



---

Spring 4-1-1996

## REAFFIRMING AFFIRMATIVE ACTION WE'VE COME A LONG WAY, BUT NOT FAR ENOUGH

Cynthia R. Mabry

Follow this and additional works at: <https://scholarlycommons.law.wlu.edu/crsj>



Part of the [Civil Rights and Discrimination Commons](#), and the [Law and Society Commons](#)

---

### Recommended Citation

Cynthia R. Mabry, *REAFFIRMING AFFIRMATIVE ACTION WE'VE COME A LONG WAY, BUT NOT FAR ENOUGH*, 2 Race & Ethnic Anc. L. Dig. 1 (1996).

Available at: <https://scholarlycommons.law.wlu.edu/crsj/vol2/iss1/4>

This Article is brought to you for free and open access by the Washington and Lee Journal of Civil Rights and Social Justice at Washington and Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Washington and Lee Journal of Civil Rights and Social Justice by an authorized editor of Washington and Lee University School of Law Scholarly Commons. For more information, please contact [christensena@wlu.edu](mailto:christensena@wlu.edu).

# REAFFIRMING AFFIRMATIVE ACTION WE'VE COME A LONG WAY, BUT NOT FAR ENOUGH

Cynthia R. Mabry\*

"[T]he *Adarand* decision did not dismantle affirmative action . . ."<sup>1</sup>

## I. INTRODUCTION

Affirmative action is "an effort to develop a systematic approach to open the doors of education, employment and business opportunities to qualified individuals who happen to be members of groups that have experienced longstanding and persistent discrimination."<sup>2</sup> Federal affirmative action originated over thirty years ago when President Lyndon B. Johnson signed Executive Order No. 11,246 on September 24, 1965.<sup>3</sup> The Executive Order announced the federal government's policy to provide equal employment opportunities "for all qualified persons" by prohibiting employment discrimination based on race, creed, color, or national origin.<sup>4</sup>

Executive Order No. 11,246 also forbade discrimination in federal government contracting and federally funded construction contracts.<sup>5</sup> Contractor were required to stipulate that they would not discriminate in hiring, promoting, recruiting, laying off, terminating, or compensating employees.<sup>6</sup> Conse-

quently, *all* qualified applicants would have the same employment and contracting opportunities. The Secretary of Labor was responsible for ensuring compliance with the presidential proscriptions announced in the Order.<sup>7</sup>

Affirmative action that grew out of the Executive Order means proactive (not reactive) efforts to foster *real* equality of opportunity. Affirmative action is positive government, not negative passive government that existed prior to the 1960s. Taking active affirmative steps requires setting goals based on group statistics because proving discrimination in the individual case is seldom easy. Discrimination usually comes with a mask of civility that hides its ugly face or a veneer of "objectivity" that hides cultural, ethnic, and racial bias. These "goals" may in detail appear as preferences, but they are, in the larger picture, mere signposts to success and progress toward achieving real equality.

In the past thirty years, some major advances that minorities, women, and small businesses made in higher education, employment, and business can be attributed to affirmative action programs.<sup>8</sup> However, "[t]his progress has not come without difficulty and has

---

\*Associate Professor of Law, West Virginia University College of Law; J.D. 1983, Howard University School of Law; LL.M., 1996, New York University School of Law. I acknowledge and appreciate comments and suggestions from Dean Donald Lively, Professor James McLaughlin, and Attorney Lisa Wilson, United States Department of Justice. Also, I want to acknowledge Professor Ann Maxey's support and her willingness to share her views on the importance of diversity.

<sup>1</sup> Remarks by the President on Affirmative Action, July 19, 1995, 1995 WL 423981. *Accord Is This The End of Federal Minority Contracting? Not Hardly*, FED. LAW., March/April 1995, at 38 ("Regardless of the Supreme Court decision in *Adarand*, it is highly doubtful that it will have any demonstrable negative effect on federal minority contracting").

<sup>2</sup> Remarks by the President on Affirmative Action, July 19, 1995, 1995 WL 423981. See also Dorothy Gilliam, *Damaging, Destructive Doublespeak*, WASH. POST, June 17, 1995, at H1 (opining that the definition does not include a reference to preferences).

Assistant Attorney General Walter Dellinger defined affirmative action as "a group-based remedy: where a group has been subject to discrimination, individual members of the group can benefit from the remedy, even if they have not proved that they have been discriminated against personally." Memorandum from Dellinger to General Counsels, June 28, 1995, at 5 [hereinafter Memorandum]. See also *Local 28, Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421, 482 (1986); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277-78 (1986).

---

<sup>3</sup> Exec. Order No. 11,246, 30 Fed. Reg. 12,319 (1965).

<sup>4</sup> *Id.* (promoting "the full realization of equal employment opportunity through a positive, continuing program in each executive department and agency").

<sup>5</sup> *Id.* §§ 301-304.

<sup>6</sup> *Id.* § 202(1)-(2). Contractors were required to include those seven provisions in every subcontract or purchase order unless the Secretary of Labor exempted the requirement. A contractor could be exempted from compliance with the Executive Order if the contract work was performed outside of the United States and workers were not recruited in the United States, the contract was for commercial supplies or raw materials, the contract involved less than a specified sum of money or a specified number of workers, or subcontracts below a specified value were involved. *Id.* § 204.

<sup>7</sup> *Id.* §§ 205-206. Contracting agencies were primarily responsible for ensuring compliance with the rules, regulations, and the Secretary of Labor's orders. Sanctions and penalties for non-compliance included Department of Justice proceedings to enjoin or prevent actions that affect compliance, Equal Employment Opportunity Commission or Department of Justice proceedings under Title VII of the Civil Rights Act of 1964, criminal proceedings, and barring the contracting agency from entering into further contracts with any non-complying contractor. *Id.* § 209(a).

<sup>8</sup> Rhonda McMillion, *Affirmative Action Struggle*, A.B.A. J., Jan. 1995, at 93 [hereinafter McMillion]. See also ANDREW BILLINGSLEY, *CLIMBING JACOB'S LADDER* 290-91 (1993)[here-

been challenged by lawsuits and filings of reverse discrimination appeals with the Equal Employment Opportunity Commission.<sup>9</sup>

Generally, affirmative action critics articulate two contentions. One averment is that affirmative action causes unfair preferences for minorities and women because, in the name of affirmative action, minorities and women receive jobs and contracts instead of more qualified white males.<sup>10</sup> Recently, Robert Dole, the majority leader of the Senate and a Republican presidential candidate, revealed his misconceptions—or misinterpretations—of affirmative action objectives. Dole asserted that discrimination and preferential treatment were wrong. Instead of guaranteeing equal opportunity, Dole claimed, affirmative action allowed quotas, set asides, numerical objectives, and other preferences to divide Americans.<sup>11</sup>

The term “preference,” when associated with affirmative action, misleads some people to incorrectly believe that affirmative action programs were designed to give minorities opportunities without regard to their qualifications.<sup>12</sup> The results of a 1992 poll illustrate differing attitudes about affirmative action and preferences. When asked whether they favored affirmative action, seventy percent of those polled answered in the affirmative while twenty-four percent responded negatively. When the term “racial preferences” was used, only forty-six percent of the same respondents approved of preferences.<sup>13</sup> Although critics, like Senator Dole, often say that affirmative action promotes preferences for minorities and women, nowhere in Executive Order No. 11,246 does the word “preference” appear. On the other hand, President Johnson used the word “opportunity” several times. Moreover, he explicitly stated that qualified persons should have equal opportunities.

Some critics also erroneously believe that affirmative action is no longer necessary because minority people have made significant social and economic progress since the mid-1960s.<sup>14</sup> Among others, Clint Bolick, Litigation Director for the Institute for Justice, uttered this anti-affirmative action argument. Referring to affirmative

action, Bolick said that “racial preferences are the tools of the 1960s and are utterly impotent in the 1990s.”<sup>15</sup> With this statement, Bolick not only misconstrued the purposes and effects of affirmative action, but also the continuing necessity for affirmative action programs. In 1994, Cornel West, Harvard University Professor of African-American Studies and the Philosophy of Religion, predicted that “it is a virtual certainty that without affirmative action, racial and sexual discrimination would return with a vengeance.”<sup>16</sup>

On June 19, 1995, the United States Supreme Court dealt a potentially disabling blow to affirmative action. In *Adarand Constructors, Inc. v. Peña*, the Court held that all federal, as well as state and local, governmental racial classifications shall be subject to strict judicial scrutiny.<sup>17</sup> The Court remanded the matter for the lower court to apply strict scrutiny to a federal, race-based affirmative action program.<sup>18</sup>

After the *Adarand* decision, President Clinton ordered all federal agencies to examine their affirmative action policies with the same scrutiny. Thus, the vigorous and loud anti-affirmative action debate was revived. Part II of this article reviews the majority and separate opinions in *Adarand*. Part III reveals public and private reactions to *Adarand* and subsequent efforts to support or weaken affirmative action programs. Finally, Part IV discusses the constitutionality of the program challenged in *Adarand* and concludes that it would survive strict scrutiny.

## II. THE ADARAND DECISION

### A. Statutory and Regulatory Background

Section 644(g) of the Small Business Act (the Act)<sup>19</sup> provides:

The President shall annually establish government-wide goals for procurement contracts awarded to small business concerns, and small business concerns

---

inafter BILLINGSLEY] (demonstrating immense growth of minority-owned business enterprises partially due to affirmative action policies); CORNEL WEST, RACE MATTERS 93-99 (1994)[hereinafter WEST] (calling affirmative action a “redistributive measure . . . to broaden access to America’s prosperity . . .”). See generally Frank Wu, *Neither Black Nor White: Asian Americans And Affirmative Action*, 15 B.C. THIRD WORLD L.J. 225 (1995).

<sup>9</sup> *Affirmative Action: Hearings Before the Subcomm. on the Constitution, Federalism and Property Rights* (Sept. 7, 1995)(testimony of Reginald Wilson, Ph.D.)(quoting Vernon Jordan).

<sup>10</sup> *Id.*

<sup>11</sup> Senator Robert Dole, *Clinton missed mark on affirmative action*, USA TODAY, July 20, 1995, at 11A. See also Todd S. Purdum, *President gives affirmative support to fighting bias*, N.Y. TIMES, July 20, 1995, at A1 [hereinafter Purdum] (vowing “to

---

get the federal government out of the group-preference business”).

<sup>12</sup> Purdum, *supra* note 11.

<sup>13</sup> *Id.*

<sup>14</sup> *Affirmative Action After Adarand*, 9 Lab. Rel. Rep. (BNA) S-1, S-2 (Aug. 2, 1995)[hereinafter *After Adarand*].

<sup>15</sup> *Id.* at S-1. *Accord Equal Opportunity Act of 1995 : Hearings on H.R. 2128 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 104th Cong., 1st Sess. (1995) (statement of Clint Bolick) (outlawing preferences “while allowing efforts to extend a helping hand to people outside the economic mainstream”).

<sup>16</sup> WEST, *supra* note 8, at 95.

<sup>17</sup> 115 S. Ct. 2097 (1995).

<sup>18</sup> *Id.* at 2113.

<sup>19</sup> Small Business Act, 15 U.S.C. § 631 (1995).

owned and controlled by socially and economically disadvantaged individuals, and small business concerns owned and controlled by women. The government-wide goal for participation by small business concerns shall be established at not less than 20 percent of the total value of all prime contract awards for each fiscal year. The government-wide goal for participation by small business concerns owned and controlled by socially and economically disadvantaged individuals shall be established at not less than 5 percent of the total value of all prime contract and subcontract awards for each fiscal year . . . . Notwithstanding the government-wide goal, each agency shall have an annual goal that presents, for that agency, the maximum practicable opportunity for small business concerns and small business and economically disadvantaged individuals to participate in the performance of contracts let by such agency.<sup>20</sup>

By enacting that legislation, Congress intended to give small businesses and small businesses owned and operated by socially and economically disadvantaged business enterprises (DBE) a fair chance to acquire government contracts.<sup>21</sup>

In awarding government contracts, section 644(g) required federal agencies to establish goals of at least five percent DBE participation. With the authority delegated in the Act, the United States Department of Transportation (DOT) instituted a program to encourage prime contractors to give DBEs "the maximum practicable opportunity" to contract with DOT. As an agency of the federal government, DOT promulgated the Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURAA).<sup>22</sup> Section 106(c) of STURAA, which is specifically applicable to federally-funded transportation projects, required expenditure of not less than ten percent of STURAA funds with DBEs.<sup>23</sup>

---

<sup>20</sup> *Id.* § 644(g)(1).

<sup>21</sup> *Id.* § 637(d)(1).

<sup>22</sup> Pub. L. No. 100-17, 101 Stat. 144-46.

<sup>23</sup> *Id.* § 106(c)(1), 101 Stat. 145. *See also* 49 C.F.R. §§ 23.64(e), 23.65 (1995) (permitting goals below ten percent).

<sup>24</sup> If the contractor hired two or more DBEs, the bonus would be ten percent of the DBE subcontract without exceeding two percent of the original contract amount. *See* 115 S. Ct. at 2104 (quoting the contract provision). *See also* 16 F.3d at 1539; Brief for Respondents at 17-18, *Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097 (1995) (No. 93-1841) [hereinafter Brief for Respondent].

The Clause is designed to offset the financial disincentives that would otherwise exist to employing and assisting disadvantaged businesses as subcontractors by covering the additional expenses associated with such employment. In return for compensation under the Clause, the prime contractor thus must agree to locate, train, utilize, assist, and develop [disadvantaged businesses] to become fully qualified contrac-

Later, the subcontractor compensation clause (SCC) was implemented to carry out DOT's DBE goals. Under the SCC program, a standard clause was included in all small contracts and contracts involving small prime contractors. The clause advised prime contractors that they would receive an incentive payment when they contracted with DBE subcontractors. The bonus would be ten percent of the final value of the subcontract. However, if the prime contractor hired only one DBE subcontractor, the monetary bonus could not exceed 1.5 percent of the original contract amount.<sup>24</sup>

To qualify under STURAA, subcontracting companies had to be small businesses that were at least fifty-one percent owned and controlled by "socially and economically disadvantaged" individuals.<sup>25</sup> To identify DBE subcontractors for participation in the program, prime contractors could presume that certain groups were socially and economically disadvantaged. The list included African Americans, Hispanics, Native Americans, Asians, other minorities, and any other individuals whom the Small Business Administration (SBA) designated as disadvantaged.<sup>26</sup>

Congress deemed those groups of people socially disadvantaged since despite their individual qualifications as businesspersons, racial or ethnic prejudice or cultural bias foreclosed their business opportunities.<sup>27</sup> Moreover, under both the Act and the STURAA, some small businesses were economically disadvantaged. Congress reasoned that limited start-up capital and lack of credit hindered the small companies' ability to compete aggressively in the marketplace.<sup>28</sup>

## B. Factual Summary

In 1989, the Central Federal Lands Highway Division, a branch of DOT's Federal Highway Administration, awarded a highway construction contract to Mountain Gravel & Construction Company (Mountain

---

tors in the transportation facilities construction field. The Contractor shall also provide direct assistance to disadvantaged subcontractors in acquiring the necessary bonding, obtaining price quotations, analyzing plans and specifications, and planning and management of the work.

Brief for Respondent at 17 (citations omitted).

<sup>25</sup> 15 U.S.C. §§ 637(a)(5), 637(a)(6)(A), 637(d)(3)(C); 49 C.F.R. § 23.62 (1995); 13 C.F.R. § 124.103 (1995).

<sup>26</sup> 15 U.S.C. §§ 637(d)(3)(C); § 106(c)(2)(B), 101 Stat. 146. There is a presumption that members of the designated groups are socially and economically disadvantaged. On the other hand, the presumption is rebuttable. Thus, a third party could produce evidence that the subcontractor was not socially or economically disadvantaged. 48 C.F.R. §§ 19.001, 19.703(a)(2); 49 C.F.R. § 23.62(a)-(e)(1995); 13 C.F.R. § 124.105(b)(1)(1995).

<sup>27</sup> 15 U.S.C. § 637(a)(5).

<sup>28</sup> *Id.* § 637(a)(6)(A). *See also* 13 C.F.R. §§ 124.105(b)(1), 124.106(a).

Gravel).<sup>29</sup> As DOT policy commanded, Mountain Gravel's contract provided that, as the prime contractor, Mountain Gravel would receive a monetary bonus if it employed DBEs.<sup>30</sup> So, according to its contract specifications, Mountain Gravel solicited bids from subcontractors to install guardrails along the highway. Adarand Constructors, Inc. (Adarand), a company that specialized in guardrails, submitted the lowest bid. Nevertheless, Mountain Gravel took advantage of its option to receive a \$10,000 bonus on its \$1 million contract by awarding the subcontract to another bidder - Gonzales Construction Company (Gonzales).<sup>31</sup>

Gonzales, a Hispanic company, was certified as socially and economically disadvantaged. Adarand, a white-owned firm, was not.<sup>32</sup> Candidly, Mountain Gravel's Chief Estimator admitted that Mountain Gravel selected Gonzales so that it would receive more money. Otherwise, the Estimator conceded, Adarand would have been chosen to install the guardrails.<sup>33</sup>

### C. Procedural History

In its lawsuit against the United States Secretary of Transportation and other federal officials, Adarand sought declaratory and injunctive relief to enjoin future use of SCCs.<sup>34</sup> Adarand challenged the incentive program as a discriminatory race- and gender-based presumption that would not survive scrutiny under *Richmond v. J.A. Croson Co.*<sup>35</sup> As such, Adarand alleged, the program violated its constitutional rights under the Fifth Amendment.<sup>36</sup>

The government filed a motion for summary judgment. It argued that the relaxed standard of review an-

nounced in *Fullilove v. Klutznick*<sup>37</sup> was controlling authority instead of the strict scrutiny standard used in *Croson*.<sup>38</sup> The district court judge agreed with the government, applied *Fullilove*, and granted the government's motion.<sup>39</sup> The district court ruled that the federal government had a legitimate interest in remedying past discrimination and the SCC program was narrowly tailored to achieve that goal.<sup>40</sup>

On appeal to the Tenth Circuit, Adarand stipulated that section 644(g) authorized establishment of the SCCs and that the provision satisfied *Fullilove* evidentiary requirements.<sup>41</sup> Applying a lesser standard than *Croson* required—an intermediate scrutiny standard—the court of appeals affirmed the district court's ruling that the SCCs were constitutional.<sup>42</sup>

When Adarand petitioned the United States Supreme Court for a writ of *certiorari*, the Court granted the petition.<sup>43</sup> Before the Supreme Court, Adarand argued that the court of appeals had erroneously relied upon *Metro Broadcasting, Inc. v. FCC*.<sup>44</sup> Specifically, Adarand took exception to the court's application of an intermediate scrutiny analysis to a federal race-conscious classification. The proper test, Adarand contended, was strict scrutiny—the same standard applied to state action in *Croson*.<sup>45</sup>

Government representatives continued to defend the constitutionality of the SCC program. They asserted that the program was based upon a subcontractor's disadvantaged status, not its race.<sup>46</sup> The government conceded, however, that the race-based rebuttable presumption used to certify some subcontractors was subject to heightened scrutiny.<sup>47</sup>

---

<sup>29</sup> 16 F.3d 1537, 1537 (10th Cir. 1994).

<sup>30</sup> *Id.* at 1541-42; 115 S. Ct. at 2102.

<sup>31</sup> 115 S. Ct. at 2102.

<sup>32</sup> *Id.* Either the SBA, a state highway agency, or a certifying agency approved by the contracting officer must certify that the subcontractor is a small disadvantaged business. *Id.* at 2104. Randy Pech, a white male, manages and controls daily operations at Adarand. Brief for Petitioner at 7, *Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097 (1995) (No. 93-1841) [hereinafter Brief for Petitioner].

<sup>33</sup> 115 S. Ct. at 2102.

<sup>34</sup> *Id.* at 2104. At the outset, the Supreme Court concluded that Adarand had standing to seek damages for the contract it lost as well as to enjoin future reliance on financial incentives to induce prime contractors to hire DBEs. *Id.* at 2104-05 (indicating that Adarand "is very likely to" bid on future contracts for guardrail work and will have to compete against DBEs).

<sup>35</sup> *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989). See also *Adarand*, 16 F.3d at 1544 (advocating that particularized findings of past discrimination were needed to justify the race-conscious subcontractor program).

<sup>36</sup> 115 S. Ct. at 2104, 2105-06. The Fifth Amendment of the United States Constitution provides that "[n]o person shall be . . . deprived of life, liberty, or property, without due pro-

---

cess of law." U.S. CONST. amend. V. After a long discussion regarding whether the Fifth Amendment prohibited racial classifications in federal as well as state legislation, the Court decided that the equal protection obligations in the Fifth and Fourteenth Amendments are indistinguishable.

115 S. Ct. at 2106-08.

<sup>37</sup> 448 U.S. 448 (1980).

<sup>38</sup> 16 F.3d at 1542-43.

<sup>39</sup> *Adarand Constructors, Inc. v. Skinner*, 790 F. Supp. 240, 243-44 (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) (distinguishing *Croson*).

<sup>40</sup> 790 F. Supp. at 244-45.

<sup>41</sup> 16 F.3d at 1544 (conceding further that CFLHD's use of the incentive program was within its delegated power under section 644(g)).

<sup>42</sup> *Id.* at 1543, 1546-47 (citing *Fullilove v. Klutznick*, 448 U.S. 448, 484 (1980))

<sup>43</sup> 115 S. Ct. 41 (1994).

<sup>44</sup> 497 U.S. 547 (1990).

<sup>45</sup> Brief for Petitioner, *supra* note 32, at 25-28 (criticizing the court of appeals' use of a lenient standard).

<sup>46</sup> 115 S. Ct. at 2105; Brief for Respondents, *supra* note 24, at 26.

<sup>47</sup> 115 S. Ct. at 2105.

#### D. Supreme Court Opinion

Justice O'Connor wrote the five-four majority opinion. Justices Rehnquist and Kennedy joined the entire opinion, while Justices Scalia and Thomas joined most of the opinion. Justice O'Connor reaffirmed the well-settled rule that racial and ethnic distinctions were inherently suspect; therefore, they must be examined with the strictest judicial scrutiny.<sup>48</sup> In doing so, the Court overruled the portion of *Metro Broadcasting, Inc.* that had applied an intermediate scrutiny standard.<sup>49</sup> According to the Court, the *Metro Broadcasting, Inc.* holding was inconsistent with three principles that the Supreme Court had advanced for decades. The Court had expressed skepticism about all racial and ethnic classifications. Additionally, the Court had promoted "consistency of treatment irrespective of race," and congruent application of the same standard of review to racial classifications imposed by state, local, and federal governments.<sup>50</sup>

In *Adarand*, Justice O'Connor wrote that "any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny."<sup>51</sup> "[D]etailed judicial inquiry" of racial classifications was needed to prevent encroachment upon an individual's personal right<sup>52</sup> to equal protection of the laws. Accordingly, the Court adopted the two-part strict scrutiny test that Justice O'Connor had devised in *Croson*.<sup>53</sup> In *Croson*, the Supreme Court analyzed the City of Richmond, Virginia's ordinance that thirty percent of its contracting work would be set aside for minority-owned businesses. The Court held that strict judicial scrutiny must be applied to all state and local governmental racial classifications. Such scrutiny would "smoke out",

illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen 'fit' this compelling goal so closely that there is little or no possibility

that the motive for the classification was illegitimate racial prejudice or stereotype.<sup>54</sup>

Six years after the Supreme Court decided *Croson*, it expanded the *Croson* holding. In *Adarand*, the Court ruled that a reviewing court must analyze *all* racial classifications imposed by either federal, state, or local governments with strict scrutiny.<sup>55</sup> With this ruling, the Court finally resolved the uncertainty regarding the standard of review for federally imposed race-based classifications.

The *Adarand* Court stressed that its ruling did not mean that strict scrutiny analysis would be "fatal in fact" and render all racial classifications illegal. Conversely, Justice O'Connor reiterated that strict scrutiny was a method of distinguishing legitimate racial classifications from illegitimate classifications.<sup>56</sup> Thus, though racial classifications were presumptively invalid, some classifications could survive an equal protection challenge if they were necessary to achieve a compelling governmental interest.<sup>57</sup>

Having engaged in lengthy discourse about the standard for reviewing federal racial classifications, the Supreme Court declined to apply the standard in *Adarand*. Instead, it vacated the Tenth Circuit's decision and remanded the matter for a strict scrutiny analysis of the SCC program. The Supreme Court ordered the reviewing court to consider two issues: (1) whether the SCC program served compelling interests, and (2) whether the racial classification was narrowly tailored to achieve those goals.<sup>58</sup>

The Court further suggested that the lower court should discover whether race-neutral means to increase minority business participation in government contracting had been considered. Also, the reviewing court should decide whether the duration of the program was limited. A program should not last longer than the discriminatory effects it was intended to eliminate.<sup>59</sup>

#### E. Separate Opinions

In two separate dissenting opinions, Justices Scalia and Thomas concurred in part. Both agreed that strict

---

<sup>48</sup> *Id.* at 2112-13.

<sup>49</sup> *Id.* at 2113.

<sup>50</sup> *Id.* at 2112.

<sup>51</sup> *Id.* at 2111.

<sup>52</sup> See generally Stephen Minnich, *Adarand Constructors, Inc. v. Pena—A Strict Scrutiny of Affirmative Action*, 46 CASE W. RES. L. REV. 279, 299-302 (1995) (discussing the views of individualists and group rights theorists).

<sup>53</sup> 488 U.S. at 493. See also 115 S. Ct. at 2112-13.

<sup>54</sup> *Croson*, 488 U.S. at 493-94.

<sup>55</sup> 115 S. Ct. at 2113.

<sup>56</sup> *Id.* "Strict scrutiny . . . evaluates carefully all governmental race-based decisions in order to decide which are constitutionally objectionable and which are not." *Id.*

---

<sup>57</sup> *Id.* The Court reaffirmed precedent holding that remedying the effects of past discrimination is a compelling government interest. The Court further held, however, that racial classifications rarely justify disparate treatment. *Id.* at 2113, 2117.

<sup>58</sup> *Id.* at 2118.

<sup>59</sup> *Id.* (citations omitted). The Court also highlighted discrepancies between definitions and requirements in the SBA and DOT regulations that implemented STURAA. For instance, DOT regulations do not appear to require certification that every applicant is economically disadvantaged, whereas the SBA regulation does require such certification. *Id.*

scrutiny was the appropriate standard of review.<sup>60</sup> However, for different reasons, they concluded that the SCC program would not pass strict scrutiny. Justice Scalia asserted that “[i]n the eyes of government, we are just one race.” Therefore, no governmental interest would be compelling enough to justify governmental discrimination to make amends for past discrimination.<sup>61</sup> Similarly, and not surprisingly in light of other opinions he has written, Justice Thomas declared that the “racial paternalism . . . that appears to lie at the heart of this program is at war with the principle of inherent equality that underlies and infuses our Constitution.”<sup>62</sup>

Justice Stevens filed a dissenting opinion that Justice Ginsburg joined. Justice Stevens disagreed with the majority decision that the same standard of review should be applicable to federal, state, and local programs.<sup>63</sup> He contended that the concept of congruence was inconsistent with the deference that the Court always had given Congress.<sup>64</sup> “Congressional deliberations about a matter as important as affirmative action should be accorded far greater deference than those of a state or municipality.”<sup>65</sup>

In disagreement with Justices Scalia and Thomas, Justice Stevens concluded that the Court should have affirmed the court of appeal’s judgment.<sup>66</sup> Acknowledging that society “should be wary of” governmental racial classifications, Justice Stevens opined that litigants would disagree about the outcome of review even under a uniform standard.<sup>67</sup> Moreover, Justice Stevens opposed equating invidious discrimination with remedial race-based preferences. He averred that the two concepts were distinguishable. “Invidious discrimination is an engine of oppression, subjugating a disfavored group to enhance or maintain the power of the majority. Remedial race-based preferences reflect the opposite impulse: a desire to foster equality in society.”<sup>68</sup> While invidious discrimination is “repugnant [to] a free, democratic society, [re-

medial preferences are] entirely consistent with the ideal of equality.”<sup>69</sup>

Regardless, Justice Stevens averred that the SCC program satisfied any standard—including the strict scrutiny standard—announced in any affirmative action precedent.<sup>70</sup> Justice Stevens asserted that the SCC program remedied past discrimination and attempted to compensate for disadvantages that minority contractors experienced. Typically, new minority enterprises were not socially connected with businesspersons who would award subcontracts to them.<sup>71</sup> Therefore, minority businesspersons were disadvantaged when prime contractors favored their friends or other persons with whom they had existing relationships.<sup>72</sup>

Justice Stevens concluded that “race [was] not always irrelevant to governmental decisionmaking.”<sup>73</sup> In the decisionmaking process, race was relevant “when there [was] a meaningful basis for assuming its relevance.”<sup>74</sup> For example, in Justice Stevens’s opinion, considering race was a legitimate means of achieving diversity<sup>75</sup> and assisting DBEs to overcome disadvantages associated with being a minority DBE.<sup>76</sup> Justice Stevens reasoned that the SCC program was constitutional because race was not the sole criterion for eligibility.<sup>77</sup> In fact, minorities who were not socially and economically disadvantaged would not qualify.<sup>78</sup>

Finally, Justice Stevens determined that *Fullilove* governed the outcome of *Adarand*.<sup>79</sup> In his view, the SCC program was far less objectionable than the *Fullilove* program that expressly set aside ten percent of all public contracts for minority contractors.<sup>80</sup> Yet, the *Fullilove* program satisfied strict scrutiny. Thus, “it must follow as night follows the day that the Court of Appeals’ judgment upholding [the] more carefully crafted [SCC] program should be affirmed.”<sup>81</sup>

Justices Ginsburg and Breyer joined Justice Souter in another dissenting opinion. Those Justices averred that

---

<sup>60</sup> *Id.* at 2118-19 (Scalia, Thomas, JJ., concurring in part and concurring in judgment).

<sup>61</sup> *Id.* at 2118. Justice Scalia reasoned that victims of discrimination were entitled to be made whole but not at the expense of non-minorities. “[U]nder our Constitution, there can be no such thing as either a creditor or a debtor race.” *Id.* This opinion is consistent with Justice Scalia’s concurring opinion in *Croson*, 488 U.S. at 520-28 (Scalia, J., concurring in the judgment).

<sup>62</sup> 115 S. Ct. at 2119 (describing “government-sponsored racial discrimination based on benign prejudice as noxious as discrimination inspired by malicious prejudice”).

<sup>63</sup> *Id.* at 2120 (Stevens, Ginsburg, JJ., dissenting).

<sup>64</sup> *Id.* at 2123-25 (citing *Metro Broadcasting, Inc.*, 497 U.S. at 563; *Fullilove*, 448 U.S. at 472, 490).

<sup>65</sup> 115 S. Ct. at 2120.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* By way of analogy, Justice Stevens illustrates his point. First, a “No Trespassing” sign is different from a welcome mat.

---

Second, a senator’s vote against confirmation of Thurgood Marshall to keep African Americans off the Supreme Court bench is a far cry from President Johnson’s consideration of race as a positive factor for the nominee’s selection. *Id.* at 2121.

<sup>69</sup> *Id.* at 2122-23 (citing *Wygant* 476 U.S. at 316-17 (Stevens, J., dissenting)).

<sup>70</sup> 115 S. Ct. at 2128-30.

<sup>71</sup> *Id.* at 2129.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 2127.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 2128 (citing *Regents of University of California v. Bakke*, 438 U.S. 265, 311-19 (1978); *Wygant*, 476 U.S. at 288).

<sup>76</sup> 115 S. Ct. at 2128.

<sup>77</sup> *Id.* at 2129.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 2128.

<sup>80</sup> *Id.* at 2130.

<sup>81</sup> *Id.*

an intermediate standard of analysis was proper, but concurred with Justice Stevens' position that *Fullilove* was controlling.<sup>82</sup> Justice Souter pointed out that remedial statutes should be subjected to a tripartite analysis involving a factual showing of the current effects of past discrimination, the necessity for a preferential remedy, and the suitability of the proposed preference.<sup>83</sup> Then, as Justice Stevens had done, Justice Souter decided that the SCC program passed constitutional muster.<sup>84</sup>

Finally, Justice Ginsburg, after joining Justices Stevens and Souter, wrote a separate dissent emphasizing the persistent need for affirmative action programs.<sup>85</sup> Refuting Justice Scalia's assertion that we are all one race, Justice Ginsburg wrote that, historically, the notion of one race had not been embraced in the United States.<sup>86</sup> Consequently, there were lingering effects of prodigious discrimination that were evident not only in the marketplace but also the workplace and the community.<sup>87</sup> Justice Ginsburg would not disturb the incentive programs and would leave it to Congress to modify them as societal conditions changed.<sup>88</sup> She wrote, "[g]iven this history and its practical consequences, Congress surely can conclude that a carefully designed affirmative action program may help to realize, finally, the 'equal protection of the laws' the Fourteenth Amendment has promised since 1868."<sup>89</sup>

At this juncture, four Justices—Justices Stevens, Ginsburg, Souter, and Breyer—would uphold the SCC program. Justice O'Connor's opinion in *Croson* and her statements in *Adarand* suggest that she would approve certain affirmative action measures taken as remedial action, but she would not uphold quotas.<sup>90</sup> Evidently, Justices Scalia and Thomas would not join a decision to uphold any affirmative action program.

### III. THE AFTERMATH OF ADARAND

The *Adarand* opinion started a flurry of activity for and against affirmative action.<sup>91</sup> On July 19, 1995, just

weeks after the Supreme Court decided *Adarand*, President Clinton held a press conference at the National Archives in Washington, D.C. The President reaffirmed his administration's commitment to "vigorous, effective enforcement of laws prohibiting discrimination."<sup>92</sup> He proclaimed that consistent with *Adarand* the Clinton administration would explore ways to eliminate discrimination in employment, education, and government contracting.<sup>93</sup> Meanwhile, he pledged that "the Federal Government [would] continue to support *lawful consideration of race*, . . . under programs that are flexible, realistic, subject to reevaluation, and fair."<sup>94</sup>

In furtherance of his administration's commitment, President Clinton directed all federal administrators to reevaluate affirmative action programs under their control. He specifically referenced federal programs that provide opportunities or benefits to groups of people based upon their race or ethnicity.<sup>95</sup> At the end of his pronouncement, the President suggested criteria for reviewing federal affirmative action programs. Agencies must modify or eliminate programs that effected preferences for unqualified individuals, quotas, or reverse discrimination, and those programs that continued after their equal opportunity purposes lapsed.<sup>96</sup>

A few agencies immediately responded to the President's directive. For example, the Federal Aviation Administration (FAA) issued a new diversity handbook advising managers and supervisors to explore hiring and promotion alternatives to achieve more diversity at the FAA. The objective was to increase the percentage of minorities and women in managerial positions.<sup>97</sup>

Upon reviewing its affirmative action programs, the Department of Defense suspended its fifty-eight-year-old "Rule of Two" program.<sup>98</sup> Under that program, if at least two qualified DBEs wanted to bid on a Department of Defense contract, only DBEs could compete for that particular contract. Minority-owned businesses predominated as certified businesses for those contracts.<sup>99</sup> After *Adarand*, Department of Justice and civil rights

<sup>82</sup> *Id.* at 2131.

<sup>83</sup> *Id.* at 2132. Even Supreme Court Justices misunderstand affirmative action objectives.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 2134 (Ginsburg, Breyer, JJ., dissenting).

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 2135.

<sup>88</sup> *Id.* at 2136.

<sup>89</sup> *Id.*

<sup>90</sup> See, e.g., *Adarand*, 115 S. Ct. at 2117 (clarifying that strict scrutiny did not mean fatal in fact); *Croson*, 489 U.S. at 499. In *Adarand*, Justice O'Connor wrote: "When race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the 'narrow tailoring' test this Court has set out in previous cases." 115 S. Ct. at 2117.

<sup>91</sup> See generally Kenneth Jost, *After Adarand*, A.B.A. J., Sept. 1995, at 70-75.

<sup>92</sup> Remarks by the President on Affirmative Action, July 19, 1995, at \*1, 1995 WL 423980 (White House).

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* (emphasis added).

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> Ruth Larson, *FAA put diversity above qualifications*, WASH. TIMES, Aug. 16, 1995, at A1 (opining that diversity has taken priority over qualifications).

<sup>98</sup> See *Equal Opportunity Act of 1995: Hearings on H.R. 2128 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 104th Cong., 1st Sess. (1995) (statement of Deval Patrick, Assistant Att'y Gen., Civil Rights Division) [hereinafter Patrick Testimony].

<sup>99</sup> The program had been in effect since 1937. Ann Devroy, *Rule aiding minority firms to end*, WASH. POST, Oct. 22, 1995, at A1.



lawyers surmised that the "Rule of Two" program had become vulnerable.<sup>100</sup> Reassuringly, Department of Justice officials did indicate, however, that minority businesses would continue to benefit from other affirmative action programs that *Adarand* did not affect. To salvage some programs, Department of Justice personnel would refine or alter them so that they would survive scrutiny under *Adarand*.<sup>101</sup>

Sixteen days after the Supreme Court decided *Adarand*, the Department of Justice's Office of Legal Counsel sent a memorandum to federal general counsels. The purpose of the memorandum was to provide legal guidance on the implications of *Adarand*. For the Department of Justice, Assistant Attorney General Walter Dellinger wrote that although *Adarand* involved a government contract dispute, strict scrutiny applied to federal government use of race-based criteria in health, education, hiring, and other areas as well.<sup>102</sup>

Dellinger highlighted uncertainties about the *Adarand* decision. For one thing, the Court had failed to discuss the strict scrutiny test in detail. It had failed to state whether Congress should receive deference when it found that affirmative action was a necessary response to remedy past discrimination.<sup>103</sup> Dellinger also pondered two other quandaries. First, the Court did not decide whether the federal government should amass evidence of past discrimination before it took remedial action. Second, *Adarand* expressly held that remedying past discrimination constituted a compelling interest, but it did not address whether diversity and inclusion were legitimate compelling interests.<sup>104</sup>

In light of the Court's decision and the President's directive, Dellinger proposed a checklist of questions for agencies to use for their program reviews. He concluded by saying that "*Adarand* makes it necessary to evaluate federal programs that use race or ethnicity as a basis for decision-making to determine if they satisfy the strict scrutiny standard. No affirmative action program should be suspended prior to such an evaluation."<sup>105</sup>

With similar fortitude, on September 7, 1995, Judith Winston, the General Counsel for the United States Department of Education, wrote a letter to college and university counsel regarding the potential impact that *Adarand* had on educational programs. Winston was confident that *Adarand* would not change the Depart-

ment of Education's policy on race-based financial aid. The Department of Education determined that congressionally authorized financial aid did not violate Title VII of the Civil Rights Act.<sup>106</sup>

Winston assured advocates that if the Department of Justice eventually found that a financial aid program fell short of *Adarand* standards, the Department of Education would modify the program. Like Dellinger, Winston ended with an optimistic outlook: "under governing legal standards, race-targeted student aid is legal in appropriate circumstances as a remedy for past discrimination or as a tool to achieve a diverse student body. Scholarships for these purposes are vital to the education of all students."<sup>107</sup>

Obviously, many commentators echoed President Clinton's sentiments about the need for affirmative action programs. One day after President Clinton gave his affirmative action address, Deval Patrick, the Attorney General for Civil Rights, appeared before the House Judiciary Subcommittee on the Constitution. Emphatically, Patrick told the Subcommittee that *Adarand* "certainly does not signal the end of affirmative action."<sup>108</sup> Later, another editorialist wrote,

[A]ffirmative action must stay, for as Clinton pointed out, equality of opportunity has not been attained for minorities and women. Simply banking on laws against discrimination to change that won't work. Abandoning affirmative action will only reinvigorate practices that for so long blocked more than half the nation from access to equal opportunity in education, employment, promotion and contracts.<sup>109</sup>

In late 1995, outgoing American Bar Association (ABA) President George E. Bushnell, Jr. revealed the ABA's position on affirmative action. Bushnell referred to the ABA's past commitment to affirmative action and vowed that the association would continue to support affirmative action in the future.<sup>110</sup> Speaking for the NAACP Legal Defense and Educational Fund, Attorney Elaine Jones also defended affirmative action programs. "To get beyond race," she said, "we must take it into account."<sup>111</sup>

While President Clinton, his administration, and other public and private officials were striving to main-

<sup>100</sup> *Id.* See also Patrick Testimony, *supra* note 98.

<sup>101</sup> *Id.*

<sup>102</sup> Memorandum, *supra* note 2, at 7.

<sup>103</sup> *Id.* at 12-14.

<sup>104</sup> *Id.* at 8-9.

<sup>105</sup> *Id.* at 34.

<sup>106</sup> Letter from Judith Winston, General Counsel, U.S. Dept. of Educ., to college and university counsel 2-3 (Sept. 7, 1995).

<sup>107</sup> *Id.*

<sup>108</sup> Justice Department's Civil Rights Division: Hearings on Fiscal 1996 Authorization Request for the Civil Rights Division

*Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 104th Cong., 1st Sess. (1995) (statement of Deval Patrick, Assistant Att'y Gen., Civil Rights Division) (reminding the Subcommittee that strict scrutiny is not "strict in theory, but fatal in fact").

<sup>109</sup> *Mend It, Don't End It - A Sensible Middle Course*, USA TODAY, July 20, 1995, at 10A (calling the University of California Board of Regents' dismantling of affirmative action "an ill-considered move").

<sup>110</sup> James Podgers, *ABA House Backs Affirmative Action*, A.B.A. J., Oct. 1995, at 18.

<sup>111</sup> *Id.*

tain legal affirmative action programs, others, including presidential candidates, busily sought to completely dismantle the system. For example, Governor Pete Wilson instituted plans to roll back all affirmative action programs in the State of California. Previously, he and regents of the University of California canceled a university policy of considering ethnicity and gender to admit college students.<sup>112</sup>

Presidential aspirants used their platforms to sound warnings to conservative constituents. Patrick Buchanan stated that President Clinton's "plan to perpetuate government-sponsored racial discrimination is unjust and unconstitutional."<sup>113</sup> Former presidential candidate Lamar Alexander, declared that "it is unAmerican to treat people as members of a group rather than as individuals. Unfortunately, President Clinton's report fails to recognize this fundamental principle."<sup>114</sup>

After *Adarand*, politicians offered resolutions to either limit, ban, or weaken affirmative action. Again, Senator Dole expressed his dissatisfaction with affirmative action. In lieu of affirmative action programs, Dole recommended enforcement of anti-discrimination laws to punish those who disobey the laws and compensate those who are oppressed.<sup>115</sup> Therefore, on July 27, 1995, Senator Dole and Representative Charles Canady simultaneously introduced the Equal Opportunity Act of 1995<sup>116</sup> in the House and Senate to eliminate so-called race- and gender-based preferences in the federal government.

Supposedly, the bills protected federal affirmative action programs while prohibiting preferences. They

defined "granting a preference" as "use of any preferential treatment [including] use of a quota, set aside, numerical goal, timetable, or other numerical objective."<sup>117</sup> They forbade the federal government to "grant a preference to any individual or group based in whole or in part on race, color, national origin, or sex, in connection with - (A) a Federal contract or subcontract; (B) Federal employment; or (C) any other Federally conducted program or activity . . ."<sup>118</sup> They also prohibited encouraging contractor or subcontractor preferences for individuals or groups based on race or gender.<sup>119</sup> Over seventy co-sponsors in the House of Representatives supported Canady's bill.<sup>120</sup> Dole's Senate co-sponsors included Mitch McConnell of Kentucky, Alan Simpson of Wyoming, Jon Kyl of Arizona, Hank Brown of Colorado, Don Nickles of Oklahoma, Charles Grassley of Iowa, and Richard Shelby of Alabama.<sup>121</sup>

In another effort to obliterate affirmative action in federal contracting, Senator Phil Gramm of Texas unsuccessfully attempted to amend a legislative defense appropriations bill on July 20, 1995. Gramm proposed a prohibition on funding contracts awarded based on race, color, national origin, or gender.<sup>122</sup> *Inter alia*, Gramm Amendment No. 1825 provided that "none of the funds made available by this Act may be used by any unit of the legislative branch of the Federal Government to award any Federal contract, or to require or encourage the award of any subcontract, if such award is based, in whole or in part, on the race, color, national origin, or gender of the contractor or the subcontractor."<sup>123</sup> Sixty-one legislators re-

---

<sup>112</sup>B. Drummond Ayres, Jr., *On Affirmative Action, Wilson's Moderate Path Veered Quickly to the Right*, N.Y. TIMES, Aug. 8, 1995, at A1. See also Tena Jamison, *Is it the Beginning of the End for Affirmative Action?*, 22 HUM. RTS. 14, 15 (1995) [hereinafter Jamison] (indicating a 14-10 regents' decision); *Wilson Wants to Eliminate All Affirmative Action Programs* (NBC television broadcast, July 19, 1995) (interviewing California Governor Pete Wilson who said, "We should have a complete colorblind meritocracy—that is the way."); Arleen Jacobius, *Affirmative Action On Way Out in Calif.*, A.B.A. J., Sept. 1995, at 22 (surmising that without affirmative action, the "law school population [will be] made up mostly of white and Asian students").

<sup>113</sup>Bill Nichols, *Clinton backs biased benefits-offers reforms meant to 'mend' affirmative action*, USA TODAY, July 20, 1995, at A1.

<sup>114</sup>Bill Nichols, *Clinton runs it up the middle-plays it safe with 'reform, not roll back'*, USA TODAY, July 20, 1995, at A3.

<sup>115</sup>Senator Robert Dole, *Clinton missed mark on affirmative action*, USA TODAY, July 20, 1995, at 11A. See also Todd S. Purdum, *President gives affirmative support to fighting bias*, N.Y. TIMES, July 20, 1995, at A1 (vowing "to get the federal government out of the group-preference business").

<sup>116</sup>Equal Opportunity Act of 1995, S. 1085, 104th Cong., 1st Sess. (1995), reprinted in 141 CONG. REC. S10,827-01, S10,829-31 (1995); H.R. 2128, 104th Cong., 1st Sess. (1995).

---

See also Jamison, *supra* note 112, at 15 (noting Dole and Gramm's intent to introduce legislation).

<sup>117</sup>141 CONG. REC. S10,827-01, S10,829-31.

<sup>118</sup>*Id.* § 2.

<sup>119</sup>*Id.* § 2(2). William J. Bennett, Empower America; Linda Chavez, Center for Equal Opportunity; Milton Bins, Chairman of the Council of 100 (a national network of African American Republicans); the Center for New Black Leadership; and the Independent Women's Forum supported Dole's bill. 141 CONG. REC. at S10,831-32 (providing written statements proclaiming the color-blind aspects of the legislation).

<sup>120</sup>H.R. 2128, 104th Cong., 1st Sess. (1995), 141 CONG. REC. H7916 (daily ed. July 27, 1995) (listing all the co-sponsors).

<sup>121</sup>141 CONG. REC. at S10,828 (Sen. Dole presenting S. 1085).

<sup>122</sup>141 CONG. REC. S10,402 (July 20, 1995). The bill was offered "to ensure equal opportunity and merit selection in the award of Federal contracts." *Id.*

<sup>123</sup>*Id.* Senators Murray, Daschle, Moseley-Braun, and Cohen made a counterproposal. They would substitute the language in Gramm's amendment with the following text: "None of the funds made available in this Act may be used for any program for the selection of Federal Government contractors when such program results in the award of Fed-

jected the bill while thirty-six legislators voted for it.<sup>124</sup>

Apparently, Senator Gramm, Senator Dole, Representative Canady, and their supporters ignored ABA correspondence. To its credit, the ABA sent a letter to all House and Senate committees with jurisdiction over affirmative action programs. In the letter, the ABA noted its opposition to any legislation that would eliminate federal affirmative action programs involving employment and contracting.<sup>125</sup>

This year is a presidential election year. Seemingly, presidential candidates Dole and Buchanan and other politicians have forgotten the invaluable effect of affirmative action on many constituents. Because of affirmative action, tens of thousands of African Americans, other minorities, and women were educated, employed, and successful in business. These tens of thousands of minorities and women are voters, too. As voters, they should go to the polls and vote *en masse* to show these dissenters that rolling back affirmative action to pre-1965 status will not be tolerated.

#### IV. THE LIKELIHOOD THAT THE SCC PROGRAM WILL SURVIVE STRICT SCRUTINY ON RE-MAND

---

eral contracts to unqualified persons, in reverse discrimination, or in quotas, or is inconsistent with the decision of the Supreme Court of the United States in *Adarand Constructors, Inc. v. Peña* on June 12, 1995." *Id.*

Later, that day, Senators Gramm and Moseley-Braun sparred again. In support of his proposal, Gramm testified:

Two wrongs do not make a right. We cannot correct inequity in America by making inequity the law of the land. We cannot correct things that happened 200 years ago by discriminating against people in America in 1995.

The only way to have a clean break with the unfairness of the past is to purge unfairness from the present and the future. I believe we need to be absolutely relentless in enforcing the civil rights laws. It is fundamentally wrong to give somebody a job when someone else is better qualified. It is fundamentally wrong to promote someone based on some privilege they are granted, rather than promoting the person who had the better record.

It is profoundly wrong, in fact it is un-American, to give somebody a contract when they were not the low bidder, when they were not the high quality bidder. I do not believe that two wrongs make a right. . . .

*Id.* at S10,409. A few minutes later, Senator Moseley-Braun responded:

The Senator from Texas keeps referring to two wrongs not making a right. We all know that the first wrong which he refers to, the history as well as the present experience that we had in this Nation, was discrimination.

Let me submit to everyone who is listening, the second wrong is not affirmative action. It is not our effort to fix that tragic legacy. The second wrong lies in this amendment in shutting the door, closing down the small efforts, the small steps

The Equal Protection Clause of the Fourteenth Amendment commands that:

No State shall make or enforce any law which abridges the privileges or immunities of the 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.<sup>126</sup>

The same guarantees apply to the federal government under the Fifth Amendment of the United States Constitution.<sup>127</sup> After *Adarand*, this means that state, local, and federal governments may not impose a racial classification<sup>128</sup> unless it promotes a compelling interest and it is narrowly tailored to achieve that interest.<sup>129</sup> This section discusses whether the Act, STURAA, and the SCC program are narrowly tailored to complete the government's objectives.

Complaining that the program utilized race-conscious criteria to achieve the legislative requirements of the Act and STURAA, *Adarand* launched a constitutional challenge against DOT's SCC program. Consistently, the United States Supreme Court held that race-based classifications in statutes and programs, like STURAA, the Act, and the SCC program, were inherently and constitutionally suspect. Racial distinctions "are

---

we have taken, to remedy, to provide for opportunity, to give people a shot, to give people a chance.

I say to my colleagues, as someone who is both minority and female, I am not comforted at the notion that by getting rid of affirmative action anybody is doing me a favor. So I encourage my colleagues to defeat the amendment from the Senator from Texas.

*Id.* at S10,416.

<sup>124</sup> *Id.* at S10,418.

<sup>125</sup> McMillion, *supra* note 8, at 93.

<sup>126</sup> U.S. CONST. amend. XIV, § 2.

<sup>127</sup> *Adarand*, 115 S. Ct. at 2111; *Weinburger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975); *Bolling v. Sharpe*, 347 U.S. 497, 498-99 (1954).

<sup>128</sup> 115 S. Ct. at 2113 (holding that all state, local, and federal governmental racial classifications are subject to strict scrutiny); *Palmore v. Sidoti*, 466 U.S. 429, 430 (1984); *Loving v. Virginia*, 388 U.S. 1, 11 (1967); *McLaughlin v. Florida*, 379 U.S. 184, 191-92 (1964) (indicating that the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the states); *Bolling* 347 U.S. at 497, 499 (finding that the Constitution forbids government or state discrimination based on race); *Gibson v. Mississippi*, 162 U.S. 565, 591 (1896); *Strauder v. West Virginia*, 100 U.S. 303, 307-08 (1879).

<sup>129</sup> *Adarand*, 115 S. Ct. at 2113. The Fourteenth Amendment clearly applies to states:

The Fourteenth Amendment directly empowers Congress [while] it expressly limits the States. This is no accident. It represents our Nation's consensus, achieved after hard experience throughout our sorry history of race relations, that the Federal Government must be the primary defender of racial

by their very nature odious to a free people."<sup>130</sup> Accordingly, the racial classification in the SCC program is inherently suspect and must be examined in accordance with strict scrutiny.<sup>131</sup>

However, case precedent demonstrates that race-conscious criteria in the SCC, STURAA, and the Act are constitutional. In *Fullilove v. Klutznick*,<sup>132</sup> a 1980 decision, the Supreme Court reviewed a federal remedial race-based provision in the Public Works Employment Act of 1977 (PWEA).<sup>133</sup> Under the PWEA, state or local public works grantees were required to make a good faith effort to identify qualified, bona fide minority business enterprises. Grantees were expected to award at least ten percent of their contracts to those businesses.<sup>134</sup> Then grantees were obliged to provide technical assistance for bonding, solicit federal aid for working capital, and guide minority contractors through the bidding process.<sup>135</sup>

The *Fullilove* Court examined the PWEA using a two-pronged analysis encompassing whether Congress had the power to enact the legislation and whether race and ethnicity were constitutionally permissible considerations for achieving Congress' objectives.<sup>136</sup> The Court responded to those queries by giving significant deference to Congress' remedial powers. "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 guarantees."<sup>137</sup>

Thus, the Court concluded that Congress' goal of fostering equal opportunities for minority businesses to obtain federal grants<sup>138</sup> was well within the scope of Congress' spending power, the Commerce Clause, the Fourteenth Amendment.<sup>139</sup> As a consequence, the *Fullilove* Court determined that Congress legitimately enacted the PWEA to give minority groups "equitable footing with respect to public contracting opportuni-

ties," and not to bestow a preference over other contractors.<sup>140</sup>

The Court then resolved the question regarding whether Congress could justify using race and ethnicity to accomplish its goal. When Congress promulgated the PWEA, it had access to and properly considered data showing that minority business enterprises received a disproportionately small percentage of public contracts.<sup>141</sup> Additionally, the Court found that the PWEA was constitutional because it incorporated administrative mechanisms to protect grantees and to ensure that unqualified minority business enterprises could not take advantage of the program. One safeguard allowed grantees to obtain administrative waivers if they proved that despite their diligent efforts, they could not secure at least ten percent minority business participation. Another safeguard was a complaint procedure for challenging minority businesses' qualifications for the program.<sup>142</sup> That provision ensured that only bona fide minority businesses benefited from the program.

Setting aside ten percent of public contracts meant that non-minority firms would be ineligible to receive those contracts. The Court determined, however, that forbidding non-minority participation did not create a "constitutional defect in th[e] program."<sup>143</sup> The Court reasoned that to cure the effects of prior discrimination, innocent contractors had to share the burden of effectuating the remedy.<sup>144</sup> After this searching examination, the Court decided that the PWEA did not violate the Constitution.<sup>145</sup>

As previously indicated in part II, four Justices in *Adarand* and federal government advocates contended that *Fullilove* was controlling. The federal program in *Fullilove* had some goals and provisions that were similar to the goals and provisions in the SCC program. On the other hand, *Adarand* and other Justices averred that *Croson* was decisive.

---

minorities against the States, some of which may be inclined to oppress such minorities. . . .

*Id.* at 2126 (Stevens, Ginsburg, JJ., dissenting).

<sup>130</sup> *Id.* at 2106 (citing *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)). See also *Bakke*, 438 U.S. at 290-91; *McLaughlin*, 379 U.S. at 191-92; *Bolling*, 347 U.S. at 499 (calling racial classifications "constitutionally suspect"); *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (stating that legal restrictions against a racial group are "immediately suspect").

<sup>131</sup> See *Bakke*, 438 U.S. at 290-91; *McLaughlin*, 379 U.S. at 191-92; *Bolling*, 347 U.S. at 499 (requiring scrutiny "with particular care"); *Korematsu*, 323 U.S. at 216.

<sup>132</sup> 448 U.S. 448 (1980).

<sup>133</sup> 91 Stat. 116.

<sup>134</sup> 448 U.S. at 481.

<sup>135</sup> *Id.* at 480.

<sup>136</sup> *Id.* at 473.

<sup>137</sup> *Id.* at 483.

---

<sup>138</sup> *Id.* This is allowed as long as the minority business enterprise could demonstrate that the higher cost reflected the effects of prior disadvantage and discrimination.

<sup>139</sup> *Id.* at 478.

<sup>140</sup> *Id.* at 486.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 482 (denying access to businesses that were not impaired by prior discrimination).

<sup>143</sup> *Id.* at 484.

<sup>144</sup> The Court further noted that, in actuality, minority contractors had withstood a much heavier burden than non-minority firms would be subjected to under the provisions of the PWEA. *Id.* at 484-85 n.72 (indicating that the ten percent minority business participation would account for approximately .25 percent of the 4.2 billion dollars in federal grants for construction work in the United States).

<sup>145</sup> *Id.* at 492. It is noteworthy that the Court stated that the PWEA would survive judicial review under the test applied in *Bakke*. *Id.*

Actually, both *Croson* and *Fullilove* provide guidance regarding whether the SCC program should survive strict scrutiny. In *Croson*, a city ordinance issued a mandate to contractors who were recipients of city contract awards. They were required to subcontract at least thirty percent of the contract value to businesses that were owned and controlled by members of designated racial and ethnic groups. City legislators intended to remedy past discrimination that minority business enterprises had experienced in the local construction industry.<sup>146</sup>

Justice O'Connor wrote the plurality opinion in *Croson*. The *Croson* Court held that attempting to remedy the effects of past discrimination, whether public or private, constituted a compelling interest that could justify governmental racial classifications.<sup>147</sup> The Court ruled, however, that affirmative action programs could not be based upon general societal discrimination. "While there is no doubt that the sorry history of both private and public discrimination in this country has contributed to a lack of opportunities for black entrepreneurs, this observation, standing alone, cannot justify a rigid racial quota in the awarding of public contracts in Richmond, Virginia."<sup>148</sup> Neither would amorphous claims of past discrimination.<sup>149</sup> The City of Richmond was required to specifically describe the discrimination that it intended to rectify.

"[A] prima facie [showing] of a constitutional or statutory violation" of minority citizens' rights would be sufficient to justify governmental affirmative action programs.<sup>150</sup> For example, "gross statistical disparities" between the number of minority participants and the percentage of qualified minority participants would suffice.<sup>151</sup> In contrast, underrepresentation of minorities in comparison with the number of minorities in the general population would not provide adequate support to justify an affirmative action program.<sup>152</sup>

In *Croson*, the Richmond program failed the strict scrutiny test because the evidence presented did not show that government contractors were discriminating against minority businesses.<sup>153</sup> The program also failed

because it constituted an inflexibly "rigid numerical quota" that did not disqualify minority participants who had not suffered from the effects of past discrimination.<sup>154</sup> Furthermore, the program was over-inclusive. Although the city intended to remedy discrimination against African-American contractors, the ordinance named Hispanics, Asian-Americans, Native Americans, Eskimos, and Aleuts as other beneficiaries of the program.<sup>155</sup> Moreover, the Court was concerned that eligibility requirements were so broad that successful minority entrepreneurs who were not Richmond domiciliaries would be able to participate.<sup>156</sup>

Now that the Court has ruled that the same scrutiny applies to all governmental classifications, the question about whether *Fullilove* and *Croson* applies really is moot. *Fullilove* and *Croson* both apply. In any event, the SCC program satisfies the requirements set forth in *Croson* and *Fullilove*.

With respect to the pending *Adarand* decision, armed with the foregoing information from *Croson* and *Fullilove*, the federal government knows that rectifying past discrimination is at least one legitimate compelling interest that the Court would uphold. In addition, the federal government knows precisely how the SCC program must be tailored to meet that and any other goal.

Upon remand in *Adarand*, the federal government must demonstrate a compelling interest for establishing government-wide goals for DBE participation in federal contracting. Under *Croson*, although racism still exists in America, the SCC program would not be legitimate if it were solely based on societal discrimination.<sup>157</sup> There are, however, three possible compelling reasons for the incentive programs that are well-documented.

First, as the Act required, a DOT agency designed the program for the legitimate purpose of providing subcontracting opportunities for small DBEs.<sup>158</sup> Additionally, "[t]he [SCC program] . . . fostered nationwide economic development by permitting small disadvantaged businesses to share in the economic benefit of the government's vast purchasing activity . . . [and] by working with them, . . . the government can

---

<sup>146</sup> 488 U.S. at 498-500.

<sup>147</sup> Two types of discrimination were affected: 1) the government could remedy the effects of its own discrimination, and 2) the government could remedy the effects of private discrimination that occurred within its jurisdiction while the government, as a "passive participant," had helped to perpetuate the discrimination. *Id.* at 492.

<sup>148</sup> *Id.* at 499.

<sup>149</sup> *Id.* (reasoning that the government would be unable to determine the scope of the injury it sought to remedy and would lack a "logical stopping point"). *Id.* at 498.

<sup>150</sup> *Id.* at 500.

<sup>151</sup> *Id.* at 507.

<sup>152</sup> *Id.*

---

<sup>153</sup> The evidence did demonstrate general societal discrimination. For instance, the city argued that there was a disparity between the number of prime contracts that the city awarded minorities between 1973 and 1978 and the city's fifty percent minority population. Moreover, the city claimed, there was a very low number of minority contractors that were members of the local contractors trade associations. *Id.* at 504-06.

<sup>154</sup> *Id.* at 508.

<sup>155</sup> *Id.* at 506.

<sup>156</sup> *Id.* at 508.

<sup>157</sup> *Id.* at 504-06. See also *Wygant*, 476 U.S. at 274 ("societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy").

<sup>158</sup> 16 F.3d at 1546.

strengthen such businesses and thereby enhance market competition for the goods and services the government buys."<sup>159</sup>

Second, in prior decisions, the Supreme Court has ruled that Congress was not required to make specific findings of discrimination to provide race-conscious relief.<sup>160</sup> However, when the SCC program is reviewed under the strict scrutiny analysis, the federal government will have the initial burden of producing specific evidence to justify the program.<sup>161</sup> Generalized assertions of past discrimination will not suffice to show that remedial action is necessary. "In assessing whether the governmental unit has a 'strong basis in evidence' for imposing race-conscious relief, the proffered evidence must approach a *prima facie* case of constitutional or statutory violation."<sup>162</sup> For instance, the government may introduce statistical evidence that the number of qualified minority businesses would have been larger but for discrimination.<sup>163</sup> Evidence that was available to the government when the program was implemented and when the program was challenged will be admissible.<sup>164</sup>

Establishing that there is a huge disparity between the number of qualified minority businesses and the number that receive federal contracts will not be a difficult task. For some time, congressional findings unequivocally confirm that qualified minority businesses were not receiving highway construction contracts. In 1978, when the SBA added race as one criteria for determining a subcontractor's eligibility, Congress found that social and economic discrimination deprived minority businesspersons of the "opportunity to participate fully in the free enterprise system."<sup>165</sup> At subsequent hearings, commenced after the 1978 legislation was enacted, Con-

gress reached the same conclusion that "discrimination and the present effects of past discrimination [had] hurt socially and economically disadvantaged individuals in their entrepreneurial endeavors."<sup>166</sup> The DBE provision in STURAA was enacted for similar reasons.<sup>167</sup>

Undoubtedly, statistical information shows that the pool of qualified minorities is woefully disproportionate to the number of minority businesspersons who receive government contract awards. Not only is there a dearth of minority businesses, but the few minority recipients receive only minuscule allocations of federal government contracts. In 1980, when *Croson* was decided, minority contractors were receiving less than one percent of federal contracts in the City of Richmond.<sup>168</sup> Six years later, prime contracts totaled approximately \$185 billion. Only \$5 billion—a paltry 2.7 percent of the total value of prime contracts—was awarded to minority businesses.<sup>169</sup> Subcontractors did not do any better. From 1977 through 1987, less than two percent of the total value of subcontracts was awarded to minority businesses.<sup>170</sup>

In the 1990s, the percentage of contracts awarded to minority businesses has not increased significantly. Presently, the United States construction industry is a \$450 billion industry. Approximately 100 billion of that amount represents revenue in government contracts. Now, minority-owned businesses constitute six percent of this country's construction firms, but they only receive 1.4 percent of available construction business. "[M]ost of that [one] percent comes from government contracts-affirmative action-that mandate [minority] involvement."<sup>171</sup>

---

<sup>159</sup> Brief for the Respondents at 4-5, *Adarand Constructors, Inc. v. Peña*, On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit (1994).

<sup>160</sup> *Croson*, 488 U.S. at 489; *Fullilove*, 448 U.S. at 478.

<sup>161</sup> *Croson*, 488 U.S. at 500; *Peightal v. Metropolitan Dade County*, 26 F.3d 1545, 1553 (11th Cir. 1994); *Concrete Works v. City and County of Denver*, 36 F.3d 1513, 1521 (10th Cir. 1994), *cert. denied*, 115 S. Ct. 1315 (1995); *Donaghy v. City of Omaha*, 933 F.2d 1448, 1458 (8th Cir. 1991), *cert. denied*, 502 U.S. 1059 (1991). Then the burden would shift to Adarand to show that the government's measures are unconstitutional. *Wygant*, 476 U.S. at 277-78; *Concrete Works*, 36 F.3d at 1521-22; *Contractors Ass'n v. City of Philadelphia*, 6 F.3d 990, 1005 (3d Cir. 1993).

<sup>162</sup> *Peightal*, 26 F.3d at 1553 (quoting *Croson*, 488 U.S. at 500).

<sup>163</sup> *Contractors Ass'n*, 6 F.3d at 1008; *O'Donnell Constr. Co. v. District of Columbia*, 963 F.2d 420, 427 (D.C. Cir. 1992).

<sup>164</sup> 488 U.S. at 504; *Concrete Works*, 36 F.3d at 1521; *Contractors Ass'n*, 6 F.3d at 1004; *Coral Constr. Co. v. King County*, 941 F.2d 910, 920 (9th Cir. 1991), *cert. denied*, 502 U.S. 1033 (1992).

<sup>165</sup> S. REP. NO. 1070, 95th Cong., 2d Sess. 14 (1978). See also H. R. REP. NO. 1714, 95th Cong., 2d Sess. 22 (1978).

---

<sup>166</sup> H. R. REP. NO. 460, 100th Cong., 1st Sess. 18 (1987) (noting the continuing effect of discrimination on minority businesses).

<sup>167</sup> S. REP. NO. 4, 100th Cong., 1st Sess. 11-12 (1987), reprinted in 1987 U.S.C.A.N. 66, 76 (recording the necessity of remedying "the discrimination faced by socially and economically disadvantaged persons").

<sup>168</sup> 488 U.S. at 499.

<sup>169</sup> H. R. REP. NO. 460, *supra* note 166, at 18.

<sup>170</sup> See H. R. REP. NO. 94-1791 (1977); H. R. REP. NO. 94-468 (1975); Birnbaum, "Report on New Initiatives, Techniques, and Incentives for Increasing Subcontracting Opportunities for Small Disadvantaged Businesses, Prepared for the Small Business Administration (January 1989).

Additionally, Supreme Court Justices have accepted Congress' conclusion that "private and governmental discrimination [] contributed to the negligible percentage of public contracts awarded minority contracts." *Fullilove*, 448 U.S. at 503 (Powell, J., concurring). See *id.* at 521 (Marshall, J., concurring in judgment) ("race-conscious means were necessary to break down the barriers confronting participation by minority enterprises. . .").

<sup>171</sup> *Id.* Gilliam, *supra* note 2, at H9. See also *Affirmative Action: Hearings Before the Subcomm. on the Constitution of the*

Third, neither *Croson* nor *Adarand* addressed whether diversity would be a compelling justification for an affirmative action program. In *Regents of University of California v. Bakke*,<sup>172</sup> however, Justice Powell concluded that the University of California had a compelling interest in fostering greater diversity among its students. His rationale was that diversity would create a wider range of perspectives on campus and would contribute to a more robust exchange of ideas.<sup>173</sup> Justice Stephens restated that view in his dissenting opinion in *Adarand*.<sup>174</sup> Similarly, in *Metro Broadcasting, Inc.*,<sup>175</sup> the Supreme Court upheld a Federal Communications Commission policy that allowed enhancements for minority and female applicants who sought radio and television broadcast licences.<sup>176</sup> The Court decided that the FCC's "interest in fostering the program broadcast diversity [was] an important governmental objective [that was] a sufficient basis for the Commission's minority ownership policies."<sup>177</sup>

Fostering racial and ethnic diversity alone may not constitute a compelling interest,<sup>178</sup> but the Supreme Court has previously recognized that diversity may promote other societal benefits. For example, in *United States v. Paradise*,<sup>179</sup> Justice O'Connor wrote that diversity enabled police officers to establish a better relationship with a community and to maintain law and order more effectively.<sup>180</sup>

The SCC program promotes a societal benefit by helping to diversify the marketplace. In our growing multicultural society, such diversification is advantageous to all businesspersons. Diverse employees share their varied experiences and knowledge to enrich the business. Additionally, businesspersons from different racial and ethnic backgrounds have the ability to cultivate relationships between minority customers and non-minority

businesses. Thus, non-minority businesspersons who wisely elect to do business with minority businesspersons can increase their profits by reaching wider, more diversified markets.<sup>181</sup> In summary, on remand, the federal government may proffer three compelling interests—assisting small businesses to become successful, remedying past discrimination, and promoting diversity—to satisfy the first part of the strict scrutiny analysis.

Under the second prong of the strict scrutiny test, the government must show that its use of race is narrowly tailored to advancing its compelling goals. "There appear to be two underlying purposes of the narrow tailoring test: first, to ensure that race-based affirmative action is the product of careful deliberation, not hasty decision-making; and, second, to ensure that such action is truly necessary, and that less intrusive, efficacious means to the end are unavailable."<sup>182</sup>

As the mechanism for administering the goals provisions of section 644(g) of the Act and STURAA, the SCC should be analyzed under the narrow tailoring prong of strict scrutiny. In *Adarand*, *Croson*, and *Fullilove*, the Supreme Court considered several factors to ascertain whether a classification was narrowly tailored. Those factors included: whether race-neutral alternatives were explored, the scope of the classification, whether race is one of many factors or a determinative factor in determining eligibility, the number of participants compared to the number of *qualified* participants, the duration of the program, the review process, and the burden placed on non-minority individuals.<sup>183</sup> Affirmative action programs need not satisfy every factor.<sup>184</sup> Moreover, the strict scrutiny test does not require that the government exhaust every possible alternative to a race-based program.<sup>185</sup> In short, the government is not required to use the least restrictive means available.<sup>186</sup>

---

*House Comm. on the Judiciary* (1995)(testimony of Reginald Wilson, Ph.D.)(gaining "a foothold in [the construction industry] mostly through affirmative action"); *Women, Minorities Still Lag in Government Contracting*, L.A. TIMES, Sept. 11, 1995, at 1 ("Even with affirmative action, we're still only getting crumbs."). Cf. Thomas Madden and Kevin Kordziel, *Strict Scrutiny and the Future of Federal Procurement Set-Aside Programs in the Wake of Adarand: Does 'Strict in Theory' Mean 'Fatal in Fact'?* 64 BNA-FCR 6 (1995)(claiming that set-aside programs reduced the statistical disparity between contract awards to non-minority and minority businesses).

<sup>172</sup> 438 U.S. 265 (1978).

<sup>173</sup> *Id.* at 311-14.

<sup>174</sup> *Adarand*, 115 S. Ct. at 2124 (Stephens, J., dissenting); *Croson*, 488 U.S. at 511-12 & n.1 (Stephens, J., concurring); *Johnson v. Transportation Agency*, 480 U.S. 616, 646-47 (1987) (Stephens, J., concurring); *Wygant*, 476 U.S. at 313-15 (Stephens, J., dissenting). See also *O'Donnell Constr. Co.*, 963 F.2d at 429 (Ginsburg, J., concurring).

<sup>175</sup> 497 U.S. 547 (1990).

<sup>176</sup> *Id.* at 555-58.

<sup>177</sup> *Id.* at 567-68. Although *Adarand* overruled the portion of *Metro Broadcasting, Inc.* that applied an intermediate standard

---

of scrutiny, this portion of the *Metro Broadcasting, Inc.* opinion was not disturbed. See also *Wygant*, 476 U.S. at 286 (O'Connor, J., concurring).

<sup>178</sup> Memorandum, *supra* note 2, at 16-17 (citing *Paradise*, 480 U.S. at 167 n.18. See also *Croson*, 488 U.S. at 497 (determining that attempts to develop minority role models for the community alone is not enough).

<sup>179</sup> 480 U.S. 149 (1987).

<sup>180</sup> *Id.* at 167 n.18.

<sup>181</sup> *Advocates Try to Tie Diversity to Profit*, WALL ST.J., Feb. 7, 1996, at B1.

<sup>182</sup> Memorandum, *supra* note 2, at 19.

<sup>183</sup> *Adarand*, 115 S.Ct. at 2113, 2117, 2128, 2132; *Croson*, 488 U.S. at 500, 504-08; *Fullilove*, 448 U.S. at 482, 483-86, 492.

<sup>184</sup> *Id.*

<sup>185</sup> 941 F.2d at 923. Cf. *Croson*, 488 U.S. at 507 (suggesting that the City of Richmond provide financial and technical assistance for small or new businesses as a race-neutral means of assisting small businesses). See also *Id.* at 507-10. See *id.* at 526 (Scalia, J., concurring).

<sup>186</sup> See *Fullilove*, 448 U.S. at 508 (Powell, J., concurring); *Paradise*, 480 U.S. at 199-200 (O'Connor, J., dissenting) (finding that less intrusive alternatives were available).

Clearly, racial classifications that set aside a specific number of contracts or positions are impermissible under the strict scrutiny standard. Those that are too rigid are those such as the City of Richmond's mandatory set-aside. In comparison, STURAA and the SCC program are not objectionable. Neither establishes impermissibly rigid standards for government contracts. Further, neither the Act, STURAA, nor the SCC makes hiring a DBE mandatory. In fact, STURAA and the SCC program do not require that primary contractors hire DBEs at all. The monetary incentive in the program "induces, rather than compels, prime contractors to hire DBE subcontractors."<sup>187</sup>

In the *Adarand* factual situation, Mountain Gravel knew that it could have awarded the subcontract to Adarand. Any prime contractor could choose not to exercise the option to hire a DBE and award a subcontract without consideration of DBE status. Moreover, although statistics show that it rarely happens, a prime contractor is at liberty to contract with a minority subcontractor that does not qualify as a DBE. Finally, the primary contractor would not lose a contract, or suffer any other penalty, for refusing to award a subcontract to a DBE.<sup>188</sup>

As Justice Stevens observed, section 644(g) does not dictate a quota for minority subcontractors. Without commanding specific percentage goals, section 644(g) attempts to promote minority business opportunities by establishing an annual, fluctuating goal for which the industry should strive. It sets a *de minimus* goal of five percent participation so that small businesses get the "maximum practicable opportunity" to obtain contracts.

Under the Act, the number of potential DBE contracts is, and has always been, aspirational, not mandatory. First, the President of the United States set an annual percentage goal. Then each federal agency independently developed a goal that appropriately matched that agency's contracting needs and the current market. In addition, the Act provided that when setting goals, the President and the agencies should establish goals that "realistically reflect the potential of [DBEs] to perform such contracts [or] subcontracts."<sup>189</sup> Like the goal announced in the Act, STURAA set a flexible goal of not less than ten percent that was waivable.<sup>190</sup> Whenever it was impracticable for an agency to reach the President's

goal, the agency could waive the requirement without a penalty.<sup>191</sup>

Just as the word "preference" is conspicuously absent from Executive Order No. 11,246, no preference is given to minority businesses under the Act, STURAA, or the SCC program. The classifications only require that small businesses owned and controlled by DBEs receive opportunities to contract with the government.<sup>192</sup> Rather than constituting a preference for disadvantaged subcontractors, the compensation clause is designed to remove barriers that would otherwise exist to the free participation by disadvantaged businesses in bidding for subcontracts on federal highway projects.<sup>193</sup>

Unlike the City of Richmond program, the SCC program did not effect a set-aside exclusively for minority contractors. In some cases, race is not the sole or primary factor for certifying a subcontractor.<sup>194</sup> While "race or ethnic background may be a 'plus' [for a particular contractor], it does not insulate the individual from comparison with all other [contractors]."<sup>195</sup> For minority subcontractors to qualify, in addition to having minority ownership or control of operations, the subcontracting company has to meet other criteria. The company has to be at least fifty-one percent owned by one or more people from designated minority groups. DOT regulations only named African Americans, Hispanic Americans, Native Americans, Asian-Pacific-Americans, and Asian-Indian Americans as groups that were socially and economically disadvantaged. The company has to be controlled by one or more persons in those selected minority groups. The company has to be economically disadvantaged. It has to be certified as a DBE.

Moreover, minority contractors are not the only contractors who are characterized as DBEs: Women, physically disabled businesspersons, and those that are environmentally isolated individuals who are not minorities could be DBEs.<sup>196</sup> Thus, the SCC program is not underinclusive because a company's minority status is not the sole determinate of whether it qualifies as a DBE.

Furthermore, the SCC program is narrowly tailored because the presumption of social and economic disadvantage is rebuttable.<sup>197</sup> If a competitor wants to challenge a subcontractor's certification, the competitor can initiate a protest by contacting the contracting officer

<sup>187</sup> 16 F.3d at 1547.

<sup>188</sup> 115 S. Ct. at 2130. The ten percent threshold is "an optional goal, not a set-aside." 16 F.3d at 1542 n. 9.

<sup>189</sup> 15 U.S.C. § 644(g)(2).

<sup>190</sup> Pub. L. No. 100-17, 101 Stat. 145, § 106(c)(1); 49 C.F.R. §§ 23.64(e), 23.65.

<sup>191</sup> 49 C.F.R. §§ 23.64(e), 23.65 (1995). When Mountain Gravel contracted with Gonzales, the goal, under section 106(c)(1) of the STURAA, was no less than ten percent for disadvantaged business expenditures. Pub. L. No. 100-17, 101 Stat. 145.

<sup>192</sup> 15 U.S.C. § 644(g).

<sup>193</sup> Brief for Respondents, *supra* note 24, at 31.

<sup>194</sup> See, e.g., 49 C.F.R. § 23.62. "Minority status is [] neither a sufficient nor a necessary basis for certification." Brief for the Respondents, *supra* note 24, at 13.

<sup>195</sup> 438 U.S. at 317. Cf. 488 U.S. at 508 (deciding that the Richmond plan illegally made "the color of an applicant's skin the sole relevant consideration").

<sup>196</sup> See, e.g., 15 U.S.C. § 637(d)(3)(C); Pub. L. No. 100-17, § 106(c), 101 Stat. 132, 145 (1987); 48 C.F.R. § 52.219-8 (1995) (defining disadvantaged business to include businesses owned by women); 49 C.F.R. § 23.62; 13 C.F.R. §§ 124.105-106 (certifying physically disabled and environmentally isolated).

<sup>197</sup> 49 C.F.R. §§ 23.62, 23.69(a).



any time before the subcontract work is complete.<sup>198</sup> An investigation and prompt determination regarding the subcontractor's status is required.<sup>199</sup>

Like the PWEA in *Fullilove*, STURAA, the SCC program, and the Act embody administrative assurances that prevent unqualified minority businesses from benefiting from the programs, so they are not overinclusive.<sup>200</sup> To illustrate, a DBE must pass annual certification reviews to establish its continuing eligibility.<sup>201</sup> Additionally, competitors can protest a business' DBE status at anytime.<sup>202</sup> Those measures prevent ineligible minority businesses from participating even if they have qualified earlier.<sup>203</sup>

Finally, the *Adarand* Court ruled, and President Clinton announced, that affirmative action programs should last only as long as they are necessary. Presently, the SCC program is still needed because minority contractors are not receiving their fair share of federal contracts. As a means of tracking DBE progress, DOT must submit annual reports to the SBA regarding DBE participation. In turn, the SBA must compile agency reports and submit them to the President.<sup>204</sup> When and if it becomes appropriate someday, government officials may determine that the Act, STURAA, and the SCC program no longer serve their purpose or that they have achieved DOT's and the SBA's objectives.<sup>205</sup>

The three-judge panel of the Tenth Circuit agreed with the district court and properly concluded the SCC program is constitutional:

The district court found that the challenged program satisfies *Fullilove* because it serves important governmental objectives and is substantially related to achievement of those objectives. The district court concluded that the challenged program was narrowly tailored to achieve its statutory objectives because it does not mandate its provisions in an inflexible manner. It ensures minimum impact on non-DBEs because [t]o qualify for DBE status a business must demonstrate, via the annual certification process, that it is a *bona fide* DBE, eligible to participate in the program. The annual certification mechanism is reasonably calculated to insure legitimate quali-

fied participants, so that the program does not become overinclusive in the sense of tolerating abuse of the program by non-DBEs. Likewise the program is not underinclusive since it provides that businesses not entitled to the presumption of DBE status may apply for certification and establish their qualifications to participate. We hold that the SCC program is constitutional because it is narrowly tailored to achieve its significant governmental purpose of providing subcontracting opportunities for small disadvantaged business enterprises, as required under section [644(g)] of the Small Business Act. The qualifying criteria of the SCC program is not limited to members of racial minority groups. Because eligibility is based on economic disadvantage, non-minority-owned businesses also are eligible to participate. The SCC program is not overinclusive since minority businesses that do not satisfy the economic criteria cannot qualify for DBE status. Furthermore, the SCC program is 'appropriately limited in extent and duration' because federal procurement and construction contracting practices are subject to regular 'reassessment and reevaluation by Congress.'<sup>206</sup>

The SCC program will survive strict scrutiny on remand. It is grounded upon legitimate compelling governmental interests and it is narrowly tailored to achieve goals that maximize opportunities for small businesses to obtain government contracts.

#### IV. CONCLUSION

Unfortunately, affirmative action programs remain essential. Contrary to what Justice Scalia has written, we are not all one race. All people are not treated equally yet. Neither minority contractors nor minority professionals and laborers have achieved equality in the marketplace. All Americans do not have an equal opportunity to experience the American dream that is promised in the United States Constitution. That is why an equalizer like affirmative action is vital. It ensures that more people, especially minorities, women, and economically disadvantaged people, have the same chance to obtain

<sup>198</sup> 49 C.F.R. § 23.69(b)(1) (authorizing any third party to challenge a certification).

<sup>199</sup> 49 C.F.R. § 23.69(b). *See also* Brief for Respondents, *supra* note 24, at 25-26 (advocating that the contractor must have been subjected to racial prejudice that has caused economic disadvantage).

<sup>200</sup> 15 U.S.C. § 637(a)(B)-(C); 49 C.F.R. § 23.69.

<sup>201</sup> 13 C.F.R. § 124.602(a)(1995); 115 S. Ct. at 2129. Cf. 49 C.F.R. § 23.69 (1994)(urging but not mandating periodic review).

<sup>202</sup> 13 C.F.R. § 124.603 (1995); 49 C.F.R. § 23.69.

<sup>203</sup> 115 S. Ct. at 2130. *See also* WEST, *supra* note 8, at 95.

After DBEs overcome their disadvantages, presumably, they will be able to compete for business on an equal basis and "graduate" from DBE status. *Id.* *See, e.g.*, *Autek Sys.*

*Corp. v. United States*, 835 F. Supp. 13 (D.D.C. 1993), *aff'd*, 43 F.3d 712

(D.C. Cir. 1994)(denying minority business owner disadvantaged status because of his personal income); 13 C.F.R. § 124.208 (1995). *See also* 13 C.F.R. § 124.207 (1995)(listing reasons for terminating a DBE).

<sup>204</sup> 15 U.S.C. § 644(h) (1995).

<sup>205</sup> *Croson*, 488 U.S. at 510; *Fullilove*, 448 U.S. at 513 (Powell, J., concurring); *Paradise*, 480 U.S. at 178 (plurality opinion); *Sheet Metal Workers*, 478 U.S. at 487 (Powell, J., concurring)(hiring goal was implemented for a limited duration).

<sup>206</sup> *Adarand*, 16 F.3d at 1546-47 (citations omitted). *See also Fullilove*, 448 U.S. at 486-88, 490, 521.

government contracts, to attend institutions of higher learning, and to maintain employment as non-minorities do.

Some commentators believe that strict scrutiny is a virtually insurmountable standard of review and that "*Adarand* may constitute the death knell for federal affirmative action programs."<sup>207</sup> However, other commentators, including this writer, are optimistic that most programs will survive under the *Adarand* test. Although strict scrutiny is the most searching analysis, four Supreme Court Justices in *Adarand* were willing to maintain DOT's affirmative action program. Justice O'Connor reemphasized that strict scrutiny was not intended to be "fatal in fact." Although she did not express an opinion regarding the legitimacy of the SCC program, Justice O'Connor previously has favored racial classifications that remedy past discrimination.<sup>208</sup>

---

<sup>207</sup> Alan F. Sohn, *The United States Supreme Court Addresses Racial Issues*, W. VA LAW., Sept. 1995, at 22-23.

<sup>208</sup> On the other hand, comments made by Justices Thomas and Scalia in *Adarand* reveal that proponents of affirmative action cannot count on them for a favorable decision. 115 S. Ct. at 2118.

<sup>209</sup> Brief *Amici Curiae* of the National Bar Association and the Council of 100-An Organization of Black Republicans, Inc. in Support of Respondents at 15-16, *Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097 (1995)(No. 93-1841)(filed December 6, 1994)(co-authored by Professors J. Clay Smith, Jr., and Cynthia R. Mabry, and attorneys Lisa Wilson and Erroll Brown). See also Exec. Order No. 12,928, 59 Fed. Reg. 48,377 (1994)(Clinton advocating that small businesses should have "a fair opportunity to participate in Federal procurement");

The Clinton administration has pledged its commitment to ensuring that affirmative action programs continue as long as racism exists. Previously, Democratic and Republican Presidents Eisenhower, Nixon, Carter, and Reagan encouraged federal agencies to develop programs that empower small businesses.<sup>209</sup> It is inconceivable that *Adarand*'s challenge will eradicate the Act, STURAA, or the SCC program.

Finally, even the *Adarand* Court recognized that racism still exists: "The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and [the] government is not disqualified from acting in response to it."<sup>210</sup> As long as racism exists, affirmative action must survive.

---

Exec. Order No. 12,432, 48 Fed. Reg. 32,551 (1983) (Reagan ordering federal agencies to establish means of encouraging prime contractors to use minority subcontractors); Exec. Order No. 12,190, 45 Fed. Reg. 7773 (1980)

(Carter's appointment of an Advisory Committee on Small and Minority Business Ownership to encourage and monitor subcontract awards to small businesses, "particularly with small minority businesses"); Exec. Order No. 11,518, 35 Fed. Reg. 4,939 (1970)

("members of certain minority groups through no fault of their own have been denied the full opportunity to achieve these aspirations").

<sup>210</sup> 115 S. Ct. at 2117. See also 115 S. Ct. at 2129 ("irrational racial prejudice — along with its lingering effects — still survives.").