St. Mary's Law Journal

Volume 27 | Number 2 Article 5

1-1-1996

Adarand Constructors, Inc. v. Pena: The Lochnerization of Affirmative Action Recent Development.

Patricia A. Carlson

RECENT DEVELOPMENT

ADARAND CONSTRUCTORS, INC. v. PENA: THE LOCHNERIZATION OF AFFIRMATIVE ACTION

PATRICIA A. CARLSON

> Whether or not it is more blessed to give than to receive, it is surely less suspicious.[1]

I. INTRODUCTION

Affirmative action is a culmination of proactive policies and procedures that seek to rectify and eliminate discrimination against racial mi-

1. John H. Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723, 736 (1974).

norities.[2] Advocates of affirmative action programs argue that race-based preferential treatment is justified because minorities have historically been subjected to discriminatory practices, and affirmative action programs are needed to achieve an equal playing field.[3] Opponents of affirmative action programs contend that race-based preferential treatment causes reverse discrimination, and argue that more "objective" standards should be used in hiring and admissions decisions.[4] The debate

---

2. *See Affirmative Action "Terms of Art,"* Daily Lab. Rep. (BNA) (Aug. 1, 1995) (defining affirmative action as implementation of policies and procedures designed to ensure equality of opportunity through recruiting and outreach programs), *available in* LEXIS, BNA Library, DLABRT File; *see also* Randall Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 HARV. L. REV. 1327, 1327 n.1 (1986) (listing various interchangeable terms used for affirmative action and defining affirmative action as form of preferential treatment for designated groups).

3. *See, e.g.*, Myrl L. Duncan, *The Future of Affirmative Action: A Jurisprudential/Legal Critique*, 17 HARV. C.R.-C.L. L. REV. 503, 510–11 (1982) (discussing affirmative action in terms of compensatory justice and surmising that past as well as present discrimination against minority groups warrants affirmative action); Benjamin L. Hooks, *Affirmative Action: A Needed Remedy*, 21 GA. L. REV. 1043, 1043–53 (1987) (implying that affirmative action programs are needed because minorities have been shut out of positions of power in, for example, large corporations, firms, and universities); Keith A. Owens, *Under Scrutiny, Appeal of Black Nationalism Fades*, DET. FREE PRESS, Apr. 23, 1995, at F6 (contending that racial discrimination still persists in present practices and advocating affirmative action as remedial measure); *see also* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 407 (1978) (Blackmun, J., concurring) (asserting that "in order to treat some persons equally, we must treat them differently"); Alan Freeman, *Racism, Rights, and the Quest for Equality of Opportunity: A Critical Legal Essay*, 23 HARV. C.R.-C.L. L. REV. 295, 362-64 (1988) (questioning equality-of-opportunity ideology underlying Western culture, which "rationalizes hierarchy, justifies disproportionate access to goods and power, . . . shames those at the bottom into internalizing inadequacy," and allows only limited use of race-conscious remedies to level playing field of opportunities).

4. *See* Morris B. Abram, *Affirmative Action: Fair Shakers and Social Engineers*, 99 HARV. L. REV. 1312, 1312 (1986) (arguing that color-conscious remedies increase divisions within society and are contrary to original principles of Civil Rights Movement); Judith G. Greenberg, *Erasing Race from Legal Education*, 28 U. MICH. J.L. REF. 51, 85–93 (1994) (surveying various arguments concerning affirmative action within scholastic setting and finding animosity among white law school applicants who felt that unqualified minorities had taken their place); Martin Schiff, *Reverse Discrimination Redefined as Equal Protection: The Orwellian Nightmare in the Enforcement of Civil Rights Laws*, 8 HARV. J.L. & PUB. POL'Y 627, 628 (1985) (asserting that Title VII has been used to establish quotas that turn "equal protection" into "reverse discrimination"); Philip Martin, *Basing a Job on Race Is Unfair to All Concerned*, ARK. DEMOCRAT-GAZETTE, Mar. 26, 1995, at J2 (advocating use of "merit-based" achievements to advance applicants, rather than race-based decision-making); Abigail Thernstrom, *Permaffirm Action*, NEW REPUBLIC, July 31, 1989, at 17, 17–18 (asserting that affirmative action causes strong resentment by nonminorities); *cf.* Pete Wilson, *Nation Stands for Equal Rights, Not Special Privileges*, SAN ANTONIO EXPRESS-NEWS, June 25, 1995, at L1 (arguing that affirmative action unjustifiably lowers qualification standards for minority groups). *But see* Myrl L. Duncan, *The Future of Affirmative Action: A Jurisprudential/Legal Critique*, 17 HARV. C.R.-C.L. L. REV. 503,

concerning affirmative action has garnered and maintained widespread national attention.[5]

In the midst of this national controversy, *Adarand Constructors, Inc. v. Pena*[6] placed the affirmative action issue into the hands of the United States Supreme Court for guidance and resolution. In *Adarand*, a Colorado-based construction company, Adarand Constructors, Inc., submitted a bid to build guardrails along a public road located in the San Juan National Forest.[7] Although Adarand Constructors submitted the lowest bid, the prime contractor, Mountain Gravel Company, elected to award the subcontract to Gonzales Construction Company, a minority-owned firm.[8]

The prime contractor based this decision on the Surface Transportation and Uniform Relocation Assistance Act[9] (STURAA), which mandates that at least ten percent of the dollars spent on federal highway projects pass to businesses owned by "socially and economically disadvantaged individuals."[10] STURAA's regulatory scheme incorporates the Small Business Act[11] (SBA), which creates a rebuttable presumption that racial and ethnic minorities and women are socially and economically disadvantaged.[12] As an incentive for compliance with STURAA, Department of

---

529–30 (1982) (countering meritocracy-based argument by asserting that standardized tests are culturally biased, and further arguing that racial discrimination prevents talented minorities from truly competing on basis of merit); Alex M. Johnson, Jr., *Defending the Use of Quotas in Affirmative Action: Attacking Racism in the Nineties*, 1992 U. ILL. L. REV. 1043, 1070 (criticizing merit-based arguments against affirmative action because of subjective influences that define merit).

5. *See* Richard Morin & Sharon Warden, *Americans Vent Anger at Affirmative Action*, WASH. POST, Mar. 24, 1995, at A1 (evaluating national survey which showed that three out of four Americans disfavor affirmative action); William Raspberry, *What Actions Are Affirmative?*, WASH. POST, Aug. 21, 1995, at A21 (finding that, of 248,000 American teenagers polled, 90% opposed affirmative action programs in employment and academic admissions).

6. 115 S. Ct. 2097 (1995).

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

8. *See id.* (describing events that led prime contractor not to award subcontract to Adarand Constructors).

9. Pub. L. No. 100-17, 101 Stat. 132 (1987) (codified throughout various titles in U.S.C.).

10. Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub. L. No. 100-17, § 106(c)(1), 101 Stat. 132, 145 (codified throughout various titles in U.S.C.); *Adarand*, 115 S. Ct. at 2103.

11. 15 U.S.C. §§ 631–656 (1994).

12. *See* Pub. L. No. 100–17, § 106(c)(2)(B), 101 Stat. at 146 (utilizing definition of "socially and economically disadvantaged individuals" provided by Small Business Act); *see also* Small Business Act, 15 U.S.C. §§ 637(a)-(d), 644(g) (1994) (defining "disadvantaged small business concern" and authorizing award of contracts to such entities). The SBA requires that "not less than five percent of the total value of all prime contract and subcontract awards for each fiscal year" be awarded to disadvantaged enterprises. 15

Transportation regulations provide a bonus to prime contractors who subcontract to "disadvantaged business enterprises."[13] Hence, Mountain Gravel was entitled to a bonus of approximately $10,000 from the federal government for choosing minority-owned Gonzales Construction Co.[14] Subsequently, Adarand Constructors sued, claiming that the Fifth Amendment[15] prohibits the federal government from employing race-based, elective incentive programs designed to stimulate and augment contracting opportunities for minority-owned businesses.[16]

The United States District Court for the District of Colorado granted the defendants' motion for summary judgment.[17] The United States Court of Appeals for the Tenth Circuit affirmed, maintaining that the race-based program satisfied the constitutional requirements for federal affirmative action programs previously articulated by the United States

---

U.S.C. § 644(g)(1). Socially disadvantaged individuals are "those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities." *Id.* § 637(a)(5). Economically disadvantaged individuals are "those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged." *Id.* § 637(a)(6). Furthermore, the SBA entitles prime contractors to "presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Indian tribes, Asian Pacific Americans, and other minorities, or any other individual found to be disadvantaged by the [Small Business] Administration pursuant to [15 U.S.C. § 637(a)]." *Id.* § 637(d)(3)(C). *See generally* Neal Devins, *The Civil Rights Hydra*, 89 MICH. L. REV. 1723, 1746–49 (1991) (reviewing history of SBA).

13. Act of Oct. 24, 1978, Pub. L. No. 95-507, 92 Stat. 1757, 1760–65 (codified in scattered sections of 15 U.S.C.). A business can be certified as a "disadvantaged business enterprise" under the SBA or the STURAA. *See* 15 U.S.C. § 637(a)-(d) (1994) (outlining procedures to qualify business as disadvantaged business enterprise); Pub. L. No. 100-17, § 106(c), 101 Stat. at 145 (codified throughout various titles in U.S.C.) (establishing disadvantaged enterprise certification process). In *Adarand*, the Court noted that the record did not indicate which procedure Gonzales Construction Company used to obtain certification. *Adarand*, 115 S. Ct. at 2104.

14. *See* Brief for Respondent at 18, Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995) (No. 93-1841) (estimating that 10% of Mountain Gravel's prime contract was roughly equivalent to $10,000 that Mountain Gravel received as bonus for adhering to minority compensation clause of federal contract).

15. U.S. CONST. amend. V. The Fifth Amendment provides in pertinent part that "no person shall . . . be deprived of life, liberty, or property, without due process of law." *Id.*

16. Adarand Constructors, Inc. v. Skinner, 790 F. Supp. 240, 241 (D. Colo. 1992), *aff'd sub nom.* Adarand Constructors, Inc. v. Pena, 16 F.3d 1537 (10th Cir. 1994), *vacated*, 115 S. Ct. 2097 (1995).

17. *Id.* at 245. The district court granted summary judgment in favor of the defendants after determining that the plaintiffs presented no evidence that the defendants violated federal regulations. *Id.*

Supreme Court.[18] Adarand Constructors sought review of the Tenth Circuit's decision, and the United States Supreme Court granted certiorari.[19] The Supreme Court vacated the Tenth Circuit's holding and held that "[f]ederal racial classifications, like those of a state, must serve a compelling governmental interest and must be narrowly tailored to further that interest."[20] The Court remanded the case for evaluation in light of its new test for federal affirmative action programs—strict scrutiny review.[21] The strict scrutiny standard will require the lower court to determine whether the contract was awarded based on preferential racial classifications alone, or because actual conditions indicated that Gonzales Construction qualified as a "socially and economically disadvantaged business [entity]."[22]

This Recent Development examines the Court's holding in *Adarand* and questions the validity of the Court's opinion. Part II of this Recent Development reviews the historical evolution of affirmative action programs. Part III examines the Court's prior application of the equal protection doctrine to affirmative action programs. Part IV explores the *Adarand* Court's reasons for subjecting all federal affirmative action programs to a strict scrutiny level of review. Part V claims that the *Adarand*

---

18. Adarand Constructors, Inc. v. Pena, 16 F.3d 1537, 1547 (10th Cir. 1994), *vacated*, 115 S. Ct. 2097 (1995). In affirming, the court of appeals applied intermediate scrutiny to the federally sanctioned subcontracting compensation clause program used by Mountain Gravel. *Id.* at 1544. To withstand intermediate scrutiny, the challenged law must serve an important governmental objective and be substantially related to achieve that objective. *See* Ensley Branch, NAACP v. Seibels, 31 F.3d 1548, 1580–82 (11th Cir. 1994) (defining intermediate scrutiny test). The Tenth Circuit determined that the Supreme Court's prior decisions, articulated in Fullilove v. Klutznick, 448 U.S. 448 (1980), and Metro Broadcasting v. FCC, 497 U.S. 547 (1990), which used intermediate scrutiny review, allowed Congress to enact race-conscious legislation. *Adarand Constructors, Inc.*, 16 F.3d at 1545 & n.12.

19. Adarand Constructors, Inc. v. Pena, 115 S. Ct. 41 (1994).

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

21. *Id.*

22. *Id.* The Court cautioned the Tenth Circuit to evaluate the minority subcontracting compensation clause to determine whether it was necessary to achieve a compelling government interest. *Id.* The Court also suggested that the lower court determine whether nonracial alternatives were considered before the affirmative action plan was implemented. *Id.* The Court's holding suggests that it would uphold a nonracial-preference program directed toward people who are poor or otherwise economically disadvantaged, but warns that racial preferences, standing alone, would surely be deemed unconstitutional. *See id.* at 2117 (recognizing that race-based classifications may constitutionally be made by government so long as they are narrowly tailored and promote compelling interest of government). The Court expressed dismay over the discrepancies in the regulations dealing with whether a race-based presumption was applicable or inapplicable, as well as over definitional differences involving qualifying the business as a disadvantaged business entity. *Id.* at 2118.

Court ignored both constitutional strictures and American history by taking an anachronistic approach to federal affirmative action programs. Finally, Part VI assesses the constitutional validity of federal affirmative programs under the Court's new strict scrutiny test.

II. THE LEGAL FOUNDATIONS OF AFFIRMATIVE ACTION

Affirmative action programs originated in the turbulent 1960s, when the Civil Rights Movement stirred national sentiments concerning existing racial inequality.[23] This politically charged uproar pitted southern white-supremacists who opposed racial desegregation against civil rights activists who advocated equal treatment for African-Americans.[24] In response, Congress enacted the Civil Rights Act of 1964.[25] The Civil Rights Act includes Title VI,[26] which bans discrimination in federally supported programs, and Title VII,[27] which prohibits employment discrimination in the private sector on the basis of race, color, religion, national origin, or sex.[28] Additionally, Vice President Lyndon B. Johnson established a

---

23. *See* KERMIT L. HALL, THE MAGIC MIRROR 324-25 (1989) (describing nationwide Civil Rights Movement and noting that nonviolent forms of protest, including boycotts and "sit-ins," were met with violence in South); Kenneth L. Karst, *Boundaries and Reasons: Freedom of Expression and the Subordination of Groups*, 1990 U. ILL. L. REV. 95, 95-96 (detailing events in Civil Rights Movement, which began with sit-ins staged by students who were refused service, and which culminated in nationwide boycotts of busing systems and "freedom rides"); Ronald J. Krotoszynski, Jr., *Celebrating Selma: The Importance of Context in Public Forum Analysis*, 104 YALE L.J. 1411, 1414 (1995) (describing 25,000-person protest march to Birmingham, Alabama as effort to bring national attention to civil rights).

24. *See* Laurent Belsie, *The Face of Hatred in America*, CHRISTIAN SCI. MONITOR, Nov. 27, 1991, at 8 (noting that Klu Klux Klan efforts against Civil Rights Movement may have spurred civil rights legislation).

25. *See* Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 241–49, 252–66 (codified as amended at 42 U.S.C. §§ 2000a-2000f (1988)) (prohibiting racial discrimination in voting (Title I), public accommodations (Title II), public facilities (Title III), public schools (Title IV), programs receiving federal funds (Title VI), and employment by firms affecting interstate commerce (Title VII)); *see also* S. REP. No. 872, 88th Cong., 2d Sess. 8–9, 15–22 (1964), *reprinted in* 1964 U.S.C.C.A.N. 2355, 2362–63, 2369–75 (reporting that both Republicans and Democrats were committed to advancing civil rights, and describing various discriminatory practices warranting federal legislation to protect minority rights).

26. 42 U.S.C. § 2000d (1988).

27. *Id.* § 2000e.

28. *Id.* § 2000e-2(a). The Civil Rights Act provides that nothing in Title VII shall be interpreted to require any employer to grant

> preferential treatment to any individual or to any group because of the race, color, religion, sex or national origin of the individual or group if an imbalance exists between the total number or percentage of persons of any race, color, religion, sex or national origin in any area with the total number or percentage of persons employed by any employer.

foundation for affirmative action by crafting Executive Order 10,925.[29] Executive Order 10,925 prohibited federal government contractors from discriminating against "any employee or applicant for employment because of race, creed, color, or national origin."[30]

Following the death of President John F. Kennedy, President Johnson issued Executive Order 11,246,[31] which superseded Executive Order 10,925 and forbade discrimination based on race, color, religion, national origin, or gender by organizations receiving federal contracts worth more than $10,000.[32] Executive Order 11,246 also compelled contractors with government contracts totalling $50,000 or more and with 50 or more em-

---

Id. § 2000e-2(j); *see* Larry M. Parsons, Note, *Title VII Remedies: Reinstatement and the Innocent Incumbent Employee*, 42 VAND. L. REV. 1441, 1444 (1989) (reviewing coverage afforded to employees under Title VII). Congress later enacted the Equal Employment Opportunity Act of 1972. Pub. L. No. 92-261, 86 Stat. 103 (1972) (codified as amended at 42 U.S.C. §§ 2000e, 2000e-1-6, 2000e-8-9, 2000e-13-17 (1988)). This Act effectively amended the Civil Rights Act by granting the Equal Employment Opportunity Commission the power to execute the principal aims of the Civil Rights Act. *See* 42 U.S.C. §§ 2000e-1 to -6 (granting Equal Employment Opportunity Commission broad enforcement powers).

29. Exec. Order No. 10,925, 3 C.F.R. 448 (1959–1963), *superseded by* Exec. Order No. 11,246, 3 C.F.R. 339 (1964-1965), *reprinted in* 42 U.S.C. § 2000e (1988); *see* HUGH D. GRAHAM, THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY 33, 35 (1990) (discussing role of Vice-President Lyndon B. Johnson in crafting Executive Order 10,925).

30. Exec. Order No. 10,925, 3 C.F.R. 448 (1959-1963), *superseded by* Exec. Order No. 11,246, 3 C.F.R. 339 (1964-1965), *reprinted in* 42 U.S.C. § 2000e (1988). The order also mandated that government contractors take "affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin." *Id.*; *see* Farkas v. Texas Instrument, Inc., 375 F.2d 629, 631, 632–33 n.2 (5th Cir. 1967) (delineating requirements of subcontracting clauses mandated by Executive Order 10,925 and describing procedures for compliance); Michael K. Braswell et al., *Affirmative Action: An Assessment of Its Continuing Role in Employment Discrimination Policy*, 57 ALB. L. REV. 365, 367–68 (1993) (discussing Executive Order 10,925 and explaining that President's Committee on Equal Employment Opportunity was created to enforce mandates with sanctions, such as canceling of contracts or even blocking those who failed to comply from securing future government contracts); Terry Eastland, *The Case Against Affirmative Action*, 34 WM. & MARY L. REV. 33, 33–34 (1992) (discussing scope of Executive Order 10,925 and determining that order was originally designed to protect African-Americans, but was eventually expanded to protect other racial groups).

31. Exec. Order No. 11,246, 3 C.F.R. 339 (1964-1965), *reprinted in* 42 U.S.C. § 2000e (1988).

32. *See* Contractors Ass'n v. Secretary of Labor, 442 F.2d 159, 168-71 (3d Cir. 1971) (detailing history of Executive Order 11,246); Frederick A. Morton, Jr., Note, *Class-Based Affirmative Action: Another Illustration of America Denying the Impact of Race*, 45 RUTGERS L. REV. 1089, 1123-24 (1993) (summarizing contractual requirements of Executive Order 11,246).

ployees to establish affirmative action plans.[33] Realizing that Executive Order 11,246 contained various gaps, such as a lack of enforcement mechanisms,[34] President Johnson issued Revised Order 4, which required federal contractors to include enforceable "goals" and "timetables" in their affirmative action plans.[35]

Because the construction industry was especially noncompliant in employing African-Americans,[36] the Nixon administration, pursuant to its powers under Executive Order 11,246,[37] established the Philadelphia

---

33. *See* Exec. Order No. 11,246, 3 C.F.R. 339 (1964-1965), *reprinted in* 42 U.S.C. § 2000e (1988) (promoting nondiscriminatory employment among government contractors).

34. Following the implementation of Executive Order 11,246, some courts refused to recognize the standing of plaintiffs claiming to have a cause of action for violation of the order. *See* Cohen v. Illinois Inst. of Technology, 524 F.2d 818, 822 n.4 (7th Cir. 1975) (denying professor's suit against university to recover damages for alleged sex discrimination in violation of Executive Order 11,246 because order "cannot give rise to an independent private cause of action"), *cert. denied*, 425 U.S. 943 (1976); Traylor v. Safeway Stores, 402 F. Supp. 871, 873-77 (N.D. Cal. 1975) (dismissing cause of action stemming from supermarket's failure to file affirmative action plan because plaintiff lacked standing).

35. *See* Revised Order No. 4, 41 C.F.R. §§ 660-2.11 to -2.12 (1995) (noting various factors used to evaluate contractors' utilization of minorities). The goals of Executive Order 11,246 are carried out through Revised Order 4, which lists several factors to be considered in determining whether or not there is an underutilization of minorities, including: (1) the minority population in the surrounding work area; (2) minority unemployment in the locale; (3) the overall availability of minorities who have the ability to perform the task; and (4) the training opportunities for minorities. *Id.*

36. *See* Fullilove v. Klutznick, 448 U.S. 448, 465-66 (1980) (describing study which showed that minority business enterprises received only .65% of gross receipts generated in national construction industry); HERBERT HILL, BLACK LABOR AND THE AMERICAN LEGAL SYSTEM 12–26 (1977) (noting that Jim Crow laws excluded African-Americans from engaging in opportunities related to construction industry and recognizing that, until 1964, labor law failed to protect minorities from discrimination); *see also* James E. Jones, Jr., *The Genesis and Present Status of Affirmative Action in Employment: Economic, Legal, and Political Realities*, 70 IOWA L. REV. 901, 913 (1985) (speculating that impetus of government affirmative action plan was urban renewal efforts within ghettos, coupled with civil rights activists' complaints about widespread discriminatory practices in construction hiring); Matthew L. Spitzer, *Justifying Minority Preferences in Broadcasting*, 64 S. CAL. L. REV. 293, 355–56 n.192 (1991) (describing congressional finding which indicates that construction industry engaged in past discriminatory conduct against minorities); *cf.* United Steelworkers v. Weber, 443 U.S. 193, 198 n.1 (1979) (indicating that on national basis, "[j]udicial findings of exclusion from crafts on racial grounds are so numerous as to make such exclusion a proper subject for judicial notice"); ROBERT L. FACTOR, THE BLACK RESPONSE TO AMERICA 45 (1970) (criticizing predominately white unions for maintaining policy of refusing to admit African-American laborers). *See generally* David L. Rose, *Twenty-five Years Later: Where Do We Stand on Equal Opportunity Law Enforcement?*, 42 VAND. L. REV. 1121, 1126–28, 1162–63 (1989) (providing overview of social and economic changes affecting African-Americans).

37. Exec. Order No. 11,246, 3 C.F.R. 339 (1964-1965), *reprinted in* 42 U.S.C. § 2000e (1988).

Plan—an affirmative action plan requiring federal contractors to make good faith efforts to attain minority employment goals.[38] Under this plan, the Nixon administration required construction bid invitations to include target ranges, rather than quotas.[39] Initially, the Comptroller General concluded that the Philadelphia Plan was illegal.[40] However, in response to intense lobbying from the Nixon Administration, Congress rejected the Comptroller General's finding and subsequently approved the plan.[41]

III. THE SUPREME COURT'S APPLICATION OF EQUAL PROTECTION PRINCIPLES TO AFFIRMATIVE ACTION PLANS

Even before this legislative and executive action of the 1960s and 1970s, the Equal Protection Clause of the Fourteenth Amendment had served to further the cause of racial equality.[42] Prior to the enactment of

---

38. Robert P. Schuwerk, Comment, *The Philadelphia Plan: A Study in the Dynamics of Executive Power*, 39 U. CHI. L. REV. 723, 723–24 (1972); *see* Dorothy J. Gaiter, *Mr. Fletcher's Plan: Lights, Camera, Affirmative Action*, WALL ST. J., Apr. 5, 1995, at A1 (describing Philadelphia Plan, which implored Philadelphia area to make "good faith effort" to hire minorities, and noting that government contractors who acted in bad faith would be sanctioned). This plan superseded the "old" Philadelphia Plan of 1967, which was suspended by the Department of Labor after the Comptroller General issued an opinion stating that the plan violated principles of competitive bidding. *See* Note, *The Philadelphia Plan*, 45 NOTRE DAME L. REV. 678, 680 n.15 (1970) (describing origin and history of Philadelphia Plan).

39. *See* HUGH D. GRAHAM, THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY 327 (1990) (discussing substitution of quotas for target ranges in implementing Philadelphia Plan); *see also* Earl M. Leiken, *Preferential Treatment in the Skilled Building Trades: An Analysis of the Philadelphia Plan*, 56 CORNELL L. REV. 84, 87-91, 98-112 (1970) (discussing background of Philadelphia Plan and accompanying legal issues, including constitutional considerations, implied congressional disapproval, legality under Title VII, and contractors' collective bargaining agreements).

40. *See* HUGH D. GRAHAM, THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY 331 (1990) (describing Comptroller General's ruling that Philadelphia Plan violated Title VII of Civil Rights Act).

41. *See id.* 331-39 (noting that Senator Sam Ervin and AFL-CIO attacked legal validity of Philadelphia Plan, but Attorney General John Mitchell and Labor Solicitor Laurence H. Silberman successfully defended plan); *see also* Robert P. Schuwerk, Comment, *The Philadelphia Plan: A Study in the Dynamics of Executive Power*, 39 U. CHI. L. REV. 723, 749 n.141 (1972) (discussing news conference held by George P. Shultz, Secretary of Labor, and Arthur A. Fletcher, Assistant Secretary of Labor, which urged House members to pass "new" Philadelphia Plan).

42. *See* U.S. CONST. amend. XIV, § 1 (providing all United States citizens with equal protection of law). *But see* H.R. REP. NO. 238, 92d Cong., 1st Sess. 18 (1971) (declaring that relief under 14th Amendment is "an empty promise" for disadvantaged individuals), *reprinted in* 1972 U.S.C.C.A.N. 2137, 2153–54. Section 1 of the 14th Amendment provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No

the Fourteenth Amendment, African-American individuals were not afforded the same legal protections extended to Caucasian men.[43] However, with the abolition of slavery and the enactment of the Thirteenth, Fourteenth, and Fifteenth Amendments, African-Americans were accorded a fundamental right to equality, at least in theory.[44] The Fourteenth Amendment was the most far-reaching of all the Reconstruction Amendments because it gave the federal government the explicit power to protect the newly freed slaves' civil rights against encroachment by the states.[45]

The Court eventually expanded the scope of the Fourteenth Amendment's protections,[46] and in *Regents of the University of California v.*

State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

43. *See* Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment As a Prohibition Against the Racial Use of Peremptory Challenges*, 76 CORNELL L. REV. 1, 13–14 (1990) (noting that legal landscape prior to Reconstruction Amendments denied slaves right to claim legal redress and also prohibited slaves from testifying against whites); Paul Finkelman, *The Crime of Color*, 67 TUL. L. REV. 2063, 2091–92 (1993) (noting that blacks were denied right to defend themselves against assaults perpetrated by whites); A. Leon Higginbotham, Jr. & Anne F. Jacobs, *The "Law Only As an Enemy:" The Legitimization of Racial Powerlessness Through the Colonial and Antebellum Criminal Laws of Virginia*, 70 N.C. L. REV. 969, 975 n.11 (1992) (maintaining that during slavery era, white men thought that slaves were property, and listing various forms of oppression employed by whites).

44. *See* Strauder v. West Virginia, 100 U.S. 303, 306 (1879) (commenting that incorporation of 14th Amendment into Constitution occurred because emancipated slaves lacked legal protection, and noting that 14th Amendment was structured and embraced to guarantee "colored race" civil rights comparable to that enjoyed by "whites"); *see also* Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753, 754-85 (1985) (providing review of congressional intent in enacting 14th Amendment through examination of contemporaneous racially preferential legislation, and suggesting that Congress did not believe that benign discrimination violated 14th Amendment).

45. *See* U.S. CONST. amend. XIV, § 5 (granting Congress power to enforce constitutional right to equality with appropriate legislation); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 286 (1964) (Douglas, J., concurring) (acknowledging congressional authority in § 5 of 14th Amendment to eradicate racial discrimination); *see also* The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 71–72 (1873) (stating that purpose behind enactment of 14th Amendment was to protect newly freed slaves).

46. *See* Hernandez v. Texas, 347 U.S. 475, 477-78 (1954) (determining that equal protection under 14th Amendment encompasses racial classes besides "white" and "Negro"); Buchanan v. Warley, 245 U.S. 60, 76 (1917) (noting that broad language of 14th Amendment grants equal protection to all); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) (announcing that all persons within territorial jurisdiction qualify for equal protection); *see also* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (arguing that 14th

Bakke,[47] the Court, in a plurality opinion, applied the Equal Protection Clause to established affirmative action programs for the first time.[48] In

---

Amendment extends to many areas of law, but that different levels of scrutiny may apply depending on type of interest being protected). The Equal Protection Clause of the 14th Amendment applies directly to states and municipalities. *See* Home Tel. & Tel. Co. v. City of L.A., 227 U.S. 278, 286-89 (1913) (deciding that 14th Amendment extends to action taken by state governments). Furthermore, the reverse incorporation doctrine applies the Equal Protection Clause of the 14th Amendment, through the Due Process Clause of the 5th Amendment, to the federal government. *See* Johnson v. Robison, 415 U.S. 361, 364 n.4 (1974) (holding that, although 5th Amendment does not contain Equal Protection Clause, discrimination which contravenes Equal Protection Clause of 14th Amendment is also violative of Due Process Clause of 5th Amendment); Bolling v. Sharpe, 347 U.S. 497, 498–499 (1954) (noting that Due Process Clause of 5th Amendment incorporates 14th Amendment obligations and imposes same duty on federal government). *But cf.* Bradford R. Clark, *Judicial Review of Congressional Section Five Action: The Fallacy of Reverse Incorporation*, 84 COLUM. L. REV. 1969, 1975-83 (1984) (arguing that current tendency of courts to subject state and congressional action to identical equal protection strictures is inappropriate in cases where this treatment conflicts with text, history, and structure of Constitution).

47. 438 U.S. 265 (1978) (plurality opinion).

48. *See Bakke*, 438 U.S. at 284–87 (acknowledging that Equal Protection Clause applies to affirmative action); *see also* Albert Y. Muratsuchi, Comment, *Race, Class, and UCLA School of Law Admissions, 1967-1994*, 16 CHICANO-LATINO L. REV. 90, 97 (1995) (discussing significance of *Bakke* as first decision involving affirmative action and equal protection). The Court has also addressed affirmative action programs in the private sector. In *United Steelworkers v. Weber*, the Court was called upon to decide whether Title VII forbids private employers from implementing voluntary affirmative action programs. 443 U.S. 193, 197 (1979). In *Weber*, Kaiser Aluminum and Chemical Corporation and United Steelworkers of America negotiated an affirmative action plan that reserved 50% of Kaiser's openings for African-Americans in an attempt to reflect the percentage of African-Americans within the local labor force. *Id.* at 197-99. Because Kaiser was a private company and no state action was involved, the Court proceeded to analyze the case on Title VII grounds. *Id.* at 200. After reviewing Title VII's legislative history, the Court upheld the plan, concluding that Congress intended the statute to serve as a broad, remedial tool for eliminating social and economic barriers that kept African-Americans poor, and signalled that Title VII does not require employers to redress "de facto racial imbalance[s]," but neither does it enjoin them from doing so. *Id.* at 205-06; *see also* Tangren v. Wackenhut Servs., Inc., 658 F.2d 705, 707 (9th Cir. 1981) (deciding that Title VII does not prohibit employers without history of race discrimination from enacting voluntary affirmative action programs); Cohen v. Community College of Phila., 484 F. Supp. 411, 434 (E.D. Pa. 1980) (reasoning that, under *Weber*, employers' voluntary affirmative action plans are justifiable in light of historical racial discrimination in relevant occupational sectors, even though employer has not participated in such discriminatory practices). In *Local 28 of the Sheet Metal Workers' Int'l Assoc. v. EEOC*, the Court examined an affirmative action program with which a court had ordered a union to comply because the union had previously deliberately discriminated in its hiring practices in favor of whites. 478 U.S. 421, 432-47 (1986). A lower court ordered the union to have a 29% minority membership at a set future date and imposed penalties for not doing so. *Id.* at 432-35. In affirming, the Court stated that "affirmative race-conscious relief as a remedy for past discrimination" is warranted when discrimination is "persistent or egregious . . . or where necessary to dissipate the lingering effects of pervasive discrimination." *Id.* at 445. *See generally* Ronald W.

Bakke, the Court struck down a state-sponsored affirmative action admissions program that reserved sixteen percent of the seats available at the University of California at Davis Medical School for minority applicants.[49] Allan Bakke, a white applicant, had been rejected twice for admission, although he had amassed credentials superior to most minority admittees.[50] Bakke sued, claiming that the university's admission program violated the Fourteenth Amendment and Title VI of the 1964 Civil Rights Act.[51]

Justice Powell announced the judgment of the Court in *Bakke* and suggested that public university admissions plans designed to favor racial minorities[52] must be necessary to achieve a compelling governmental objective and narrowly tailored to achieve that objective.[53] Justice Powell examined the four objectives of the university's minority admissions program: (1) to increase the historic shortage of minority medical students and doctors;[54] (2) to alleviate past discrimination by society;[55] (3) to enlarge the number of doctors who would practice in impoverished commu-

---

Adelman, Note, *Voluntary Affirmative Action Plans by Public Employers: The Disparity in Standards Between Title VII and the Equal Protection Clause*, 56 FORDHAM L. REV. 403, 407–13 (1987) (reviewing Supreme Court precedent applying Title VII to affirmative action programs).

49. *Bakke*, 438 U.S. at 272-75. The minority groups considered by the university for reserved admissions included African-Americans, Chicanos, and Asian-Americans. *Id.* at 276 n.6.

50. *See id.* at 277-78 n.7 (comparing grade point average of Bakke to that of minority admittees).

51. *Id.* at 277–78; *see* U.S. CONST. amend. XIV, § 1 (establishing that "[n]o State shall . . . deny any person within its jurisdiction the equal protection of the laws"); 42 U.S.C. § 2000d (1988) (stating that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance").

52. Justice Powell found that the actions of the university were actionable under the 14th Amendment because the university received federal funding. *Bakke*, 438 U.S. at 282-83 n.17.

53. *See id.* at 291, 299, 305 (suggesting that strict scrutiny is appropriate standard of review). Justice Powell reasoned that 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." *Id.* at 289-90.

54. *Id.* at 307. Justice Powell dismissed Davis's defense that the special admissions program assured a specific percentage of racial or ethnic groups within its student body. *Id.* Absent a detailed analysis, Justice Powell asserted, such an aim was invalid on its face and unconstitutional. *Id.*

55. *Id.* In repudiating this objective, Justice Powell held that affirmative action could not be used to rectify societal discrimination. *Id.* Rather, Justice Powell suggested that the objective of remedying past discrimination could be sufficiently compelling only where explicit judicial, legislative, or administrative findings of specific constitutional or statutory violations had been made. *Id.*

nities;[56] and (4) to promote racial diversity.[57] Justice Powell found that the fourth policy—promotion of racial diversity—was a compelling government interest that could support a race-based classification.[58] However, the Court ultimately struck down the university's program because the means chosen to achieve diversity were not the least restrictive means available.[59]

Although a majority of the Court agreed that the university's program was unconstitutional, Justice Powell was unable to convince a majority of the Court that strict scrutiny was the appropriate level of review. Justices Brennan, White, Marshall, and Blackmun thought intermediate scrutiny was the correct standard of review.[60] Justices Stevens, Stewart, Rehnquist, and Chief Justice Burger asserted that the admissions program violated Title VI, and did not suggest a level of review.[61] Thus, *Bakke* did not clearly and firmly establish a standard for reviewing state affirmative action programs.[62]

The Court did not set a clear standard for reviewing state affirmative action programs until 1989, when the Court explicitly held in *City of Richmond v. J.A. Croson Co.*[63] that all state affirmative action programs were subject to a strict level of scrutiny.[64] The City of Richmond had established an affirmative action plan requiring contractors to subcontract at

---

56. *Bakke*, 438 U.S. at 310–11.

57. *Id.* at 311-15.

58. *Id.* at 314; *see also* Grove Sch. v. Guardianship & Advocacy Comm'n, 596 F. Supp. 1361, 1364 (N.D. Ill. 1984) (following holding of *Bakke* by using diversity as support for educational institution's right to establish unique curriculum).

59. *See id.* at 318 & n.53 (surmising that Davis Plan was unfair because it limited seats available to nonminorities).

60. *Bakke*, 438 U.S. at 359 (Brennan, J., concurring in part and dissenting in part).

61. *Id.* at 421 (Stevens, J., concurring in part and dissenting in part).

62. *See* Michigan Rd. Builders Ass'n v. Milliken, 834 F.2d 583, 596 (6th Cir. 1987) (Lively, C.J., dissenting) (noting that, as of 1987, Supreme Court had failed to articulate standard of review for affirmative action programs due to lack of consensus); Michel Rosenfeld, *Decoding* Richmond: *Affirmative Action and the Meaning of Constitutional Equality*, 87 MICH. L. REV. 1729, 1731 (1989) (implying that, until 1989, majority of Court could not agree on single standard of review for state affirmative action plans).

63. 488 U.S. 469 (1989) (plurality opinion).

64. *Croson*, 488 U.S. at 494. The Court reasoned 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." *Id.* Commentators predicted negative results for race-based affirmative action programs after the Court's decision in *Croson*. *See* Kathleen M. Sullivan, City of Richmond v. J.A. Croson Co.: *The Backlash Against Affirmative Action*, 64 TUL. L. REV. 1609, 1614-15 (1990) (predicting widespread negative impacts on existing state and local minority set-aside programs as result of *Croson* decision); Jill B. Scott, Note, *Will the Supreme Court Continue to Put Aside Local Government Set-Asides as Unconstitutional?: The Search for an Answer in* City of Richmond v. J.A. Croson Co., 42 BAYLOR L. REV. 197, 229 (1990) (commenting that *Croson* decision indicated that race-

least thirty percent of their work to minority business enterprises.[65] To comply with the plan, J.A. Croson Company was required to subcontract to a minority firm that charged a seven percent fee for doing little more than paperwork.[66]

Justice O'Connor, writing for the Court in *Croson*, stated that before a state affirmative action program is implemented, there must be a specific finding of discrimination.[67] The Court conclusively found no facts adequate to demonstrate prior discrimination by the City of Richmond.[68] According to the Court, even if prior discrimination had been found, the City's plan would still violate the Fourteenth Amendment's Equal Protection Clause because it was not narrowly tailored to remedy past discrimination.[69]

The history of the Court's application of constitutional principles to federal affirmative action plans is equally convoluted. For example, in *Fullilove v. Klutznick*,[70] the Court failed to produce a standard by which courts could assess the appropriate level of scrutiny for reviewing federal affirmative action programs.[71] The Court in *Fullilove* reviewed the con-

---

based affirmative action programs enacted by local governments would not survive strict constitutional scrutiny).

65. *Croson*, 488 U.S. at 477-80. Richmond's affirmative action plan defined a qualified minority business enterprise as a " 'business at least fifty-one (51) percent of which is owned and controlled . . . by minority group members.' " *Id.* at 478 (quoting RICHMOND, VA., CITY CODE § 12-23 (1985)). Richmond's affirmative action plan further defined minority group members as " '[c]itizens of the United States who are Blacks, Spanish-speaking, Orientals, Indians, Eskimos or Aleuts.' " *Id.* (quoting RICHMOND, VA., CITY CODE § 12-23 (1985)). The Court concluded that the affirmative action plan was over-inclusive because a minority business from any part of the country could qualify under the program. *Id.* at 508.

66. *Id.* at 482-83.

67. *Id.* at 498.

68. *Id.* at 498–506.

69. *Croson*, 488 U.S. at 507-08.

70. 448 U.S. 448 (1980) (plurality opinion).

71. *See* South Fla. Chapter of Associated Gen. Contractors v. Metropolitan Dade County, Fla., 723 F.2d 846, 850 (11th Cir. 1984) (noting lack of consensus in *Bakke*, and acknowledging that *Fullilove* also failed to produce majority opinion); Mark D. Plevin, Note, *The Constitutionality of Affirmative Action in Public Employment: Judicial Deference to Certain Politically Responsible Bodies*, 67 VA. L. REV. 1235, 1240-41 (1981) (discussing confusion created in lower courts by plurality decision in *Bakke* and noting that one court used intermediate scrutiny test advocated by Justice Brennan, rather than strict scrutiny test suggested by Justice Powell). Chief Justice Burger, joined by Justices Powell and White, announced the judgment of the Court in *Fullilove*, and applied both the intermediate and strict standards of review before declaring that the affirmative action program was constitutional under either standard. *Fullilove*, 448 U.S. at 492. Justices Marshall, Brennan, and Blackmun concurred in the Court's judgment, but believed that intermediate scrutiny was the appropriate level of review, stating that "the proper inquiry is whether

stitutionality of the Minority Business Enterprise (MBE) provision of the Public Works Employment Act of 1977,[72] which mandated that applicants obtaining federal funds for state and local building projects spend at least ten percent of those funds on goods or services provided by minority business enterprises.[73] In a plurality decision, the *Fullilove* Court decided that the statute was constitutional under either intermediate review or the strict scrutiny review applied in *Bakke*.[74]

Writing for the plurality, Chief Justice Burger concluded that under either the Spending Clause or Section Five of the Fourteenth Amendment, Congress had authority to enact the MBE provision.[75] The Court upheld the MBE provision on the ground that Congress, unlike the states, has broad power under the Fourteenth Amendment to remedy the effects of past racial discrimination.[76] The Court reasoned that congressional

---

racial classifications designed to further remedial purposes serve important governmental objectives and are substantially related to [the] achievement of those objectives." *Id.* at 519 (Marshall, J., concurring). Justice Powell surmised that strict scrutiny should apply because a racial classification must be "a necessary means of advancing a compelling governmental interest." *Id.* at 496 (Powell, J., concurring). However, Justice Stewart, joined by Justice Rehnquist in dissent, did not apply a standard of review, claiming that the use of a race-based classification system is unconstitutional if specific acts of discriminatory conduct are not first identified. *Id.* at 526-28 (Stewart, J., dissenting). Justice Stevens also dissented and concluded that the affirmative action program was unconstitutional because it bestowed a preference on minorities without the use of objective criteria. *Id.* at 539–41 (Stevens, J., dissenting). Yet, Justice Stevens did not suggest a standard of review to be applied in future affirmative action cases. *See id.* (asserting that affirmative action program was unconstitutional, but failing to discuss appropriate level of scrutiny for such programs).

72. 42 U.S.C. § 6705(f)(2) (1988).

73. *See Fullilove*, 448 U.S. at 458–75 (reviewing, in detail, MBE provision); *see also* 42 U.S.C. § 6705(f)(2) (mandating percentage of federal funds that must go to MBEs). The Public Works Employment Act of 1977 provides in pertinent part:

> Except to the extent that the Secretary determines otherwise, no grant shall be made under this chapter for any local public works project unless the applicant gives satisfactory assurance to the Secretary that at least 10 percent of the amount of each grant shall be expended for minority business enterprises. For purposes of this paragraph, the term "minority business enterprise" means a business at least 50 percent of which is owned by minority group members or, in case of a publicly owned business, at least 51 percent of the stock of which is owned by minority group members. For the purposes of the preceding sentence, minority group members are citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts.

42 U.S.C. § 6705(f)(2).

74. *See Fullilove*, 448 U.S. at 492 (commenting that MBE plan would be constitutional under either intermediate or strict scrutiny).

75. *Id.* at 472-78.

76. *See id.* at 483, 490 (discussing Congress's broad remedial powers). Chief Justice Burger stated: "It is fundamental that in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress, expressly charged by the Constitution with competence and authority to enforce equal protection

measures need not be color-blind, so long as the measures are narrowly tailored.[77] In addressing the contention that the MBE program was overinclusive because it applied to races other than the African-American race, the Court noted that the program's administrative waiver and exemption procedures were sufficient safeguards to assure that the MBE program was not overinclusive.[78]

In *Metro Broadcasting v. Federal Communications Commission*,[79] the Court took a somewhat different approach and concluded that intermediate scrutiny was the appropriate standard of review in evaluating federal affirmative action programs,[80] reasoning that deference must be granted to Congress in implementing benign affirmative action plans.[81] The Court declared that the First Amendment supports Federal Communications Commission (FCC) regulations designed to promote minority-owned broadcasting stations.[82] After discussing the history of minority participation in the broadcasting industry,[83] the Court concluded that " 'the effects of past inequities stemming from racial and ethnic discrimination [had] resulted in a severe underrepresentation of minorities in the media of mass communications.' "[84] In applying intermediate scrutiny, the Court examined whether the FCC's race-based measures served important governmental objectives, and determined that programming diversity is itself an important governmental objective because the public has a "right to receive a diversity of views and information over the airwaves."[85] The Court then evaluated whether the FCC's programs were

---

guarantees." *Id.* at 483. Chief Justice Burger also commented that deference must be granted to Congress because of its role in trying new techniques to accomplish remedial objectives. *Id.* at 490.

77. *See id.* at 482 (summarizing permissible congressional action within context of desegregation cases).

78. *Fullilove*, 448 U.S. at 486-89.

79. 497 U.S. 547 (1990).

80. *See Metro Broadcasting*, 497 U.S. at 564–65 (summarizing Court's rejection of strict scrutiny analysis when reviewing race-based classifications in federal legislation).

81. *Id.* at 563.

82. *Id.* at 567-68.

83. *Id.* at 552–56. The Court found that, although minorities statistically comprised one-fifth of the nation's population, approximately two percent of the 11,000 radio and television stations in the United States were owned by minorities. *Id.* at 553.

84. *Metro Broadcasting*, 497 U.S. at 566-68 (quoting H.R. CONF. REP. No. 765, 97th Cong., 2d Sess. 43 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2237, 2287). The Court also noted that the promotion of diversity was a compelling governmental objective and that ownership of a broadcasting company affected the type of material that a company would inevitably broadcast. *Id.* at 569.

85. *Id.* at 567-68. Justice Brennan determined that minority-preference programs designed to augment minority ownership diversify the limited number of broadcasters on the airwaves, just as a diverse student body will encourage " 'a robust exchange of ideas' "

substantially related to fulfilling the government's objective, and decided that a constitutionally sufficient nexus existed between minority ownership and programming diversity.[86]

In sum, the Court has historically approached the constitutionality of federal and state affirmative action programs differently. The Court has deferred to congressional attempts to remedy past historical discrimination through federal affirmative action programs, while invalidating state affirmative action programs under strict scrutiny review.[87] However, with the Court's recent decision in *Adarand*, the future of federal affirmative action programs has been jeopardized.

IV. THE DECISION OF *ADARAND CONSTRUCTORS, INC. V. PENA*

Since *Metro Broadcasting*, the membership of the Court has changed significantly. Specifically, Justice Thomas, a conservative Republican, replaced Justice Marshall, who was widely considered a liberal civil rights activist, thereby theoretically creating a new conservative majority.[88] The

---

at a university. *Id.* (quoting Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 311-12 (1978)).

86. *Id.* at 569-79. Justice Brennan announced that *Croson* would not control the Court's decision because the strict scrutiny standard articulated therein was limited only to race-based measures adopted by state and local governments. *Id.* at 565. Justice Brennan then opined that "a program employing a benign racial classification . . . adopted by an administrative agency at the explicit direction of Congress" must be reviewed with great deference. *Id.* at 563. Justice Brennan noted that both Congress and the FCC had found a correlation between broadcast diversity and minority ownership. *Id.* at 569. In fact, Justice Brennan recounted numerous acts and findings which expressly concluded that minority ownership polices were warranted in achieving broadcast diversity. *Id.* at 568-79. Justice Brennan found that the FCC had, in fact, declined to implement more extreme measures in maintaining its goal of programming diversity. *Id.* at 588-92. Finally, Justice Brennan explained that the FCC's techniques did not unjustifiably burden nonminorities. *Id.* at 596.

87. *Compare Fullilove*, 448 U.S. at 490–92 (upholding federal affirmative action program) *with Croson*, 488 U.S. at 507–08 (invalidating state affirmative action program because it failed to satisfy strict scrutiny).

88. *See* Erwin Chemerinsky, *The Crowded Center*, A.B.A. J., Oct. 1994, at 78, 78-79 (reporting replacement of Justice Marshall with Justice Thomas, and noting Thomas's routinely conservative voting practices); Juan Williams, *A Question of Fairness; Clarence Thomas, a Black, Is Ronald Reagan's Chairman of the Equal Employment Opportunity Commission*, ATLANTIC, Feb. 1987, at 70, 79 (reviewing letter written by Clarence Thomas that revealed his belief that Constitution should be interpreted without regard to race); *I Emphasize Black Self-Help: Thomas's Thoughts on Quotas, the Work Ethic, and Conservatism*, WASH. POST, July 2, 1991, at A7 (quoting variety of public statements by Clarence Thomas indicating opposition to affirmative action programs); *see also* David G. Savage, *Race Matters: New Cases Return a Volatile Issue to the Top of the Supreme Court's Agenda*, A.B.A. J., Jan. 1995, at 40, 40 (predicting that retirement of liberal Justices replaced by more conservative Justices creates new Supreme Court majority likely to strike down affirmative action programs).

Supreme Court's 1995 decision in *Adarand Constructors, Inc. v. Pena*[89] illustrates the Court's new conservative bent, as Justice Thomas cast the decisive vote and dealt a deadly blow to federal affirmative action programs.[90]

The majority in *Adarand* held that "strict scrutiny is the proper standard for analysis of all racial classifications, whether imposed by a federal, state, or local actor."[91] Justice O'Connor, writing for the majority, noted that upon remand, the Tenth Circuit Court of Appeals should evaluate the subcontractor compensation clause at issue in *Adarand* under strict scrutiny review.[92] Justice O'Connor stated that the first prong of the strict scrutiny test requires the government to assert a "compelling interest" warranting the use of a race-based classification.[93] With regard to the second prong of strict scrutiny review, Justice O'Connor asserted that when a race-based action is found to be compelling, it must be "narrowly tailored" to accomplish the compelling interest.[94] Justice O'Connor added that the "narrowly tailored" prong must now include determinations of whether race-neutral means were considered prior to

89. 115 S. Ct. 2097 (1995).

90. *See* Dan Freedman, *Thomas Aided by Affirmative Action Rules He Helped Weaken*, SAN DIEGO UNION & TRIB., June 14, 1995, at A12 (claiming that Justice Thomas cast crucial vote to disable affirmative action program).

91. *Adarand*, 115 S. Ct. at 2113. As an initial matter, the Court established that Adarand Constructors had standing to bring suit under the equal protection component of the Fifth Amendment's Due Process Clause because Adarand had a legally protected interest in securing future guardrail contracts, and had demonstrated the likelihood of harm in the federal government's future use of race-based subcontracting compensation clauses. *See id.* at 2104 (determining that Adarand Constructors had standing to claim equal protection violation under Fifth Amendment). Adarand Constructors sought declaratory and injunctive relief in the use of a federal subcontracting compensation clause, claiming the clause violated its right to equal protection. *Id.* Specifically, Adarand Constructors claimed that it was not granted a guardrail contract because a federal subcontracting compensation clause caused the prime contractor to award the subcontract to a disadvantaged subcontractor to obtain additional funds. *Id.* Justice O'Connor established that Adarand Constructors had standing to sue because the federal government's further use of the subcontracting compensation clause violated a legally protected interest that prevented Adarand Constructors "from competing on . . . equal footing." *Id.* Justice O'Connor determined that Adarand Constructors presented evidence which showed that it would be required to compete for future guardrail contracts against small disadvantaged subcontractors. *Id.* at 2105.

92. *See id.* at 2118 (mandating use of strict scrutiny, but also describing questions to be answered upon remand concerning DBE certification procedure).

93. *Id.* at 2117. Justice O'Connor emphasized that use of the strict scrutiny test would enable courts to thoroughly examine the ends and means of racial classifications used in affirmative action programs. *Id.* at 2117-18.

94. *Id.*

the use of race-based measures, and whether or not the program was limited in duration.[95]

The essential reasoning underlying the Court's opinion was uncovered when, after reviewing past Supreme Court jurisprudence concerning race-based classifications, Justice O'Connor declared that three general approaches to governmental racial classifications exist—skepticism, consistency, and congruency.[96] The first approach, skepticism, suggests that whenever race-based measures are used they must be regarded as constitutionally-suspect classifications.[97] The second approach, consistency, signifies that the equal protection analysis should apply to all races, regardless of whether a person is deemed to be a member of a disadvantaged racial group.[98] Finally, the third approach, congruency, asserts that a similar standard for reviewing all federal and state affirmative action programs is necessary to promote the basic principle of the Fifth and Fourteenth Amendments—the equal protection of *all* individuals, rather than certain groups alone.[99]

In overruling *Metro Broadcasting*, Justice O'Connor reasoned that the Court's use of intermediate scrutiny for federal affirmative action programs undermined all three ideals—skepticism, consistency, and especially congruency.[100] Specifically, Justice O'Connor reasoned that the application of strict scrutiny is central to ensuring equal protection of the laws because applying two different standards of review for federal and state affirmative action programs results in an incongruent application of the equal protection doctrine.[101] In addition, Justice O'Connor justified

---

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

96. *Id.* at 2111.

97. *Id.*

98. *Id.* at 2111–12.

99. *Adarand*, 115 S. Ct. at 2111-13. Justice O'Connor noted that equal protection rights are personal rights. *Id.* at 2112–14.

100. *Id.* at 2112. Justice O'Connor thought that the Court's holding in *Metro Broadcasting* especially undermined the congruency postulate because "the race of the benefitted group [was] critical [in] determin[ing] which standard to apply." *Id.* Furthermore, Justice O'Connor commented that equal protection principles mandate that all races be constitutionally covered because the right to equal protection is a personal right. *Id.* at 2112-14.

101. *See id.* at 2112-15 (surmising that Court's utilization of different standards of review—strict scrutiny review at state level and intermediate scrutiny review at federal level—was inconsistent with equal protection principles); *see also* Buckley v. Valeo, 424 U.S. 1, 93 (1976) (construing equal protection to be same under 14th and 5th Amendments); Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975) (equating 5th Amendment equal protection doctrine with 14th Amendment equal protection doctrine); Gibson v. Mississippi, 162 U.S. 565, 591 (1895) (noting that Constitution forbids both federal and state governments from discriminating on basis of race). *But see* Hampton v. Mow Sun Wong, 426 U.S. 88, 100 (1976) (stating that overriding national interest may justify upholding federal legislation that would be unconstitutional if enacted at state level); *but cf.* De-

the Court's departure from stare decisis by noting that *Metro Broadcasting* had itself undermined established precedent which held that equal protection was a personal right rather than a group right.[102] According to Justice O'Connor, the Court's decision in *Adarand* restores the fabric of precedent by protecting individuals, rather than minority groups.[103]

The majority opinion also contains a lengthy rebuttal of Justice Stevens's dissenting opinion.[104] For example, Justice O'Connor attempted to head off accusations that across-the-board application of strict scrutiny fails because it equates affirmative action programs that are designed to alleviate discrimination with programs that purposefully discriminate.[105] In anticipation of this accusation, Justice O'Connor asserted that applying strict scrutiny to race-based classifications forces the Court to look closely at the proffered governmental interest.[106] Justice O'Connor maintained that applying strict scrutiny would compel the government to provide evidence that the racial classification was necessary.[107]

Justices Scalia and Thomas concurred. Justice Scalia succinctly stated that the Constitution does not support a "creditor or a debtor race."[108] Justice Scalia declared that granting racial entitlements to one group and not others is contrary to the understanding that "under the eyes of the government we are just one race."[109] Similarly, Justice Thomas criticized affirmative action programs as being a form of racial paternalism with "unintended consequences [that] can be as poisonous and pernicious as any other form of discrimination."[110] Justice Thomas argued that racial distinctions undermine the ethical basis of equal protection principles be-

---

troit Bank v. United States, 317 U.S. 329, 337 (1943) (stating that, "unlike the Fourteenth Amendment, the Fifth contains no equal protection clause and it provides no guaranty against discriminatory legislation by Congress"); Helvering v. Lerner Stores Corp., 314 U.S. 463, 468 (1941) (noting that Fifth Amendment does not contain equal protection clause).

102. *Adarand*, 115 S. Ct. at 2114-15.

103. *Id.* at 2116. Justice O'Connor concluded: "*Metro Broadcasting*'s untenable distinction between state and federal racial classifications lacks support in our precedent, and undermines the fundamental principal of equal protection as a personal right." *Id.* at 2117.

104. *See id.* at 2113-16 (addressing Justice Stevens's dissent).

105. *See id.* at 2113 (claiming, somewhat defensively, that Court can, despite Justice Stevens's claim to contrary, differentiate between benign and invidious discrimination).

106. *See Adarand*, 115 S. Ct. at 2113 (stating that strict scrutiny allows for careful evaluation to determine which methods are constitutionally objectionable).

107. *Id.* at 2112, 2114.

108. *Id.* at 2118 (Scalia, J., concurring). In Justice Scalia's estimation, government never has a "compelling interest" in creating classifications based on race. *Id.*

109. *Id.* at 2119.

110. *Adarand,* 115 S. Ct. at 2119 (Thomas, J., concurring).

cause such distinctions foster attitudes of superiority, resentment, and even entitlement.[111]

In dissent, Justice Stevens wholeheartedly endorsed the Court's decision to review racial classifications with a keen sense of skepticism.[112] However, he discounted both the Court's consistency and congruency approaches.[113] Justice Stevens first scrutinized the majority's consistency approach,[114]stating that "[i]nvidious discrimination is an engine of oppression, subjugating a disfavored group to enhance or maintain the power of the majority."[115] In contrast, Justice Stevens asserted, "[r]emedial race-based preferences reflect the opposite impulse: a desire to foster equality in society."[116] Moreover, Justice Stevens noted that the very implication of the strict scrutiny test unwarrantingly skews the analysis and ultimately places "well-crafted programs at unnecessary risk."[117] Finally, Justice Stevens argued that the majority's consistency argument is flawed because different standards of review would apply to gender-based and race-based affirmative action programs.[118]

Addressing the majority's third proposition, congruency, Justice Stevens chided the majority for refusing to acknowledge the distinction between federal and state action.[119] According to Justice Stevens, the majority should have deferred to Congress because the Fourteenth Amendment gives the federal government, unlike the state government, broad authority to enact remedial measures, such as affirmative action

---

111. *See id.* (arguing that race-based affirmative action programs are "noxious" because whether they are designed to benefit specific race or not, they result in discrimination).

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

113. *Id.* at 2120–23.

114. *See Adarand*, 115 S. Ct. at 2120–23 (criticizing majority's "consistency" postulate and claiming that Court failed to distinguish "between a 'No Trespassing Sign' and a welcome mat," because it equated affirmative action measures designed to help alleviate discrimination with measures that blatantly perpetuate discrimination).

115. *Id.* at 2120.

116. *Id.*

117. *Id.* at 2120–21 n.1. In an attempt to justify his position, Justice Stevens turned to the federal government's history of discrimination against Japanese-Americans during World War II, as well as the discrimination suffered by Native Americans, and suggested that "consistency" wrongfully requires that programs advocating invidious discrimination be treated on the same plane as those that are benign. *Id.* at 2121–22.

118. *See Adarand*, 115 S. Ct. at 2122 (noting that Court will apply intermediate scrutiny to gender-based affirmative action programs, while applying strict scrutiny to race-based affirmative action programs). Justice Stevens maintained that when a singular affirmative action program addresses both race and gender, it is "anomalous" to claim that the programs are consistent because one program would require two distinct levels of review. *Id.*

119. *Id.* at 2123-24.

programs, designed to remedy historic racial discrimination.[120] Thus, Justice Stevens asserted that congressional affirmative action demands more judicial deference than does state affirmative action.[121]

Justice Stevens also criticized the majority's refusal to defer to precedent such as *Fullilove*.[122] In general terms, Justice Stevens cast aspersions upon the Court for its misapplication of the judicial doctrine of stare decisis.[123] Specifically, Justice Stevens reasoned that because the *Fullilove* majority upheld the Public Works Employment Act of 1977,[124] which granted explicit preferences based solely on race, the acts challenged in *Adarand*—STURAA and the SBA—should be upheld for similar reasons.[125]

In a separate dissenting opinion, Justice Souter agreed with Justice Stevens's call for the Court to base its decision on the precedent set by *Fullilove*.[126] Justice Souter further explained that Congress's power under Section Five of the Fourteenth Amendment is sufficient, standing alone, to withstand strict scrutiny.[127] Justice Souter argued, therefore, that the lower court should find the affirmative action programs in STURAA and the SBA constitutional.[128]

Justice Ginsburg joined the other dissenters, but wrote separately to emphasize that affirmative action programs should be preserved as a "catch-up mechanism[ ] designed to cope with the lingering effects of entrenched racial subjugation."[129] Justice Ginsburg discussed at length the deeply entrenched roots of ethnocentricism and racism in American jurisprudence, American business, and American history.[130] Accordingly, Justice Ginsburg concluded that society's pervasive and continuing dis-

---

120. *Id.* 115 S. Ct. at 2125–26. Justice Stevens argued that the concept of federalism dictates that the federal government has primary authority to guard against the states' power to discriminate against racial minorities. *Id.* at 2126. According to Justice Stevens, this power is derived from the enactment of the 14th Amendment, which serves as a check against oppression by the states. *Id.* Justice Stevens then determined that the primary reason for the dispersal of power over the states is to promote "incongruity" rather than "congruity." *Id.*

121. *See id.* at 2125 (calling proposition that Congress is entitled to no more deference than states in enacting affirmative action programs "extraordinary").

122. *Adarand,* 115 S. Ct. at 2128.

123. *Id.* at 2126 (stating that "[t]he Court's concept of *stare decisis* treats some of the language we have used in explaining our decisions as though it were more important than our actual holdings").

124. 42 U.S.C. §§ 6701-6710 (1989).

125. *Adarand*, 115 S. Ct. at 2128 (Stevens, J., dissenting).

126. *Id.* at 2131-32 (Souter, J., dissenting).

127. *Id.* at 2133.

128. *Id.*

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

130. *Id.* at 2134–35.

criminatory practices fueled the need for the continuance of affirmative action programs.[131]

V. ANALYSIS OF *ADARAND*: THE *LOCHNER* ERA REVISITED

The majority's decision in *Adarand* harkens back to an era that many had thought long gone—the *Lochner* era. The term "Lochnerizing" has, in modern years, been used to describe a form of strong judicial activism employed in a period in which Supreme Court Justices frequently struck legislation as a means of furthering their own moral and political views.[132] During the *Lochner* era, the Court frequently manifested a strong preference for individual rights over social rights.[133]

In the namesake case, *Lochner v. New York*,[134] the Court struck down a New York statute that set maximum working hours for bakery employees,[135] despite New York's claims that the law protected the health and safety of workers.[136] Rejecting the State's arguments, the majority reasoned that the state could achieve its objective without interfering with employees' freedom to contract.[137] In holding for the employer, the Court refused to defer to legislative findings of fact, instead deciding on its own accord that no plausible connection existed to justify special protection of the workers.[138] In dissent, Justice Holmes declared that the Court based its decision "upon an economic theory which a large part of the country does not entertain."[139] Justice Holmes then asserted his conviction of judicial restraint and urged the Supreme Court to defer to "the right of a majority to embody their opinions in law."[140]

---

131. *Id.* at 2135.

132. *See* GERALD GUNTHER, CONSTITUTIONAL LAW 444–45 (12th ed. 1991) (noting that Court relied upon Justices' personal values when deciding *Lochner* line of cases).

133. *See id.* at 446 (discussing *Lochner* philosophy that protected personal rights); Robert A. Burt, *Alex Bickel's Law School and Ours*, 104 YALE L.J. 1853, 1860 (1995) (noting that *Lochner* Court preferred individual rights over nation's welfare).

134. 198 U.S. 45 (1905).

135. *Lochner*, 198 U.S. at 64–65.

136. *See id.* at 59-64 (rejecting various arguments made by State of New York).

137. *Id.* at 61–62.

138. *Id.* at 59–61.

139. *Lochner*, 198 U.S. at 75 (Holmes, J., dissenting); *see* FRANK R. STRONG, SUBSTANTIVE DUE PROCESS OF LAW: A DICHOTOMY OF SENSE AND NONSENSE 95 (1986) (stating that Justices of *Lochner* Court, "steeped in the economics of Adam Smith and the sociology of Herbert Spencer, unabashedly read their philosophy into the Constitution"); *see also* CARL B. SWISHER, AMERICAN CONSTITUTIONAL DEVELOPMENT 520-22 (1943) (indicating that *Lochner* majority substituted Court's values for judgement of Legislature).

140. *Lochner*, 198 U.S. at 75 (Holmes, J., dissenting); *see* Thomas A. Reed, *Holmes and the Path of Law*, 37 AM. J. LEGAL HIST. 273, 300 (1993) (discussing Justice Holmes's dissent in *Lochner* and his judicial philosophy that Court should give deference to Congress).

History eventually vindicated Justice Holmes's opinion. In the years following *Lochner*, the Court came under attack for succumbing to judicial activism.[141] The Great Depression was the beginning of the end of Lochnerizing because the Court continued to strike federal and state legislation that sought to relieve the country from its downward economic spiral, prompting a response from the executive branch.[142] President Franklin Roosevelt, who was trying to jump-start the nation's economy, grew disenchanted with the Court and instituted his Court-packing plan.[143] Soon thereafter, the Court retreated from its previous course and supported the President's efforts to boost the nation's economy—"a switch in time that saved nine."[144]

Since 1936, the Court has consistently refused to strike federal socio-economic regulations.[145] Two related reasons have been advanced for its refusal: (1) the Court's institutional incompetency to evaluate and imple-

---

141. *See* Griswold v. Connecticut, 381 U.S. 479, 523 (1965) (Black, J., dissenting) (criticizing *Lochner*-era cases for supplanting legislative judgment with philosophies of Justices); GERALD GUNTHER, CONSTITUTIONAL LAW 453-58 (11th ed. 1991) (discussing criticism of *Lochner*-era Court's intrusive scrutiny of legislative means); *see also* Ferguson v. Skrupa, 372 U.S. 726, 730 (1963) (noting that Court had discarded *Lochner* doctrine and "returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment[s] of legislative bodies").

142. *See* Michael Comiskey, *Can a President Pack—Or Draft—The Supreme Court?: FDR and the Court in the Great Depression and World War II*, 57 ALB. L. REV. 1043, 1045–46 (1994) (detailing Court's "constitutional war" against New Deal programs and noting that lower federal courts, following Supreme Court precedent, "issued 1600 injunctions against enforcement of federal statutes").

143. *See* S. REP. NO. 711, 75th Cong., 1st Sess. *passim* (1937) (providing details of Roosevelt's Court-packing plan); Michael S. Ariens, *A Thrice-Told Tale, Or Felix the Cat*, 107 HARV. L. REV. 620, 627–28 (1994) (describing politics surrounding Roosevelt's Court-packing plan).

144. *See* Michael S. Ariens, *A Thrice-Told Tale, or Felix the Cat*, 107 HARV. L. REV. 620, 630–37 (1994) (discussing history behind phrase, "a switch in time that saved nine," and noting various attempts to explain change in Court's philosophy, some of which contend that Court altered view due to politics); Alpheus T. Mason, *Harlan Fiske Stone and FDR's Court Plan*, 61 YALE L.J. 791, 816 (1952) (noting that Roosevelt believed Court's turnaround in interpreting Constitution was greatest impetus for demise of Court-packing plan); Robert L. Stern, *The Commerce Clause and the National Economy, 1933-46*, 59 HARV. L. REV. 645, 681–82 (1946) (surmising that Court retreated from stance of voiding legislation because of fear that Court-packing plan might undermine independence and prestige of federal judiciary). *See generally* Herbert McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34, 38 (discussing Court's eventual abdication of *Lochner* approach to adjudication).

145. *See* Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 239–41 (1984) (describing Court's deference to federal and state legislation); United States v. Carolene Prods. Co., 304 U.S. 144, 148 (1938) (noting Court's respect for legislative judgment); *see also* Lorrie M. Marcil, Note, *Statutes that Exempt Favored Industries from Meeting Highway Weight Restrictions: Constitutionality Under the Equal Protection Clause*, 1984 DUKE L.J. 963, 976

ment legislative policy decisions;[146] and (2) the primacy of elected branches in determining the propriety of socio-economic legislation.[147] The similarity between *Adarand* and *Lochner* lies in the Court's complete failure in both cases to address either of these considerations.

A. *The* Adarand *Court's Departure from the Original Meaning of the Fourteenth Amendment*

The *Adarand* decision illustrates the Court's resort to Lochnerization to advance two primary ideals. First, the Court posited that racial classifications are generally unlawful.[148] Second, the Court asserted that equal protection principles apply only to individuals, rather than groups.[149] However, in championing these ideals, the Court ignored the history of the Constitution, particularly the history of the Fourteenth Amendment.[150]

The history of the Fourteenth Amendment reveals that "race-conscious Reconstruction programs were enacted concurrently with the Fourteenth Amendment and were supported by the same legislators who favored the constitutional guarantee of equal protection."[151] Indeed, the Reconstruction Amendments were implemented expressly for the benefit of African-Americans, thereby contradicting the *Adarand* Court's concept of color-blind treatment for all races.[152] As one commentator has aptly noted, the

---

(commenting that modern judiciary refuses to strike legislation and utilizes rational basis review so as not to substitute Court's judgment for that of Legislature).

146. *See* Beacon Prods. Corp. v. Reagan, 633 F. Supp. 1191, 1194–95 (D. Mass. 1986) (noting that judiciary lacks resources and expertise to decide political policy questions); Richard Levy, *Escaping* Lochner's *Shadow: Toward a Coherent Jurisprudence of Economic Rights*, 73 N.C. L. REV. 329, 351 (1995) (noting that Supreme Court is institutionally incompetent to make broad policy decisions).

147. *See* United States v. Lopez, 115 S. Ct. 1624, 1651–53 (1995) (Stevens, J., dissenting) (reviewing history of Commerce Clause and commenting that Court should respect primacy of congressional enactments of social and economic legislation).

148. Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2111 (1995). In the majority opinion, for instance, Justice O'Connor stated that whenever a racial classification is used, it must be viewed as suspect. *Id.* Justice O'Connor also asserted that "consistency" demands that all racial categorizations, whether invidious or benign, be reviewed under the same strict scrutiny standard. *Id.*

149. *Id.* at 2112–13.

150. *Cf.* JOHN C. LIVINGSTON, FAIR GAME?: INEQUALITY AND AFFIRMATIVE ACTION 93 (1979) (noting "striking historical irony in the parallel between the argument for a color-blind Constitution, and the way in which the Court provided constitutional protection for the privileges of the new economic elite after the Civil War").

151. Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753, 754 (1985).

152. *See Adarand*, 115 S. Ct. at 2122 (Stevens, J., dissenting) (declaring that principal aim of 14th Amendment was protection of newly freed slaves); Paul Brest, *Affirmative*

notion of a color-blind Constitution is falsely glorified because "[t]he history of segregation is not the history of Blacks creating racial categories to legitimate slavery, nor is it a history of segregated institutions aimed at subordinating whites."[153] While the *Adarand* Court's notion of a color-blind society appears admirable, no such society exists in America, which reveals that the Court is turning a blind eye to the plight of minorities.[154]

The *Adarand* Court's refusal to note the historical background prompting the enactment of Section Five of the Fourteenth Amendment,[155] while claiming to restore "the fabric of the law,"[156] is not only intellectually inconsistent, but uncharacteristic of a Court that promotes conservative jurisprudence. In prior decisions, the Court has gone to great lengths to discern the original intent of the Constitution's Framers.[157] For exam-

---

Action and the Constitution: Three Theories, 72 IOWA L. REV. 281, 282 (1987) (noting that affirmative action is constitutional, although unanticipated by Framers of 14th Amendment, because similar programs were enacted during Reconstruction era); Robert M. Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287, 1295 (1982) (noting that Reconstruction Amendments "were designed to ameliorate the condition of Blacks"); *see also* Fullilove v. Klutznick, 448 U.S. 448, 482 (1980) (plurality opinion) (rejecting contention that Congress must be "color-blind" when fashioning remedial affirmative action programs). *See generally* Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753 *passim* (1986) (detailing arguments for and against Reconstruction legislation and concluding that original intent was to provide special protections for newly freed slaves).

153. Neil Gotunda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1, 49 (1991); *see also* Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753, 754 (1985) (determining that history of 14th Amendment "strongly suggests that the framers of the amendment could not have intended it generally to prohibit affirmative action for blacks or other disadvantaged groups").

154. *See* Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363, 363 (1992) (arguing that, despite Civil Rights Movement and some legislative victories, racial equality has not yet been achieved); Benjamin L. Hooks, *Affirmative Action: A Needed Remedy*, 21 GA. L. REV. 1043, 1052 (1987) (noting that modern-day discriminatory practices are historical product of white-male dominance); *see also* Kenneth L. Karst, *Citizenship, Race, and Marginality*, 30 WM. & MARY L. REV. 1, 6 (1988) (acknowledging that "[b]lack people are not merely disadvantaged when they are poor; they are also relatively poor because they are black").

155. *See* The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 71 (1873) (detailing historical background of Civil War Amendments and noting that purpose underlying them was to achieve "freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him").

156. *Adarand*, 115 S. Ct. at 2116.

157. *See* United States Term Limits, Inc. v. Thornton, 115 S. Ct. 1842, 1848–57, 1971 (1995) (reviewing history of constitutional convention to determine Framers' intent, and holding that states may not impose additional qualifications for congressional offices when additional qualifications have likely effect of handicapping class of persons); Colgrove v. Battin, 413 U.S. 149, 153–56 (1973) (referencing common law and intentions of Framers in enacting Seventh Amendment in upholding local rule allowing for six- person jury); United

ple, in *Wallace v. Jaffree*,[158] Justice O'Connor explicitly noted that the Framers' intentions, as revealed by history, should govern the Court's decisions.[159] Additionally, in *United States v. Lopez*,[160] decided in the same term as *Adarand*, the Court did not hesitate to espouse the original intent of the Framers of the Constitution in holding for the first time since the New Deal that Congress lacked power under the Commerce Clause to enact a particular law.[161] In *Adarand*, however, the Court failed to make any reference to the intentions of the Framers of the Reconstruction Amendments, selectively relying instead on precedent that was malleable enough to conform to the Court's most recent interpretation of the Equal Protection Clause.[162]

The Court's recasting of its equal protection doctrine in terms of three approaches to race-based classifications masks the Court's failure to inquire as to precisely what the Fourteenth Amendment was designed to accomplish. For instance, under the Court's skepticism approach, any time a racial classification is used, that classification is constitutionally suspect.[163] This approach presumes that the Constitution is color-blind, and that all persons, regardless of race, are to be treated equally by the government.[164] With such a presumption, the Court ignores the history

---

States v. Brewster, 408 U.S. 501, 516–17 (1972) (noting intentions of Framers in drafting Speech or Debate Clause while upholding indictment of former senator for bribery); Powell v. McCormack, 395 U.S. 486, 531–32 (1969) (reviewing Constitutional Convention debates in determining constitutionality of resolution passed by House of Representatives).

158. 472 U.S. 38 (1985).

159. *Wallace*, 472 U.S. at 80–81 (O'Connor, J., concurring).

160. 115 S. Ct. 1624 (1995).

161. *See Lopez*, 115 S. Ct. at 1626–27 (discussing, in detail, Framers' intent). In reaching its conclusion, the Court relied on the writings of early federalists. *Id.*

162. *See Adarand*, 115 S. Ct. at 2126–28 (Stevens, J., dissenting) (criticizing Court's selective use of precedent); *cf.* Robert A. Burt, *Precedent and Authority in Antonin Scalia's Jurisprudence*, 12 CARDOZO L. REV. 1685, 1685–86 (1991) (asserting that Justice Scalia relies on precedent only if it conforms to his view); M. Shanara Gilbert, *An Ounce of Prevention: A Constitutional Prescription for Choice of Venue in Racially Sensitive Criminal Cases*, 67 TUL. L. REV. 1855, 1905 n.247 (1993) (alleging that Supreme Court selectively uses precedent when convenient to achieve desired result).

163. *See Adarand*, 115 S. Ct. at 2111 (discussing skepticism approach employed by Supreme Court in cases involving race classifications).

164. *See id.* at 2113 (justifying color-blind concept because congressional race-based preferences tend to foster prejudice); Judith G. Greenburg, *Erasing Race from Legal Education*, 28 U. MICH. J.L. REF. 51, 58 (1994) (noting that "color-blind" approach stresses individual characteristics and advocates race-neutral decisions); Suzanna Sherry, *Selecting Judicial Activism in the Equal Protection Context: Democracy, Distrust, and Deconstruction*, 73 GEO. L.J. 89, 91 (1984) (determining that "color-blind" model disapproves of race-based governmental decisions); *see also* Richard A. Posner, *The* DeFunis *Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 SUP. CT. REV. 1, 21-26

of racial inequality leading to the Reconstruction Amendments,[165] as well as the continuing racial biases so pervasive in modern America.[166] Likewise, the Court's consistency postulate, advocating the consistent use of strict scrutiny for all race-conscious legislation whether benign or invidious, is also suspect for refusing to discuss the historical context of the Fourteenth Amendment.[167]

The *Adarand* Court's congruency approach is constitutionally infirm as well because it assumes that the limits on the federal government's power to alleviate racial discrimination must be equal to that of the states.[168] The Court, with little rationalization, glosses over the textual grant of authority in the Enforcement Clause of the Fourteenth Amendment,[169] which expressly provides Congress with the authority "to enforce, by appropriate legislation, the provisions" of the Fourteenth Amendment, while simultaneously limiting the power of the states.[170] As Justice Stevens noted in his dissent, "[t]he Fourteenth Amendment directly empow-

---

(claiming that government should be prohibited from using race as factor in determining distribution of benefits).

165. *See Slaughter-House Cases*, 83 U.S. (16 Wall.) at 71 (noting that "one pervading purpose" of Reconstruction Amendments was to rectify past injustices against African-Americans).

166. *See Adarand*, 115 S. Ct. at 2134–35 (Ginsburg, J., dissenting) (describing pervasiveness of racial bias in modern America).

167. *See id.* at 2111, 2114 (using consistency postulate as reason for applying strict scrutiny, yet failing to discuss original intent of 14th Amendment); *see also* Tom A. Collins, *The Press Clause Construed in Context: The Journalists' Right to Access to Places*, 52 MO. L. REV. 751, 755-65 (1987) (commenting that constitutional interpretation mandates that courts adhere to and accord deference to historical background of text of Constitution); Mark P. Denbeaux, *The First Word of the First Amendment*, 80 NW. U. L. REV. 1156, 1156-58, 162-71 (1986) (determining that constitutional interpretation must begin with history and evolution of law); *cf.* Robert A. Burt, *Precedent and Authority in Antonin Scalia's Jurisprudence*, 12 CARDOZO L. REV. 1685, 1687 (1991) (asserting that Justice Scalia adheres to original intent of Framers because it is only legitimate source of constitutional interpretation).

168. *See Adarand*, 115 S. Ct. at 2107–08 (discussing 14th Amendment and concluding that equal protection principles warrant application of similar standards to federal and state governments). *But cf.* Hampton v. Mow Sun Wong, 426 U.S. 88, 100 (1976) (suggesting that "overriding national interests" permit Congress to discriminate against undocumented aliens, although states are forbidden to do so).

169. *See* U.S. CONST. amend. XIV, § 5 (providing Congress with power to enforce provisions of 14th Amendment through appropriate legislation). *Compare Adarand*, 115 S. Ct. at 2114 (concluding that first prong of strict scrutiny does not diminish deference to congressional authority to remedy discrimination) *with id.* at 2125 (Stevens, J., dissenting) (contending that *Adarand* majority ignored Enforcement Clause of 14th Amendment).

170. U.S. CONST. amend. XIV, § 5; *see* Oregon v. Mitchell, 400 U.S. 112, 126–29 (1970) (noting that Enforcement Clauses in Civil War Amendments, including § 5 of 14th Amendment, directly empower Congress to enact legislation to end racial discrimination); Katzenbach v. Morgan, 384 U.S. 641, 648 n.8, 651 (1966) (emphasizing that § 5 of 14th

ers Congress at the same time it expressly limits the States."[171] Thus, the *Adarand* Court's proposition that the limits imposed by the Constitution upon the federal government must be congruent with those imposed upon the states is contradicted by the very text and structure of the Constitution itself.[172] Essentially, the *Adarand* Court is not only grafting limits onto the Constitution, it is supplanting an express grant of authority with an amorphous approach.

Finally, the Court in *Adarand* subverted the original meaning of the Fourteenth Amendment by promoting individual liberty at the expense of social equality. The *Adarand* Court resembles the *Lochner* Court in this regard because both conservative courts dismantled governmental programs designed to further social equality among groups in order to promote individual liberty.[173] For example, the *Lochner* Court used the substantive due process doctrine to strike down legislative efforts that hampered individuals' freedom to contract.[174] In essence, the substantive due process doctrine suggests that every individual has a certain set of fundamental liberties that should remain free from governmental interference.[175]

Amendment expressly grants Congress power to carry out constitutional guarantees of 14th Amendment).

171. *Adarand*, 115 S. Ct. at 2116 (Stevens, J., dissenting); *see also Mitchell*, 400 U.S. at 126, 129 (asserting that Framers of Civil War Amendments intended enforcement clauses to provide Congress with authority to override states to rectify racial discrimination).

172. *Compare* U.S. CONST. amend. XIV, § 1 (limiting state power to deny equal protection of laws) *with* U.S. CONST. amend. XIV, § 5 (empowering Congress to pass legislation to guarantee equal protection). *But see* Buckley v. Valeo, 424 U.S. 1, 93 (1975) (implying that equal protection limits on federal government are same as limits on state government).

173. *See* KERMIT HALL, THE MAGIC MIRROR 242 (1989) (discussing how liberty to contract, as developed by *Lochner* Court, sustained individual rights); *see also* Michel Rosenfeld, *Decoding* Richmond*: Affirmative Action and the Elusive Meaning of Constitutional Equality*, 87 MICH. L. REV. 1729, 1732 (1989) (suggesting that strict scrutiny operates by "decontextualization" model, which overlooks reality and focuses instead upon constructs that disregard group-based rights). *Compare Adarand*, 115 S. Ct. at 2114 (noting that equal protection has long been considered "personal right") *with* Lochner v. New York, 198 U.S. 45, 53–54 (1905) (noting that liberty to contract is to be considered protected "individual" right).

174. *See Lochner*, 198 U.S. at 62 (announcing that legislation designed to limit number of hours of employment unconstitutionally abridged "liberty of person and of free contract provided for in the Federal Constitution"); *see also* New York Life Ins. Co. v. Head, 234 U.S. 149, 161–65 (1914) (reasoning that state cannot impair right of out-of-state persons to contract); Allgeyer v. Louisiana, 165 U.S. 578, 589 (1897) (noting that term "liberty," as contemplated in 14th Amendment, includes right to contract and pursue vocation).

175. *See* GERALD GUNTHER, CONSTITUTIONAL LAW 433-34 (12th ed. 1991) (describing substantive due process as stemming from natural law tradition of viewing rights as

Adarand mirrors *Lochner* because the 1995 Court implicitly chose to reinforce notions of individual liberty in a free market system to prevent consideration of race as a factor in the distribution of economic benefits.[176] In fact, the Court in *Adarand* determined that the challenging contractor had standing to sue because the subcontracting compensation clause thwarted his right to compete.[177] The Court's decision to allow a nonminority to subvert a program aimed at promoting social and economic equality for minorities once again contradicts the original purpose of the Fourteenth Amendment—to aid minorities.[178] Therefore, the Justices' substitution of their notions of individual rights and economic liberty for Congress's judgment that minorities are socially and economically disadvantaged illuminates the Court's *Lochner*-like preference for promoting individual rights at the expense of social rights without regard to the original meaning of the Fourteenth Amendment.

---

embodiment of social contract). In the *Lochner* era, the Court struck down much economic legislation that interfered with the liberty to contract. *See, e.g.*, Williams v. Standard Oil Co., 278 U.S. 235, 245 (1929) (holding state regulation of gasoline prices unconstitutional); Coppage v. Kansas, 236 U.S. 1, 11 (1915) (striking down statute that forbade employers from preventing employees' union membership); Adair v. United States, 208 U.S. 161, 174-80 (1908) (voiding federal statute that enjoined employers from conditioning terms of employment).

176. *See Adarand*, 115 S. Ct. at 2105 (granting standing to Adarand Constructors because race-based subcontracting compensation clause prevented company from garnering construction contracts).

177. *Id.* at 2104. The *Adarand* Court noted that Adarand Constructors had standing to sue because governmental contracts allocated on the basis of race could affect the contractor's economic rights. *Id.* at 2104–05. The Court also stated that the race-based classifications resulted in the plaintiff competing on unequal grounds. *Id.* at 2105. Thus, the *Adarand* Court, like the *Lochner* Court, was concerned with protecting the right to contract.

178. *See* City of Richmond v. Croson, 488 U.S. 469, 511–12 (1989) (Stevens, J., concurring) (noting that "a central purpose of the Fourteenth Amendment is to further the national goal of equal opportunity for all our citizens"); *see also* Lino Graglia, *Do We Have an Unwritten Constitution?—The Privileges or Immunities Clause of the Fourteenth Amendment*, 12 HARV. J.L. & PUB. POL'Y 83, 83 (1989) (claiming that *Slaughter-House Cases* were correctly decided because 14th Amendment was promulgated to provide protections to newly freed African-Americans); Robert C. Palmer, *The Parameters of Constitutional Reconstruction:* Slaughter-House, Cruikshank, *and the Fourteenth Amendment*, 1984 U. ILL. L. REV. 739, 743 (discussing *Slaughter-House Cases* and concluding that primary impetus for enactment of Reconstruction Amendments was protection of African-Americans).

B. *The Court's Use of Strict Scrutiny to Circumvent Legislative Judgment*

1. Applying Strict Scrutiny

Instead of conforming to the original meaning of the Fourteenth Amendment and practicing judicial abstinence, the *Adarand* Court used strict scrutiny as a tool to enforce the values of the Justices.[179] As Justice Marshall aptly stated, "strict scrutiny is strict in theory, but fatal in fact."[180] Currently, the strict scrutiny test is a towering hurdle for legislation, in part because courts presume that legislation reviewed under strict scrutiny is unconstitutional.[181] In fact, the Supreme Court had never upheld a racial statute that was strictly scrutinized until *Korematsu v. United States*,[182] and the Court has since all but recanted its decision in that case.[183] The two-prong strict scrutiny test requires the government to assert a compelling interest[184] and select means necessary to achieve the compelling interest.[185] The compelling interest prong, which was once

---

179. *Cf.* Craig v. Boren, 429 U.S. 190, 211-12 (1976) (Stevens, J., concurring) (suggesting that Court's scrutiny was not mandated by Equal Protection Clause, and charging that Court uses such standards merely to justify decisions because, in reality, only one standard of review exists).

180. Fullilove v. Klutznick, 448 U.S. 448, 519 (1980) (Marshall, J., concurring); *see also* Loving v. Virginia, 388 U.S. 1, 11 (1967) (determining that Equal Protection Clause demands that racial classifications be subjected to most rigid scrutiny); Bolling v. Sharpe, 347 U.S. 497, 499 (1954) (concluding that "[c]lassifications based solely upon race must be scrutinized with particular care since they are contrary to our traditions and hence constitutionally suspect").

181. Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (noting that legislation reviewed under strict scrutiny is rarely upheld).

182. 323 U.S. 214 (1944).

183. *See Korematsu*, 323 U.S. at 223-24 (upholding statute that effectively imprisoned citizens of Japanese ancestry during World War II because compelling need to prevent espionage and sabotage existed); *see also* Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2106, 2117 (1995) (describing holding and facts in *Korematsu*, and later admitting that strict scrutiny "can sometimes fail to detect an illegitimate racial classification").

184. *See* City of Richmond v. Croson, 488 U.S. 469, 507–08 (1989) (indicating that specific instances of past discrimination must be proven before governmental interest in remedying past discrimination may be considered compelling); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 307–09, 315 (1978) (demanding that government make findings before interest is deemed compelling, but also declaring promotion of diversity to be compelling governmental interest).

185. *See Fullilove*, 448 U.S. at 496 (Powell, J., concurring) (claiming that racial preferences for minority businesses are constitutional because they are necessary to promote compelling government interest in eradicating effects of past discrimination); *Bakke*, 438 U.S. at 305 (holding that state's racial classifications must be necessary to achieve legitimate interest); *cf. Croson*, 488 U.S. at 504 (noting that affirmative action program at issue was not narrowly tailored because plan was overinclusive).

satisfied by general governmental findings, now requires specific findings of past government-sanctioned discrimination.[186]

The requirement of specific findings of relevant past discrimination to prove that the government has a compelling interest in establishing an affirmative action program is a somewhat misleading academic premise that masks the Court's Lochnerization in the field of affirmative action. Obviously, the history of the United States is replete with discrimination against minorities. In light of the fact that slavery was abolished less than 150 years ago, and just 45 years ago many public and private facilities were still segregated, Congress was certainly justified in presuming that minorities remain socially and economically disadvantaged.[187] Statistics indicate that the socio-economic status of African-Americans generally lags far behind that of their Caucasian counterparts due to persistent patterns of discrimination.[188] In fact, at least one scholar has predicted that acceptance of the "color-blind principle would possibly lead to a resegregated society" in which "all-white universities and workplaces" are the norm.[189]

In sum, it now seems that, just as the *Croson* Court required state affirmative action plans to be supported by specific findings of discrimination, the Court will require federal affirmative action plans to likewise be

---

186. *Compare Fullilove*, 448 U.S. at 528 n.8 (Stewart, J., dissenting) (noting that affirmative action program was allowed to survive constitutional scrutiny although "not one mention of racial discrimination or the need to provide a mechanism to correct the effects of such discrimination" was found in legislative history of program) *with Croson*, 488 U.S. at 488, 498-99, 504 (disallowing use of congressional findings similar to those in *Fullilove* to support affirmative action program, while stating that state governments must specifically identify discriminatory practices before forging ahead with affirmative action program).

187. *See Adarand*, 115 S. Ct. at 2134–36 (Ginsburg, J., dissenting) (noting continuing effects of historical racial discrimination and contending that Congress has power to counteract such discriminatory effects); *see also id.* at 2122 n.5 (Stevens, J., dissenting) (commenting that if affirmative action program produces more harm than benefits, legislature is in position to correct problem); Alexander Aleinikoff, *A Case for Race Consciousness*, 91 COLUM. L. REV. 1060, 1118–20 (1991) (suggesting that 13th Amendment authorizes federal government to combat lingering effects of slavery).

188. *See Adarand*, 115 S. Ct. at 2134–36 (Ginsburg, J., dissenting) (listing various persistent discriminatory practices suffered by minorities and surmising that Congress has power to correct such abuses); George C. Galster, *Polarization, Place, and Race*, 71 N.C. L. REV. 1421, 1425 (1993) (noting that poverty rate for African-Americans is appreciably higher than that for Caucasians, and claiming that even as educational opportunities increase for African-Americans, disparity in income between Caucasians and African-Americans remains).

189. *See* Jeffrey Rosen, *Is the U.S. Ready to Go Colour-Blind?*, INDEPENDENT, July 24, 1995, at 11 (suggesting that consequence of color-blind concept could be resegregation); *see also* David Luban, *Difference Made Legal: The Court and Dr. King*, 87 MICH. L. REV. 2152, 2159 (1989) (proclaiming that United States is in danger of becoming "irredeemably racist society").

supported by specific findings of government-sanctioned discrimination.[190] It is also apparent that the Court will now demand that programs be race-neutral to the greatest extent possible.[191] This approach to the first prong of the strict scrutiny test, however, fails to recognize the true underlying purpose of strict scrutiny review—to scrupulously and suspiciously examine majoritarian rules that too arbitrarily impinge on a member of a class of persons historically treated with hostility.[192]

Precedent reveals that the "necessary means" prong of strict scrutiny review has also undergone a transformation. Prior to *Adarand*, the federal government only needed to *contemplate* race-neutral alternatives.[193] Now, however, the federal government may have to *employ* race-neutral alternatives prior to implementating an affirmative action program.[194]

---

190. *Compare Adarand*, 115 S. Ct. at 2118 (declaring that strict scrutiny should be applied to federal affirmative action plans) *with Croson*, 488 U.S. at 501 (discussing strict scrutiny's requirement that specific findings of past government-sanctioned discrimination exist).

191. *See Adarand*, 115 S. Ct. at 2118 (noting that, on remand, court of appeals should inquire into whether affirmative action plan at issue employed race-neutral means); *see also Croson*, 488 U.S. at 507-11 (discussing strict scrutiny requirement that race-neutral means be utilized before race-specific means are employed in affirmative action programs).

192. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (urging that strict scrutiny be applied only when "discrete and insular minorities" have suffered through majoritarian classification schemes); *see also* John H. Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723, 728-41 (1974) (concluding that strict scrutiny review should only apply to racial minorities, such as African-Americans, because whites are not exploited by political process).

193. *See* United States v. Paradise, 480 U.S. 149, 171 (1987) (noting that whether race-neutral means of achieving government's interest are *considered* is one of several factors courts review when assessing constitutionality of affirmative action plans).

194. *See Adarand*, 115 S. Ct. at 2118 (imploring lower court to ascertain whether race-neutral alternatives existed). Although Justice O'Connor advises the lower court in *Adarand* to ascertain whether race-neutral alternatives were considered, she has previously suggested that strict scrutiny review requires that race-neutral means be *employed* prior to establishing classifications based on race. *See* Metro Broadcasting v. FCC, 497 U.S. 547, 622 (1990) (O'Connor, J., dissenting) (claiming that even intermediate scrutiny demands that "untried" race-neutral alternatives to racial classifications render federal affirmative action programs unconstitutional, and thereby suggesting that strict scrutiny would surely demand that race-neutral alternatives be implemented before government may constitutionally make racial classifications). The Justices who, along with Justice O'Connor, formed the majority in *Adarand*, with the exception of Justice Thomas who was new to the Court, also joined Justice O'Connor in her dissent in *Metro Broadcasting*, which urged actual adoption of race-neutral alternatives prior to the implementation of an affirmative action program. *See id.* at 602, 625 (criticizing FCC for employing "race-conscious means before *adopting* readily available race-neutral, alternative means") (emphasis added). Thus, while the *Adarand* Court instructs the lower court to ascertain whether race-neutral alternatives were considered, in practice it seems the relevant inquiry will be whether such alternatives were actually implemented.

Consequently, the Court may strike affirmative action programs as unconstitutional in future decisions if the governmental entity has not enacted race-neutral options prior to the implementation of the programs, even when the government is combatting blatant past discrimination. This new approach to the "necessary means" prong of strict scrutiny review will undoubtedly and unfortunately fail to adequately deter invidious discrimination.

2. Failure to Defer to Democratic Choice

The proper use of strict scrutiny was discussed in *United States v. Carolene Products Co.*,[195] an opinion that effectively overruled *Lochner*.[196] According to the *Carolene Products* Court, "[p]rejudice against discrete insular minorities may be a special condition, which tends seriously to curtail the operation of the political processes, ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."[197] The *Carolene Products* Court's interpretation demonstrates that in the political process, strict scrutiny is warranted only when majoritarian legislation serves to prejudice a minority group.[198] In a democracy, the political arena is a stronghold of the majority; only when the majoritarian process works to thwart minority representation should strict scrutiny be wielded by the judiciary.[199]

The Court in *Adarand* wrongly applied this level of scrutiny normally reserved for issues involving fundamental rights and invidious racial discrimination to majoritarian, congressionally enacted affirmative action

---

195. 304 U.S. 144 (1938).

196. *See* Matthew S. Bewig, Lochner v. The Journeymen Bakers of New York: *The Journeymen Bakers, Their Hours of Labor, and the Constitution*, 38 AM. J. LEGAL HIST. 413, 425 (1994) (discussing *Carolene Products* Court's rejection of *Lochner*); Patrick C. McGinley, *Trashing the Constitution: Judicial Activism, the Dormant Commerce Clause, and the Federalism Mantra*, 71 OR. L. REV. 409, 434 (1992) (noting that *Carolene Products* case signaled end of *Lochner* era).

197. *Carolene Prods. Co.*, 304 U.S. at 152-53 n.4; *see also* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-6, at 1453-54 (2d ed. 1988) (declaring that groups who are "perennial losers in the political struggle" warrant special protection because of "widespread, insistent prejudice against them").

198. *Cf.* Graham v. Richardson, 403 U.S. 365, 371-72 (1971) (stating that classifications based on alienage are inherently suspect and subject to strict judicial scrutiny); Hunter v. Erickson, 393 U.S. 385, 391 (1968) (noting that facially-neutral racial classification treating African-Americans and Caucasians "in an identical manner" violates equal protection when it adversely impacts minority group).

199. *See* JOHN H. ELY, DEMOCRACY AND DISTRUST 170 (1980) (contending that racial prejudice is not centered upon "whites" discriminating against "whites"); Suzanna Sherry, *Selective Judicial Activism in the Equal Protection Context: Democracy, Distrust, and Deconstruction*, 73 GEO. L.J. 89, 114–15 (1984) (claiming that affirmative action programs do not warrant strict scrutiny review).

programs.[200] The Court disregarded the fact that the American people, through their democratically elected Congress, implemented affirmative action programs to the detriment of the majority in an attempt to foster equality and alleviate discrimination. Furthermore, majoritarian programs, such as the affirmative action programs implemented to help African-Americans, are inherently different from legislation relegating African-Americans to a subordinate status.[201] Nonetheless, by rhetoric if not by reason alone,[202] the *Adarand* Court equated the two, and wrongly applied strict scrutiny.[203]

Instead of learning the basic lesson of *Lochner*'s legacy—the need for judicial deference to legislative enactments—the *Adarand* Court elevated its own judicial values over those of the American people.[204] Further-

---

200. *See* New Orleans v. Dukes, 427 U.S. 297, 303 (1976) (per curiam) (condemning court action that judges "the wisdom or desirability of legislative policy" not affecting fundamental rights); *see also* Shapiro v. Thompson, 394 U.S. 618, 634 (1969) (applying strict scrutiny to governmental action encroaching upon fundamental rights); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (noting that marriage and procreation are fundamental rights warranting strict scrutiny review).

201. *See Adarand*, 115 S. Ct. at 2121 (Stevens, J., dissenting) (criticizing Court for not being able to distinguish difference between "a 'No Trespassing' sign and a welcome mat," and further calling into question holding of Court because "[i]t would equate a law that made black citizens ineligible for military service with a program aimed at recruiting black soldiers").

202. *See* Thomas Ross, *Innocence and Affirmative Action*, 43 VAND. L. REV. 297, 300-01 (1990) (commenting that white persons' claims of innocence of present discriminatory practices amount to "rhetoric of innocence" and work against affirmative action programs). Professor Ross noted that the "rhetoric of innocence" is employed to discredit affirmative action programs. *Id.* Consequently, commentators who advocate the innocence of whites portray them as victims of affirmative action programs because, in their view, that particular person, by virtue of his race alone, may not have individually discriminated against the minority. *Id.* Thus, questions addressing the plight of minorities are usually left unanswered. *Id.* Furthermore, Mr. Ross explains that this rhetorical analysis also tends to discount the status of blacks as actual victims by insisting that discrimination be proven. *Id.* Therefore, the "rhetoric of innocence" concludes that affirmative action plans disadvantage whites by providing undeserved benefits to blacks. *Id.*

203. *See Adarand*, 115 S. Ct. at 2111 (determining that irrespective of who was "burdened" or who "benefitted" from racial classifications, consistency, as warranted by equal protection principles, mandates strict scrutiny review).

204. *See* Missouri, Kan. & Tex. Ry. Co. v. May, 194 U.S. 267, 269–70 (1904) (commenting that legislature is in better position than judiciary to implement policy in light of legislature's superior fact-finding capability and public accountability); Robert H. Bork, *The Constitution, Original Intent, and Economic Rights*, 23 SAN DIEGO L. REV. 823, 829-32 (1986) (claiming that judicial activism grounded upon political or economic rights is not appropriate role for judicial branch); *see also* Earl M. Maltz, *Some New Thoughts on an Old Problem—The Role of the Intent of the Framers in Constitutional Theory*, 63 B.U. L. REV. 811, 843 (1983) (warning against dangers of federal judiciary acting in legislative capacity).

more, by employing strict scrutiny review, the *Adarand* Court interfered with the democratic process by adopting a level of review so stringent that majoritarian-enacted affirmative action programs are not likely to survive.[205] This action effectively short-circuits the democratic process because the Court has already decided what programs will survive, without allowing the American people to decide for themselves which affirmative action programs should remain intact.[206]

The Court's invasion of legislative domain is especially problematic because the judiciary has no experience in determining whether nonracial alternatives to affirmative action programs actually work.[207] Congress, on the other hand, has the information-gathering capability and the administrative resources to determine the viability of such measures.[208]

---

205. *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 573–75 (4th ed. 1991) (noting that strict scrutiny almost always requires legislation to be invalidated); James Kilpatrick, *Court Reverses Discrimination*, CINCINNATI ENQUIRER, Aug. 25, 1995, at A14 (predicting end to all federal affirmative action programs that fail strict scrutiny); James Kilpatrick, *Reversing Discrimination in Reverse*, BUFFALO NEWS, Aug. 28, 1995, at B3 (commenting that *Adarand* has resulted in dismantling of affirmative action programs). *But see Adarand*, 115 S. Ct. at 2117 (predicting that some affirmative action programs may survive *Adarand* holding).

206. Soon after the Court's holding in *Adarand*, legislation was introduced in Congress advocating the elimination of all race-based and gender-based preferences in federal contracting programs. *See* S. 1085, 104th Cong., 1st Sess. § 2 (1995) (declaring that race and gender preferences in allocation of federal contracts are impermissible); H.R. 2128, 104th Cong., 1st Sess. § 8 (1995) (barring federal government from granting any federal contractor or subcontractor preferential treatment on basis of race or gender). This method of deciding the viability of federal affirmative action programs is proper because Congress is politically accountable to the electorate.

207. *See Fullilove*, 448 U.S. at 491 (asserting that "court must respect the limitations on its own powers" because to do otherwise would violate functions of other branches of government and be tantamount to judicial usurpation of powers); Lawrence C. Marshall, *The Canons of Statutory Construction and Judicial Constraints: A Response to Macy and Miller*, 45 VAND. L. REV. 673, 675 (1992) (concluding that Congress, rather than judiciary, should decide legislative priorities). One commentator concluded:

> The judicial process is . . . too remote from conditions, and deals, case by case, with too narrow a slice of reality. It is not accessible to all the varied interest at play in any decision of great consequence. It is very properly independent. It is passive. It has difficulty controlling the stages by which it approaches a problem. It rushes forward too fast, or it lags; its pace hardly ever seems just right. For all these reasons, it is, in a vast, complex, changeable society, a most unsuitable instrument for the formation of policy.

ALEXANDER BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 175 (1970).

208. *See Fullilove*, 448 U.S. at 477–78 (noting ability of Congress to obtain abundant evidence, such as disparity studies, to correct discrimination); Richard D. Friedman, *Putting the Dormancy Doctrine out of Its Misery*, 12 CARDOZO L. REV. 1745, 1755 (1991) (noting Congress's superior abilities to review policy decisions); Christopher S. Marchese, *The Dormant Commerce Clause and Airport Noise: A Case for Narrow Judicial Review*, 44 BAYLOR L. REV. 645, 690–93 (1992) (commenting that in making policy decisions, Con-

Thus, it seems nonsensical to advocate the use of nonracial alternatives if a congressional or administrative finding clearly indicates that only an affirmative action program will cure discrimination. Because the Supreme Court lacks the authority and competency to make these legislative determinations, the Court has ignored its proper role and engaged in a form of judicial activism that smacks of Lochneresque jurisprudence by requiring nonracial alternatives to be employed initially under all circumstances.[209]

VI. Repercussions of Applying Strict Scrutiny to Federal Affirmative Action Programs

The *Adarand* Court's application of strict scrutiny to federal affirmative action programs will surely prompt numerous challenges to federal contracting programs.[210] Consequently, if the strict scrutiny test truly mandates that nonracial alternatives must first be embraced, serious repercussions will follow.[211] For instance, all affirmative action plans established by Revised Order 4 may be in constitutional jeopardy because federal contractors are required to establish "goals and timetables" to rectify "underutilization" of minorities, but are not required to implement race-neutral means to achieve those goals.[212] Likewise, it appears

---

gress's exceptional ability stems from its fact-finding resources and input from myriad interests).

209. *Cf.* Griswold v. Connecticut, 381 U.S. 479, 520-21 (1965) (Black, J., dissenting) (arguing that Court replaced legitimate laws with its own policy choices); New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (warning that personal convictions of Justices must be guarded in order to prevent their prejudices from being injected into legal principles); Felix Frankfurter, The Public and its Government 50, 51 (1930) (determining that veto power of Court has serious downfalls because fears of Justices may sway them to refuse to acknowledge novel avenues of dealing with social evils).

210. *See* David G. Savage, *Rebuilding Affirmative Action: The Court Mandates 'Strict Scrutiny' for All Official Race-Based Programs*, A.B.A. J., Aug. 1995, at 42, 42 (comparing facts of *Adarand* with those of other affirmative action cases and predicting downfall of federal affirmative action programs). *See generally* Jeffrey Rosen, *The Color-Blind Court*, New Republic, July 31, 1995, at 19, 23 (predicting that various affirmative action programs will be held unconstitutional).

211. *See* Rex D. Van Middlesworth, *Affirmative Action: What's Next for Affirmative Action?: Because of Sandra Day O'Connor's Mixed Signals, the Supreme Court Raised More Questions Than It Answered in* Adarand, Tex. Law., June 26, 1995, at 11 (stating that by "requiring this highest standard of review, the *Adarand* decision casts doubt on the constitutionality of a large number of federal programs designed to increase contracting opportunities for minority-owned businesses"). Though the *Adarand* opinion dictates that strict scrutiny is the new standard to be applied to all race-based federal affirmative action programs, what remains unclear is how the courts are to apply strict scrutiny, especially because many of these programs also encompass a gender component.

212. Revised Order No. 4, 41 C.F.R. § 60–2.11 to -2.12 (1995).

that affirmative action contracting programs will also fail the strict scrutiny test because they lack a factual predicate specifically identifying past discriminatory conduct.[213] Even presuming that specific evidence of past discrimination is found, federal contractors will be prohibited from implementing affirmative action programs without first pursuing nonracial alternatives.[214] It may take years to exhaust all nonracial alternatives, which could place minorities in a worse position than if affirmative action programs had been implemented immediately.

Executive Order 11,246's requirement that certain federal contractors have a written affirmative action program is also at risk under the Court's new strict scrutiny test because it does not require that nonracial alternatives be administered before implementing an affirmative action program.[215] Similarly, federal subcontracting compensation clauses, such as those in STURAA and the SBA, may be constitutionally doomed.[216] For example, in *Croson*, the Court struck down a state affirmative action plan because, although it was designed to remedy past discrimination against African-Americans, it was overinclusive in that it also addressed "Hispanics, Asian Americans, Native Americans, Eskimos, and Aleuts."[217] Because STURAA and the SBA contain similar provisions, and because STURAA and the SBA will now be held to the same review formerly reserved for state affirmative action plans, the lower court in *Adarand*, on remand, will likely hold that STURAA and the SBA are unconstitutional unless the federal government can specifically prove that all of these minority groups have suffered from discriminatory practices within the construction industry.

Finally, the FCC's "distress sale program," which allows a broadcaster to turn his license over to a minority-owned broadcasting company prior

---

213. *See* Kathleen M. Sullivan, *Sin of Discrimination: Last Term's Affirmative Action Cases*, 100 HARV. L. REV. 78, 91-96 (1986) (commenting that Court will only approve affirmative action programs that directly address specific "sins" of past discrimination).

214. *Cf.* United States v. Paradise, 480 U.S. 149, 199-200 (1987) (O'Connor, J., dissenting) (asserting that court-ordered affirmative action program was not narrowly tailored because court did not use nonracial criteria in implementing affirmative action plan).

215. *See* Nancy Montwielar, *Affirmative Action: Clinton Review Is Concentrating on Procurement Programs, Official Says*, Daily Lab. Rep. (BNA) (Sept. 25, 1995) (commenting that *Adarand* holding invalidates Executive Order 11,246 because no showing of prior discriminatory acts is required by order), *available in* LEXIS, BNA Library, DLABRT File.

216. Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2119 (1995) (Scalia, J., concurring) (commenting that STURAA and SBA are unlikely to survive strict scrutiny).

217. *See* City of Richmond v. Croson, 488 U.S. 469, 506, 511 (1989) (plurality opinion) (criticizing and striking down affirmative action plan because no evidence of prior discrimination was presented for minority groups other than African-Americans).

to a revocation hearing, may also be in constitutional jeopardy.[218] The program's constitutional validity is questionable because race is the sole factor in determining eligibility, regardless of whether prior discrimination has been specifically identified.[219] This program survived under intermediate scrutiny in *Metro Broadcasting*, but, like so many other federal programs, may not survive under the strict scrutiny mandated by *Adarand*.[220]

VII. CONCLUSION

The Supreme Court's decision in *Adarand* resurrected an era that most thought was long gone—the *Lochner* era. The similarities between *Lochner* and *Adarand* are readily apparent and lie at the core of the respective decisions. For example, both cases represent a judicial interpretation of what is or is not "proper" legislation. Additionally, both Courts demonstrated a penchant for making policy decisions that favored individual rights over group or societal rights.

The *Adarand* Court's *Lochner*-like approach is problematic in at least three primary respects. First, the *Adarand* Court ignored the original meaning of the Fourteenth Amendment in promoting its vision of a color-blind Constitution devoted to individual rights. Second, the Court in *Adarand* acted as a "super-legislature" in employing strict scrutiny as a means of striking benign legislation that did not fit within its own political and moral agenda. Finally, the Court subverted the democratic process by invalidating majority-enacted legislation.

The repercussions of the Court's decision in *Adarand* will surely be immense. Many federal affirmative action programs will undoubtedly be challenged under the Court's new strict scrutiny test, and many may be invalidated. Additionally, in the long term, the Court may be ever more inclined to Lochnerize in other politically divisive areas. Perhaps most importantly, however, the Supreme Court's decision in *Adarand* will surely have a detrimental effect on those in society who have never experienced anything close to the Court's ideal of a color-blind Constitution.

---

218. *See Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 F.C.C.2d 979, 983–84 (1978) (authorizing licensee whose license is about to be revoked to sell station to minority at 75% of fair market value).

219. *See id.* (using race to determine eligibility for distress sale program).

220. *Compare* Metro Broadcasting v. FCC, 497 U.S. 547, 567–68 (1990) (applying intermediate scrutiny in upholding FCC program granting race-based preferences) *with Adarand*, 115 S. Ct. at 2118 (requiring all federal affirmative action programs to be strictly scrutinized).