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Paved with Good Intentions: Affirmative Action after Adarand

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PAVED WITH GOOD INTENTIONS: AFFIRMATIVE ACTION AFTER *ADARAND*?

I. Introduction

> "You are saved," cried Captain Delano, more and more astonished and pained; "you are saved: what has cast such a shadow upon you?"[1]

> You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, "You are free to compete with all the others," and still justly believe that you have been completely fair.[2]

The politically potent phrase "affirmative action"[3] has been loosely defined as "[any] attempts to bring members of under-represented groups . . . into a higher degree of participation in some beneficial program."[4] However, like so many others,[5] this definition belies both the myriad forms which affirmative action may take[6] and

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1. Ralph Ellison, Invisible Man 1 (Random House 1972) (1952) (quoting Herman Melville, Benito Cereno 183 (1842)).

2. The Negro in Twentieth Century America 226 (John Hope Franklin and Isidore Starr, eds., 1967) (quoting Lyndon B. Johnson, To Fulfill These Rights, Remarks of the President at Howard University, Washington D.C., June 4, 1965).

3. Other terms used to describe this practice include "reverse discrimination," "preferential treatment," "quotas," and "hiring goals." Michel Rosenfeld, Affirmative Action and Justice 42-43 (1991). However, not all phrases are created equal. Robert K. Fullinwider notes that "[t]he terms involved in the . . . controversy are especially treacherous," The Reverse Discrimination Controversy 10 (1980), immediately infusing any discussion about such practices with strong political and moral overtones. For a closer examination of the power of language in the debate over affirmative action, see Philip L. Fetzer, *"Reverse Discrimination": The Political Use of Language*, 12 Nat'l Black L.J. 212 (1993) (The phrase reverse discrimination is a "covert political term which should be removed from the vocabulary of any serious academician or layperson.").

4. Rosenfeld, *supra* note 3, at 42 (citing Kent Greenawalt, Discrimination and Reverse Discrimination 17 (1983)).

5. Other attempts to define the concept produce equally nebulous results. *See* Reverse Discrimination 3 (Barry R. Gross ed. 1977) (defining same as "giving special or preferred treatment to persons who are members of . . . groups . . . against whose membership generally unjust discrimination was or is being practiced."). *See also* Patricia J. Williams, The Alchemy of Race and Rights 121 (1991) (Affirmative action is "an act of verification and vision, an act of social as well as professional responsibility.").

6. For example, a Congressional Research Service Report requested by Senator Robert Dole lists over 150 federal executive orders and statutory and regulatory provisions which "grants [sic] a preference to individuals on the basis of race, sex, national origin or ethnic background." 141 Cong. Rec. S3929 - 4001 (daily ed. March 15, 1995). These regulations affect

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the colossally controversial political, philosophical, and constitutional debate it has spawned.[7] "Few constitutional questions in recent history have stirred as much debate" as affirmative action,[8] and since the inception of both policy and phrase with President Kennedy's Executive Order 10925,[9] both American society and the Supreme Court have struggled to reconcile the preferential policies of race-based "affirmative action" with Justice Harlan's often quoted characterization of our Constitution as "color blind."[10]

Now, almost thirty years after affirmative action programs first received a constitutional stamp of approval,[11] political discourse has turned to an examination of the efficacy and usefulness of such programs. Recent executive[12] and legislative[13] interest in the scope, function and effect of federal affirmative action programs mirrors state concerns over the effects of preferential admission and hiring policies on non-minority constituencies.[14]

"close to a fifth of the nation's total economic activity." Harvey Berkman, *Many 'Tentacles' to Race-Based Federal Policies*, NAT'L L.J., April 24, 1995, at A1, col. 1.

7. The most recent (and most volatile) battle in the war over affirmative action is being fought in California. Pete Wilson's recent successful move to eliminate the use of affirmative action admissions programs within the University of California system has stirred the fire there. *See* Margot Hornblower, *Taking It All Back: At Pete Wilson's Urging, the University of California Says No to Racial Preferences*, TIME, July 31, 1995, at 34. Also *see generally* RACIAL PREFERENCE AND RACIAL JUSTICE: THE NEW AFFIRMATIVE ACTION CONTROVERSY (Russell Nieli ed. 1991) ("[D]ominant opinion on civil rights is no longer uniform, and is split on whether preferential employment on the basis of race and ethnic group is a proper response to discrimination and disadvantage.").

8. DeFunis v. Odegaard, 416 U.S. 312, 350 (1974) (Brennan, J., dissenting).

9. HUGH DAVIS GRAHAM, THE CIVIL RIGHTS ERA 28 (1990).

10. Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting). For a fully developed historical and political analysis of the "color blind theory," *see* ANDREW KULL, THE COLOR BLIND CONSTITUTION (1992).

11. Regents of the Univ. of Calif. v. Bakke, 438 U.S. 265 (1978). *See infra* notes 49-59 and accompanying text for a fuller analysis.

12. Note President Clinton's "Affirmative Action Review Report," released shortly after *Adarand*, reaffirming the need for affirmative action programs. DAILY LAB. REP. July 20, 1995, page 5.

13. Note also Senator Bob Dole's rebuttal to President Clinton's affirmative action report, *see supra* note 12, indicating his intent to introduce legislation which would "get the Federal Government out of the group preference business." 141 CONG. REC. S10260 (daily ed. July 19, 1995). Making good on that promise, Senator Dole introduced Senate Bill 1085, which would effectively prohibit discrimination and preferential treatment on the basis of race, color, national origin, or sex in federal contracts, employment, and programs. S. 1085, 104th Cong., 1st Sess. (1995).

14. Particularly California, where the popularly known "California Civil Rights Initiative" proposes to amend the California constitution to eliminate the use of preferential treatment by the state or its political subdivisions. Assembly Constitutional Amendment Number 2, introduced Dec. 5, 1994. Also note the ironic and perhaps prophetic dismantling of affirmative action admission programs in the University of California system. *See* Hornblower, *supra* note 7.

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As is often the case, heightened political scrutiny of this controversial issue encouraged closer judicial examination,[15] and the Supreme Court recently reconsidered which level of judicial scrutiny should apply to beneficial federal race-based classifications analyzed under the equal protection provisions of the Fifth and Fourteenth Amendments.[16] In *Adarand Constructors, Inc. v. Pena*,[17] a sharply divided Court revisited and rejected as unworkable and untenable the application of intermediate scrutiny to "benign" federal racial classifications as forwarded in *Metro Broadcasting, Inc. v. FCC*.[18] Citing the need for "skepticism," "consistency," and "congruence"[19] when reviewing all governmentally imposed racial classifications, the five justice majority in *Adarand* looked to the standard of review applied in *City of Richmond v. J.A. Croson Co.*[20] and imposed strict scrutiny as the proper standard of review for all race-based classifications, whether beneficial or detrimental[21] and whether imposed by federal, state, or municipal governmental entities.[22]

However simple the holding, *Adarand's* effects will be far more pervasive than the words employed suggest. *Adarand* not only departs from case law distinguishing federal affirmative action measures from similar state programs, but also places the status of all federal affirmative action programs in constitutional limbo.[23] The majority's limited discussion also raises questions regarding the application of strict scrutiny to federal affirmative action programs.[24] Therefore, section two of this note will discuss the Supreme Court's affirmative

15. Much like the abortion controversy in the late 1960's and early 1970's. *See* JAMES C. MOHR, ABORTION IN AMERICA: THE ORIGINS AND EVOLUTION OF NATIONAL POLICY 250-263 (1978).

16. The Fourteenth Amendment provides in pertinent part that "[n]o State . . . shall deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV. The Fifth Amendment has no equivalent language, but the Court has interpreted the Due Process Clause of the Amendment to incorporate an equal protection component. *See infra* notes 40-108 and accompanying text.

17. 115 S. Ct. 2097 (1995).

18. 497 U.S. 547 (1990).

19. *Adarand*, 115 S. Ct. at 2111.

20. 488 U.S. 469 (1989).

21. Throughout this paper, the terms "beneficial" or "benign" denote policies which grant benefits or preferences based on the race of the recipient, such as those at issue in *Adarand*. The words "detrimental" or "harmful" describe those laws and policies which deny benefits or preferences solely on the basis of race. This author acknowledges the controversial nature of the use of this language, and also acknowledges the suggestions of those who believe affirmative action programs are more harmful than helpful to its beneficiaries. *See, e.g.*, *Adarand*, 115 S. Ct. at 2119 (Thomas, J., concurring).

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

23. *See* discussion *infra* part IV.

24. *See* discussion *infra* part IV.

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action jurisprudence prior to *Adarand*, section three will analyze the majority's reasoning, and section four will discuss *Adarand*'s impact on the status of existing federal affirmative action programs and jurisprudence.

II. Affirmative Action and the Supreme Court: From No Scrutiny to Strict Scrutiny

Arguing about what standard of review should apply in a given case "may strike some as a lawyers'[sic] quibble over words."[25] It is, however, a vitally important argument; one which may in the equal protection context ultimately decide the fate of one's case.[26] Over the years, the Supreme Court has established a treble-tiered framework under which all laws and regulations challenged under the Fourteenth Amendment must be analyzed.[27] The least stringent standard of review, rational basis review,[28] historically has operated as a judicial rubber stamp for most social and economic classifications imposed by a legislature.[29] However, application of strict scrutiny[30] analysis to a governmental classification has the opposite effect; few classifications escape the narrowly drawn strict scrutiny test intact,[31] leading one

25. *Metro Broadcasting*, 497 U.S. at 610 (O'Connor, J., dissenting).

26. "The standard of review establishes whether and when the Court and Constitution allow the Government to employ racial classifications. A lower standard signals that the government may resort to racial distinctions more readily." *Id.*

27. *See* 2 Rotunda, et al., Treatise on Constitutional Law: Substance and Procedure § 18.3 (1986 & Supp. 1991).

28. Rational basis or low level scrutiny review was first established by the Court in F.S. Royster Guano Co. v. Virginia, 253 U.S. 412 (1920). Rational basis review requires that a "classification must be reasonable, not arbitrary, and must rest upon some . . . difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Id.* at 415. More recent articulations of the test simply note that under rational basis review, "[l]egislative classifications are valid unless they bear no rational relationship to the state's objectives." New York Transit Auth. v. Beazar, 440 U.S. 568, 592 (1979) (citing Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 314 (1976)).

29. *See generally* 2 Rotunda, et al., *supra* note 27, at 324 ("The Court will not grant any significant review of legislative decisions to classify persons in terms of general economic legislation."). *But see* City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985) (reviewing and invalidating denial of special use permit for operation of group home under rational basis review).

30. "To pass muster [under strict scrutiny review], a challenged governmental action must be closely related to a compelling governmental interest." The Oxford Companion to the Supreme Court of the United States 845 (Kermit L. Hall ed. 1992) [hereinafter Oxford Companion] (internal quotations omitted). The Court usually states the test as whether the classification is "precisely tailored," *Bakke*, 438 U.S. at 299 (Powell, J., concurring in part and in the judgment) or "narrowly tailored to serve a compelling governmental interest." *Croson*, 488 U.S. at 507.

31. Prior to *Croson*, very few classifications satisfied strict scrutiny analysis. The most recent pre-*Croson* classifications to survive were those requiring the relocation of Japanese-Americans during World War II. *See* Korematsu v. United States, 323 U.S. 214 (1944); Hirabayashi v.

constitutional scholar to describe the test as "strict in theory, but fatal in fact."[32] Intermediate scrutiny,[33] the middle tier within the framework, developed as an alternative test primarily applied to classifications based on gender;[34] of the three tests, only intermediate scrutiny truly operates as a test.[35]

Although all legislative classifications challenged under the Fifth and Fourteenth Amendment equal protection provisions[36] must pass Constitutional muster under one of these three tests, often the most critical question posed to the Court involves which of the three tests should apply to the classification at issue.[37] This threshold question comprises the core controversy in the Court's struggle over the constitutionality of affirmative action programs.[38] An examination of the Court's splintered decisions in this area indicates that the historical and political climate in which the question is asked often will foreshadow the answer.

Initially, for the Supreme Court, affirmative action was literally a moot point. In *DeFunis v. Odegaard,*[39] one of the Court's first forays into the constitutionality of affirmative action programs,[40] the Court failed to reach the merits of the case. DeFunis's equal protection

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United States, 320 U.S. 81 (1943). Since *Croson*, however, courts seem to have relaxed the standards for beneficial racial classifications. *See Bakke*, 438 U.S. at 311-12; *Metro Broadcasting*, 497 U.S. at 566.

32. Gerald Gunther, *The Supreme Court 1971 Term — Foreword: In Search of Evolving Doctrine in a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

33. Classifications will withstand intermediate judicial scrutiny if they are substantially related to an important governmental interest. Craig v. Boren, 429 U.S. 190, 197 (1976).

34. *See* 2 ROTUNDA, ET AL., *supra* note 27, at 326.

35. *Id.* at 329 (intermediate scrutiny has "some ad hoc quality."). *See also* Matthews v. Lucas, describing the middle tier test as "not a toothless one." 427 U.S. 495, 510 (1976).

36. After some confusion regarding the extent of the Fifth Amendment's protection of rights similar to those protected under the Fourteenth Amendment, *see generally Adarand*, 115 S. Ct. at 2106-08, the Court ultimately determined that the Fifth Amendment has an equal protection component. *See* Bolling v. Sharpe, 347 U.S. 497 (1954). The Court there noted though "'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of law'... it would be unthinkable that the ... Constitution would impose a lesser duty on the federal government." *Id.* at 499-500. *See also* Kenneth L. Karst, *The Fifth Amendment's Guarantee of Equal Protection*, 55 N.C. L. REV. 541 (1977).

37. Particularly where the Court is faced with a classification which may not be easily pigeonholed as an economic or social classification. *See City of Cleburne*, 473 U.S. at 456, 459-460 (Marshall, J., dissenting); *see also* Michael M. v. Superior Court of Sonoma County, 450 U.S. 464, 468 (1981) ("[T]he traditional minimum rationality test takes on a somewhat 'sharper focus' where gender-based classifications are challenged.").

38. *See* discussion *infra* notes 40-108 and accompanying text.

39. 416 U.S. 312 (1974).

40. *See also* United Jewish Org. of Williamsburgh, Inc. v. Carey, 430 U.S. 144 (1977). The Court there upheld the use of numerical race targets in legislative redistricting as a means of ensuring fair representation, as long as such use did not unduly burden the rights of whites.

challenge of beneficial race-based admission policies at the University of Washington Law School was thwarted by a per curiam opinion holding the controversy moot[41] under Article III of the Constitution.[42] The Court found that DeFunis's admission to and impending graduation from Washington's School of Law eliminated his need for relief.[43] Further, though the nature of the question presented appeared "capable of repetition, yet evading review,"[44] the Court determined the possibility of a timely review would exist as long as the challenged admissions programs remained in place.[45] The *DeFunis* majority's use of "passive virtues"[46] to avoid the ultimate issue of the program's constitutionality split the Court[47] and spawned much critical commentary.[48] More importantly, *DeFunis* indicated the Court's reluctance to deal with the still novel idea.

However, the controversial nature of affirmative action programs ensured the Court could not dodge the issue forever. Four years later the Court again considered the constitutionality of a race-based preferential admissions program under the Equal Protection Clause.[49] Allen Bakke, a white applicant denied admission to the University of California at Davis Medical School, challenged the school's use of a special admissions program for minorities which effectively excluded white applicants from competing for sixteen openings.[50] A crucial swing opinion written by Justice Powell allowed the Court to deliver one of the most politically savvy decisions of the late twentieth century. In *Bakke*, the Court simultaneously held that though consideration of a person's race or ethnic background as a "plus" in admissions

41. Mootness occurs when "the issue that is being litigated has become resolved in one way or another, thus leaving the plaintiff with no current complaint." OXFORD COMPANION, *supra* note 30, at 562.

42. *DeFunis*, 416 U.S. at 319-20.

43. *Id.* at 317.

44. *Id.* at 318-19 (citing Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 515 (1911)).

45. *Id.* at 319.

46. *See generally* Alexander M. Bickel, *The Supreme Court 1960 Term — Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961).

47. The decision split 5-4, with Justices Brennan, White, Douglas, and Marshall dissenting. Douglas actually reached the merits and found no violation of the Equal Protection Clause on the record as presented. *DeFunis*, 416 U.S. at 344.

48. *See generally* ROBERT M. O'NEIL, DISCRIMINATING AGAINST DISCRIMINATION: PREFERENTIAL ADMISSIONS AND THE *DeFunis* Case (1975); IVOR KRAFT, DEFUNIS V. ODEGAARD: RACE, MERIT, AND THE FOURTEENTH AMENDMENT (1976). For a critical analysis of the Court's use of Article III passive virtues, see Gerald Gunther, *The Subtle Vices of the 'Passive Virtues' - A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1 (1964).

49. *Bakke*, 438 U.S. 265.

50. *Id.* at 275. The program was established in an attempt to secure admissions for disadvantaged students generally; in practice, however, only members of certain minority groups were admitted under the special admissions plan. *Id.* at 275-76.

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decisions and policies theoretically does not violate the Fourteenth Amendment's guarantee of equal protection, the special admissions program challenged in *Bakke* was unconstitutional as applied.[51]

Though *Bakke* has correctly been considered a watershed decision,[52] what the Court did not do in *Bakke* is as significant as what it did. First, the Court did not reach consensus on the proper standard of review applicable to voluntarily adopted state affirmative action programs. Only Justice Powell considered preferential race-based polices subject to strict judicial scrutiny;[53] the four justices he joined to allow beneficial racial classifications clearly supported application of intermediate scrutiny,[54] and the other four justices refused to reach the Constitutional issue.[55] Further, unlike the four Justices he joined to invalidate California's program,[56] Powell's opinion effectively limited the holding to programs similar to the one at issue in *Bakke.* His concern focused only on the means by which the program attempted to boost minority enrollment; California's plan only failed strict scrutiny analysis because it "prefer[red] the designated minority groups at the expense of other individuals who [were] totally foreclosed from competition for the . . . special admissions seats in every . . . class."[57] Under the more palatable "Harvard Plan," Powell noted that:

> The applicant who loses out on the last available seat to another candidate receiving a "plus" on the basis of ethnic background will not have been foreclosed from all consideration for that seat simply because he was not the right color or had the wrong surname. . . . His qualifications would have been weighed fairly and competitively, and he would have no basis to complain of unequal treatment under the Fourteenth Amendment.[58]

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51. *Id.* at 271-72.

52. *See* 2 ROTUNDA, ET AL., *supra* note 27, at 450 ("The *Bakke* decision remains singular in the depth of analysis of constitutional issues relating to affirmative action programs.").

53. *Bakke*, 438 U.S. at 291.

54. *Id.* at 359 (Brennan, White, Marshall, and Blackmun, J.J., concurring in the judgment and dissenting in part) ("Racial classifications designed to further remedial purposes must serve important governmental objectives and must be substantially related to achievement of those objectives." (internal quotations and citations omitted)).

55. *Id.* at 411 ("[T]he question whether race can ever be used as a factor . . . is not an issue in this case . . . .") (Stevens, J., concurring in part and dissenting in part).

56. Justices Stevens, Burger, Stewart, and Rehnquist invalidated the program on statutory grounds. *Id.* at 408, 421.

57. *Id.* at 305.

58. *Id.* at 318. Powell's aversion to quota systems such as the one in *Bakke* seems to stem from a dislike of "mass process" in which individuals are not treated as individuals, but as members of a class. This, according to Laurence Tribe, undermines an individual's right "to be treated by the government as a unique and not a fungible being." LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1527 n.26 (2d ed. 1988). A more thorough examination of this theory of rights may be found in LAURENCE H. TRIBE, CONSTITUTIONAL CHOICES 223-28 (1985).

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As a result of the Court's splintered analysis, *Bakke* generated "considerable unease"[59] and gave little direction to courts analyzing beneficial racial classifications beyond its facts.

Due to a moderate majority[60] and lackluster leadership,[61] the Burger Court continued to disagree about the proper standard of review in affirmative action cases. In *Fullilove v. Klutznick*,[62] the Court examined the constitutionality of the "minority business enterprise" or "MBE" provisions of the Public Works Employment Act of 1977.[63] The provision mandated an award of ten percent of federal funds allocated to state and local public works to businesses "50% percentum of which is [sic] owned by minority group members."[64] Two three-justice pluralities, writing separately, held the provision constitutional under the equal protection provisions of the Fifth and Fourteenth Amendments.[65] Again, the Court could not agree on the proper standard of review. However, six justices applied some lesser standard than strict scrutiny. Three justices applied intermediate scrutiny in examining the provisions.[66] Writing for the other three, Justice Burger's analysis focused on "whether the objectives [of the MBE program were] within the power of Congress . . . [and] whether the limited use of racial and ethnic criteria, in the context presented, [was] a constitutionally permissible means for achieving the congressional objectives . . . ."[67] Justice Burger's plurality opinion emphasized Congress' ability to attain its objectives through section Five of the Fourteenth Amendment, which acts as a "positive grant . . . authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment."[68] Noting there is no requirement that "Congress must act in a wholly

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59. TRIBE, AMERICAN CONSTITUTIONAL LAW, *supra* note 58, at 1523.

60. *See* BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT 314-16 (1993). Schwartz notes that this majority was composed of Justices White, Stewart, Powell, Blackmun, and Stevens.

61. *Id.* at 312-14.

62. 448 U.S. 448 (1980).

63. Pub. L. No. 95-28, 91 Stat. 116 (codified at 42 U.S.C. § 6705), amending the Local Public Works Capital Development and Investment Act of 1976, Pub. L. No. 94-369, 90 Stat. 999 (codified at 42 U.S.C. § 6701 *et seq.*).

64. 42 U.S.C. § 6705 (f) (2) (1976 ed., Supp. II). The provision further defined "minority group members" for purposes of the Act as "citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts." *Id.*

65. *Fullilove*, 448 U.S. at 453, 517 (Marshall, J., concurring).

66. *Id.* at 519 (Marshall, J., concurring).

67. *Id.* at 473 (emphasis omitted).

68. *Id.* at 476 (citing Katzenbach v. Morgan, 384 U.S. 641, 651 (1966)), 520 (Marshall, J., concurring).

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'color-blind' fashion" to remedy race discrimination,[69] Burger found that the MBE program "provide[d] a reasonable assurance that application of racial . . . or ethnic criteria [would] be limited to accomplishing the remedial objectives of Congress"[70] because the provisions allowed for waiver and exemption in certain circumstances.[71] Burger's plurality explicitly rejected both standards of review forwarded in *Bakke*,[72] but noted that the MBE provision would survive under either standard.[73]

Subsequent attempts to determine the proper standard of review for beneficial race-based classifications proved equally daunting for the Court. For example, only four of the five Justice majority in *Wygant v. Jackson Board of Education*[74] held that strict scrutiny was proper where reviewing a race-based layoff protection provision for minority teachers.[75] Further, two other cases considering the constitutionality of affirmative action programs judicially imposed as a remedy for past discrimination begged the question; though acknowledging the Court had "not agreed . . . on the proper test to be applied in analyzing the constitutionality of race-conscious remedial measures[,]"[76] in both *Local 28 of the Sheet Metal Workers Int'l. Assoc. v. EEOC*[77] and *United States v. Paradise*,[78] the majorities held "the relief ordered survives even strict scrutiny analysis."[79]

In 1989, after a decided shift to the political right,[80] the Court tried to put to rest recurring questions over the proper standard of review for affirmative action programs in *City of Richmond v. J.A.*

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69. *Id.* at 482.

70. *Id.* at 487.

71. *Id.* at 487-89.

72. *Id.* at 492; *see Bakke*, 438 U.S. at 271-72.

73. *Fullilove*, 448 U.S. at 492.

74. 476 U.S. 267 (1986).

75. *Id.* at 274, 280.

76. Local 28 of the Sheet Metal Workers Int'l Ass'n v. EEOC, 478 U.S. 421, 480 (1986).

77. *Id.* In *Sheet Metal Workers* the Court considered whether Title VII's remedial provisions allow courts to order race-conscious relief which may benefit persons not identified as victims of unlawful discrimination. A splintered opinion upheld the relief ordered in this case. *Id.* at 482.

78. 480 U.S. 149 (1987). Here, the Court determined race-conscious provisions imposed by the district court of Alabama to remedy systemic discrimination against African-Americans in the state trooper employment hierarchy did not violate the Fourteenth Amendment. *Id.* at 185.

79. *Id.* at 166-67; *see also Sheet Metal Workers*, 478 U.S. at 480 (noting that regardless of the test to be used, the practice at issue passed even strict scrutiny).

80. SCHWARTZ, *supra* note 60, at 367-369 (noting and analyzing the addition of Justices Scalia, Kennedy, Souter, and Thomas to the Court).

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Croson Co.[81] The plaintiffs in *Croson* challenged a municipal ordinance requiring an award of 30 percent of city construction subcontracts to minority businesses.[82] A five justice majority led by Justice O'Connor agreed with the Fourth Circuit's use of strict scrutiny in reviewing the ordinance.[83] The majority found *Fullilove* inapposite, and distinguished *Croson* from *Fullilove* for two reasons. First, *Fullilove* involved the "unique remedial powers of Congress under § 5 of the Fourteenth Amendment";[84] *Croson*, on the other hand, dealt with remedial provisions enacted by state and local governments. The court reasoned the States' power to enact racial classifications is limited by section One of the Fourteenth Amendment, which "stemmed from a distrust of state legislative enactments based on race[.]"[85] Congress, on the other hand, acts pursuant to "a *positive* grant of legislative power" under section Five of the Fourteenth Amendment, allowing the federal government greater latitude in enacting legislation which furthers the purpose of the Amendment.[86] Accordingly, courts should be more skeptical of state action which classifies on the basis of race. Second, though the City of Richmond's MBE ordinance paralleled the flexible nature of the Congressional MBE in *Fullilove*, the City's ability to enact such provisions under section One of the Fourteenth Amendment did not parallel Congress' power under section Five.[87] Although the Court acknowledged state and municipal governments may act to eliminate discrimination,[88] such actions "must . . . be exercised within the constraints of §1 of the Fourteenth Amendment."[89] This constitutional restraint, according to the majority, compels governments to specifically "[identify] that discrimination with the particularity required by the . . . Amendment"[90] in order to dispel concerns over oppressive or inequitable use of racial classifications for nefarious purposes.[91]

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81. 488 U.S. 469 (1989).

82. *Id.* at 477 (citing and discussing Ordinance No. 83-69-59, codified at RICHMOND, VA. CITY CODE § 12-156 (a) (1985)).

83. *Id.* at 486.

84. *Id.* at 488.

85. *Id.* at 491.

86. *Id.* (quoting *Katzenbach*, 384 U.S. at 651).

87. *Id.* at 490.

88. *Id.* at 491-92.

89. *Id.* at 492.

90. *Id.*

91. *Id.* ("It is beyond dispute that any public entity . . . has a compelling interest in assuring that public dollars . . . do not serve to finance the evil of private prejudice.").

Analyzing the Richmond program under strict scrutiny, the majority in *Croson* invalidated the municipal MBE program.[92] The majority examined the factual findings of the Richmond City Council and found the evidence presented regarding race discrimination in the Richmond construction industry was insufficient to support a finding of compelling governmental interest.[93] According to the majority, assertions of broad based societal discrimination would not establish a compelling governmental interest,[94] nor would findings of past discrimination within a particular local industry.[95] The majority indicated the City would need to show an inference of discrimination by establishing a nexus between a high number of qualified MBE's and a low number of participating MBE's in the Richmond area.[96] Further, the majority found it "almost impossible to assess"[97] whether the plan could satisfy the narrow tailoring requirement. The majority did indicate, however, that evidence of viable race-neutral alternatives in achieving the governmental interest or a program's use of strict numerical quotas might lead to a program's demise under the second prong of the strict scrutiny test.[98]

Croson finally solidified the standard of review for racial classifications of any kind at the state and local level. *Fullilove*'s split majority, combined with the *Croson* majority's dicta regarding section Five

92. *Id.* at 511.
93. *Id.* at 510.
94. *Id.*
95. *Id.* at 498.
96. *Id.* at 501-04. Here, the Court relied heavily on Title VII disparate impact jurisprudence, which requires a similar statistical disparity between the racial composition of the relevant labor force and the employer's work force in order to prove a prima facie case of discrimination. *See* Int'l. Bhd. of Teamsters v. United States, 431 U.S. 324, 340 n.20 (1977) ("Statistics showing racial or ethnic imbalance are probative . . . because such imbalance is often a tell-tale sign of purposeful discrimination; absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will . . . result in a work force more or less representative of the racial and ethnic composition of the population of the community from which employees are hired."); Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 650-651 (1989) (comparing "racial composition of the qualified persons in the labor market and the persons holding at-issue jobs" to determine if prima facie case of disparate impact discrimination was established); *see also* Hazelwood Sch. Dist. v. United States, 433 U.S. 299 (1977) (applying the same standard to establish a prima facie case of pattern or practice discrimination). For a more specific analysis, *see* Michael L. Marshall, *Causation in Employment Discrimination Analysis: A Proposed Marriage of the Croson and Wards Cove Rationales*, 20 U. BALT. L. REV. 307 (1991).
97. *Croson*, 488 U.S. at 507.
98. *Id.* at 507-08.

of the Fourteenth Amendment, left undetermined the standard of review applicable to beneficial racial classifications employed by federal actors.[99]

Metro Broadcasting, Inc. v. FCC[100] answered that question. In *Metro Broadcasting*, a five justice majority held "benign" race-based classifications enacted by Congress satisfy the equal protection provision of the Fifth Amendment if they withstand intermediate scrutiny and do not "impose *undue* burdens on non-minorities."[101] In his final opinion issued before retiring, Justice Brennan relied heavily on the reasoning in *Fullilove* and dicta in *Croson* to support the application of intermediate scrutiny to such provisions.[102] Noting the Court must defer to Congress when Congress wields the powers provided it by the Constitution,[103] Brennan combined Congress' powers under the Commerce and Spending Clauses with its enforcement powers under section Five of the Fourteenth Amendment to establish a broad umbrella of congressional authority under which such classifications might appropriately be invoked.[104] In distinguishing *Croson* from *Metro Broadcasting*, Justice Brennan reiterated *Croson*'s distinction between federal and state classifications, noting the states' tendency toward enacting oppressive racial classifications.[105] The majority also underscored *Fullilove*'s deference to Congress' "institutional competence as the National Legislature."[106]

The Court then turned to the provisions at issue.[107] The first enabled the FCC to take race into consideration as a "plus" in granting new licenses only when prospective minority owners intended to actively participate in the station's management.[108] The second allowed "distress sales" of licenses to prospective minority licensees. Sellers

99. *See* Cassandra D. Hart, *Unresolved Tensions: The Croson Decision*, 7 HARV. BLACKLETTER J. 71 (1990); John J. Hayes, *Congressional Ratification of Otherwise Unconstitutional Local Affirmative Action: Can Congress Override Croson?* 35 N.Y.L. SCH. L. REV. 681 (1990).

100. 497 U.S. 547 (1990).

101. *Id.* at 597.

102. *Id.* at 564-66.

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

104. *Id.*

105. *Id.* at 566.

106. *Id.* at 563 (citing *Fullilove*, 448 U.S. at 490).

107. The FCC promulgated these policies acting pursuant to Congress' grant of administrative authority in the Communications Act of 1934, 48 Stat. 1064 (codified as amended at 47 U.S.C. §§ 151 *et seq.*).

108. *Metro Broadcasting*, 497 U.S. at 556, 557 (citing WPIX Inc., 68 F.C.C.2d 381, 411-12 (1978)).

were allowed to bypass standard FCC regulations in such circumstances.[109] The majority found both policies substantially related to the important governmental objective of diversity in broadcast programming.[110] The Court determined in light of the limited number of frequencies available and the FCC's policy of ensuring diverse viewpoints in broadcasting, Congress and the FCC have broad latitude in determining who may receive stations.[111] Further, the Court considered Congress' and the FCC's examinations of possible "relationship[s] between expanded minority ownership and greater broadcast diversity."[112] Both the FCC's findings and Congress' subsequent support of those findings were sufficient to establish the second prong of intermediate scrutiny analysis.[113]

Metro Broadcasting and *Croson* appeared to bring the constitutional debate over the proper standard of review to a tenuous rest. In both *Croson* and *Metro Broadcasting*, the Court considered the historical purpose and context of the Fourteenth Amendment. Taken together, the two cases seemed to create a balance between promoting the nation's interest in encouraging substantive racial equality and recognizing and limiting the states' historic tendency to overreach Constitutional limits.[114] However, "with five votes, anything is possible[,]"[115] and the possibility this balance would last slipped away with Justices Marshall, Brennan, and White's retirements.[116] Considering the critical commentary which followed *Metro Broadcasting*,[117] it seemed only a matter of time until the new conservative Court would reconsider the issue.

109. *Id.* at 557 (citing WPIX Inc., 68 F.C.C.2d at 983).
110. *Id.* at 566.
111. *Id.* at 566-67 (citing Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969)).
112. *Id.* at 569.
113. *Id.* at 569-70.
114. *See* Madison *infra* note 221 and accompanying text.
115. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1185 (1989).
116. *See* SCHWARTZ, *supra* note 60.
117. *See* Douglas O. Linder, *Review of Affirmative Action after* Metro Broadcasting v. FCC: *The Solution Almost Nobody Wanted*, 59 UMKC L. REV. 293 (1991); Lucy Katz, *Public Affirmative Action and the Fourteenth Amendment: The Fragmentation of Theory after* Richmond v. J.A. Croson Co. *and* Metro Broadcasting, Inc. v. Federal Communications Commission, 17 T. MARSHALL L. REV. 317 (1992).

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III. STATEMENT OF THE CASE

A. *Facts*

Mountain Gravel and Construction Company was awarded the prime contract for a Colorado highway construction project in 1989.[118] The contract, awarded by the Department of Transportation through its subsidiary Central Federal Lands Highway Division, contained a clause which provided prime contractors additional compensation for hiring subcontractors certified as small businesses controlled by "socially and economically disadvantaged individuals."[119] The clause also provided a presumption of social and economic disadvantage for certain racial and ethnic minorities.[120]

These mandatory provisions contained in most federal agency contracts had their origins in the Small Business Act (SBA)[121] and regulations promulgated by the Small Business Administration.[122] They were created and implemented in an effort to further the policy of encouraging participation of minorities in the performance of federal agency contracts.[123] Mountain Gravel's contract, awarded under the Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURAA),[124] adopted the SBA's definition of social and economic disadvantage and the statutory presumptions of social and economic disadvantage for women and racial minorities provided in the SBA.[125] Statutory requirements under the SBA and STURAA were implemented through federal and state regulatory schemes for certifying businesses owned by socially or economically disadvantaged individuals.[126] Under both the SBA and STURAA presumptions of economic or social disadvantage were rebuttable by third parties.[127]

Mountain Gravel requested bids on a portion of the prime contract from subcontractors specializing in guardrail work, and received bids from several companies, including Adarand Constructors and

118. *Adarand*, 115 S. Ct. at 2102.
119. *Id.*
120. *Id.*
121. 15 U.S.C. § 631 *et seq.* (1990 & Supp. V).
122. *See, e.g.*, 13 CFR § 124.102 (1994).
123. *Adarand*, 115 S. Ct. at 2102.
124. *Id.* at 2103 (citing Pub. L. No. 100-17, 101 Stat. 132).
125. *Id.* at 2103 (citing 101 Stat. 145, 146). Unlike the SBA's goal of five percent participation, STURAA set a higher goal of ten percent minority participation in federal transportation contracts. *Id.* at 2102-03.
126. *Id.* at 2102-04.
127. *Id.* at 2103.

Gonzales Construction.[128] Adarand's bid was the lowest submitted;[129] however, Gonzales Construction had obtained certification as a small business controlled by socially and economically disadvantaged individuals. Because of this certification, the prime contractor awarded the subcontract to Gonzales, despite Adarand's lower bid.[130]

Adarand filed suit in U.S. District Court for the District of Colorado, challenging the constitutionality of such race-based presumptions in federal contracts under the equal protection component of the Fifth Amendment.[131] The District Court granted defendant's motion for summary judgment.[132] Applying intermediate scrutiny as adopted in *Fullilove* and *Metro Broadcasting* and holding the presumptions valid under the Fifth Amendment, the District Court noted the presumptions "[were] supported by long standing congressional policies related to achieving the important governmental objective of remedying discrimination."[133]

On appeal, the Tenth Circuit affirmed.[134] Noting "[t]he question of congressional action was not before the Court in *Croson*[,]"[135] a three judge panel reaffirmed the vitality of *Fullilove* and *Metro Broadcasting*'s "intermediate scrutiny standard of review" when Congress exercises its "specific constitutional mandate under section 5 to enforce the Fourteenth Amendment."[136] The Supreme Court subsequently granted certiorari.[137]

B. *Issues*

As a threshold question, the Court had to determine whether Adarand had standing to assert a claim for forward looking relief.[138] The central issue presented in *Adarand* was whether *Metro Broadcasting* properly adopted intermediate scrutiny as the standard of review for federally imposed beneficial racial classifications.[139] If not, the

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128. *Id.* at 2102.
129. *Id.*
130. *Id.* at 2102.
131. Adarand Constructors, Inc. v. Skinner, 790 F. Supp. 240, 241 (D. Colo. 1992).
132. *Id.* at 245.
133. *Id.*
134. Adarand Constructors, Inc. v. Pena, 16 F.3d 1537, 1539 (10th Cir. 1994).
135. *Id.* at 1544.
136. *Id.* at 1544-45.
137. Adarand Constructors, Inc. v. Pena, 115 S. Ct. 41 (1994).
138. *Adarand*, 115 S. Ct. at 2104-05.
139. *Id.* at 2105-06.

Court had to address the question of whether abandoning *Metro Broadcasting* would depart from the principles of stare decisis.[140]

IV. The Majority's Holding

In a 5-4 decision the Court held any court analyzing racial classifications imposed by any governmental actor must review the provisions under the Fifth and Fourteenth Amendment equal protection components using strict scrutiny.[141] In so holding, the Court expressly overruled *Metro Broadcasting*'s use of intermediate scrutiny in reviewing "benign" race-based classifications,[142] and implicitly overruled *Fullilove*'s reliance on a "less rigorous standard" of review for federal race-based classifications.[143]

The majority limited the opinion's scope to explicit race-based classifications, expressly declining to address the standard required when reviewing facially neutral classifications having a disparate impact.[144] The Court also did not extend *Adarand* to apply to Title VII jurisprudence, focusing solely on the constitutional issue.[145] Recognizing that the ruling "alter[ed] the playing field in some important respects,"[146] the Court also refused to rule on the constitutional propriety of the racial presumptions in dispute and instead remanded the case to the District Court.[147] The Court did, however, specifically point to *Fullilove* and *Croson* for guidance in determining whether the provisions were narrowly tailored.[148]

As a threshold issue, the Court first addressed whether Adarand had standing to seek declaratory and injunctive relief against future use of subcontract compensation clauses containing racial presumptions.[149] Analyzing Adarand's claims under the standards enunciated

140. *Id.* at 2114.
141. *Id.* at 2113.
142. *Id.*
143. *Id.* at 2117.
144. *Id.* at 2105.
145. *See id.* at 2105-06.
146. *Id.* at 2118.
147. *Id.* Because the District Court and the Court of Appeals had analyzed the presumptions under intermediate scrutiny, they had not determined whether the regulations furthered a compelling governmental interest or whether the regulations were narrowly tailored as required by *Croson.* Moreover, differences in the regulatory schemes implemented under the SBA and STURAA were not carefully considered at the district court level. *Id.*
148. *See id.*
149. Standing is a judicial term of art indicating that a "party has sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy." Black's Law Dictionary 1405 (6th ed. 1990). The requirement is "derived from the 'case or controversy' requirement of Article III." Oxford Companion, *supra* note 30, at 819. The doctrine consists

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in *Lujan v. Defenders of Wildlife*,[150] the Court determined Adarand had standing to bring the suit seeking forward looking relief.[151]

Next, in determining the proper standard of review for beneficial federal race-based classifications, the majority's analysis of affirmative action jurisprudence through *Croson* emphasized "three general propositions" crucial to the majority holding: skepticism of racial classifications in general, consistency of review of all racial classifications whether "benign" or burdensome, and congruence between Fourteenth and Fifth Amendment equal protection analysis.[152] These three propositions, the majority asserted, compel "the conclusion that any person, of whatever race, has the right to demand that any governmental actor . . . justify any racial classification . . . under the strictest judicial scrutiny."[153]

First, the majority espoused the need for healthy skepticism of all racial classifications. Drawing from cases presenting classifications which benefit and burden racial groups,[154] the majority asserted

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of a two prong inquiry; first, whether there is injury in fact to the plaintiff, and second, whether there is a "showing of actual governmental causation of that injury." *Id.* at 820.

150. 504 U.S. 555 (1992). *Lujan* involved a challenge to administrative regulations interpreting section Seven of the Endangered Species Act, 16 U.S.C. § 1536 *et seq.* The plaintiffs in *Lujan* sought declaratory and injunctive relief. The Court, however, held the plaintiffs had not established injury in fact because they had "allege[d] only an injury at some indefinite future time," *Lujan*, 504 U.S. at 565 n.2, and could not show imminent injury. Similarly, in *Adarand* the plaintiffs sought declaratory and injunctive relief against future use of subcontractor compensation clauses in federal contracts. *Adarand*, 115 S. Ct. at 2104. The Court therefore had to consider whether Adarand's asserted injury was sufficiently "imminent" under the standards enunciated in *Lujan*. *Id.*

151. *Adarand*, 115 S. Ct. at 2105. First, Adarand had properly alleged "an invasion of a legally protected interest which is . . . concrete and particularized," *id.* at 2104 (citing *Lujan*, 504 U.S. at 560), by asserting the clauses denied it equal protection of the laws. To show the harm was particularized, the Court held Adarand needed only to show the presumptions "prevents [sic] (it) from competing on an equal footing," *id.* at 2105 (citing Ass'n. of Gen. Contractors v. City of Jacksonville, 113 S. Ct. 2297, 2304 (1993)), not that it would be the lowest bidder in the future. *Adarand*, 115 S. Ct. at 2105.

Adarand had also adequately shown "imminent injury" from the use of racial presumptions in federal contracts. The Court noted the frequency with which Adarand bids for guardrail subcontracts, combined with the number of federal prime contracts awarded each year in Colorado, ensured Adarand's future participation in federal bidding would be highly likely. *Id.* Further, the Court found Adarand's competition for such contracts would often include certified small disadvantaged businesses. *Id.* These factors combined led the court to believe Adarand would likely be harmed "sometime in the relatively near future," providing adequate risk of harm to confer standing to Adarand. *Id.*

152. *Adarand*, 115 S. Ct. at 2111.

153. *Id.*

154. *Id.* at 2111 (*See, e.g.*, McLaughlin v. Florida, 379 U.S. 184 (1964); Hirabayashi v. United States, 320 U.S. 81 (1943); *Fullilove*, 448 U.S. 488 (1980); *Wygant*, 476 U.S. 267 (1986)).

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"some heightened level of scrutiny"[155] should apply to beneficial racial classifications. In comparing *Metro Broadcasting* to these previous cases, the majority determined *Metro Broadcasting*'s adoption of intermediate scrutiny when reviewing benign racial classifications improperly treated "certain . . . classifications . . . less skeptically than others,"[156] thus undermining the principle of skepticism.

Second, the majority emphasized the need for consistency in the standard of review in all cases in which racial classifications are imposed, regardless of who is burdened or benefitted. Citing *Bakke* and *Croson* for support, the majority held the *Metro Broadcasting* standard inapposite, since "the race of the benefitted group" determined the proper standard of review.[157] Noting that equal protection rights inure in individuals, the Court held *Metro Broadcasting*'s standard of review improper because it allows group classifications based on race, "classification[s] long recognized as 'in most circumstances irrelevant . . . .'"[158]

Finally, the majority underscored prior Court holdings equating equal protection analysis under the Fifth and Fourteenth Amendments.[159] *Metro Broadcasting*'s less stringent analysis of race-based classifications under the Fifth Amendment "squarely rejected" the concept of congruence established by previous Fifth Amendment case law.[160]

The majority finally determined abandoning *Metro Broadcasting* did not improperly depart from the doctrine of stare decisis.[161] Noting the principles of skepticism, consistency, and congruence "stood for an 'embracing' and 'intrinsically soun[d]' understanding of equal protection,"[162] the Court determined *Metro Broadcasting*'s holding was inconsistent with such past understanding of equal protection jurisprudence. The majority reasoned departure from *Metro Broadcasting*'s standard of review would not require an abrupt change in peoples'

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

156. *Id.* at 2112.

157. *Id.* at 2111-12.

158. *Id.* at 2112 (quoting Hirabayashi v. United States, 320 U.S. 81, 100 (1943)).

159. *Id.* at 2111. *See, e.g.*, Bolling v. Sharpe, 347 U.S. 497 (1954); Buckley v. Valeo, 424 U.S. 1 (1976); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975).

160. *Adarand*, 115 S. Ct. at 2112.

161. *Id.* at 2114-17.

162. *Id.* at 2115.

daily conduct.[163] Nor had people come to rely on *Metro Broadcasting*'s standard of review in ordering their lives.[164] These considerations led the majority to conclude the interest in maintaining an "intrinsically sounder doctrine" outweighed the benefits of adhering to precedent.[165]

V. Analysis

Although the majority in *Adarand* rejected the "surface appeal"[166] of analyzing preferential racial classifications under a less stringent standard than strict scrutiny, the question remains whether the appealingly simple solution of strict scrutiny applied across the board can itself survive strict scrutiny. After analyzing equal protection jurisprudence prior to *Croson*, the majority asserted applying strict scrutiny to all racial classifications does not "depart from the fabric of the law . . . ."[167] However, the majority's interpretation of equal protection analysis fails to address important historical and precedential concerns in determining the standard of review for federal beneficial racial classifications.[168] As a result, the majority opinion decontextualizes the Fourteenth Amendment, effectively stripping it of its historical power and purpose.[169]

A. *In Promoting Skepticism, the Court Unnecessarily Assumed Strict Scrutiny to Be the Proper Standard of Review*

The majority asserted its examination of pre-*Croson* equal protection cases clearly suggest skepticism as an overarching theme when analyzing any racial classification and cites to the Japanese internment and relocation cases[170] as well as *Wygant*[171] and *Fullilove*[172] as support for this proposition. As Justice Stevens concedes in his dissent, this

163. *Id.* at 2116.
164. *Id.* at 2115-16. Here, the Court paid lip service to its discussion of stare decisis in Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992).
165. *Adarand*, 115 S. Ct. at 2115.
166. *Id.* at 2112.
167. *Id.* at 2116.
168. *See* discussion *infra* part IV (A-C).
169. "[C]onstitutional test[s] . . . under the equal protection clause should . . . be contextually sensitive to relevant factors of history, culture, and dominant political motivation. The test of dominant political motivation . . . must be interpreted against the background of a history . . . of moral degradation . . . ." David A. J. Richards, Conscience and the Constitution 176 (1993).
170. *See supra* note 31.
171. *Wygant*, 476 U.S. 267.
172. *Fullilove*, 448 U.S. 448.

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section of the majority's analysis is "in principle, a good statement of law and of common sense."[173]

Implementing strict scrutiny when reviewing beneficial racial classifications does not necessarily follow from the majority's need for skeptical review of racial classifications, however. Though the cases relied upon by the majority invoke some level of heightened scrutiny for all racial classifications, only those which involve review of detrimental racial classifications invoke strict scrutiny as the proper standard of review.[174] Moreover, the majority's reliance on pre-*Croson* affirmative action cases to support this finding underscores the Court's inability to agree on a standard of review for beneficial race-based classifications. For example, the majority cited *Wygant v. Jackson Board of Education* to establish this proposition; however, only a plurality in *Wygant* forwarded strict scrutiny as the proper standard of review.[175] Further, the majority cited *Fullilove* as support for imposing strict scrutiny, but neglected to note six justices forwarded something less than strict scrutiny of review in that case.[176] Therefore, though pre-*Croson* cases "always have employed a more stringent standard"[177] than rational basis review for beneficial racial classifications, the heightened scrutiny employed by the court in previous cases do not definitively compel the use of strict scrutiny in the instant case.

B. *In Promoting Consistency, the Court Decontextualized the Fourteenth Amendment and the Concept of Strict Scrutiny*

In *Adarand*, the majority indicated that the use of strict scrutiny was also compelled by its finding in *Croson* that "the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefitted by a particular classification."[178] Analyzing all racial classifications under strict judicial scrutiny, the majority noted, would impose a consistent analysis of all such classifications.[179] Consistent review of all group race classifications would thereby protect the individual's right to equal protection of the law.[180]

173. *Adarand*, 115 S. Ct. at 2120 (Stevens, J., dissenting).
174. *See id.* at 2111 and text accompanying note 159.
175. *See Wygant*, 476 U.S. at 274, 280 and text accompanying notes 74-75.
176. *See Fullilove*, 448 U.S. at 453, 517, 519 and text accompanying notes 65-66.
177. *Wygant*, 476 U.S. at 279.
178. *Adarand*, 115 S. Ct. at 2110 (citing *Croson*, 488 U.S. at 493-94).
179. *Id.* at 2112-13.
180. *Id.* at 2114.

In promoting consistency of review, however, the majority failed to recognize the Court's historical distinction in equal protection jurisprudence between classifications which act as "a No Trespassing sign" and those which symbolize a "welcome mat."[181] By disregarding this distinction, the majority effectively stripped from the equal protection clause and the concept of strict scrutiny their historical and legal power as tools used specifically to protect "those groups in society which have occupied, as a consequence of widespread insistent prejudice against them, the position of perennial losers in the political struggle."[182]

The Fourteenth Amendment's protections and restrictions cannot be separated from the historical and social environment from which they evolved.[183] After a brutal civil war which ripped the country apart, Congress recognized the need to reject the constitutional imprimatur of slavery and racism. In enacting and adopting the Civil War Amendments,[184] Congress and the States attempted to dispel the legal and social distinctions slavery placed on African-Americans as a group.[185] As a result, subsequent legislative[186] and judicial[187] actions

181. *Id.* at 2121 (Stevens, J., dissenting).

182. TRIBE, AMERICAN CONSTITUTIONAL LAW, *supra* note 58, at 1453-54.

183. *See, e.g.*, Henry Steele Commager, *Historical Background of the Fourteenth Amendment, in* THE FOURTEENTH AMENDMENT 14-28 (Bernard Schwartz, ed. 1970); JACOBUS TENBROEK, THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT (1951); *see also* Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753 (1985). For a fascinating article discussing the increased use of historical analysis in Fourteenth Amendment litigation, see Peter Charles Hoffer, *'Blind to History' — The Use of History in Affirmative Action Suits: Another Look at* City of Richmond v. J. A. Croson Co., 23 RUTGERS L.J. 271 (1992).

184. Also known as the Reconstruction Amendments, these three amendments

> are the most important amendments to the U.S. Constitution since the Bill of Rights of 1791. They include the Thirteenth Amendment (ratified in 1865) . . . the Fourteenth Amendment (ratified in 1868) . . . and the Fifteenth Amendment (ratified in 1870) . . . . [They] constitute, as a unit, the ultimate constitutional resolution of the long constitutional crisis that culminated in secession and the American Civil War of 1861-1865.

RICHARDS, *supra* note 169, at 6.

185. Such as the denial of U.S. citizenship to African-Americans in Dred Scott v. Sanford, 60 U.S. 393, 407 (1856), where African-Americans were described as "beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect . . . ."

186. For example, the Freedmen's Bureau was established by Congress in 1865 specifically to help newly freed slaves adapt to post-Civil War society. Act of March 3, 1865, ch. 90, 13 Stat. 507 (1866). Other legislative programs are considered in Schnapper, *supra* note 183, at 754-84.

187. *See* Slaughterhouse Cases, 83 U.S. 36, 71-72 (1872) ("[O]n the most casual examination of the language of these amendments, no one can fail to be impressed with the one pervading purpose found in them all, . . . we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman . . . . Both the language and spirit of these articles are to have their fair and just weight in any question of construction.").

recognized the Fourteenth Amendment's primary purpose as a vehicle for establishing group remedies for recently freed African-Americans. Although Jim Crow laws emerged as an unfortunate product of the backlash against these provisions,[188] the framers of the Fourteenth Amendment understood its provisions to allow remedial group classifications which benefitted African Americans in some circumstances.[189]

Further, the concept of strict scrutiny was similarly spawned in an attempt to distinguish classifications which burden minority groups from other less invidious classifications. In *United States v. Carolene Products Co.*,[190] Justice Stone reserved for later decision an issue which would become the vehicle for the Court's subsequent development of strict scrutiny analysis.[191] According to Stone, "[P]rejudice against discrete and insular minorities may be a special condition . . . which may call for a correspondingly more searching judicial scrutiny"[192] in order to protect such groups from political decisions which unduly burden them. This famous footnote developed into a theory of judicial review which required extremely close examination of "suspect" classifications,[193] generally defined as those classifications which burden a group based on race or ancestry.[194]

In examining governmental classifications which burden racial groups, the Court has historically relied on several factors to determine whether strict scrutiny applies. First, the Court has consistently required a showing of intent to burden the racial group classified; state action which merely affects racial groups in a discriminatory pattern absent a showing of intent to burden those groups will not invoke

188. Jim Crow encompassed both explicit laws restricting African-Americans legally and socially, such as the practice at issue in Plessy v. Ferguson, 163 U.S. 537 (1896), as well as facially neutral laws which adversely impacted African-Americans, such as grandfather clauses, poll taxes, and literacy requirements. BERNARD R. BOXILL, BLACKS AND SOCIAL JUSTICE 49 (1984).

189. *See* Schnapper, *supra* note 183, at 754 ("[R]ace-conscious Reconstruction programs were enacted concurrently with the fourteenth amendment and were supported by the same legislators who favored the constitutional guarantee of equal protection. This history strongly suggests that the framers of the amendment could not have intended it . . . to prohibit affirmative action for blacks or other disadvantaged groups.").

190. 304 U.S. 144 (1938).

191. *See* Lewis F. Powell, Jr., *Carolene Products Revisited*, 82 COLUM. L. REV. 1087-88 (1982).

192. *Carolene Products*, 304 U.S. at 152 n.4.

193. The Court also applies strict scrutiny review to those classifications which obstruct or hinder the exercise of a fundamental right. TRIBE, AMERICAN CONSTITUTIONAL LAW, *supra* note 58, at 1451. For a discussion of fundamental rights theory, *see id.* at 1454-57.

194. *Id.* at 1465-66.

application of strict judicial scrutiny.[195] Second, when a class exhibits immutable characteristics, or a pattern of prejudice against a class exists, the Court has imposed a more rigorous level of scrutiny for classifications negatively affecting such classes.[196] Third, the Court has held that where a classification brands an excluded class as inferior, strict scrutiny is the more proper standard of review.[197]

In determining whether it should apply strict scrutiny to beneficial racial classifications, *Adarand*'s majority completely ignored the first and second factors and improperly focused on the group benefitted in applying the third. First, Adarand clearly could not show any governmental intent to burden anyone. The only evidence of intent Adarand provided involved the SBA's policy to encourage the participation of minorities.[198] Adarand could neither show intent to burden the minorities classified by the race-based presumptions nor discriminatory intent to burden the nonminorities excluded by the classifications, because discriminatory intent focuses on classifications which are made "because of, not merely in spite of"[199] their adverse effect. Further, Adarand did not attempt to show, and the Court did not consider, whether Adarand's immutable non-minority status contributed to the negative impact of the SBA presumptions, or whether Adarand's owners could prove their non-minority status had been the basis of historical prejudice. Finally, the Court did consider the effect of stigmatic harm in *Adarand*; however, unlike prior cases where the Court considered whether stigma attached to the groups excluded from participation or benefits by the classification, the majority instead considered the stigmatic harm to the classified group receiving the benefits.[200] The majority in *Adarand* did not consider whether non-minorities excluded under the SBA presumptions would suffer stigmatic harm, and also ignored prior determinations by the Court

195. *See, e.g.*, Washington v. Davis, 426 U.S. 229, 253 (1976) (Stevens, J., concurring) ("The requirement of purposeful discrimination is a common thread running through the cases [in equal protection jurisprudence]."); McCleskey v. Kemp, 481 U.S. 279, 292 (1987) ("Our analysis begins with the basic principle that a [person] who alleges an equal protection violation has the burden of proving 'the existence of purposeful discrimination.'") (quoting Whitus v. Georgia, 385 U.S. 545, 550 (1967)).

196. *See* Frontiero v. Richardson, 411 U.S. 677, 684-86 (1973); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973) (A "traditional indicia of suspectness" includes class which has been "subjected to . . . a history of purposeful unequal treatment.").

197. *See* Brown v. Board of Educ. of Topeka, 347 U.S. 483, 494 (1954); *see also* United Jewish Org. of Williamsburgh, Inc. v. Carey, 430 U.S. 144, 165 (1977) (use of race "represented no racial slur or stigma with respect to [the excluded] whites . . . .").

198. *See Adarand*, 115 S. Ct. at 2102.

199. Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979).

200. *Adarand*, 115 S. Ct. at 2112-13.

that questions of harm to non-minorities caused by beneficial racial classifications should be left to the legislature.[201]

By applying strict scrutiny to beneficial racial classifications without requiring a showing of any of these factors, the Court inherently redefined discriminatory intent as simply an intent to classify according to race. This definition departs from the historical understanding of discriminatory intent as one to burden, stigmatize, or harm a particular racial group.[202] Moreover, using this definition the majority indirectly applied strict scrutiny review to classifications having only a harmful effect, an analysis generally prohibited by the Court.[203]

Finally, as Justice Stevens noted in dissent, by applying strict scrutiny to beneficial racial classifications at the federal level the *Adarand* majority "risks sacrificing common sense at the altar of formal consistency."[204] Imposing strict scrutiny review for all racial classifications at all levels actually results in inconsistency of review between beneficial race classifications and other beneficial group classifications. For example, the Court imposes intermediate scrutiny when reviewing beneficial gender classifications,[205] and only requires rational basis review of policies which benefit Native Americans[206] and veterans.[207] Ironically, the Court's holding results in inconsistency of analysis of classifications which distribute benefits to different minority groups while imposing the most heavy burden on beneficial classifications to the group most oppressed historically.

201. *See Fullilove*, 448 U.S. at 484-87.
202. *See supra* text accompanying notes 196-199.
203. *See supra* text accompanying note 194.
204. *Adarand*, 115 S. Ct. at 2122 (Stevens, J., dissenting).
205. *See, e.g.*, Johnson v. Transportation Agency, 480 U.S. 616 (1987) (holding Title VII challenges to gender based classifications must withstand intermediate scrutiny). *See also* Concrete Works of Colo., Inc. v. City and County of Denver, 36 F.3d 1513, 1519 (10th Cir. 1994), *cert. denied* 115 S. Ct. 1315 (1995) (holding intermediate scrutiny as the proper standard of review where analyzing gender based state and local affirmative action programs). *But see* Brunet v. City of Columbus, 1 F.3d 390, 403-04 (6th Cir. 1993), *cert. denied*, 114 S. Ct. 1190 (1994) (relying on *Croson* in applying strict scrutiny to beneficial gender based classifications).
206. Morton v. Mancari, 417 U.S. 535, 554 (1974) (applying rational basis review to beneficial hiring policies for members of federally recognized tribes because "Indians [are not] a discrete racial group, but . . . members of quasi-sovereign tribal entities").
207. *See Feeney*, 442 U.S. at 279, 281.

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C. *In Promoting Congruence, the Court Ignored Important Considerations Based on Federalism*

The *Adarand* majority applied strict scrutiny to federal race-based classifications in part to foster congruent analysis of equal protection questions under the Fifth and Fourteenth Amendments.[208] The majority relied primarily on *Bolling v. Sharpe*,[209] a companion case to *Brown v. Board of Educ. of Topeka*,[210] which established the equal protection provision of the Fifth Amendment provided the same rights to schoolchildren in the District of Columbia as the Fourteenth Amendment provided to all other African-American schoolchildren.[211] However, the majority's assertion overlooked "important practical and legal differences between federal and state and local decisionmakers."[212]

First, the majority refused to acknowledge section Five of the Fourteenth Amendment may provide Congress greater latitude in enacting provisions such as those at issue in *Adarand*.[213] Section Five explicitly provides Congress with the power to enforce the Fourteenth Amendment's substantive provisions through appropriate legislation,[214] and the Court has interpreted it to permit Congress to define the substantive guarantees of the Amendment.[215] This expansion of federal power under the Amendment, coupled with section One's restrictions on states, in effect forced "a dramatic change in the balance

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208. *See* notes 40-108 and accompanying text.

209. 347 U.S. 497 (1954).

210. 347 U.S. 483 (1954).

211. *Bolling*, 347 U.S. at 498-500.

212. *Adarand*, 115 S. Ct. at 2123 (Stevens, J., dissenting).

213. *See generally* Matt Pawa, *When the Supreme Court Restricts Constitutional Rights, Can Congress Save Us? An Examination of Section Five of the Fourteenth Amendment*, 141 U. PA. L. REV. 1029 (1993); Rex E. Lee, *Missing Pieces: A Commentary on Choper*, 72 IOWA L. REV. 275, 280 (1987). Lee states:

> Whatever limitations section one of the fourteenth amendment imposes on the remedial ability of state governments to give benefits based on racial classifications, section five of that amendment changes the considerations for evaluating the propriety of action by Congress. Section five represents a deliberate decision on the part of the Constitution makers that Congress should have a greater measure of discretion in determining the extent to which this Nation's preferences and advantages should be distributed. . . .

Rex E. Lee, *Missing Pieces: A Commentary on Choper*, 72 IOWA L. REV. 275, 280 (1987).

214. Section Five provides that "Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5.

215. *See* Katzenbach v. Morgan, 384 U.S. 641, (1966); *see also* EEOC v. Wyoming, 460 U.S. 226, 243 n.18 (1983) ("Congress need [not] recite the words 'section 5' or 'Fourteenth Amendment' or 'equal protection,'" if the Court can discern some legislative purpose or factual predicate that supports the exercise of that power.) *But see* Oregon v. Mitchell, 400 U.S. 112 (1970) (holding that amendment authorizing 18 year-olds to vote in state and local elections was beyond power of Congress to enact).

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between congressional and state power over matters of race."[216] Until *Adarand*, the Court had recognized and incorporated this understanding of section Five in its affirmative action jurisprudence. In both *Fullilove* and *Metro Broadcasting*, a majority of justices pointed to the interaction of section One and section Five in determining the proper standard of review for federal race-based classifications.[217] Even the *Croson* Court noted the significance of section Five in distinguishing *Croson* from *Fullilove*.[218] In *Adarand*, however, the majority simply dismissed the impact of section Five; though "various Members of this Court [had previously] taken different views of the authority § 5 of the Fourteenth Amendment confers upon Congress to deal with the problem of racial discrimination," the majority concluded "[w]e need not . . . address these differences today."[219]

Further, the majority's opinion overlooks the distinction made by the framers of the Constitution between federal and state government in establishing a federalist system. Steeped in the "social reality and governmental theory"[220] prevalent at the time of the framing, Madison and the Founding Fathers understood the dangers inherent in small governmental units and established a strong federal government to protect against those abuses.[221] Slavery, however, remained the weak link in Madison's strong federal system,[222] and the constitutional compromise so carefully struck at the time of the framing gradually unravelled as the new nation grew.[223] The resulting "second

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216. *Croson*, 488 U.S. at 490.

217. *See Fullilove*, 448 U.S. at 487; *Metro Broadcasting*, 497 U.S. 547.

218. *See Croson*, 488 U.S. at 491.

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

220. *Croson*, 488 U.S. at 522 (Kennedy, J., concurring in part and in the judgment).

221. *See* THE FEDERALIST No. 10, at 46-47 (James Madison) (W.J. Ashley ed., 1911). Madison stated:

> The smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plans of oppression. Extend the sphere, and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength, and to act in unison with each other. . . . Hence, it clearly appears, that the advantage which a republic has over a democracy, in controlling the effects of faction, is enjoyed by a large over a small republic[.]

Id.

222. *See* RICHARDS, *supra* note 169, at 25 (noting Madison's struggle with slavery as a balance between slaveowners' property interests and the restrictions on African-American liberty).

223. *See* Commager, *supra* note 183, at 21-22.

revolution"[224] shook federalism to its core, and encouraged Congress to reconsider the Framers' concerns about oppression at the state governmental level. The resulting Civil War Amendments, particularly the Fourteenth Amendment, "was proposed and approved . . . to quiet any constitutional doubt about national power"[225] to eliminate racial discrimination.

Croson and *Metro Broadcasting* together reflected this understanding of the Fourteenth Amendment's purpose. The *Croson* majority specifically recognized the Amendment's role in "chang[ing]. . . the balance between congressional and state power over matters of race[,]"[226] and required state and local governments to meet the most stringent standard when using race to classify for any purpose. *Metro Broadcasting*'s majority, relying on *Croson*'s dicta, further underscored this distinction and required a less stringent standard of review when examining benign racial classifications enacted by the federal government.[227] The *Croson* and *Metro Broadcasting* majorities, as well as the Framers, underscored the important difference between actions undertaken by inherently factional state governments and a more unified federal government.[228] The *Adarand* majority, however, declined to consider this extremely important historical distinction; indeed, as Justice Stevens noted in dissent, the majority offered "not a word of direct explanation for its sudden and enormous departure[.]"[229]

VI. *Adarand*'s Implications and Impact

"Strict scrutiny expresses a mood; it doesn't decide a case."[230] This statement, made shortly after *Adarand* was handed down, pinpoints the two most disturbing concepts underlying the opinion. First, strict scrutiny as enunciated by the Court in *Adarand* certainly does not decide a case. Prior decisions involving federal beneficial racial classifications have not analyzed such provisions using strict scrutiny,[231] and *Adarand* itself gives very little guidance.[232] Even application of *Adarand*'s "strict scrutiny" test to the provisions at issue in

224. *See* Richards, *supra* note 169, at 108.
225. *See id.* at 126-27.
226. *Croson*, 488 U.S. at 490.
227. *Metro Broadcasting*, 497 U.S. at 490.
228. *See Adarand*, 115 S. Ct. at 2123-25 (Stevens, J., dissenting).
229. *Id.* at 2125.
230. Kenneth Karst, *quoted in* Kenneth Jost, *After Adarand*, A.B.A. J., Sept. 1995, at 70, 71.
231. Except *Croson*, 448 U.S. at 490-92 and text accompanying notes 85-88.
232. *See Adarand*, 115 S. Ct. at 2114.

Adarand was delegated to the lower courts.[233] Therefore, questions remain regarding *Adarand*'s impact on affirmative action jurisprudence and the "strict scrutiny" test itself. Further, *Adarand*'s imposition of strict scrutiny in all affirmative action cases also without doubt evokes a mood. Taken together with several of last term's opinions, *Adarand* indicates the Court will no longer hold itself out as a sympathetic forum for advocacy of race issues.

A. Adarand *Will Encourage Protracted Litigation*

In theory, the majority in *Adarand* proposes a simple solution to a complex problem; courts must simply apply strict scrutiny analysis to federal programs challenged in order to determine their validity. The majority's imprimatur, however, answers none of the several questions implicitly raised by the opinion.[234] What constitutes a compelling governmental interest and what types of programs will meet the narrow tailoring requirement of *Adarand* are questions not addressed by the majority; moreover, it is unclear whether the test itself will retain its vigor and create a formidable hurdle which such programs must overcome, or become a watered-down version in such circumstances. A brief overview of existing case law indicates the answers to these questions will not come easily, and only after much examination by lower federal courts.

1. Compelling Governmental Interests

The Court's affirmative action jurisprudence indicates that a governmental program may further two types of compelling governmental interests: remedial[235] and non-remedial.[236] Programs which further remedial interests generally do not fare well with the Court, simply because the Court has imposed such a heavy burden of proof regarding the need for group relief in such circumstances.[237] One crucial question *Adarand* left unanswered is whether the Court will consider post-enactment evidence of discrimination in determining whether remedial interests furthered by a program are compelling.[238]

233. *See id.* at 2106.
234. Jost, *supra* note 230, at 71.
235. These include the interests in remedying past discrimination forwarded in *Croson* and *Paradise*. *See* SCHWARTZ, *supra* note 60, at 367-69.
236. These interests include creating diversity in classrooms and in broadcasting. *See Bakke*, 438 U.S. at 311-12; *Metro Broadcasting*, 497 U.S. at 566.
237. *See Croson*, 448 U.S. at 510. *But see Paradise*, 480 U.S. 167-69.
238. Walter Dellinger, Memorandum to General Counsels, U.S. Dept. of Justice, Office of Legal Counsel, June 28, 1995, p. 2.

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Lower courts considering the issue have consistently allowed the use of post-enactment evidence,[239] reading *Croson*'s requirement that governments "identify [past] discrimination . . . with some specificity"[240] liberally.[241] In order to ensure consistent analysis of remedial governmental interests, the Court will ultimately have to determine whether and for what purposes post-enactment evidence may be used in affirmative action litigation.

Cases indicate forward looking programs which further non-remedial governmental interests in a more inclusive and diversified society may surprisingly be more likely to survive this prong of the strict scrutiny analysis. *Adarand* certainly does not preclude the use of such non-remedial governmental interests, and both *Bakke* and *Metro Broadcasting* specifically indicated non-remedial interests would support the first prong of equal protection analysis.[242] However, in other cases, most notably *Wygant* and *Croson*, the Court specifically rejects diversity as a proper governmental interest.[243] These conflicts may indicate non-remedial interests will only be seriously examined when fundamental Constitutional rights are implicated,[244] or may simply derive from the Court's previous confusion coupled with *Adarand*'s brevity. Whatever the cause of the conflict, the need for resolution will probably eventually prompt the Court to act. Since two of the nine Justices currently sitting have indicated there can never be a governmental interest compelling enough to permit any racial classification,[245] this loophole may close as well.

2. Narrow Tailoring

The *Adarand* majority specifically instructed lower courts to examine *Croson* and *Fullilove* in determining whether the narrow tailoring requirement had been met.[246] Those pre-*Adarand* cases indicate

239. *See* Concrete Works of Colo., Inc. v. City and County of Denver, 36 F.3d 1513, 1521 (10th Cir. 1994); Coral Constr. Co. v. King County, 941 F.2d 910 (9th Cir. 1991); Harrison and Burrowes Bridge Constructors, Inc. v. Cuomo, 981 F.2d 50 (2d Cir. 1992); Contractors Ass'n. v. City of Philadelphia, 6 F.3d 990 (3d Cir. 1993).

240. *Croson*, 488 U.S. at 504.

241. *See Concrete Works*, 36 F.3d at 1521 ("[W]e do not read *Croson*'s evidentiary requirement as foreclosing the consideration of post-enactment evidence.").

242. *Bakke*, 438 U.S. at 311-12; *Metro Broadcasting*, 497 U.S. at 566.

243. *Wygant*, 476 U.S. at 274-76; *Croson*, 448 U.S. at 496-99.

244. Both Justices Brennan and Powell appeared to rely heavily on First Amendment considerations in *Bakke* and *Metro Broadcasting*. *See Bakke*, 438 U.S. at 311-15; *Metro Broadcasting*, 497 U.S. at 566-69.

245. *Adarand*, 115 S. Ct. at 2118-19 (Scalia and Thomas, J.J., concurring in part and in the judgment).

246. *Id.* at 2118.

several factors which will likely be considered in determining whether the classifications are narrowly tailored to further the government's interest. Courts should consider whether there are race-neutral alternatives to the program examined,[247] whether the program is limited in its scope and contains exemption and waiver provisions,[248] whether the program is reviewed periodically and implemented for a limited time period,[249] and whether the program unduly burdens innocent parties.[250] Questions remain regarding how the courts should apply these factors. The Court did not indicate whether a minimal showing must be made on all factors, or whether some factors should be weighted more heavily than others. Nor did the Court consider whether and to what extent the difference between remedial and nonremedial interests forwarded by the government may affect the relevant factors considered in examining the program. Such vagueness will likely result in confusion and conflict in the lower courts, and the Court will again be required to revisit affirmative action.

3. Fatal in Fact?

In *Adarand*, the majority took great pains to attempt "to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'"[251] As a guide to the proper application of strict scrutiny to beneficial racial classifications, this dicta may have more practical effect than the rest of the opinion.[252] Although the use of strict scrutiny when reviewing harmful racial classifications will certainly foreshadow their demise, application of the same standard to beneficial racial classifications at the state and local level has not resulted in across the board invalidity.[253] Given the majority's reluctance to indicate whether section Five of the Fourteenth Amendment has any significant impact on

247. *Croson*, 488 U.S. at 507.

248. *Id.*; *Fullilove*, 448 U.S. at 487.

249. *Fullilove*, 448 U.S. at 490.

250. *Croson*, 488 U.S. at 504.

251. *Adarand*, 115 S. Ct. at 2117 (quoting *Fullilove*, 448 U.S. at 519).

252. *See* Marcia Coyle, *Is A Kinder And Gentler Strict Scrutiny in the Cards?* NAT'L L.J., June 26, 1995, at A16, col. 1.

253. Several state and/or local affirmative action programs have survived strict scrutiny. *See* Cone Corp. v. Hillsborough County, 908 F.2d 908 (11th Cir. 1990) *cert. denied* 498 U.S. 983 (1990); Peightal v. Metropolitan Dade County, 26 F.3d 1545 (11th Cir. 1994); Associated Gen. Contractors v. Coalition for Economic Equity, 950 F.2d 1401 (9th Cir. 1991). *See generally* Janna D. Peters, *In Croson's Wake — The Eleventh Circuit Weakens the Application of Strict Scrutiny to State and Local Affirmative Action Plans*, 20 STETSON L. REV. 1013 (1991); Nicole Duncan, *Croson Revisited; A Legacy of Uncertainty in the Application of Strict Scrutiny*, 26 COLUM. HUM. RTS. L. REV. 679 (1995).

the amount of deference properly accorded Congressional action,[254] the majority's assertion may lead to a less vigorous application of the strict scrutiny analysis where beneficial classifications are challenged.

B. *In* Adarand *and Other Cases This Term the Court Indicated It Will Be a Less Sympathetic Forum for Race Issues*

Though the majority asserted *Adarand*'s holding will not bar government from acting to erase the "unfortunate reality"[255] of racial discrimination in American society, the Court's track record throughout the 1995-96 term indicates the palliative nature of that statement. Throughout the term, the Court rode roughshod over several remedial structures the Warren and Burger Courts implemented to neutralize the effects of racial discrimination.[256] *Adarand* and *Croson* will at least limit the future implementation of affirmative action programs; at worst, they signal the demise of most existing programs.[257] *Missouri v. Jenkins*[258] further limited the power of federal courts to construct and implement desegregation plans, and in *Miller v. Johnson*[259] the Court invalidated Georgia's Congressional redistricting plans. The "unhappy persistence"[260] of racism in substantially all facets of American life obviously carried little force with last term's Court. Instead, it simply turned a color blind eye to the reality of race's impact.[261]

VII. CONCLUSION

Theoretically, *Adarand Constructors, Inc. v. Pena* simply aligned the standard of review imposed on federal, state and local affirmative action programs. Promoting the idyllic vision of a color blind America, the Court championed the values of skepticism, consistency and congruence in affirmative action jurisprudence. However, in its

254. *Adarand*, 115 S. Ct. at 2114.
255. *Id.* at 2117.
256. SCHWARTZ, *supra* note 60, at 276-78, 322-25.
257. *See* discussion *supra* part VI (A).
258. 115 S. Ct. 2038 (1995).
259. 115 S. Ct. 2475 (1995).
260. *Adarand*, 115 S. Ct. at 2117.
261. *See* Adam Winkler, *Sounds of Silence: The Supreme Court and Affirmative Action*, 28 LOY. L.A. L. REV. 923, 925 (1995) ("The Court presumes the institutions and institutional practices it defers to are neutral, natural, and necessary, failing to recognize how those structures are themselves the product of a contingent social context. . . . Consequently, the Court does not notice how the general attitudes of prejudice and racism in society infect and infiltrate the very institutions to which the Court defers.").

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search for consistent answers, the Court overlooked the changing nature of the question. Easy law is rarely good law, particularly when divorced from the society in which it functions, and in *Adarand* the Court failed to recognize the important role of history and society in shaping American race relations. In doing so, the Court raised more questions than it answered, and ultimately will have to grapple with the issue again in order to clarify the proper application of strict scrutiny to such programs. Ironically, by ignoring history in *Adarand*, the Supreme Court is destined to repeat it.

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