FIFTH AND FOURTEENTH AMENDMENTS — DUE PROCESS AND EQUAL PROTECTION — FEDERAL AFFIRMATIVE ACTION PROGRAMS, LIKE THOSE OF A STATE, MUST SERVE A COMPELLING GOVERNMENTAL INTEREST AND MUST BE NARROWLY TAILORED TO FURTHER THAT INTEREST — *Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097 (1995).

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> *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. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved.*[1]

I. INTRODUCTION

Both federal and state governments have enacted numerous minority assistance programs under the guise of affirmative action.[2] Through racial classifications, affirmative action programs seek to remedy the harsh effects of slavery and create new social, economic, and political opportunities for

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[1]Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting) (criticizing the holding of the majority based on the "separate but equal" doctrine).

[2]"Affirmative action" programs are:

> [E]mployment programs required by federal statutes and regulations designed to remedy discriminatory practices in hiring minority group members; i.e., positive steps designed to eliminate existing and continuing discrimination, to remedy lingering effects of past discrimination, and to create systems and procedures to prevent future discrimination; commonly based on population percentages of minority groups in a particular area. Factors considered are race, color, sex, creed, and age.

BLACK'S LAW DICTIONARY (6th ed. 1990) (citations omitted). Although many affirmative action programs are aimed at improving the status of women, this Casenote will focus on preferential racial programs, as discussed in Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995) [hereinafter *Adarand III*].

minorities through racial pluralism and diversity.[3] In considering the constitutionality of affirmative action programs, courts have had the difficult task of balancing proper uses of race[4] and the benefits and opportunities

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[3]LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW, § 16-22, at 1521 (2d ed. 1988). Criticizing the notion of a "colorblind" Constitution in support of affirmative action programs, Tribe stated:

> Just as race has played a crucial role in our nation's past, so it must play a role in the present — whether to eradicate racial distinctions from our future, or to overcome the lingering effects of racial distinctions from our future, or to achieve racial pluralism and diversity without racial domination.

Id.

[4]Tribe advocates the judiciary's consideration of the "different circumstances of persons of different races" when reviewing affirmative action programs. *Id.* (citing United States v. Paradise, 480 U.S. 149, 185-86 (1987) ("The race-conscious relief imposed here was amply justified and narrowly tailored to serve the legitimate and laudable purposes of the District Court."); Local 28, Sheet Metal Workers Int'l Ass'n v. Equal Employment Opportunity Comm'n, 478 U.S. 421, 451 (1986) ("We have previously suggested that courts may utilize certain kinds of racial preferences to remedy past discrimination under Title VII. The Courts of Appeals have unanimously agreed that racial preferences may be used, in appropriate cases, to remedy past discrimination under Title VII."); North Carolina v. Swann, 402 U.S. 43, 46 (1971) ("Just as the race of students must be considered in determining whether a constitutional violation has occurred, so also must race be considered in formulating a remedy.")). In contrast, Justice Clarence Thomas, then-Chairman of the United States Equal Employment Opportunity Commission, proffered:

> I continue to believe that distributing opportunities on the basis of race or gender, whoever the beneficiaries, turns the law against employment discrimination on its head. Class preferences are an affront to the rights and dignity of individuals — both those individuals who are directly disadvantaged by them, and those who are their supposed beneficiaries. I think that preferential hiring on the basis of race or gender will increase racial divisiveness, disempower women and minorities by fostering the notion that they are permanently disabled and in need of handouts, and delay the day when skin color and gender are truly the least important things about a person in the employment context.

Clarence Thomas, *Affirmative Action Goals and Timetables: Too Tough? Not Tough Enough!*, 5 YALE L. & POL'Y REV. 402, 403 n.3 (1987).

afforded to disadvantaged individuals,[5] with the negative impact that said programs have on non-minorities.[6]

The problematic assessment of affirmative action programs also has been a source of great tension for the United States Supreme Court.[7]

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[5]*See* Kathyrn J. Rodgers, *Affirmative Action: Have Race- and Gender-Conscious Remedies Outlived Their Usefulness? No: Look at the Facts, Not Rhetoric*, A.B.A. J., May 1995, at 41 ("Affirmative action programs have brought thousands into the work force. That does not mean it displaced others because of reverse discrimination. It means that because of affirmative action, women and minorities competed for jobs they were qualified for but previously denied because of stereotypes."); Alex M. Johnson, Jr., *Defending the Use of Quotas in Affirmative Action: Attacking Racism in the Nineties*, 1992 U. ILL. L. REV. 1043, 1043 (defending the implementation of "[m]andatory quotas or strict numerical goals in the admission process for colleges and professional schools . . . [as] a necessary remedial tool given the invidious nature of discrimination and the manipulation of the concept of 'merit' in our society to maintain the favored position of the dominant group (white males) in our society"); Roy L. Brooks, *The Affirmative Action Issue: Law, Policy, and Morality*, 22 CONN. L. REV. 323, 324 (1990) (arguing that affirmative action is "neither morally nor politically suspect"); Mryl L. Duncan, *The Future of Affirmative Action: A Jurisprudential / Legal Critique*, 17 HARV. C.R.-C.L. L. REV. 503, 507 (1982) (arguing that affirmative action programs can be supported through three rationales, namely compensatory justice, distributive justice, and social utility, and concluding that future programs should be based on the distributive justice theory where an individual is entitled to affirmative action, not because society is admitting and paying for past discrimination, but because minorities deserve a greater share of present and future community resources).

[6]*See Review & Outlook*, WALL ST. J., July 13, 1995, at A18 ("With or without [*Adarand Constructors v. Pena*] . . ., it's clear that affirmative action as we know it is heading for a change. Polls show that most Americans oppose outright quotas and preferences based on race, ethnicity or gender. Such machinations somehow offend our national sense of fair play."); Lino A. Graglia, *Affirmative Action: Have Race- and Gender-Conscious Remedies Outlived Their Usefulness? Yes: Reverse Discrimination Serves No One*, A.B.A. J., May 1995, at 40 ("Affirmative action is a euphemism for race or sex discrimination. The basic question it presents is whether government should grant preferences to some individuals, and therefore disadvantage others, because of their race or sex. For most people the answer is not difficult."); Terry Eastland, *The Case Against Affirmative Action*, 34 WM. & MARY L. REV. 33, 34 (1992) ("When examined in terms of both theory and practice, affirmative action deserves a negative judgment. Affirmative action cannot remain a way of life unless we wish to change for the worse the very essence of what it means to be an American.").

[7]*See* University of California Regents v. Bakke, 438 U.S. 265, 289-90 (1978) (Powell, J., plurality) ("The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal."). *But see* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 280-81 (Powell, J., plurality) ("As part of this Nation's

Federal jurisprudence has struggled to formulate a definitive standard of review for affirmative action programs[8] because many Justices have been suspicious of racial quotas and set-asides that burden innocent non-minority racial groups.[9] In fact, the Court did not produce a majority opinion with

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dedication to eradicating racial discrimination, innocent persons may be called upon to bear some of the burden of the remedy."). For a further discussion of the Supreme Court's difficulty with affirmative action programs see *infra* notes 96-150 and accompanying text.

[8]*See* United States v. Paradise, 480 U.S. 149, 166 (1986) (Brennan, J., plurality) ("[A]lthough this Court has consistently held that some elevated level of scrutiny is required when a racial or ethnic distinction is made for remedial purposes, it has yet to reach consensus on the appropriate constitutional analysis."); *see also* Antonin Scalia, *The Disease as Cure: "In Order to Get Beyond Racism, We Must First Take Account of Race."*, 1979 WASH. U. L.Q. 147. As a professor at the University of Chicago School of Law, Justice Scalia characterized the Court's affirmative action decisions as follows:

> Here, as in some other fields of constitutional law, it is increasingly difficult to pretend to one's students that the decisions of the Supreme Court are tied together by threads of logic and analysis — as opposed to what seems to be the fact that the decisions of each of the Justices on the Court are tied together by threads of social preference and predisposition.

Id. at 147.

[9]TRIBE, *supra* note 3, at 1523. In discerning the Court's difficulty with affirmative action programs, Tribe explained:

> Yet the Court's cases express considerable unease about such racially explicit set-asides, and about measures that visit focused burdens on individuals because of their non-minority racial status. For reasons never fully explained . . . the Court has seemingly regarded *all* such governmental uses of explicit racial classification as constitutionally problematic to *some* degree, regardless of whether the particular classification at issue appears to reflect any stigmatizing prejudice that has distorted the fairness of the political process that produced the classification, and regardless of whether the classification operates to reinforce anything resembling a racial caste system in which some races permanently dominate others.

Id. (citations and footnotes omitted) (emphasis in original).

In Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986), however, Justice O'Connor attempted to reconcile the various Justices' approaches to affirmative action:

> In the final analysis, the diverse formulations and the number of separate writings put forth by various Members of the Court in these difficult cases do not necessarily reflect an intractable fragmentation in opinion with respect to certain core principles. Ultimately, the Court is at least in accord

respect to the standard of review for affirmative action programs until 1989 in the case of *City of Richmond v. J.A. Croson Co.*[10]

Although all Supreme Court Justices have advocated a level of heightened scrutiny for affirmative action programs,[11] the Court had failed previously to adopt either strict or intermediate scrutiny as the appropriate standard under both the Fifth Amendment Due Process Clause[12] and the Fourteenth Amendment[13] Equal Protection Clause.[14] The result of the

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> in believing that a public employer, consistent with the Constitution, may undertake an affirmative action program which is designed to further a legitimate remedial purpose and which implements that purpose by means that do not impose disproportionate harm on the interests, or unnecessarily trammel the rights, of innocent individuals directly and adversely affected by a plan's racial preference.

Id. at 287 (O'Connor, J., concurring).

[10]488 U.S. 469, 493-94 (1989) (holding that strict scrutiny was the applicable standard of review under the Equal Protection Clause of the Fourteenth Amendment for race-based programs); *see also* Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2110 (1995) ("With *Croson*, the Court finally agreed that the Fourteenth Amendment requires strict scrutiny of all race-based action by state and local governments.").

[11]TRIBE, *supra* note 3, at 1523 ("Indeed, every member of the Court seems to think that at least some form of heightened scrutiny is appropriate; no [J]ustice has endorsed minimal scrutiny of race-based preferences. But the Court has yet to agree on how searching its review of affirmative action need be." (citations omitted)).

[12]The Fifth Amendment's Due Process Clause provides, in pertinent part, "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. V.

[13]Section 1 of the Fourteenth Amendment provides in full:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

Additionally, section 5 of the Fourteenth Amendment provides: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5.

Supreme Court's reluctance has been a wide range of decisions with an incoherent standard of review.[15]

Finally, through *Adarand Constructors, Inc. v. Pena*,[16] a majority of the Supreme Court has adopted strict scrutiny as the appropriate standard of review for affirmative action programs.[17] By adopting strict scrutiny, the Court required government-sponsored racial preferences to be viewed with the "most rigid scrutiny"[18] to ensure constitutional compliance with the Due

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[14]*See* Charles Fried, Metro Broadcasting, Inc. v. FCC: *Two Concepts of Equality*, 104 HARV. L. REV. 107 (1990). In this article, Fried demonstrates the complexities involved in formulating a single standard under the Fifth and Fourteenth Amendments and the ideological differences among Supreme Court Justices:

> The conflict between the liberal, individualistic conception and the collectivist, group-rights conception of equal protection plays out in doctrinal terms through the debate over the proper standard of review for race-based governmental action. The issue is whether government needs a "compelling" justification, one that would overcome "strict scrutiny," whenever it classifies persons by race, or whether a more relaxed standard is appropriate, at least when government favors members of groups seen or designated as disadvantaged. The level of scrutiny is an entirely appropriate, even inevitable doctrinal entailment of these contrasting visions. To the individualist, who believes that the equal protection clause requires the government to craft its laws to treat people equally, regardless of race, the government must make a showing of compelling need in order to legislate along racial lines. To the collectivist, for whom equal protection is a command to secure substantive aggregate equality for disadvantaged groups, legislation undertaken in that spirit need not be scrutinized as carefully.

Id. at 110.

[15]*See* Robert C. Power, *Affirmative Action and Judicial Incoherence*, 55 OHIO ST. L.J. 79, 159 (1994) (arguing that the Supreme Court's affirmative action jurisprudence has produced "incoherent" decisions that should not be abandoned unless a better approach is formulated).

[16]115 S. Ct. 2097 (1995).

[17]*Id.* at 2117 (stating that the requirement of strict scrutiny is the foremost method of ensuring that lower courts will thoroughly examine all racial classifications regardless of benign legislative intentions).

[18]*See* Korematsu v. United States, 323 U.S. 214, 216 (1944).

Process Clause of the Fifth Amendment and the Equal Protection Clause of the Fourteenth Amendment.[19]

II. EXAMINATION OF THE CURRENT CONFLICT BEFORE THE COURT

The United States Supreme Court granted *certiorari* in *Adarand Constructors* to decide the standard of review for federal minority assistance programs.[20] By a 5-4 margin, the Court held that strict scrutiny was the applicable standard.[21] Justice O'Connor, writing for the majority, pronounced that *Fullilove v. Klutznick* and *Metro Broadcasting, Inc. v. FCC* were no longer controlling precedent to the extent that those cases subjected federal racial classifications to a standard less than strict scrutiny.[22] The Court, however, declined to rule on the merits of Adarand Constructors's claim and remanded the case for a determination of whether the Subcontracting Compensation Clause program was narrowly tailored to serve a compelling governmental interest.[23]

Adarand Constructors, competing for a subcontract to complete guardrail work on a federal highway project in Colorado, submitted a bid to the prime contractor, Mountain Gravel and Construction Company ("Mountain Gravel").[24] Although Adarand Constructors submitted the

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[19]*See Review & Outlook*, *supra* note 6, at A18 ("In *Adarand Constructors v. Pena*, the Court ruled that federal affirmative action programs must be subjected to the same 'strict scrutiny' that already applies to state programs to help minorities. Under that standard, racial preferences are justified only if they are narrowly designed to redress past discrimination. Few meet that test.").

[20]*Adarand III*, 115 S. Ct. at 2101-02.

[21]*Id.* at 2117.

[22]*Id.* Justice O'Connor, however, did not determine whether the program upheld in *Fullilove* would survive under a strict scrutiny analysis today. *Id.*

[23]*Id.* at 2118; *see also infra* note 179 discussing the role of the lower courts on remand.

[24]Adrand Constructors Inc. v. Pena, 115 S. Ct. 2097, 2102 (1995). The Central Federal Lands Highway Division ("CFLHD"), on September 15, 1989, granted a one million dollar prime contract to Mountain Gravel and Construction Company, a small business contractor, for the West Dolores federal highway project in Colorado. Adarand Constructors, Inc. v. Pena, 16 F.3d 1537, 1541 (10th Cir. 1994) [hereinafter *Adarand II*]. The CFLHD included a 1% bonus in Mountain Gravel and Construction Company's prime contract, as a contingent sum, to be paid if 10% of the subcontracts on the West Dolores

lowest bid, Mountain Gravel granted the subcontract[25] to the Gonzales

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project were awarded to disadvantaged business enterprises. *Id.*

[25]*Adarand II*, 16 F.3d at 1542. Under Title 15 of the United States Code, § 637(d)(3), the following clause must appear in most federal agency contracts:

> (A) It is the policy of the United States that small business concerns, small business concerns owned and controlled by socially and economically disadvantaged individuals . . . shall have the maximum practicable opportunity to participate in the performance of contracts let by any Federal agency, including contracts and subcontracts for subsystems, assemblies, components, and related services for major systems. It is further the policy of the United States that its prime contractors establish procedures to ensure the timely payment of amounts due pursuant to the terms of their subcontracts with small business concerns, small business concerns owned and controlled by socially and economically disadvantaged individuals . . . .
>
> (B) The contractor hereby agrees to carry out this policy in the awarding of subcontracts to the fullest extent consistent with the efficient performance of this contract. The contractor further agrees to cooperate in any studies or surveys as may be conducted by the United States Small Business Administration or the awarding agency of the United States as may be necessary to determine the extent of the contractor's compliance with this clause.
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> (C) As used in this contract, the term "small business concern" shall mean a small business as defined pursuant to section 3 of the Small Business Act [15 U.S.C.A. 632] and relevant regulations promulgated pursuant thereto. The term "small business concern owned and controlled by socially and economically disadvantaged individuals" shall mean a small business concern —
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> > (i) which is at least 51 per centum owned by one or more socially and economically disadvantaged individuals; or, in the case of any publicly owned business, at least 51 per centum of the stock of which is owned by one or more socially and economically disadvantaged individuals; and
> >
> > (ii) whose management and daily business operations are controlled by one or more of such individuals.
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> The contractor shall presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities, or any other individual found to be disadvantaged by the Administration pursuant to section 8(a) of the Small Business Act [15 U.S.C.A. 637(a)].
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> . . . .
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> (E) Contractors acting in good faith may rely on written representations by their subcontractors regarding their status as either a small business concern, a small business concern owned and controlled by socially and economically disadvantaged individuals . . . .

Construction Company ("Gonzales Construction") pursuant to the Subcontractor Compensation Clause contained in its contract.[26]

Under authority of the Small Business Act,[27] the Central Federal

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15 U.S.C. § 637(d)(3) (1994).

[26]Under authority of the Small Business Act, the Subcontracting Compensation Clause program was adopted in 1979 by the Federal Lands Highway Program of the Federal Highway Administration, an agency within the Department of Transportation, to comply with the minority assistance goals of the Small Business Act. *Adarand II*, 16 F.3d at 1540. The CFLHD offers the Subcontracting Clause program in order to comply with the Department of Transportation's participation goals for disadvantaged business enterprises. *Id.* at 1542. The Subcontracting Compensation Clause in Mountain Gravel and Construction Company's contract provided:

> *Subcontracting*. This subsection is supplemented to include a Disadvantaged Business Enterprise (DBE) Development and Subcontracting Provision as follows:
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> "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).
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> . . . .
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> "The Contractor will be paid an amount computed as follows:
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> "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.
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> "2. If subcontracts are awarded to two or more DBEs, 10 percent of the final amount of the approved DBE subcontracts, not to exceed 2 percent of the original contract amount."

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

[27]Section 644(g) of the Small Business Act provides the following:

> (1) The President shall annually establish Government-wide goals for procurement contracts awarded to small business concerns, small business concerns owned and controlled by socially and economically disadvantaged individuals, and small business concerns owned and controlled by women.

Highway Administration, a branch of the United States Department of Transportation, included a Subcontractor Compensation Clause program in Mountain Gravel's prime contract as a monetary incentive for awarding subcontracts to small businesses that are at least 51% owned and controlled by socially and economically disadvantaged individuals.[28] Gonzales

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> The Government-wide goal for participation by small business contracts shall be established at not less than 20 percent of the total value of all prime contract awards for each fiscal year. The Government-wide goal for participation by small business concerns owned and controlled by socially and economically disadvantaged individuals shall be established at not less than 5 percent of the total value of all prime contract and subcontract awards for each fiscal year. . . . Notwithstanding the Government-wide goal, each agency shall have an annual goal that presents, for that agency, the maximum practicable opportunity for small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals to participate in the performance of contracts let by such agency. The Administration and the Administrator of the Office of Federal Procurement Policy shall, when exercising their authority pursuant to paragraph (2), insure that the cumulative annual prime contract goals for all agencies meet or exceed the annual Government-wide prime contract goal established by the President pursuant to this paragraph.
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> (2) The head of each Federal agency shall, after consultation with the Administration, establish goals for the participation by small business concerns,, [sic] by small business concerns owned and controlled by socially and economically disadvantaged individuals, and by small business concerns owned and controlled by women in procurement contracts of such agency. Goals established under this subsection shall be jointly established by the Administration and the head of each Federal agency and shall realistically reflect the potential of small business concerns, small business concerns owned and controlled by socially and economically disadvantaged individuals . . . to perform subcontracts under such contracts.

15 U.S.C. § 644(g) (1994).

[28]*Adarand II*, 16 F.3d at 1541 (citing 15 U.S.C. § 637(a)(4)(A) (1994)). Under the Small Business Act, "[s]ocially disadvantaged individuals are those who have been subject to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities." § 637(a)(5). Additionally, "[e]conomically 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. . . ." § 637(a)(6)(A). Furthermore, the Small Business Act requires that "[t]he Government-wide goal for participation by small business concerns owned and controlled by socially and economically disadvantaged individuals shall be established at not less than 5 percent of the total value of all prime contract and subcontract awards for each fiscal year." 15 U.S.C. § 644(g)(1) (1994). These government goals for

Construction was minority owned and, therefore, was presumed to be a "disadvantaged business enterprise."[29] By not accepting Adarand Constructors's low bid and granting the subcontract to Gonzales Construction, Mountain Gravel became eligible for incentive payments of up to 1.5 % of the original contract amount for hiring one disadvantaged business enterprise or up to 2 % for hiring two or more disadvantaged business enterprises.[30] As a result of hiring Gonzales Construction, Mountain Gravel received a $10,000 bonus.[31]

The United States District Court of Colorado first heard Adarand Constructors's argument that the Subcontracting Compensation Clause program unconstitutionally violated the Equal Protection Clause of the Fourteenth Amendment.[32] In its complaint, Adarand Constructors claimed that the Subcontracting Compensation Clause program's use of race and gender as factors in awarding federal contracts in Colorado, without any

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socially and economically disadvantaged individuals are established by the head of each federal agency in conjunction with the Small Business Administration. § 644(g)(2).

[29]*Adarand III*, 115 S. Ct. at 2102 (citing 15 U.S.C. § 637(d)(2),(3)). Furthermore, absent contrary evidence, the following individuals are presumed to be socially disadvantaged:

> Black Americans; Hispanic Americans; Native Americans (American Indians, Eskimos, Aleuts, or Native Hawaiians); Asian Pacific Americans (persons with origins from Burma, Thailand, Malaysia, Indonesia, Singapore, Brunei, Japan, China, Taiwan, Laos, Cambodia (Kampuchea), Vietnam, Korea, The Philippines, U.S. Trust Territory of the Pacific Islands (Republic of Palau), Republic of the Marshall Islands, Federated States of Micronesia, the Commonwealth of the Northern Mariana Islands, Guam, Samoa, Macao, Hong Kong, Fiji, Tonga, Kiribati, Tuvalu, or Nauru); Subcontinent Asian Americans (persons with origins from India, Pakistan, Bangladesh, Sri Lanka, Bhutan, the Maldives Islands or Nepal); and members of other groups designated from time to time by SBA according to procedures set forth at paragraph (d) of this section.

13 C.F.R. § 124.105(b)(1) (1994).

[30]Adarand Constructors, Inc. v. Pena, 16 F.3d 1537, 1540 (10th Cir. 1994).

[31]*Id.* at 1542. In the Supreme Court's opinion, the majority noted that Mountain Gravel's Chief Estimator would have accepted Adarand's low bid but for the financial incentives it received from hiring the Gonzales Construction Company as a result of the subcontractor compensation clause program. *Adarand III*, 115 S. Ct. at 2102.

[32]Adarand Constructors, Inc. v. Skinner, 790 F. Supp. 240 (D. Colo. 1992) [hereinafter *Adarand I*].

findings of past discrimination in Colorado, violated the Fifth and Fourteenth Amendments' equal protection guarantees.[33] Adarand Constructors moved for summary judgment, seeking a declaratory judgment and permanent injunction against the Department of Transportation, the Federal Highway Administration, and the Central Federal Lands Highway Division until specific findings of past racial discrimination could be made pursuant to *J.A. Croson*.[34] The Department of Transportation, in a cross-motion for summary judgment, argued that the Subcontracting Compensation Clause program was a federal remedial program authorized under *Fullilove*, and that Adarand Constructors's reliance on *J.A. Croson* was improper because *J.A. Croson* involved only state and local minority assistance programs.[35] Without oral argument, the district court denied Adarand Constructors's summary judgment motion and granted summary judgment in favor of the Department of Transportation.[36] The court reasoned that the Subcontracting Compensation Program was a valid federal program under the United States Supreme Court's decision in *Fullilove*.[37]

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[33]*Adarand II*, 16 F.3d at 1542. Additionally, Adarand argued that the Subcontracting Compensation program violated the privileges and immunities guaranteed by sections 1983 and 12000(d) of title 42 of the United States Code. *Id.* (citations omitted).

[34]*Adarand I*, 790 F. Supp. at 242. By arguing that *City of Richmond v. J.A. Croson Co.* was controlling, Adarand urged the district court to adopt a strict scrutiny analysis of the Subcontracting Compensation Clause program and determine that the program was not narrowly tailored to advance a compelling government interest. *Adarand II*, 16 F.3d at 1542.

[35]*Adarand II*, 16 F.3d at 1542. Additionally, it is significant that Adarand Constructors incorrectly argued that the Subcontracting Compensation Clause program was instituted pursuant to the Surface Transportation Assistance Act of 1982 ("STAA") and the Surface Transportation and Uniform Relocation Act of 1987 ("STURAA") because the Department of Transportation argued that Adarand lacked standing to pursue this claim. *Id.* The Department of Transportation argued that Adarand Constructors lacked standing because the Subcontracting Compensation Clause program was instituted pursuant to § 644(g) of the Small Business Act, and not through the STAA or the STURAA. *Id.* However, in its reply brief to the Department of Transportation's cross-motion for summary judgment, Adarand did acknowledge that the Subcontracting Compensation Clause program was authorized under § 644(g) of the Small Business Act. *Id.*

[36]*Adarand I*, 790 F. Supp. at 245.

[37]*Id.* at 244-45. Furthermore, the district court concluded that *Fullilove* and *Metro Broadcasting* provided the proper standard of review, in other words, whether the program "serves important governmental objectives and [whether] . . . it is substantially related to the achievement of th[o]se objectives." *Id.* at 244 (citations omitted). In so finding, the

On appeal, the United States Court of Appeals for the Tenth Circuit upheld the district court's decision, but on different grounds.[38] First, the circuit court stated that the district court erroneously determined that the Subcontracting Compensation Clause program was authorized, as claimed by Adarand Constructors, through the Surface Transportation Assistance Act of 1982 and its successor, the Surface Transportation and Uniform Relocation Assistance Act of 1987.[39] The circuit court recognized that the Subcontracting Compensation Clause program was statutorily authorized through section 644(g) of the Small Business Act, and that the district court should have addressed the Department of Transportation's standing argument.[40]

The Department of Transportation argued that Adarand Constructors lacked standing to attack the Subcontracting Compensation Clause program because Adarand Constructors challenged the wrong statute.[41] The circuit court, however, rejected that argument, and noted that Adarand Constructors had sufficiently identified section 644(g) of the Small Business Act as authorizing the Subcontracting Compensation Clause program.[42] In so doing, the circuit court's decision was based on the merits of Adarand Constructors's complaint that the Subcontracting Compensation Clause

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district court was satisfied that there were important governmental objectives underlying the program even though Congress did not make any specific findings of past discrimination. *Id.* The court noted that there were "abundant historical bas[es] from which to conclude" that there were sufficient governmental objectives supporting the Subcontracting Compensation Clause and that the program was narrowly tailored to achieve those objectives without violating the Constitution. *Id.* at 244-45 (citations omitted).

[38]*Adarand II*, 16 F.3d at 1539 n.1 (citing Helvering v. Gowan, 302 U.S. 238, 245 (1937) ("[T]he rule is settled that if the decision below is correct, it must be affirmed, although the district court relied upon a wrong ground or gave a wrong reason.")).

[39]*Id.* at 1539. Both Adarand Constructors and the Department of Transportation, however, revised their arguments on appeal by stipulating that the Subcontracting Compensation Clause program was authorized under § 644(g) of the Small Business Act, and that the constitutionality of the STAA and STURAA was not at issue. *Id.*

[40]*Id.* at 1543.

[41]*Id.*

[42]*Id.* ("We are satisfied that Adarand is entitled to attack the constitutional validity of the legislation authorizing the very program which was challenged in its complaint, even though Adarand did not identify section [644(g)].").

program unconstitutionally created racial preferences.[43] Furthermore, the circuit court recognized that the analysis of the Subcontracting Compensation Clause program under the Small Business Act was identical to the district court's analysis of the Surface Transportation Assistance Act ("STAA") and the Surface Transportation and Uniform Relocation Act ("STURAA").[44]

Next, the circuit court focused on Adarand Constructors's central argument and analyzed whether the district court erred in applying *Fullilove* as the constitutional test for a race-conscious preference program implemented under the statutory authority of Congress.[45] Based upon the lower court's finding that "the challenged regulations and actions involve[d] only federal actors acting pursuant to congressional mandate,"[46] the circuit court agreed with the district court in holding that the proper analysis for a "race-conscious program" authorized by Congress was the standard of

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[43]*Id.* at 1543. The circuit court did note that the Department of Transportation would have a stronger standing argument against Adarand Constructors as to the portions of the Subcontracting Compensation Clause program that apply to women-owned business enterprises ("WBE"). *Id.* The circuit court, however, limited its decision to the constitutionality of the Subcontracting Compensation Clause program's racial preferences. *Id.* The decision was also limited because both Adarand Constructors and the Department of Transportation focused on the racial aspects of the Subcontracting Compensation Clause program Adarand Constructors never argued the gender aspect of the program in its summary judgment motion or in its arguments before the circuit court, and Adarand Constructors never demonstrated that it had been denied a federal subcontract because of the ramifications of the WBE Subcontracting Compensation Clause program. *Id.*

[44]*Id.* ("As the Government itself points out, the analysis of the constitutionality of the SCC program under the authority of the Small Business Act is the same as that applied by the district court to STAA and STURAA.").

Additionally, the circuit court stated that the district court, in reliance on the Surface Transportation Assistance Act and the Surface Transportation and Uniform Relocation Assistance Act, erroneously concluded that Central Federal Lands Highway Division was required to adopt a 10 % minority set aside because § 644(g) of the Small Business Act does not require a mandatory 10 % set aside. *Id.* at 1542. The CFLHD's subcontracting compensation clause in this case, as authorized by the Small Business Act, is an optional goal that is in the discretion of the prime contractor whether or not to participate in the program through the hiring of Disadvantaged Business Enterprises as subcontractors. *Id.* at 1542 n.9.

[45]*Id.* at 1543.

[46]*Id.* at 1542-43 (citing Adarand Constructors, Inc. v. Skinner, 790 F. Supp. 240, 244 (D. Colo. 1992)).

Fullilove.[47] The circuit court's reasoning was twofold. First, the court stated that through *Fullilove*, and more recently in *Metro Broadcasting, Inc. v. FCC*,[48] the federal government acting under authority of Congress and Section Five of the Fourteenth Amendment, can legislate affirmative action programs more freely than state or local governments.[49] The court explained that, because the Central Federal Lands Highway Division's implementation of the Subcontracting Compensation Clause program was within the agency's authority as delegated by Congress, it was reasonably related to the intentions of the Small Business Act.[50] Second, the court reasoned that the legislative history of the Small Business Act evidenced Congress's intention that federal agencies adopt goals that afforded Disadvantaged Business Enterprises maximum opportunities to procure federal contracts.[51]

Furthermore, the circuit court rejected Adarand Constructors's argument that the Central Federal Land Highway Division must make specific findings of past racial discrimination to justify the Subcontracting

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[47]*Id.* at 1543. The circuit court determined that *Fullilove* established the applicable standard and analogized Adarand Constructors's case to the decision in Ellis v. Skinner, 961 F.2d 912 (10th Cir. 1992). In *Ellis*, a contractor challenged the constitutionality of the Department of Transportation's disadvantaged business enterprise program applied in Utah. *Id.* at 913. The court in *Ellis* utilized the *Fullilove* test in upholding the constitutionality of the Utah Department of Transportation's disadvantaged business enterprise program, and determined that the Utah agency was not required to seek an available waiver of the minimum 10% minority set-aside, despite not making any factual findings of past racial discrimination as required under *J.A. Croson*. *Id.* at 916. Thus, the *Ellis* court rejected the argument that the failure to seek this available waiver of the 10% minority set-aside constituted an unconstitutional state or local affirmative action set-aside. *Id.* at 915.

[48]497 U.S. 547 (1990).

[49]Adarand Constructors, Inc. v. Pena, 16 F.3d 1537, 1545 (10th Cir. 1994) (citation omitted).

[50]*Id.* at 1546 (citing Hecla Mining Co. v. United States, 909 F.2d 1371, 1375-76 (10th Cir. 1990) ("[W]hen Congress explicitly or implicitly delegates to agencies the power to elucidate a specific provision of a statute, the resulting agency action is entitled to deference." (citation omitted)).

[51]*Id.* at 1545 (citing H.R. REP. NO. 100-1070, 100th Cong., 2d Sess. 73 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5401, 5507).

Compensation Clause program under *J.A. Croson*.[52] Adarand's argument was based on the fact that the Subcontracting Compensation Clause program was formulated by a federal agency, and not by Congress.[53] The circuit court concluded that there was no legal authority to support Adarand's argument that a federal agency is required to make independent findings to justify a race-conscious program in accordance with congressional requirements.[54] In fact, the circuit court noted that *Fullilove* did not stand for the proposition that Congress must establish specific percentage goals for minority preference programs.[55] Rather, *Fullilove*, the court noted, stood for the notion that Congress, through Section Five of the Fourteenth Amendment, may establish minority and ethnic programs that satisfy equal protection requirements to combat discrimination on a national level.[56] Therefore, because Adarand conceded that section 644(g) of the Small Business Act satisfied the requirements of *Fullilove*, Adarand Constructors was forced to argue that the Subcontracting Compensation Clause program was not narrowly tailored to achieve the remedial purpose of the Small Business Act.[57]

The circuit court concluded that the Subcontracting Compensation Clause program was narrowly tailored to achieve a government purpose, but

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[52]*Id.* ("Adarand cites no authority, nor do we know of any, to support the proposition that a federal agency must make independent findings to justify the use of a benign race-conscious program implemented in accordance with federal requirements.").

[53]*Id.* at 1544. Adarand Constructors conceded in its arguments that the Central Federal Lands Highway Division was acting under authority of Congress and that the only way that the Central Federal Lands Highway Division's program could be unconstitutional was if the act of Congress itself was unconstitutional. *Id.* Adarand Constructors also conceded that § 644(g) of the Small Business Act, which satisfies the requirements of *Fullilove*, authorizes the Subcontracting Compensation program and that the Central Federal Lands Highway Division did not exceed its power delegated under § 644(g). *Id.*

[54]*Id.* at 1545. Based on its decision in Ellis v. Skinner, 961 F.2d 912, 916 (10th Cir. 1992), the circuit court further stated that a state was not required to make particularized findings of past discrimination under *J.A. Croson* and, therefore, the Central Federal Lands Highway Division could not be required to make such findings. *Id.*

[55]*Id.* at 1546.

[56]*Id.* (citing Fullilove v. Klutznick, 448 U.S. 448, 480 (1980) (Burger, C.J., plurality)).

[57]*Id.*

for different reasons than the district court.[58] According to the district court, the minority preference program was constitutional because it was similar to the one upheld in *Fullilove*, and was narrowly tailored to achieve its remedial objectives.[59] The circuit court, in contrast, asserted that the Subcontracting Compensation Clause program was constitutional because eligibility was not based solely on racial or ethnic status, but rather on economic disadvantage.[60] Additionally, the circuit court stated that minority businesses that were not economically disadvantaged did not qualify for "Disadvantaged Business Enterprise" status.[61] The circuit court emphasized that the Subcontracting Compensation Clause program did not mandate contractors to subcontract with Disadvantaged Business Enterprises.[62] The circuit court reasoned that, because the Subcontracting Compensation Clause program induced contractor participation through monetary incentives, the program did not violate the Equal Protection Clause.[63] Specifically, the circuit court acknowledged the conclusion drawn by the Court in *Fullilove*, that "[i]t is not a constitutional defect that [the program] may disappoint the expectations of nonminority firms."[64]

As a result of the Tenth Circuit's decision, the United States Supreme Court granted *certiorari* to examine whether the proper standard of review

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[58]*Id.* at 1546-47.

[59]*Id.* at 1546 (citing Adarand Constructors, Inc. v. Pena, 790 F. Supp. 240, 244 (D. Colo. 1992)). The circuit court explained that the district court determined that these programs ensured minimum harm to non-Disadvantaged Business Enterprises because a bona fide Disadvantaged Business Enterprise was required to demonstrate its status as such through an annual certification process. *Id.* (citing *Adarand I*, 790 F. Supp. at 244). Furthermore, the circuit court noted that the district court concluded that the Subcontracting Compensation Clause program's annual certification process ensured constitutional compliance because the program did not tolerate abuse by non-Disadvantaged Business Enterprises and allows businesses, not afforded the disadvantaged presumption, to establish their qualifications for the program. *Id.* (citing *Adarand I*, 790 F. Supp. at 244).

[60]*Id.* at 1547.

[61]*Id.*

[62]*Id.*

[63]*Id.*

[64]*Id.* (quoting Fullilove v. Klutznick, 448 U.S. 448, 484 (1980) (Burger, C.J., plurality)).

was applied.[65] Adarand Constructors's central argument before the Supreme Court was that the Subcontracting Compensation Clause program utilizes race as the deciding factor when awarding federal construction subcontracts.[66] Adarand Constructors argued that because the Subcontracting Compensation Clause program presumes that members of certain races are "disadvantaged," the program unconstitutionally violated equal protection guarantees by affording opportunities to minorities solely on account of race or ethnic origin.[67] Further, Adarand Constructors argued that strict scrutiny was the appropriate standard of review for federal minority procurement programs,[68] and that the Tenth Circuit erred by applying an intermediate level of review to this "race-conscious" federal program.[69] In so arguing, Adarand Constructors explained that the

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[65]Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2101-02 (1995).

[66]Petitioner's Brief at 20-21, Adarand Constructors, Inc. v. Pena, 16 F.3d 1537 (10th Cir. 1994) (No. 93-1841), *cert. granted*, 115 S. Ct. 41 (1994) [hereinafter Petitioner's Brief].

[67]*Id.* at 21-23. Adarand explained that non-minority firms that seek "disadvantaged business enterprise" certification are denied such status because non-minority firms are presumptively not "disadvantaged." *Id.* at 22 n.18. Specifically, economic data considered for the status of "economic disadvantaged" is not examined unless the firm is initially deemed "socially disadvantaged." *Id.*

[68]*Id.* at 24-25. Adarand asserted that federal "race-conscious" procurement programs were unconstitutional because the Due Process Clause of the Fifth Amendment incorporates the Fourteenth Amendments' equal protection guarantees. *Id.* (citing United States v. Paradise, 480 U.S. 149, 166 n.16 (1987) (Brennan, J., plurality) ("[T]he reach of the equal protection guarantee of the Fifth Amendment is coextensive with that of the Fourteenth.")). Moreover, Adarand reasoned that, because the Supreme Court traditionally uses "strict scrutiny" for the equal protection component of the Fifth Amendment, "strict scrutiny" ought to apply to this federal program creating a racial classification. *Id.* (citing Fullilove v. Klutznick, 448 U.S. 448, 519 (1980); Korematsu v. United States, 323 U.S. 214, 216 (1944)).

[69]*Id.* at 25-26. Specifically, Adarand posited that by "combining the *Fullilove* opinion authored by Chief Justice Burger with the concurring opinion in that case authored by Justice Marshall . . . the Tenth Circuit is in error . . . [because] 'intermediate scrutiny' is not the standard of review for government contracting programs set forth by a majority of the justices in *Fullilove*, nor is it the standard set-forth in other decisions of this [Supreme] Court." *Id.*

Additionally, Adarand conceded that there was an issue as to whether Chief Justice Burger's opinion in *Fullilove* required "strict scrutiny," but argued that the Chief Justice's opinion stressed "careful judicial evaluation," "narrow tailor[ing]," and "most searching examination," indicating a level of review equivalent to strict scrutiny. *Id.* at 26-27 (citing

Supreme Court's decision in *Metro Broadcasting*[70] was not controlling in this case because *Metro Broadcasting* involved First Amendment issues in an area in which Congress specifically enumerated the need for "diversity"[71] and, therefore, did not apply to "race-conscious" construction contracting programs.[72] Based on this reasoning, Adarand Constructors argued for a strict scrutiny review in order to guarantee compliance with the Constitution's equal protection principles.[73]

The Department of Transportation countered that the presumption of "disadvantage" was both "rebuttable and nonconclusive,"[74] and that racial minorities were not granted such status unless they were also economically disadvantaged.[75] The Department of Transportation explained that the compensation clause program was available for all subcontractors who have

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Fullilove, 448 U.S. at 480, 491).

[70]497 U.S. 547 (1990).

[71]Petitioner's Brief, *supra* note 66, at 28-30 (citing *Metro Broadcasting*, 497 U.S. at 601) (Stevens, J., concurring)). The First Amendment issues of *Metro Broadcasting* can be seen as follows:

> "[T]he people as a whole retain their interest in free speech by radio [and other forms of broadcast] and their collective right to have the medium function consistently with the ends and purposes of the First Amendment," and "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."

Metro Broadcasting, 497 U.S. at 567 (quoting Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969)).

[72]Petitioner's Brief, *supra* note 66, at 31. Adarand asserted that because Congress never identified "diversity" as a justification for using racial classifications in government contracting that *Metro Broadcasting* was inapplicable to this case. *Id.* at 30 (citing 15 U.S.C. § 631(f)(1)).

[73]*Id.* at 49.

[74]Respondent's Brief at 25, Adarand Constructors, Inc. v. Pena, 16 F.3d 1537 (10th Cir. 1994) (No. 93-1841), *cert. granted*, 115 S. Ct. 41 (1994) [hereinafter Respondent's Brief].

[75]*Id.* at 25-26.

been subjected to discrimination and have suffered economic disadvantage.[76] Because of these interrelated requirements, the Department of Transportation contended that the Subcontracting Compensation Clause was a "program based on disadvantage, not race."[77]

The Department of Transportation further contested Adarand's standing to challenge the use of the race-based rebuttable presumption aspect of the Subcontracting Compensation Clause.[78] Adarand Constructors failed to establish, the Department of Transportation alleged, that the race-based rebuttable presumption influenced Mountain Gravel's award of the subcontract to Gonzales Construction, and that it would be harmed by future subcontracts that contain compensation clauses.[79] Additionally, the Department of Transportation's standing argument relied on the fact that Adarand Constructors did not challenge the certification of Gonzales Construction as a "socially and disadvantaged business enterprise" in accordance with established regulations and procedures.[80] Because there

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[76]*Id.* at 25 ("All subcontractors covered by the Clause also must, in addition to having suffered social disadvantage caused by group prejudice or bias, have suffered economic disadvantage.").

[77]*Id.* at 26. The Department of Transportation stated:

> The Subcontracting Compensation Clause program is thus a program based on disadvantage, not on race. There is no constitutional impediment to legislative action based on such disadvantage beyond the requirement that the means be nonarbitrary and rationally related to the objective. Government regulation "in the social and economic field" requires only the most relaxed judicial scrutiny.

Id. (citing Dandridge v. Williams, 397 U.S. 471, 484 (1970)).

[78]*Id.* at 27 ("If petitioner seeks to challenge the Clause as race-conscious, the proper focus of that challenge is on the only aspect of the program that is race-based; the race-based rebuttable presumption used on some certification determinations under the Subcontracting Compensation Clause.").

[79]*Id.* at 27-28. The Department of Transportation contended that, "There has thus been no showing that the race-based rebuttable presumption, which is the only racial component of the challenged program, was actually applied so as to affect the award of the subcontract in this case." *Id.* at 28.

[80]*Id.* at 28-29. The Department of Transportation explained:

> A challenge by petitioner to Gonzales's certification would have required the certifying agency not simply to confirm the race of those who own and control the company, but to review and verify the company's actual

was no challenge to Gonzales Construction's certification as a "disadvantaged business enterprise," or no application by Adarand Constructors to be certified as such, the Department of Transportation maintained that Adarand Constructors lacked standing.[81]

III. A HISTORICAL REVIEW: THE JUDICIARY'S RESPONSE TO AFFIRMATIVE ACTION PROGRAMS

The Fourteenth Amendment was adopted in 1868 to provide freedom and equal treatment by prohibiting state-sponsored discrimination against emancipated slaves.[82] Although the text of the Fourteenth Amendment provides that "[n]o state shall . . . deny to any person . . . the equal protection of the laws,"[83] emancipated slaves continued to confront racial discrimination and racism long after passage of the Civil War Amendments.[84] Through the combination of the Supreme Court's landmark

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> disadvantaged status. If Gonzales is actually disadvantaged and if petitioner, as appears, had a fair opportunity to challenge that status but chose not to do so, petitioner can hardly claim now that any rebuttable presumption used to determine that Gonzales was disadvantaged was unconstitutional.

Id. at 29.

[81]*Id.* at 29. After concluding its standing arguments, the Department of Transportation also argued that Congress's enactment of race-based remedial programs was subject to intermediate scrutiny as established under Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990) and Fullilove v. Klutznick, 448 U.S. 448 (1980). Respondents' Brief, *supra* note 74, at 34-39.

[82]*See* University of California Regents v. Bakke, 438 U.S. 265, 293 (1978) (Powell, J., plurality) ("Although many of the Framers of the Fourteenth Amendment conceived of its primary function as bridging the vast distance between members of the Negro race and the white 'majority' . . . the Amendment itself was framed in universal terms, without reference to color, ethnic origin, or condition of prior servitude." (citation omitted)); McLaughlin v. Florida, 379 U.S. 184, 192 (1964) ("[T]he central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States."). For a further discussion of the framing of the Fourteenth Amendment, see HORACE E. FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT (1908).

[83]See *supra* note 13 for the full text of § 1 of the Fourteenth Amendment.

[84]*See* WILLIAM GILLETTE, RETREAT FROM RECONSTRUCTION 1869-1879, 379 (1979). In discussing the problems faced by emancipated slaves during the post-Reconstruction period, Gillette writes:

decision in *Brown v. Board of Education*,[85] the ensuing Civil Rights Movement and the passage of the Civil Rights Act of 1964,[86] President Lyndon B. Johnson's Executive Order 11246,[87] and affirmative action

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> For the southern Negro, the end of reconstruction meant nothing but defeat, for the southern whites, who became finally reconciled to the end of slavery, decided to treat the blacks as peasants instead. As a result, the Negro was subordinated politically, economically, educationally, and socially. The failure to protect him and his franchise meant that the freedman was not truly free. Having believed that they would enjoy power, prosperity, educational opportunity, protection, equality, and patronage, the blacks found that they were still impotent, poor, ignorant, intimidated, segregated, and largely forgotten.

Id. (footnote omitted).

[85]347 U.S. 483 (1954).

[86]Pub. L. No. 88-352, § 701, 78 Stat. 253 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (1988)).

[87]*See* ARTHUR GUTMAN, EEO LAW AND PERSONNEL PRACTICES, 235-38 (1993). Gutman explains that until Congress passed the Civil Rights Act of 1964, Executive Order 11246 ("E.O. 11246"), issued by President Lyndon B. Johnson in 1965 and amended by him in 1967, had been the culminating efforts of numerous Presidents to mandate nondiscrimination in the federal government. *Id.* at 238. Furthermore, E.O. 11246 was a three-part order covering federal government employees, sellers of goods and services to the federal government and construction contractors. *Id.* at 236-37. President Roosevelt issued the first nondiscrimination order in 1941, to be followed by President Truman in 1945 and 1951, President Eisenhower in 1953 and 1954, President Kennedy in 1961 and 1963, President Johnson in 1965 and 1967, President Nixon in 1969, and President Carter in 1978. *Id.* at 238-41. The chief attribute of President Johnson's E.O. 11246 was the agreement between procurement and construction contractors to follow the Equal Opportunity Clause (E.O. Clause) in § 202 of the Executive Order. *Id.* at 236. Among the nine provisions of the E.O. Clause, there were two significant subsections of § 202(1) which are as follows:

> [1] The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. [2] The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, or national origin. Such action shall include, but not be limited to the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship.

programs, African-Americans experienced improvements in economic and social status.[88] As a result of Fifth Amendment Due Process Clause and Fourteenth Amendment Equal Protection Clause, challenges to affirmative action programs, courts have had the arduous task of determining their constitutionality.[89]

A. STANDARDS OF REVIEW FOR EQUAL PROTECTION ANALYSIS

The United States Supreme Court has applied the Equal Protection Clause to laws and governmental programs that classify citizens according to various characteristics and social factors.[90] The Court will analyze the classification through a three tier approach, ensuring the classification is proper. The three tiers of review are as follows: (1) "rational basis" — whether the law is rationally related to a legitimate state interest;[91] (2) "intermediate or middle tier review" — whether a law is substantially related

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Id.

[88]*See* A COMMON DESTINY: BLACKS AND AMERICAN SOCIETY 7 (Gerald D. Jaynes & Robin M. Williams, Jr. eds., 1989) (reporting that improved economic and social opportunities for African-Americans developed through urbanization and relocation to northern cities from 1940 to 1970, the civil rights movement, and the tremendous and continued rate of national economic growth from 1940 to 1970).

[89]Much of the difficulty in determining the constitutionality of affirmative action programs has been caused by the United States Supreme Court's application of strict scrutiny to state and local minority preference programs, and an intermediate level of review for minority preference programs initiated under authority of Congress. *See* Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

[90]Although the Equal Protection Clause of the Fourteenth Amendment itself only applies to state and local governments, the Court has applied the Due Process Clause of the Fifth Amendment to federal laws, which if passed by a state, would violate the Equal Protection Clause of the Fourteenth Amendment. *See* Bolling v. Sharpe, 347 U.S. 497 (1954). For a further discussion of the "equal protection of the laws" see JETHRO K. LIEBERMAN, THE EVOLVING CONSTITUTION 183-85 (1992).

[91]Many cases have applied the rational basis test. *See, e.g.*, Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483, 488 (1955) ("It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it."); United States v. Carolene Products, 304 U.S. 144, 152 (1938) (holding that legislation regulating commercial transactions are constitutional unless it does not rest "upon some rational basis within the knowledge and experience of the legislators"). For a further discussion of the "rational basis" or "relationship test" see LIEBERMAN, *supra* note 90, at 440-41.

to the achievement of an important state interest;[92] and (3) "strict scrutiny" — whether a law is narrowly tailored to advance a compelling state interest.[93] The Court has traditionally applied strict scrutiny to cases wherein a fundamental right is implicated or a suspect class is involved, and has applied rational basis to laws that do not infringe on a fundamental right or involve a suspect classification.[94] Middle tier review is applied to "quasi-suspect" classifications that need more protection than rational basis, but do not merit the protection of strict scrutiny.[95] Thus, the Court will examine the state or federal statute and apply the corresponding standard of review according to the interests at stake in the particular case or controversy.

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[92]*See* Clark v. Jeter, 486 U.S. 456, 461 (1988) (stating that classifications based on sex or illegitimacy are subject to a level of "intermediate" or "heightened" scrutiny); Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982) (stating that intermediate scrutiny requires a showing that "the classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives'"). For a further discussion of the "intermediate scrutiny," see LIEBERMAN, *supra* note 90, at 515.

[93]*See* Korematsu v. United States, 323 U.S. 214, 216 (1944) ("[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. . . . [C]ourts must subject them to the most rigid scrutiny."); *Carolene Products*, 304 U.S. at 153 n.4 ("[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." (citations omitted)). For a further discussion of "strict scrutiny," see LIEBERMAN, *supra* note 90, at 515.

[94]The Court has recognized several rights as "fundamental." *See* Roe v. Wade, 410 U.S. 113 (1973) (the right to privacy); Boddie v. Connecticut, 401 U.S. 220 (1971) (the right of access to the courts); Kramer v. Union Free Sch. Dist., 395 U.S. 621 (1969) (the right to vote); Shapiro v. Thompson, 394 U.S. 618 (1969) (the right to interstate travel); Loving v. Virginia, 388 U.S. 1 (1967) (the right to marry). For a further discussion of "fundamental rights," see LIEBERMAN, *supra* note 90, at 226-27.

The Court has deemed "suspect" classifications as those giving distinct treatment to a group that has been discriminated against historically. *See* Yick Wo v. Hopkins, 118 U.S. 356 (1886) (holding unconstitutional a statute that discriminated in its administration against Chinese-owned laundries).

[95]*See* Trimble v. Gordon, 430 U.S. 762 (1977) (holding that an Illinois statute that prevented illegitimate children from inheriting their father's estate was not an appropriate means to achieve the state's objective of promoting legitimate family relationships); Craig v. Boren, 429 U.S. 190 (1976) (holding that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives).

B. STANDARDS OF REVIEW FOR AFFIRMATIVE ACTION PROGRAMS

Although the Supreme Court has established structured standards of review for Equal Protection Clause challenges, the Court has struggled with the application of these standards to affirmative action programs.[96] The Supreme Court first addressed the appropriate standard of review for affirmative action programs in *University of California Regents v. Bakke*.[97] In *Bakke*, the Court examined the Medical School of the University of California at Davis's special admission program that established quotas based on the race and ethnic background of the applicant.[98] The purpose of the program was to achieve a racially diverse student body.[99] Splitting four justices in favor of the program and four justices against, Justice Powell's plurality opinion announced the judgment of the Court,[100] concluding that strict scrutiny was the applicable standard to be applied to the University's race-based admission policy.[101]

Although there was no prior discrimination or court order requiring an affirmative action program, the University created a separate admission standard for "economically and/or educationally disadvantaged" applicants and for "minority groups."[102] Applications submitted by members of these groups were evaluated on a lesser standard than the other applicants.[103] Justice Powell reasoned that the preferential treatment solely based upon membership in a racial group was discrimination forbidden by the

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[96]*See supra* notes 7-10 and accompanying text.

[97]438 U.S. 265 (1978).

[98]*Id.* at 269-70 (Powell, J., plurality).

[99]*Id.*

[100]*Id.* at 269-72 (Powell, J., plurality).

[101]*Id.* at 291 (Powell, J., plurality) ("Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination.").

[102]*Id.* at 274 (Powell, J., plurality).

[103]*Id.* at 274-75 (Powell, J., plurality) (stating that applicants considered under the "economically and/or educationally disadvantaged" or the "minority group" were considered even if their grade point average was below a 2.5 out of 4.0 standard for all other applicants).

Constitution.[104] Moreover, Justice Powell explained that although the state has a legitimate and substantial interest in remedying past discrimination, there was no precedent for taking such action without a prior judicial, legislative, or administrative finding of past unconstitutional discrimination.[105] As a result, Justice Powell determined that the University's admissions program was unconstitutional, but left open the possibility that other affirmative action programs, based on a finding of past racial discrimination which created a substantial state interest in vindicating the rights of those victims, could be constitutional.[106]

The Supreme Court's next major affirmative action decision was *Fullilove v. Klutznick*.[107] The Court upheld the federal Public Works Employment Act of 1977 ("the 1977 Act"), which required grants under the act for local public works projects to include at least 10 % for minority business enterprises.[108] Chief Justice Burger's plurality opinion, joined by

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[104]*Id.* at 307 (Powell, J., plurality)

[105]*Id.*

[106]*Id.* Justice Powell explained:

> The State certainly has a legitimate and substantial interest in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination. . . .
>
> We [, however,] have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations. After such findings have been made, the governmental interest in preferring members of the injured groups at the expense of others is substantial, since the legal rights of the victim must be vindicated.

Id. (citations omitted).

[107]448 U.S. 448 (1980).

[108]*Id.* at 453-54 (Burger, C.J., plurality) (citation omitted). Chief Justice Burger explained that § 103(f)(2) of the 1977 Act, referred to as the "minority business enterprise" or "MBE" provision, required the following:

> Except to the extent that the Secretary determines otherwise, no grant shall be made under this Act for any local public projects unless the applicant gives satisfactory assurance to the Secretary that at least 10 per centum of the amount of each grant shall be expended for minority business enterprise. For the purpose of this paragraph, the term "minority business enterprise" means a business, at least 50 per centum of which is owned by minority

Justice White and Justice Powell, rejected the argument that this 10 % minority requirement violated the Equal Protection Clause of the Fourteenth Amendment.[109] The Chief Justice reasoned that Congress's legislative authority under Section Five of the Fourteenth Amendment provided sufficient justification for such a program.[110] Chief Justice Burger opined that it was not unconstitutional for Congress to effectuate a limited and properly tailored remedy to cure past racial discrimination.[111] Although not advocating an unlimited congressional power to pass minority assistance legislation,[112] Chief Justice Burger proffered that Congress's power was limited to the extent that the legislation was aimed at accomplishing the remedial objectives of reversing past discrimination.[113] In so stating, Chief

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> group members or, in case of a publicly owned business, at least 51 per centum of the stock of which is owned by minority group members. For the purposes of the preceding sentence, minority group members are citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts.

Id. at 454 (Burger, C.J., plurality).

[109]*Id.* at 492 (Burger, C.J., plurality).

[110]*Id.* at 483-84 (Burger, C.J., plurality) (arguing that Congress has "broad remedial powers" directly stated in the Constitution to enforce equal protection guarantees through legislation that directly induces states from continuing discriminatory conduct).

[111]*Id.* at 484 (Burger, C.J., plurality). Chief Justice Burger explained:

> Congress, after due consideration, perceived a pressing need to move forward with new approaches in the continuing effort to achieve the goal of equality of economic opportunity. In this effort, Congress has necessary latitude to try new techniques such as the limited use of racial and ethnic criteria to accomplish remedial objectives; this is especially so in programs where voluntary cooperation with remedial measures is induced by placing conditions on federal expenditures.

Id. at 490 (Burger, C.J., plurality).

[112]*Id.* at 480 (Burger, C.J., plurality) ("We recognize the need for careful judicial evaluation to assure that any congressional program that employs racial or ethnic criteria to accomplish the objective of remedying the present effects of past discrimination is narrowly tailored to the achievement of that goal.").

[113]*Id.* at 487 (Burger, C.J., plurality) ("[T]he MBE provision cannot pass muster unless, with due account for its administrative program, it provides a reasonable assurance that application of racial or ethnic criteria will be limited to accomplishing the remedial

Justice Burger concluded that, regardless of whether strict or intermediate scrutiny applied to the minority business enterprise program, the program did not violate the United States Constitution.[114]

Justice Stewart's dissenting opinion in *Fullilove*, joined by then-Justice Rehnquist, vehemently argued that the Equal Protection Clause clearly prohibited "invidious discrimination" by both federal and state governments.[115] Justice Stewart reasoned that the government could not act to the detriment of a person or group solely on account of their race or ethnic origin.[116] Because there was no finding of congressional discrimination in federal contract appropriations, Justice Stewart criticized the Court's characterization of the minority business enterprise section of the 1977 Act as a "remedial measure."[117]

Additionally, Justice Stewart asserted that the Court's decision would have the negative long-term consequence of reinforcing a baseless stereotype that certain groups are unable to achieve success without special governmental assistance.[118] To prevent this deleterious effect, Justice Stewart asserted that equal protection analysis for both federal and state

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objectives of Congress and that misapplications of the program will be promptly and adequately remedied administratively.").

[114]*Id.* at 492 (Burger, C.J., plurality).

[115]*Id.* at 523 (Stewart, J., dissenting) ("Under our Constitution, any official action that treats a person differently on account of his race or ethnic origin is inherently suspect and presumptively invalid." (citations omitted)).

[116]*Id.* at 525 (Stewart, J., dissenting) ("Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." (citation omitted)).

[117]*Id.* at 527-28 (Stewart, J., dissenting).

[118]*Id.* at 531 (Stewart, J., dissenting) (citation omitted). Further, Justice Stewart proffered:

> [B]y making race a relevant criterion once again in its own affairs the Government implicitly teaches the public that the apportionment of rewards and penalties can legitimately be made according to race — rather than according to merit or ability — and that people can, and perhaps should, view themselves and others in terms of their racial characteristics. Notions of "racial entitlement" will be fostered, and private discrimination will necessarily be encouraged.

Id. at 532 (Stewart, J., dissenting) (citations omitted).

affirmative action and minority assistance programs required strict judicial scrutiny.[119]

Justice Stevens also dissented from the Court's holding, but differed from the reasoning of Justice Stewart and Justice Rehnquist, espousing absolute prohibitions on all statutory race classifications.[120] Justice Stevens would closely scrutinize any governmental enactment that created distinctions between citizens on the basis of race.[121] In so reasoning, Justice Stevens concluded that this statute was not a "narrowly tailored" use of a racial classification because Congress failed to set forth the characteristics of the preferred group that warranted the special treatment.[122]

After *Fullilove*, the Court confronted the issue of whether a school board's preferential layoffs based on an employee's race or national origin violated the Equal Protection Clause in the case of *Wygant v. Jackson Board of Education*.[123] In *Wygant*, the Court explained that because of racial tension in 1972, the school board, in its collective bargaining agreement with the local teachers' union, included a stipulation that required layoffs to occur according to seniority status, so long as the percentage of minority teachers remained the same.[124] Subsequently, non-minority teachers with seniority

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[119]*Id.* at 523 (Stewart, J., dissenting). Justice Stewart argued:

> The equal protection standard of the Constitution has one clear and central meaning — it absolutely prohibits invidious discrimination by government. That standard must be met by every State under the Equal Protection Clause of the Fourteenth Amendment. And that standard must be met by the United States itself under the Due Process Clause of the Fifth Amendment.

Id. (citations omitted).

[120]*Id.* at 532 (Stevens, J., dissenting).

[121]*Id.* at 548 (Stevens, J., dissenting).

[122]*Id.* at 552-53 (Stevens, J., dissenting). In a footnote, Justice Stevens took exception with Congress's failure to address various issues when authorizing the program, such as why six racial classifications were selected, and whether businesses, formed just to take advantage of the program's preferences, were eligible as minority owned businesses. *Id.* at 552 n.30 (Stevens, J., dissenting).

[123]476 U.S. 267, 269 (1986) (Powell, J., plurality).

[124]*Id.* at 270 (Powell, J., plurality). The clause added to the collective bargaining agreement by the school board stated as follows:

status, who were discharged in favor of minority teachers,[125] brought suit challenging the school board's policy under, *inter alia*, the Equal Protection Clause of the Fourteenth Amendment.[126]

In a plurality opinion, Justice Powell set forth the Supreme Court precedent for review of equal protection challenges.[127] Initially, Justice Powell asserted that the level of judicial scrutiny applicable to a group's classification challenge was not dependent upon historical government discrimination against that particular group.[128] Justice Powell emphasized, however, that all racial and ethnic classifications were "inherently suspect" and demanded the "most exacting judicial examination" of programs based upon such classifications.[129] Based on these principles, Justice Powell set forth a two-part test to determine whether the collective bargaining agreement clause at issue violated the Equal Protection Clause: (1) whether the program was supported by a compelling state objective; and (2) whether the clause was narrowly tailored to accomplish that objective.[130]

> In the event that it becomes necessary to reduce the number of teachers through layoff from employment by the Board, teachers with the most seniority in the district shall be retained, except that at no time will there be a greater percentage of minority personnel laid off than the current percentage of minority personnel employed at the time of the layoff. In no event will the number given notice of possible layoff be greater than the number of positions to be eliminated. Each teacher so affected will be called back in reverse order for positions for which he is certified maintaining the above minority balance.

Id. at 270-71 (Powell, J., plurality) (quoting Article XII of the Collective Bargaining Agreement).

[125]The Court explained that Article VII of the Collective Bargaining Agreement defined minority employer as "those employees who are Black, American Indian, Oriental, or of Spanish descendancy." *Id.* at 271 n.2 (Powell, J., plurality).

[126]*Id.* at 272 (Powell, J., plurality).

[127]*Id.* at 273 (Powell, J., plurality).

[128]*Id.* (citing Mississippi University for Women v. Hogan, 458 U.S. 718, 724 n.9 (1982); University of California Regents v. Bakke, 438 U.S. 265, 291-99 (1978) (Powell, J., plurality); (other citations omitted)).

[129]*Id.* (quoting *Bakke*, 438 U.S. at 291).

[130]*Id.* at 274 (Powell, J., plurality) (citations omitted).

Through an application of the two-part inquiry, the *Wygant* plurality concluded that the school board's policy did not adequately compel the use of a racial classification.[131] Justice Powell determined that the school board's approach of remedying societal discrimination, based on the pretense that minority students need minority role models, did not serve a compelling state interest justifying the use of a racial classification.[132] Specifically, the plurality rejected the Jackson school board's argument that the layoff provision would remedy past discrimination, and struck down the layoff provision for not being a suitable means of achieving a compelling state interest.[133] Although the plurality opinion struck down the layoff provision, Justice Powell indicated that certain preferential race programs could pass constitutional muster if created to eradicate racial discrimination.[134]

In 1989, the Supreme Court returned to the principles established in *Fullilove* with the case of *City of Richmond v. J.A. Croson Co.*[135] In *J.A.*

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[131]*Id.* at 274-84 (Powell, J., plurality). In opposition, Justice Marshall, with whom Justice Brennan and Justice Blackmun joined, dissented and advocated the use of intermediate scrutiny, in other words, whether the classification served an important governmental purpose and was substantially related to achieve that purpose. *Id.* at 301-02 (Marshall, J., dissenting) (citations omitted). Further, Justice Stevens dissented and stated that the proper inquiry should be whether the Jackson school board's layoff provision furthers the public interest in educating students for the future. *Id.* at 313 (Stevens, J., dissenting).

[132]*Id.* at 274-76 (Powell, J., plurality). Justice Powell explained, "Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy." *Id.* at 276 (Powell, J., plurality).

[133]*Id.* at 277-78 (Powell, J., plurality). In deciding that the Jackson board did not prove the existence of prior discrimination, the plurality stated, "In particular, a public employer like the Board must ensure that, before it embarks on an affirmative-action program, it has convincing evidence that remedial action is warranted. . . . [I]t must have sufficient evidence to justify the conclusion that there has been prior discrimination." *Id.* at 277 (Powell, J., plurality).

[134]*Id.* at 281 (Powell, J., plurality) ("'When effecting a limited and properly tailored remedy to cure the effects of prior discrimination, such a 'sharing of the burden' by innocent parties is not impermissible.'" (quoting Fullilove v. Klutznick, 448 U.S. 448, 480 (1980) (quoting Franks v. Bowman Transportation Co., 424 U.S. 747, 777 (1976)))). Rather than require layoffs of non-minority teachers, Justice Powell suggested that the Jackson school board could have achieved its goals through less intrusive "hiring goals" because "[d]enial of a future employment opportunity is not as intrusive as loss of an existing job." *Id.* at 282-83 (Powell, J., plurality).

[135]488 U.S. 469 (1989).

Croson, the Court held that a state minority assistance program, similar to the federal minority assistance program in *Fullilove*, was unconstitutional.[136] Justice O'Connor's plurality opinion distinguished *Fullilove* by stating that Congress, unlike state or local governments, is specifically granted authority to combat racial discrimination through the Fourteenth Amendment.[137] Justice O'Connor reaffirmed the Court's prior holding in *Wygant v. Jackson Board of Education*[138] and concluded that classifications based on race are suspect and are subject to strict scrutiny analysis.[139] Justice O'Connor reasoned that, without a finding of specific governmental discrimination, a generalized assertion that there has been prior discrimination in an industry will not support a state or local government's attempt to remedy societal discrimination.[140]

Five years prior to deciding *Adarand Constructors*, the Court decided *Metro Broadcasting, Inc. v. FCC*.[141] In *Metro Broadcasting*, the Supreme

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[136]In 1983, the Richmond City Council adopted the Minority Business Utilization Plan that required prime contractors to whom the city awarded construction contracts to subcontract at least 30 % of the dollar amount of the contract to one or more Minority Business Enterprises (MBE's). *Id.* at 477-78. The plan defined an MBE as "a business at least 51 percent of which is owned and controlled . . . by minority group members." *Id.* at 478. Minority group members were defined as "citizens of the United States who are Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts." *Id.*

[137]*Id.* at 490 (O'Connor, J., plurality) (citing Katzenbach v. Morgan, 384 U.S. 641, 651 (1966) ("Correctly viewed, § 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment.")).

[138]476 U.S. 267 (1986) (Powell, J., plurality). In *Wygant*, the Court held that racial classifications contained in affirmative action programs are justified under a strict scrutiny analysis where narrowly tailored means are chosen to accomplish the state's compelling interest. *Id.* at 274 (Powell, J., plurality). In stating that societal discrimination alone would be insufficient to justify a racial classification, the Court explicated that there must be convincing evidence of past racial discrimination by the government before allowing the use of racial classifications to remedy prior discrimination. *Id.* at 277-78 (Powell, J., plurality); *see also supra* notes 123-134 and accompanying test for a further discussion of the Court's decision.

[139]*J.A. Croson*, 488 U.S. at 492-93 (O'Connor, J., plurality) ("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.").

[140]*Id.* at 498 (O'Connor, J., plurality).

[141]497 U.S. 547 (1990).

Court upheld two Federal Communications Commission minority preference programs.[142] By a 5-4 majority, the Court applied an intermediate level of scrutiny,[143] and held that the minority preference programs served important governmental interests and were substantially related to achievement of those interests, thereby satisfying intermediate scrutiny.[144] Writing for the majority, Justice Brennan reasoned that the Federal Communications Commission's minority ownership preference policies were justified on the basis of promoting broadcast diversity.[145]

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[142]The *Metro Broadcasting* majority described the Federal Communications Commission's minority preference programs as follows:

> First, the Commission pledged to consider minority ownership as one factor in comparative proceedings for new licenses . . . as a plus to be weighed together with all other relevant factors. . . .
>
> Second, the FCC outlined a plan to increase minority opportunities to receive reassigned and transferred licenses through so-called "distress sale" policy. As a general rule, a licensee whose qualifications to hold a broadcast license come into question may not assign or transfer that license until the FCC has resolved its doubts in a noncomparative hearing. The distress sale policy is an exception to that practice, allowing a broadcaster whose license has been designated for a revocation hearing, or whose renewal application has been designated for hearing, to assign the license to an FCC-approved minority enterprise. . . . [T]he minority ownership must exceed 50 percent or be controlling. The buyer must purchase the license before the start of the revocation or renewal hearing, and the price must not exceed 75 percent of fair market value.

Id. at 556-57 (citations and footnotes omitted).

[143]*Id.* at 566 ("We hold that the FCC minority ownership policies pass muster under the test we announce today. First, we find that they serve the important governmental objective of broadcast diversity. Second, we conclude that they are substantially related to the achievement of that objective.").

[144]*Id.* at 564.

[145]*Id.* at 584. Justice Brennan, joined by Justices White, Marshall, Blackmun, and Stevens, announced:

> We hold that 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 — are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives.

Through this narrow majority, the Supreme Court, for the first time, upheld an affirmative action program with a middle tier analysis based on reasons other than remedying past racial discrimination.[146] The four dissenters argued that, under a strict scrutiny review, the programs would not comply with established constitutional principles.[147] In dissent, Justice O'Connor reasoned that the majority's use of Section Five of the Fourteenth Amendment to justify lesser than a strict scrutiny analysis was unwarranted because past decisions based on Section Five were limited to those instances in which Congress acted in response to state action.[148] Justice O'Connor further argued that the Court's holding in *Fullilove* stood only for the proposition that Congress may enact measures that seek to remedy identified past discrimination affecting a particular industry.[149] Moreover, Justice O'Connor criticized the majority's toleration and acceptance of "benign racial

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Id. at 564-65 (footnote omitted).

[146]*Id.* at 603 (O'Connor, J., dissenting) ("This Court's precedents in no way justify the Court's marked departure from our traditional treatment of race classifications [strict scrutiny] and its conclusion that different equal protection principles apply to these federal actions.").

[147]Justice O'Connor, joined by Chief Justice Rehnquist, Justice Scalia, and Justice Kennedy, writing for the dissent, stated:

> To uphold the challenged programs, the Court departs . . . from our traditional requirement that racial classifications are permissible only if necessary and narrowly tailored to achieve a compelling interest. This departure marks a renewed toleration of racial classifications and a repudiation of our recent affirmation that the Constitution's equal protection guarantees extend equally to all citizens.

Id. at 602 (O'Connor, J., dissenting).

[148]*Id.* at 605-06 (O'Connor, J., dissenting) ("Section 5 empowers Congress to act respecting the States, and of course this case concerns only the administration of federal programs by federal officials.").

[149]*Id.* at 607 (O'Connor, J., dissenting) ("The FCC and Congress are clearly not acting for any remedial purpose, . . . and the Court today expressly extends its standard to racial classifications that are not remedial in any sense.").

classifications" as unwise, in light of history's lesson that all racial classifications must be viewed suspectly and strictly scrutinized.[150]

Through a review of the Court's affirmative action jurisprudence, two distinct interpretations regarding the applicable standard of review for affirmative action and minority preference programs emerge.[151] The conservative members of the Court have advocated strict scrutiny review for affirmative action programs, while the liberal members have preferred a more lenient standard.[152] Since the decision in *Metro Broadcasting*, Justice Brennan and Justice Marshall have left the Court, and have been replaced by Justice Souter and Justice Thomas, respectively. Justice White and Justice Blackmun have also left the Court, replaced by Justice Ginsburg and Justice Breyer.[153] As a result of this dramatic five-year, four-member turnover, the Court's narrow majority in *Metro Broadcasting* has been overruled by a new five-member majority in *Adarand Constructors, Inc. v. Pena*, favoring

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[150]*Id.* at 609-10 (O'Connor, J., dissenting). In support of the principle that racial preference programs must be carefully analyzed through strict scrutiny, Justice O'Connor stated:

> Depending on the preference of the moment, those racial distinctions might be directed expressly or in practice at any racial or ethnic group. We are a Nation not of black and white alone, but one teeming with divergent communities knitted together by various traditions and carried forth, above all, by individuals. Upon that basis, we are governed by one Constitution, providing a single guarantee of equal protection, one that extends equally to all citizens.

Id. at 610 (O'Connor, J., dissenting).

Moreover, Justice O'Connor further reasoned that even remedial racial preference programs must be subject to strict scrutiny analysis. *Id.* at 611 (O'Connor, J., dissenting). Justice O'Connor stated, "We subject even racial classifications claimed to be remedial to strict scrutiny, however, to ensure that the Government in fact employs any race-conscious measures to further this remedial interest and employs them only when, and no more broadly than, the interest demands." *Id.* (citations omitted).

[151]*See supra* notes 96-150 and accompanying text.

[152]In no way should this statement be interpreted to trivialize or erroneously simplify the individual identities and philosophies of past and present Supreme Court members. Rather, for the purposes of this discussion, this statement is offered to neatly categorize the two competing interpretations.

[153]In *Metro Broadcasting*, Justices Marshall, White, Blackmun, and Stevens all joined Justice Brennan in the *Metro Broadcasting* decision to compromise the majority in support of intermediate scrutiny. Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 564-65 (1990).

strict scrutiny review of federal affirmative action and minority preference programs.[154]

IV. THE SUPREME COURT'S ADOPTION OF A "KINDER-GENTLER" STRICT SCRUTINY ANALYSIS FOR AFFIRMATIVE ACTION PROGRAMS

Writing for the majority, Justice O'Connor explained that the federal government established an elaborate financial incentive program that induced prime contractors to subcontract construction projects to "socially disadvantaged" small businesses.[155] Justice O'Connor explained that the Small Business Administration established two programs, the "8(a) program" and the "8(d) subcontracting program," to further its participation goals by requiring at least "5 percent of the total value of all prime contract[s] and subcontract[s]" to be awarded to small businesses controlled by "socially and economically disadvantaged individuals" during each fiscal year.[156] According to the majority, Mountain Gravel's contract was authorized pursuant to the Surface Transportation and Uniform Relocation Assistance

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[154]*See* John J. Welsh, Adarand Constructors, Inc. v. Pena*: A Forecast of Enhanced Scrutiny for Affirmative Action Programs*, 5 SETON HALL CONST. L.J. 933, 964 (1995) (predicting that a majority of the Court would select strict scrutiny as the applicable standard of review for affirmative action programs).

[155]Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2102 (1995). According to the majority:

> The Small Business Act . . . declares it to be "the policy of the United States that small business concerns, [and] small business concerns owned and controlled by socially and economically disadvantaged individuals, . . . shall have the maximum practicable opportunity to participate in the performance of contracts let by any Federal agency."

Id. (quoting 15 U.S.C. § 637(d)(1)).

[156]*Id.* (quoting 15 U.S.C. § 644(g)(1)). The majority noted that the "8(a) program" established a permissive presumption of eligibility to small businesses 51% owned by a Black, Hispanic, Asian, Pacific, Subcontinent Asian, and Native American, or any other small business who can prove by clear and convincing evidence that it is socially and economically disadvantaged. *Id.* at 2103 (citing 13 C.F.R. § 124.102-103, 124.105-106 (1994)). Further, the majority explained that the "8(d) subcontracting program" also grants a similar race-based presumption to minority groups of social and economic disadvantage, but is "less restrictive" than the "8(a) program." *Id.* (citing 13 C.F.R. § 124.106(b) (1994); 48 C.F.R. §§ 19.001, 19.703(a)(2) (1994)).

Act of 1987,[157] which contained social and economic racial-presumptions similar to those of the Small Business Administration.[158]

After setting forth the relevant federal laws and regulations at issue, the Court concluded that Adarand Constructors had standing to challenge and obtain relief from Subcontractor Compensation Clause programs.[159] Justice O'Connor determined that Adarand Constructors had satisfied this initial inquiry because there was a sufficient showing that Adarand Constructors would bid in the near future on another government contract with the same type of financial incentive program.[160] Although the Court acknowledged that future use of subcontractor compensation clauses by the federal government may not "imminently" injure Adarand Constructors, Justice O'Connor directed the inquiry to whether Adarand Constructors had made an adequate showing of future bidding on government contracts in Colorado that contained incentives for hiring disadvantaged subcontractors.[161] In light of continued financial incentives to prime contractors to hire disadvantaged subcontractors, the Court recognized that Adarand Constructors faced potential injury in the immediate future in that it was prevented from "competing on an equal footing."[162]

After establishing that Adarand Constructors had standing, the Court embarked on a historical review of prior decisions involving the Fifth Amendment's Due Process Clause and the Fourteenth Amendment's Equal

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[157]Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub. L. No. 100-17, 101 Stat. 132 (1988).

[158]*Adarand III*, 115 S. Ct. at 2103 (citations omitted). Justice O'Connor asserted that under § 106(c)(1) of the STURAA not less than 10 % of all appropriated funds were required to be allocated to small business concerns owned and controlled by socially and economically disadvantaged individuals. *Id.* Moreover, the Court noted, "STURAA adopts the Small Business Act's definition of 'socially and economically disadvantaged individual' including the applicable race-based presumptions. . . ." *Id.*

[159]*Id.* at 2105 (finding that Adarand satisfied the standing requirement due to the likelihood that the Central Federal Lands Highway Division would include Subcontractor Compensation Clauses at least once a year in prime contracts awarded in Colorado).

[160]*Id.*

[161]*Id.*

[162]*Id.* (citing General Contractors v. Jacksonville, 113 S. Ct. 2297, 2303 (1993) (asserting that an aggrieved party's standing does not require a claim that it would have received the benefit but for the barrier)).

Protection Clause.[163] Justice O'Connor traced the Court's treatment of governmental classifications that affected classes of people that have suffered societal discrimination.[164] Although early Supreme Court decisions declined to apply the Fourteenth Amendment Equal Protection Clause to the federal government,[165] Justice O'Connor restated the principle of *Bolling v. Sharpe*:[166] the equal protection components of the Fifth and Fourteenth Amendments are indistinguishable.[167] In so stating, Justice O'Connor emphasized the fact that the Court has consistently held that government racial classifications, whether created by federal or state governments, must be subjected to the most rigid judicial scrutiny.[168]

Expanding on the principle that racial classifications have been subject to strict scrutiny, Justice O'Connor next examined the Court's treatment of federal and state programs intended to assist historically disadvantaged groups.[169] Over the past twenty years, Justice O'Connor noted, the Court

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[163]*Id.* at 2106.

[164]*Id.* at 2108.

[165]*See* Hirabayashi v. United States, 320 U.S. 81, 102 (1943) ("[The Fifth Amendment] restrains only such discriminatory legislation by Congress as amounts to a denial of due process."); Detroit Bank v. United States, 317 U.S. 329, 337 (1943) ("Unlike the Fourteenth Amendment, the Fifth contains no equal protection clause and it provides no guaranty against discriminatory legislation by Congress." (citation omitted)); La Belle Iron Works v. United States, 256 U.S. 377, 392 (1921) ("Reference is made to cases decided under the equal protection clause of the Fourteenth Amendment . . . but clearly they are not in point." (citation omitted)).

[166]347 U.S. 497, 499 (1954) ("[T]he Constitution of the United States, in its present form, forbids, so far as civil and political rights are concerned, discrimination by the general government, or by the states, against any citizen because of his race." (citation omitted)).

[167]Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2106-08 (1995). The majority stated, "Thus, in 1975, the Court stated explicitly 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 (quoting Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975)).

[168]*Id.* at 2107 (citing Korematsu v. United States, 323 U.S. 214, 216 (1944) ("[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect . . . [and] courts must subject them to the most rigid scrutiny.").

[169]*Id.* at 2108; *see also supra* notes 96-150 and accompanying text (discussing many of the Court's affirmative action decisions).

has struggled to formulate the proper standard of review for affirmative action and minority assistance programs.[170] Despite the Court's failure to announce a standard of review until *City of Richmond v. J.A. Croson Co.*,[171] Justice O'Connor stated that the Court's previous cases had analyzed governmental racial classifications with "skepticism," "consistency," and "congruence."[172]

According to the majority, the Court's decision in *Metro Broadcasting, Inc. v. FCC* was an aberration.[173] In *Metro Broadcasting*, Justice O'Connor explained, the Court deviated from the long-standing principle that both federal and state governments are held to the same equal protection duty by holding that "benign" racial classifications created by the federal government are subject to intermediate scrutiny.[174] Justice O'Connor criticized the application of intermediate scrutiny in *Metro Broadcasting* for ignoring the essential precept that all governmental racial classifications must be strictly scrutinized for differentiating between federal and state programs, relaxing suspicion of racial classifications, and for varying the standard of

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[170]*Id.* at 2109. Justice O'Connor posited, "The Court's failure to produce a majority opinion in *Bakke*, *Fullilove*, and *Wygant* left unresolved the proper analysis for remedial race-based governmental action." *Id.* (citing United States v. Paradise, 480 U.S. 149, 166 (1987) (Brennan, J., plurality) ("[A]lthough this Court has consistently held that some elevated level of scrutiny is required when a racial or ethnic distinction is made for remedial purposes, it has yet to reach consensus on the appropriate constitutional analysis.")).

[171]*Id.* at 2110 (stating that the Court in *City of Richmond v. J.A. Croson Co.* finally produced a majority opinion subjecting all state and local race-based programs to strict scrutiny).

[172]*Id.* at 2111. Justice O'Connor explained that through the principles of "skepticism," "consistency," and "congruence," the Court reached 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." *Id.*

[173]*Id.* at 2111-12. Justice O'Connor explained, "In *Metro Broadcasting*, the Court repudiated the long-held notion that 'it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government' than it does on a State to afford equal protection of the laws." *Id.* at 2111 (quoting Bolling v. Sharpe, 347 U.S. 497, 500 (1954)).

[174]*Id.* at 2111-12. Additionally, Justice O'Connor chided the *Metro Broadcasting* Court for accepting "benign" racial classifications without defining exactly which racial classifications were benign, and for applying intermediate scrutiny to this amorphous concept of benign racial classifications. *Id.* at 2112.

review depending on the race of the group involved.[175] As a result, the majority overruled *Metro Broadcasting* to the extent that a standard of review less than strict scrutiny would be applied to any racial classification, regardless of whether it was created by federal, state, or local government.[176]

The majority concluded by announcing that the application of strict scrutiny will ensure that all racial classifications are thoroughly examined, and that only narrowly tailored racial classifications based on a compelling government interest will be tolerated.[177] Further, the majority dismissed the view that strict scrutiny is "strict in theory, but fatal in fact."[178] Thus,

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[175]*Id.* In scrutinizing the *Metro Broadcasting* decision, Justice O'Connor proffered:

> By adopting intermediate scrutiny as the standard of review for congressionally mandated "benign" racial classifications, *Metro Broadcasting* departed from prior cases in two significant respects. First, it turned back on *Croson*'s explanation of why strict scrutiny of all government racial classifications is essential . . . .
>
> Second, *Metro Broadcasting* squarely rejected one of the three propositions established by the Court's earlier equal protection cases, namely, congruence between the standards applicable to federal and state racial classifications, and in so doing also underminded the other two — skepticism of all racial classifications, and consistency of treatment irrespective of the race of the burdened or benefited group.

Id.

[176]*Id.* at 2113. For the majority, Justice O'Connor reaffirmed the principles abandoned by *Metro Broadcasting* and stated that the Fifth and Fourteenth Amendments "protect *persons*, not *groups*. . . . [A]ll governmental action based on race . . . should be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed." *Id.* at 2112-13.

Furthermore, Justice O'Connor clarified the majority's decision, in light of Justice Stevens's dissent, by stating that the application of strict scrutiny allows lower courts to distinguish "legitimate from illegitimate," between "permissible and impermissible," uses of racial classifications, and "whether a compelling governmental interest justifies the infliction of that injury." *Id.* at 2113-14.

[177]*Id.* at 2117 (citation omitted).

[178]*Id.* (quoting Fullilove v. Klutznick, 448 U.S. 448, 519 (1980) (Powell, J., concurring)); *see also* United States v. Paradise, 480 U.S. 149, 167 (1987) (Brennan, J., plurality). In defending that strict scrutiny is not "fatal in fact," Justice O'Connor stated, "When race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the 'narrow tailoring' test this Court has set out in previous cases." Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2117 (1995).

the majority remanded the case for a determination as to the constitutionality of the Subcontractor Compensation Clause under a strict scrutiny standard.[179]

V. JUSTICE O'CONNOR'S "SPECIAL JUSTIFICATION" FOR DEPARTING FROM THE DOCTRINE OF *STARE DECISIS*

Writing for the plurality, Justice O'Connor, joined by Justice Kennedy, justified the majority opinion's deviation from the doctrine of *stare decisis*.[180] Thereby, Justice O'Connor reasoned that "special justifications"[181] existed for the Court's departure from *Metro Broadcasting*.[182] The plurality attacked the decision in *Metro Broadcasting* as creating an indefensible deviation from the tenets of equal protection, and also as differentiating racial classifications between state and federal

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[179]*Adarand III*, 115 S. Ct. at 2118. According to Justice O'Connor, the circuit court, in rejecting Adarand's initial complaint, did not address whether the Subcontractor Compensation Clause program was limited in purpose or whether it would continue after serving its fundamental purpose of alleviating racial discrimination. *Id.* (citing *Fullilove*, 448 U.S. at 513 (Powell, J., concurring)). Justice O'Connor explained that the circuit court, on remand, could weigh whether Congress considered any race-neutral methods of increasing minority opportunity and participation in government contracting. *Id.* (citing City of Richmond v. J.A. Croson Co., 488 U.S. 469, 507 (1989)).

Furthermore, Justice O'Connor urged the circuit court to examine the "complex regulatory regimes" involved in the Subcontractor Compensation Clause programs. *Id.* First, the Court noted that the Small Business Act's "8(a) program" and the Department of Transportation's regulations that applied the STURAA program had different requirements for determining economic disadvantage of individual subcontracting clause participants. *Id.* Moreover, the majority stated that the inconsistent definitions of "socially disadvantaged," as applied through the Small Business Administration's "8(a)" and "8(d)" programs, need to be examined by the circuit court to determine whether the Subcontractor Compensation Clause program satisfies strict scrutiny. *Id.*

[180]*Id.* at 2114 (O'Connor, J., plurality).

[181]*Id.* (citing Arizona v. Rumsey, 467 U.S. 203, 212 (1984) ("Although adherence to precedent is not rigidly required in constitutional cases, any departure from the doctrine of *stare decisis* demands special justification.")).

[182]*Id.* at 2115-16 (O'Connor, J., plurality). Justice O'Connor characterized *Metro Broadcasting* as a departure from "prior cases" and concluded, "By refusing to follow *Metro Broadcasting*, then, we do not depart from the fabric of the law; we restore it." *Id.* at 2116 (O'Connor, J., plurality).

action.[183] Thus, the plurality characterized *Metro Broadcasting* as a "misapplication"[184] and proceeded to apply the established principle that all racial classifications were subject to strict scrutiny and that the Fifth and Fourteenth Amendments require the same equal protection analysis.[185]

VI. A CALL TO LIMIT RACIAL PREFERENCES AND AFFIRMATIVE ACTION PROGRAMS

Justice Scalia, concurring in part and concurring in the judgment, wrote separately to express the conviction that there never existed compelling interests for government to institute race-based remedial programs or

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[183]*Id.* at 2115 (O'Connor, J., plurality). Many commentators also have criticized the decision in *Metro Broadcasting*; *see, e.g.*, Neal Devins, Metro Broadcasting, Inc. v. FCC*: Requiem for a Heavyweight*, 69 TEXAS L. REV. 125, 145-46 (1990) (asserting that the Court in *Metro Broadcasting* failed to apply strict scrutiny as required under *City of Richmond v. J.A. Croson Co.*, and erroneously differentiated between state and federal equal protection principles); Fried, *supra* note 14, at 113 (arguing that *Metro Broadcasting* deviated from prior affirmative action decisions by applying an intermediate level of review, by recognizing diversity as an important governmental objective, and by tolerating "benign" forms of racial discrimination); Lucy Katz, *Public Affirmative Action and the Fourteenth Amendment: The Fragmentation of Theory After* Richmond v. J.A. Croson *and* Metro Broadcasting, Inc. v. Federal Communications Commission, 17 T. MARSHALL L. REV. 317, 357 (1992) (criticizing the "current fragmentation of [affirmative action] doctrine" as a "dangerous and seriously flawed approach to constitutional interpretation"); Douglas O. Linder, *Review of Affirmative Action After* Metro Broadcasting v. FCC*: The Solution Almost Nobody Wanted*, 59 UMKC L. REV. 293, 316-17 (1991) (noting that the Court's application of intermediate scrutiny in *Metro Broadcasting* had "virtually no support in the Constitution's text or the precedents of the Court").

[184]Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2117 (1995) (O'Connor, J., plurality) ("In this case, as between that principle and 'its later misapplication,' the principle must prevail.").

[185]*Id.* at 2116-17 (O'Connor, J., plurality). In support of the notion that "special justification" existed to depart from *Metro Broadcasting*, the plurality stated:

> Remaining true to an "intrinsically sounder" doctrine established in prior cases better serves the values of stare decisis than would following a more recently decided case inconsistent with the decisions that came before it; the latter course would simply compound the recent error and would likely make the unjustified break from previously established doctrine complete.

Id. at 2115 (O'Connor, J., plurality).

preferences without a finding of past discrimination.[186] Justice Scalia accepted the notion that remedies were appropriate for cases of prior discrimination,[187] but vehemently argued that any type of benign or remedial racial preference program was indefensible under the principles of the United States Constitution.[188] In so stating, Justice Scalia reluctantly agreed to remand to the lower courts the determination of whether the challenged program satisfied strict scrutiny.[189]

Justice Thomas, also concurring in part and concurring in the judgment, agreed that strict scrutiny was the applicable standard of review for government racial classifications, but wrote separately to express the view that government's role is to provide equal opportunity and protection for all races, not equality and advantage on account of race.[190] Based on this

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[186]*Id.* at 2118 (Scalia, J., concurring) ("In my view, government can never have a 'compelling interest' in discriminating on the basis of race in order to 'make up' for past racial discrimination in the opposite direction.").

[187]*Id.* ("Individuals who have been wronged by unlawful racial discrimination should be made whole . . . .").

[188]*Id.* at 2118-19 (Scalia, J., concurring). Justice Scalia explained:

> [U]nder our Constitution there can be no such thing as either a creditor or debtor race. . . . To pursue the concept of racial entitlement — even for the most admirable and benign purposes — is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred. In the eyes of government, we are just one race here. It is American.

Id.

[189]*Id.* at 2119 (Scalia, J., concurring).

[190]*Id.* at 2119 (Thomas, J., concurring). Justice Thomas's concurring opinion took exception to the supposition that there is a "racial paternalism exception to the principle of equal protection" as expressed by Justice Stevens's and Justice Ginsburg's dissenting opinions. *Id.* Justice Thomas stated:

> It is also true that "[r]emedial" racial preferences may reflect "a desire to foster equality in society." But there can be no doubt that racial paternalism and its unintended consequences can be as poisonous and pernicious as any other form of discrimination. So-called "benign" discrimination teaches many that because of chronic and apparently immutable handicaps, minorities cannot compete with them without their patronizing indulgence. Inevitably, such programs engender attitudes of superiority or, alternatively, provoke resentment among those who believe that they have been wronged by the

reasoning, Justice Thomas embraced the view that racial preference programs, whether inspired by honorable or malicious intentions, were unconstitutionally discriminatory.[191]

VII. THE DISSENT: JUDICIAL DEFERENCE TOWARD CONGRESSIONAL RACE-BASED REMEDIAL PROGRAMS

Justice Stevens, joined by Justice Ginsburg, dissented to express the belief that the majority's decision ignored controlling precedent.[192] Justice Stevens opined that there are significant differences between racial classifications that are intended to perpetuate inferior racial classes and those governmental actions aimed at remedying and furthering societal equality.[193] Benign-racial preference programs, asserted Justice Stevens,

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> government's use of race. These programs stamp minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are "entitled" to preferences.

Id.

[191] *Id.* Advocating the position that all government discrimination was unconstitutional, Justice Thomas stated:

> As far as the Constitution is concerned, it is irrelevant whether a government's racial classifications are drawn by those who wish to oppress a race or by those who have a sincere desire to help those thought to be disadvantaged. There can be no doubt that the paternalism that appears to lie at the heart of this program is at war with the principle of inherent equality that underlies and infuses our Constitution.

Id. Justice Thomas supported this conclusion with a quote from the Declaration of Independence. *Id.* ("We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are life, liberty, and the pursuit of happiness. . . ." (quoting THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776))).

[192] *Id.* at 2120 (Stevens, J., dissenting).

[193] *Id.* ("Invidious discrimination is an engine of oppression, subjugating a disfavored group to enhance or maintain the power of the majority. Remedial race-based preferences reflect the opposite impulse: a desire to foster equality in society.").

could not, and should not, be identified or associated with intentional government discrimination.[194]

Through the majority's adoption of strict scrutiny for all affirmative action programs, Justice Stevens feared that the rigid and inflexible requirements of strict scrutiny would prohibit legitimate and necessary federal affirmative action programs.[195] Justice Stevens opined that the majority's adoption of strict scrutiny placed an unnecessary burden on federally enacted minority assistance programs aimed at redressing years of intentional discrimination.[196] Conceding that a single standard of review could be applied to both intentional government discrimination and to benign racial preference programs, Justice Stevens offered a flexible approach that would distinguish legitimate programs that effectuated disparate treatment from those that were intentionally discriminatory.[197] In light of the Court's adoption of a single standard of review, Justice Stevens proffered that the Court should have embraced a standard to accommodate reasonable and justifiable racial preferences.[198] Through a standard of review more flexible than strict scrutiny, Justice Stevens asserted that the Court would

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[194]*Id.* at 2121 (Stevens, J., dissenting). To illustrate this point, Justice Stevens stated:

> The consistency that the Court espouses would disregard the difference between a "No Trespassing" sign and a welcome mat. It would treat a Dixiecrat Senator's decision to vote against Thurgood Marshall's confirmation in order to keep African Americans off the Supreme Court as on a par with President's Johnson's evaluation of his nominee's race as a positive factor. It would equate a law that made black citizens ineligible for military service with a program aimed at recruiting black soldiers. An attempt by the majority to exclude members of a minority race from a regulated market is fundamentally different from a subsidy that enables a relatively small group of newcomers to enter that market.

Id.

[195]*Id.* at 2122 (Stevens, J., dissenting).

[196]*Id.*

[197]*Id.* Justice Stevens stated, "Nothing is inherently wrong with applying a single standard to fundamentally different situations, as long as that standard takes relevant differences into account." *Id.*

[198]*Id.*

uphold reasonable federal affirmative action programs compliant with equal protection principles.[199]

Furthermore, Justice Stevens assailed the majority's decision to apply strict scrutiny to remedial race-based programs in the name of "consistency," as being irreconcilable with the Court's standards of review for other forms of discrimination.[200] According to Justice Stevens, affirmative action programs for women presently require less judicial scrutiny than benign racial preference programs even though the Fourteenth Amendment was passed to eliminate discrimination against former slaves.[201] Justice Stevens explained that the majority, in the name of "consistency," relied on theoretical standards and sacrificed the true concept of equal protection.[202] The Court, according to Justice Stevens, erroneously equated a majority's decision to inconvenience itself by providing benefits and preferences to disadvantaged minority groups with a majority's decision to purposely discriminate against minority groups.[203]

Justice Stevens next attacked the majority's concept of "congruence" because of the Court's assumption that Congress's decision to enact an affirmative action program was equivalent to a state or local government's decision.[204] Through various affirmative action decisions, both the Court and members of the majority opinion, asserted Justice Stevens, acknowledged Congress's authority to enforce the Fourteenth Amendment and to establish

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[199]*Id.* In disparaging the majority's inflexible strict scrutiny standard of review, Justice Stevens stated, "[A] single standard that purports to equate remedial preferences with invidious discrimination cannot be defended in the name of 'equal protection.'" *Id.*

[200]*Id.*

[201]*Id.* (citing Associated General Contractors v. San Francisco, 813 F.2d 922 (9th Cir. 1987) (determining that gender preference programs satisfied intermediate scrutiny, while also holding that racial preferences did not survive strict scrutiny)).

[202]*Id.*

[203]*Id.* at 2122-23 (Stevens, J., dissenting) (stating that a majority's decision to discriminate is "virtually always repugnant to the principles of a free and democratic society" while providing preferences to minorities is "in some circumstances, entirely consistent with the ideal of equality") (citing Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 316-17 (1986) (Stevens, J., dissenting)).

[204]*Id.* at 2123-24 (Stevens, J., dissenting).

affirmative action programs.[205] Justice Stevens accused the majority of skirting established judicial doctrine requiring the Court to defer to Congress's authority in the affirmative action arena.[206] Justice Stevens explained that the majority's concept of "congruence" ignored the differences between the federal government's role and a state or local government's capacity to adopt affirmative action programs.[207] In examining cases such as *Metro Broadcasting*, *Fullilove*, and *J.A. Croson*, Justice Stevens demonstrated that a majority of the Court and pluralities of the Court have recognized Congress's authority to enact affirmative action programs through Section Five of the Fourteenth Amendment.[208] Congress's authority,

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[205]*Id.* (citing Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); Fullilove v. Klutznick, 448 U.S. 448 (1980)).

[206]*Id.* at 2125 (Stevens, J., dissenting) ("Ironically, after all of the time, effort, and paper this Court has expanded in differentiating between federal and state affirmative action, the majority today virtually ignores the issue.").

[207]*Id.* Justice Stevens stated:

> Presumably, the majority is now satisfied that its theory of "congruence" between the substantive rights provided by the Fifth and Fourteenth Amendments disposes of the objection based upon divided constitutional powers. But it is one thing to say (as no one seems to dispute) that the Fifth Amendment encompasses a general guarantee of equal protection as broad as that contained within the Fourteenth Amendment. It is another thing entirely to say that Congress's institutional competence and constitutional authority entitles it to no greater deference due a State legislature. The latter is an extraordinary proposition; and, as the foregoing discussion demonstrates, our precedents have rejected it explicitly and repeatedly.

Id. (footnotes omitted).

[208]In defense of Congress's authority, Justice Stevens stated:

> The Fourteenth Amendment directly empowers Congress at the same time it expressly limits the States. This is no accident. It represents our Nation's consensus, achieved after hard experience throughout our sorry history of race relations, than the Federal Government must be the primary defender of racial minorities against the States, some of which may be inclined to oppress such minorities. A rule of "congruence" that ignores a purposeful "incongruity" so fundamental to our system of government is unacceptable.

Id. at 2126 (Stevens, J., dissenting).

Justice Stevens opined, was further justified because congressional programs evidence the will of the Nation's elected representatives,[209] and because racial discrimination has been traditionally entrenched at the state and local level.[210]

Rather than accept the majority's abandonment of established Supreme Court precedent, Justice Stevens defended the application of intermediate scrutiny to congressional affirmative action programs as adopted in *Metro Broadcasting* and *Fullilove*.[211] Moreover, although the Court applied intermediate scrutiny in *Metro Broadcasting*, Justice Stevens believed that the challenged programs would have withstood a strict scrutiny analysis because the challenged programs were designed to remedy past discrimination and to achieve future diversity in broadcasting.[212] Justice Stevens argued that the Court in *Metro Broadcasting* properly deferred to the authority of Congress and, therefore, was justified in upholding a legitimate means of achieving racial diversity through intermediate scrutiny.[213] The current majority disregarded the doctrine of *stare decisis*,[214] therefore, Justice Stevens opined that the majority's application of strict scrutiny to a federal affirmative action program could not be justified on the premise of restoring prior law.[215]

Moreover, Justice Stevens addressed the merits of Adarand Constructors's claim in light of the Court's first review of a federal affirmative action program in *Fullilove*.[216] Justice Stevens asserted that the challenged program was less offensive to the principles of equal protection

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[209]*Id.* at 2125 (Stevens, J., dissenting).

[210]*Id.* at 2124 (Stevens, J., dissenting) (citing City of Richmond v. J.A. Croson Co., 488 U.S. 469, 520-24 (1989) (Scalia, J., concurring)).

[211]*Id.* at 2127-28 (Stevens, J., dissenting) (citing Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990); Fullilove v. Klutznick, 448 U.S. 448 (1980) (Burger, C.J., plurality)).

[212]*Id.* at 2127 ("Instead of merely seeking to remedy past discrimination, the FCC program was intended to achieve future benefits in the form of broadcast diversity.").

[213]*Id.*

[214]Justice Stevens noted that only Justice Kennedy joined Justice O'Connor, and that Chief Justice Rehnquist, Justice Scalia, and Justice Thomas provided no justification for ignoring the doctrine of *stare decisis*. *Id.* at 2128 n.12 (Stevens, J., dissenting).

[215]*Id.* at 2128 (Stevens, J., dissenting).

[216]*Id.* at 2128-29 (Stevens, J., dissenting).

than the program upheld in *Fullilove*.[217] The Justice further explained that because a small business, under the current program, could qualify based on social and economic disadvantage instead of race, the program was less racially conscious and, therefore, less offensive than the *Fullilove* program.[218]

Additionally, Justice Stevens defended the challenged program based on the exclusion of minority groups who were not socially or economically disadvantaged.[219] The fact that a small business did not qualify for the program without a showing of social or economic disadvantage, coupled with the fact that the presumption of social or economic disadvantage was rebuttable, led Justice Stevens to conclude that the program was an appropriate method of conquering racial barriers.[220] Justice Stevens believed that Congress, through monetary incentives to prime contractors, was providing both relief for past discrimination and a "forward-looking" remedy by penetrating the inner circles of prime contractors who usually award subcontracts to existing business partners.[221]

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[217]*Id.* at 2128 (Stevens, J., dissenting).

[218]*Id.* Justice Stevens, however, recognized the fact that the program challenged by Adarand Constructors incorporated a rebuttable presumption of social disadvantage and, under the STURAA, an additional rebuttable presumption of economic disadvantage based on race. *Id.* Yet, Justice Stevens accepted these rebuttable presumptions because a small business could qualify for the program, without these presumptions, by showing that it was both economically and socially disadvantaged. *Id.*

[219]*Id.* at 2129 (Stevens, J., dissenting). In comparing the *Fullilove* program with the *Adarand* program, Justice Stevens illustrated:

> Whereas a millionaire with a long history of financial successes, who was member of numerous social clubs and trade associations, would have qualified for a preference under the 1977 Act merely because he was an Asian American or an African American, . . . neither the SBA nor STURAA creates any such anomaly. The DBE program excludes members of minority races who are not, in fact, socially or economically disadvantaged.

Id. (citations omitted).

[220]*Id.*

[221]*Id.* Moreover, Justice Stevens noted that the challenged program also provided "forward-looking" relief by allowing the social and economic disadvantaged status of subcontractors to be challenged throughout the certification process, and to be continually reviewed during certification. *Id.* at 2129-30 (Stevens, J., dissenting).

Lastly, Justice Stevens argued that the challenged program, unlike the program upheld in *Fullilove*, did not establish mandatory participation percentages, an issue that was thoroughly debated by Congress prior to enactment of the program.[222] Justice Stevens, disenchanted with the majority's position, proffered that the Court's decision confused the obvious dichotomy between intentional government discrimination and benign racial programs, disregarded established judicial deference toward federal affirmative action programs, and jeopardized the viability of a carefully crafted congressional program.[223]

Justice Souter, joined by Justice Ginsburg and Justice Breyer, dissented to express the opinion that the majority unjustifiably deviated from *Fullilove* and the doctrine of *stare decisis*.[224] In so stating, Justice Souter explained that Adarand Constructors failed to demonstrate that *Fullilove* would not apply to the present facts[225] and that *Fullilove* could no longer be controlling precedent.[226] The majority's decision, which did not apply

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[222]*Id.* at 2130 (Stevens, J., dissenting). Justice Stevens noted:

> If the 1977 program of raced-based set-asides satisfied the strict scrutiny dictated by Justice Powell's vision of the Constitution — a vision the Court expressly endorses today — it must follow as night follows the day that the Court of Appeals' judgment upholding this more carefully crafted program should be affirmed.

Id.

[223]*Id.* at 2131 (Stevens, J., dissenting).

[224]*Id.* at 2131-34 (Souter, J., dissenting).

[225]*Id.* at 2131 (Souter, J., dissenting) ("The statutory scheme must be treated as constitutional if *Fullilove v. Klutznick*, is applied, and petitioners did not identify any of the factual premises on which *Fullilove* rested as having disappeared since that case was decided.").

[226]*Id.* at 2132 (Souter, J., dissenting). In support of *Fullilove*, Justice Souter proffered:

> Although *Fullilove* did not reflect doctrinal consistency, its several opinions produced a result on shared grounds that petitioner does not attack: that discrimination in the construction industry had been subject to government acquiescence, with effects that remain and that may be addressed by some preferential treatment falling within the congressional power under § 5 of the Fourteenth Amendment.

Id.

Fullilove, was limited to the applicable standard of review, therefore, Justice Souter recognized that the issues settled by *Fullilove* — whether the government's program narrowly addresses the effects of past discrimination, whether preferential treatment is an essential remedy, and whether the program's preferential plan is suitable — will have to be settled once again by a lower court on remand.[227]

Moreover, Justice Souter characterized the majority's strict scrutiny requirement as being unnecessary in light of the interpretation previously given to Chief Justice Burger's *Fullilove* plurality opinion.[228] In support of this proposition, Justice Souter relied on the majority's statements, repudiating characterizations of strict scrutiny as "strict in theory, but fatal in fact," as evidence that the majority's strict scrutiny standard mirrored Chief Justice Burger's flexible *Fullilove* approach.[229] Further, Justice Souter declared that the majority's silence as to the role of Section Five of the Fourteenth Amendment leaves intact congressional authority to enforce the Fourteenth Amendment in compliance with strict scrutiny review.[230]

Finally, Justice Souter questioned whether the current majority's decision disrupts the Court's established jurisprudence of upholding race-based remedies that not only assail past discrimination, but also seek to eliminate future effects of past discrimination.[231] When the effects of past

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[227]*Id.* Even though Justice Souter criticized the majority for not analyzing the merits of Adarand Constructors's claim, it is noteworthy that Justice Souter conceded the possibility that "proof of changed facts might . . . render[] *Fullilove*'s conclusion obsolete." *Id.*

[228]*Id.* Justice Souter opined:

> Chief Justice Burger's noncategorical approach is probably best seen not as more lenient than strict scrutiny but as reflecting his conviction that the treble-tiered scrutiny structure merely embroidered on a single standard of reasonableness whenever an equal protection challenge required a balancing of justification against probable harm.

Id.

[229]*Id.* at 2132-33 (Souter, J., dissenting) ("Indeed, the Court's very recognition today that strict scrutiny can be compatible with the survival of a classification so reviewed demonstrates that our concepts of equal protection enjoy a greater elasticity than the standard categories might suggest."). For a detailed examination on the Court's traditional application of strict scrutiny, see *supra* notes 93-94 and accompanying text.

[230]*Id.* at 2133 (Souter, J., dissenting).

[231]*Id.* (citing Albermarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975)).

discrimination continue to linger, Justice Souter explained, reasonable and temporary preferential treatment afforded to minorities is justified and constitutional, even though innocent members of the majority races are harmed.[232] In this regard, Justice Souter pointed to the majority's constitutional validations of governmental affirmative action programs directed at remedying past discrimination,[233] and concluded that the majority's adoption of strict scrutiny did not alter the standard by which a race-based remedial preference program is assessed as reasonable.[234]

Justice Ginsburg, joined by Justice Breyer, dissented for the reasons espoused by Justice Souter and Justice Stevens, and to admonish the Court for intervening in this case.[235] Justice Ginsburg wrote separately, however, to clarify the common beliefs and understandings espoused by a majority of the Court.[236] Although Court members disagreed on the role of Congress and the United States Constitution in curing racism and racial inequality,[237] Justice Ginsburg praised all members of the Court for recognizing that racial inequality persists in American society.[238] Justice Ginsburg agreed that intentional governmental discrimination, as in *Korematsu v. United*

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[232]*Id.* at 2133-34 (Souter, J., dissenting)

[233]*Id.* at 2133 (Souter, J., dissenting). Justice Souter stated, "Indeed, a majority of the Court today reiterates that there are circumstances in which Government may, consistently with the Constitution, adopt programs aimed at remedying the effects of past invidious discrimination." *Id.* (citations omitted).

[234]*Id.* at 2134 (Souter, J., dissenting).

[235]*Id.* at 2134 (Ginsburg, J., dissenting). Justice Ginsburg believed that there was "no compelling cause" for the Court's intervention in light of the attention that affirmative action was receiving from the political branches, and because of the Court's traditional deference to Congress's authority to alleviate racial discrimination. *Id.*

[236]*Id.*

[237]*Id.* at 2135 (Ginsburg, J., dissenting). Justice Ginsburg proffered, "The divisions in this difficult case should not obscure the Court's recognition of the persistence of racial inequality and a majority's acknowledgement of Congress's authority to act affirmatively, not only to end discrimination, but also to counteract discrimination's lingering effects." *Id.*

[238]*Id.*

States,[239] would never again be upheld through the majority's formulation of strict scrutiny.[240] Further, Justice Ginsburg commended the majority's use of strict scrutiny for the purpose of detecting illegitimate government and impermissible uses of race-based programs by the government.[241] While disagreeing with the majority's holding and believing that the challenged Subcontractor Compensation Clause program was a legitimate and constitutional use of governmental authority, Justice Ginsburg opined that the majority's decision will enable the Court's affirmative action jurisprudence to evolve and respond to changing conditions.[242]

VIII. CONCLUSION: AFFIRMATIVE ACTION — IS THIS THE END?

While legal commentators anticipated an end to affirmative action in *Adarand Constructors*,[243] Justice O'Connor's opinion evidences a centrist position[244] that, in actuality, ensures the survival of narrowly tailored

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[239]323 U.S. 214, 216 (1944) (recognizing that disparate racial treatment must under go the "most rigid" scrutiny, but upholding an intentionally discriminatory racial classification of Japanese-Americans during World War II). In support of a high standard of scrutiny for destructive racial classifications, Justice Ginsburg stated, "A *Korematsu*-type classification, as I read the opinions in this case, will never again survive scrutiny: such a classification, history and precedent instruct, properly ranks as prohibited." Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2136 (1995) (Ginsburg, J., dissenting).

[240]*Adarand III*, 115 S. Ct. at 2136 (Ginsburg, J., dissenting). Justice Ginsburg stated, "Properly, a majority of the Court calls for review that is searching, in order to ferret out classifications in reality malign, but masquerading as benign." *Id.*

[241]*Id.*

[242]*Id.*

[243]*See* Welsh, *supra* note 154, at 964; *see also* William Banks, *At the Halfway Point: Light Docket Makes It Hard to Read Trends in Supreme Court Decisions*, A.B.A. J., April 1995, 50, 52 ("If [Chief Justice] Rehnquist, [Justice] O'Connor[,] and [Justice] Scalia hold true to their dissents in *Metro Broadcasting*, affirmative action may suffer a major defeat.").

[244]*See Adarand III*, 115 S. Ct. at 2117 (dispelling the notion that strict scrutiny is "strict in theory, but fatal in fact" and arguing that "[w]hen race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the 'narrow tailoring' test . . . .").

affirmative action programs that serve a compelling government interest.[245] The Court's holding also reconciles the previously inconsistent standards of review under the Due Process Clause of the Fifth Amendment and the Equal Protection Clause of the Fourteenth Amendment.[246] Nonetheless, the majority has firmly established that government sponsored racial preference programs are inherently suspect and must be thoroughly examined to ensure constitutional compliance.[247] Through the adoption of strict scrutiny, the Court has placed a considerable burden upon the shoulders of lower courts left with the task of determing the constitutionality of federal affirmative action programs.[248] Whether the Court's new standard will eventually cause lower courts to declare that certain, or even all, federal affirmative action programs fail strict scrutiny remains unclear.

Additionally, the majority, in holding that strict scrutiny was the applicable standard of review for all racial classifications, failed to address the role of Section Five of the Fourteenth Amendment, the authority conferred on Congress to enforce the provisions of the Fourteenth Amendment, and the judicial deference to Congress's proper use of that authority.[249] Justice Souter's dissent interpreted this to mean that "§ 5 [is left] exactly where it is as the source of an interest of the national government sufficiently important to satisfy the corresponding requirement of the strict scrutiny test."[250] The fact that Section Five has previously

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[245]*See* David G. Savage, *Rebuilding Affirmative Action: The Court's 'Strict Scrutiny' For All Official Race-Based Programs*, A.B.A. J., August 1995, 42. In assessing the Court's decision in *Adarand Constructors*, Savage proffered: "[Justice] O'Connor's majority opinion in *Adarand* unquestionably stopped short of a definitive ruling on federal affirmative action. It did not even declare unconstitutional the program directly at issue . . . ." *Id.*

[246]*See supra* notes 7-15 and accompanying text.

[247]*See Adarand III*, 115 S. Ct. at 2117.

[248]*See* Marcia Coyle, *Is a Kinder and Gentler Strict Scrutiny in the Cards?*, NAT'L L.J., June 26, 1995, at A16 ("In the aftermath of the U[nited] S[tates] Supreme Court's recent affirmative-action decision, federal trial judges . . . likely will struggle with whether they are to apply the strict scrutiny they learned in law school or some sort of 'kinder and gentler' strict scrutiny . . . .").

[249]*See Adarand III*, 115 S. Ct. at 2114 (stating that the Court's holding does not address the role of § 5 of the Fourteenth Amendment and congressional authority to enforce the Fourteenth Amendment).

[250]*Id.* at 2133 (Souter, J., dissenting).

been interpreted as granting Congress authority to enforce the Fourteenth Amendment[251] will probably frustrate the Court's adoption of a single standard of review because of the majority's failure to define the limits of congressional authority under Section Five. As such, the Court has not resolved Section Five's proper role, and perhaps, has set the stage for the next chapter of equal protection jurisprudence.

As reflected by the Court's narrow 5-4 decision, however, the means of ensuring future generations of Americans equal treatment and equal protection of the laws will continue to be a divisive issue. While a majority of the Court fell short of declaring that the Constitution is "colorblind,"[252] one member, Justice Thomas,[253] boldly advocated an end to equal protection's racial paternalism exception which assumes that there is a difference "between laws designed to subjugate a race and those that distribute benefits on the basis of race in order to foster some current notion of equality."[254] According to Justice Thomas, "Government cannot make us equal: it can only recognize, respect, and protect us as equal before the law."[255] Although this view was not adopted by a majority of the Court, Justice Thomas's concurring opinion clearly challenges the Court's narrow acceptance of racial preference programs and reinforces the basic principle

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[251]*See* City of Richmond v. J.A. Croson, 488 U.S. 469, 491 (1989) (O'Connor, J., plurality) ("We do not . . . find in § 5 of the Fourteenth Amendment some form of federal pre-emption in matters of race. We simply note what should be apparent to all — § 1 of the Fourteenth Amendment stemmed from a distrust of state legislative enactments based on race; § 5 is . . . a 'positive grant of legislative power' to Congress.").

[252]*See* Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

[253]Justice Thomas has been severely criticized for advocating an anti-affirmative action position. *See* Jack E. White, *Dividing Line: Uncle Tom Justice*, TIME, June 26, 1995, at 36 ("In the four years since [President] George Bush chose him to fill the 'black seat' vacated by [Justice] Thurgood Marshall, [Justice] Thomas has emerged as the high court's most aggressive advocate of rolling back the gains [Justice] Marshall fought so hard for. The madening irony is that [Justice] Thomas owes his seat to precisely the kind of racial preference he goes to such lengths to excoriate."). While no one can dispute the harsh effects of racial discrimination, the fact that Justice Thomas has experienced affirmative action's racial preferences, and now is staunchly opposed, provides a very compelling argument for an inquiry into whether the constitutional justifications for affirmative action programs continue to exist.

[254]*Adarand III*, 115 S. Ct. at 2119 (Thomas, J., concurring).

[255]*Id.*

that "all men are created equal."[256] Through strict scrutiny review of racial preference programs, this Court has safeguarded equal protection guarantees for all Americans by limiting potential abuses of racial classifications and by preserving governmental authority to enact narrowly tailored affirmative action programs that serve a compelling government interest.

[256]*See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).