Mississippi College Law Review

Volume 16
Issue 2 *Vol. 16 Iss. 2*

Article 8

1996

Setting a Higher Standard: Judicial Review of Federal Affirmative Action in the Wake of Adarand

David W. Case

Custom Citation
16 Miss. C. L. Rev. 369 (1995-1996)

SETTING A HIGHER STANDARD: JUDICIAL REVIEW OF FEDERAL AFFIRMATIVE ACTION IN THE WAKE OF *ADARAND*

*David W. Case**

This dispute regarding the appropriate standard of review may strike some as a lawyers' quibble over words, but it is not.[1]

I. INTRODUCTION

In the present-day civil rights arena, no subject kindles more fundamental disagreement in legal or political debate than affirmative action.[2] Not surprisingly, the tone and tenor of this national debate has intensified exponentially following the United States Supreme Court's June 1995 decision in *Adarand Constructors, Inc. v. Pena*.[3] *Adarand* holds that federal affirmative action programs utilizing racial classifications must be reviewed under the same standard – strict scrutiny – previously made applicable to state and local measures in *City of Richmond v. J.A. Croson Co.*[4] In other words, racial classifications imposed by any federal, state, or local affirmative action measure are constitutional only if "narrowly tailored" to serve a "compelling" governmental interest.[5]

Adarand's holding came despite the Court's not-so-distant 1990 decision in *Metro Broadcasting, Inc. v. FCC*,[6] mandating only intermediate scrutiny in reviewing the constitutionality of federal affirmative action programs. This rapid reversal of *Metro Broadcasting*'s more deferential standard underscores the

---

* The author is a partner in the law firm of Ott & Purdy, P.A., Jackson, Mississippi. B.A. 1985, J.D. 1988, University of Mississippi; LL.M. 1993, Columbia University. Law Clerk to Judge Rhesa H. Barksdale, United States Court of Appeals for the Fifth Circuit, 1991-92.

1. Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 610 (1990) (O'Connor, J., dissenting), *overruled by* Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995).

2. *See* Kenneth Jost, *After* Adarand, A.B.A. J., Sept. 1995, at 70 (In 1995, "[a]ffirmative action emerged almost overnight as the country's hottest political issue."). *Accord* Lara Hudgins, Comment, *Rethinking Affirmative Action in the 1990s: Tailoring the Cure to Remedy the Disease*, 47 BAYLOR L. REV. 815, 816 (1995) ("Affirmative action is one of today's most debated and divisive issues."). Such comments, however, merely echo innumerable similar observations made over the last three decades. As Justice Brennan noted well over twenty years ago, "[f]ew constitutional questions in recent history have stirred as much debate, and they will not disappear." DeFunis v. Odegaard, 416 U.S. 312, 350 (1974) (Brennan, J., dissenting). Debate over affirmative action has indeed "not disappear[ed]," nor is such debate likely to disappear within the foreseeable future. The scope of this article, however, is limited to discussion of the impact of Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995), upon the Supreme Court's decades-long debate over judicial standards of equal protection review in affirmative action cases. The continuing, and voluminously charted, debate over the proper role of race conscious affirmative action remedies in achievement of the important, but somewhat enigmatic, goal of legal, political and economic equality for citizens of all races is beyond the scope of this Article. For an interesting discussion of the nebulous concept of equality as it relates to constitutional equal protection guarantees, see Note, *Forty Megahertz and a Mule: Ensuring Minority Ownership of the Electromagnetic Spectrum*, 108 HARV. L. REV. 1145 (1995) (attempting to demonstrate a libertarian conception of equality in the Court's equal protection decisions), and Charles Fried, Metro Broadcasting, Inc. v. FCC*: Two Concepts of Equality*, 104 HARV. L. REV. 40 (1990) (contrasting the individualistic conception of equality against the collectivist or group-rights conception of equality).

3. 115 S. Ct. 2097 (1995).

4. 488 U.S. 469 (1989). *See Adarand*, 115 S. Ct. at 2113.

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

6. 497 U.S. 547 (1990).

Court's increasingly conservative shift in attitude toward affirmative action. Without doubt, *Adarand* calls into serious question the constitutionality of numerous, ongoing federal affirmative action programs.[7]

Adarand elicited an immediate reaction at the highest levels of national government. Less than two weeks following the decision, Attorney General Janet Reno announced that guidelines would be issued to all federal agencies requiring review of federal affirmative action programs in the light of *Adarand*.[8] On June 28, 1995, the Justice Department's Office of Legal Counsel released a 37-page memorandum, signed by Assistant Attorney General Walter Dellinger, setting forth "preliminary legal guidance on the implications of" *Adarand* for use in "assessing the constitutionality of [current] federal affirmative action programs".[9] Further, on July 19, 1995, President Clinton delivered a speech on affirmative action at the National Archives, which emphasized that "we must, and we will, comply with the Supreme Court's *Adarand* decision."[10] In conjunction with his speech, the President issued a memorandum to all executive department and agency heads directing an evaluation of their affirmative action programs consistent with the Justice Department's previously released *Adarand* guidelines.[11]

The comprehensive review of federal affirmative action programs triggered by *Adarand* has already had significant impact. In late October 1995, the

---

7. *See, e.g.*, Tena Jamison, *Is it the Beginning of the End for Affirmative Action?*, 22 HUM. RTS. 14, 14 (1995). When former Senate Majority Leader Robert Dole inquired early in 1995 concerning the number of federal statutes and regulations relating to affirmative action, the Library of Congress' Congressional Research Service furnished him a list of some 160 then-current provisions. Jost, *supra* note 2, at 75.

8. Ann Devroy, *Reno to Issue Policy Guidelines for Federal Affirmative Action*, WASH. POST, June 23, 1995, at A1.

9. Memorandum from Assistant Attorney General Walter Dellinger to General Counsels (June 28, 1995) (copy on file with author).

10. President Bill Clinton, Speech on Affirmative Action at The Rotunda National Archives (July 19, 1995) (transcript on file with author). In specific regard to *Adarand*, President Clinton stated that:

> we must, and we will, comply with the Supreme Court's *Adarand* decision of last month. Now, in particular, that means focusing set-aside programs on particular regions and business sectors where the problems of discrimination or exclusion are provable and are clearly requiring affirmative action. I have directed the Attorney General and the agencies to move forward with compliance with *Adarand* expeditiously.
>
> But I also want to emphasize that the Adarand decision did not dismantle affirmative action and did not dismantle set asides. In fact, while setting stricter standards to mandate reform of affirmative action, it actually reaffirmed the need for affirmative action and reaffirmed the continuing existence of systematic discrimination in the United States.
>
> What the Supreme Court ordered the federal government to do was to meet the more rigorous standard for affirmative action programs that state and local governments were ordered to meet several years ago. And the best set-aside programs under that standard have been challenged and have survived.
>
> * * * *
>
> Today, I am directing all our agencies to comply with the Supreme Court's *Adarand* decision, and also to apply the four standards of fairness to all our affirmative action programs that I have already articulated: No quotas in theory or practice; no illegal discrimination of any kind, including reverse discrimination; no preference for people who are not qualified for any job or opportunity; and as soon as a program has succeeded, it must be retired. Any program that doesn't meet these four principles must be eliminated or reformed to meet them.

Id.

11. Memorandum from President Bill Clinton to Heads of Executive Departments and Agencies (July 19, 1995) (copy on file with author).

Department of Defense announced the suspension of its so called "rule-of-two," which had been applied to all Department contracting business since 1987.[12] Under the rule,[13] where a reasonable expectation existed that at least two qualified small and disadvantaged businesses would bid on a contract, only small and disadvantaged businesses were permitted to compete for that contract.[14] The Justice Department determined that this set-aside measure could not survive the strict scrutiny required by *Adarand*.[15] The suspended "rule-of-two" had previously resulted in over $1 billion in federal contracting business for minority-owned firms in 1994 alone.[16] As the federal government continues its review in the wake of *Adarand*, numerous other affirmative action programs or measures may be subject to either elimination or substantial modification.[17]

This Article will provide an overview of the primary Supreme Court decisions affecting federal affirmative action, including a discussion of the two prior precedents overturned by the *Adarand* Court. An examination of the facts and holding of *Adarand* will follow, including an analysis of the vastly divergent views expressed by an extremely fractured Court. Finally, this Article will briefly address the questions left unanswered by the *Adarand* majority and the resulting uncertainty surrounding future application of strict scrutiny to federal affirmative action programs.

II. FEDERAL AFFIRMATIVE ACTION PRIOR TO *Adarand*

Affirmative action decisions have historically presented the most striking example of the wide ideological gulf often separating individual Justices on the Supreme Court.[18] These deep divisions are perhaps best reflected in the exceedingly difficult time the Court has had in reaching consensus on the appropriate

---

12. Ann Devroy, *Rule Aiding Minority Firms to End*, WASH. POST, Oct. 22, 1995, at A1.

13. *See* 48 C.F.R. § 219.501 to .508-70 (1995).

14. Devroy, *supra* note 12, at A1.

15. Devroy, *supra* note 12, at A1.

16. Devroy, *supra* note 12, at A1.

17. *See generally* William T. Coleman III, Adarand *and Its Aftermath: How the Supreme Court Overestimated Precedent and Underestimated the Impact of Its Decision*, 31 PROCUREMENT LAW. 12, 13 (1996) ("[t]here are literally billions of dollars tied up in [Department of Defense] contracts that may be affected by the holding of" *Adarand*).

On May 23, 1996, the Clinton Administration released a proposed plan, developed by the Justice Department, to completely overhaul affirmative action in federal contracting to comply with the strict scrutiny standard of *Adarand*. *Proposed Reforms to Affirmative Action in Federal Procurement*, 61 Fed. Reg. 26042 (1996). This proposal is intended to form the model for subsequent amendment of the affirmative action provisions of the Federal Acquisition Regulation and the Defense Federal Acquisition Regulation Supplement. In an effort to demonstrate the compelling governmental interest required by *Adarand*, the Justice Department conducted a preliminary study — *The Compelling Interest for Affirmative Action in Federal Procurement: A Preliminary Survey* — which appears as an appendix to the department's proposed plan. *Id.* at 26050. The study asserts that the evidence collected by the Justice Department "to date" concerning racial discrimination in federal procurement "reflect[s] ongoing patterns and practices of exclusion, as well as the tangible, lingering effects of prior discriminatory conduct." *Id.* at 26051. As discussed *infra*, *Adarand* does not specifically identify what will constitute a "compelling" governmental interest justifying the continued use of race-based affirmative action by the federal government. Therefore, the Justice Department's conclusion that a compelling governmental interest exists justifying further affirmative action in federal procurement is virtually certain to be the subject of future court challenges.

18. *See* Douglas O. Linder, *Review of Affirmative Action after* Metro Broadcasting v. FCC*: The Solution Almost Nobody Wanted*, 59 UMKC L. REV. 293, 293-94 (1991).

level of equal protection review in affirmative action cases. Indeed, although the modern debate over affirmative action has raged for well over three decades,[19] the Court's previous attempts to articulate applicable standards in this area have been strongly criticized as "fragmented," "inconsistent in result," and "arbitrary in application."[20]

As emphasized by Justice Stevens in dissent, *Adarand* represents only the third time the Supreme Court has considered the constitutionality of a federal affirmative action program.[21] In both of the first two cases, *Fullilove v. Klutznick*[22] and *Metro Broadcasting*,[23] the Court upheld the affirmative action measure while sharply differing over the level of scrutiny to be applied in analyzing the petitioners' equal protection claims. In contrast, the *Adarand* majority pretermitted decision on the constitutionality of the program in question and chose, instead, to conclusively resolve only the standard of review issue. For better or worse, therefore, it appears that, at least for the moment, a majority of the current Court has indeed reached consensus on the requisite level of equal protection scrutiny for all affirmative action cases.

Resolution of this highly contested issue, however, should not be viewed solely in the vacuum of the *Adarand* Court's many fragmented opinions. Indeed, *Adarand* represents an end product of a quite lengthy and, at times, virulent debate among numerous Justices, many of whom are no longer on the Court. To fully measure *Adarand*'s impact on this debate, therefore, this conflict must be seen in its historical context.

A. Regents of the University of California v. Bakke[24]

The Court's 1978 *Bakke* decision is said to have "set the structure for all future discourse on affirmative action."[25] *Bakke* involved an unsuccessful white applicant's equal protection challenge to a University of California Medical School admissions program setting aside sixteen positions, out of one hundred total, for which only minority applicants could qualify.[26] The fragmented opinions in *Bakke* aptly forebode the debate which would span decades over the appropriate analytical framework for review of race-conscious affirmative action measures.

Although voting 5-4 to strike down the University's minority admissions program, the *Bakke* voting majority failed to agree on a rationale. Of those voting to invalidate the program, only Justice Powell, author of the primary *Bakke* opinion, utilized an equal protection analysis. Justice Powell asserted that any racial classification, even those designed to benefit or protect minorities, is suspect and

19. *See* Hudgins, *supra* note 2, at 819-21.

20. *See* Lucy Katz, *Public Affirmative Action and the Fourteenth Amendment: The Fragmentation of Theory after* Richmond v. J.A. Croson Co. *and* Metro Broadcasting, Inc. v. Federal Communications Commission, 17 T. MARSHALL L. REV. 317, 318 (1992).

21. Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2126 (1995) (Stevens, J., dissenting).

22. 448 U.S. 448 (1980).

23. 497 U.S. 547 (1990).

24. 438 U.S. 265 (1978).

25. Katz, *supra* note 20, at 329. *See generally* Vincent Blasi, Bakke *as Precedent: Does Mr. Justice Powell Have a Theory?*, 67 CAL. L. REV. 21 (1979); Robert G. Dixon, Jr., Bakke: *A Constitutional Analysis*, 67 CAL. L. REV. 69 (1979).

26. Regents of the Univ. of California v. Bakke, 438 U.S. 265, 274-76 (1978).

thus subject to strict scrutiny review under the Fourteenth Amendment.[27] Although carefully acknowledging that, under some circumstances, race could positively factor into admissions decisions, Justice Powell found that *Bakke*'s absolute set aside could not survive strict scrutiny and, therefore, violated the equal protection clause.[28] While concurring in the judgment, Justice Stevens, joined by Chief Justice Burger and Justices Stewart and Rehnquist, found it unnecessary to reach the petitioner's Fourteenth Amendment claim. Instead, they found the race-based exclusion at issue invalid solely under Title VI of the Civil Rights Act of 1964.[29]

In dissent, Justice Brennan, joined by Justices White, Marshall and Blackmun, found strict scrutiny review inappropriate because the benign race-conscious measure in *Bakke* implicated no fundamental right or suspect classification.[30] The dissenters argued that, instead, only intermediate scrutiny should apply to the University's admissions policy, which they would have upheld as substantially related to an important governmental objective.[31] Of the Justices reaching the issue, therefore, only one of five favored strict, rather than intermediate, scrutiny. Nevertheless, Justice Powell's *Bakke* opinion is clearly the genesis for the Court's current majority position applying strict scrutiny to all race conscious affirmative action programs.[32]

B. Fullilove v. Klutznick

In its first opportunity to address the constitutionality of a federal affirmative action measure, the Court again was able to reach a majority decision only for

---

27. *Id.* at 290-91.

28. *See id.* at 315, 317. In this regard, Justice Powell suggested in *Bakke* that the goal of obtaining the educational benefits flowing from a racially diverse student body may be a "compelling" governmental interest in higher education justifying limited race-conscious classifications. *Id.* at 311-16. In a recent case involving the University of Texas School of Law, however, the United States Court of Appeals for the Fifth Circuit unequivocally rejected this proposition:

> [A]ny consideration of race or ethnicity by the law school for the purpose of achieving a diverse student body is not a compelling interest under the Fourteenth Amendment. Justice Powell's argument in *Bakke* garnered only his own vote and has never represented the view of a majority of the Court in *Bakke* or any other case.

Hopwood v. State, 78 F.3d 932, 944 (5th Cir.), *cert. denied*, 116 S. Ct. 2581 (1996). Reaction to the Fifth Circuit's *Hopwood* decision was immediate and vehement. *See, e.g.*, Peter Applebome, *Ruling Threatens College Policies on Racial Entries*, N.Y. TIMES, Mar. 21, 1996, at A1, Col. 3 ("some scholars and affirmative-action supporters said the [Fifth Circuit] had dangerously exceeded its powers in rejecting the Supreme Court's *Bakke* decision"); Editorial, *Bad Law on Affirmative Action*, N.Y. TIMES, Mar. 22, 1996, at A14, Col. 1 (criticizing *Hopwood* as "hasty, aggressively activist and legally dubious"); Mari J. Matsuda & Charles R. Lawrence, *Myths About Minorities*, N.Y. TIMES, Apr. 2, 1996, at A13, Col. 1 ("The court's decision drastically limits affirmative action at public universities within the Fifth Circuit's jurisdiction and if sustained could sound the death knell for affirmative action programs around the country."). Initial frenzy over the potential consequences of *Hopwood* to race-conscious affirmative action measures aside, the Fifth Circuit correctly observed in *Hopwood* that Justice Powell's equal protection discussion in *Bakke* represented the opinion of only one Justice, and, as to the arguments concerning "diversity" as a compelling interest under strict scrutiny, has never been adopted by a majority of the Supreme Court. As such, Justice Powell's *Bakke* opinion could not under any circumstance be construed as binding on the circuit courts. The Supreme Court declined to grant certiorari in *Hopwood* on July 1, 1996. Whether *Hopwood*'s rationale will be followed or rejected by other circuits remains to be seen.

29. *See Bakke*, 438 U.S. at 412 (Stevens, J., concurring in judgment in part and dissenting in part).

30. *See id.* at 359 (Brennan, J., concurring in judgment in part and dissenting in part).

31. *Id.*

32. *See* Katz, *supra* note 20, at 331.

the ultimate result, not the underlying rule of decision. The *Fullilove* Court voted 6-3 to uphold the "minority business enterprise" (MBE) provision of the Public Works Employment Act of 1977, requiring utilization of at least ten percent of federal funds for local public works projects to procure services or supplies from minority-owned firms.[33] Again, the critical division in the various opinions was over the necessary level of equal protection review.[34]

Chief Justice Burger announced the judgment in *Fullilove* in a plurality opinion joined by Justices White and Powell.[35] Although upholding the MBE provision against an equal protection challenge, the plurality opinion expressly avoided the standard of review debate initiated in *Bakke*.[36] Indeed, as Justice Powell's separate concurrence observed, the Chief Justice's opinion failed to "articulate judicial standards of review in conventional terms."[37] As commentators have subsequently recognized, the *Fullilove* plurality nevertheless applied a standard of review "somewhere *between*" strict scrutiny and a traditional form of intermediate review as advocated in *Bakke*.[38]

Although stressing the MBE provision's "strictly remedial" nature, the plurality opinion asserted that any preference based on racial or ethnic criteria "must necessarily receive a most searching examination."[39] This "searching examination," however, must be tempered by "appropriate deference to Congress" in discharge of its authority under the spending and commerce powers, and under section 5 of the Fourteenth Amendment, to enforce constitutional equal protection guarantees by appropriate legislation.[40] Indeed, the plurality opinion is, to say the least, an ardent declaration of deference to congressional judgment even where "a congressional program raises equal protection concerns."[41] In the many subsequent justifications for various positions in the Court's renewed standard of review debate in *Croson*, *Metro Broadcasting*, and *Adarand*, this aspect of *Fullilove*'s plurality opinion attracted the most attention and, not surprisingly, the most conflicting interpretations.[42] Further, *Fullilove*'s strong separation of powers lan-

---

33. Fullilove v. Klutznick, 448 U.S. 448, 453-54 (1980). Albeit under contrasting rationales, Chief Justice Burger and Justices Powell, White, Brennan, Marshall, and Blackmun voted to uphold the MBE provision.

34. For a substantive discussion of *Fullilove*'s impact upon this country's continuing legal and political debate over affirmative action, see Drew S. Days, III, Fullilove, 96 YALE L.J. 453 (1986).

35. *Fullilove*, 448 U.S. at 453.

36. *See id.* at 492 ("This opinion does not adopt, either expressly or implicitly, the formulas of analysis articulated in such cases as [*Bakke*]. However, our analysis demonstrates that the MBE provision would survive judicial review under either 'test' articulated in the several *Bakke* opinions.").

37. *Id.* at 495-96 (Powell, J., concurring).

38. *See, e.g.*, Linder, *supra* note 18, at 299 (emphasis in original).

39. *Fullilove*, 448 U.S. at 481, 491.

40. *Id.* at 472. The Fourteenth Amendment provides that Congress has the "power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5. For a discussion on the reach of Congress' § 5 power, see Jesse H. Choper, *Congressional Power to Expand Judicial Definitions of the Substantive Terms of the Civil War Amendments*, 67 MINN. L. REV. 299 (1982); and Archibald Cox, *Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91 (1966).

41. *Fullilove*, 448 U.S. at 472. For example, the plurality opinion states that, "[w]hen we are required to pass on an Act of Congress, we assume 'the gravest and most delicate duty that this Court is called on to perform.' " *Id.* (quoting Blodgett v. Holden, 275 U.S. 142, 148 (1927)). "[W]e accord[ ] 'great weight to the decisions of Congress' even though . . . a congressional program raises equal protection concerns." *Id.*

42. *See, e.g.*, *infra* notes 59-67, 70-71, 76-78, 80-81, 88-95, and accompanying text.

guage[43] may explain, at least in part, Justice White's decision to join the plurality and abandon the intermediate standard of review position he previously joined in *Bakke*.[44]

In his separate concurrence, Justice Powell, as he had in *Bakke*, subjected the MBE provision to strict scrutiny.[45] Based upon the deference he afforded congressional enactments under the enforcement clauses of the Thirteenth and Fourteenth Amendments, Justice Powell found the MBE set-aside "a reasonably necessary means of furthering the compelling governmental interest in redressing the discrimination that affects minority contractors."[46] In another concurring opinion, Justice Marshall, joined by Justices Brennan and Blackmun, also voted to uphold the set-aside, but argued the equal protection claim should be reviewed under intermediate scrutiny as articulated by the dissenters in *Bakke*.[47]

As did Justice Powell, Justices Stewart and Rehnquist also subjected the MBE provision to strict scrutiny, but in dissent argued that the set-aside must be rejected under this standard.[48] Justice Stevens also dissented from the judgment in a separate opinion, but failed to set forth a clear position on the standard of review

---

43. "[W]e are bound to approach our task with appropriate deference to Congress, a co-equal branch charged by the Constitution." *Fullilove*, 448 U.S. at 472. "Here we pass, not on a choice made by a single judge or a school board, but on a considered decision of the Congress and the President." *Id.* at 473. "Here we deal . . . not with the limited remedial powers of a federal court, for example, but with the broad remedial powers of Congress. It is fundamental that in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress, expressly charged with the Constitution with competence and authority to enforce equal protection guarantees." *Id.* at 483.

44. *See supra* text accompanying note 30. Much has been made through the years of Justice White's seeming unpredictability in race cases and, in particular, affirmative action cases. *See, e.g.*, Charles Fried, Essay in *A Tribute to Justice Byron R. White*, 107 HARV. L. REV. 20, 20-23 (1993). *See also* Lance Liebman, *Justice White and Affirmative Action*, 58 U. COLO. L. REV. 471, 473-87 (1987) (attempting reconciliation of Justice White's opinions on race and affirmative action). As former Solicitor General Fried has noted, however, one "thread of continuity" in Justice White's work on the Court was his unwavering commitment to a strong constitutional separation of powers doctrine. Fried, *supra* at 23. Without question, Justice White often provided the decisive vote in critical affirmative action decisions, joining without comment seemingly inconsistent opinions from one case to the next. *See* Fried, *supra* at 20; Neal E. Devins, Metro Broadcasting, Inc. v. FCC: *Requiem for a Heavyweight*, 69 TEX. L. REV. 125, 125 n.6 (1990). *See infra* note 83 and accompanying text. Justice White's vote in each such decision, however, is best understood when viewed in the light of his long-standing commitment to separation of powers and his concomitant respect for the politically responsive, legislative authority of Congress, a constitutionally charged co-equal branch of the federal government. *Cf.* Rhesa H. Barksdale, Essay in *A Tribute to Justice Byron R. White*, 107 HARV. L. REV. 3, 6 (1993) (Justice White's "opinions reflect his unwavering confidence and faith in our majoritarian, democratic system. He understands the limited role of the courts, especially the federal courts, in that system, feeling confident that the affairs of our nation are best managed by its people and their elected representatives.").

45. *Fullilove*, 448 U.S. at 507 (Powell, J., concurring).

46. *Id.* at 510, 515 (Powell, J., concurring).

47. *Id.* at 517 (Marshall, J., concurring in judgment). However, as current Solicitor General Drew Days, who argued *Fullilove* before the Supreme Court on behalf of the United States, has cogently observed:

> The efforts [in *Fullilove*] to delineate the appropriate test for evaluating the constitutionality of racial classifications ran from Justice Powell's 'strict scrutiny' to Chief Justice Burger's 'most searching examination' to Justice Marshall's 'substantially related to an important governmental objective.' The truth is, however, that all the members of the majority applied a standard that fell below any of the ones upon which they claimed to rely. In the absence of any significant legislative history, these Justices looked to a variety of congressional reports, hearings, and legislation related to the general condition of minority business enterprises. On this basis, they wrote their own post hoc rationalizations, concluding not that Congress 'could reasonably have' relied, but in fact that Congress did rely, upon this societal condition in enacting the minority set-aside.

Drew S. Days, III, Fullilove, 96 YALE L.J. 453, 467-68 (1987) (footnotes omitted).

48. *Fullilove*, 448 U.S. at 522-23 (Stewart, J., dissenting).

issue.[49] Nevertheless, Justice Stevens observed that the equal protection clause imposed upon the Court "a special obligation to scrutinize any governmental decisionmaking process that draws nationwide distinctions between citizens on the basis of their race."[50] However, Justice Stevens carefully noted his disagreement with Justices Stewart and Rehnquist that the equal protection clause absolutely prohibited any statutory classification based on race.[51]

C. City of Richmond v. J.A. Croson Co.

In 1989, the stakes in the ongoing standard of review debate were raised considerably when, for the first time, a majority of the Court subjected an affirmative action program to strict scrutiny review.[52] *Croson* involved a Richmond, Virginia ordinance requiring prime contractors on city construction projects to subcontract at least thirty percent of the dollar amount of each contract to minority-owned businesses.[53] Relying primarily upon *Fullilove*, both the trial court and the original appellate panel upheld the ordinance against an equal protection challenge, determining the city was entitled to deference similar to that accorded Congress in *Fullilove*.[54]

The *Croson* Court voted 6-3 to invalidate the Richmond set-aside program.[55] Five members of this majority – Justices O'Connor, White, Scalia, Kennedy, and Chief Justice Rehnquist – concluded that strict scrutiny was the applicable standard of equal protection review.[56] In a separate opinion concurring in part and concurring in the judgment, Justice Stevens, similar to his dissent in *Fullilove*, again stubbornly refused to "engag[e] in [the] debate over the proper standard of

---

49. *See id.*, 448 U.S. at 532, 550-53 (Stevens, J., dissenting).

50. *Id.* at 548 (Stevens, J., dissenting). Indeed, Justice Stevens further emphasized that "[r]acial classifications are simply too pernicious to permit any but the most exact connection between justification and classification." *Id.* at 537.

51. *Id.* at 548.

52. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493-94 (1989). *Id.* at 520 (Scalia, J., concurring in judgment); *Id.* at 551 (Marshall, J., dissenting). *See also* Charles Fried, *Affirmative Action after* City of Richmond v. J.A. Croson Co.*: A Response to the Scholars' Statement*, 99 YALE L.J. 155, 155 (1989) ("For the first time a majority of the Court holds unequivocally that all racial classifications . . . must pass strict scrutiny and be justified by a compelling governmental purpose."); Michel Rosenfield, *Decoding* Richmond*: Affirmative Action and the Meaning of Constitutional Equality*, 87 MICH. L. REV. 1729, 1731 (1989) ("[A] majority on the Court for the first time has settled on a single standard--the strict scrutiny test."). Only three years earlier, in Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 273-74 (1986), a plurality of the Court, consisting of Justices Powell, O'Connor, Rehnquist, and Chief Justice Burger, had applied strict scrutiny to a public employer's voluntary affirmative action plan challenged under the equal protection clause.

53. *Croson*, 488 U.S. at 477-79, 486.

54. *Id.* at 483-84. Following the intervening *Wygant* decision, the Supreme Court remanded *Croson* to the Fourth Circuit Court of Appeals for further consideration. On remand, a divided panel of the Fourth Circuit struck down the city ordinance finding strict scrutiny review applicable based on *Wygant*. *Id.* at 485.

55. *Id.* at 476.

56. *Id.* at 493-94; *id.* at 520 (Scalia, J., concurring in judgment).

review to apply in affirmative-action litigation."[57] Instead, Justice Stevens joined only that portion of Justice O'Connor's opinion finding the city had presented insufficient evidence justifying the need for a race-based remedy for past discrimination in its construction industry.[58]

In a portion of her opinion garnering only a plurality vote, Justice O'Connor, joined by Chief Justice Rehnquist and Justice White, also directly addressed the contention that review of the city's set-aside program should be controlled by *Fullilove*, which upheld a similar set aside program imposed by Congress on local construction projects utilizing federal funding.[59] The plurality rejected this notion, finding *Fullilove* clearly distinguishable as primarily based upon Congress' "unique remedial powers" under section 5 of the Fourteenth Amendment.[60] Under section 5, "Congress, unlike any State or political subdivision, has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment."[61] Giving substance to this federal-state dichotomy, Justice O'Connor emphasized:

> That Congress may identify and redress the effects of society-wide discrimination does not mean that, a fortiori, the States and their political subdivisions are free to decide that such remedies are appropriate. Section 1 of the Fourteenth Amendment is an explicit constraint on state power, and the States must undertake any remedial efforts in accordance with that provision. To hold otherwise would be to cede control over the content of the Equal Protection Clause to the 50 state legislatures and their myriad political subdivisions. The mere recitation of a benign or compensatory purpose for the use of a racial classification would essentially entitle the States to exercise the full power of Congress under § 5 of the Fourteenth Amendment *and insulate any racial classification from judicial scrutiny under § 1*.[62]

Accordingly, the plurality found that *Fullilove*'s deference to congressional power was not dispositive of the Court's review of state and local governmental authority to enact similar set-aside programs.[63]

---

57. *Id.* at 514 (Stevens, J., concurring in part and concurring in judgment). Justice Stevens' continued refusal to address this issue can be attributed to his observed "skeptic[ism] of discontinuously calibrated levels of scrutiny and [his] corresponding[ ] confiden[ce] of his own ability to discern on a case-by-case basis when racial classifications are and are not appropriate." Fried, *supra* note 2, at 126. This is strikingly reminiscent of Justice Stewart's often remembered personal standard for reviewing obscenity cases: "I know it when I see it." *See* Jacobellis v. Ohio, 378 U.S. 184, 197 (Stewart, J., concurring). The obvious dilemma in this type of judicial analysis, however, is that it provides absolutely no guidance to trial and appellate judges, requiring, at best, a guess as to whether the Supreme Court would also "see" an equal protection violation in any given affirmative action program. This approach to judicial review is further hindered by the inability to "discern [any] evident pattern from the trajectory of Justice Stevens' dispositions" in his affirmative action opinions. Fried, *supra* note 2, at 126.

58. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 511-12 (1989) (Stevens, J., concurring in part and concurring in judgment).

59. *Id.* at 486-93.

60. *Id.* at 488.

61. *Id.* at 490.

62. *Id.* (emphasis added).

63. *Id.* at 491. In his separate opinion, Justice Scalia also acknowledged the federal-state distinction implicated by § 5 of the Fourteenth Amendment and the Court's holding in *Fullilove*. *Id.* at 521-22 (Scalia, J., concurring in judgment). However, Justice Scalia thought it sufficient to note simply that *Fullilove* was not controlling "without revisiting what we held in *Fullilove* (or trying to derive a rationale from the three separate opinions, none of which commanded more than three votes . . .)." *Id.* at 522.

Although joining all other aspects of her opinion, Justice Kennedy declined to join in Justice O'Connor's discussion of *Fullilove*'s significance.[64] Justice Kennedy argued that it was "difficult" to accept the proposition that Congress was properly authorized to enact legislation which would otherwise violate equal protection if enacted by a state or local government.[65] Anticipating the subsequent debate on this subject in *Metro Broadcasting* and in *Adarand*, Justice Kennedy stated that this issue was not before the Court, and that "any *reconsideration* of that issue must await some further case."[66] For Justice Kennedy at least, the continued validity of *Fullilove* remained an open question.[67]

In dissent, Justice Marshall, joined by Justices Brennan and Blackmun, sharply denounced the majority decision as "a deliberate and giant step backward in this Court's affirmative action jurisprudence."[68] The dissenters reiterated their consistently stated view that benign race conscious classifications should be subjected only to intermediate scrutiny, and castigated *Croson*'s first-ever majority holding for strict scrutiny as "an unwelcome development."[69] Justice O'Connor's attempts to distinguish *Fullilove* through assertion of a distinction between state and federal authority reflected in section 5 of the Fourteenth Amendment met with equal criticism.[70] Justice Marshall argued that, contrary to the plurality's contention, "*Fullilove* did not view § 5 either as limiting the traditionally broad powers of the States to fight discrimination, or as mandating a zero-sum game in which state power wanes as federal power waxes."[71] However, with hindsight afforded by the subsequent turn of events in *Metro Broadcasting*, the dissenters' complete rejection of *Croson*'s federal-state distinction would indeed prove ironic.

---

64. *Id.* at 518 (Kennedy, J., concurring in part and concurring in judgment).

65. *Id.*

66. *Id.* (emphasis added).

67. Justice Kennedy's hesitation to join this aspect of Justice O'Connor's opinion may also demonstrate his recognition that the *Fullilove*-based distinction could potentially be used to create a differing standard of equal protection review for federal, as opposed to state or local, affirmative action programs. This is, indeed, the manner in which Justice O'Connor's *Croson* opinion was subsequently utilized by the *Metro Broadcasting* majority. *See infra* notes 80-81 and accompanying text.

68. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 529 (1989) (Marshall, J., dissenting).

69. *Id.* at 535, 551.

70. *Id.* at 557-58.

71. *Id.* at 558. Moreover, Justice Marshall noted that four justices in *Bakke* had stressed that:

> "[There is] no reason to conclude that the States cannot voluntarily accomplish under § 1 of the Fourteenth Amendment what Congress under § 5 of the Fourteenth Amendment validly may authorize or compel either the States or private persons to do. A contrary position would conflict with the traditional understanding recognizing the competence of the States to initiate measures consistent with federal policy in the absence of congressional preemption of the subject matter. Nothing whatever in the legislative history of either the Fourteenth Amendment or the Civil Rights Act even remotely suggests that the States are foreclosed from furthering the fundamental purpose of equal opportunity to which the Amendment and those Acts are addressed.

Id. at 559-60 (quoting Regents of the Univ. of California v. Bakke, 438 U.S. 265, 368 (1978) (Brennan, J., concurring in judgment in part and dissenting in part)).

D. Metro Broadcasting, Inc. v. FCC

Metro Broadcasting signaled an abrupt and, for many, astounding change of course in the Court's continuing standard of review debate.[72] At issue in *Metro Broadcasting* were certain racial preferences of the Federal Communications Commission (FCC) intended to increase minority ownership in the radio and television broadcasting industry.[73] In upholding these preferences, *Metro Broadcasting* marked yet another "first" in the Court's debate, although poles apart from the "first" achieved only eighteen months previous in *Croson*. For the first time, a majority of the Court clearly subjected an affirmative action program to relaxed, or intermediate, scrutiny.[74] The *Croson* dissenters – Justices Brennan, Marshall, and Blackmun – were joined by Justices Stevens and White to create a new majority in *Metro Broadcasting*.[75] In stark contrast to the dissent he joined in *Croson*, however, Justice Brennan's majority opinion in *Metro Broadcasting* now fully embraced the *Fullilove*-based, federal state distinction advanced by Justice O'Connor in *Croson*.

Indeed, as the Court's only prior case reviewing a federal affirmative action measure, interpretation of *Fullilove*'s rationale became a focal point for both the majority and dissenting opinions in *Metro Broadcasting*. For example, citing *Fullilove*'s discussion of deference to congressional judgment, Justice Brennan emphasized that it was of "overriding significance" that Congress had "approved – indeed, mandated" the FCC's minority ownership programs.[76] Justice Brennan also placed substantial weight upon the fact that six Justices in *Fullilove* applied something less than strict scrutiny review: the "close examination" called for by the three justices in the *Fullilove* plurality; and intermediate scrutiny as advocated by Justices Brennan, Marshall and Blackmun in *Fullilove*, as they also did in *Bakke*, *Wygant*, and *Croson*.[77] Without attempting to reconcile these separate standards of review, however, Justice Brennan simply announced that the intermediate review standard advocated by the three *Croson* dissenters in *Fullilove* is

---

72. *See, e.g.*, Devins, *supra* note 44, at 127-28 (asserting that *Metro Broadcasting* represented a "significant" and "surprising" expansion of affirmative action; "[a]t the beginning of the 1989 term it seemed impossible that a majority of Justices would subscribe to such a far reaching decision").

73. Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 552 (1990), *overruled by* Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995).

74. *See* Fried, *supra* note 2, at 112 ("the Supreme Court had never, prior to *Metro Broadcasting*, clearly applied relaxed scrutiny to race-conscious legislative measures").

75. *Metro Broadcasting*, 497 U.S. at 550.

76. *Id.* at 563.

77. *Id.* at 564. Quite tellingly, however, Justice Brennan chose to ignore the fact that the "searching review" applied by Chief Justice Burger's plurality opinion in *Fullilove* is far closer to strict scrutiny than intermediate, including the familiar admonition that congressional action is constitutional only if "narrowly tailored" to meet its objectives. Fullilove v. Klutznick, 448 U.S. 448, 490 (1980). This omission did not escape the notice of the dissenters. *See infra* text accompanying notes 94-95.

the standard "[w]e apply . . . today."[78] The majority further declared, without citation to any authority, that this newly announced standard would apply to all "benign race-conscious measures mandated by Congress – even if those measures are not 'remedial' in the sense of being designed to compensate victims of past governmental or societal discrimination."[79]

Justice Brennan then seized upon the federal-state distinction in order to reconcile *Metro Broadcasting*'s result with the previous Term's decision in *Croson*. Citing to the opinions of Justices O'Connor and Scalia, Justice Brennan argued that "much of the language and reasoning in *Croson* reaffirmed the lesson of *Fullilove* that race-conscious classifications adopted by Congress to address racial and ethnic discrimination *are subject to a different standard* than such classifications prescribed by state and local governments."[80] In other words, the *Metro Broadcasting* majority utilized both *Fullilove* and *Croson*'s discussion and interpretation of *Fullilove* to create dual standards for reviewing the constitutionality of racial classifications: one standard for Congress, and another standard for classifications imposed by state or local governments.[81] Numerous legal commentators, however, have strongly questioned Justice Brennan's sincerity in crafting a more deferential test for federal, as opposed to state or local, affirmative action programs.[82] The consensus is that Justice Brennan, long a supporter of across-the-board application of intermediate scrutiny to all affirmative action measures, accepted the federal-state distinction only to hold the critical fifth vote of Justice White, the only member of the Court to join both the *Croson* and *Metro Broadcasting* majorities.[83]

Justice O'Connor, joined by Chief Justice Rehnquist and Justices Scalia and Kennedy, dissented.[84] Justice O'Connor argued that the proper standard of review had been determined last Term in *Croson*, and that none of the Court's precedents, *Croson* included, supported the majority's conclusion "that different

---

78. *Metro Broadcasting*, 497 U.S. at 564. As previously discussed, however, there was no majority in *Fullilove* for any particular standard of review, and no single approach received more than three votes. *See supra* notes 35-48 and accompanying text. Accordingly, the mere fact that a majority did not apply strict scrutiny in *Fullilove* is hardly precedential support for imposing intermediate scrutiny as the new test for reviewing federal affirmative action programs. For that matter, a majority of the Justices in *Fullilove* also did not apply intermediate scrutiny. As one commentator has noted, however, *Fullilove* was the only authority available to the *Metro Broadcasting* majority and thus was utilized in an attempt "[t]o avoid charges of having pulled the new review standard out of thin air." Linder, *supra* note 18, at 300.

79. *Metro Broadcasting*, 497 U.S. at 564-65.

80. *Id.* at 565 (emphasis added).

81. *See* Linder, *supra* note 18, at 301.

82. *See, e.g.*, Linder, *supra* note 18, at 295-96 ("Justice Brennan did his best to justify the development of a new test for federal affirmative action programs, but his heart was not in it."); Katz, *supra* note 20, at 336 (Justice Brennan's acceptance of federal-state distinction a "neat trick"); Fried, *supra* note 2, at 126-27 (although Justice Brennan offers "the *Fullilove* distinction in his opinion, one doubts whether he takes it, or intends us to take it, seriously"; "[i]t is transparently clear that [Brennan] does not believe that the principles he invokes are limited to Congress.").

83. *See* Katz, *supra* note 20, at 336; Linder, *supra* note 18, at 296, 316 17; Fried, *supra* note 2, at 126. *Cf.* Fried, *supra* note 44, at 20 (noting that Justice White joined the *Metro Broadcasting* majority without comment, even though Justice Brennan's opinion "was clearly, even provocatively, inconsistent with *Croson*"). *But see* Devins, *supra* note 44, at 128 ("*Metro Broadcasting* exemplifies Brennan's ability to build coalitions that sacrifice doctrinal purity to achieve the desired outcome.").

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

equal protection principles" applied to federal racial classifications.[85] "The Constitution's guarantee of equal protection binds the Federal Government as it does the States, and no lower level of scrutiny applies to the Federal Government's use of race classifications."[86] In this regard, Justice O'Connor asserted that *Croson* simply reaffirmed the Court's traditional safeguard against discrimination – strict scrutiny – in reviewing racial classifications such as those contained in the FCC's preference policies.[87]

Justice O'Connor next attacked the assertion that *Fullilove*, or her attempts to distinguish *Fullilove* in *Croson*, supported the majority's "novel application of intermediate scrutiny to 'benign' race conscious measures adopted by Congress."[88] First, Justice O'Connor argued that, despite *Fullilove*'s references to other sources of congressional authority, *Croson* had held that *Fullilove* was primarily based upon Congress' "unique remedial powers" under section 5 of the Fourteenth Amendment.[89] As Justice O'Connor correctly noted, section 5 was not implicated in *Metro Broadcasting* inasmuch as that provision empowers Congress to act concerning the States and "this case concerns only the administration of federal programs by federal officials."[90]

Second, Justice O'Connor argued that, at most, *Fullilove* applied only to congressional action seeking to remedy identified past discrimination.[91] Indeed, *Fullilove* emphasized that "careful review was essential to ensure that Congress acted solely for remedial rather than other, illegitimate purposes."[92] The dissent asserted, therefore, that the *Metro Broadcasting* majority could not properly use *Fullilove* to extend its new standard of review to "racial classifications that are not remedial in any sense."[93] Finally, in contrast to Justice Brennan's observation that a majority in *Fullilove* did not apply strict scrutiny, Justice O'Connor observed that six members of the *Fullilove* Court had also rejected intermediate scrutiny in favor of a "more stringent form of review."[94] As such, *Fullilove* could not support the majority's adoption of intermediate scrutiny.[95]

Metro Broadcasting was Justice Brennan's last majority opinion before his retirement in late 1990.[96] The decision was both roundly criticized as reflecting "suspect reasoning" and widely acclaimed as exemplifying Justice Brennan's "consummate skill and brilliance" in building majority coalitions to achieve

85. *Id.* at 603.
86. *Id.* at 604 (citing Bolling v. Sharpe, 347 U.S. 497, 500 (1954)).
87. *Id.* at 603.
88. *Id.* at 606.
89. *Id.* at 605-07.
90. *Id.* at 605-06.
91. *Id.* at 607.
92. *Id.*
93. *Id.*
94. *Id.* at 608.
95. *Id.*
96. *See* Katz, *supra* note 20, at 336.

desired results.[97] Regardless of reaction to *Metro Broadcasting*'s remarkable departure from *Croson*, however, the long-term health of Justice Brennan's final majority opinion was called into serious doubt by his retirement.[98] Indeed, absent Justice Brennan's ability to hold together this fragile majority, support for *Metro Broadcasting*'s new intermediate standard of review was, at best, precarious.

III. *Adarand Constructors, Inc. v. Pena*

Justice Brennan's departure, however, would not be the sole factor influencing renewed debate on the standard of review issue. To the contrary, the five year gap between *Metro Broadcasting* and *Adarand* witnessed a dramatic turnover in the Court's membership. Of the five members of the *Metro Broadcasting* majority, only Justice Stevens remained. Gone were the trio of Justices – Brennan, Marshall, and Blackmun – who, beginning with their 1978 dissent in *Bakke*, had unwaveringly supported intermediate scrutiny of affirmative action. Gone also was the crucial swing vote of Justice White as cast in both *Croson* and *Metro Broadcasting*. A great deal of strength was retained on the other side of the debate, however, as all four of *Metro Broadcasting*'s dissenting Justices remained on the Court. Similar to the position previously occupied by Justice White, therefore, the balance of power in this continuing debate might once again shift based upon a single vote cast by any of the four new Justices joining the Court between *Metro Broadcasting* and *Adarand*.[99]

A. Background Summary

In September 1989, the Central Federal Lands Highway Division, a division of the United States Department of Transportation ("DOT"), awarded a prime contract for construction of a federal highway project in Colorado to Mountain Gravel & Construction Company.[100] As required by section 502 of the Small Business Act (the "Act"),[101] the contract contained a "subcontractor compensa-

97. *See* Devins, *supra* note 44, at 128 and n.20, 155 (quoting Marcia Coyle, *A Final Victory Marks the End of a Career*, NAT'L L.J., Aug. 13, 1990, at S4, col. 2).

98. *See* Devins, *supra* note 44, at 128 ("*Metro Broadcasting*'s monumental character may doom its prospects for lasting precedential influence. The replacement of William Brennan with David Souter portends either an extremely narrow reading of *Metro Broadcasting* or its outright reversal."); Linder, *supra* note 18, at 317 (In the light of Justice Brennan's retirement, "resolution of the issue of review standards for affirmative action reached in *Metro* may be temporary.").

99. The new members of the Court appointed during this period were Justices Souter, Thomas, Ginsburg, and Breyer.

100. Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2102 (1995).

101. 15 U.S.C.A. §§ 631-656 (West Supp. 1996).

tion clause"[102] providing Mountain Gravel additional compensation for hiring subcontractors certified as small businesses controlled by "socially and economically disadvantaged individuals."[103] The Act creates a rebuttable presumption that "Black Americans, Hispanic-Americans, Native-Americans, Asian Pacific Americans, and other minorities" are "socially and economically disadvantaged individuals."[104] Following award of the prime contract, Mountain Gravel solicited bids for the guardrail portion of the contract.[105] Adarand Constructors, Inc., a non-minority firm, submitted the low bid.[106] However, Mountain Gravel awarded the guardrail subcontract to Gonzales Construction Company, a higher bidder certified as a disadvantaged business enterprise under the Act.[107] Mountain Gravel subsequently testified that Adarand's bid would have been accepted over that of Gonzales but for the additional compensation received for hiring Gonzales.[108]

Adarand sued the DOT, contending that providing financial incentives to hire "socially and economically disadvantaged" subcontractors utilizing the Act's race-based presumptions violated the equal protection component of the Fifth Amendment's due process clause. The district court granted summary judgment in favor of the DOT.[109] The Tenth Circuit affirmed, finding the Supreme Court's decision in *Fullilove* controlling.[110] The Tenth Circuit held that "[u]nder *Fullilove*, if Congress has expressly mandated a race-conscious program, *a court must apply a lenient standard*, resembling intermediate scrutiny, in assessing the program's constitutionality."[111] Moreover, citing *Metro Broadcasting*, the court emphasized that "[t]he lesson we glean from *Fullilove* and *Croson* is that the fed-

---

102. This clause provided as follows:

> 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 owned and controlled by socially and economically disadvantaged individuals . . . .
> A small business concern will be considered a DBE after it has been certified as such by the U.S. Small Business Administration or any State Highway Agency. Certification by other Government agencies, counties, or cities may be acceptable on an individual basis provided the Contracting Officer has determined the certifying agency has an acceptable and viable DBE certification program. If the Contractor requests payment under this provision, the Contractor shall furnish the engineer with acceptable evidence of the subcontractor(s) DBE certification and shall furnish one certified copy of the executed subcontract(s).
>
> * * * *
>
> 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.

Adarand, 115 S. Ct. at 2103-04.

103. *Id.* at 2102.

104. 15 U.S.C.A. § 637(d)(2), (3) (West Supp. 1996).

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

106. *Id.*

107. *Id.*

108. *Id.*

109. Adarand Constructors, Inc. v. Skinner, 790 F. Supp. 240, 245 (D. Colo. 1992), *rev'd sub nom.*, Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995).

110. Adarand Constructors, Inc. v. Pena, 16 F.3d 1537, 1543, 1547 (10th Cir. 1994), *rev'd*, 115 S. Ct. 2097 (1995).

111. *Id.* at 1544 (emphasis added).

eral government, acting under congressional authority, can engage more freely in affirmative action than states and localities."[112] *Metro Broadcasting*'s dual standards had quite clearly taken hold in the lower courts.

B. The Holding and Rationale of Adarand

On appeal to the Supreme Court, however, the *Metro Broadcasting* dissenters found their critical fifth vote in the person of Justice Thomas. By a 5-4 vote, therefore, this new majority swiftly dismantled *Metro Broadcasting*'s short-lived dual standards for judicial review of affirmative action measures. As in *Croson* and *Metro Broadcasting*, Justice O'Connor once again took center stage in this long-standing debate.

Writing for the *Adarand* majority, Justice O'Connor initially sought to repair the damage to application of strict scrutiny to all governmental racial classifications precipitated by her attempts to distinguish *Fullilove* in the plurality portion of her *Croson* opinion. Clearly mindful of Justice Brennan's use of this distinction in *Metro Broadcasting*, Justice O'Connor announced that the *Adarand* Court would "revisit the issue" of the respective equal protection obligations of the federal and state governments imposed under the Constitution's Fifth and Fourteenth Amendments.[113] Through a lengthy, historical tour of the Court's previous equal protection cases, Justice O'Connor emphasized that, since the mid-1970s, a virtually identical equal protection obligation had been imposed on the federal government as that imposed on the States.[114] Justice O'Connor further asserted that, indeed, many of the Court's equal protection decisions in this regard had not indicated even the "possibility" of different standards for state and federal action.[115]

Justice O'Connor recognized, however, that the Court's equal protection decisions had primarily involved invidious governmental racial classifications, as opposed to race-conscious governmental action designed to benefit, rather than hinder, groups historically the target of harmful discrimination.[116] Therefore, Justice O'Connor next undertook to review the Court's lengthy debate – extending from *Bakke* through *Metro Broadcasting* – over the proper level of equal protection review for affirmative action measures.[117] Not surprisingly, *Croson* was the focal point for this analysis:

> With *Croson*, the Court finally agreed that the Fourteenth Amendment requires strict scrutiny of all race-based action by state and local governments. But *Croson* of course had no occasion to declare what standard of review the Fifth Amendment requires for such action taken by the Federal Government. *Croson* observed simply that the Court's "treatment of an exercise of congressional

112. *Id.* at 1545.
113. Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2106 (1995).
114. *Id.* at 2107. For example, Justice O'Connor referenced the express statement of this principle in Weinberger v. Wisenfeld, 420 U.S. 636, 638 n.2 (1975), in which the Court observed that "[t]his Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment." *Id.* at 2108.
115. *Id.* at 2107-08.
116. *Id.* at 2108.
117. *Id.* at 2108-12.

> power in *Fullilove* cannot be dispositive here," because *Croson*'s facts did not implicate Congress' broad power under § 5 of the Fourteenth Amendment.[118]

Nevertheless, Justice O'Connor also acknowledged that *Croson* had, in fact, generated "lingering uncertainty" concerning the appropriate standard of review for federal affirmative action.[119]

Before turning her attention to the Court's recent decision in *Metro Broadcasting*, however, Justice O'Connor carefully paused to summarize her review of the Court's equal protection and affirmative action decisions through Croson. In this regard, Justice O'Connor argued that, by the time Metro Broadcasting reached the Court, the Court's previous decisions had firmly established "three general propositions":

> (1) "skepticism" – recognition that racial classifications are inherently suspect and thus subject to a "most searching" judicial examination;
>
> (2) "consistency" – the understanding that the proper standard of equal protection review is unaffected by "the race of those burdened or benefited by a particular classification"; and
>
> (3) "congruence" – recognition that the Court's approach to equal protection analysis under the Fifth Amendment concerning the federal government is "the same" as that applied to state and local governments under the Fourteenth Amendment.[120]

Justice O'Connor asserted that these ideas had been long considered "central to th[e] Court's understanding of equal protection."[121] Accordingly, Justice O'Connor stressed that, considered together, these principles necessarily "lead to the conclusion that any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny."[122]

The stage was thus set for *Metro Broadcasting*'s outright reversal. Justice O'Connor argued that *Metro Broadcasting*'s "surprising" adoption of intermediate scrutiny to review "benign" federal racial classifications represented a significant departure from the Court's prior affirmative action cases.[123] In this regard, Justice O'Connor accused the *Metro Broadcasting* majority of "turn[ing] its back on *Croson*'s explanation of why strict scrutiny of all governmental racial classifi-

---

118. *Id.* at 2110.
119. *Id.* at 2111.
120. *Id.*
121. *Id.* at 2113.
122. *Id.* at 2111, 2113.
123. *Id.* at 2112.

cations is essential."[124] Additionally, the Court found that *Metro Broadcasting* "squarely rejected" one of the three propositions established by the Court's previous decisions: "congruence between the standards applicable to federal and state racial classifications."[125] Indeed, the *Adarand* majority found that *Metro Broadcasting* wholly "repudiated" the Court's "long-held notion" that the Constitution imposes no lesser duty on the federal government than on the States to insure equal protection of the laws.[126]

The *Adarand* Court further found that *Metro Broadcasting*'s departure from "congruence" seriously undermined the Court's other established equal protection principles: "skepticism" and "consistency."[127] In other words, *Metro Broadcasting* treated certain racial classifications (i.e., "benign" federal classifications) with less "skepticism" than others, and had ignored "consistency of treatment" by making the race of the benefited group a critical factor in determining the proper standard of equal protection review.[128] Justice O'Connor asserted, however, that the three propositions identified in *Adarand* all derived from the basic principle that constitutional equal protection is intended to "protect persons, not groups."[129] Application of strict scrutiny was best suited to insure non-infringement of this "*personal* right to equal protection."[130] Accordingly, the *Adarand* majority held that:

> all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests. To the extent that *Metro Broadcasting* is inconsistent with that holding, it is overruled.[131]

The Court further observed that, "to the extent (if any) that *Fullilove* held federal racial classifications to be subject to a less rigorous standard, it is [also] no longer controlling."[132]

---

124. *Id.* Quoting from *Croson*, Justice O'Connor reemphasized:
> 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 simply racial politics. Indeed, the purpose of strict scrutiny is to "smoke out" illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen "fit" this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.

Id. (quoting City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989)).

125. *Id.* at 2112.

126. *Id.* at 2111-12.

127. *Id.* at 2112.

128. *Id.*

129. *Id.* at 2112-13. *Accord* Fried, *supra* note 2, at 107-10 (emphasizing the conflict between the "group-rights" and "individualistic" equal protection perspectives on the Court).

130. *Adarand*, 115 S. Ct. at 2112-13 (emphasis added).

131. *Id.*

132. *Id.* at 2117.

C. The Dissenters' Rebuttal

The task of responding to the *Adarand* majority's seizure of control in the standard of review debate was entrusted to Justice Stevens, the last remaining member of the *Metro Broadcasting* majority. In a dissent joined by Justice Ginsburg, Justice Stevens sharply criticized the majority's analysis for failing to substantively incorporate the dichotomy between (1) "benign" and "invidious" discrimination and (2) federal and state action.[133] In Justice Stevens' view, these essential distinctions were "obscured" through the majority's application of "doctrinaire" notions such as "consistency" and "congruence."[134]

Similar to his previous affirmative action opinions, however, Justice Stevens' *Adarand* dissent reflects his deeply-rooted distrust of structured standards of any type in affirmative action cases.[135] For example, Justice Stevens admonished that "uniform standards are often anything but uniform."[136] He further emphasized that, "[w]hen a court becomes preoccupied with abstract standards, it risks sacrificing common sense at the altar of formal consistency."[137] Such statements clearly reflect Justice Stevens' rejection of rigid, formalized tests for reviewing governmental racial classifications in favor of a case-by-case "common sense" approach closely akin to a subjective rational basis test.[138] This view, more than any long-standing commitment to intermediate scrutiny for affirmative action, motivates Justice Stevens' disagreement with the "consistency" principle incorporated into the *Adarand* majority's strict scrutiny analysis.

In this vein, Justice Stevens' dissent chastises the majority as follows:

> The . . . explanation for treating dissimilar race-based decisions as though they were equally objectionable is a supposed inability to differentiate between "invidious" and "benign" discrimination. But the term "affirmative action" is common and well understood. Its presence in every day parlance shows that people understand the difference between good intentions and bad.[139]

Said another way, Justice Stevens contends that the ability to "understand" the difference between right and wrong, or between "good" and "bad" discrimination, is the only tool necessary for judicial review of affirmative action measures. Such a completely unbridled, results oriented approach, however, provides a poor foundation for constitutional analysis.[140] Instead of dual standards of review, Justice Stevens' approach would create as many different standards of review as exist judges in the American legal system.

---

133. *Id.* at 2120-26 (Stevens, J., dissenting). The dissenters also strongly criticized the majority's failure to adhere to the doctrine of *stare decisis* in overruling *Metro Broadcasting*. *See id.* at 2126-28; *id.* at 2132 (Souter, J., dissenting). Especially in constitutional cases, however, fidelity to *stare decisis* seems most dependent upon whose ox is being gored at that particular moment. *See also* Linder, *supra* note 18, at 317 and n.161.

134. *Id.* at 2123.

135. *See supra* note 57 and accompanying text.

136. Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2120 (1995) (Stevens, J., dissenting).

137. *Id.* at 2122.

138. *See* Fried, *supra* note 2, at 126.

139. *Adarand*, 115 S. Ct. at 2121 (citation omitted).

140. *See supra* note 57.

Justice Stevens' disdain for structured standards of review also ignores the fundamental difference between determining the proper standard and judicial application of that standard. As Justice O'Connor's *Adarand* opinion emphasizes:

> The principle of consistency simply means that whenever the government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection. *It says nothing about the ultimate validity of any particular law; that determination is the job of the court applying strict scrutiny.* The principal of consistency explains the circumstances in which the injury requiring strict scrutiny occurs. The application of strict scrutiny, in turn, determines whether a compelling governmental interest justifies the infliction of that injury[141]

In other words, simply trusting the judiciary's ability to distinguish "good" discrimination from "bad" wholly ignores competing equal protection concerns implicated even in the context of so-called "benign" governmental racial classifications. Establishing strict scrutiny as the appropriate standard reflects recognition of these competing concerns as well as fidelity to equal protection's most fundamental principle – governmental decision making should be independent of race. On the other hand, government may at times have legitimate (i.e., compelling) interests in engaging in race-conscious decision making. Strict scrutiny requires a reviewing court to recognize and uphold such legitimate governmental interests during application of this standard.

Even those favoring across-the-board application of intermediate scrutiny to all affirmative action programs may be disappointed with Justice Stevens' "I know it when I see it" approach to equal protection review.[142] This approach is certainly a weak successor to the forceful arguments for intermediate scrutiny first advanced by Justice Marshall in *Bakke* as a means of responding to continuing racial discrimination in America.[143] Indeed, none of the dissenting opinions in *Adarand* produced a clear champion for the intermediate scrutiny position advocated for nearly three decades by Justices Brennan, Marshall and Blackmun. Whether a stronger proponent of intermediate scrutiny for affirmative action measures will eventually emerge on the current Court must await the outcome of future cases. Until then, the reappearance of a majority coalition similar to that formed in *Metro Broadcasting* seems exceedingly remote.

IV. WHAT IS THE FUTURE FOR APPLICATION OF STRICT SCRUTINY TO FEDERAL AFFIRMATIVE ACTION?

Despite Justice O'Connor's observations concerning the importance of the Court's lengthy standard of review debate,[144] significant concerns were left unan-

---

141. *Adarand*, 115 S. Ct. at 2114 (emphasis added).

142. *See, e.g.*, Katz, *supra* note 20, at 354-58 (strongly advocating "[i]termediate scrutiny . . . to judge all remedial or benign classifications that burden, or impinge upon, a previously privileged class: privileged because of economic class, race, gender, ethnicity or disability").

143. *See id.* at 356.

144. *See supra* note 1 and accompanying text.

swered by the *Adarand* majority which remain to be addressed. Most importantly, although strict scrutiny is now the required standard for review of all governmental racial classifications, the question remains whether deference to Congress will play any future role in actual application of strict scrutiny to federal affirmative action programs. Indeed, *Adarand* expressly leaves the door open to such a possibility. Responding to Justice Stevens' charge that the majority had ignored the essential distinction between federal and state government, Justice O'Connor emphasized that:

> requiring . . . Congress, like the States, [to] enact racial classifications only when doing so is necessary to further a "compelling interest" does not contravene any principle of appropriate respect for a co-equal Branch of the Government. It is true that various Members of this Court have taken different views of the authority § 5 of the Fourteenth Amendment confers upon Congress to deal with the problem of racial discrimination, and the extent to which courts should defer to Congress' exercise of that authority. *We need not, and do not, address these differences today.*[145]

The majority's failure to provide any guidance on how, or whether, the lower courts should address this essential question is puzzling, especially given their remand of *Adarand* to the trial court for an initial determination of whether the federal program at issue satisfies strict scrutiny.[146] This unresolved issue will undoubtedly be the subject of much future debate and may eventually require resolution by the Supreme Court.

In his concurring opinion in *Fullilove*, Justice Powell determined that the race-based federal subcontracting provision at issue satisfied strict scrutiny review.[147] Justice Powell's application of the strict scrutiny standard, however, was tempered in large part by deference to Congress' authority to redress racial discrimination under the enforcement clauses of the Thirteenth and Fourteenth Amendments.[148] In this regard, Justice Powell noted that:

> I believe that Congress' choice of a remedy should be upheld . . . if the means selected are equitable and reasonably necessary to the redress of identified discrimination. Such a test allows the Congress to exercise necessary discretion but preserves the essential safeguard of judicial review of racial classifications.[149]

Under this approach, deference to Congress is not considered in the first step of a court's review; that is, determining which equal protection standard to apply. Instead, the appropriateness of deferring to congressional judgment is evaluated only *after* the standard is selected. In other words, deference to Congress only plays a role during actual application of strict scrutiny to the affirmative action measure in question.

---

145. *Adarand*, 115 S. Ct. at 2114 (citations omitted; emphasis added).
146. *Id.* at 2118.
147. *See supra* notes 45-46 and accompanying text.
148. Fullilove v. Klutznick, 448 U.S. 448, 508-10 (1980) (Powell, J., concurring).
149. *Id.* at 510.

In her creation of a federal-state distinction in *Croson*, Justice O'Connor did not fully explore Justice Powell's application of strict scrutiny in *Fullilove*, nor the manner in which deference to Congress factored into his separate opinion. This is certainly not surprising. Justice O'Connor's *Croson* opinion clearly intended only to reject the proposition that state and local legislatures were entitled to the same deference previously afforded the federal legislature by the *Fullilove* plurality.[150] *Croson*'s failure to fully develop Justice Powell's strict scrutiny position, however, permitted Justice Brennan in *Metro Broadcasting* to capitalize on the federal-state distinction in a manner not supported by *Fullilove*. Specifically, Justice Brennan was able to utilize *Fullilove*'s discussion of deference to congressional judgment as an element in determining the appropriate review standard, rather than simply as an additional factor for consideration in the actual application of the standard.[151] While clearly rejecting deference to Congress as an aspect in determining which equal protection standard to apply, *Adarand* simultaneously leaves the door open for the lower courts to adopt Justice Powell's approach of incorporating such deference into the actual application of strict scrutiny.[152] Only time will tell whether this door will also eventually be shut by the *Adarand* majority.

Commentators have long suggested that the standard of review in equal protection cases is outcome determinative, and that strict scrutiny is an essentially insurmountable obstacle: "strict in theory, but fatal in fact."[153] This suggestion was echoed by Justice Powell in *Fullilove* during his independent review of the federal program at issue under strict scrutiny.[154] Significantly, however, Justice O'Connor took affirmative steps in *Adarand* to "dispel" this notion.[155] "The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it."[156] By way of example, Justice O'Connor emphasized that "every Justice" had supported a "narrowly tailored" remedy for pervasive governmental racial discrimination as recently as the Court's 1987 decision in *United States v. Paradise*.[157]

Searching for *Adarand*'s silver lining, Justice Ginsburg's separate dissent carefully highlighted this portion of Justice O'Connor's opinion.[158] However,

---

150. *See supra* notes 40-43 and accompanying text.

151. Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 563 (1990), *overruled by* Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995).

152. In a dissent joined by Justices Ginsburg and Breyer, Justice Souter appears to recognize this possibility, asserting that on remand the *Adarand* majority's view of strict scrutiny "will presumably be applied as Justice Powell employed it" in *Fullilove*. Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2134 (1995) (Souter, J., dissenting).

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

154. *See* Fullilove v. Klutznick, 448 U.S. 448, 507 (1980) (Powell, J., concurring) ("the failure of legislative action to survive strict scrutiny has led some to wonder whether our review of racial classifications has been strict in theory, but fatal in fact").

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

156. *Id.*

157. 480 U.S. 149 (1987); *Adarand*, 115 S. Ct. at 2117.

158. *Adarand*, 115 S. Ct. at 2136 (Ginsburg, J., dissenting).

whether there is any substance to *Adarand*'s optimistic declaration that establishing strict scrutiny as the applicable standard is not necessarily outcome determinative remains to be seen. Again, much depends upon whether future court decisions applying strict scrutiny to federal affirmative action substantially follow the road map made applicable to state and local governments in *Croson*,[159] or whether the door left open in *Adarand* results in a less stringent application of strict scrutiny for programs mandated by Congress.

V. CONCLUSION

Adarand seemingly ends the Court's decades-long debate over which standard of equal protection review governs race-conscious affirmative action programs. However, for strict scrutiny proponents to declare victory and assert that *Adarand* is the final word in this lengthy debate would be both imprudent and premature. Imprudent because one need look no further than the Court's dramatic turnover in membership between *Metro Broadcasting* and *Adarand* to realize that the retirement of key Justices and the constantly shifting winds of political fortune could rapidly lead to a new majority coalition with very different ideological views on affirmative action.[160] Premature, of course, because of the critical question acknowledged, but not answered, in *Adarand*. That is, will future application of strict scrutiny to federal affirmative action be softened by rules permitting judicial deference for review of congressionally-mandated programs? When that question is conclusively resolved, Justice O'Connor's hopeful assertion that strict scrutiny of such programs is no longer "fatal in fact" can then be fully and finally evaluated.

---

159. For a discussion of the application of strict scrutiny to state and local affirmative action measures following *Croson*, see Nicole Duncan, Croson *Revisited: A Legacy of Uncertainty in the Application of Strict Scrutiny*, 26 COLUM. HUM. RTS. L. REV. 679 (1995).

160. For a discussion of the politicization of the judicial branch, particularly in the federal appointment process, see James L. Robertson, *Of Bork and Basics*, 60 MISS. L.J. 439 (1990) (reviewing ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1990)), and David W. Case, *In Search of an Independent Judiciary: Alternatives to Judicial Elections in Mississippi*, 13 MISS. C. L. REV. 1, 21-22, 29 (1992).