Duquesne Law Review

Volume 34 | Number 2 Article 9

1996

Constitutional Law - Fifth Amendment - Fourteenth Amendment - Equal Protection - Standard of Review - Racial Classifications

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CONSTITUTIONAL LAW—FIFTH AMENDMENT—FOURTEENTH AMENDMENT—EQUAL PROTECTION—STANDARD OF REVIEW—RACIAL CLASSIFICATIONS—The United States Supreme Court held that racial classifications imposed by either federal, state or local governments must be analyzed by a reviewing court using a strict scrutiny standard.

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

In 1989 Mountain Gravel and Construction Company ("Mountain Gravel") was awarded the prime contract for a highway construction project in Colorado.[1] The award was given by the Central Federal Lands Highway Division, a unit of the United States Department of Transportation.[2] Subsequently, Mountain Gravel solicited bids from subcontractors for the guardrail portion of the construction project.[3] Both Adarand Constructors, Inc. ("Adarand") and Gonzales Construction Company ("Gonzales") submitted bids.[4] Although Adarand submitted the lowest bid, Mountain Gravel awarded the guardrail subcontract to Gonzales.[5] The prime contract awarded to Mountain Gravel contained a clause that stated that if Mountain Gravel hired certified small businesses controlled by "socially and economically disadvantaged individuals," it would receive additional compensation.[6] Gonzales was a certified

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1. Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2102 (1995). On September 15, 1989, Mountain Gravel was awarded the prime contract for the West Dolores Project located in the San Juan National Forest. Brief for Petitioner at 8, *Adarand,* 115 S. Ct. 2097 (1995) (No. 93-1841). The highway project was located approximately 400 miles from Denver in Montezuma and Dolores Counties. *Id.*

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

3. *Id.*

4. *Id.* Adarand is a highway construction company based in Colorado Springs, Colorado that specializes in guardrail work. *Id.*

5. *Id.* Mountain Gravel's chief estimator submitted an affidavit stating that Adarand had submitted the lowest bid. *Id.*

6. *Id.* at 2103-04. The clause in Mountain Gravel's contract stated:

> Subcontracting. This subsection is supplemented to include a Disadvantaged Business Enterprise (DBE) Development and Subcontracting Provision as follows; Monetary compensation is offered for awarding subcontracts to small business concerns . . . . A small business concern will be considered a DBE after it has been certified as such by the U.S. Small Business Administration

disadvantaged business enterprise ("DBE") and Adarand was not.[7]

In August of 1990, Adarand filed suit in the United States District Court for the District of Colorado seeking declaratory[8] and injunctive relief.[9] Adarand claimed that the federal program that induced prime contractors such as Mountain Gravel to hire subcontractors based on race rather than the amount of a bid was unconstitutional.[10] Adarand argued that the incentive clause in the contract violated the Fifth and Fourteenth Amendments of the United States Constitution.[11] On April 24, 1991, cross motions for summary judgment were

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> or any State Highway Agency . . . . The Contractor will be paid an amount computed as follows: 1. If a subcontract is awarded to one DBE, 10 percent of the final amount of the approved DBE subcontract, not to exceed 1.5 percent of the original contract amount. 2. If subcontracts are awarded to two or more DBE's, 10 percent of the final amount of the approved DBE subcontracts, not to exceed 2 percent of the original contract amount.

Id.

7. *Adarand*, 115 S. Ct. at 2102-03. The Small Business Act of 1958 states in pertinent part:

> It is the policy of the United States that small business concerns, and small business concerns owned and controlled by socially and economically disadvantaged individuals, shall have the maximum practicable opportunity to participate in the performance of contracts let by any Federal agency . . . The term small business concern owned and controlled by socially and economically disadvantaged individuals shall mean a business concern—(i) which is at least 51 per centum owned by one or more socially and economically disadvantaged individuals . . . . [T]he contractor shall presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minority individuals.

Small Business Act of 1958, Pub. L. 85-536, § 2[8], 72 Stat. 384, 389 (codified as amended at 15 U.S.C. § 637 (1988 & Supp. V 1993)).

8. Declaratory relief or judgment is defined as a remedy for which a determination is made by a court as to the legal rights of the litigant(s). BLACK'S LAW DICTIONARY 409 (6th ed. 1990).

9. Adarand Constructors, Inc. v. Skinner, 790 F. Supp. 240 (D. Colo. 1992), *aff'd sub nom.* Adarand Constructors, Inc. v. Pena, 16 F.3d 1537 (10th Cir. 1994), *vacated,* 115 S. Ct. 2097 (1995). Injunctive relief is generally defined as a judicial process where the court directs or orders a person to do something or refrain from doing something either on a permanent basis or until the litigation is resolved. BLACK'S LAW DICTIONARY 784 (6th ed. 1990).

10. *Adarand*, 790 F. Supp. at 243. Adarand claimed that the federal program encouraged prime contractors to hire DBE's and that the presumption that a subcontractor that was minority controlled qualified as a DBE denied Adarand equal protection under the law. *Id.*

11. *Id.* The Fifth Amendment provides in part that "no person . . . [shall] be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V. The Fourteenth Amendment provides in part that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV.

filed.[12] The district court issued an opinion and order denying Adarand's motion for summary judgment and granting the Government's motion for summary judgment.[13] Adarand filed an appeal with the United States Court of Appeals for the Tenth Circuit on August 5, 1992.[14] The court of appeals affirmed the decision of the district court, holding that the district court did not err in relying on past decisions of the United States Supreme Court when it applied an "intermediate scrutiny" standard[15] as the standard of review.[16] Adarand subsequently filed a petition for writ of certiorari[17] and certiorari was granted by the United States Supreme Court.[18] The issue before the Court was whether all racial classifications imposed by either a federal, state or local government should be analyzed by a reviewing court under a strict scrutiny or intermediate scrutiny standard.[19]

The Supreme Court began its analysis by considering whether Adarand had standing to sue.[20] The Court reasoned that for Adarand to have standing to sue, it had to demonstrate that the future use of subcontractor compensation clauses would constitute an invasion of a legally protected interest which is "concrete, particularized and actual or imminent."[21] The Court

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12. *Adarand*, 790 F. Supp. at 241. Summary judgment is a procedural device available when there is no genuine issue of material fact and therefore the moving party is entitled to prevail as a matter of law. BLACK'S LAW DICTIONARY 1435 (6th ed. 1990).

13. *Adarand*, 790 F. Supp. at 245.

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

15. *Adarand*, 16 F.3d at 1545 (citing Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 694 (1990), *overruled by* Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995)). In order for racial classifications to pass the intermediate scrutiny standard of review, the classifications must serve important governmental objectives and be substantially related to achievement of those objectives. *Id.*

16. *Id.* at 1544.

17. *Adarand*, 115 S. Ct. at 2112. Certiorari is defined as a writ which is used to require a lower court to produce a certified record of a particular case tried therein. BLACK'S LAW DICTIONARY 228 (6th ed. 1990). The writ is issued granting certiorari so that the court issuing the writ may inspect the proceedings and determine whether there have been any irregularities. *Id.*

18. Adarand Constructors, Inc. v. Pena, 115 S. Ct. 41 (1994) (granting certiorari).

19. *Adarand*, 115 S. Ct. at 2112. In order for a racial classification to pass the strict scrutiny standard of review, the classification must be a narrowly tailored measure or program that furthers compelling governmental interests. *Id.* at 2113. Justice O'Connor was joined in the majority opinion by Chief Justice Rehnquist and Justices Scalia, Kennedy and Thomas. *Id.* at 2111.

20. *Id.* at 2104. Standing to sue is defined as: "No person is entitled to assail the constitutionality of an ordinance or statute except as he himself is adversely affected by it." BLACK'S LAW DICTIONARY 1405 (6th ed. 1990).

21. *Adarand*, 115 S. Ct. at 2104 (citing Lujan v. Defenders of Wildlife, 504

applied these requirements and found that Adarand's legally protected interest was that the use of subcontractor compensation clauses by the government might deny Adarand equal protection under the law.[22] The Court asserted that by using racial classifications in the bid award process, the interest was particularized to Adarand.[23] The Court found that statistically, Adarand was likely to bid on contracts containing subcontractor compensation clauses on a yearly basis.[24] Thus, the Court concluded that injury to Adarand was imminent and that Adarand had standing to sue.[25]

The Court then focused on the level of scrutiny to be used by a reviewing court when determining whether racial classifications imposed by a federal, state or local government are constitutional.[26] Justice O'Connor, writing for the majority, explained that based upon past decisions of the Court, "skepticism," "consistency," and "congruence" are three general propositions that have been established with respect to governmentally imposed racial classifications.[27] First, the Court asserted that any racial classification imposed by the government for the purpose of treating persons differently, whether it be a preference or a contention, should be viewed by courts with "skepticism."[28] Next, the Court stated that the standard of review for race-based classifications must be "consistent" with the protections afforded to all individuals under the Equal Protection Component of the Fifth Amendment.[29] Finally, the Court reasoned that there must be "congruence" when analyzing equal protection, whether it be under the Fifth or Fourteenth Amendments.[30]

U.S. 555, 560 (1992)).

22. *Id.*

23. *Id.* at 2104-05. The Court explained that the type of injury alleged by Adarand was that a discriminatory classification prevented Adarand from competing on equal footing for subcontracts because of Adarand's non-minority status. *Id.* at 2105.

24. *Id.* at 2105.

25. *Id.* The Court explained that an imminent injury is an injury that is not so speculative that it may never occur. *Id.* An imminent injury, the Court continued, is an injury that has a certainty that it will in fact occur in the near future. *Id.*

26. *Adarand,* 115 S. Ct. at 2105-11.

27. *Id.* at 2111.

28. *Id.*

29. *Id.* The Court reasoned that all racial classifications must be viewed with consistency under the Fifth Amendment regardless of those burdened or benefitted by the classification. *Id.*

30. *Id.* at 2113 (citing Buckley v. Valeo, 424 U.S. 1, 93 (1976)). The Court noted that equal protection analysis under the Fifth Amendment is the same as that under the Fourteenth Amendment. *Id.* at 2112-13.

The Court further explained that any past decisions rejecting or undermining any of the three propositions—skepticism, consistency or congruence—should be overruled.[31] The Court held that the three propositions taken together logically lead to the conclusion that an individual, regardless of race, has a right to demand that any government actor justify racial classifications which subject the individual to unequal treatment under the strictest judicial scrutiny.[32] The Court concluded that a racial classification would withstand strict scrutiny only when the classification serves a compelling governmental interest and is narrowly tailored to achieve that interest.[33] The Court vacated the judgment of the court of appeals and remanded the case to the district court for further proceedings consistent with its opinion.[34]

In a concurring opinion, Justice Scalia noted that there could never be a compelling governmental interest for racial discrimination even if the government was trying to right past wrongs.[35] Justice Scalia agreed that persons who have suffered the effects of racial discrimination should be compensated in some manner.[36] However, Justice Scalia argued that "under our Constitution there can be no such thing as a creditor or a debtor race."[37] Justice Scalia concluded that the program in question, however unlikely to survive under strict scrutiny, was properly

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31. *Adarand,* 115 S. Ct. at 2113. *See, e.g.,* Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990) (holding that FCC minority ownership policies are constitutional under an intermediate scrutiny standard), *overruled by* Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995).

32. *Adarand,* 115 S. Ct. at 2111. The Court supported its conclusion by quoting Justice Powell in Board of Regents of Univ. of Cal. v. Bakke:

> If it is the individual who is entitled to judicial protection against classifications based upon his racial or ethnic background because such distinctions impinge upon his personal rights, rather that the individual only because of his membership in a particular group, then the constitutional standards may be applied consistently. Political judgments regarding the necessity for the particular classification may be weighed in the constitutional balance, but the standard of justification will remain constant. This is as it should be, since those political judgments are the product of rough compromise struck by contending groups within the democratic process. When they touch upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling government interest. The Constitution guarantees that right to every person regardless of his background.

Id. (citing Board of Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 299 (1978)).

33. *Id.* at 2113.

34. *Id.* at 2118.

35. *Id.* (Scalia, J., concurring).

36. *Id.*

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

remanded.[38]

In a separate concurring opinion, Justice Thomas expressed his agreement with the Court's holding that strict scrutiny must be applied to all racial classifications imposed by federal, state and local governments.[39] Furthermore, Justice Thomas asserted that racial classifications by governments raise a constitutional question.[40] In addition, Justice Thomas reasoned that when racial classification programs have been imposed, minorities suffer by being labeled inferior, and develop dependencies or attitudes that they should be entitled to preferences.[41] Thus, Justice Thomas concluded that government sponsored racial discrimination is just as "noxious as discrimination inspired by malicious prejudice."[42] Finally, Justice Thomas reasoned that governments cannot make us equal, but rather "can only recognize, respect, and protect us as equal before the law."[43]

In a dissenting opinion, Justice Stevens contended that the majority was correct in its assertion that all cases involving racial classification should be viewed with "skepticism."[44] However, Justice Stevens stated that the majority's propositions of "consistency" and "congruence" are propositions with which he cannot agree.[45] The majority's concept of "consistency," Justice Stevens argued, would ignore the distinction between a "No Trespassing" sign and a "Welcome" mat.[46] Justice Stevens explained that "congruence" should not be the policy of the Court when reviewing federal race classification programs.[47]

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38. *Id.*

39. *Id.* at 2119 (Thomas, J., concurring).

40. *Id.* Justice Thomas stated that racial classifications by the government undermine the moral basis of the equal protection principle. *Id.*

41. *Id.*

42. *Adarand,* 115 S. Ct. at 2119.

43. *Id.*

44. *Id.* at 2120 (Stevens, J., dissenting). Justice Stevens was joined by Justice Ginsburg. *Id.*

45. *Id.*

46. *Id.* at 2121. The dissent further argued that "consistency" is an abstract concept, stating that "there is no moral or constitutional equivalence between a policy that is designed to perpetuate a caste system and one that seeks to eradicate racial subordination." *Id.* at 2120.

47. *Adarand,* 115 S. Ct. at 2131. The dissent stated that deference should be given to the federal legislature because it is a larger and more diversified body than the legislatures of the states. *Id.* at 2124. To further explain his argument Justice Stevens quoted James Madison:

> 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

Furthermore, Justice Stevens criticized the majority for ignoring precedent.[48] In his conclusion, Justice Stevens asserted that the judgment of the court of appeals should have been affirmed.[49]

In a dissenting opinion authored by Justice Souter, the majority was criticized for entertaining the question of strict scrutiny.[50] Justice Souter contended that the proper question in the case was whether the federal agency involved had made specific findings of racial discrimination that warranted a race-based remedial program.[51] Consequently, Justice Souter reasoned that the majority's opinion did not change the standard by which racial classifications are reviewed and that the standard of review was and should remain strict scrutiny.[52]

One of the first cases in which the Supreme Court applied strict scrutiny as the standard of review for racial classifications imposed by the federal government is *Korematsu v. United States*.[53] In *Korematsu,* the issue before the Court was whether Civilian Exclusion Order No. 34, which banned all persons of Japanese ancestry from a prescribed area of the Pacific Coast, was constitutional under the Equal Protection Component of the Fifth Amendment.[54] The Court held that Korematsu, a Japanese-American, could be treated differently than non-

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plan 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.

Id. (citing THE FEDERALIST NO. 10, at 82-84 (Clinton Rossiter ed., 1961)).

48. *Id.* at 2126-30. *See* Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990) (holding that FCC minority ownership policies are constitutional under intermediate scrutiny), *overruled by* Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995); Fullilove v. Klutznick, 448 U.S. 448 (1980) (holding that the Federal Minority Business Enterprise statute is constitutional).

49. *Adarand*, 115 S. Ct. at 2131.

50. *Id.* (Souter, J. dissenting). Justice Souter was joined by Justices Ginsburg and Breyer. *Id.*

51. *Id.* (citing *Adarand,* 16 F.3d at 1544).

52. *Id.* at 2133. Justice Souter argued that strict scrutiny should be applied to all race-based classifications. *Id.* However, Justice Souter reasoned that there have been and will continue to be governmental race-based classifications that are narrowly tailored and serve compelling governmental interests and thus will pass the strict scrutiny test. *Id.* at 2132-34.

53. 323 U.S. 214 (1944). *See also* Hirabayashi v. United States, 320 U.S. 81 (1943) (holding that a curfew of Japanese-Americans was constitutional due to the pressing necessity of national safety).

54. *Korematsu,* 323 U.S. at 216-21. Exclusion Order No. 34 was one of many orders authorized by Congress issued after the United States declared war on Japan. *Id.* The order directed all persons of Japanese ancestry to leave the area, report to and remain at a designated assembly center and proceed to a relocation center as directed by military authorities. *Id.* at 221.

Japanese-American citizens due to the pressing public necessity of a wartime situation.[55] The Court reasoned that Congress had authority under the War Powers Clause of the Constitution to determine who should and should not remain in an area threatened by hostile forces.[56] In the beginning of its analysis, the Court noted that racial classifications restricting a single racial group are "immediately suspect" and therefore courts must apply a strict scrutiny standard.[57] However, the Court explained that not all classifications are unconstitutional.[58] Therefore, the Court concluded that exclusion of persons of Japanese ancestry during wartime is constitutional because of the pressing necessity of national safety and security.[59]

In *Bolling v. Sharpe*,[60] the Supreme Court considered whether racial segregation in public schools in the District of Columbia violated the Due Process Clause of the Fifth Amendment.[61] The Court held that segregation of African-American children in public education is not reasonably related to any governmental objective and violates the Due Process Clause of the Fifth Amendment.[62] The Court opined that it would be unthinkable that the same Constitution that prohibits states from maintaining segregated schools would impose a lesser duty on the federal government.[63] Chief Justice Warren, delivering the opinion of the Court, reasoned that racial classifications must be scrutinized with care because they are fundamentally suspect.[64] The Court explained that the Constitution prohibits discrimination by federal and state governments against any citizen because of race.[65] Therefore,

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55. *Id.* at 216. The aim of Exclusion Order No. 34 was to prevent espionage and sabotage. *Id.* at 216-17.

56. *Id.* at 218. Approximately five thousand Japanese-Americans refused to swear allegiance to the United States and several thousand requested return to Japan. *Id.* at 219. The Constitution of the United States expressly gives Congress the power "to declare war . . . and make rules concerning captures on land and water." U.S. CONST. art. I, § 9, cl. 11.

57. *Korematsu*, 323 U.S. at 216.

58. *Id.* The Court explained that in times of pressing public necessity, racial restrictions may be imposed due to national safety. *Id.*

59. *Id.*

60. 347 U.S. 497 (1954).

61. *Bolling*, 347 U.S. at 498. A class action suit was brought by minor African-American plaintiffs challenging the constitutionality of segregation in the District of Columbia public schools. *Id.* The plaintiffs had been refused admission to a public school in the District of Columbia because of their race. *Id.* The District of Columbia is governed by the Fifth Amendment, rather than the Fourteenth Amendment, which governs the states. *Id.* at 499.

62. *Id.* at 500.

63. *Id.*

64. *Id.* at 499.

65. *Id.* (citing Gibson v. Mississippi, 162 U.S. 565 (1896) and Steele v. Louis-

the Court concluded, in order for the federal government to restrict the conduct of an individual because of race, it must show a "proper governmental objective."[66] The Court found that segregation in public schools does not satisfy any proper or reasonable governmental objective and is therefore unconstitutional.[67]

In *Loving v. Virginia*,[68] the issue before the Court was whether a state law which prevented marriages between persons solely because of race violated the Equal Protection Clause of the Fourteenth Amendment.[69] In *Loving*, a Caucasian man and an African-American woman married in violation of a Virginia antimiscegenation statute.[70] The Court held that the statute was unconstitutional because it deprived persons of their constitutional right to due process and equal protection under the Fourteenth Amendment.[71] The Court reasoned that the Equal Protection Clause requires that racial classifications be analyzed using a strict scrutiny standard.[72] Therefore, the Court concluded that in order for a racial classification to be constitutional, it must be established that some proper state goal is to be achieved notwithstanding the racial

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ville & N. R.R., 323 U.S. 192 (1944)).

66. *Bolling*, 347 U.S. at 499-500. The Court explained that segregation in public education imposes a burden on African-American children—an arbitrary deprivation of their liberty—and thus a violation of the Due Process Clause of the Fifth Amendment. *Id.* at 500.

67. *Id.* at 500.

68. 388 U.S. 1 (1967).

69. *Loving*, 388 U.S. at 4. The Lovings were convicted of violating § 20-58 of the Virginia Code, which stated:

> *Leaving State to evade law.* If any white person and colored person shall go out of this State, for the purpose of being married, and with the intention of returning, and be married out of it, and afterwards return to reside in it, cohabiting as man and wife, they shall be punished as provided in § 20-59, and the marriage shall be governed by the same law as if it had been solemnized in this State. The fact of their cohabitation here as man and wife shall be evidence of their marriage.

Id.

Section 20-59 of the Virginia Code provided: "*Punishment for marriage.* If any white person intermarry with a colored person, or any colored person intermarry with a white person, he shall be guilty of a felony and shall be punished by confinement in the penitentiary for not less than one nor more than five years." *Id.*

70. *Id.* The couple travelled to the District of Columbia and were married. *Id.* at 3. The couple then returned to Virginia and lived as husband and wife. *Id.* A few months after returning to Virginia the couple was indicted for violation of the Virginia antimiscegenation statute. *Id.* at 2-3. Miscegenation is defined as a mixture of races. BLACK'S LAW DICTIONARY 999 (6th ed. 1990).

71. *Loving*, 388 U.S. at 12. The Court stated: "Marriage is one of the basic civil rights of man, fundamental to our very existence and survival." *Id.* (citing Skinner v. Oklahoma, 316 U.S. 535 (1942)).

72. *Id.* at 11 (citing Korematsu v. United States, 323 U.S. 216 (1944)).

discrimination.[73]

In *Board of Regents of the University of California v. Bakke*,[74] the Court was confronted with the issue of whether a special minority admissions program at the University of California-Davis Medical School (the "Davis Program") violated Title VI of the Civil Rights Act of 1964 and the Equal Protection Clause of the Fourteenth Amendment.[75] The Court held that the Davis Program violated Title VI of the Civil Rights Act of 1964 and the Equal Protection Clause of the Fourteenth Amendment and ordered the University of California-Davis (the "University") to admit Bakke.[76] The Court, applying strict scrutiny as the judicial standard of review, concluded that racial or ethnic classifications of any sort are inherently suspect.[77] In a plurality opinion, Justice Powell explained that the Davis Program conflicted with the Equal Protection Clause of the Fourteenth Amendment because Bakke was not allowed to compete for any of the sixteen seats reserved for minorities due to his race.[78] Furthermore, Justice Powell asserted that the University had not established that the Davis Program was necessary to accomplish a "compelling state interest" and therefore could not survive the strict scrutiny standard.[79]

In *Fullilove v. Klutznick*,[80] the Court addressed the issue of whether a provision of a congressional statute, which requires at least ten percent of federal public funds granted for local public works projects be used to procure services or supplies from

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73. *Id.* The Court found that Virginia had no proper goal that justified the state law. *Id.* at 11-12.

74. 438 U.S. 265 (1978).

75. *Bakke*, 438 U.S. at 282-300. Title VI of the Civil Rights Act of 1964, Pub. L. No. 88-352, § 601, 78 Stat. 241, 252 (current version at 42 U.S.C. § 2000d (1988)) provides as follows: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under a program or activity receiving federal financial assistance." *Id.* at 284.

76. *Id.* at 320. Alan Bakke, a Caucasian applicant, had been rejected twice by the University. *Id.* at 276-77.

77. *Id.* at 305.

78. *Id.* at 298. Under the Davis Program, 84 seats were open for competition by all applicants, minority or non-minority. *Id.* at 289. The remaining 16 seats were reserved for minority applicants only. *Id.*

79. *Id.* at 309-10. The University failed to show that by its own actions it had discriminated against an actual victim in the past. *Id.* at 307-10. Therefore, it was not remedying its own prior discriminatory practice. *Id.* at 317-18. Justice Powell reasoned that the Davis Program was too broad to pass constitutional muster and, therefore, Bakke had been wrongfully denied admission. *Id.* at 319-20. Justice Powell asserted that Bakke could not be burdened with redressing group grievances (discrimination) that were no fault of his own. *Id.* at 298.

80. 448 U.S. 448 (1980).

minority business enterprises ("MBE's"), is constitutional under the Fifth Amendment.[81] The Court held that the statute is constitutional.[82] Chief Justice Burger, in a plurality opinion of the Court, reasoned that the MBE provision could be constitutional under either the strict scrutiny standard or the intermediate scrutiny standard.[83] However, the Court explained that deference should be given to Congress when legislation is enacted to remedy past discrimination, and a reviewing court should apply a more lenient standard of review other than strict scrutiny.[84] Finally, the Court maintained that the MBE provision passed constitutional muster because it is narrowly tailored, limited in scope and was enacted as a strictly remedial measure.[85]

In *Wygant v. Jackson Board of Education,*[86] the Supreme Court considered whether a school board's adoption of race-based preferences for determination of teacher layoffs violated the Fourteenth Amendment.[87] The Court, in a plurality opinion,

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81. *Fullilove,* 448 U.S. at 453. The petitioners in *Fullilove* were several associations of construction contractors and subcontractors who alleged that they were being injured economically by the enforcement of the ten percent MBE requirement. *Id.* at 455. The Minority Business Enterprise provision of the Public Works Employment Act of 1977 provides:

> Except to the extent that the Secretary determines otherwise, no grant shall be made under this Act for any local public works project unless the applicant gives satisfactory assurance to the Secretary that at least 10 per centum of the amount of each grant shall be expended for minority business enterprises.

Public Works Employment Act of 1977, Pub. L. 95-28, 91 Stat. 116 (codified at 42 U.S.C. § 6705(f)(2) (1988)).

82. *Fullilove,* 448 U.S. at 519.

83. *Id.* at 492. The Chief Justice explained that the Court did not adopt either standard explicitly but instead established the following test: "Any preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees." *Id.* at 491.

84. *Id.* at 519. The Court explained: "[W]e accorded great weight to the decisions of Congress" even though the legislation implicated fundamental constitutional rights guaranteed by the First Amendment. *Id.* at 519-20 (citing Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973)). The rule is not different when a congressional program raises equal protection concerns. *Id.*

85. *Id.* at 489.

86. 476 U.S. 267 (1986).

87. *Wygant,* 476 U.S. at 269-73. In 1972, the Jackson Board of Education (the "Board") added a layoff provision to the collective bargaining agreement it had with its teachers. *Id.* at 270. The Board reasoned that the provision was "necessary because of the racial tension in the community which had extended to its schools." *Id.* The layoff provision stated:

> In the event that it becomes necessary to reduce the number of teachers through layoff from employment by the Board, teachers with the most seniority in the district shall be retained, except that at no time will there be a greater percentage of minority personnel laid off than the current percentage of minority personnel employed at the time of layoff. In no event will the number given notice of possible layoff be greater than the number of positions

held that preferential protection from layoffs because of race violates the Equal Protection Clause of the Fourteenth Amendment.[88] The Court explained that in order for minorities to be advantaged by racial classifications, a state must demonstrate a compelling purpose and the purpose must be narrowly tailored to achieve its goal.[89] Additionally, the Court reasoned that societal discrimination alone is not enough to justify racial classifications.[90] Rather, the Court explained that there must be some showing of prior discrimination by the governmental unit.[91] Thus, the Court employed the strict scrutiny standard and held that the layoff clause violated the Fourteenth Amendment.[92]

In *City of Richmond v. J.A. Croson Co.*,[93] the Court addressed the issue of whether a city's requirement that prime contractors subcontract at least thirty percent of the contract dollar amount to MBE's violated the Equal Protection Clause of the Fourteenth Amendment.[94] The Court, applying the strict scrutiny standard, held that the City of Richmond's minority preference program failed to make specific findings as to past discrimination and was therefore unconstitutional.[95] The Court

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to be eliminated. Each teacher so affected will be called back in reverse order for positions for which he is certified maintaining the above minority balance.

Id. at 270-71. Caucasian school teachers challenged the constitutionality of the layoff provision in the contract, alleging that it gave preferential protection to minority employees. *Id.* at 271.

88. *Id.* at 284.

89. *Id.* at 280. The layoff provision could not be justified by the Board's desire to provide minority role models for students. *Id.* at 276.

90. *Id.* at 276. The Court opined that without particularized findings a court could allow race-based remedies that are "ageless in their reach into the past and timeless in their ability to affect the future." *Id.*

91. *Id.* at 277.

92. *Wygant*, 476 U.S. at 283-84. The Court, in support of its judgment, asserted that: "Racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification." *Id.* at 280 (citing Fullilove v. Klutznick, 448 U.S. 448, 537 (1980) (Stevens, J., dissenting)).

93. 488 U.S. 469 (1989).

94. *Croson*, 488 U.S. at 477-78. A Caucasian prime contractor claimed that the MBE program violated its right to equal protection under the law. *Id.* at 485. The contractor had submitted the only bid to the City of Richmond for the installation of plumbing fixtures in the city jail. *Id.* at 482. The contractor was unable to obtain an MBE subcontractor for the bid and requested that the City waive its 30 percent set aside requirement. *Id.* The City refused and the contractor brought suit. *Id.* at 483. The Richmond City Code, § 12-156(a) (1985), defined an MBE as "a business at least fifty-one percent of which is owned and controlled . . . by minority group members. Minority group members . . . [are] citizens of the United States who are Blacks, Spanish speaking, Orientals, Indians, Eskimos, or Aleuts." *Id.* at 478.

95. *Id.* at 499-500. The Court maintained that the standard of review under the Equal Protection Clause does not depend on whether a race is burdened or benefitted by a racial classification and that strict scrutiny must be applied to state or

reasoned that the City of Richmond failed to consider the use of race-neutral means to increase MBE participation in city contracts and the program was not narrowly tailored to meet any specific goal.[96] The Court concluded by noting that the City of Richmond had not demonstrated "a strong basis in evidence" for its decision that race-based action was necessary.[97]

In *Metro Broadcasting, Inc. v. FCC*,[98] the Court addressed the issue of whether Federal Communications Commission (the "FCC") minority ownership policies violate the Fifth Amendment.[99] The majority of the Court, applying an intermediate scrutiny standard, held that FCC minority ownership policies are constitutional if they serve the important governmental purpose of attaining broadcast diversity and are significantly related to achievement of that goal.[100] The Court explained that deference should be given to Congress' judgment in light of its institutional competence as a national legislature.[101] Additionally, the Court reasoned that the FCC

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local public minority preference programs. *Id.* at 494 (citing Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 279-80 (1986) (O'Connor, J., concurring in part and concurring in the judgment)).

96. *Id.* at 507-08.

97. *Id.* at 510. The Court stated that: "[U]nder Richmond's scheme, a successful Black, Hispanic, or Oriental entrepreneur from anywhere in the country enjoys an absolute preference over other citizens based solely on their race." *Id.* at 508. Additionally, the Court explained that there was no evidence of past discrimination against Hispanics, Eskimos, Orientals or Aleuts in any part of the Richmond construction industry. *Id.* at 506. The Court openly displayed the ridiculousness of Richmond's inclusion of Eskimos in the ordinance when it stated:

> It may well be that Richmond has never had an Aleut or Eskimo citizen. The random inclusion of racial groups that, as a practical matter, may never have suffered from discrimination in the construction industry in Richmond suggests that perhaps the city's purpose was not in fact to remedy past discrimination.

Id.

98. 497 U.S. 547 (1990), *overruled by* Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995).

99. *Metro Broadcasting*, 497 U.S. at 552. *Metro Broadcasting* was a consolidation of two cases. *Id.* Two broadcasting companies filed suit alleging that the FCC policies violated the Fifth Amendment. *Id.* The broadcasting companies claimed that the FCC policies give preference to minority broadcasting companies in obtaining new licenses and acquiring existing television and radio stations and that the policies violate the equal protection provision of the Fifth Amendment. *Id.* at 558-63. One policy awards preference for minority ownership and participation in management when the FCC considered licensing for new radio or television stations. *Id.* at 556-57. The other policy allows a broadcaster to avoid FCC sanctions if the broadcaster transferred ownership to a minority enterprise. *Id.* at 557.

100. *Id.* at 600.

101. *Id.* at 563 (citing Fullilove v. Klutznick, 448 U.S. 448 (1980)). The Court asserted that race-conscious programs that are mandated by Congress, even if those programs are not designed to compensate victims of past societal or governmental discrimination, are constitutional if they serve important governmental interests and they are substantially related to the achievement of those objectives. *Id.*

minority ownership policies sought to achieve a diversification of ownership that would lead to a broadened range of programming available to the public.[102] Therefore, the Court concluded that intermediate scrutiny provides that such policies are constitutional to the extent that they serve important governmental objectives and are substantially related to the achievement of those objectives.[103]

The Supreme Court's ruling in *Adarand* has established that the judicial standard of review for racial classifications, whether imposed by federal, state or local governments, should be strict scrutiny.[104] Presumably this will create a level playing field between the federal and state governments when further racial classification programs are challenged in the courts.

In *Korematsu, Bolling, Loving, Bakke, Wygant* and *Croson*, the Supreme Court applied strict scrutiny as the standard of review when passing on the constitutionality of race-based classification statutes. In *Fullilove* and *Metro Broadcasting,* the Court applied the more lenient standard of intermediate scrutiny. With the exception of *Korematsu* and *Bolling,* the distinguishing factor between the cases was whether the racial classification had been imposed by a state or the federal government.[105] Prior to *Adarand,* the Supreme Court had two standards of review for racial classification cases.[106] If the case involved a federal statute or federally-sponsored program, the Court would impose intermediate scrutiny.[107] However, if the case involved a state statute or a state-sponsored program the Court applied strict scrutiny as the judicial standard of review.[108]

In the past, the Supreme Court accorded deference to legislation passed by Congress, reasoning that due to its size and composition, congressional decisions should be given a lenient review.[109] The Court elaborated that both Congress' representative status and the compromising nature of legislation

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102. *Id.* at 568. The Court defined intermediate scrutiny utilizing a two prong test: 1) classifications must serve important governmental objectives; and 2) classifications must be substantially related to the achievement of those objectives. *Id.* at 566.

103. *Id.* at 600. The Court explained that "diversity in broadcasting" is an important governmental objective which could be achieved through enlarging minority participation. *Id.* at 572.

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

105. *Id.* at 2107.

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

107. *See Metro Broadcasting,* 497 U.S. at 564-65; *Fullilove,* 448 U.S. at 519 (Marshall, J., concurring).

108. *See Croson,* 488 U.S. at 493-94.

109. *See Fullilove,* 448 U.S. at 472; *Metro Broadcasting,* 497 U.S. at 563.

were part of the design by the Founding Fathers of this country to guard against oppression.[110] Yet, some members of the Court disagreed with that proposition. Justice O'Connor, writing the majority opinion for the Court in *Adarand,* contended that whether racial classifications are determined by Congress, a state or a local governmental unit, the racial classifications should be held to the highest judicial scrutiny.[111] In *Metro Broadcasting,* Justice O'Connor argued in a dissenting opinion, joined by Chief Justice Rehnquist and Justices Scalia and Kennedy, that governments must not allocate benefits or burdens among individuals based on the assumption that race or ethnicity determines how individuals act or think.[112]

Five years later, the minority dissenters in *Metro Broadcasting* comprised the majority in *Adarand.*[113] Since the Court's holding in *Metro Broadcasting,* four Justices who formed part of the majority in that case have retired.[114] Hence, the decision in *Adarand* should not be a startling event. Chief Justice Rehnquist, Justices O'Connor, Scalia and Kennedy, joined by Justice Thomas, were able to override the double standard that had been applied to race classifications for more than a decade.[115]

In conclusion, while the Court appears to have leveled the playing field for the federal and state governments, increased discretion is now available for courts to determine if racial classifications can survive a strict scrutiny standard. Prior to *Adarand,* a federally mandated racial classification program was subjected to an intermediate scrutiny standard of judicial review. In order to be valid, the program only had to serve important governmental interests and be substantially related to those governmental interests. Following *Adarand,* courts are required to determine if a federally mandated racial classification program is narrowly tailored to remedy past discrimination that has been proven to have occurred and that the government has a compelling interest in that program.

The Supreme Court's decision in *Adarand* proclaimed that all Americans are entitled to equal treatment under the law, regardless of their race. The color of one's skin should not be of

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110. *See Fullilove,* 448 U.S. at 490-91.

111. *Adarand,* 115 S. Ct. at 2105-11.

112. *Metro Broadcasting,* 497 U.S. at 602 (O'Connor, J., dissenting).

113. *Adarand,* 115 S. Ct. at 2097.

114. *Metro Broadcasting,* 497 U.S. at 552. Justices Brennan, White, Marshall, Blackmun, and Stevens formed the majority. *Id.*

115. *See Adarand,* 115 S. Ct. at 2097.

interest to the United States Government.

Yet, there is no doubt that racial discrimination still exists today. Accordingly, it must be understood that special programs may sometimes be necessary to remedy blatant racial discrimination. But the question that remains after *Adarand* is whether the federal government, in trying to remedy discrimination through special programs, can design programs that a court will find to be narrowly tailored and specific enough to achieve a compelling interest. In the end, only future court decisions will indicate whether such programs can in fact survive when reviewed under strict scrutiny.

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