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1995

***Adarand Constructors, Inc. v. Pena—A Strict Scrutiny of Affirmative Action***

Stephen C. Minnich

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**Recommended Citation**

Stephen C. Minnich, *Adarand Constructors, Inc. v. Pena—A Strict Scrutiny of Affirmative Action*, 46 *Case W. Rsrv. L. Rev.* 279 (1995)

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## COMMENT

### ADARAND CONSTRUCTORS, INC. v. PENA—A STRICT SCRUTINY OF AFFIRMATIVE ACTION

#### I. INTRODUCTION

In equal protection jurisprudence, the general rule is that government actions employing explicit racial and ethnic classifications are strictly scrutinized.<sup>1</sup> An exception is invoked if government's purpose in enacting such programs can be characterized as "benign," in which case a lesser standard of judicial scrutiny is applied. However, the exception applies only if Congress is the governmental actor.<sup>2</sup> For example, when a state or local government favors minority businesses in awarding construction contracts, strict scrutiny is applied. But if the state or local government is simply a "disbursing agent" for the federal government, then the program is subject to a relaxed degree of scrutiny.<sup>3</sup>

This was the state of equal protection analysis in the affirmative action<sup>4</sup> arena until June of 1995. In *Adarand Constructors, Inc. v. Pena*,<sup>5</sup> the Supreme Court simplified its analysis considerably, holding that all racial classifications must be strictly scruti-

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1. See *infra* note 31 and accompanying text.

2. See *infra* notes 64-67 and accompanying text.

3. See, e.g., *Milwaukee County Pavers Ass'n v. Fiedler*, 922 F.2d 419, 423-24 (7th Cir.) (affirming the district court judge's distinction between a state program and the state's disbursement of funds pursuant to a federal program, applying intermediate scrutiny to the latter), *cert. denied*, 500 U.S. 954 (1991).

4. Government's most common uses of racial classifications for benevolent purposes are popularly referred to as "affirmative action" programs. Affirmative action has been defined as "preferences [designed] to redress perceived inequalities in economic and social life." Lucy Katz, *Public Affirmative Action and the Fourteenth Amendment: The Fragmentation of Theory After Richmond v. J.A. Croson Co. and Metro Broadcasting, Inc. v. Federal Communications Commission*, 17 T. MARSHALL L. REV. 317, 317 (1992).

5. 115 S. Ct. 2097 (1995).

nized.<sup>6</sup> The Court's new standard for equal protection analysis applies whether government's purpose in enacting legislation may be characterized as benevolent, malevolent, or otherwise, and whether it is Congress or a local school board enacting and administering the program.<sup>7</sup>

Part II of this Comment reviews the landmark Supreme Court cases and opinions leading to the convoluted equal protection analysis of affirmative action programs prior to *Adarand*. Part III reviews Justice O'Connor's opinion for the Court in *Adarand*, as well as the opinions of the concurring and dissenting justices. Part IV analyzes the doctrinal arguments underlying the affirmative action debate, supporting *Adarand's* recognition that the right to equal protection of the law belongs to the individual, and that classifications based on race should be exceedingly difficult to justify. Part V applauds *Adarand's* rejection of the idea that government has an important interest in bringing about diversity, as well as the misconception that benign governmental intent is readily identifiable. Finally, part VI concludes that the Court's decision in *Adarand* should be viewed not as an end for legitimate affirmative action programs, but rather as a positive step toward governmental decisionmaking in which race itself is not a factor.

## II. THE PATH TO *ADARAND*: LANDMARK AFFIRMATIVE ACTION CASES

To appreciate the impact of *Adarand* on equal protection analysis of affirmative action programs, it is necessary to understand the development of that analysis through prior case law. The following landmark cases outline the progression of the Supreme Court's affirmative action analytical framework prior to *Adarand*.

### A. *Bakke and the Argument for Strict Scrutiny of Affirmative Action*

In *Regents of the University of California v. Bakke*<sup>8</sup> the Supreme Court considered a white male applicant's challenge to a special admissions program at the Medical School of the University

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6. *Id.* at 2113.

7. *Id.* at 2111 (concluding that "any governmental actor subject to the Constitution [must] justify any racial classification . . . under the strictest judicial scrutiny").

8. 438 U.S. 265 (1978).

of California at Davis.<sup>9</sup> Allan Bakke, whose application for admission to the medical school was twice rejected, charged that the effect of Davis's admissions program favoring minority candidates was to exclude him from the school on the basis of race,<sup>10</sup> in violation of Title VI of the Civil Rights Act of 1964<sup>11</sup> and the Equal Protection Clause of the Fourteenth Amendment.<sup>12</sup>

After finding the scope of Title VI to be coextensive with that of the Fourteenth Amendment,<sup>13</sup> Justice Powell addressed the question of the level of judicial scrutiny applicable to Davis's special admission program, which he initially characterized as "a line drawn on the basis of race and ethnic status."<sup>14</sup> For Powell, the rights guaranteed by the Fourteenth Amendment, including the right to equal protection of the law, were personal rights guaranteed to the individual.<sup>15</sup> His plurality opinion stated, "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."<sup>16</sup> Accordingly, any distinction based on race or ethnicity must be subjected to the "most exacting judicial examination."<sup>17</sup>

Although Powell believed that the State, and thus Davis, had an important interest in ameliorating the effects of past discrimination, the interest was not sufficiently compelling to intrude on the rights of an individual absent "judicial, legislative, or administrative findings of constitutional or statutory violations."<sup>18</sup> Thus, the Davis program was unconstitutional insofar as it disadvantaged inno-

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9. *Id.* at 277-78.

10. In 1973 and 1974, the years when Bakke's applications were rejected, the total size of the class was 100, but 16 of the seats were allocated through a special admissions process reserved for members of certain minority groups. *Bakke*, 438 U.S. at 274-75. The record showed that in each of the years when Bakke was rejected by Davis, the grade point averages and entrance exam scores of the students admitted under the special program were significantly lower than those of Bakke and others rejected under the regular admissions program. *Id.* at 277 n.7. Thus, Bakke argued that he was denied admission solely on the basis of his race. *Id.* at 277-78.

11. 42 U.S.C. § 2000d (1988).

12. U.S. CONST. amend. XIV, § 1.

13. *Bakke*, 438 U.S. at 287 (Powell, J., plurality opinion).

14. *Id.* at 289. Justice Powell noted summarily the squabble between the parties over whether the Davis program should be characterized as a "goal" or a "quota," but dismissed the semantical distinction as "beside the point." *Id.* at 288-89 & n.26.

15. *Id.* at 289.

16. *Id.* at 289-90.

17. *Id.* at 291.

18. *Bakke*, 438 U.S. at 307-09.

cent individuals for purposes of eliminating general "societal discrimination."<sup>19</sup> Nevertheless, Justice Powell believed that Davis, as an institution of higher learning, did have a compelling First Amendment interest in developing a diversified student body, and could consider race or ethnicity as one factor among many in the admissions process.<sup>20</sup> While Davis's racial quota program was not narrowly tailored toward its goal of student diversity, a program such as Harvard's, in which race or ethnicity was a single factor tending to tip the admissions balance in favor of a minority applicant, might survive strict judicial scrutiny.<sup>21</sup>

Four justices concurred in the Court's judgment only insofar as it affirmed the order of the California Supreme Court, which allowed Bakke's admission to the school.<sup>22</sup> Justice Stevens, joined by Chief Justice Burger and Justices Stewart and Rehnquist, preferred to affirm the state court on the narrower basis that Davis had violated Bakke's rights under Title VI by excluding him because of his race, thus avoiding the broader constitutional issue of whether race may be considered in the admissions process.<sup>23</sup>

Finally, four justices agreed with Justice Powell insofar as he concluded that Davis was not entirely precluded by the Constitution from considering race in its admissions process, but otherwise took issue with his standard of analysis and conclusions.<sup>24</sup> Justice Brennan, joined by Justices White, Marshall, and Blackmun, rejected the fundamental principle implicit in Justice Powell's opinion "that the Constitution must be colorblind,"<sup>25</sup> instead concluding that remedial racial classifications need only be substantially related to the achievement of important governmental objectives.<sup>26</sup> Acknowledging that the Court's equal protection jurisprudence had firmly established the practice of strictly scrutinizing governments' use of suspect classifications, Justice Brennan framed the "classification" element in terms of the group that was singled out and

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19. *Id.* at 310.

20. *Id.* at 311-14.

21. *Id.* at 316-18.

22. *Bakke*, 438 U.S. at 408-10, 421 (Stevens, J., concurring in the judgment in part and dissenting in part).

23. *Id.* at 411, 421.

24. *Id.* at 325-26 (Brennan, J., concurring in the judgment in part and dissenting in part).

25. *Id.* at 336 (referring to Justice Harlan's often quoted assertion from *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)).

26. *Id.* at 359 (Brennan, J., concurring in the judgment in part and dissenting in part).

disadvantaged by the classification.<sup>27</sup> Thus, the debate between Justice Powell and Justice Brennan in *Bakke* is often distilled to the fundamental issue over whether the right to equal protection of the law under the Fourteenth Amendment is an individual right or a group right.<sup>28</sup> Perhaps Justice Blackmun best summarized the latter position: "In order to get beyond racism, we must first take account of race. . . . And in order to treat some persons equally, we must treat them differently. We cannot—we dare not—let the Equal Protection Clause perpetuate racial supremacy."<sup>29</sup>

*B. Distinguishing Fullilove: Croson and Strict Scrutiny of State Affirmative Action Legislation*

In *City of Richmond v. J.A. Croson Co.*,<sup>30</sup> a majority of the Court finally settled on strict scrutiny as the standard of judicial review for all racial classifications, including affirmative action legislation.<sup>31</sup> The Court reviewed an equal protection challenge to an affirmative action plan adopted by the City of Richmond, Virginia.<sup>32</sup> Richmond's plan required construction contractors awarded city projects to subcontract at least thirty percent of the contract value to minority businesses,<sup>33</sup> unless a waiver was sought, in which case the contractor would have to show that qualified minority subcontractors were not available.<sup>34</sup> After J.A. Croson Compa-

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27. See *id.* at 357. Justice Brennan noted that "whites as a class [do not] have any of the 'traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.'" *Id.* (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973)).

28. See *infra* part IV.A.

29. *Bakke*, 438 U.S. at 407 (Blackmun, J., concurring in part and dissenting in part). Justice Marshall characterized Justice Powell's analysis as "substituting abstract equality for the genuine equality the Amendment was intended to achieve." *Id.* at 398.

30. 488 U.S. 469 (1989).

31. See *id.* at 494 (finding that the standard of review in equal protection cases "is not dependent on the race of those burdened or benefitted by a particular classification"). Part III.A of Justice O'Connor's opinion was not for the Court, but was joined by Chief Justice Rehnquist and Justices White and Kennedy. *Id.* at 476. Justice Scalia was the fifth justice advocating strict scrutiny of all racial classifications. *Id.* at 520 (Scalia, J., concurring).

32. *Id.* at 477-86.

33. The Richmond plan considered Black, Spanish-speaking, Oriental, Indian, Eskimo, and Aleutian U.S. citizens to be "minority group members," and a minority business was considered to be one owned and controlled by at least 51% minority group members. *Id.* at 478.

34. *Id.* at 478-79.

ny was denied a waiver, and subsequently lost a city project when it tried and failed to meet the city's minority subcontractor requirements, Croson filed suit in district court alleging that Richmond's plan violated the Equal Protection Clause.<sup>35</sup>

### 1. Distinguishing *Fullilove*

Justice O'Connor, joined in part II of her opinion by Chief Justice Rehnquist and Justice White, first sought to distinguish the Court's decision in *Fullilove v. Klutznick*.<sup>36</sup> In *Fullilove*, the Court considered a federal affirmative action plan nearly identical to Richmond's plan in *Croson*.<sup>37</sup> In upholding the federal plan, Chief Justice Burger's opinion emphasized special deference to Congress's broad remedial powers under section 5 of the Fourteenth Amendment in enacting legislation to enforce its provisions.<sup>38</sup> Thus, Congress's generalized findings of historical discrimination against minority-owned businesses in the construction industry were enough to justify exercise of its section 5 remedial powers to ensure that federal grants to state and local governments were not used to perpetuate the discrimination.<sup>39</sup>

Justice Powell recognized that the set-aside in *Fullilove* was a "quota" supported only by generalized findings of past discrimination in the industry as a whole, and thus was not much different than the Davis plan overturned in *Bakke*.<sup>40</sup> Nevertheless, Powell

35. *Id.* at 481-83.

36. 448 U.S. 448 (1980).

37. In fact, the Richmond affirmative action plan appears to have been modeled on the minority business enterprise (MBE) provision found constitutional in *Fullilove*. The MBE provision in that case required that at least 10% of the amount of each grant under the Public Works Employment Act of 1977 be expended for "minority business enterprise[s]." *Id.* at 453-54. Furthermore, minority businesses were considered to be businesses owned by at least 51% minority group members, which were defined the same as in the Richmond plan adopted several years later. *Id.* at 454; see also *supra* notes 33-34 and accompanying text.

38. *Fullilove*, 448 U.S. at 476. Section 5 of the Fourteenth Amendment provides that "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5.

39. *Fullilove*, 448 U.S. at 478. Chief Justice Burger explicitly refused to adopt either strict scrutiny analysis or intermediate scrutiny analysis as articulated in the various *Bakke* opinions. *Id.* at 492. Nevertheless, Chief Justice Burger, joined by Justices White and Powell, *id.* at 453, purported to conduct "a most searching examination" of the legislation at issue. *Id.* at 491. Justice Powell, while concurring with Burger in upholding the federal MBE provision, re-emphasized his adherence to the standard of strict scrutiny he had articulated in *Bakke*. *Id.* at 496. Justices Marshall, Brennan, and Blackmun, the other three justices concurring in the Court's judgment, applied the standard of intermediate scrutiny they had articulated in *Bakke*. *Id.* at 519.

40. *Id.* at 505; see also *supra* note 10 and accompanying text (noting that 16 out of

agreed that the federal MBE provision was constitutional, although not perhaps the most narrowly tailored, distinguishing *Bakke* in dicta: "The degree of specificity required in the findings of discrimination and the breadth of discretion in the choice of remedies may vary with the nature and authority of a governmental body."<sup>41</sup>

Justice O'Connor seized upon Congress's section 5 "specific constitutional mandate to enforce the dictates of the Fourteenth Amendment" as a means of distinguishing the plan upheld in *Fullilove* from the city of Richmond's plan before the Court in *Croson*.<sup>42</sup> Thus, while generalized findings by Congress of historical discrimination were sufficient to justify Congress's use of racial classifications in remedial legislation, the city of Richmond was required to particularize its findings of private discrimination, essentially showing that it had been "a 'passive participant' in a system of racial exclusion practiced by elements of the local construction industry."<sup>43</sup>

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100 University of California at Davis Medical School seats were reserved for minority applicants). An advocate on behalf of the government in *Fullilove* has more recently argued that the MBE provision at issue in that case was enacted into law without any Congressional hearings, and that the Court applied a standard of scrutiny falling well below those which the various members of the majority purportedly applied. Drew S. Days, III, *Fullilove*, 96 YALE L.J. 453, 465, 467 (1987). Curiously, Mr. Days represented the government again in *Adarand*. See *Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097, 2101 (1995), see also Neal Devins, *Metro Broadcasting, Inc. v. FCC: Requiem for a Heavyweight*, 69 TEX. L. REV. 125, 136-41 (1990) (discussing the lack of FCC support and Congressional fact-finding for the two programs at issue in *Metro*).

41. *Fullilove*, 448 U.S. at 515 n.14 (Powell, J., concurring). Justice Powell also noted that the Court could not review the federal MBE provision "without explicit recognition that we are reviewing an Act of Congress." *Id.* at 499. "Unlike the Regents of the University of California, Congress properly may—and indeed must—address directly the problems of discrimination in our society." *Id.* (citing *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 257 (1964)). Thus, while Justice Powell purported to apply strict scrutiny in *Fullilove*, *id.* at 496, in reality the standard he applied fell well below traditional strict scrutiny. See, e.g., *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 310 (1977) (opinion of Powell, J., announcing the judgment of the Court) (concluding that the Davis program was unconstitutional insofar as it was addressed solely to remedying the general effects of "societal discrimination"); *supra* note 40.

42. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 490 (1989). In adopting the state and local versus federal distinction enunciated by Chief Justice Burger and Justice Powell in *Fullilove*, Justice O'Connor was joined in part II of her opinion only by Chief Justice Rehnquist and Justice White. *Id.* at 476. Justice Kennedy explicitly declined to join with O'Connor in drawing the Equal Protection Clause line between state and federal remedial legislation. *Id.* at 518 (Kennedy, J., concurring in part and concurring in the judgment).

43. *Id.* at 492.



## 2. Strict Scrutiny of Affirmative Action Legislation

*Fullilove* thus distinguished, O'Connor adopted strict scrutiny as the standard of judicial review for all racial classifications, including so-called "benign" or "remedial" classifications.<sup>44</sup> In applying strict scrutiny, Justice O'Connor was joined by Chief Justice Rehnquist and Justices White and Kennedy.<sup>45</sup> Justice Scalia agreed with the four justices that strict scrutiny should be applied to all racial classifications, benign or otherwise, although he declined to join in O'Connor's opinion because he did not believe that remedying the effects of past discrimination could ever justify government's use of racial classifications.<sup>46</sup>

Justice O'Connor grounded her reasoning in the proposition set forth by Justice Powell in *Bakke*,<sup>47</sup> that the Fourteenth Amendment guarantees rights to the individual, and not to any particular racial group.<sup>48</sup> Furthermore, insulating legislation from strict judicial scrutiny by classifying it a priori as benign would undermine courts' ability to identify illegitimate uses of race.<sup>49</sup> Finally, O'Connor justified strict scrutiny of remedial legislation by noting that "[c]lassifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a

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44. *Id.* at 493-94.

45. *Id.* at 476.

46. *Id.* at 520 (Scalia, J., concurring in the judgment). It was Justice Scalia's belief that although remedying the effects of identified discrimination might justify race-neutral government action, it would not justify a government's explicit use of racial classifications. *Id.* at 526.

47. *See supra* note 15 and accompanying text.

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

49. *See id.* Justice O'Connor stated,

Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are "benign" or "remedial" and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. 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.

*Id.* For example, O'Connor noted that Richmond's population was approximately 50% black, and that five of the nine city council members were black. *Id.* at 495. Thus, Justice O'Connor felt that "[t]he concern that a political majority will more easily act to the disadvantage of a minority based on unwarranted assumptions or incomplete facts would seem to militate for, not against, the application of heightened judicial scrutiny in this case." *Id.* at 495-96.

politics of racial hostility.”<sup>50</sup>

The Court in *Croson* held that there was no showing of past discrimination in the Richmond construction industry.<sup>51</sup> Furthermore, the Court found the city’s statistical evidence of discrimination in its local construction industry irrelevant and misleading.<sup>52</sup> Finally, congressional findings of nationwide discrimination in the construction industry could not justify Richmond’s use of remedial racial classifications and the underlying assumption that discrimination existed in the Richmond construction trade.<sup>53</sup>

Justices Marshall, Brennan, and Blackmun adhered to the same view in *Croson* that they had expressed in *Bakke*,<sup>54</sup> that “race-conscious classifications designed to further remedial goals ‘must serve important governmental objectives and must be substantially related to achievement of those objectives’ in order to withstand constitutional scrutiny.”<sup>55</sup> Justice Marshall believed that remedial racial classifications should not be subjected to the Court’s traditional strict level of judicial scrutiny, which he had characterized in *Fullilove* as “scrutiny that is strict in theory, but fatal in fact.”<sup>56</sup> Applying their “intermediate” level of scrutiny, the dissenting justices believed that the statistical disparities and the congressional findings of past nationwide discrimination, which were rejected by O’Connor,<sup>57</sup> were sufficient bases to justify the city of Richmond’s remedial use of racial classifications.<sup>58</sup>

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50. *Id.* at 493.

51. *Id.* at 500.

52. Statistics offered into evidence in *Croson* showed that while the population of Richmond was approximately 50% black, in the five-year period extending from 1978 to 1983 only 0.67% of the city’s prime construction contracts were awarded to minority-owned businesses. *Id.* at 479-80. As evidence of past discrimination it was also shown that local construction trade associations had virtually no minority members. *Id.* at 480. Justice O’Connor found such statistics irrelevant absent evidence of the number of minorities qualified to participate in the industry. *Id.* at 501-03. However, O’Connor did concede that in some rare cases a statistically sound disparity such as was offered in *Croson* might justify race-conscious remedial legislation. *Id.* at 509.

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

54. See *supra* notes 25-29 and accompanying text.

55. *Croson*, 488 U.S. at 535 (Marshall, J., joined by Justices Brennan and Blackmun, dissenting) (quoting *University of California Regents v. Bakke*, 438 U.S. 265, 359 (1978)).

56. *Id.* at 552 (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980) (Marshall, J., concurring in the judgment)); see also *Katz*, *supra* note 4, at 325 (referring to the Court’s choice among standards of review as largely “outcome determinative”).

57. See *supra* notes 52-53 and accompanying text.

58. *Croson*, 488 U.S. at 541-48 (Marshall, J., dissenting). While the dissenting justices believed that remedying the effects of general societal discrimination, without specific findings, was a sufficiently important governmental interest to satisfy their standard of

### C. Metro Broadcasting and Reaffirmation of the State-Federal Distinction

Only one year after its decision in *Croson*, the Court revisited the issue of the standard of review to be applied in evaluating remedial racial classifications in *Metro Broadcasting, Inc. v. FCC*.<sup>59</sup> The Court reviewed equal protection challenges to two FCC programs designed to increase the representation of minority viewpoints in broadcasting by increasing minority ownership of radio and television broadcast stations.<sup>60</sup> In one, the FCC considered minority ownership<sup>61</sup> as a single positive factor among others in comparative proceedings for new licenses.<sup>62</sup> In the other program, only approved minority enterprises were eligible to purchase broadcast licenses from existing broadcasters at "distress sales."<sup>63</sup>

In applying a standard of intermediate scrutiny to the FCC programs, Justice Brennan, writing for the Court, found it "of overriding significance in these cases that the FCC's minority ownership programs have been specifically approved—indeed, mandated—by Congress."<sup>64</sup> Thus, the Court distinguished its decision in *Croson*, which applied strict scrutiny to a benign racial classifica-

review, *see id.* at 530-32, 540, they also thought that the evidence presented by the city of Richmond was sufficient to satisfy the majority's standard. *Id.* at 541. For example, they thought that Justice O'Connor's unwillingness to consider statistical disparities absent evidence of the number of qualified minorities was inappropriate, in that past discrimination may have been the very reason why there was a limited number of qualified minority group members in the industry. *Id.* at 542-43.

59. 497 U.S. 547 (1990).

60. *Id.* at 552.

61. Minorities under the FCC programs were considered to be Black, Hispanic Sur-named, American Eskimo, Aleutian, American Indian, and Asiatic American persons. *Id.* at 553 n.1.

62. *Id.* at 556-57. Minority ownership was only dispositive to the extent the minority owner actively participated in the daily management of the station. *Id.* at 557.

63. The "distress sale" program was an exception to the FCC's general policy that prohibited a broadcaster from transferring its license while its qualifications to hold the license were being investigated. *Id.* at 557.

64. *Metro*, 497 U.S. at 563. Justice Brennan's reference was to Congress's enactment of FCC appropriations legislation that prohibited the FCC from re-examining the two minority ownership policies at issue in *Metro*. *Id.* at 560. The involvement of Congress, however, was probably not a truly distinguishing factor for Justice Brennan, who had always argued in favor of intermediate scrutiny for all affirmative action programs. The purpose of the state-federal distinction was to draw the vote of Justice White, who joined with Justice O'Connor's strict scrutiny opinion in *Croson*. Charles Fried, *Metro Broadcasting, Inc. v. FCC: Two Concepts of Equality*, 104 HARV. L. REV. 107, 126 (1990); *see also* Devins, *supra* note 40, at 128 n.21 (noting Justice White's propensity for showing deference to Congress).

tion,<sup>65</sup> on the basis that the FCC's program was supported by Congress's institutional competence and Commerce Clause power.<sup>66</sup> The Court required only that the FCC programs be substantially related to the achievement of important governmental interests. The Court also noted that the government's interest need not be to remedy the effects of past governmental or even societal discrimination.<sup>67</sup>

The FCC's asserted interest was in promoting broadcast diversity,<sup>68</sup> which the Court found was a sufficiently important interest in that it served First Amendment values.<sup>69</sup> Second, the Court found a substantial relationship between the FCC's asserted goal of broadcast diversity and increased minority ownership of broadcast stations, the means by which the FCC sought to achieve its goal.<sup>70</sup> In applying this second prong of its newly-adopted test, the Court relied primarily on findings and conclusions of the FCC and Congress, which recited a connection between diversity of broadcasting and minority ownership.<sup>71</sup>

Four dissenting justices, consistent with their opinions in *Croson*,<sup>72</sup> would have applied strict scrutiny to the FCC programs.<sup>73</sup> Justice O'Connor lamented the Court's "renewed tolera-

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65. See *supra* note 44 and accompanying text.

66. *Metro*, 497 U.S. at 563. Justice Brennan quoted Justice O'Connor's opinion in *Croson* for the proposition "that 'Congress may identify and redress the effects of society-wide discrimination.'" *Id.* at 565 (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 490 (1989)). Brennan further noted that *Croson* could not be read to overrule the Court's decision in *Fullilove*. *Id.*

67. *Id.* at 564-65.

68. In that the FCC's asserted interest was not remedial, *Metro* was arguably not a traditional affirmative action case. See *supra* note 4 (defining affirmative action).

69. *Metro*, 497 U.S. at 556-68. The Court compared the FCC's diversity of programming objective to the diversity of ideas interest that Justice Powell, in his *Bakke* opinion, thought might justify racial preferences in university admissions decisions. *Id.* at 568 (citing *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 311-13 (1978)).

70. *Id.* at 569.

71. Although the Court claimed that it was not deferring to the FCC and Congress, it did admit according great weight to their fact finding expertise. *Id.* at 569. Nevertheless, the Court's finding that there was a substantial relationship between the FCC's end and its chosen means appears to have been based almost entirely on the FCC's and Congress's conclusions to that effect. See *id.* at 569-79. The Court stated that, "As revealed by the historical evolution of current federal policy, both Congress and the Commission have concluded that the minority ownership programs are critical means of promoting broadcast diversity. We must give great weight to their joint determination." *Id.* at 579.

72. Chief Justice Rehnquist, and Justices O'Connor, Scalia, and Kennedy were four of the five justices in *Croson* who applied strict scrutiny to a benign racial classification. See *supra* notes 44-45 and accompanying text.

73. *Metro*, 497 U.S. at 603 (O'Connor, J., joined by Rehnquist, C.J., and Scalia and

tion of racial classifications and . . . repudiation of our recent affirmation [in *Croson*] that the Constitution's equal protection guarantees extend equally to all citizens."<sup>74</sup> A lower level of scrutiny should not have been applied to the federal government's use or approval of a racial classification, the dissent asserted, despite the Court's decision in *Fullilove*.<sup>75</sup> O'Connor argued that the standard set forth in *Croson* should have been applied, distinguishing *Fullilove* in that the FCC programs did not implicate Congress's powers under section 5 of the Fourteenth Amendment.<sup>76</sup> Furthermore, O'Connor noted that the Court's decision in *Fullilove* did not adopt Justice Marshall's "intermediate" level of scrutiny, and that application of such a lesser standard was without precedent.<sup>77</sup>

Justice O'Connor and the three other dissenting justices believed that the government's purported finding of a connection between race and ideas was nothing more than an impermissible stereotype.<sup>78</sup> They were similarly concerned about the stigma and suggestion of inferiority that racial preferences may carry, particularly when unrelated to remedial objectives.<sup>79</sup> Finally, the dissenting justices were skeptical about the Court's ability to identify and separate "benign" discrimination from invidious discrimination, so that it could determine which degree of judicial scrutiny to apply.<sup>80</sup> Justice Kennedy characterized the Court's decision in *Metro* as doing "no more than mov[ing] us from 'separate but equal' to

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Kennedy, JJ., dissenting).

74. *Id.* at 602.

75. *Id.* at 604-06.

76. *Id.* at 605-07. The dissent distinguished *Fullilove*, in which Congress's powers under § 5 of the Fourteenth Amendment justified a lower level of judicial scrutiny, on the basis that § 5 only empowered Congress to oversee the states' adherence to the Fourteenth Amendment, and *Metro* involved the administration of federal programs. *Id.* at 605-06. Moreover, the dissent believed *Fullilove* still required that Congress's purpose for use of racial classifications be remedial in nature. *Id.* at 607. Justice O'Connor's opinion in *Metro* has been criticized as "an extraordinary reversal of her prior position" in *Croson*, distinguishing *Croson* "by narrowing it beyond recognition." Katz, *supra* note 4, at 337.

77. *Metro*, 497 U.S. at 608. Although Justices Marshall, Brennan, and Blackmun applied intermediate scrutiny in *Fullilove*, the lead opinion of Chief Justice Burger, joined by Justices White and Powell, and the concurring opinion of Justice Powell, purported to apply standards of analysis sounding more like strict scrutiny. See *supra* note 39.

78. *Metro*, 497 U.S. at 618-19. O'Connor thought that the FCC's means were so unrelated to its asserted ends, she suggested that the FCC's true goal was to allocate broadcast licenses on the basis of race, a kind of racial balancing, rather than its asserted goal of broadcast diversity. *Id.* at 625.

79. *Id.* at 636 (Kennedy, J., dissenting).

80. *Id.* at 635.

'unequal but benign.'"<sup>81</sup>

### III. THE COURT'S DECISION IN *ADARAND*

#### A. *Factual and Procedural Background of the Case*

In *Adarand Constructors, Inc. v. Pena*,<sup>82</sup> the Court reviewed a subcontractor's equal protection challenge to the federal government's use of racial preferences in subcontractor compensation clauses.<sup>83</sup> Mountain Gravel & Construction Co. was the prime contractor on a highway construction project for a division of the U.S. Department of Transportation.<sup>84</sup> Although Adarand Constructors, Inc. was the low bidder for guardrail work on the project, Gonzales Construction Co., a minority-owned business,<sup>85</sup> was awarded the subcontract.<sup>86</sup> Despite its higher bid, Gonzales was awarded the subcontract because Mountain's prime contract included a clause that increased Mountain's compensation by roughly ten percent of the subcontract value<sup>87</sup> for subcontracts awarded to so-called Disadvantaged Business Enterprises (DBEs) like Gonzales.<sup>88</sup>

A subcontractor was considered a DBE under the government contract when it was, inter alia, certified as such by the U.S. Small Business Administration (SBA).<sup>89</sup> Two different SBA programs provided that "socially and economically disadvantaged" individuals would be eligible for such subcontractor compensation clauses.<sup>90</sup>

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81. *Id.* at 638.

82. 115 S. Ct. 2097 (1995).

83. *Id.* at 2102-04.

84. *Id.* at 2102. The Central Federal Lands Highway Division of the U.S. Department of Transportation awarded the construction contract to Mountain. *Id.*

85. More precisely, Gonzales was certified as a business owned and controlled by "socially and economically disadvantaged individuals." *Id.*

86. *Id.* A Mountain employee admitted that Adarand would have been awarded the guardrail subcontract absent the subcontractor compensation clause at issue. *Id.*

87. Mountain Gravel received an additional \$10,000 by hiring Gonzales rather than Adarand for the guardrail work. Marcia Coyle, *Supreme Court Ponders Racial Set-Aside Case: New Era or Step Backward?*, NAT'L L.J., Jan. 23, 1995, at A1, A17.

88. *Adarand*, 115 S. Ct. at 2103-04. The Court's opinion thoroughly examined the "complex scheme of federal statutes and regulations" that requires such subcontractor compensation clauses to appear in most federal contracts. *Id.* at 2102-03. The prime directive for such federal contract provisions is The Small Business Act, which declares the federal government's policy of encouraging participation of "socially and economically disadvantaged individuals" in the performance of federal contracts. 15 U.S.C. § 637(d)(1) (1993).

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

90. See *id.* at 2102-03. See generally Major Thomas J. Hasty, III, *Minority Business Enterprise Development and the Small Business Administration's 8(A) Program: Past,*

The SBA further presumed that members of certain minority racial groups were "socially disadvantaged," such that businesses owned by individuals belonging to minority racial groups were presumed eligible for subcontractor compensation clauses.<sup>91</sup> Individuals belonging to other racial groups were required to prove "social disadvantage [by] clear and convincing evidence."<sup>92</sup>

A subcontractor could also qualify as a DBE under the government's contract with Mountain Gravel if certified as such by a state or local government agency.<sup>93</sup> However, the Secretary of Transportation's minimum criteria required state agencies to presume, as with the SBA programs, social and economic disadvantage for certain racial groups.<sup>94</sup>

Adarand alleged that the subcontractor compensation clause and the race-based presumptions underlying it violated Adarand's right to equal protection.<sup>95</sup> The United States District Court for the District of Colorado granted the government's motion for summary judgment,<sup>96</sup> and the Tenth Circuit Court of Appeals affirmed.<sup>97</sup> Both courts relied on the federal-state distinction crafted by the opinions in *Fullilove*, *Croson*, and *Metro* in concluding that a lower standard of judicial scrutiny applied to congressionally mandated programs such as those challenged by Adarand.<sup>98</sup>

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*Present, and (Is There a) Future?*, 145 MIL. L. REV. 1 (1994) (thoroughly explaining and analyzing the Small Business Administration's 8(A) program, one of the challenged programs in *Adarand*).

91. Black, Hispanic, Asian Pacific, Subcontinent Asian, and Native American individuals were presumed to be socially disadvantaged. *Adarand*, 115 S. Ct. at 2103; 13 C.F.R. §§ 124.105(b)(1), 124.106(b) (1995); 48 C.F.R. §§ 19.001, 19.703(a)(2) (1994).

92. *Adarand*, 115 S. Ct. at 2103; 13 C.F.R. § 124.105(c) (1995).

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

94. *Id.* at 2103; 49 C.F.R. § 23.62 (1994); 49 C.F.R. pt. 23, subpt. D, App. C (1994).

95. *Adarand*, 115 S. Ct. at 2104.

96. *Adarand Constructors, Inc. v. Skinner*, 790 F. Supp. 240, 245 (D. Colo. 1992).

97. *Adarand Constructors, Inc. v. Pena*, 16 F.3d 1537, 1547 (10th Cir. 1994).

98. *See id.* at 1543-45 (the Court found no support for "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"); *see also* *Adarand Constructors, Inc. v. Skinner*, 790 F. Supp. at 243 ("The overriding distinction between the program upheld in *Fullilove* and the instant program, when compared to the program held unconstitutional in *Croson*, is undoubtedly the congressional mandate behind the *Fullilove* program and this one.").

*B. Justice O'Connor's Opinion for the Court*

After concluding that Adarand had standing to seek an injunction against the government's future use of race-conscious subcontractor compensation clauses,<sup>99</sup> the Court addressed the issue of the level of judicial scrutiny to be applied. Justice O'Connor, writing for the Court,<sup>100</sup> first reviewed the Court's jurisprudence concerning the extent to which the Fifth Amendment's Due Process Clause incorporates an equal protection element.<sup>101</sup> In a school desegregation case, the Court had concluded that "it would be unthinkable that the same Constitution would impose a lesser duty on the federal government."<sup>102</sup> The *Adarand* Court, citing several other cases expressing similar views, concluded that the Court's review of a Fifth Amendment equal protection claim should be the same as if the claim had arisen under the Fourteenth Amendment.<sup>103</sup>

The Court next reviewed the various opinions expressed in *Bakke*,<sup>104</sup> *Fullilove*,<sup>105</sup> and *Wygant v. Jackson Board of Education*.<sup>106</sup> The Court's failure to generate a majority opinion in those cases caused confusion regarding the proper standard of scrutiny applicable to remedial government action employing racial classifications.<sup>107</sup> While the Court's decision in *Crosby*<sup>108</sup> had

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99. *Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097, 2104-05 (1995).

100. Justice O'Connor's opinion, other than part III.C, was joined by Chief Justice Rehnquist and Justices Kennedy and Thomas. *See id.* at 2101. The opinion was also joined by Justice Scalia, except to the extent that it was inconsistent with Justice Scalia's concurring opinion. *See id.* Thus, Justice Scalia's concurring opinion must be examined to determine the extent that Justice O'Connor's opinion was for the Court. Only Justice Kennedy joined part III.C of O'Connor's opinion. *See id.*

101. The Fifth Amendment, which applies to the federal government, does not have an explicit guarantee of equal protection, providing only that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V. The Fourteenth Amendment, which applies to the states, explicitly incorporates an equal protection guarantee, providing that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

102. *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954).

103. *Adarand*, 115 S. Ct. at 2108 (citing *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975), *Buckley v. Valeo*, 424 U.S. 1, 93 (1976), and *United States v. Paradise*, 480 U.S. 149, 166 n.16 (1987)).

104. *See supra* part II.A.

105. *See supra* notes 36-41 and accompanying text.

106. 476 U.S. 267 (1986). The opinions expressed in *Wygant*, involving an affirmative action racial preference in school layoffs, were similar to those expressed by the various members of the Court in *Bakke*. *See id.*; *supra* part II.A.

107. *Adarand*, 115 S. Ct. at 2109-10.

108. *See supra* part II.B.



partially resolved the issue by applying strict scrutiny to a city's allegedly remedial use of racial classifications,<sup>109</sup> it did not determine what level of scrutiny would apply to the federal government in similar circumstances.<sup>110</sup> Nevertheless, Justice O'Connor gleaned three general principles from the Court's equal protection jurisprudence through and including the answer provided in *Croson*.<sup>111</sup>

The first principle was skepticism—that the Court must make a “searching examination” of any classifications based on race or ethnicity.<sup>112</sup> The second principle was consistency—that “the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefitted by a particular classification.”<sup>113</sup> Justice O'Connor's third and final principle was congruence—that, as discussed in part III.A of the Court's opinion,<sup>114</sup> Fifth Amendment equal protection analysis of federal government action must be the same as Fourteenth Amendment equal protection analysis of state and local action.<sup>115</sup> From these three principles and the Court's jurisprudence supporting them, Justice O'Connor concluded for the Court 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.”<sup>116</sup> The Court's reasoning was based on the principle set forth by Justice Powell in *Bakke*: the right to equal protection is an individual and not a group right.<sup>117</sup>

The Court rejected its decision in *Metro* as departure from precedent.<sup>118</sup> First, *Metro* ignored *Croson*'s explanation of the need for strict scrutiny of all racial classifications—that, “absent

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109. *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-94 (1989).

110. *Adarand*, 115 S. Ct. 2097, at 2110.

111. *Id.* at 2111.

112. *Id.* (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 273 (Powell, J., plurality opinion) and *Fullilove v. Klutznick*, 448 U.S. 448, 491 (1980)).

113. *Id.* (quoting *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 494 (1989) (plurality opinion)).

114. See *supra* notes 101-03 and accompanying text.

115. *Adarand*, 115 S. Ct. at 2111 (citing *Buckley v. Valeo*, 424 U.S. 1, 93 (1976)).

116. *Id.*

117. *Id.* (citing *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 299 (1978) (Powell, J.)). The Court further stated that its three propositions “all derive from the basic principle that the Fifth and Fourteenth Amendments to the Constitution protect *persons*, not *groups*.” *Id.* at 2112.

118. See *supra* part II.C.

searching judicial inquiry," it is not always possible to distinguish between benign and invidious discrimination.<sup>119</sup> Second, *Metro* departed from precedent in ignoring the principles of skepticism, consistency, and congruence, which the *Adarand* Court gleaned from the Court's equal protection jurisprudence.<sup>120</sup> Discussing the principle of stare decisis, Justice O'Connor framed the Court's departure from its decision in *Metro* as a return to firmly established precedent, rather than as a departure from precedent.<sup>121</sup> The Court held that "all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests."<sup>122</sup>

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119. *Adarand*, 115 S. Ct. at 2112 (quoting *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (O'Connor, J., plurality opinion)). Responding to Justice Stevens' dissent, the Court further noted that even though Congress' intentions may clearly be good, even Justice Stevens had recognized that

"good intentions" alone are not enough to sustain a supposedly "benign" racial classification: "[E]ven though it is not the actual predicate for this legislation, a statute of this kind inevitably is perceived by many as resting on an assumption that those who are granted this special preference are less qualified in some respect that is identified purely by their race. Because that perception—especially when fostered by the Congress of the United States—can only exacerbate rather than reduce racial prejudice, it will delay the time when race will become a truly irrelevant, or at least insignificant, factor. Unless Congress clearly articulates the need and basis for a racial classification, and also tailors the classification to its justification, the Court should not uphold this kind of statute."

*Id.* at 2113 (emphasis added) (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 545 (1980) (Stevens, J., dissenting)).

120. *Id.* at 2112; see also *supra* notes 112-15 and accompanying text.

121. *Adarand*, 115 S. Ct. at 2114-15. In support of this argument, Justice O'Connor insisted that,

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. Part III.C of Justice O'Connor's opinion, discussing stare decisis, was not for the Court and was joined only by Justice Kennedy. *Id.* at 2101.

122. *Id.* at 2113. The Court explicitly overruled *Metro* to the extent that it was inconsistent with its new holding. *Id.* The Court did not find the statutes at issue unconstitutional, however, but instead remanded the case to the court of appeals for further consideration. The lower court had considered the federal statutes under *Metro*'s standard of intermediate scrutiny rather than strict scrutiny. *Id.* at 2118. The Court also noted that *Fullilove* would no longer be controlling to the extent that it applied a less rigorous standard of review to the federal government's affirmative action legislation. *Id.* at 2117.

Justice O'Connor's opinion established a new standard for review of affirmative action legislation only to the extent that it was not inconsistent with Justice Scalia's concurring opinion.<sup>123</sup> Justice Scalia agreed that strict scrutiny must be applied to any governmental use of racial classifications.<sup>124</sup> However, Scalia disagreed with the idea that government could ever have a "compelling" interest in using racial classifications to remedy the effects of past discrimination.<sup>125</sup> Scalia believed that "[t]o pursue the concept of racial entitlement—even for the most admirable and benign of purposes—is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred."<sup>126</sup>

Justice Thomas, who also joined in the Court's opinion, was primarily concerned about the "racial paternalism" aspect of affirmative action legislation:

[T]here 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 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.<sup>127</sup>

### C. *Opinions of the Dissenting Justices*

Justice Stevens, in his dissent,<sup>128</sup> first criticized the majority for its "supposed inability to differentiate between 'invidious' and 'benign' discrimination."<sup>129</sup> Second, Stevens criticized the majority

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123. See *supra* note 100.

124. *Adarand*, 115 S. Ct. at 2118 (Scalia, J., concurring in part and concurring in the judgment).

125. *Id.*

126. *Id.* at 2119.

127. *Adarand*, 115 S. Ct. at 2119 (Thomas, J., concurring in part and concurring in the judgment).

128. Justice Stevens' dissenting opinion was joined by Justice Ginsburg. *Id.* at 2120.

129. *Id.* at 2120-22 (Stevens, J., dissenting). Stevens viewed the Court's new concept of

for refusing to recognize a significant difference between affirmative action legislation by the federal government and that by state or local governments.<sup>130</sup> Congress's institutional competence, its mandate under section 5 of the Fourteenth Amendment, and its powers under the Commerce Clause and Spending Clause, Stevens argued, all justified deference by the Court to Congress's legislative decisions.<sup>131</sup> Addressing the principle of stare decisis, Justice Stevens viewed the majority's decision as a departure from the precedent of *Fullilove* and *Metro*, which upheld federal affirmative action programs in deference to Congress, rather than as a return to precedent.<sup>132</sup>

Justice Souter agreed that the Court's decision in *Fullilove* applied and noted that Adarand failed to contest the factual findings of discrimination in the construction industry upon which *Fullilove* was based. Thus, Justice Souter argued that stare decisis required the Court to uphold the programs at issue.<sup>133</sup> Justice Souter further opined that, as Justice Powell believed the legislation in *Fullilove* satisfied strict scrutiny, on remand Adarand's challenge to Congress's evidentiary findings of past discrimination would fail.<sup>134</sup>

Justice Ginsburg emphasized the common thread among a majority of the Court—the belief that Congress has an interest in remedying the effects of past discrimination that still infect society.<sup>135</sup> Further, Ginsburg noted that the majority's reason for strict scrutiny of all racial classifications was to “ferret out classifications

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consistency in terms of the purpose behind the legislation, whether benign or invidious. *Id.* at 2021. The majority, in turn, criticized Stevens for failing to recognize the right to equal protection as an individual, personal right. *Id.* at 2114. For the majority consistency meant that the right to equal protection belongs to all persons equally.

130. *Id.* at 2122-23.

131. *Id.* at 2123-26. In support, Justice Stevens referred to the opinions of various members of the Court in *Croson*, distinguishing *Fullilove* on such bases, and in *Metro*, distinguishing *Croson* on such bases. See *supra* notes 42-43 (discussing *Croson*), 76-77 (discussing *Metro*) and accompanying text.

132. *Adarand*, 115 S. Ct. at 2127.

133. *Id.* at 2131-32 (Souter, J., dissenting). Justice Souter was joined in his opinion by Justices Ginsburg and Breyer. *Id.* at 2131.

134. *Id.* at 2133-34. Justice Souter did not believe that the majority's opinion adopting strict scrutiny should or would change the standard of review as applied in *Fullilove*. *Id.*

135. *Adarand*, 115 S. Ct. at 2135 (Ginsburg, J., dissenting). Justice Ginsburg was joined in her opinion by Justice Breyer. *Id.* at 2134. Justice Ginsburg cited several studies showing that societal discrimination was still evident in hiring practices, consumer relations, housing, and business generally. *Id.* at 2135 & nn.3-6.

in reality malign, but masquerading as benign,"<sup>136</sup> and thus strict scrutiny should not necessarily be fatal to legitimate affirmative action programs.<sup>137</sup> Thus, while she agreed with Justice Stevens' principle of according deference to Congress and the precedential value of *Fullilove*,<sup>138</sup> Justice Ginsburg optimistically viewed the Court's opinion "as one that allows our precedent to evolve, still to be informed by and responsive to changing conditions."<sup>139</sup>

#### IV. DOCTRINAL VICTORIES IN ADARAND

The debate in *Bakke*, *Fullilove*, *Crosby*, *Metro*, and finally *Adarand* over the proper standard of judicial review of affirmative action legislation has often been viewed as a struggle between two groups adhering to ideologically opposed, variously defined theories. The groups are those generally in favor of and those others generally opposed to affirmative action programs.<sup>140</sup> The theories with which they defend their positions debate both the meaning of equality and the role of the judiciary in constitutional interpretation. Thus, the Court's decision in *Adarand* may be viewed as a choice between diametrically opposed philosophies and the victory of one over the other.<sup>141</sup>

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136. *Id.* at 2136.

137. Justice Ginsburg urged that "[t]he 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' authority to act affirmatively, not only to end discrimination, but also to counteract discrimination's lingering effects." *Id.* at 2135 (citations omitted).

138. See *supra* notes 128-32 and accompanying text.

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

140. Politically, the debate has been framed as one between Democrats and Republicans. See, e.g., Linda Chavez, *Racial Justice: Changing the Tune*, LEGAL TIMES, Dec. 26, 1994, at 18 (opining that it is Democrats who support a theory of "group rights," while Republicans favor an "individual rights" theory of equality). The notion that the Court's decision in *Adarand* might be explained along political party lines and with reference to public opinion may be unsettling and unacceptable to many constitutional law scholars, as well as members of the Court itself. See James G. Wilson, *The Role of Public Opinion in Constitutional Interpretation*, 1993 B.Y.U. L. REV. 1037, 1118 (1993) (applauding Justice Souter's attempt to combine *stare decisis* with public opinion, while noting that some constitutional law scholars and some of Justice Souter's colleagues on the Court would reject such a "fluid vision" of the Constitution). Nevertheless, Professor Wilson has argued that the Court's opinions and rhetoric do not always fully explain the impetus behind individual Justices' decisions, and that public opinion plays at least a peripheral role. *Id.* at 1135-36.

141. *Adarand* does not necessarily mean the demise of affirmative action. As an illustration, while some affirmative action supporters brace themselves for a defense of existing legislation, others view *Adarand* as a partial victory in that a firm majority of the Court expressed the belief that not all race-based remedial legislation are unconstitutional. See

### A. *Individual Rights Versus Group Rights*

Probably the most fundamental debate sparked by affirmative action legislation concerns the meaning of equality. It is agreed that both the Fifth Amendment and the Fourteenth Amendment guarantee to all persons "equal protection of the laws."<sup>142</sup> However, the meaning of equality in society and the role of government in protecting that liberty has been hotly contested.

The debate over the meaning of equality may be framed loosely as one over whether the Constitution embraces a theory of "group rights" or a theory of "individual rights."<sup>143</sup> The underlying assumption of the group rights theory is that in the absence of discrimination, there will be few differences in socio-economic status among groups. The focus of group rights theory, as the name suggests, is on improving the social status of minority groups as a whole.<sup>144</sup> It adopts an asymmetrical, "empowerment model," in which affirmative steps must be taken to enhance the economic and social standing of minorities, thereby leveling the playing field among the races.<sup>145</sup> In doing so, group rights theory identifies individuals as members of a particular group, and emphasizes the rights of the group over those of the individual.<sup>146</sup> Group rights theory views affirmative action legislation as a legitimate remedy

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generally Sam Skolnik, *Ralph Neas' Last Stand?; Activists Gird for Battle After Adarand*, LEGAL TIMES, June 19, 1995, at 16, 19.

142. U.S. CONST. amends. V & XIV, § 1; see also *supra* notes 101-03 and accompanying text (explaining that the Due Process Clause of the Fifth Amendment has been interpreted by the Court to include a guarantee of equal protection identical to the explicit guarantee found in the Fourteenth Amendment).

143. See, e.g., Fried, *supra* note 64, at 108-09 (using similar terms). These phrases will be adopted herein as perhaps best describing the essential nature of the debate. However, the same controversy has been described in a multitude of different ways. For example, the debate has been framed as one between: "liberal individualism" and "collectiv[ism]," *id.* at 109; "formal equal opportunity" and "critical race theory," Roy L. Brooks & Mary Jo Newborn, *Critical Race Theory and Classical-Liberal Civil Rights Scholarship: A Distinction Without a Difference?*, 82 CAL. L. REV. 787, 788-89 (1994); a "rhetoric of innocence" and a "rhetoric of guilt," Neal Devins, *The Rhetoric of Equality*, 44 VAND. L. REV. 15, 15-16 (1991); "backward-looking" relief and "forward-looking" relief, Sheila Foster, *Difference and Equality: A Critical Assessment of the Concept of "Diversity"*, 1993 WIS. L. REV. 105, 107-08 (1993); and an "antidiscrimination principle" and an "equal results model," *id.* at 148-49.

144. Katz, *supra* note 4, at 318.

145. Brooks & Newborn, *supra* note 143, at 790. It may be more accurate to view some formulations of the group rights theory as requiring not only that the playing field be level among the races (as individual rights theory arguably requires as well), but also that the final score be a tie.

146. Fried, *supra* note 64, at 109.

for the continuing effects of past and present societal discrimination.<sup>147</sup>

The leading Supreme Court advocates of group rights theory have been Justices Marshall and Brennan. In *Bakke*, Justice Brennan was not so much concerned that Allan Bakke, as an individual, was disadvantaged, but rather focused on the fact that Bakke was white, and thus a member of a class without a history of unequal treatment.<sup>148</sup> Marshall similarly focused on the group, rather than the individual, that was disadvantaged by the legislation at issue in *Croson*, arguing that strict scrutiny should not have been applied.<sup>149</sup>

In sharp contrast, individual rights theory teaches that fundamental rights, such as the right to equal protection of the laws, belong to the individual, and not by virtue of his or her membership in a group.<sup>150</sup> Individuals are responsible for their own actions, but have no greater obligation to society.<sup>151</sup> In short, individual rights theory "does not view the existence of discrimination and social segmentation as a sufficient reason to reproduce [the same evils] in the coercive apparatus of the state."<sup>152</sup> It views affirmative action legislation as "pernicious discrimination."<sup>153</sup>

Equality, according to individual rights theorists, means that the Constitution must be "colorblind."<sup>154</sup> In other words, "the law must treat all groups, including historically excluded groups, without reference to race or color."<sup>155</sup> Individuals must be evaluated not with reference to their membership in some group, but rather on the basis of their individual merit. As one author suggested, it may be appropriate in some circumstances to define merit on the basis of relative rather than absolute standards, emphasizing efforts

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147. Devins, *supra* note 143, at 18 (referring to the group rights theory as the "guilt model").

148. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 357 (1978) (Brennan, J., concurring in the judgment in part and dissenting in part); see also *supra* notes 25-29 and accompanying text.

149. *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 553 (1989) (Marshall, J., dissenting) (arguing that the "Court has never held that numerical inferiority, standing alone, makes a racial group 'suspect' and thus entitled to strict scrutiny review").

150. Fried, *supra* note 64, at 108.

151. Katz, *supra* note 4, at 318.

152. Fried, *supra* note 64, at 109.

153. Devins, *supra* note 143, at 18.

154. See, e.g., Days, *supra* note 40, at 470 (noting that the goal of a "color-blind Constitution" has been "honored more in the breach than in observance").

155. Brooks & Newborn, *supra* note 143, at 795.

rather than results.<sup>156</sup> In other words, merit may consider “how well individuals have done given their starting places,”<sup>157</sup> and yet not run afoul of the primacy of the individual. As Professor Morrison suggests, it is not necessary to adhere to absolute standards of merit to avoid making group-based inquiries.<sup>158</sup> Nevertheless, while an individual rights theorist might examine the starting place of an individual, or the diversity overcome along the way, in evaluating merit, the individual’s starting place would not be viewed as being born black, white, Croatian, or otherwise.

Justice Powell focused on equality as an individual right in *Bakke*.<sup>159</sup> In Justice O’Connor’s *Croson*, *Metro*, and *Adarand* opinions, she has more recently adhered to the same view of equal protection as an individual right.<sup>160</sup> In Justice O’Connor’s opinion the only valid justification for departing from this principle and permitting explicit governmental use of racial classifications, would be remedying the effects of past governmental discrimination.<sup>161</sup> Justice Scalia’s position, that race may never legitimately be a factor in governmental decision making,<sup>162</sup> is perhaps more doctrinally pure than Justice O’Connor’s position.<sup>163</sup> However, insofar as it is entirely consistent with individual rights theory to argue that individuals deserve to be compensated for identifiable harms suffered at the hands of government,<sup>164</sup> Justice O’Connor’s approach to individual rights theory is perhaps more doctrinally sound. Therefore, despite the lack of support for Justice Scalia’s

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156. John E. Morrison, *Colorblindness, Individuality, and Merit: An Analysis of the Rhetoric Against Affirmative Action*, 79 IOWA L. REV. 313, 332 (1994).

157. *Id.*

158. *See id.* at 336 (asserting the contested point).

159. *See supra* notes 15-17 and accompanying text.

160. *See Adarand*, 115 S. Ct. at 2111 (1995); *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 602 (1990) (O’Connor, J., dissenting); *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989).

161. *See Metro*, 497 U.S. at 612-13 (O’Connor, J., dissenting).

162. *See Adarand*, 115 S. Ct. at 2118 (Scalia, J., concurring in part and concurring in the judgment).

163. Justice Scalia’s approach to individual rights theory may be viewed as a polar contrast to the group rights theory. *See, e.g.*, David Cole, *‘Hoop Dreams’ and Colorblindness*, LEGAL TIMES, Jan. 23, 1995, at 43 (asserting that the Court’s approach to affirmative action legislation “is much closer to Justice Scalia’s point of view than to Justice Marshall’s”).

164. *See Devins, supra* note 143, at 32 (arguing that “[r]ace-dependent decision making . . . cannot be rejected out of hand as inconsistent with the antidiscrimination principle [insofar as] [c]ompensatory justice demands that an individual wronged by pernicious discrimination be entitled to compensation adequate to remedy the wrong suffered”).



perhaps purer doctrinal approach, a solid majority of the Court has signalled its approval of the individual rights theorists' conception of equality.

*B. The Rationality Model Versus the Historical Model*

A second debate, reaching at least peripherally the broader issue of the proper role of the judiciary in constitutional interpretation, underlies the affirmative action controversy. At its simplest, it is a debate over the standard of judicial review—strict scrutiny or intermediate scrutiny—applicable to government's supposedly benign use of racial classifications. More fundamentally, however, it is a debate over the extent that the judiciary should invade the province of the legislature (and especially the Court's co-equal branch, Congress) in guarding constitutional liberties.

The position of those opposed to affirmative action has been relatively straightforward. In the equal protection context, it is recognized that government must routinely engage in line drawing on the basis of various characteristics to achieve acceptable, legitimate, and even desirable goals.<sup>165</sup> The rationality model examines the likelihood that a particular classification will bear a rational relationship to a legitimate government end.<sup>166</sup> If the likelihood is high, as with economic legislation, the Court largely defers to legislative decisionmaking.<sup>167</sup> However, when government uses race as a proxy, it is presumed that government has acted irrationally and illegitimately,<sup>168</sup> and the legislation or program at issue is carefully scrutinized. Underlying this theory is the antidiscrimination principle, which counsels against drawing lines on the basis of race except in extremely limited circumstances.<sup>169</sup> In the abstract, allocating burdens and benefits on the basis of race is presumptively wrong and is presumed to bear no rational relation to a legitimate government purpose.

In contrast to the rationality model, the historical model looks beyond the government's explicit use of a racial classification, examining whether the group(s) disadvantaged by the classification have been subjected to a history of discrimination or excluded from the political process by reason of immutable and irrelevant

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165. Katz, *supra* note 4, at 323.

166. *Id.* at 326.

167. *Id.* at 324.

168. *Id.* at 326.

169. Devins, *supra* note 143, at 27.

characteristics.<sup>170</sup> The historical model may be viewed as a modification of the pure rationality model. Government's use of racial classifications is presumed to be irrational and illegitimate, but only so long as history has shown that government might be inclined to discriminate against the disadvantaged groups.

An interrelated theory that has drawn the support of those in favor of affirmative action programs is the separation of functions principle.<sup>171</sup> Separation of functions commands deference to legislative decisionmaking and the majoritarian process in drawing distinctions among persons,<sup>172</sup> and in that respect it is an underlying basis from which the rationality model proceeds. However, separation of functions theory departs from the pure rationality model and the antidiscrimination principle in examining the political process underlying the government's racial classification. If the disadvantaged groups are the groups controlling the political process, the theory goes, they have disadvantaged themselves for a greater good and the reasons for being suspicious of their use of a racial classification do not exist.<sup>173</sup> Separation of functions is similar to the historical model in its focus on the characteristics of the disadvantaged group, and as a justification for a lesser judicial inquiry than traditional strict scrutiny. It differs in its focus on the disadvantaged group's ability to participate in the political process rather than the disadvantaged group's having been subject to a historical pattern of invidious discrimination, although the latter may very likely have been a cause of the former.

Justice Powell's *Bakke* opinion reflected the rationality model's conclusion that all classifications based on race must be strictly scrutinized.<sup>174</sup> Justice O'Connor's principle of skepticism discussed in *Adarand* reflected a similar sentiment, concluding that all racial classifications are immediately suspect.<sup>175</sup> O'Connor's second general principle in *Adarand*, consistency, rejected both the historical model and the separation of functions principle in one broad stroke. She summarily dismissed any theory that varied the standard of review based on the race of those advantaged or disad-

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170. Katz, *supra* note 4, at 326.

171. Devins, *supra* note 143, at 22.

172. *Id.* at 23-24.

173. Devins, *supra* note 40, at 143.

174. *Bakke*, 438 U.S. at 291 (opinion of Powell, J., announcing the judgment of the Court).

175. *Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097, 2111 (1995).

vantaged by the racial classification at issue.<sup>176</sup> On the flip side, as might be expected, Justice Brennan's opinions have relied on the historical model. In *Bakke*, for example, Brennan argued that the Davis program should not have been strictly scrutinized when it was the class of whites, who had not been subjected to a history of racial discrimination, who were disadvantaged by the Davis program.<sup>177</sup>

The rationality model and the antidiscrimination principle have been criticized as inconsistent with the original impetus behind multi-level judicial scrutiny—invidious discrimination against blacks.<sup>178</sup>

Under the three-tiered analysis applied by the Court, affirmative action for women should be subject to intermediate scrutiny, and affirmative action for others to minimum scrutiny. The result is that affirmative action programs that benefit women are easier to defend under the equal protection clause than identical programs that benefit African Americans or Hispanics.<sup>179</sup>

A purely theoretical problem with this critique is that it reverts to the historical model's underlying assumptions in analyzing the results under the rationality model. Nevertheless, it does require an explanation as to the disparate effects resulting from application of the rationality model in the affirmative action arena. The lower level of scrutiny for gender classifications is perhaps best explained by the antidiscrimination principle underlying the rationality model. Discrimination on the basis of race is inherently wrong, generally irrelevant to legitimate government goals, and justified only in extremely limited circumstances.<sup>180</sup> As the right to equal protection belongs to the individual, and not by virtue of his or her membership in a group,<sup>181</sup> the rule applies without reference to the race of those advantaged and disadvantaged by a particular classification. Classifications based on gender, on the other hand, are more likely to be rationally related to a legitimate government

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176. *Id.*; see also *supra* note 113 and accompanying text.

177. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 357 (1978) (Brennan, J., concurring in part and dissenting in part); see also *supra* note 27 and accompanying text.

178. Katz, *supra* note 4, at 340 (citing *Contractors Ass'n., Inc. v. City of Philadelphia*, 735 F. Supp. 1274, 1302 (E.D. Pa. 1990)).

179. *Id.* at 339.

180. See *supra* notes 166-69 and accompanying text.

181. See *supra* notes 150-53 and accompanying text.

end, and are therefore scrutinized less carefully.<sup>182</sup>

The problem with the historical model is that it permits courts to determine whether governmental actions discriminate against minorities before applying any level of scrutiny. It allows courts to scrutinize less carefully explicit racial classifications which are not facially disadvantageous to minorities. It affords less than equal protection to individuals who, although not members of a historically repressed class, may have been entirely excluded from the political process. Moreover, as Justice O'Connor's recent opinions explain, with racial classifications come the additional difficulties of screening allegedly benign intent, as well as the unavoidable threat of stigma.<sup>183</sup>

#### V. ADARAND AND THE IMPORTANCE OF STRICTLY SCRUTINIZING RACIAL CLASSIFICATIONS

Perhaps the most universally understood principle of *Adarand* is that strict scrutiny is now applicable to every government statute or program, whether state or federal, which allocates burdens and benefits on the basis of race. The impact is generally understood that affirmative action legislation and programs will be more difficult to justify, and that the justification for such programs must be to remedy the effects of past governmental discrimination. The doctrinal purity and consistency of the Court's approach in *Adarand*, which may serve to eliminate one or two class sessions for constitutional law students, says nothing of its importance. The true value of *Adarand* lies in its rejection of the dangerous precedents established, albeit for a brief period, in *Metro*.

##### A. Diversity and Racial Balancing

In *Metro*, the Court did the unprecedented, announcing that the FCC's goal of promoting broadcast diversity was a sufficiently important interest to pass constitutional muster.<sup>184</sup> As the Court has solidified a standard of strict scrutiny for all racial classifica-

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182. Katz, *supra* note 4, at 325. Professor Katz's critique of the fate of the results in affirmative action programs in favor of the economically disadvantaged as being "both an historically and logically 'anomalous result,'" *id.* at 340, is even more difficult to understand. Given this country's history and acceptance of social legislation in favor of the economically disadvantaged, it is difficult to conceive why applying minimum level scrutiny to such legislation might be viewed as "anomalous."

183. See *infra* part V.B.

184. *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 566-68 (1990).

tions, it is unlikely that an interest in diversity will survive judicial scrutiny in the near future.<sup>185</sup> However, it is worth examining the negative aspects of sanctioning a governmental interest in diversity as compelling or even important, should the delicate balance of the Court shift once again.

In *Metro*, the importance of the FCC's and Congress's asserted interest in diversity was clothed in the guise of serving "First Amendment values."<sup>186</sup> Nevertheless, as one author asserted, "equal protection antidiscrimination concerns trump the first-amendment diversity value."<sup>187</sup> If not generally evident, this principle is particularly true with respect to the government's attempt to mandate diversity of broadcasting. While the FCC programs at issue in *Metro* directly conflicted with the Fourteenth Amendment's equal protection guarantee, eliminating the FCC programs would not have directly interfered with the First Amendment's promise of free speech.<sup>188</sup> The First Amendment's command to Congress is negative—that it "shall make no law . . . abridging the freedom of speech"—rather than a positive command to make some forum available for speech.<sup>189</sup>

The government's interest in remedying the effects of identified governmental discrimination, which has always been a sufficiently compelling interest to permit explicit racial classifications, is readily distinguishable. When individuals have been denied equal protection of the law in the past, the government is viewed as having an interest in, and perhaps even more so an obligation, to compensate those individuals injured by government action itself.<sup>190</sup> When government breaches its Fourteenth Amendment obligations to some individuals, the diffuse burden visited on those other individuals burdened by a racial classification is justified by the end.

The majority in *Metro* weighed the FCC programs against Justice Powell's dicta in *Bakke*.<sup>191</sup> Justice Powell opined that the

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185. See, e.g., *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 2119 (1995) (Thomas, J., concurring in part and concurring in the judgment) (arguing the dangerous effects of all racial preferences); *Metro*, 497 U.S. at 612 (O'Connor, J., joined by Rehnquist, C.J., and Scalia and Kennedy, JJ., dissenting) (arguing that broadcast diversity was certainly not a compelling government interest).

186. 497 U.S. at 568.

187. Devins, *supra* note 40, at 148.

188. *Id.* at 148-49.

189. U.S. CONST. amend. I.

190. See *supra* note 164 and accompanying text.

191. *Metro*, 497 U.S. at 568.

University of California at Davis could constitutionally consider race and ethnicity as one factor among many in its admissions process, justified by its First Amendment interest in developing a diversified student body.<sup>192</sup> Justice O'Connor expressed a similar sentiment several years later in *Wygant v. Jackson Board of Education*.<sup>193</sup> The *Metro* majority attempted to assimilate broadcast diversity to educational diversity, arguing that not only did minorities benefit from the FCC's ownership policies, but also that "benefits redound to all members of the viewing and listening audience."<sup>194</sup> Nevertheless, it appears doubtful that today's Court would find an interest in diversity, even in the limited context of education, sufficiently compelling to justify explicit reference to race absent some showing of past governmental discrimination.<sup>195</sup>

A principal objection to government's explicit use of racial classifications, justified by nothing more than an asserted governmental interest in promoting "diversity," is that the essence of enforced diversity is a form of outright racial balancing. The weak connection between the FCC's minority ownership policies and its purported goal of increasing broadcast diversity in *Metro* suggests that the FCC's true purpose was to increase minority ownership, or in other words, "racial balancing" of broadcast station ownership.<sup>196</sup> In *Swann v. Charlotte-Mecklenburg Board of Educa-*

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192. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 311-14 (1978) (Powell, J.). Although four other justices agreed with Justice Powell on this point, Justice Powell was the only one of the five who applied strict scrutiny. See *supra* notes 18-27 and accompanying text.

193. 476 U.S. 267, 286 (1986) (O'Connor, J., concurring in part and concurring in the judgment) (noting that "although its precise contours are uncertain, a state interest in the promotion of racial diversity has been found sufficiently 'compelling,' at least in the context of higher education").

194. *Metro*, 497 U.S. at 568. While such an argument, accepting Justice Powell's dicta in *Bakke*, might justify the minority preference program at issue in *Metro*, it certainly would not justify the FCC's distress sale program. See *supra* notes 60-63 and accompanying text (describing the two FCC programs at issue in *Metro*). Justice Powell clearly explained in *Bakke* that a quota program that completely excluded individuals from competition on the basis of race was not narrowly tailored toward the goal of diversity. *Bakke*, 438 U.S. at 314-18. The FCC's distress sale program completely excluded non-minority individuals from purchasing a class of broadcast stations, and to that extent was the ultimate of quotas—100%. See *supra* note 63 and accompanying text.

195. In *Metro*, Justice O'Connor, joined by Chief Justice Rehnquist and Justices Scalia and Kennedy, opined that remedying the effects of identified past discrimination was the only governmental interest that might justify the use of explicit racial classifications. *Metro*, 497 U.S. at 612-13. Justice Thomas has renounced all affirmative action programs as a brand of "racial paternalism." See *supra* note 127 and accompanying text.

196. *Metro*, 497 U.S. at 625 (O'Connor, J., dissenting) (quoting *Richmond v. J.A.*

tion,<sup>197</sup> a school integration case, the Court expressly disapproved of a goal requiring "any particular degree of racial balance or mixing."<sup>198</sup> The repulsiveness of racial balancing at the hands of government has been explained in these terms:

What is clear is that when government gets into the business of identifying various communities and cultural groupings and manipulating their fortunes, it results in something ugly, awkward, or trivial, like the FCC policies at issue [in *Metro*]. As this is true of diversity in broadcasting, so it is also true of diversity generally. In friendships, cultural ties, and voluntary associations, a generous spirit seeks out difference and variety. But forced on us by bureaucratic command, this liberating impulse degenerates into what Justice O'Connor rightly decried as impermissible stereotyping, tending not toward richness and difference at all, but to a particularly leaden kind of uniformity, only seemingly enlivened by what a mediocre officialdom counts as variety.<sup>199</sup>

Moreover, tolerance of racial balancing in the guise of diversity could, ironically, eventually be used to exclude members of minority groups who are deemed to be overrepresented in a particular social context.<sup>200</sup>

Nevertheless, the greater harm of connecting thoughts, behavior, and other attributes to race, in the name of promoting diversity, is in reinforcing a traditional mode of thinking—that race makes a difference in how individuals should regard one another.<sup>201</sup> In describing affirmative action programs as "racialist," or "racially conscious,"<sup>202</sup> Professor Stephen L. Carter explained the greater

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Croson Co., 488 U.S. 469, 507 (1989)).

197. 402 U.S. 1 (1971).

198. *Id.* at 24.

199. Fried, *supra* note 64, at 121 (footnotes omitted).

200. Foster, *supra* note 143, at 133; *see also Metro*, 497 U.S. at 614 (O'Connor, J., dissenting) (noting that the FCC's asserted interest in broadcast diversity "would justify discrimination against members of any group found to contribute to an insufficiently diverse broadcasting spectrum, including those groups currently favored"). *See, e.g., United States v. Starett City Assocs.*, 840 F.2d 1096, 1098 (2d Cir. 1988) (rejecting a housing plan that limited the number of black tenants in an effort to maintain an integrated, racially balanced housing complex and to limit the effect of white flight).

201. *See, e.g., Metro*, 497 U.S. at 618 (O'Connor, J., dissenting) (criticizing the FCC programs at issue in *Metro* for equating race with behavior).

202. Stephen L. Carter, *When Victims Happen to Be Black*, 97 YALE L.J. 420, 433

societal harm of racially conscious thinking:

Once it is accepted that race can carry significance—a point which is central to the case for racial consciousness in remedial programs—the dispute may be reduced to one over what race more rationally signifies: an education disadvantage that a just society will find ways to overcome, or a tendency toward criminality that a just society will avoid. The fact that one of the two choices seems morally odious does not mean that no one could rationally conclude that it is correct. The societal goal of preventing violent crime seems just as worthy as the societal goal of eliminating the legacy of racial oppression. If the tools of racial categorization can fairly be used for the second, it is no easy matter to explain, to someone who believes them helpful, why they cannot be used for the first. If all one can say is, “You’ve got the statistics wrong,” then the degree of *moral* suasion is very slight. Thus the critic of affirmative action programs is able to concede that racism is a greater enemy than racialism, and yet point as well to the risks involved in perpetuating racialism. A society without racism is an excellent goal, the argument might conclude; teaching that racial consciousness is wrong is a vital step along the way.<sup>203</sup>

*B. The Myth of Benign Discrimination and the Reality of Stigma*

A necessary assumption of the theory of “benign discrimination,” and its accompanying relaxed standard of judicial review, is that courts will be able to readily distinguish between benevolent and malevolent governmental employment of racial classifications. As Justice O’Connor skeptically remarked in *Metro*, “[h]istory should teach greater humility.”<sup>204</sup> When the Court makes a surface-level inquiry and classifies legislation as benign, determining that relaxed judicial scrutiny is appropriate, it undermines a funda-

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(1988).

203. *Id.* at 434-35 (footnote omitted). Although the passage quoted from Professor Carter’s article addressed affirmative action programs that, although remedial, seek to remedy the effects of societal discrimination, its import applies even more forcefully to government programs grounded in nothing more than diversity. *See also* Fullilove v. Klutznick, 448 U.S. 448, 534 (1980) (Stevens, J., dissenting) (noting that “classifications based on race are potentially so harmful to the entire body politic”).

204. *Metro*, 497 U.S. at 609 (O’Connor, J., dissenting).



mental purpose of judicial inquiry—"to 'smoke out' illegitimate uses of race," perhaps those "motivated by illegitimate notions of racial inferiority or simple racial politics."<sup>205</sup> In effect, the Court assumes the answer before asking the question.

The crucial defect in the principle of scrutinizing benign racial classifications less carefully is not only in its myopia, but more so in its misunderstanding of the actual impact of government's so-called benign racial classifications. No matter how benevolent and admirable government's intent, affirmative action programs stigmatize their beneficiaries.<sup>206</sup> While some may argue that the benefits justify the burden, an even more disastrous effect of affirmative action programs is that they stigmatize not only their specific beneficiaries, but the entire races that they purport to benefit.<sup>207</sup> They create a disastrous impression that members of minority groups are generally less intelligent, less qualified, and less able to make it on their own.<sup>208</sup>

If it is accepted that affirmative action programs stigmatize their beneficiaries, it is irrelevant who is to blame for the harm. Despite government's best intentions, the entire concept of benign racial classifications is turned on its head. In an insightful criticism of the Court's decision in *Washington v. Davis*<sup>209</sup> and its doctrine requiring proof of discriminatory legislative intent for facially neutral, disparate racial impact classifications,<sup>210</sup> Professor Charles Lawrence III observed that,

If stigmatizing actions injure by virtue of the meaning society gives them, then it should be apparent that the evil intent of their authors, while perhaps sufficient, is not necessary to the infliction of the injury. For example, a well-meaning if misguided white employer, having observed that her black employees usually sat together at lunch, might build a separate dining room for them with the in-

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205. *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989).

206. See, e.g., Linda Chavez, *Racial Justice: Changing the Tune*, LEGAL TIMES, Dec. 26, 1994, at 18, 28 (reporting the resentment that affirmative action programs evoke among whites, and the stigma felt by the beneficiaries).

207. Foster, *supra* note 143, at 145-46 (noting the reported stigma felt by members of minority racial and ethnic groups on college campuses).

208. *Id.* at 145-46 (observing that Blacks and Hispanics are often viewed as "less intelligent than 'regular admits'" on college campuses).

209. 426 U.S. 229 (1976).

210. Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 318 (1987).

tent of making them more comfortable. This action would stigmatize her black employees despite her best intentions.<sup>211</sup>

It is apparent then that what is important in evaluating affirmative action legislation is the actual effects of such programs, and not the “benign” intent of government. If the intent of government is invidiously discriminatory, then stigma attaches. However, if the intent of government is benign and stigma still attaches, the song remains the same.

One author has argued that the stigma argument is inconsistent with individual rights theory.<sup>212</sup> If stigma attaches to the group as a result of affirmative action legislation, the argument goes, then it is a result of group-based thinking that affirmative action did not create.<sup>213</sup> While affirmative action certainly is not the originator of group-based thinking, it is the cause of group-based thinking in the contexts in which stigma results. For example, suppose a well-known government program favored persons with green eyes. When a person with green eyes was hired, promoted, awarded a government contract, or granted admission to a university, whether as a result of the program or not, an unavoidable assumption of the preference outsiders (those without green eyes) would be that the characteristic, green eyes, and not merit, was the reason for the favorable action.

On the other hand, if a person with green eyes was awarded some preference because a background inquiry revealed economic disadvantage, and thus greater merit than another with identical qualifications,<sup>214</sup> it would be ludicrous to assume that the green eyes made the difference. In other words, no stigma attaches. Green eyes have no independent significance, and even if the effect of the preference for the economically disadvantaged is discovered, no stigma attaches in that the preference is based on relative merit. That the economic disadvantage might have been in some measure a result of the individual’s having been born with green eyes does not shift the emphasis to the individual’s green eyes. In other words, it is the affirmative action program itself that reinforces

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211. *Id.* at 352 (footnotes omitted).

212. See *supra* part IV.A for explication of the individual rights theory.

213. Morrison, *supra* note 156, at 342-43.

214. The assumption of greater merit is based on the concept of relative merit, which emphasizes efforts, rather than absolute merit, which emphasizes results. See *supra* notes 156-58 and accompanying text.

group-based thinking.

## VI. CONCLUSION

“[E]ven though affirmative action’s supporters are at best relatively insignificant purveyors of racist thought in America, the criticism is still on the mark: The programs do rely on racist categorization, and thus do work to perpetuate the idea that skin color carries significance.”<sup>215</sup>

*Adarand Constructors, Inc. v. Peña* represents more than a consolidation of equal protection race-based classification analysis. It signifies a shift from group-based thinking to a focus on the constitutional rights of individuals, and an acknowledgement that racial classifications are rarely related to legitimate government goals. It also represents a rejection of the legitimacy of racial balancing by government, and the idea that legislation may be classified as “benign” without a thorough examination of its effects.

*Adarand* is not and should not be viewed as a death knell for all affirmative action programs. So long as such programs are narrowly tailored to address identified governmental discrimination against minorities, they should survive strict scrutiny. However, insofar as race-based legislation will certainly be more difficult to justify, *Adarand* may properly require Congress to shift its focus to helping disadvantaged minorities and non-minorities alike, without reference to their race. In that respect, *Adarand* may be viewed as a positive step toward government in which race carries no independent significance—government in which all persons truly are equal in the eyes of the law. While colorblind government may still be a goal for the future, *Adarand* is at least a step in the right direction.

STEPHEN C. MINNICH

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215. Carter, *supra* note 202, at 436.