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Raise High the Roof Beam: Adarand Constructors, Inc. v. Pena and the New Level of Scrutiny for Federal Affirmative Action

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RAISE HIGH THE ROOF BEAM: *ADARAND CONSTRUCTORS, INC. V. PENA* AND THE NEW LEVEL OF SCRUTINY FOR FEDERAL AFFIRMATIVE ACTION

In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently.[1]

INTRODUCTION

The Supreme Court reviewed a significant Tenth Circuit decision during the 1994-95 survey period: *Adarand Constructors, Inc. v. Pena*.[2] *Adarand* addressed the issue of affirmative action;[3] specifically, the level of scrutiny appropriate for evaluating federal race-based programs. The Supreme Court vacated the Tenth Circuit's decision in *Adarand* and held that all racial classifications, whether imposed by federal, state, or local government, should be subject to "strict scrutiny."[4] This standard applies even if the program in question has a benign purpose[5] and requires that all government affirmative action programs[6] be narrowly tailored to serve a compelling government interest.[7]

The *Adarand* Court, however, failed to provide firm direction as to what measures government entities should take in order to serve these interests. This article traces the development of affirmative action jurisprudence and attempts to provide guidance for practitioners litigating government affirmative

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1. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 407 (1978) (Blackmun, J., concurring in the judgment, and dissenting in part).

2. 16 F.3d 1537 (10th Cir. 1994), *vacated*, 115 S. Ct. 2097 (1995).

3. Affirmative action programs are rooted in the assumption that employers hire workers and contract for jobs within a framework reflecting long-standing patterns of discrimination and prejudice. To correct the resulting imbalances, employers must consider race or sex by endeavoring to hire and retain workers from groups which have suffered from past discrimination. Affirmative action programs are necessary in public contracting to assure that contracts are awarded to deserving parties, not merely favored ones. EQUAL RIGHTS ADVOCATES & SAN FRANCISCO LAWYERS' COMMITTEE FOR URBAN AFFAIRS, THE AFFIRMATIVE ACTION HANDBOOK: HOW TO START AND DEFEND AFFIRMATIVE ACTION PROGRAMS 1 (Judith Kurtz et al. eds., 1992) [hereinafter THE HANDBOOK].

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

5. *See id.* In the context of affirmative action, a "benign" purpose refers to a remedial goal, such as attempting to remedy the effects of past discrimination, or to a non-remedial goal, where role models are provided for minorities, or to promote diversity. *Id.*

6. The law surrounding affirmative action distinguishes between programs for private entities and those implemented by government. The *Adarand* decision applies only to government employment. Courts require stricter standards for government employers than for private ones; however, private entities still need to follow guidelines in enacting an affirmative action plan. For practical guidance in this realm, see THE HANDBOOK, *supra* note 3; JAMES WALSH, MASTERING DIVERSITY: MANAGING FOR SUCCESS UNDER ADA & OTHER ANTI-DISCRIMINATION LAWS (1995).

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

action claims or advising government employers who wish to institute a permissible affirmative action plan in the wake of *Adarand.*

I. VOLUNTARY GOVERNMENTAL AFFIRMATIVE ACTION PLANS[8]

The Supreme Court's struggle with the heated topic of affirmative action[9] is apparent in the many plurality and majority opinions on this issue, which reflect a chronic lack of consensus within the Court. The *Adarand* decision represents a drastic change in the Court's treatment of affirmative action law.[10] In *Adarand,* the Court mandated that all racial classifications, whether imposed by federal, state, or local government, be analyzed under a strict scrutiny standard.[11] The ramifications of the decision are not yet clear. However, because all race-conscious programs must now serve a compelling governmental need, *Adarand* threatens to extinguish all but the most narrowly and carefully crafted race-based state and federal affirmative action programs.[12]

A. *The Pre-*Adarand *History of Affirmative Action*

The Court first treated the issue of affirmative action in *Regents of the University of California v. Bakke.*[13] *Bakke* involved an equal protection challenge to a state-run medical school's policy of reserving a certain number of spaces in the enrolling class for minority applicants.[14] Allan Bakke, a white

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8. Affirmative action law is divided into two sectors: court-ordered and voluntary. This article deals solely with voluntary plans. It should be noted that affirmative action is distinct from a quota system, for which it is often mistaken. Quota programs reserve a set number or percentage of positions for individuals in specific groups. The quota will be met whether or not the applicants are properly qualified. Individuals who are not a member of a specific group are ineligible to compete for reserved positions. Affirmative action plans, on the other hand, do not preclude any individual from competing for a position, but instead seek to increase the number of minority applicants through recruitment and outreach programs. These programs seek to ensure that all qualified job applicants are aware of employment possibilities. THE HANDBOOK, *supra* note 3, at 2.

9. The issue of affirmative action compels a strong emotional response in many. For viewpoints critical of affirmative action, see Morris B. Abram, *Affirmative Action: Fair Shakers and Social Engineers,* 99 HARV. L. REV. 1312 (1986); Richard A. Posner, *The* DeFunis *Case and the Constitutionality of Preferential Treatment of Racial Minorities,* 1974 SUP. CT. REV. 1; Martin Schiff, *Reverse Discrimination Re-Defined as Equal Protection: The Orwellian Nightmare in the Enforcement of Civil Rights Laws,* 8 HARV. J.L. & PUB. POL'Y 627 (1985). For those speaking in favor of affirmative action, see T. Alexander Aleinikoff, *A Case for Race-Consciousness,* 91 COLUM. L. REV. 1060 (1991); Frances L. Ansley, *A Civil Rights Agenda for the Year 2000: Confessions of An Identity Politician,* 59 TENN. L. REV. 593 (1992); Paul Brest, *The Supreme Court 1975 Term, Forward: In Defense of the Antidiscrimination Principle,* 90 HARV. L. REV. 1 (1976); John H. Ely, *The Constitutionality of Reverse Racial Discrimination,* 41 U. CHI. L. REV. 723 (1974).

10. 115 S. Ct. 2097 (1995).

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

12. Despite Justice O'Connor's contention in *Adarand* that the Court wished to dispel the perception of strict scrutiny as "strict in theory, but fatal in fact," strict scrutiny is a formidable obstacle. *Id.* at 2117. The last time that a majority of the Court upheld a race-based classification under strict scrutiny was in 1944, in Korematsu v. United States, 323 U.S. 214 (1944). In that decision, the Court voted 6-3 to uphold an executive order, borne of a fear of sabotage, to temporarily exclude persons of Japanese ancestry from certain areas. *Id.* at 215-24.

13. 438 U.S. 265 (1978).

14. *Bakke,* 438 U.S. at 281. The admissions committee designated 16 places out of 100 for which only minority applicants could be eligible. *Id.* at 275-76.

male twice rejected by the University of California at Davis Medical School, alleged that he would have been admitted to the school under the special standards for minority admissions.[15] Justice Powell, writing for a plurality, ordered Bakke's admission to the program.[16] He rejected the university's contention that discrimination against a white majority cannot be viewed as such if it is remedial in nature.[17] He noted that classifications granting benefits on the basis of race would instill resentment in the individuals "burdened,"[18] and stressed the "inherent unfairness" of depriving "innocent persons of equal rights and opportunities."[19] The Court, however, also ruled that race could be a factor in the admissions process.[20] While emphasizing that a diverse student

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15. The university had a separate admissions committee largely composed of members of minority groups. *Id.* at 274. If, in 1973, an applicant answered "yes" to questions indicating that he wished to be considered "economically and/or educationally disadvantaged," or, in 1974, that he wished to be considered as a member of a minority group, the application was sent to a special admissions committee. *Id.* at 274-75. At this point, the application was screened to determine the validity of the claim. *Id.* If the applicant was eligible for the special admissions program, he was rated by a similar standard to the general admissions program, except that the grades of the special applicants were not required to meet the general applicants' 2.5 grade point average cutoff. *Id.* at 275. The special committee presented its top candidates to the general committee until the number of minority applicants that the faculty had agreed would be accepted were admitted. *Id.* at 274-75. During the two years for which Bakke was denied admission to the medical school, minority applicants were admitted who had significantly lower grades or Board scores than Bakke. *Id.* at 277.

16. *Id.* at 320.

17. *Id.* at 294. In so holding, Justice Powell first articulated a theme which would run through later cases and prove pivotal in *Adarand*: that affirmative action programs, although benign in purpose, have the impact of exacting discrimination against whites and must, therefore, be subject to the same standards as classifications imposing traditional discrimination.

18. *Id.* at 295 n.34.

19. *Id. Bakke* makes apparent the concept of white "entitlement." Many commentators have perceived this notion and its ramifications regarding affirmative action programs. As one commentator critically commented, "Any remedy for past discrimination must not be too costly to whites. So-called 'innocent' whites may not be made to pay the penalty for past injustices." Richard Delgado, *Rodrigo's Fourth Chronicle: Neutrality and Stasis in Antidiscrimination Law*, 45 STAN. L. REV. 1133, 1144 (1993). For another analysis of the concept of white "entitlement" in *Bakke* and other decisions, see D. Marvin Jones, *Darkness Made Visible: Law, Metaphor, and the Racial Self*, 82 GEO. L.J. 437, 486 (1993) (stating that the constitutional question in *Bakke* was merely a ruse to strip minorities and their advocates of both the medical school's affirmative action program and the true concept of affirmative action by redefining it to mean reverse discrimination); *see also* Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709, 1767 (1993) (noting the irony of the Court's use of the Equal Protection Clause to protect benefits for whites with an eye toward their "established expectations," despite the Clause's original purpose: to secure equality for African-Americans and renounce race-based and race-conscious measures as unconstitutional).

20. *Bakke*, 438 U.S. at 296 n.36. The Court stated that race or ethnic background could be "deemed a 'plus'" in the applicant's file, just as would any other traditional factors such as "exceptional personal talents, unique work or service experience, leadership potential" or "a life spent on a farm." *Id.* at 316-17. One commentator stated:

> Justice Powell here was deeply wrong; the daily experience of being a member of a stigmatized minority is not equivalent to a summer job or an ability to play the piano . . . . Justice Powell reduced race to a plus factor in order to make it "fit in" with the existing decision-making procedures of the university. Race is brought down to the level of work experience because that is a level with which the institution is familiar; race consciousness is only acceptable if it can be envisioned as a normal "factor" akin to those used in the usual institutional procedures.

Adam Winkler, *Sounds of Silence: The Supreme Court and Affirmative Action*, 28 LOY. L.A. L. REV. 923, 942-43 (1995).

body was a sufficiently compelling goal for an institution of higher learning,[21] the Court objected to the strict allotment of spaces by race.[22] Notably, the Court also found that remedying the disabling effects of identified prior discrimination was a fitting justification for an affirmative action program, despite the fact that the university did not present this argument.[23]

Two years after the *Bakke* decision, the Court revisited the issue of race-based classifications in *Fullilove v. Klutznick*.[24] Unlike *Bakke*, *Fullilove* involved a federal program; namely, the "Minority Business Enterprise" (MBE) provision of the Public Works Employment Act of 1977. In *Fullilove*, an association of construction contractors and subcontractors instituted an action seeking a preliminary injunction to prevent enforcement of the MBE.[25] Writing for the plurality, Chief Justice Burger upheld the provision as an exercise of Congress's spending power[26] and commerce power.[27] The Court held that "in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress."[28]

The *Fullilove* Court found that the MBE program was "narrowly tailored" to accomplish Congress's goal of remedying past discrimination in public works projects.[29] Chief Justice Burger explicitly declined to apply a labeled standard of review, saying instead that racial classifications must receive a "most searching examination."[30] He further noted that while the Court did not adopt the standards from *Bakke*, the provision in question would survive review under either test discussed in *Bakke*.[31]

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21. The Court in *Bakke* recognized diversity as a "compelling goal," despite the fact that it did not uphold the program. *Bakke*, 438 U.S. at 311-12, 314.

22. *See id.* at 311. The university attempted to distinguish their "special admissions" program from a quota system by saying that no true number was set for minority acceptees. *Id.* at 288. The university asserted that it would not accept an unqualified applicant merely to meet a quota, nor would it cap the number of minority students by limiting the number admitted under general admission standards. *Id.* at 288 n.26. The Court called the distinction "semantic," stating that whether termed a goal or quota, the program still amounted to a line drawn on the basis of race or ethnicity. *Id.* at 289.

23. *Id.* at 307. The Court emphasized that racial and ethnic classifications must be "precisely tailored to serve a compelling government interest," the exact definition of strict scrutiny. *Id.* at 299. Four Justices in *Bakke* (Brennan, White, Marshall, & Blackmun), however, argued for a less stringent standard of review for racial classifications "designed to further remedial purposes." *Id.* at 359. These Justices suggested intermediate scrutiny as the proper test for race-conscious remedies. *Id.* at 362.

24. 448 U.S. 448 (1980). For an analysis of *Fullilove*, see Sofia Adrogue, *When Injustice Is the Game, What Is Fair Play?*, 28 HOUS. L. REV. 363, 369-76 (1991); Drew S. Days, III, Fullilove, 96 YALE L.J. 453 (1987).

25. *Fullilove*, 448 U.S. at 448, 455. The act required that, absent an administrative waiver, states use at least 10% of the federal funds granted for local public works projects to procure goods or services from minority owned businesses. *Id.* at 448.

26. *Id.* at 473-78.

27. *Id.* at 475-78.

28. *Id.* at 483. The Court further observed that Congress possesses "broad powers" to remedy the results of past discrimination. *Id.* at 478. Congress also need not compile a record or present findings; the Court was "well satisfied" that Congress had an "abundant historical basis" from which to judge the existence of a nationwide problem. *Id.*

29. *Id.* at 487-88. The program provided for a waiver and exemption and was limited in extent and duration. *Id.*

30. *Id.* at 491.

31. The program would, therefore, have been upheld under strict or intermediate review. *Id.*

Several years later, in *Wygant v. Jackson Board of Education*,[32] the Court examined the types of past discrimination that could justify an affirmative action program.[33] The Court struck down a collective bargaining agreement extending layoff protection to minority teachers, while denying the same benefit to white teachers with more seniority.[34] The plurality reached this decision by applying a strict scrutiny standard and finding that the school board's goal of providing role models for minority students was not "narrowly tailored" and did not meet a "compelling government interest."[35]

Justice O'Connor, in her concurrence in *Wygant*, agreed that remedying "societal" discrimination did not constitute a compelling state interest.[36] She then noted the detrimental effect of requiring illegal discrimination as a prerequisite to an affirmative action program.[37] Such a requirement would severely undermine government employers' incentive to voluntarily meet their civil rights obligations.[38] Finally, Justice O'Connor provided tangible guidance as to what acts of prior discrimination would be sufficient to support the enactment of an affirmative action program.[39] She rejected the school board's assertion that the difference between the number of minority students in the school and the number of minority teachers employed by the school could be evaluated for discriminatory practices.[40] Instead, she asserted that an "inference of deliberate discrimination in employment" is permissible only when the proven availability of minorities in the relevant labor pool "substantially exceeded those hired."[41] Such an inference may provide a compelling basis

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at 492. In a concurring opinion, Justices Brennan, Marshall, and Blackmun repeated their assertion in *Bakke* that intermediate scrutiny was the applicable level of review for a remedial program. *Id.* at 519. Justices Stewart and Rehnquist dissented, arguing that the set-aside program was unconstitutional. They asserted that the "Constitution is colorblind" and that the "decision is wrong for the same reason that *Plessy v. Ferguson* was wrong." *Id.* at 522-23.

32. 476 U.S. 267 (1986).

33. *Wygant*, 476 U.S. at 270. Once again, the Court failed to unite in a majority opinion. As in *Bakke*, Justice Powell authored the plurality opinion. *Id.*

34. *Id.*

35. In fact, the Court said that the role-model objective, that black students are in a better position when taught by black teachers, could actually work to legitimize discriminatory employment practices by encouraging the use of low African-American enrollment figures to justify a "corresponding" dearth of African-American teachers. The Court further stated that the role-model theory creates a situation analogous to that rejected in *Brown v. Board of Education* when "carried to its logical extreme." *Id.* at 276.

First, the Court found that remedying societal discrimination did not amount to a compelling government interest. "Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy." *Id.* at 276-78. Instead, Justice Powell insisted that the particular institution implementing the affirmative action program must show that it committed discrimination in the past to justify the layoff inequalities. *Id.* at 274-75. Second, the Court held that the layoff plan was not narrowly tailored; less restrictive means were available to achieve the same goal, so the program could not withstand strict scrutiny. *Id.* at 280 n.6. The Court, however, carefully distinguished *Wygant* from cases which involved hirings: "though hiring goals may burden some innocent individuals, they simply do not impose the same kind of injury that layoffs impose." *Id.* at 282.

36. *Id.* (O'Connor, J., concurring).

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* at 294.

41. *Id.*

for an employer to execute a voluntary affirmative action plan in order to remedy discernible prior employment discrimination.[42]

In *Richmond v. J.A. Croson*,[43] the Court finally achieved a majority opinion and determined that strict scrutiny provided the appropriate standard of review when analyzing state and local government programs.[44] Additionally, the Court provided further insight into the type of statistical evidence of past discrimination necessary to meet the "compelling government interest" standard.[45] The city of Richmond, Virginia adopted a Minority Business Utilization Plan requiring prime contractors to subcontract at least 30% of city construction contracts to "Minority Business Enterprises."[46] The city argued that the program was constitutional under the justifications expressed in *Fullilove*.[47] The Court held, however, that the Equal Protection Clause of the Fourteenth Amendment requires strict scrutiny of all race-based action by state and local governments, without regard to the purpose of the statute.[48] Justice O'Connor, writing for the majority, distinguished *Fullilove* as a federal program, and thus exempt from strict scrutiny.[49]

Croson represented the first time that a majority of the Court agreed that a race-based affirmative action measure must be evaluated under strict scrutiny. The Court held that while states and localities may take remedial action upon a finding that their practices led to discrimination, they must also identify the discrimination with "some specificity" before adopting an affirmative action program.[50] The majority stated that the city failed to establish proof of discrimination sufficient to constitute a compelling government interest.[51] The Court found that reliance on general past discrimination did not amount to a compelling interest,[52] and rejected the city's statistical argument that while the city's population was over 50% black, minorities received only .67% of the city's construction contracts.[53] As in *Wygant*, however, the *Croson* Court was not without advice as to the type of statistical evidence relevant to a successful claim of past discrimination. It stated that disparities between minority participation in a particular industry and the percentage of minorities qualified in the skills to compete in that industry could be probative of discrimination.[54]

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42. *Id.* at 292.

43. 488 U.S. 469 (1989). For an in-depth treatment of *Croson*, see Jennifer M. Bott, *Affirmative Action from* Bakke *to* Croson: *The Affirmative Action Quagmire and the D.C. Circuit's Approach to FCC Minority Preference Policies*, 58 GEO. WASH. L. REV. 845 (1990); Dianne E. Dixon, *The Dismantling of Affirmative Action Programs: Evaluating* City of Richmond v. J.A. Croson Co., 7 N.Y.L. SCH. J. HUM. RTS. 35 (1990); Kathleen M. Sullivan, City of Richmond v. J.A. Croson Co.*: The Backlash Against Affirmative Action*, 64 TUL. L. REV. 1609 (1990).

44. *Croson*, 488 U.S. at 499-500.

45. *Id.*

46. *Id.* at 469.

47. *Id.* at 489.

48. *Id.* at 490-91, 493-94.

49. *Id.* at 489.

50. *Id.* at 504.

51. *Id.* at 505.

52. *Id.* at 497-98.

53. *Id.* at 479-80, 499.

54. *Id.* at 501. The Court intimated that a proper statistical evaluation in this case would be a comparison of the number of MBEs in Richmond qualified to accept city subcontracting work

Justice O'Connor was careful to distinguish *Fullilove* from the similar "set-aside" program in *Croson* by drawing heavily on the "unique remedial powers of Congress."[55] She noted that Congress, unlike the states, had a specific mandate to enforce the Fourteenth Amendment.[56] This enforcement power incorporates the power to "define situations which Congress determines threaten principles of equality and to adopt prophylactic rules to deal with those situations."[57] Thus, the Court's analysis in *Croson* turned on the nature of the governmental body enacting the regulation.

In *Croson*, Justice O'Connor, joined by Chief Justice Rehnquist and Justice White, noted that congressionally enacted racial preferences raise discrete issues,[58] implying that the standard of review for a federal program differed from that involving a state or local government. One year later, the Court gave effect to this concept in *Metro Broadcasting, Inc. v. FCC*.[59] *Metro Broadcasting* involved a challenge to a congressional mandate that the FCC give preference to minorities when awarding licenses for radio and television stations.[60] In this case, the Court applied an intermediate standard of review and held that the FCC's minority preference policy did not violate the equal protection component of the Fifth Amendment.[61] The Court found "overriding significance" in the fact that the programs were mandated by Congress.[62] Furthermore, the Court found that benign race-conscious measures required by

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with the percentage of city construction funds awarded to minority subcontractors. *Id.* at 502.

55. *Id.* at 488.

56. *Id.* at 490.

57. *Id.* The dissent in *Croson* found Richmond's set-aside program indistinguishable from the program upheld in *Fullilove*. *Id.* at 535 (Marshall, J., dissenting, joined by Brennan & Blackmun, JJ.). They argued for a more lenient standard of review, namely, the intermediate standard they had proposed in *Bakke*. *Id.* (citing *Bakke*, 438 U.S. at 359). The dissent contended that this intermediate standard was met in *Croson* by the city's twin objectives of "eradicating the effects of past discrimination" and of "preventing [its] own spending decisions from reinforcing and perpetuating the exclusionary effects" of the discrimination. *Id.* at 536-37. After considering the evidence provided to the city council and Congress's findings as outlined in *Fullilove*, the dissent, using the majority's own language, established the existence of a "'strong,' 'firm,' and 'unquestionably legitimate' basis upon which the city council could determine that the effects of past racial discrimination warranted a remedial and prophylactic governmental response." *Id.* at 540.

58. *Id.* at 490.

59. 497 U.S. 547 (1990), *overruled by* 115 S. Ct. 2097 (1995). For an in-depth look at *Metro Broadcasting*, see generally Michel Rosenfeld, Metro Broadcasting v. FCC: *Affirmative Action at the Crossroads of Constitutional Liberty and Equality*, 38 UCLA L. REV. 583 (1991) (discussing the difficulty of reconciling previous affirmative action cases); Patricia Williams, Metro Broadcasting v. FCC: *Regrouping in Singular Times*, 104 HARV. L. REV. 525 (1990).

60. *Metro Broadcasting*, 497 U.S. at 552.

61. *Id.* at 564-65.

62. *Id.* at 563. The Court held that minority ownership policies were "substantially related" to the achievement of a legitimate government interest in broadcasting diversity. *Id.* at 566. Justice Brennan, relying on *Fullilove*, stated that the FCC policy did not constitute a quota and did not impose an undue burden on nonminorities because the program involved only a limited number of licenses. *Id.* at 598-99. Justice O'Connor, in her *Metro Broadcasting* dissent (and subsequently in *Adarand*), contradicted her contention in *Croson* that congressional programs deserve to be distinguished from those administered by states and localities. She argued that, under *Croson*, strict scrutiny must be applied to the FCC policy. *Id.* at 603 (O'Connor, J., Rehnquist, C.J., Scalia & Kennedy, JJ., dissenting). She attacked remedial policies, such as the one in question, as endorsing race-based reasoning and dividing the country into stigmatized groups, encouraging racial hostility and conflict. *Id.* at 604.

Congress were constitutionally permissible even if not "'remedial' in the sense of being designed to compensate victims of past governmental or societal discrimination."[63] This distinction was significant, as the Court ultimately recognized broadcasting diversity as a compelling non-remedial goal. Although the Court had previously recognized diversity as a compelling goal in *Bakke*, *Metro Broadcasting* was the first, and only, affirmative action case in which the court upheld a program seeking to promote a non-remedial goal.

B. *Summary of the State of Affirmative Action Law Prior to* Adarand

Before *Adarand*, the Court's focus was on the distinction between federal and state programs. The Court had never before applied strict scrutiny to an affirmative action program adopted by Congress or failed to uphold such a program. *Fullilove* and *Metro Broadcasting* controlled Congressional actions; *Croson* governed state and local programs. Federal programs received intermediate review; the Court subjected state and local programs to strict scrutiny. The Court recognized that remedying the effects of past discrimination constituted a "compelling government interest," and acknowledged that a non-remedial goal could meet that objective. The *Bakke* Court explicitly held that a diverse student body was a compelling goal for an institution of higher learning.[64] In *Metro Broadcasting*, when it upheld the FCC's goal of promoting

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63. *Id.* at 564-65.

64. The Court has never overruled this concept, and under *Bakke*, diversity remains a compelling interest in the setting of higher education. This holding, however, is in jeopardy due to recent opinions emerging from the Fourth and Fifth Circuit Courts of Appeals. In *Podberesky v. Kirwan*, the Fourth Circuit held that the University of Maryland denied a student of Hispanic and white origin equal protection of the laws by denying him consideration for a scholarship open only to African-American students. Podberesky v. Kirwan, 38 F.3d 147, 153 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 2001 (1995). The university maintained that the scholarship program was necessary to combat the enduring effects of a long history of past discrimination against African-American students. *Id.* at 152. The Fourth Circuit found evidence of present effects of past discrimination at the university insufficient to support the program. *Id.* at 153-54. In necessitating *present* effects, the circuit court is expanding the requirements; the Supreme court requires only a finding of past discrimination to justify the application of a race-based measure. *Id.* The requirement of present effects had previously been advanced by Justice Scalia in his *Croson* concurrence. *Croson*, 488 U.S. at 520. The Supreme Court denied certiorari, allowing the decision to stand, and to be the controlling standard in the Fourth Circuit.

The Fifth Circuit, in *Hopwood v. Texas*, invalidated the University of Texas' Law School admissions program, which provided for special admissions standards for minorities. Hopwood v. Texas, 78 F.3d 932, 934 (5th Cir. 1996), *cert. denied*, No. 95-1773, 1996 WL 227009 (U.S. July 1, 1996). The court denied that *Bakke* controlled the issue, and instead relied on *Adarand*. *Id.* at 944. In doing so, the court reviewed the program under a strict scrutiny standard and held that the need for diversity in a university student body can never be a compelling reason to impose racial classifications. *Id.* at 948. The *Hopwood* court held that race can never be used as a factor in admissions, not even as the "plus" factor enunciated in *Bakke*. *Id.* While the use of race was not permitted, a university

> may properly favor one applicant over another because of his ability to play the cello, make a downfield tackle, or understand chaos theory. An admissions process may also consider an applicant's home state or relationship to school alumni. . . . Schools may even consider factors such as whether an applicant's parents attended college or the applicant's economic and social background.

Id. at 946. The university has decided that the ruling applies not only to admissions, but to financial aid, scholarships, and fellowships. Renae Merle, *Morales: On* Hopwood, *Wait for the Court*, DAILY TEXAN, Apr. 9, 1996, at 1. On July 1, 1996, the United States Supreme Court denied cer-

broadcasting diversity, the Court recognized diversity as an important government interest.[65] The Court did not explicitly address, however, whether the concept of diversity as a constitutionally permissible goal of an affirmative action plan reaches beyond the context of the broadcasting and university settings.

II. *ADARAND CONSTRUCTORS, INC. v. PENA*[66]

A. *Facts and Procedural History*

The Small Business Act (SBA) provides government contractors with financial incentives to employ "disadvantaged business enterprises" (DBEs) as subcontractors. According to § 637(d) of the SBA, a DBE is at least 51% owned and controlled by individuals who are socially and economically disadvantaged.[67] Members of certain minority racial and ethnic groups,[68] as well as women, are presumed socially and economically disadvantaged.[69]

In accordance with the Act, the Federal Lands Highway Program (FLHP) effected the Subcontracting Compensation Clause (SCC), which provided contractors with an incentive payment of up to 1.5% of the original contract value if they hired DBE subcontractors.[70] FLHP awarded Mountain Gravel Construction Company (Mountain Gravel) a federal highway contract.[71] Adarand Constructors, Inc. (Adarand), a white-owned subcontractor, not recognized as a DBE, applied to build the guard rail portion of the project.[72] Mountain Gravel chose a subcontractor who submitted a higher bid but was a certified DBE, thereby entitling Mountain Gravel to a $10,000 incentive payment.[73]

Adarand sued the government, asserting that the FLHP's policy of offering financial incentives to contractors who hired DBE subcontractors violated the Equal Protection Clause.[74] The United States District Court for the

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tiorari, thereby declining the opportunity to reconsider the *Bakke* decision, at least for now.

65. Because the *Metro Broadcasting* Court upheld the legitimacy of the goal of broadcast diversity under the intermediate standard, it remains unsettled whether this is a "compelling goal" under strict scrutiny.

66. 16 F.3d 1537 (10th Cir. 1994), *vacated*, 115 S. Ct. 2097 (1995).

67. 15 U.S.C. § 637(d) (1994). The act defines socially disadvantaged individuals as "those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities." *Id.* § 637 (a)(5). "Economically disadvantaged individuals are those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged." *Id.* § 637 (a)(6)(A).

68. These socially and economically disadvantaged individuals include: "Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities." *Id.* § 637(d)(3)(c) (1994).

69. This presumption is rebuttable under DBE criteria. *See Adarand*, 16 F.3d at 1541.

70. *Id.* at 1540.

71. *Id.* at 1541.

72. *Id.* at 1542.

73. *Id.* at 1541-42.

74. *Id.* at 1542.

District of Colorado granted summary judgment in favor of the government, and Adarand appealed.[75]

B. *Tenth Circuit Decision*

The Tenth Circuit unanimously affirmed the lower court's decision, holding the challenged policy constitutional.[76] The court relied on *Fullilove*[77] to support its decision, citing *Fullilove* for the proposition that Congress properly acts within its "broad powers under the Commerce Clause and § 5 of the Fourteenth Amendment when it imposes an affirmative action program to remedy nationwide discrimination in the construction industry."[78]

The court held that, under *Fullilove*, courts "must apply a lenient standard, resembling intermediate scrutiny" to federal affirmative action programs.[79] It was careful to distinguish *Croson's* application of the "strict scrutiny" standard for state and local programs.[80]

The Court of Appeals found significance in the fact that the challenged program did not require contractors to participate in the program and did not set precise DBE goals.[81] Rather, the contractor had the "option, not the obligation" to choose a DBE subcontractor.[82] Because the "program induces, rather than compels" contractors to select DBE subcontractors, the court found that it did not violate equal protection.[83]

C. *Supreme Court Decision*[84]

1. Majority Opinion

The Supreme Court vacated the judgment and remanded the case to the Tenth Circuit.[85] Although the Court did not dismantle the challenged

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75. *Id.* at 1539, 1542. The district court rejected Adarand's argument that the program must be subjected to strict scrutiny under the standards set out in *Croson*, and held that *Metro Broadcasting* and *Fullilove* should control. Adarand Constructors, Inc. v. Skinner, 790 F. Supp. 240, 244 (D. Colo. 1992). The court found that in *Adarand*, as in *Fullilove*, Congress had "abundant historical basis" to support the challenged program. *Id.* The district court also found the program sufficiently narrowly tailored to serve Congress's important objectives. *Id.*

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

77. *Id.* at 1543 (citing Fullilove v. Klutznick, 448 U.S. 448 (1980)); *see* discussion *supra* notes 24-31 and corresponding text.

78. *Adarand*, 16 F.3d at 1543-44.

79. *Id.* at 1544. The court recognized that *Metro Broadcasting* also called for intermediate scrutiny of federal programs. *Id.* at 1545 n.12.

80. *Id.* at 1545 ("The lesson that we glean from *Fullilove* and *Croson* is that the federal government, acting under congressional authority, can engage more freely in affirmative action than states and localities.").

81. *Id.* at 1547.

82. *Id.*

83. *Id.*

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

85. Justice O'Connor filed the opinion joined by Justice Kennedy; Justices Scalia and Thomas filed opinions concurring in part and concurring in the judgment; Justice Stevens filed a dissenting opinion in which Justice Ginsburg joined; Justice Souter filed a dissenting opinion in which Justices Ginsburg and Breyer joined; Justice Ginsburg filed a dissenting opinion in which Justice Breyer joined.

program, the decision clearly leveled an overwhelming blow to federal affirmative action programs. The Court held that all racial classifications, whether imposed by federal, state, or local government, must be analyzed under a strict scrutiny standard.[86] In doing so, the Court relied heavily on its decision in *Richmond v. J.A. Croson*, extending the standard it adopted for states and localities to the federal government.[87]

The Court began the opinion with a review of its decisions leading up to *Adarand*. As previously discussed, the Court in *Croson*[88] held that the Fourteenth Amendment requires strict scrutiny of all raced-based action by state and local governments. While conceding that *Croson* did not determine the level of review required by the Fifth Amendment for federal race-based action, the *Adarand* Court held that certain tenets relating to this issue had been previously decided by the Court in the cases leading up to *Croson*:[89]

> First, skepticism: "[a]ny preference based on racial or ethnic criteria must necessarily receive a most searching examination,"[90]. . . [s]econd, consistency: "the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification,"[91]. . . third, congruence: "[e]qual protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment."[92]

The Court merged these three propositions and concluded that any person, regardless of race, who is exposed to inequality by a government classification based on race is entitled to have the government substantiate this classification under strict scrutiny.[93]

The Court then addressed the previous case inconsistent with the new standard enunciated in *Adarand*: *Metro Broadcasting v. FCC*.[94] Faced with a directly opposing opinion, the *Adarand* Court decided that *Metro Broadcasting's* analysis was flawed.[95] Attacking its own opinion, penned merely five years earlier, the Court found that *Metro Broadcasting* erroneously rejected *Croson's* insistence that strict scrutiny review of government classifications is necessary.[96] Furthermore, the Court faulted *Metro Broadcasting* for

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

87. See *supra* notes 43-58 and accompanying text for a discussion of *Croson*.

88. 488 U.S. 469 (1989).

89. *Croson*, 488 U.S. at 493.

90. *Adarand*, 115 S. Ct. at 2111 (quoting Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 273 (1986)).

91. *Id.* (quoting *Croson*, 488 U.S. at 494).

92. *Id.* (quoting Buckley v. Valeo, 424 U.S. 1, 93 (1976)).

93. *Id.*

94. 497 U.S. 547 (1990) (upholding two federal race-based policies against an Equal Protection challenge by stating that congressionally mandated benign classifications are subject to intermediate scrutiny), *overruled by* 115 S. Ct. 2097 (1995). For a full discussion of *Metro Broadcasting*, see *supra* notes 59-63 and accompanying text.

95. *Adarand*, 115 S. Ct. at 2111-13.

96. *Id.* at 2112 (quoting *Croson*, 488 U.S. at 493) ("Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics."). While Justice O'Connor expounds on this

rejecting the tenet that "congruence" should exist between the criteria relevant to "federal and state racial classifications."[97]

To the *Adarand* majority, *Metro Broadcasting* undermined the principle that the Fifth and Fourteenth Amendments exist to "protect persons, not groups."[98] The *Adarand* Court concluded that strict scrutiny should thus be required for all group classifications, including race, whether imposed by state, local, or federal government.[99] The Court then explicitly overruled *Metro Broadcasting* to the extent that the case is inconsistent with the *Adarand* holding.[100]

The Court in *Adarand* declared that all "federal racial classifications," like state and local classifications, "must serve a compelling government interest and must be narrowly tailored to further that interest."[101] Although the Court refused to concede that *Fullilove* called for a standard below strict scrutiny, it eliminated any potential ambiguity by stating that if *Fullilove* held those classifications to a less rigid standard, "it no longer controll[ed]."[102]

The majority maintained that the strict scrutiny standard of review guarantees that courts will consistently give racial classifications careful examination.[103] The Court tempered this, however, by asserting that it wished to eliminate the perception that "strict scrutiny is strict in theory, fatal in fact."[104] The Court concluded by remanding the case to the Tenth Circuit for further consideration, in light of the fact that *Adarand* "alters the playing field in some important respects."[105] Specifically, the Tenth Circuit had not addressed whether the interests served by the subcontracting compensation clauses were compelling and whether the program was sufficiently narrowly tailored.[106]

2. Concurring Opinions

Justice Scalia concurred in part and concurred in the judgment. He departed from the majority, however, by arguing that the government never possesses a "compelling" interest in classifying individuals on the basis of race in order to "make up" for a discriminatory past.[107]

Justice Thomas also concurred in part and concurred in the judgment. He agreed with the majority's conclusion that strict scrutiny applies to all race-

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theory at length in *Adarand*, she touches on it only briefly in *Croson*. *Croson*, 488 U.S. at 493.

97. *Adarand*, 115 S. Ct. at 2111-13.
98. *Id.* at 2112.
99. *Id.* at 2113.
100. *Id.*
101. *Id.* at 2117.
102. *Id.*
103. *Id.*
104. *Id.* (quoting *Fullilove*, 448 U.S. at 519 (Marshall, J., concurring)).
105. *Id.* at 2118.
106. *Id.*
107. *Id.* (Scalia, J., concurring). Justice Scalia contended that a system of racial entitlement, even with noble purposes, "reinforce[s] and preserve[s] for future mischief the way of thinking that produced race slavery, race privilege, and race hatred." *Id.* at 2119.

based governmental classifications.[108] He wrote separately, however, to attack Justice Stevens's and Justice Ginsburg's dissents, which in his view maintained "a racial paternalism exception to the principle of equal protection."[109] Justice Thomas argued that laws intending to oppress a race and those intending to provide "benefits on the basis of race" are of "moral and constitutional equivalence."[110]

3. Dissenting Opinions

Justice Stevens authored a dissent, in which Justice Ginsburg joined. Justice Stevens stated that, "instead of deciding this case in accordance with controlling precedent, the Court today delivers a disconcerting lecture about the evils of governmental racial classifications."[111] He rejected the majority's notion that no "meaningful difference" exists between the determination to place a special burden on a minority and the determination to confer a benefit upon individual members of a minority.[112] Stevens argued that no "moral or constitutional equivalence" exists between the concepts of discrimination and affirmative action.[113] He accused the Court of adopting a policy which "would disregard the difference between a 'No Trespassing' sign and a welcome mat;" one which would fail to see the disparity between a policy that rendered "black citizens ineligible for military service" and one intended to recruit black servicemen.[114]

Justice Stevens next attacked the majority's concept of "congruence," asserting that it overlooked fundamental differences between the legislative bodies enacting the programs.[115] He argued that *Metro Broadcasting*, *Fullilove*, and *Croson* all raise crucial differences between federal and state programs,[116] and questioned the Court's silence as to the "sudden and enormous departure from the reasoning in past cases."[117]

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108. *Id.* (Thomas, J., concurring).

109. *Id.*

110. *Id.* Affirmative action programs, he averred, "stamp minorities with a badge of inferiority" and may induce them to believe "that they are 'entitled' to preferences." *Id.* Finally, he termed "discrimination based on benign prejudice . . . just as noxious as discrimination inspired by malicious prejudice." *Id.*

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

112. *Id.*

113. *Id.* He argued that the two reflect competing impulses; one seeks to foster a class structure, the other equality. *Id.*

114. *Id.* at 2121. Justice Stevens seemed to subtly ridicule the majority's contention that courts will not be able to differentiate between "invidious" and "benign" discrimination: "But the term 'affirmative action' is common and well-understood. Its presence in everyday parlance shows that people understand the difference between good intentions and bad." *Id.* He also admonished the majority's holding that remedial classifications and discrimination are equivalent and should not be upheld "in the name of 'equal protection.'" *Id.* at 2122.

115. *Id.*

116. *Id.* at 2124.

117. *Id.* at 2125. Justice Stevens further criticized the majority's failure to adhere to stare decisis in its treatment of *Fullilove* and *Metro Broadcasting*, saying that the majority ignored the power of binding precedent. *Id.* at 2131. He noted that *Metro Broadcasting* was overruled only as far as its use of intermediate scrutiny, and, therefore, its holding that diversity may constitute a sufficient government interest to warrant a nonremedial race-based program remains in force. *Id.* at 2127.

Justice Souter wrote a second dissent, and was joined by Justices Ginsburg and Breyer. Justice Souter argued that stare decisis compels adherence to *Fullilove*.[118] Additionally, he observed that the majority opinion in *Adarand* does not suggest a real change in the Court's traditional view of Congress's § 5 powers as "broad," "unique," and "unlike [those of] any state or political subdivision."[119]

Justice Ginsburg authored the third dissent, joined by Justice Breyer. She argued that since Congress was already handling the subject of affirmative action, no compelling reason existed for the Court's intervention on the issue.[120] Justice Ginsburg agreed with Justice Stevens's contention that Congress deserves great deference from the judiciary. Additionally, she recounted the long history of discrimination against racial minorities in this country.[121]

4. Analysis

Adarand radically alters the landscape of affirmative action law. Prior to this decision, the Court had never before applied strict scrutiny to a remedial race-conscious program adopted by Congress. By requiring strict scrutiny review for all racial classifications imposed by federal, state, or local governments, the decision promises to end all but the most "narrowly tailored" federal, state, and local affirmative action programs.

Perhaps the most disturbing facet of the Court's decision is the guise under which the Court imposed its mandate. The Court asserted that strict scrutiny is necessary because only under such heightened review does it become clear whether the program in question seeks to advance minorities or oppress them. In *Adarand*, the Court constructively terminated a policy designed to foster equality, while attempting to do so in a favorable light, with fairness as its guiding principle. As the dissent recognized, however, the majority's sudden concern for a lower court's inability to differentiate between good and bad intentions is little more than a transparent pretext with which to put an end to all race-based measures.

The Court erred in several other respects by vacating the Tenth Circuit's decision. First, the Court adopted the theory of "congruence," asserting that equal protection analysis should be identical under either the Fifth or the Fourteenth Amendment. In doing so, it ignored the fundamental difference between the federal government and the states; a distinction which previous Courts had outlined so laboriously.[122]

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118. *Id.* at 2132 (Souter, J., dissenting).

119. *Id.* at 2133.

120. *Id.* at 2134 (Ginsburg, J., dissenting). Specifically, Justice Ginsburg noted that she would not interfere with the programs at issue in *Adarand*, and "would leave their improvement to the political branches." *Id.* at 2136.

121. *Id.* ("Congress surely can condone that a carefully designed affirmative action program may help realize, finally, the 'equal protection of the laws' the Fourteenth Amendment has promised since 1868.").

122. *Id.* at 2127 (Stevens, J., dissenting) ("Although members of today's majority trumpeted the importance of that [federal-state dichotomy] distinction in *Croson*, they now reject it in the name of 'congruence.'"). Justice Stevens makes a valid point: in *Croson*, as in *Adarand*, Justice Scalia and Chief Justice Rehnquist were aligned with Justice O'Connor, who, in authoring *Croson*,

In fact, throughout *Adarand's* majority opinion, Justice O'Connor flatly contradicts what she previously stated in *Croson*. In *Croson*, she relied upon the distinction between Congress and state governments in holding that state programs should be subject to a strict scrutiny standard: "What appellant ignores is that Congress, unlike any State or political subdivision, has a specific Constitutional mandate to enforce the dictates of the Fourteenth Amendment."[123] Additionally, her *Croson* opinion relied heavily on Chief Justice Burger's *Fullilove* opinion, expounding at length on Congress's competence to properly employ race-conscious remedial relief.[124] In failing to distinguish the congressional program at issue in *Adarand* from the city program in *Croson*, Justice O'Connor abandons a principle fundamental to constitutional jurisprudence: the distinction between state and federal government.

Congressional programs should be treated differently than those adopted by states and localities. Congress merits appropriate deference from the judiciary as to race-based measures because of its "specifically delegated powers."[125] Congress derives its authority from several sources. First, Congress possesses "institutional competence as the National Legislature."[126] The Constitution also grants Congress powers through the Spending Clause,[127] the Commerce Clause,[128] and the enforcement clauses of the Civil War Amendments.[129] Furthermore, Congress is a co-equal branch, and the Court is bound to give Congress's decisions "great weight."[130] These powers justify judicial deference to measures adopted by Congress that are not granted to those designated by states or localities.

The Court further erred in asserting that, by overruling *Metro Broadcasting*, it was not making new law, but merely restoring the law to its former status. In *Fullilove*, prior to *Metro Broadcasting*, the Court spoke on the

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had focused on the difference between state and federal programs. Justice Rehnquist did not write a separate opinion in either case. Justice Scalia, concurring in the *Croson* judgment, wrote, "A sound distinction between federal and state (or local) action based on race rests not only upon the substance of the Civil War Amendments, but upon social reality and governmental theory." *Croson*, 488 U.S. at 522. Kennedy, on the other hand, while concurring in the judgment, stated that congressional programs should be subject to strict scrutiny:

> The process by which a law that is an equal protection violation when it is enacted by a state becomes transformed to an equal protection guarantee when enacted by Congress poses a difficult proposition for me; but as it is not before us, any reconsideration of that issue must await some further case.

Id. at 518.

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

124. *Id.* at 487-88.

125. *Fullilove*, 448 U.S. at 473.

126. *Metro Broadcasting*, 497 U.S. at 563.

127. U.S. CONST. art. I, § 8; *see Fullilove*, 448 U.S. at 474.

128. Article I, Section 8, Clause 3 of the Constitution provides Congress with authority to "regulate any activity that has a 'real and substantial relation to the national interest.'" Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 255 (1964).

129. These Amendments "worked a dramatic change in the balance between congressional and state power over matters of race. . . . 'They were intended to be what they really are, limitations of the powers of the States and enlargements of the power of Congress.'" *Croson*, 488 U.S. at 490 (quoting *Ex parte* Virginia, 100 U.S. 339, 345 (1880)).

130. *Fullilove*, 448 U.S. at 472.

question of the applicable standard of review for a federal affirmative action program and specifically chose not to apply strict scrutiny.

Although the *Fullilove* Court chose not to impose a label on the standard employed, it upheld a program on a standard plainly less severe than strict scrutiny;[131] in fact, Justice Burger took great pains to avoid the term.[132] By denying that *Adarand* represents a vast departure from existing law, the Court indulges in a flimsy rationalization for a result-driven opinion.

III. PRACTICAL RAMIFICATIONS OF *ADARAND*

A. *Introduction*

Adarand promises to have far-reaching repercussions. While the Clinton administration publicly lauded affirmative action in the weeks following *Adarand*,[133] the administration simultaneously called for an immediate review of all federal agencies to ensure compliance with the *Adarand* standard.[134] Deval Patrick, the Assistant Attorney General for Civil Rights, has indicated that some federal affirmative action plans "will have to end and others will have to be reformed" due to *Adarand*'s stricter standards.[135]

It is unclear whether *Adarand* threatens all federal race-based programs. Although the strict scrutiny standard will make it significantly more difficult for race-conscious programs to survive, Justice O'Connor left open a window of hope in *Adarand*. She explicitly acknowledged the need for race-conscious programs by stating that "[t]he unhappy persistence of both the practice and

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131. The *Metro Broadcasting* Court confirmed this: "A majority of the Court in *Fullilove* did not apply strict scrutiny to the race-based classification at issue." *Metro Broadcasting*, 497 U.S. at 564.

132. In fact, Justice O'Connor herself explicitly recognized this fact in *Croson*: "The principal opinion in *Fullilove*, written by Chief Justice Burger, did not employ 'strict scrutiny' or any other traditional standard of equal protection review." *Croson*, 488 U.S. at 487. Justice Burger merely found that racial preferences must receive a "most searching examination." He did not name strict scrutiny; in fact, he rejected it, saying, "This opinion does not adopt, either expressly or implicitly, the formulas of analysis articulated in such cases as *University of California Regents v. Bakke*." *Fullilove*, 448 U.S. at 492.

133. "[T]he federal Government will continue to support lawful consideration of race, ethnicity, and gender under programs that are flexible, realistic, subject to reevaluation, and fair." *President Clinton's Memorandum on Affirmative Action, July 19, 1995*, Daily Lab. Rep. (BNA) No. 147, at D42 (Aug. 1, 1995).

134. *Id.* For a comprehensive list of all congressional race-based programs, see *Congressional Research Service's Compilation and Overview of Federal Laws and Regulations Establishing Affirmative Action Goals*, Daily Lab. Rep. (BNA) No. 36, at D25 (Feb. 23, 1995).

135. *Affirmative Action: Some Programs Will Fail the Adarand Test, Patrick Tells House Oversight Panel*, Daily Lab. Rep. (BNA) No. 140, at D3, 1 (July 21, 1995). The Department of Justice has been hard at work to adjust federal affirmative action programs in compliance with *Adarand*. Less than a year after *Adarand*, the Department of Justice has already published proposals to reform affirmative action in federal procurement which conform to the standards outlined in *Adarand*. *See Justice Department Proposed Reform to Affirmative Action in Federal Procurement*, Daily Lab. Rep. (BNA) No. 100, at D22 (May 23, 1996). The Justice Department has also compiled an impressive list of studies and statistics on racial discrimination of minority-owned businesses which provide evidence that federal programs are justified under the compelling interest test. *See Justice Department Appendix on the Compelling Interest for Affirmative Action in Federal Procurement: A Preliminary Survey*, Daily Lab. Rep. (BNA) No. 100, at D23 (May 23, 1996).

lingering effects of racial discrimination" in this country will sometimes justify a narrowly tailored race-based remedy.[136]

The question remains, however, as to what exactly constitutes a "compelling" governmental interest and what internal checks a program must possess to be viewed as "narrowly tailored." Although the *Adarand* Court did not provide explicit guidance, direction is available from precedent. *Croson* is perhaps the best resource, as the *Adarand* Court relied heavily upon its reasoning. Additionally, Justice O'Connor's concurrence in *Wygant* provides practical advice for public employers.[137]

B. *The "Compelling Interest" Requirement*

In order for a government affirmative action program to meet the compelling interest standard, the government employer must demonstrate that the plan addresses ongoing discrimination, or that effects of past discrimination are shown by particularized findings.[138] Statistical evidence, therefore, may be the only acceptable verification of discrimination.[139]

Clearly, generalized societal discrimination is not a sufficient justification for an affirmative action plan.[140] For example, a government employer cannot justify an affirmative action plan on the foundation that discrimination is a pervasive problem in the United States. Evidence of nationwide discrimination in a particular industry is similarly insufficient to justify a state or local program; the discrimination must be linked to the local industry.[141] In the case of a federal program, however, evidence of nationwide discrimination may still be sufficient.

An industry is not required to hire minorities in proportion to the representation of the minority in the general population.[142] Instead, the statistics must reflect the number of minorities in the relevant population with the skills required to perform the job.[143] The analysis, therefore, hinges on the disparity between the number of qualified minorities in the relevant population and the number employed by the specific government entity.[144] In certain employment contexts, such as those involving entry level positions or positions requiring little training, disparities between the number of minorities in a

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

137. *See* discussion *supra* notes 36-42 and accompanying text.

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

139. *Id.* at 501-03 (calling for statistical evidence to support discrimination in the work force).

140. *Wygant*, 476 U.S. at 276.

141. *Croson*, 488 U.S. at 504. If the program in question is enacted by a state or local government, the statistical evidence must be specific to the local industry. The *Croson* Court chastised the city for relying on congressional findings of nationwide discrimination in the industry rather than statistics reflecting the local industry. *Id.*

142. In *Croson*, evidence that while the city's population was over 50% minority, minority businesses received only 0.67% of the city's prime contracts, was not adequate in the Court's eyes to demonstrate discrimination. *Id.* at 501.

143. *Id.*

144. *Id.* at 501-02.

particular field and those in the general population may be probative of a pattern of discrimination.[145]

The requirement of a disparity between the number of qualified minorities in the relevant pool and the number of minorities hired is somewhat flawed by failing to account for one of the critical effects of discrimination. Discrimination is a pervasive problem to the extent that it virtually precludes participation of minorities in certain industries. Discrimination, therefore, can clearly still exist even if the number of qualified minority participants in an industry was proportional to the number hired. *Croson* left unanswered the question of whether a government may provide evidence that the number of minorities participating in a particular field would have been greater had it not been for historical patterns of discrimination. The trend in lower courts has been to allow reliance upon such evidence.[146]

The issue remains open as to whether affirmative action may be used for non-remedial objectives. The program at issue in *Adarand* was determined to be remedial, in that it sought to redress the effects of past discrimination, and thus did not lead the Court to address this issue. Justice Stevens, however, in his *Adarand* dissent, maintained that the concept of promoting diversity is consistent with the majority's opinion in *Adarand*.[147] While the majority overruled *Metro Broadcasting* on other grounds, the holding that diversity constituted a significant government interest remains intact.[148] Additionally, the Court in *Bakke* identified a diverse student body as a compelling interest for a university.[149] It is unclear, however, whether the concept of diversity as a compelling interest extends beyond the unique environment of a university. Because *Metro Broadcasting* was decided under the intermediate scrutiny standard, broadcast diversity was found to satisfy only an important government interest.[150] The compelling government interest in diversity outside of the university or broadcasting contexts remains unclear.

C. *The "Narrowly Tailored" Requirement*

In order to satisfy the strict scrutiny standard, the affirmative action program must also be "narrowly tailored." The Court has not set forth specific standards to advise employers how to narrowly tailor their affirmative action programs. The following factors, derived from several Supreme Court opinions, offer some assistance in assessing whether a program is "narrowly tailored."

One important aspect of a narrowly tailored program involves whether the government considered race-neutral means *before* adopting the affirmative action program.[151] Other determinants include the flexibility and duration of

145. *Id.*

146. Assistant Attorney General Walter Dellinger, *Justice Department Memorandum on Supreme Court's* Adarand *Decision*, Daily Lab. Rep. BNA) No. 125, at D33, 14 (June 29, 1995).

147. *Id.*

148. *Adarand*, 115 S. Ct. at 2127-28 (Stevens, J., dissenting).

149. *Bakke*, 438 U.S. at 313.

150. *See* discussion *supra* note 59-65 and accompanying text.

151. *Croson*, 488 U.S. at 507. Examples of race-neutral measures suggested by the Court

the plan,[152] regular assessment and reevaluation procedures,[153] the scope of the program,[154] and the availability of waiver provisions.[155] Additionally, the reasonableness of a numerical goal in light of the number of qualified minorities in the industry is pivotal in determining whether a program meets the narrow tailoring requirement.[156] Finally, courts will consider the effect of the program on third parties.[157]

CONCLUSION

The *Adarand* decision is disturbing on a number of levels. Perhaps most distressing is the Court's dismissal of the good will and race-consciousness inherent in enacting an affirmative action program. The assertion that strict scrutiny is necessary to determine the injurious or beneficial nature of an affirmative action program undercuts the competency of Congress, as well as that of every court in the land.

Affirmative action was just one of a calculated list of political statements issued this term by the conservative Court. Like *Adarand*, the two other cases involving race and decided by the Court this term severely limited the government's ability to provide measures to promote racial equality.[158] By ignoring precedent and requiring strict scrutiny for congressionally mandated

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include "[s]implification of bidding procedures, relaxation of bonding requirements, and training and financial aid for disadvantaged entrepreneurs of all races." *Id.* at 509-10; *see also* United States v. Paradise, 480 U.S. 149, 171 ("In determining whether race-conscious remedies are appropriate, we look to several factors, including the efficacy of alternative remedies."); *Wygant*, 476 U.S. at 280 n.6 (stating that governments must consider "lawful alternative[s] and less restrictive means" and citing the theory that the racial classification should "fit" more closely than other available measures).

152. *Paradise*, 480 U.S. at 170; *see also Fullilove*, 448 U.S. at 513 (stating that the "temporary nature of this remedy ensures that a race-conscious program will not last longer than the discriminatory effects it is designed to eliminate") (Powell, J., concurring); *Bakke*, 438 U.S. at 374 (noting that the medical school's strict allotment of 16% of the spaces in the class for minority applicants was too rigid).

153. *Fullilove*, 448 U.S. at 513.

154. The *Wygant* Court found that random inclusion of certain minority groups "further illustrates the undifferentiated nature of the plan." *Wygant*, 476 U.S. at 284, n.13. In *Croson*, the Court criticized the "gross overinclusiveness" of Richmond's racial categories. The district court took judicial notice of the fact that the vast majority of minority individuals in Richmond were African-American. Despite this, the plan included Spanish-speaking, Asian-American, Indian, Eskimo, and Aleut individuals. *Croson*, 488 U.S. at 506.

155. *See Paradise*, 480 U.S. at 171 (enumerating the availability of waiver provisions among a list of factors contributing to the narrow tailoring requirement); *Fullilove*, 448 U.S. at 488 (noting the significance of Congress's allowance for administrative waiver and exemption, given a showing that the level of minority participation cannot be reached while still maintaining the goals of the program).

156. *Paradise*, 480 U.S. at 171.

157. *Id.* The Court has historically frowned on programs which it felt placed heavy burdens on nonminorities. *See Bakke*, 438 U.S. at 310 (holding that none of the interests offered by the university could justify a plan which completely prevented nonminorities from competing for a specific number of positions); *Wygant*, 476 U.S. at 282 (holding that layoff provision imposed too great an injury to nonminorities).

158. Jeffery Rosen, *The Color-Blind Court*, NEW REPUBLIC, July 31, 1995, at 19. *Miller v. Johnson* called into question the Voting Rights Act by holding that the Fourteenth Amendment prohibits states from employing race as the "predominant purpose" in apportioning voting districts. Miller v. Johnson, 115 S. Ct. 2475 (1995). *Missouri v. Jenkins* constrained the federal courts' power to remedy the effects of school desegregation. Missouri v. Jenkins, 115 S. Ct. 2038 (1995).

programs, the Court is expanding its own role and limiting that of Congress, its supposed "co-equal" branch.

As the Court felled the axe on affirmative action programs, it hid behind the ruse of a color-blind Constitution. As Justice Scalia trumpeted in his *Adarand* concurrence, "In the eyes of the government, we are all one race here. It is American."[159] The original intent behind this doctrine carried far more wisdom than the shallow dogma that remains today. Justice Harlan, the sole dissenter in *Plessy v. Ferguson*, felt strongly that the statute which denied African-Americans access to the same train cars that carried whites was degrading and unconstitutional.[160] He wrote:

> But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law.[161]

The color-blind Constitution, once a concept embodying fairness and equality, has become yet another vehicle for oppression by a majority voice.

Lia A. Fazzone

159. *Adarand*, 115 S. Ct. at 2119 (Scalia, J., concurring).
160. Plessy v. Ferguson, 163 U.S. 537, 562 (1896).
161. *Id.* at 559.