate governmental purpose").

³⁵ See, e.g., *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980) (Marshall, J., concurring) (recognizing that "conventional" test for reviewing "governmental programs employing racial classifications" is strict scrutiny); accord *Schwartz*, *supra* note 16, at 1 (indicating that strict scrutiny is necessary because discrimination and bias are so pervasive that skeptical judicial monitoring is needed to ensure actions or laws are not governed by discrimination and bias); see *Petitioner's Brief at 24, Adarand* (No. 93-1841) (arguing that Court traditionally employed strict scrutiny in considering violations of equal protection component of Due Process Clause of Fifth Amendment); see also *Miller v. Johnson*, 115 S. Ct. 2475, 2486 (1995) (noting that statutes are subject to strict scrutiny under equal protection analysis not only when express racial classifications are utilized but also when, although seemingly race neutral in language, it is motivated by racial purpose); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986) (stating that under strict scrutiny there must be convincing evidence that remedial action is necessary before implementing affirmative action); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982) (indicating that classifications based on race are inherently suspect and trigger strict scrutiny review); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 299 (1978) (requiring compelling governmental interest to justify any state imposed burden based upon individual's race or ethnicity); *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (finding legal restrictions based on racial classification immediately subject to rigid scrutiny).

³⁶ See *Adarand Constructors, Inc. v. Pena*, 16 F.3d 1537, 1543 (10th Cir. 1994) (holding that proper review of program was *Fullilove* standard resembling intermediate scrutiny because federal government acting under congressional authority can engage more freely in affirmative action than states and localities), *vacated*, 115 S. Ct. 2097 (1995).

tion of the "intermediate scrutiny" standard.³⁷ The Supreme Court vacated the lower courts' judgments and declared that strict scrutiny was the appropriate standard of review in the equal protection analysis of federal laws addressing the issue of race.³⁸

C. Government Classifications Under Equal Protection Analysis

Prior to *Adarand*, the Supreme Court had analyzed the applicable standard of review for equal protection challenges to race-based legislation on several occasions.³⁹ The Court's failure to embrace an applicable level of scrutiny in such cases as *Regents of the University of California v. Bakke*,⁴⁰ *Fullilove v. Klutznick*,⁴¹ and

³⁷ *Adarand Constructors, Inc. v. Skinner*, 790 F. Supp. 240, 244 (D. Colo. 1992), *aff'd*, 16 F.3d 1537 (10th Cir. 1994), *vacated*, 115 S. Ct. 2097 (1995). The district court claimed that the program must demonstrate that it serves important governmental objectives and that it is substantially related to achievement of those objectives. *Id.*; see *Craig v. Boren*, 429 U.S. 190, 197 (1976). Intermediate scrutiny requires that the challenged law serve an "important government objective." *Id.* This level of scrutiny is applied to gender discrimination claims. *Id.*; *Metro Broadcasting*, 110 S. Ct. at 3009. A classification will survive intermediate scrutiny when it serves an important governmental purpose and is substantially related to that purpose. *Id.*; Daniel Seligman, *The Scrutinizers: U.S. Supreme Court Fails to End Affirmative Action in Adarand Constructors, Inc. v. Pena*, FORTUNE, July 24, 1995, at 170. A program subject to strict scrutiny requires a "compelling government interest" to pass muster under the Constitution's Equal Protection mandate, while intermediate scrutiny requires a "reasonable relationship to a legitimate government interest." *Id.* The difference between compelling and legitimate is not always clear. *Id.* There is not a bright line separating the definitions of these words. *Id.*

³⁸ See *Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097, 2114 (1995). Justice O'Connor's plurality opinion found that all racial classifications imposed by federal, state or local government must be analyzed under strict scrutiny. *Id.* To survive strict scrutiny, an affirmative action program must serve a compelling governmental interest and be narrowly tailored to redress specific and identifiable past discrimination. *Id.* Justice O'Connor stated that any government program that classifies people according to race should be subject to strict scrutiny because of the Constitution's guarantee of equal protection to all individuals. *Id.*; cf. *Adarand*, 16 F.3d at 1537. The Court of Appeals for the Tenth Circuit upheld the program by finding it has served a "significant governmental purpose of providing subcontracting opportunities for small, disadvantaged business enterprises." *Id.*; James Kilpatrick, *Affirmative Action Ruling Lucidly Hazy*, AUSTIN-AMERICAN STATESMAN, June 22, 1995, at A15. The author noted that significant governmental interest may not rise to the level of compelling governmental interest. *Id.*

³⁹ See, e.g., *Wygant*, 476 U.S. at 269-70 (questioning whether school board could adopt race-based preferences in determining which teachers to lay off); *Fullilove*, 448 U.S. at 491-92 (upholding federal program requiring 10% of public works contracts to be awarded to minority-controlled enterprises); *Bakke*, 438 U.S. at 320 (holding that university's plan to set aside 16 out of 100 seats for minority students too rigid although general concept of giving special consideration to minorities acceptable). See generally JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 14 (4th ed. 1995) (detailing history and application of Equal Protection Clause including challenges to race-based legislation).

⁴⁰ 438 U.S. 265 (1978) (holding that medical school's admission program which used race as consideration violated Equal Protection Clause of United States Constitution).

⁴¹ 448 U.S. 448 (1980) (holding that Minority Business Enterprise provision did not violate Equal Protection Clause of Constitution).

*Wygant v. Jackson Board of Education*⁴² left the appropriate constitutional framework for reviewing remedial race-based governmental legislation unresolved.⁴³ The difficulty the Court experienced in determining the appropriate standard of review was first apparent in *Bakke*.⁴⁴ *Bakke* involved an equal protection challenge to an admission program at a state run medical school which reserved a certain number of seats for minority students.⁴⁵ Justice Powell, in writing the plurality opinion for the Court, applied the strict scrutiny standard of review and concluded that the medical school's admission program violated the Equal Protection Clause.⁴⁶ Justice Stevens, in a concurring opinion joined by Chief Justice Burger and Justices Rehnquist and Stewart, found it unnecessary to analyze the program under constitutional review because they believed the admissions program violated Title VI of the Civil Rights Act of 1964.⁴⁷ In contrast, Justices Brennan, Marshall, Blackmun and White, agreed that such a program should be subjected to constitutional evaluation but argued that an intermediate level of scrutiny was the appropriate standard of review.⁴⁸ Although the *Bakke* decision failed to produce a majority opinion for the Court, it did conclude that race-based governmental programs must be subject to some level of constitutional evaluation,⁴⁹ however, left the question of the appropriate level of review unanswered.

⁴² 476 U.S. 267 (1986) (holding that school board's use of racial preferences violated the Equal Protection Clause of Constitution).

⁴³ See Christopher S. Miller, *The End Justifies the Means: Affirmative Action, Standards of Review, and Justice White*, 46 U. MIAMI L. REV. 1305, 1306, 1324 n.7 (1992) (explaining different standards adopted by Justices in *Bakke*, *Fullilove*, and *Wygant*); Solomon Oliver, Jr., *Litigating the Constitutionality of State and Local Affirmative Action Plans: Issues and Approaches*, 10 REV. LITIG. 55, 56-57 (1990) (noting inability of Justices to agree on appropriate standard of review for affirmative action programs in *Bakke*, *Fullilove*, and *Wygant*); Rocco Potenza, *Affirmative Action: Will Justice O'Connor Author Its End*, 22 U. TOL. L. REV. 805, 805 (1991) (recognizing that *Bakke*, *Fullilove*, and *Wygant* were all plurality decisions in which Court failed to establish appropriate standard of review); Adam Winkler, *Sounds of Silence: The Supreme Court and Affirmative Action*, 28 LOY. L.A. L. REV. 923, 944 (1995) (stating that Court has wavered between standards of review in affirmative action cases since *Bakke*); Sally Morris, Comment, *One More Battle on the Ongoing War Over Affirmative Action: Metro Broadcasting, Inc. v. FCC*, 26 NEW ENG. L. REV. 921, 922 (1992) (indicating dispute over standard of review in *Bakke*, *Fullilove*, and *Wygant*).

⁴⁴ See *Bakke*, 438 U.S. at 275.

⁴⁵ See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 269-70 (1978).

⁴⁶ See *id.* at 270-71.

⁴⁷ See *id.* at 411-18.

⁴⁸ See *id.* at 411-12.

⁴⁹ See *Bakke*, 438 U.S. at 320.

Two years later in *Fullilove*, the Court had the opportunity to answer this question when it was presented with an equal protection challenge to a federal statute requiring that at least ten percent of federal funds granted for federal works projects be set aside for minority owned businesses.⁵⁰ With facts similar to *Adarand*, the *Fullilove* Court held that the statute was constitutional but again failed to agree on the applicable test to analyze the constitutionality of a remedial race-based governmental program.⁵¹ Chief Justice Burger's plurality opinion, in which Justices White and Powell joined, outlined a two-part test which examined: (1) whether the objectives of the statute were within the power of Congress; and (2) whether the use of racial criteria was a constitutionally permissive means of achieving that congressional objective.⁵² Justice Powell, in a concurring opinion, followed his position in *Bakke* and again advocated the application of strict scrutiny to all racial classifications.⁵³ In analyzing Chief Justice Burger's rationale, Justice Powell posited that the plurality opinion had essentially imposed a strict scrutiny standard of review.⁵⁴ In a dissenting opinion, Justice Stewart, joined by Justice Rehnquist, adopted Justice Powell's position, but concluded that the strict scrutiny test had not been satisfied and maintained that the statute was unconstitutional.⁵⁵ Justice Marshall, joined by Justices Brennan and Blackmun, concurred in the judgment but espoused that intermediate scrutiny was the appropriate level of review.⁵⁶ After *Fullilove*, it was clear that the Supreme Court was still divided on the appropriate level of scrutiny to be afforded to government racial classifications.⁵⁷

⁵⁰ See *Fullilove v. Klutznick*, 448 U.S. 448, 453 (1980).

⁵¹ See *id.* at 491-92.

⁵² See *id.*

⁵³ See *id.* at 496.

⁵⁴ See *id.* at 496.

⁵⁵ See *Fullilove v. Klutznick*, 448 U.S. 448, 522-23 (1980).

⁵⁶ See *id.* at 519.

⁵⁷ See *Richmond v. Croson*, 488 U.S. 469, 487 (1989) (recognizing that *Fullilove* did not employ any traditional standard of equal protection review); see also Martha J. Hess, *Constitutional Law—Equal Protection—Benign Classifications Based on Race Must Be Narrowly Tailored to Achieve a Compelling Governmental Interest*, 21 ST. MARY'S L.J. 493, 498-99 (1989) (stating that *Fullilove* did not adopt level of scrutiny when it upheld minority set-aside plan), Miller, *supra* note 43, at 1312 (noting that *Fullilove* did not endorse any constitutional standard of review); John Payton, *The Meaning and Significance of the Croson Case*, 1 GEO. MASON U. CIV. RTS. L.J. 59, 61 (1990) (explaining that *Fullilove* court failed to employ any standard of equal protection review).

The Supreme Court continued to struggle with this question in *Wygant*.⁵⁸ In *Wygant*, the Court was presented with an equal protection challenge to a school board policy which considered race as a factor in determining which teachers to lay off.⁵⁹ Justice Powell, joined by Chief Justice Burger and Justices Rehnquist and O'Connor, applied the strict scrutiny test in the plurality opinion of the Court.⁶⁰ In analyzing whether the plan served a compelling government interest and whether or not it was narrowly tailored to achieve that interest, Justice Powell concluded that the Jackson Board of Education had not demonstrated a sufficiently compelling governmental interest and struck down the plan as violating the Equal Protection Clause of the Constitution.⁶¹ Justices O'Connor and White concurred, agreeing with the judgment, but disagreeing with the rationale.⁶² Justice Marshall dissented, joined by Justices Brennan and Blackmun, again arguing that intermediate scrutiny was the appropriate level of review.⁶³ After three opportunities the Supreme Court failed to articulate a controlling standard of review for race-based preference programs.

In 1989, however, a majority of the Court resolved this issue as it related to state legislation enacted to remedy prior racial discrimination.⁶⁴ In *Richmond v. J.A. Croson Co.*,⁶⁵ a municipal statute required that thirty percent of its contracting work be awarded to minority-owned businesses.⁶⁶ When the statute was

⁵⁸ See *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 267 (1986).

⁵⁹ See *id.*

⁶⁰ See *id.* at 274-78.

⁶¹ See *id.*

⁶² See *id.* at 286-89, 295.

⁶³ See *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 301-03 (1986).

⁶⁴ See *City of Richmond v. Croson*, 488 U.S. 469, 493 (1989) (applying strict scrutiny and noting that standard's usefulness to "smoke out" illegitimate uses of race).

⁶⁵ 488 U.S. 469 (1989).

⁶⁶ See *id.* at 477-78. The Richmond City Council enacted the Minority Business Act which required prime contractors contracting with the City to subcontract at least 30% of the amount of the prime contract to a Minority Business Enterprise ("MBE"). *Id.* at 477. A business which was 51% owned and controlled by minority group members was considered an appropriate MBE under the Plan. *Id.* Minority group members were defined as United States citizens who are Black, Spanish-speaking, Oriental, Indian, Eskimo or Aleut. *Id.* at 478. The City Council adopted the Plan after sufficient evidence of past discrimination within the construction industry was brought to their attention. *Id.* at 479-80. The Council reviewed a study indicating that from 1978 through 1983 only .067% of the City's prime construction contracts had been awarded to minority businesses, listened to testimony by the former mayor that the local construction industry is widespread with race discrimination and exclusion, and received evidence that the major construction trade associations in Richmond had virtually no minority members. *Id.* The City Council also relied on the findings of nationwide discrimination within the construction industry on which the Supreme Court predicated its decision in *Fullilove*. *Id.*

challenged, the Court held that the standard of review for all racial classifications by municipal government was strict scrutiny.⁶⁷ In *Croson*, the Court found that the Fourteenth Amendment's Equal Protection Clause required that race-based action by state and local governments be subject to strict scrutiny.⁶⁸ The *Croson* Court also noted, in dicta, that it had no authority, based on the facts presented, to declare the appropriate standard of review under a Fifth Amendment analysis of race-based action taken by the federal government.⁶⁹

D. *Adarand Requires Strict Scrutiny*

In *Adarand*, the Court, for the first time, formed a 5-4 majority which refused to uphold a federal affirmative action policy.⁷⁰ Justice O'Connor's majority opinion held that the federal government may not give special preferences to minority businesses when awarding contracts, unless the program passes "strict scrutiny."⁷¹ Strict scrutiny requires that the program (1) be implemented to

⁶⁷ See *id.* at 493-94. "[T]he standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefitted by a particular classification." *Id.* at 494; see also *Excerpts; The Supreme Court on Affirmative Action*, COURIER J. (Louisville), June 14, 1995, at 7A. This article indicated that the *Metro Broadcasting* opinion was authored by Justice Brennan, a longtime liberal warhorse on the Court, on eve of his retirement. *Id.*; Linda Greenhouse, *Affirmative Action Fate Lies with Politics, Not Court*, NEWS AND OBSERVER (Raleigh), June 14, 1995, at A1. Greenhouse noted that the 5-4 ruling in *Metro Broadcasting* "was a product of former Justice Brennan's ability to accomplish liberal results long after he had a liberal Court to work with." *Id.* But see *Metro Broadcasting v. FCC*, 497 U.S. 547, 563-566 (1990) (holding that "benign" federal racial classifications need only to satisfy intermediate scrutiny in analyzing Fifth Amendment challenge to two race-based policies of FCC), *overruled by Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097 (1995).

⁶⁸ See *Croson*, 488 U.S. at 504; *cf. id.* at 520 (Scalia, J., concurring) ("I do not agree with . . . Justice O'Connor's dicta, suggesting that, despite the Fourteenth Amendment, state and local governments may in some circumstances discriminate on the basis of race in order . . . to ameliorate the effects of past discrimination.").

⁶⁹ See *Adarand*, 115 S. Ct. at 2110; *City of Richmond v. Croson*, 488 U.S. 469, 484-85 (1989). In deciding *Croson*, the Court had to address *Fullilove* which was controlling precedent. *Id.* In order for the Court to hold the Plan in *Croson* unconstitutional, the Court had to either overrule *Fullilove* or had to distinguish it from the facts in *Croson*. *Id.* Justice O'Connor chose the latter and held that federal racial classifications such as the program in *Fullilove* should not be subject to strict scrutiny because the federal government has broad remedial powers. *Id.* In contrast, Justice O'Connor reasoned that state and local governments have no "specific constitutional mandate to enforce the dictates of the Fourteenth Amendment." *Id.* at 490. Thus, she concluded that a more stringent review must be given to racial classifications employed by state and local governments. *Id.*; *cf. id.* at 518 (Kennedy, J., concurring) (stating "the process by which a law that is an equal protection violation when enacted by a state becomes transformed to an equal protection guarantee when enacted by Congress poses a difficult question for me").

⁷⁰ See *Adarand*, 115 S. Ct. at 2113.

⁷¹ See *id.* at 2112-13.

achieve a compelling governmental interest and (2) be narrowly tailored in its method of achieving that interest.⁷² The opinion enunciated the view that racial classifications are unfair, even if designed to benefit a previously disadvantaged group.⁷³ The Court stated that all racial classifications, including those in federal programs, are inherently suspect and presumptively invalid.⁷⁴

In a crucial passage of the opinion, however, Justice O'Connor intimated that strict scrutiny would not unilaterally defeat programs that extend preferences based on race.⁷⁵ Although *Adarand* restricted affirmative action programs, it did not completely eliminate their use.⁷⁶ Rather, the decision provided constitutional authority for certain preference programs that provide detailed evidence of past discrimination and prove that such racial

⁷² See *Adarand Constructors, Inc. v. Pena*, 115 St. Ct. 2097, 2111 (1995). "[S]uch classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests." *Id.* at 2113. *But see id.* at 2129 (Stevens, J., dissenting). Justice Stevens noted that "SBA and STURRA embody Congress' recognition that such barriers may actually handicap minority firms seeking business as subcontractors from established leaders in the industry that have a history of doing business with their golfing partners". *Id.*

⁷³ See *id.* at 2112; see also *Shaw v. Reno* 113 S. Ct. 2816, 2818 (1993) (discussing that "racial classifications of any sort pose the risk of lasting harm to our society [by] reinforcing the belief . . . that individuals should be judged by the color of their skin"); *Metro Broadcasting v. FCC*, 497 U.S. 547, 602 (1990) (O'Connor, Scalia, Kennedy, JJ., & Rehnquist, C.J., dissenting) (stating that departure from strict scrutiny in determining constitutionality of racial classifications "marks a renewed toleration of racial classifications and a repudiation of our recent affirmation that the constitution's equal protection guarantees extend equally to all citizens"); *Croson*, 488 U.S. at 501 (suggesting Court is presumptively skeptical of all racial classifications); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276-77 (1986) (stating that "history of racial classifications in this country suggests that blind judicial deference to legislative or executive pronouncements of necessity have [sic] no place in equal protection analysis"); *Drew S. Days, III, Fullilove*, 96 *YALE L.J.* 453, 485 (1987) (arguing that good intentions insufficient to validate government set-asides that employ "explicit racial classification system[s]").

⁷⁴ See *Adarand* 115 S. Ct. at 2104-14 (holding that all racial classifications, imposed by either federal, state or local government must be analyzed by reviewing court under strict scrutiny); *supra* note 34 (discussing strict scrutiny standard).

⁷⁵ See *Adarand*, 115 S. Ct. at 2117. Justice O'Connor stated that the Court wished to "dispel the notion that strict scrutiny is "strict in theory but fatal in fact." *Id.* She acknowledged the "persistence of both the practice and the lingering effects of racial discrimination against minorities in this country" and expressed that "the government is not disqualified from acting in response to it." *Id.* Justice O'Connor referred to *United States v. Paradise*, 480 U.S. 149, 167 (1987), as an example of the permissive governmental response to discrimination. *Id.* She explained that "[a]s recently as 1987 . . . every Justice of this Court agreed that the Alabama Department of Public Safety's 'pervasive, systematic and obstinate discriminatory conduct' justified a narrowly tailored race-based remedy." *Id.* Justice O'Connor further concluded that "[w]hen race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the 'narrow tailoring' test this Court has set out in previous cases." *Id.*

⁷⁶ See *Adarand*, 115 S. Ct. at 2117 (discussing that Justice O'Connor expressly indicated that programs would not be "fatal in fact" and would allow governmental response to racial discrimination).

preferences represent a "narrowly tailored" remedy.⁷⁷ To prove that a remedy is narrowly tailored, the program must be confined to a specific time period and be imposed as a last resort, after all other solutions have been exhausted.⁷⁸ Such a high threshold of review inevitably will have a significant impact on federal affirmative action policies.⁷⁹ Although *Adarand* is not fatal in fact to affirmative action, it may cripple many federal programs which do not meet the new constitutional standard.⁸⁰

⁷⁷ See *Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097, 2117-18 (1995); *Bennett v. Arrington*, 20 F.3d 1525, 1647-48 (11th Cir. 1994) (holding that flexibility and duration of city's affirmative action plan which included race-based promotional system for fire department was not narrowly tailored); *H.K. Porter Company, Inc. v. Metropolitan Dade County*, 975 F.2d 762, 766-67 (11th Cir. 1992) (holding that county's minority set aside program was not narrowly tailored because county did not investigate or have knowledge of earlier discrimination in industry); *O'Donnell Constr. Co. v. District of Columbia*, 963 F.2d 420, 424-25 (D.C. Cir. 1992) (declaring Act unconstitutional because there was no evidence that white contractors had been favored over non-whites, set-aside goal was not linked to any racial discrimination in construction industry, and no evidence existed of past discrimination against groups which were defined as minorities under Act); *Shurberg Broadcasting of Hartford, Inc., v. FCC*, 876 F.2d 902, 938-53 (D.C. Cir. 1989) (finding that FCC's distress sale program favoring minority-owned purchasers was not narrowly tailored to remedy past discrimination or to promote program diversity in that it was not reasonably related to interest it sought to vindicate); *Martin v. School Dist. of Phil.*, No. CIV.A.95-5650, 1995 WL 564344, at *1-3 (E.D. Pa. Sept. 21, 1995) (finding that policy requiring transfer of 35% to 65% of students to another school district was not narrowly tailored to serve compelling state interest); *American Subcontractors Assoc., Inc. v. City of Atlanta*, 376 S.E.2d 662, 666-67 (1989) (noting that testimony of witnesses acknowledging problems with minority participation could be ameliorated by alternate remedies and implementation of quota system for minority participation demonstrated lack of narrow tailoring); *cf. Cone Corp. v. Hillsborough County*, 908 F.2d 908, 913 (11th Cir. 1990) (holding that plan contained sufficient procedural safeguards to be considered narrowly tailored); *Alexander v. Prince George's County*, Nos. CIV. AW-93-2636, CIV. AW-94-2030, 1995 WL 603297, at *9-10 (D. Md. Oct. 11, 1995) (finding fire department's affirmative action narrowly tailored in that alternate remedies were unsuccessful, it was of limited duration, it was designed to remedy present imbalances resulting from past discrimination, it was flexible, and it did not have severe impact on third parties); *Shuford v. Alabama State Bd. of Educ.*, No. Civ.A.89-T-196-N, 1995 WL 494913, at *29 (M.D. Ala. Aug. 11, 1995) (determining that goals for black women were not overinclusive but were slightly underinclusive to be sufficiently narrowly tailored); *Association of General Contractors, Inc. v. City of San Francisco*, 748 F. Supp. 1443, 1455-56 (N.D. Cal. 1990) (holding plan was narrowly tailored because it attempted race-neutral remedy and avoided use of rigid quotas).

⁷⁸ See *Adarand*, 115 S. Ct. at 2118. The Court stated that when reviewing race-based programs a court must consider: (1) "whether there was any consideration of the use of race-neutral means to increase minority business participation;" and (2) "whether the program was appropriately limited such that it will not last longer than the discriminating effects it is designed to eliminate." *Id.*

⁷⁹ Compare David G. Savage, *Rebuilding Affirmative Action*, 81, A.B.A. J. 42, 46 (1995) (arguing that recent strict scrutiny fatalities indicate future of affirmative action) with Ralph Thomas, *Is This The End of Minority Contracting? Not Hardly . . .*, 42 FED. LAW. 34, 38 (1995) (arguing that *Adarand's* new guidelines will make federal minority contracting stronger than before).

⁸⁰ See *Fullilove v. Klutznick*, 448 U.S. 448, 507 (1980) (Powell, J., concurring) (stating that "[t]he failure of legislative action to survive strict scrutiny has led some to wonder whether our review of racial classifications has been strict in theory but fatal in fact"); *Gunther, supra*, note 1, at 8 (suggesting that statutes are rarely sustained under strict

An important aspect of the *Adarand* ruling is that the Court upheld the legitimacy of affirmative action and rejected explicit efforts by Justices Antonin Scalia and Clarence Thomas to eliminate all race-based remedies for discrimination.⁸¹ While both Justices joined the majority opinion, each would have declined to justify any affirmative action programs.⁸² Both Justices contended that the Constitution is colorblind and, as such, all race-based distinctions are invalid.⁸³ Even though the majority refused to go

scrutiny because strict scrutiny review is "strict in theory but usually fatal in fact"); Lisa A. Montanano, Comment, *The Americans with Disabilities Act: Will the Court Get the Hint? Congress' Attempts to Raise Status of Persons with Disabilities in Equal Protection Cases*, 15 PACE L. REV. 621, 631 (1995) (noting that statutes rarely survive strict scrutiny analysis); Schwartz, *supra* note 16, at 1 (suggesting that few measures can pass threshold test of strict scrutiny). *But see Adarand*, 115 U.S. at 2100 (suggesting that "[i]t is not true that strict scrutiny is strict in theory and fatal in fact"); *supra* note 75 and accompanying text (explaining majority decision left opening for governmental response to racial discrimination).

⁸¹ See *Adarand*, 115 S. Ct. at 2118-19 (Scalia, J., concurring). Justice Scalia stated that government can never justify racial preferences to compensate for past racial discrimination because under our constitution "there can be no such thing as creditor or debtor race." *Id.*; *id.* at 2119 (Thomas, J., concurring). Justice Thomas expressed his view that affirmative action is a form of "racial paternalism and its unintended consequences can be as poisonous and pernicious as any other form of discrimination." *Id.* He further noted that all racial distinctions are prohibited by the Constitution because "government sponsored racial discrimination is just as noxious as discrimination inspired by malicious prejudice" noting a "moral and constitutional equivalence between laws designed to subjugate a race and those that distribute benefits on the basis of race in order to foster equality." *Id.*

⁸² See *Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097, 2118-19 (1995) (discussing Justices Scalia and Thomas' view enunciated in *Adarand* that all race-based distinctions should be eliminated).

⁸³ See *Adarand*, 115 S. Ct. at 2118 (Scalia, J., concurring) (stating that "[i]n the eyes of the government we are only one race"); *id.* at 2119 (Thomas, J., concurring) (advocating that "[u]nder our Constitution, the government may not make distinctions on the basis of race"); see also *City of Richmond v. J.A. Croson, Co.*, 488 U.S. 469, 520, 524 (1989) (Scalia, J., concurring) (stating that "the benign purpose of compensating for social disadvantages, whether they have been acquired by reason of prior discrimination or otherwise, can no more be persuaded by the illegitimate means of racial discrimination . . . [when] we depart from race-neutral programs we play with fire and more than an occasional . . . Croson burns"); *Johnson v. Transp. Agency*, 480 U.S. 616, 657 (1987) (Scalia, J., dissenting) (indicating that racist principles breed racist results and that minority group members who have overcome racial stereotypes are hurt by lower standards of affirmative action programs); *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting) (stating that "there is no caste system here, our Constitution is colorblind and neither knows nor tolerates classes among citizens"); Antonin Scalia, *Commentary: The Disease as Cure*, 1979 WASH. U. L.Q. 147, 157 (1979) (indicating he is "opposed to racial affirmative action for reasons of both principle and practicality" believing that accepting or rejecting people on basis of their race is wholly unacceptable); Clarence Thomas, *Toward a "Plain Reading" of the Constitution—The Declaration of Independence in Constitutional Interpretation*, 30 HOW. L.J. 983, 992 (1987) (explaining history of colorblind principles in Supreme Court jurisprudence). *But see Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 326 (1978) (Brennan, White, Marshall and Blackmun, JJ., concurring in part and dissenting in part) (stating that "we cannot . . . let color blindness become myopia which masks the reality that many 'created equal' have been treated within our lifetimes as inferior both by the law and by their fellow citizens"); *Associate Gen. Contractors, Inc. v. Altshuler*, 490 F.2d 9, 16 (1st Cir. 1973) (suggesting that "[t]he observation that the Constitution is colorblind represents

that far, the Court, nevertheless, expressly overruled *Metro Broadcasting v. FCC*,⁸⁴ a 1990 decision which upheld two federal race-based policies against a Fifth Amendment challenge.⁸⁵

Why did the Court reverse its viewpoint on affirmative action? The addition of Justice Clarence Thomas to the Court seemed to create a cohesive majority, making the difference in the outcome of the case.⁸⁶ Since the Court last addressed the issue, Justice Thurgood Marshall,⁸⁷ the legendary civil rights lawyer and leading liberal on the Court, had retired and Justice Thomas, a staunch conservative, was appointed to take his seat.⁸⁸ With Thomas supplying the fifth vote necessary to form a majority, the

a long-term goal, and it is by now understood that our society cannot be completely colorblind in the short term if we are to have a colorblind society in the longterm"); John E. Morrison, *Colorblindness, Individuality: Merit: An Analysis of the Rhetoric Against Affirmative Action*, 79 IOWA L. REV. 313, 316-24 (1994) (indicating that Justice Scalia is opponent of affirmative action programs and positing that colorblind policies reflect desire to avoid painful past and failure to acknowledge motivation behind race-based programs).

⁸⁴ 110 S. Ct. 2997 (1990).

⁸⁵ *Id.* at 3027-28.

⁸⁶ See Margaret Carlson, *Marching to a Different Drummer: By Choosing Clarence Thomas, Who Says Integration Is An Impossible Dream, Bush Sparks Debate over the Goals of the Civil Rights Movement*, TIME, July 15, 1991, at 18 (quoting Thomas' opposition to programs that force people to hire a certain percentage of minorities); Yxta M. Murray, *The Cultural Implications of Judicial Selection*, 79 CORNELL L. REV. 374, 385 (1994) (indicating that Justice Thomas' conservative viewpoints are adequately demonstrated as he has consistently argued against affirmative action and abortion); K.G. Jan Pillai, *Affirmative Action, In Search of a National Policy*, 2 TEMP. POL. & CIV. RTS. L. REV. 1, 4-5 (1992) (recognizing that appointment of several conservative justices, including Justice Thomas, have initiated intense political debate over fairness of affirmative action with proponents of such policies on losing side); Gary Simson, *Thomas's Supreme Unfitness—A Letter to the Senate on Advice and Consent*, 78 CORNELL L. REV. 619, 621 (1992) (discussing that it was Thomas' staunch opposition to affirmative action that became his "calling card" among conservative Republicans).

⁸⁷ See generally MICHAEL D. DAVIS, THURGOOD MARSHALL: WARRIOR AT THE BAR, REBEL ON THE BENCH (Carol Publication Group 1992) (detailing advocacy of Justice Thurgood Marshall); ROGER L. GOLDMAN, THURGOOD MARSHALL: JUSTICE FOR ALL (Carroll & Graf 1992) (discussing Justice Marshall's support for minorities while on bench); DEBRA HESS, THURGOOD MARSHALL: CHANGING THE LEGAL SYSTEM (Silver Burdett Press 1990) (expressing effect of Justice Marshall on legal system); MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936-1961 (Oxford University Press 1994) (explaining significance of Justice Marshall in Civil Rights movement).

⁸⁸ See Michael Comiskey, *The Rehnquist Court and American Values*, 77 JUDICATURE 261, 263 (1994) (noting that Court appears less receptive to affirmative action since Justices Brennan and Marshall were replaced by more conservative Justices, David Souter and Clarence Thomas); Cecil A. Rhodes, *The Victim Impact Statement and Capital Crimes: Trial By Jury and Death By Character*, 21 S.U. L. REV. 1, 15 (1994) (suggesting that Clarence Thomas is "the antithesis of all that [Justice] Marshall had advocated politically and judicially", in that Thomas is by far most conservative justice, and that his appointment "epitomized the stereotypical negative affirmative action backlash which conservatives . . . had espoused").

Court reversed course and criticized preferential programs based on race.⁸⁹

II. THE CONSERVATIVE TREND OF THE SUPREME COURT

A. *Judicial Movement to the Right*

The United States Supreme Court ended its 1994-95 term with the emergence of a solid conservative majority.⁹⁰ Chief Justice Rehnquist and Justices Scalia, Thomas, O'Connor, and Kennedy formed a cohesive voting bloc which actively re-examined basic constitutional principles in the most controversial cases of the

⁸⁹ See Dan Freedman, *Court Drops Race Bomb, Affirmative Action Dealt Blow, Justices Stop Short of Scrapping Federal Programs, Say They May Violate Equal Protection*, S.F. EXAMINER, June 12, 1995, at A1 (suggesting that key vote in *Adarand* was that of Justice Thomas); Dan Freedman, *Thomas Vote Turns Supreme Court's Tide*, DAYTON DAILY NEWS, June 14, 1995, at 9A (noting that Justice Thomas was the crucial fifth vote needed to form conservative majority); David S. Savage, *High Court Deals Severe Blow To Federal Affirmative Action Rights: Justices Hold That Race-Based Preferential Treatment Is Almost Always Unconstitutional But An Opening Is Left For Narrow Specific Bias Remedies*, L.A. TIMES, June 13, 1995, at 1 (noting that with Justice Thomas casting fifth vote in *Adarand*, Court attempted to eliminate preferential race-based programs and dramatically reversed course); David S. Savage, *Supreme Court Takes U-Turn On Affirmative Action*, THE BATON ROUGE ADVOCATE, June 13, 1995, at 1A (stating that Justice Thomas cast deciding vote); Jim Tranquada, *High Court Puts Limits on Affirmative Action*, L.A. DAILY NEWS, June 13, 1995, at N1 (suggesting that Justice Thomas provided crucial vote).

⁹⁰ See Derrick Bell, *Black History And America's Future*, 29 VAL. U. L. REV., 1179, 1181 (1995) (indicating that conservative Court majority attempted to dismantle decades of liberal victories); Michael K. Braswell et al., *Affirmative Action: An Assessment Of Its Continuing Role in Employment Discrimination*, 57 ALB. L. REV. 365, 365 (1993) (stating that conservative Supreme Court majority of Supreme Court appears to be on course to limit Affirmative Action as component of antidiscrimination policy); John A. Powell, *An Agenda For Post Civil Rights Era*, 29 U.S.F. L. REV. 889, 901 (1995) (suggesting that President and Congress adhering to Court's colorblind principles have started reexamining affirmative action policies); John J. Ross, *The Employment Year In Review*, 527 PRACTICING L. INSTIT. 7, *26 (1995) (noting that conclusion of 1994-95 Supreme Court term indicated five justice conservative bloc which sent message that it is time to put race aside); Richard Carelli, *Conservative Bloc Steers High Court Politically Charged Decisions Of Term Reflect Shift To Right*, STATE J.-REG. (Springfield), July 2, 1995, at 6 (noting that five member majority emerged in most politically charged cases of term deepening Court's ideological fault line); Richard Carelli, *Supreme Court Veers To Right in Radical Rulings*, PORTLAND OREGONIAN, July 2, 1995, at A9 (recognizing conservative shift of 1994-95 Court in decisions on affirmative action, voting rights, school desegregation, religion and privacy); *Conservative Majority Takes Shape On Supreme Court in the Post Term a Bloc of 5 Justices Shoved the Court the Farthest to the Right That It Had Been in the Past 40 Years*, ORLANDO SENTINEL, July 2, 1995, at A1 (suggesting that Court's 1994-95 term was its most conservative in 40 years; five conservative justices were able to form majority bloc which controlled politically charged cases); Jan Crawford, *Court Sets Affirmative Action Limits The U.S. Supreme Court Addresses Desegregation And Affirmative Action in Decisions That Redefine Its Attitude Toward Programs Designed To Address Racial Inequality*, CHI. TRIBUNE, June 13, 1995, at 1 (illustrating that *Adarand* was able to command solid majority of Court's conservative bloc unlike previous cases regarding racial preferences).

term.⁹¹ The Court's recent decisions illustrate a conservative activism not enunciated by the Court since the *Lochner*⁹² era when it threatened the New Deal legislation.⁹³ For example, in the past term, the Court not only ruled against minority preference programs in *Adarand*, but also struck down a black majority voting district⁹⁴ and rejected a Kansas City school desegregation plan.⁹⁵

⁹¹ See, e.g., *Rosenberger v. Rector*, 115 S. Ct. 2510, 2522-23 (1995) (permitting allocation of public funds for private religious activities); *Miller v. Johnson*, 115 S. Ct. 2475, 2485-86 (1995) (determining that race cannot be primary factor in drawing election boundaries); *Sandin v. Connor*, 115 S. Ct. 2293, 2299-301 (1995) (creating more stringent standard for prisoner suits challenging prison conditions); *Missouri v. Jenkins*, 115 S. Ct. 2038, 2040-41 (1995) (holding that Court of Appeals had exceeded its authority in creating desegregation remedy); *Lopez v. United States*, 115 S. Ct. 1624, 1630 (1995) (limiting congressional power to regulate activities that incidentally affect interstate commerce).

⁹² *Lochner v. New York*, 198 U.S. 45, 64 (1905) (holding labor law providing that no employees shall be permitted to work more than 60 hours per week in bakery is not legitimate exercise of state's police power); see Patricia A. Carlson, *Adarand Constructors, Inc. v. Pena: The Lochnerization of Affirmative Action*, 27 ST. MARY'S L.J. 423, 445-56 (1996) (depicting *Adarand* decision as "Lochner era revisited"); Stephen A. Siegel, *Lochner Era Jurisprudence and the American Constitutional Tradition*, 70 N.C. L. REV. 1, 100-11 (1991) (suggesting that *Lochner* era was transitional period in Supreme Court history). David Bernstein, Note, *The Supreme Court and "Civil Rights," 1886-1908*, 100 YALE L.J. 725, 729-31 (1990) (noting *Lochner* era and its impact on Supreme Court jurisprudence).

⁹³ See *Carter v. Carter Coal Co.*, 298 U.S. 238, 288, 297, 310 (1936). The Court held that the Bituminous Coal Conservation Act of 1935 was unconstitutional and an invalid use of the Commerce Clause. *Id.*; *Schecter Poultry Corp. v. United States*, 295 U.S. 495, 542, 550 (1935). The National Industrial Recovery Act as applied to the petitioner was held to be unconstitutional under the Commerce Clause because poultry was considered neither in nor affecting the current of commerce. *Id.*; GERALD GUNTHER, *CONSTITUTIONAL LAW* 122-24 (12th ed. 1991). As a result of these Supreme Court decisions, President Roosevelt attempted to implement a "Court packing Plan." *Id.* President Roosevelt sought Congressional authority to appoint an additional federal judge for each judge who was 70 years old and had served on the Court for at least 10 years. *Id.* The Plan would be applied to all levels of the federal judiciary, including the Supreme Court. *Id.* The Plan was defeated by Congress. *Id.*; JUDICIARY COMM. REPORT, June 14, 1937. Members opposed to the legislation contended that in practical operation the Constitution would then be whatever the executive or legislative branches of the Government deemed it to be, an interpretation which would be changed with each administration. *Id.*; see also *Affirmative Action Rules Scaled Back*, PANTAGRAPH (Bloomington), June 13, 1995, at A1. This article noted the breadth of the Court's ruling in the *Adarand* decision. *Id.*; Joan Biskupic, *Court's Conservatives Make Presence Felt; Reagan Appointees Lead Rightward*, WASH. POST, July 2, 1995, at A1. A sharp division existed among the justices this term. *Id.* One-third of the 82 signed opinions were decided by 5-4 votes. *Id.* The conservative bloc prevailed in the six most significant cases of the term deciding issues on affirmative action, voting districts, school desegregation, religious rights, congressional power and prisoner's rights. *Id.* Justices Rehnquist, Scalia and Thomas voted similarly in 25 out of the 49 non-unanimous cases, Justice Kennedy joined them in 24 of those cases and Justice O'Connor joined them in 20. *Id.* Justices Scalia and Thomas voted together 90% of the time, Justices Ginsberg and Stevens, 80% of the time. *Id.* The Justices voting together least often were Thomas and Stevens who agreed only 47% of the time. *Id.*

⁹⁴ See *Miller*, 115 S. Ct. at 2490 (determining that redistricting plan enabling increase in minority representation in Congress by creating congressional districts comprised of either Black or Hispanic majorities, was unconstitutional).

⁹⁵ See *Missouri*, 115 S. Ct. at 2040-41 (determining that school desegregation plan was unconstitutional).

Moreover, the judicial appointees⁹⁶ of Presidents Ronald Reagan and George Bush conveyed an intent to put race aside and make the law colorblind.⁹⁷

The shift of the balance of power on the Court towards the conservative right has been a gradual process and has been traced by scholars for some time.⁹⁸ Indeed, during the past few years the Court has indicated its proclivity to embrace a conservative philosophy in interpreting the law.⁹⁹ *Shaw v. Reno*¹⁰⁰ is an example of this trend.¹⁰¹ In 1993, the Court refused to uphold a congress-

⁹⁶ See *Affirmative Action Gets Squeezed Supreme Court Orders Stricter Standards*, ORLANDO SENTINEL, June 13, 1995, at A1 (indicating that Supreme Court decisions are being dominated by conservative justices appointed by Presidents Reagan and Bush); Biskupic, *supra* note 93, at A1 (noting that current composition of Court is what Reagan actively sought when making appointments); Tony Mauro, *Court Signals 'End For Era' In Civil Rights*, USA TODAY, June 13, 1995, at A1 (recognizing that Court's dramatic conservative shift was clear legacy of Reagan-Bush era with overturning of civil rights victories); David O'Brien, *Nation, The Supreme Court on Race-Rehnquist's Been Waiting 40 Years*, L.A. TIMES, July 2, 1995, at 2 (discussing that Justice Rehnquist can rely on support from Justices O'Connor, Scalia, Kennedy and Thomas, appointees from Reagan and Bush presidencies); Roberto Rodriguez & Patrisia Gonzales, *Supreme Court Rulings Damage Respect for Law*, CHI. SUN TIMES, July 20, 1995, at 31 (suggesting that efforts of Presidents Reagan and Bush to form cohesive conservative majority on Court are now being recognized with overturning of civil rights victories); Chet Whye, Jr., *If Thomas and O'Connor Aren't Quota Picks, Then Who?*, DENV. POST, June 16, 1995, at B7 (noting Reagan and Bush's conservative impact on the recent swing of Court).

⁹⁷ See Charles R. Lawrence III, *The Epidemiology of Color-Blindness: Learning to Think and Talk About Race Again*, 15 B.C. THIRD WORLD L.J. 1, 6 (1995). Lawrence suggests that the Justices of Court are blinded to existence of racism. *Id.* In so doing, he asserts three responses given by the Justices when the reality of racism is brought to their attention. *Id.* The Justices may respond by saying "this is not evidence" (referring to Justice O'Connor's *Croson* opinion asserting that City's justification of set-asides is based on "amorphous" and "unsupported" assertion of "societal discrimination"). *Id.* However, it is possible that the Justices may decide that "this is economics, not race" (referring to majority opinion in *Croson* suggesting that race-neutral economic barriers were real problem, not discrimination). *Id.* The third possibility is that the Justices may conclude that "this is protected racist speech, not conduct" (referring to *R.A.V. v. St. Paul*, 112 S. Ct. 2538, 2548-50 (1992) where Court held that crossburning is a protected form of political speech). *Id.* The final response would be "it is not racism when white contractors hire their friends and their friends just happen to be white" (referring to *Croson* stating that evidence of minority membership in local contractor's associations was not probative of any discrimination). *Id.* And then the Justices further deny the existence of racism by claiming "you must be a racist if you don't believe we are a colorblind society." *Id.*; Carlos J. Nan, *Adding Salt to the Wound: Affirmative Action and Critical Race Theory*, 12 LAW & INEQUALITY 553, 561 (1994). In examining Court's affirmative action decisions, this article concluded that such programs illustrate Court's attempt to create a colorblind Constitution by the implementation of colorblind reasoning *Id.*

⁹⁸ See *Shaw v. Reno*, 113 S. Ct. 2816, 2832 (1993) (illustrating Court's conservative analysis); see also Richard A. Brisbin Jr. & Jon C. Kilwein, *U.S. Supreme Court Review of State High Court Decisions*, 78 JUDICATURE 33, 40 (1994) (noting conservative trend of Supreme Court in recent terms particularly with Court's review of state high court decisions).

⁹⁹ See Brisbin & Kilwein, *supra* note 98, at 40 (indicating recent conservative trend of Court).

¹⁰⁰ 113 S. Ct. 2816 (1993).

¹⁰¹ See *id.* at 2832 (providing earlier example of Court's conservative trend).

sional redistricting plan which would increase the possibility of minority representation in Congress by creating two majority-black voting districts.¹⁰² In so doing, the Court refused to follow its holding in *United Jewish Organizations of Williamsburgh Inc. v. Carey*¹⁰³ where the Court upheld a similar redistricting plan.¹⁰⁴ The Court in *Carey* held that the plan favoring minority voters was constitutional and not considered discriminatory as long as it did not promote proportional underrepresentation of white voters.¹⁰⁵ In *Shaw*, however, the Court expressly distinguished *Carey* and declared that racial classifications threaten to incite hostility and to stigmatize people by reason of their membership in a racial group.¹⁰⁶ Thus, the Court concluded that if race was a predominant factor in drawing congressional district lines, the districting scheme will be subject to strict scrutiny.¹⁰⁷ The case was remanded back to the United States District Court for the District of Nevada to be reviewed under a strict scrutiny analysis.¹⁰⁸ The holding in *Shaw* offered clear evidence that the Court did not intend to uphold any racial classification unless it was narrowly tailored to further a compelling governmental interest.¹⁰⁹ The *Shaw* holding was indicative of the Court's restrictive trend and foreshadowed what was to come in *Adarand*.¹¹⁰

These latest constitutional interpretations by the Supreme Court are markedly different from those developed during the 1960s, '70s and early '80s when the Court legitimized programs designed to furnish opportunities for minorities and women.¹¹¹ In

¹⁰² See *id.*

¹⁰³ 430 U.S. 144 (1977).

¹⁰⁴ See *id.* at 165-68.

¹⁰⁵ See *id.*

¹⁰⁶ See *Shaw v. Reno*, 113 S. Ct. 2816, 2824-28 (1973).

¹⁰⁷ See *id.* at 2832.

¹⁰⁸ See *id.*

¹⁰⁹ See *id.*

¹¹⁰ *Compare Shaw*, 113 S. Ct. 2816 with *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 2097 (1995).

¹¹¹ See William N. Eskridge, *Reneging on History? Playing the Court/Congress/President Civil Rights Game*, 79 CAL. L. REV. 613, 616 (1991) (indicating activism of Supreme Court in response to civil rights during Warren and Burger eras); Alan Freeman, *Racism, Rights and the Quest For Equality of Opportunity: A Critical Legal Essay*, 23 HARV. C.R.-C.L. L. REV. 295, 298-300, 304-05 (1988) (suggesting Supreme Court displayed commitment to Civil Rights Movement); Richard L. Fricker, *The Warren Court: A Retrospective*, 22 HUM. RTS. 46, 46 (1995) (describing the Warren Court as "rip[ping] civil rights out of law books and placing them firmly into the consciousness of American society"); Michael B. Mushlin, *Unsafe Havens, the Case for Constitutional Protection of Foster Children from Abuse and Neglect*, 23 HARV. C.R.-C.L. L. REV. 199, 219 (1988) (discussing Supreme Court's receptive approach to civil rights); John E. Nowak, *The Rise and Fall of Supreme Court Concern for*

its former support of the Civil Rights Act of 1964, the Court used its institutional prestige as an instrument for social change to defend and validate many civil rights programs.¹¹² Indeed, the Court under Chief Justice Warren Burger approved minority preferences in training programs and subcontracting for minority-owned businesses, and encouraged the targeted hiring and promotion of minorities and women as a remedy for past discrimination.¹¹³ As a result, generations of minorities and women have entered fields of employment that were previously closed to them.¹¹⁴

The Rehnquist Court, in its current quest for a colorblind Constitution, has abandoned the undertakings of Chief Justices Warren and Burger, effectively denying that races are not yet treated equally.¹¹⁵ This sharp turn to the right may be attributed to Jus-

Racial Minorities, 36 WM. & MARY L. REV. 345, 349 (1995) (noting that dramatic action taken by Court with regard to civil rights through mid 1980s has transformed into restricted efforts to help racial minorities); Isabelle K. Pinzler, *The Legislative Response*, 7 N.Y.L. SCH. J. HUM. RTS. 123, 123 (1990) (stating that from time of *Brown v. Board of Educ.* to middle of 1980s civil rights advocates were accustomed to looking to Supreme Court in their struggle for civil rights as well as women's rights); Henry J. Reske, *The Diverse Legacy of Warren Burger*, 81 A.B.A. J. 36, 36 (1995) (suggesting that Burger Court went even further than liberal Warren Court in protecting civil rights).

¹¹² See generally *supra* notes 9-11 and accompanying text (discussing that Supreme Court was instrumental in advancing Civil Rights movement).

¹¹³ See, e.g., *Local 28 of Sheet Metal Workers v. EEOC*, 478 U.S. 421, 479-82 (1986) (holding that federal court may order hiring quotas to counteract "persistent and egregious" discrimination); *Fullilove v. Klutznick*, 448 U.S. 448, 516-17 (1980) (upholding federal statute creating racial quotas which guaranteed minority owned businesses percentage of federal grants, Justice Burger finding that "Congress had the right to remedy past discrimination and these remedies need not be colorblind"); *United Steel Workers v. Weber*, 443 U.S. 193, 200-09 (1979) (holding use of training program quota that allowed private employers opportunity to give minority workers special treatment in hiring, training and promotions constitutional).

¹¹⁴ See Mary C. Daly, *Rebuilding the City of Richmond: Congress's Power to Authorize the States to Implement Race Conscious Affirmative Action Plans*, 33 B.C. L. REV. 903, 922 (1992) (stating that employers recognized usefulness of numerical goals and timetables in opening previously closed career opportunities to women and minorities); Deborah Graham, *It's Getting Better Slowly*, 72 A.B.A. J. 54, 54 (1986) (indicating that women have entered legal field in unprecedented numbers because traditional barriers have fallen); Kathryn J. Rodgers, *Affirmative Action*, 81 A.B.A. J. 40, 40 (1995) (noting that because of affirmative action, women and minorities are able to compete for positions they are qualified for but previously denied because of stereotypes); Gerald S. Janoff, Comment, *Adarand Constructors, Inc. v. Peña: The Supreme Court To Decide the Fate of Affirmative Action*, 69 TUL. L. REV. 997, 1010 (1995) (recognizing that affirmative action has attempted to level playing field to allow women and minorities equal access to opportunities).

¹¹⁵ See *supra* note 97 and accompanying text. It is noted that the Supreme Court is blind to racism, advocating a colorblind interpretation of the Constitution. *Id.*; see also Mark S. Brodin, *Reflections on the Supreme Court's 1988 Term: The Employment Discrimination Decision and the Abandonment of the Second Reconstruction*, 31 B.C. L. REV. 1, 13-17 (1989). This article provides case law examples of conservative Court's abandonment of earlier liberal philosophies. *Id.*; Aaron Epstein, *Supreme Court Steps Away From Race-Based Remedies*, ORANGE COUNTY REG., July 1, 1995, at A12. Epstein suggests that racial minorities who were the winners of yesterday are the losers today. *Id.*; Richard Lacayo, *The*

tices O'Connor's and Kennedy's recent willingness to take more conservative stances more frequently.¹¹⁶ This development reveals a definitive split of the philosophy within the Court this term.¹¹⁷

Concurrently, a fairly reliable four-vote liberal bloc has emerged.¹¹⁸ Although the left wing of the Court has expressed strong liberal views, it will be ineffective in eliminating the effects

Soul of a New Majority, TIME, July 10, 1995, at 46. It appears from the actions of the current Court that the Earl Warren legacy has been "laid to rest." *Id.* "When in a single day the Court can rule against a black-majority voting district, . . . in favor of public funding for a Christian student magazine and . . . approve a cross erected by the Klu Klux Klan in a public park, it can't be much fun anymore to be a liberal justice." *Id.*; O'Brien, *supra* note 96, at 2. O'Brien argues that the effects of discrimination are still a reality within our society and concludes it is doubtful whether the Court has provided the necessary tools to address the problem. *Id.*

¹¹⁶ See, e.g., *Rosenberger v. Rector*, 115 S. Ct. 2510, 2522-23 (1995) (permitting allocation of public funds for private religious activities); *Miller v. Johnson*, 115 S. Ct. 2475, 2485-86 (1995) (determining that race cannot be primary factor in drawing election boundaries); *Sandin v. Connor*, 115 S. Ct. 2293, 2299-301 (1995) (creating more stringent standard for prisoner suits challenging prison conditions); *Missouri v. Jenkins*, 115 S. Ct. 2038, 2040-41 (1995) (holding that Court of Appeals had exceeded its authority in creating desegregation remedy); *Lopez v. United States*, 115 S. Ct. 1624, 1630 (1995) (limiting congressional power to regulate activities that incidentally affect interstate commerce); see also GIRARDEAU A. SPANN, RACE AGAINST THE COURT: SUPREME COURT AND MINORITIES IN CONTEMPORARY AMERICA 127 (1993) (stating that after President Reagan's appointment of conservative Justices O'Connor, Scalia and Kennedy, Supreme Court was finally able to issue majority opinion in constitutional affirmative action case); Jeffrey S. Brand, *The Second Front in the Fight For Civil Rights: The Supreme Court, Congress and Statutory Fees*, 69 TEX. L. REV. 291, 295 (1990) (suggesting that Supreme Court has erected "substantial roadblocks to prosecution of civil rights cases, undermined favorable civil rights precedent and created uncertainty about the sustaining of past progress" and that emergence of five Justice majority, consisting of Chief Justice Rehnquist, along with Justices Kennedy, Scalia, O'Connor and Thomas has been characterized as "first conservative majority in half a century" to hand down these decisions); Erwin Chermersky, *The Crowded Center*, 80 A.B.A. J. 78, 79 (1994) (indicating that Court's staunch conservative bloc, that of Chief Justice Rehnquist and Justices Scalia and Thomas have on many occasions attracted votes of Justices O'Connor and Kennedy for conservative result); *Election Year Supreme Court*, BALTIMORE SUN, Oct. 15, 1995, at 2F (indicating that Justices O'Connor and Kennedy have voted with conservative bloc of Court in recent terms); Ross, *supra* note 90, at *24 (noting that although Justices O'Connor and Kennedy are more pragmatic than conservative, they continue to basically vote conservative).

¹¹⁷ See *Rosenberger*, 115 S. Ct. at 2522-23 (same); *Miller*, 115 S. Ct. at 2485-86 (indicating five to four split of Court); *Sandin*, 115 S. Ct. at 2299-301 (same); *Jenkins*, 115 S. Ct. at 2040-41 (same); *Lopez*, 115 S. Ct. 1630 (same); see also Greenhouse, *supra* note 67, at A1. This article explains that the center has disappeared from the Court this term. *Id.* The appointments of Justices Ginsberg and Breyer, both pragmatic moderates, were expected to anchor a strong central bloc on the Court. *Id.* Both easily won Senate confirmation through strong bipartisan support. *Id.* However, the current make-up of the Court is far from converging toward a central moderate position. *Id.* Instead, Justices Ginsberg and Breyer have aligned themselves on the liberal side of the dividing line with Justices Stevens and Souter. *Id.*

¹¹⁸ See, e.g., *Rosenberger*, 115 S. Ct. at 2533-51 (1995) (Souter, Stevens, Ginsburg, Breyer, JJ., dissenting); *Miller*, 115 S. Ct. at 2497-509 (1995) (same); *Sandin*, 115 S. Ct. at 2302-10 (1995) (same); *Jenkins*, 115 S. Ct. at 2073-91 (same); *Lopez*, 115 S. Ct. at 1651-65 (1995) (same).

of prior discrimination unless it can persuade Justices O'Connor or Kennedy to adopt its viewpoint more often.¹¹⁹ Indeed, Justice O'Connor has demonstrated that she will not always agree with her conservative colleagues.¹²⁰ As a result, in the most controversial areas, such as racial preferences,¹²¹ religious liberty,¹²² abor-

¹¹⁹ See Dori Meinert, *Major Cases on Supreme Court's Docket This Term*, SAN DIEGO UNION TRIB., Oct. 1, 1995, at A1 (recognizing that Court's conservative bloc dominated when they were able to get Justices O'Connor and Kennedy to vote with them, however when Court's liberal Justices were able to persuade either O'Connor or Kennedy, they were victorious); Lacayo, *supra* note 115, at 46 (noting that unless liberal wing can attract O'Connor or Kennedy to their side more frequently, liberal bloc on Court is in danger of becoming "a vestigial organ, visible but pointless").

¹²⁰ See Jilda M. Aliotta, *Justice O'Connor and Equal Protection Clause: A Feminine Voice*, 78 JUDICATURE 232, 233 (1995) (suggesting that Justice O'Connor's record indicates she is not "knee-jerk conservative"); Erwin Chemerinsky, *Is the Rehnquist Court Really That Conservative? An Analysis of 1991-92 Term*, 26 CREIGHTON L. REV. 987, 987 (1993) (recognizing that Justice O'Connor asserted independence in key cases effectively preventing conservatives from drastically changing law); Aaron Epstein, *Kennedy, O'Connor Hold Key to Direction of Court*, NEWS TRIBUNE (Tacoma), Oct. 1, 1995, at D1 (stating that Justice O'Connor "applied brakes to what might otherwise have been a runaway right-wing juggernaut").

¹²¹ See, e.g., *Richmond v. J.A. Croson Co.*, 488 U.S. at 469, 470 (1989). In this decision, which was written by Justice O'Connor, the Supreme Court held that a city plan requiring contractors to hire minority subcontractors was unconstitutional. *Id.*; see also John Payton, *The Meaning and Significance of the Croson Case*, 1 GEO. MASON U. CIV. RTS. L.J. 59, 62-79 (1990). In this article, Payton details the necessary components to satisfy strict scrutiny under O'Connor's decision. *Id.*; Michel Rosenfeld, *Decoding Richmond: Affirmative Action and the Elusive Meaning of Constitutional Equality*, 87 MICH. L. REV. 1729, 1749-55 (1989). This article explains Justice O'Connor's opinion in *Croson* by focusing on her treatment of racial classifications which she believes cause stigmatic harm, perpetrate notions of racial inferiority and serve the aims of racial politics. *Id.* Further asserting her support for strict scrutiny, Rosenfeld articulates her analysis of constitutionally permissible programs under that level of review. *Id.*; Jill B. Scott, Note, *Will the Supreme Court Continue to Put Aside Local Government Set-Asides As Unconstitutional?: The Search for an Answer in City Of Richmond v. J.A. Croson Co.*, 42 BAYLOR L. REV. 197, 213-19 (1990). The article examines the *Croson* plan under O'Connor's strict scrutiny review. *Id.*

¹²² See, e.g., *Lee v. Weisman*, 505 U.S. 577, 586-87 (1992) (O'Connor, J., joining in opinion of Court) (arguing that government may not promote or affiliate itself with any form of religion); *County of Allegheny v. ACLU*, 492 U.S. 573, 637 (1989) (O'Connor, J., concurring) (concluding that creche suggests christianity is favored religion and is unconstitutional because government cannot advocate particular religion); *Lynch v. Donnelly*, 465 U.S. 668, 692 (1984) (O'Connor, J., concurring) (suggesting implementation of "endorsement test" to analyze government stances on religion by scrutinizing communicated message to determine if it is either endorsement or disapproval of religion); see also Barbara S. Barrett, *Religious Displays and First Amendment: County of Allegheny v. American Civil Liberties Union*, 13 HARV. J.L. & PUB. POL'Y 399, 404-05 (1990) (indicating that Justice O'Connor believes government endorsement of religion is unconstitutional); Mark A. Boatman, Lee v. Weisman : *In Search of Defense for Establishment Clause*, 37 ST. LOUIS U. L.J. 773, 776-77 (1993) (suggesting that Justice O'Connor's "endorsement test" is likely to persuade future courts as appropriate standard, which subsequently occurred in *Allegheny*); David J. Rood, Jr., *County of Allegheny v. American Civil Liberties Union: Symbolic Analysis Under The Establishment Clause*, 1 MD. J. CONTEMP. LEGAL ISSUES 267, 270 (1990) (noting that Justice O'Connor provided swing votes in *Lynch* and *Allegheny*); Christopher S. Nesbit, Note, *County of Allegheny v. ACLU: Justice O'Connor's Endorsement Test*, 68 N.C. L. REV. 590, 590 (1990) (explaining that Court's decision in *Allegheny* represents first time Court accepted Justice O'Connor's "endorsement test" as analytical framework). *But see* Steven G.

tion,¹²³ and federalism,¹²⁴ Justice O'Connor appears to possess great power as the "swing vote" on the Court.¹²⁵

The current disposition of the Court not only raises issues regarding how it will decide future affirmative action cases, but also evokes concerns about the course it will follow when a vacancy on

Gey, *Religious Coercion and the Establishment Clause*, 1994 U. ILL. L. REV. 463, 481 (1994) (suggesting that Justice O'Connor implementation of "objective observer" analysis within her "endorsement test" framework relays messages to religious minorities that their perceptions are either wrong or do not matter).

¹²³ See, e.g., *Casey v. Planned Parenthood*, 112 S. Ct. 2791, 2791 (1992) (O'Connor, J., joining opinion of Court) (reaffirming essential holding of *Roe v. Wade*, 410 U.S. 113 (1973), that woman has fundamental right to abortion without undue interference from state); *Hodgson v. Minnesota*, 497 U.S. 417, 458-60 (1990) (O'Connor, J., concurring) (holding that waiting period between notification to parents of minors' choice to have abortion and performance of abortion is constitutional); *Ohio v. Akron Ctr. for Reproductive Health*, 110 S. Ct. 2972, 2978-83 (1990) (O'Connor, J., joining in opinion of Court) (holding judicial bypass procedure of statute requiring parental notification of abortion complies with Fourteenth Amendment); see also William Goodwine, Jr., *Abortion Parental Notification Statutes: Hodgson v. Minnesota and Ohio v. Akron Center for Reproductive Health*, 14 HARV. J. L. & PUB. POL'Y 237, 244 (1991) (indicating that Justice O'Connor appears to be aligning herself with liberal side of Court on abortion issues maintaining that abortion is constitutionally protected right and providing liberals with necessary fifth vote to form majority); Stephen J. Wermiel, *O'Connor: A Dual Role—An Introduction*, 13 WOMEN'S RTS. L. REP. 129, 135-36 (1991) (submitting that Justice O'Connor's swing vote on issue of abortion makes many women nervous of her power); Kenneth R. Wing, *The Supreme Court's Spring Term: Abortion, the Right to Die and the Decline of Privacy Rights*, 15 J. HEALTH POL. POL'Y & L. 919, 922 (1990) (indicating that Justice O'Connor has emerged as swing vote in abortion cases maintaining abortion as fundamental constitutional right); Andrea M. Sharvin, Note, *Potential Fathers and Abortion: A Woman's Womb Is Not a Man's Castle*, 55 BROOK. L. REV. 1359, 1404 n.11 (1990) (stating that swing vote on abortion rests "solely with Justice O'Connor"); Wynn H. Sourial, Comment, *The Erosion of Roe v. Wade: Do Minors Have Any Rights?*, 13 WHITTIER L. REV. 285, 324 (1992) (stating that Justice O'Connor played pivotal role in *Hodgson* case by siding with liberal side of Court and rejecting efforts of Chief Justice Rehnquist to require notification from both parents); Natalie Wright, Note, *State Abortion Law After Casey: Finding Adequate and Independent Grounds for Choice in Ohio*, 54 OHIO ST. L.J. 891, 896 (1993) (noting that in *Casey* for first time Justice O'Connor became swing vote in abortion case).

¹²⁴ See, e.g., *New York v. United States*, 505 U.S. 144, 154-59 (1992) (indicating, in O'Connor's opinion, that judiciary has duty to police congressional encroachment on autonomy of states in compliance with Tenth Amendment); *Gregory v. Ashcroft*, 501 U.S. 452, 456-65 (1991) (discussing premises of federalism); see also M. David Gelfand & Keith Werhan, *Federalism and Separation of Powers on a "Conservative" Court: Currents and Cross-Currents from Justices O'Connor and Scalia*, 64 TUL. L. REV. 1443, 1449-56 (1990) (explaining Justice O'Connor's conservative approach to federalism in that she often comes to defense of state and local governments); H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 VA. L. REV. 633, 639-52 (1993) (outlining Justice O'Connor's viewpoint on federalism).

¹²⁵ See William H. Freivogel, *Making Things Right*, ST. LOUIS POST-DISPATCH, July 2, 1995, at E1. Justice O'Connor is the most influential member of the Court. *Id.* The outcome of Supreme Court decisions are frequently within her control. *Id.* "She is a consummate balancer of interests" who believes it is the Court's responsibility to create fine distinctions and rejects the sweeping generalizations advocated by Scalia. *Id.* The polarization of the Court is almost irrelevant because the decisions come down to the viewpoints of O'Connor and at times Kennedy. *Id.* Justice O'Connor most frequently votes with the liberal core of the Court in cases involving women, children and the death penalty. *Id.*

the bench arises.¹²⁶ The most crucial cases this term, including *Adarand*, were decided by 5-4 votes,¹²⁷ indicating the fragile balance of the current Court.¹²⁸

B. *The Interpretation of Adarand*

While the Supreme Court analyzed the constitutional underpinnings of affirmative action in the *Adarand* decision, its ultimate fate will be decided in the political arena and by the lower courts.¹²⁹ Since *Adarand* failed to resolve the affirmative action debate in categorical terms, it left to Congress and to the lower courts the responsibility of determining how to implement and monitor federal affirmative action programs which provide benefits based on race within the constitutionally articulated guidelines.¹³⁰ Congress will be responsible for amending federal affirm-

¹²⁶ See Robert W. Bennett, *Styles of Judging*, 84 Nw. U. L. REV. 853, 853 (1990) (suggesting that centrality, strength and importance of judicial review have made selection process for Supreme Court among most important for public office especially because appointments are for life tenure); Stephen L. Carter, *Why the Confirmation Process Can't Be Fixed*, 1993 U. ILL. L. REV. 1, 2 (1993) (discussing opportunity of President to alter and shape policy through Supreme Court nomination); Kevin T. McGuire, Book Review, 11 CONST. COMMENT. 622, 622 (1995) (noting that composition of Supreme Court has substantial legal and political consequences and because of this Presidents are particularly careful in selecting nominees to ensure their ideologies will be followed).

¹²⁷ See, e.g., *Rosenberger v. Rector*, 115 S. Ct. 2510, 2522-23 (1995) (permitting allocation of public funds for private religious activities); *Miller v. Johnson*, 115 S. Ct. 2475, 2485-86 (1995) (determining that race cannot be primary factor in drawing election boundaries); *Sandin v. Connor*, 115 S. Ct. 2293, 2299-301 (1995) (creating more stringent standard for prisoner suits challenging prison conditions); *Missouri v. Jenkins*, 115 S. Ct. 2038, 2040-41 (1995) (holding that Court of Appeals had exceeded its authority in creating desegregation remedy); *Lopez v. United States*, 115 S. Ct. 1624, 1630 (1995) (limiting congressional power to regulate activities that incidentally affect interstate commerce).

¹²⁸ See Adolphus L. Williams, Jr., *A Critical Analysis of the Bakke Case*, 16 S.U. L. REV. 129, n.172 (1989) (noting that 5-4 decision is least desirable because it suggests deeply divided court, creates possibility decision will be tested again in future and suggests that slightly altered facts may persuade one Justice to reconsider and change his or her opinion); Amy L. Padden, Note, *Overruling Decisions in the Supreme Court: The Role of a Decision's Vote, Age and Subject Matter in the Application of Stare Decisis After Payne v. Tennessee*, 82 GEO. L. J. 1689, 1689 (1994) (discussing reduced precedential value of 5-4 decisions).

¹²⁹ See James Carney, *Mend It, Don't End It*, TIME, July 31, 1995, at 35 (indicating President Clinton's support for affirmative action programs); Maura Dolan, *Wilson to Sue State Over Affirmative Action Laws: Governor Wants Appellate Court to Overturn Preference Given to Women and Minority-Owned Firms*, L.A. TIMES, Aug. 10, 1995, at A1 (explaining Governor Wilson's staunch disapproval of affirmative action and current lawsuit against state for implementing such programs); Greenhouse, *supra* note 67, at A1 (suggesting political arena will be ultimate forum to decide future of affirmative action); Kevin Meride, *Dole Aims at Affirmative Action Bill to End Racial, Gender Preferences*, WASH. POST, July 28, 1995, at A10 (suggesting Congressional Republicans will use *Adarand* as basis for eliminating federal preference programs).

¹³⁰ See Charles Oliver, *Is Affirmative Action In or Out? Supreme Court Ruling Will Take Years To Sort Out*, INVESTOR'S BUS. DAILY, June 28, 1995, at A1. It is noted that the

ative action programs to ensure that their provisions will pass constitutional muster under strict scrutiny.¹³¹ The lower courts then must review such programs according to the *Adarand* frame-

Adarand decision did not provide guidance to Congress as to the quality or quantity of evidence that is required to uphold a race based remedy under new standard of review. *Id.*; see also *Affirmative Action—Clinton Defends Federal Programs*, FACTS ON FILE WORLD NEWS DIGEST, July 20, 1995. This article notes that President William J. Clinton signed an executive order on July 19, 1995 in which he directed all federal agencies to ensure that their programs meet the strict scrutiny requirements of *Adarand*. *Id.*; President Clinton's, Remarks on Affirmative action at the National Archives, U.S. NEWSWIRE (July 19, 1995). President Clinton vigorously defended affirmative action policies following the completion of a five-month-long review of federal affirmative action programs. *Id.* President Clinton stated that the purpose of affirmative action is to provide our nation with a means to address the systematic exclusion of individuals from opportunities to develop, perform, achieve and contribute on the basis of their race. *Id.* He contended that affirmative action makes education, employment and business opportunities available to members of groups who have experienced continuous discrimination. *Id.* The President distinguished affirmative action from promotion of unqualified individuals over qualified individuals without regard to merit and expressed his dissatisfaction with numerical quotas. *Id.* In confronting the high unemployment rates for African-Americans and Hispanics and the gap in earning potential between women and men the President concluded that affirmative action remains a useful tool for equalizing economic and educational opportunities, since disparities among races in the work force still exist. *Id.* Finally, President Clinton directed all federal agencies to comply with the Supreme Court's *Adarand* decision. *Id.* He listed four standards of fairness that should apply to all affirmative action programs: (1) no quotas in theory or practice; (2) no illegal discrimination of any kind, including reverse discrimination; (3) no preference for people who are not qualified for any job or other opportunity; and (4) as soon as a program has succeeded, it must end. *Id.* Moreover, any program that fails to meet these principles must either be eliminated or reformed to meet them. *Id.*; *Text of Memorandum on Affirmative Action from President Clinton to Heads of Executive Departments and Agencies*, U.S. NEWSWIRE (July 19, 1995). This memorandum directed all federal agencies to eliminate any program which creates quotas, preferences for unqualified individuals, reverse discrimination or continues after its equal opportunity purposes have been achieved. *Id.*; *The Best Policy May Be Race-Neutral, but Nation Must Guarantee Opportunity*, HARRISBURG PATRIOT, June 14, 1995, at A10. President Clinton has indicated his support for reforming affirmative action to achieve race-neutral language rather than eliminating such programs. *Id.*; cf. Kevin Merida, *Dole Aims at Affirmative Action; Bill to End Federal Racial, Gender Preferences Goes Beyond Court Ruling*, WASH. POST, July 28, 1995, at A10. Dole chose to introduce legislation, titled the Equal Opportunity Act of 1995, that would end race and gender based federal affirmative action programs in contracting, hiring and other federally conducted activities. *Id.* This goes far beyond the Supreme Court's view in the *Adarand* decision. *Id.* The legislation comes at a precarious time for Republicans in the Congress. *Id.* Republicans are debating between implementing an approach to dismantle affirmative action or a more moderate stance designed to indicate to minorities and women that the party is not ignoring their concerns. *Id.*; *If Not Affirmative Action, What?*, SET-ASIDE ALERT (Small Business Press), July 3, 1995. Senator Dole's proposal would end the use of all preferences based on race, gender, or national origin, prohibit the federal government from "requiring or encouraging" federal contractors to use racial or gender preferences in hiring or selecting subcontractors and suppliers and forbid the federal government and courts from using racial and gender preferences as remedies for discrimination. *Id.*

¹³¹ See Terry Eastland, *Rule Of Law: Congress and Clinton*, WALL ST. J., June 14, 1995, at A19. This article indicates that the Supreme Court left to Congress and the President the task of resolving the affirmative action debate. *Id.*; Roger K. Lowe, *Affirmative Action Ruling Leaves Clinton in Difficulty*, COLUMBUS DISPATCH, June 18, 1995, at 3B. It is noted that a heated debate regarding affirmative action has emerged which will transcend into political arena. *Id.*

work to determine whether they are narrowly tailored to achieve a compelling governmental interest.¹³²

III. ASSESSMENT OF EXISTING FEDERAL PROGRAMS BASED ON ADARAND ANALYSIS

It is submitted that some affirmative action programs will survive the strict scrutiny standard promulgated by *Adarand*. Justice O'Connor specifically articulated that the mere application of strict scrutiny alone should not prove fatal to affirmative action programs.¹³³ However, in order for affirmative action programs to survive this higher standard of review they must be revised to comply with the requirements of strict scrutiny.

A. *Strict Scrutiny Requirements*

For a program to satisfy the compelling governmental interest component, there must exist more than general societal discrimination.¹³⁴ The governmental actor must specify the past discrimination that is responsible for the preference program¹³⁵ and demonstrate that this past discrimination has present effects.¹³⁶ The Court determines the existence of past discrimination by examining historical, anecdotal and statistical evidence.¹³⁷

After it is determined that a preference program serves a compelling governmental interest, it will be scrutinized to ensure that it is narrowly tailored.¹³⁸ In determining whether a plan is nar-

¹³² See *Administration Issues Guidelines in Adarand's Wake*, SET-ASIDE ALERT (Small Business Press), July 17, 1995 (suggesting that Supreme Court gave little guidance to lower courts on application of strict scrutiny, in particular, how it is defined in practice); Biskupic, *supra*, note 93, at A1 (discussing that lower courts will have to determine evidence required to pass strict scrutiny analysis under *Adarand*); *Court Curtails Affirmative Action and School Desegregation Order Stricter Test Mandated For Federal Preferences*, NEWS AND OBSERVER (N.C.), June 13, 1995 at A1 (noting that lower courts will begin to play new role in federal affirmative action because latitude to congressionally enacted programs has been eliminated); Neil Munro, *Front News*, WASH. TECH., July 27, 1995 (explaining that *Adarand* decision directed lower courts to strictly scrutinize federal affirmative action programs to ensure they meet compelling need and are tailored to counter specific discrimination).

¹³³ See *Adarand Constructors, Inc. v. Pena*, 115 S.Ct. 2097, 2117 (1995).

¹³⁴ See *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 498-99 (1989).

¹³⁵ See *id.* at 500.

¹³⁶ See *Podberskey v. Kirwan*, 956 F.2d 52, 56 (4th Cir. 1992).

¹³⁷ See *Shuford v. Alabama State Bd. of Educ.*, Civ A No.89-T-196-N, 1995 WL 494913, at *18 (M.D. Ala. Aug. 11, 1995) (stating that "under strict scrutiny, the court must look to historical, anecdotal, and statistical evidence to determine whether there is past discrimination").

¹³⁸ *Madsen v. Women's Health Ctr.*, 114 S. Ct. 2516, 2525 (1994) (explaining that under strict scrutiny Court determines whether restriction is necessary to serve compelling gov-

rowly tailored, the courts have considered many factors: (1) the efficiency of alternative remedies; (2) the planned duration of the remedy; (3) the relationship between the percentage of minority workers to be employed and the percentage of minority groups in the relevant population; (4) the availability of waiver provisions; and (5) the effect of the plan on innocent third parties.¹³⁹

B. Examples of Affirmative Action Plans Under Strict Scrutiny

Although a federal program has not been analyzed within the strict scrutiny framework, state programs that have passed strict scrutiny review provide an adequate indication of the type of federal program likely to be sustained by the courts.¹⁴⁰ The affirmative action program upheld in *Alexander v. Prince George's County*¹⁴¹ provides an example of the factors federal courts will consider under strict scrutiny. This case involved six white males who challenged the Fire Department's decision not to hire them, claiming they would have been hired if not for the Department's affirmative action plan.¹⁴²

The County presented the trial court with extensive statistical and historical evidence of discrimination in the hiring of minority firefighters.¹⁴³ In addition, a long history of discrimination was revealed through anecdotal evidence.¹⁴⁴ It was clear that African-Americans were not welcome within the Department.¹⁴⁵ Examples of discrimination against African-Americans included being referred to as "niggers," returning to their desk to find a cross inscribed with "R.I.P." and decorated with a sheet designed like a klansman's hood, and being prevented from driving trucks.¹⁴⁶

ernmental interest and if it is narrowly drawn to achieve that end); *Metro Broadcasting v. FCC*, 110 S. Ct. 2997, 3029 (1990) (O'Connor, J., dissenting) (noting that strict scrutiny requires statute to be narrowly tailored to achieve compelling governmental interest in order to pass constitutional muster); *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (stating that strict scrutiny requires that there be compelling state interest to enact law that it be narrowly drawn to serve that purpose).

¹³⁹ See *United States v. Paradise*, 480 U.S. 149, 187 (1987).

¹⁴⁰ See *supra* note 77 and accompanying text (indicating programs that both have and have not passed strict scrutiny in past).

¹⁴¹ Civ. AW-93-2636, CIV. AW-94-2030, 1995 WL 603297, at *10 (D. Md. Oct. 11, 1995).

¹⁴² See *id.* at *1.

¹⁴³ See *id.* at *7.

¹⁴⁴ See *id.* at *8.

¹⁴⁵ See *id.* at *7-9.

¹⁴⁶ See *Alexander v. Prince George's County*, Civ. AW-93-2636, CIV. AW-94-2030, 1995 WL 603297 at *7-9 (D. Md. Oct. 11, 1995).

Furthermore, the Court found the plan to be narrowly tailored to achieve the compelling interest of remedying past discrimination.¹⁴⁷ First, alternative remedies, including intensifying minority recruitment, were not effective.¹⁴⁸ Second, the plan was limited in duration and reviewed annually to determine if its goals had been achieved.¹⁴⁹ Third, the plan was designed to remedy present racial imbalances specifically resulting from past discrimination.¹⁵⁰ Further, the plan was flexible, in that it did not require the Department to hire a certain number of minorities.¹⁵¹ Lastly, the Plan did not have a severe impact on third parties because it did not bar the hiring of other employees and, in fact, the Department continued to hire many white males.¹⁵² Moreover, the plan merely gave a preference to minority applicants, not a guarantee of employment.¹⁵³ Because of these factors, the Court concluded that the plan was sufficiently narrowly tailored to further a compelling governmental interest and was thus considered constitutional.¹⁵⁴

The Court has expressly provided a framework within which affirmative action programs will survive strict scrutiny.¹⁵⁵ If a program is tailored within these guidelines it will be held constitutional as it was in *Alexander*.¹⁵⁶ If the preference program fails to meet the stated requirements, however, it will be struck down.¹⁵⁷

For example, in *Wittmer v. Peters*¹⁵⁸ the Court struck down a race-based preference program for failure to meet the narrowly tailored prong of the strict scrutiny test.¹⁵⁹ In this case, employees of the Illinois Department of Corrections ("DOC") claimed that the warden's decision to promote an African-American to the position of lieutenant violated their rights guaranteed by the Equal Protec-

¹⁴⁷ See *id.*

¹⁴⁸ See *id.*

¹⁴⁹ See *id.*

¹⁵⁰ See *id.*

¹⁵¹ See *Alexander v. Prince George's County*, Civ. AW-93-2636, CIV. AW-94-2030, 1995 WL 603297 at *7-9 (D. Md. Oct. 11, 1995).

¹⁵² See *id.*

¹⁵³ See *id.*

¹⁵⁴ See *id.*

¹⁵⁵ See *Adarand Constructors, Inc., v. Peña*, 115 S. Ct. 2097, 2117-18 (1995).

¹⁵⁶ See *Alexander v. Prince George's County*, Civ. AW-93-2636, CIV. AW-94-2030, 1995 WL 603297 at *7-9 (D. Md. Oct. 11, 1995).

¹⁵⁷ See *Wittmer v. Peters*, No. 94-3045, 1995 WL 631639 at *7 (C.D. Ill. Aug. 31, 1995).

¹⁵⁸ No. 94-3045, 1995 WL 631639 (C. D. Ill. Aug. 31, 1995).

¹⁵⁹ See *id.* at *7.

tion Clause.¹⁶⁰ Promotions at the DOC were based on scores received from a physical agility test, a written examination and an oral interview.¹⁶¹ The warden chose to promote five white applicants who ranked first, fourth, fifth, tenth and eleventh and an African-American applicant who ranked forty-second.¹⁶² The plaintiffs, ranked third, sixth, and eighth brought this action in response to the warden's decision to promote a less qualified minority applicant.¹⁶³ The State of Illinois argued that it had a compelling interest "in the safe, efficient, and successful operation of its boot camps."¹⁶⁴ To that end, it claimed that the consideration of race in promotional decisions were within its "operational needs" since a majority of its prison population were minorities.¹⁶⁵ The DOC feared that failure to promote minority employees would lead to the perception that the boot camp was racially motivated and consequently defeat its purpose of instilling discipline and respect for authority.¹⁶⁶

The Court agreed that the State had a compelling interest in the safe operation of its boot camps.¹⁶⁷ The Court, however, held that the DOC failed to implement the necessary safeguards to pass constitutional muster under strict scrutiny.¹⁶⁸ There was no evidence of past discrimination against minorities in the DOC's promotional practices.¹⁶⁹ Further, the state failed to provide evidence as to why African-American representation at the lieutenant position as opposed to the officer position was essential to the safe functioning of the boot camp.¹⁷⁰ Accordingly, the Court concluded that the promotion of an African-American male was not necessary to further the state's compelling interest to operate safe facilities.¹⁷¹

¹⁶⁰ See *id.* at *2.

¹⁶¹ See *id.* at *1.

¹⁶² See *id.* at *2.

¹⁶³ See *Wittmer v. Peters*, No. 94-3045, 1995 WL 631639, at *2 (C.D. Ill. Aug. 31, 1995).

¹⁶⁴ See *id.* at *3.

¹⁶⁵ See *id.*

¹⁶⁶ See *id.*

¹⁶⁷ See *id.* at *6-7.

¹⁶⁸ See *Wittmer v. Peters*, No. 94-3045, 1995 WL 631639, at *3-7 (C.D. Ill. Aug. 31, 1995).

¹⁶⁹ See *id.* at *2.

¹⁷⁰ See *id.* at *6-7.

¹⁷¹ See *id.*

Another example of a preference program that failed to meet strict scrutiny is provided in *Koski v. Gainer*.¹⁷² In *Koski*, the United States District Court for the Northern District of Illinois examined the affirmative action plan of the Illinois State police ("ISP").¹⁷³ The purpose of the program was to achieve percentage parity between the ISP workforce and that of the general population.¹⁷⁴ Racial parity was obtained through numerical goals.¹⁷⁵ In analyzing the program, the Court considered the factors espoused in *Paradise* to determine whether the preference program was narrowly tailored.¹⁷⁶

First, the Court concluded that the state had satisfactorily sought alternative remedies by participating in minority recruiting efforts unrelated to the application process.¹⁷⁷ Next, the Court examined the flexibility of the program and the duration of its relief.¹⁷⁸ This aspect of the plan failed the narrowly tailored requirement in that it maintained the same percentage goals since its inception and was based on overbroad figures obtained from the state census.¹⁷⁹ Accordingly, the Court held that the ISP plan violated the Equal Protection Clause of the Fourteenth Amendment.¹⁸⁰ From the previous cases, it should be clear that a preference program can survive strict scrutiny review so long as it adheres to constitutional guidelines and implements sufficient safeguards.

CONCLUSION

The 1960's enlightened the American public to the evils of racial discrimination. The Supreme Court was instrumental in creating the legal framework necessary to battle long existing racial prejudices. In so doing, the Court supported remedies, including race based preference programs, to end racial discrimination. Recently, such programs have come under constitutional attack. In *Adarand* the Court promulgated that federal race-based prefer-

¹⁷² No. 92C3293, 1995 WL 599052 (N. D. Ill. Oct. 5, 1995).

¹⁷³ See *id.* at *1-3.

¹⁷⁴ See *id.* at *4.

¹⁷⁵ See *id.*

¹⁷⁶ See *id.* at *15.

¹⁷⁷ See *Koski v. Gainer*, No. 92C3293, 1995 WL 599052, at *15 (N.D. Ill. Oct. 5, 1995).

¹⁷⁸ See *id.* at *15-17.

¹⁷⁹ See *id.* at 17.

¹⁸⁰ See *id.* at *21.

ence programs are to be reviewed under strict scrutiny and outlined the components necessary for a program to survive this level of constitutional review. It appears if a federal program incorporates sufficient safeguards to ensure that it is narrowly tailored and illustrates a history of validated discrimination, it will pass strict scrutiny. Although strict scrutiny is the highest level of review, it is possible to satisfy its requirements. Strict scrutiny is strict in theory but not necessarily fatal in fact.

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