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FACTS

Mountain Gravel & Construction Company (Contractor) was hired by the Central Federal Highway Administration of the United States Department of Transportation to complete a highway construction project in Colorado. The contract included a standard Subcontracting Construction Clause (SCC) that encouraged prime contractors to hire small disadvantaged business enterprises (DBE's) by offering financial compensation for the added expense of employing and assisting such subcontractors. Petitioner, Adarand Constructors, Inc., submitted the low subcontractor bid on the guard-rail portion of the project. The Contractor, however, took advantage of the SCC and awarded the subcontract to Gonzales Construction Company, a DBE under section 502 of the Small Business Act[1] (SBA).

The SBA sets out the definition of small disadvantaged business. A small disadvantaged business is at least 51% owned and controlled by persons who are both socially and economically disadvantaged.[2] A "socially disadvantaged" person is one who has been subjected to "racial or ethnic prejudice or cultural bias because of [his or her] identity as a member of a group without regard to [his or her] individual qualities."[3] An "economically disadvantaged" person is a socially disadvantaged person who also demonstrates that his or her "ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged."[4]

The statute creates a rebuttable presumption that various racial and ethnic minorities are socially and economically disadvantaged. Prime contractors are authorized to "presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities, or any other individual found to be disadvantaged by the [Small Business] Administration pursuant to section 8(a) of the [SBA]."[5]

Adarand Constructors, Inc. brought an action under 42 U.S.C. § 1983 and 42 U.S.C. § 2000d (Title VI) challenging the constitutionality of this presumption, seeking a declaratory judgment and injunctive relief. On cross-motions for summary judgment, the district court held that the program did not violate equal protection guarantees.[6] Specifically, the trial court held that the Supreme Court's decisions in *Fullilove v. Klutznick*[7] and *Metro Broadcasting, Inc. v. FCC*[8] mandated less than strict scrutiny in review of "benign" race-conscious measures passed by Congress. The Tenth Circuit essentially affirmed.[9] The Tenth Circuit understood *Fullilove* as holding that "if Congress has expressly mandated a race-conscious program, a court must apply a lenient standard, resembling intermediate scrutiny, in assessing the program's constitutionality."[10] The Tenth Circuit had

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[1] Section 502 provides: The President shall annually establish Government-wide goals for procurement contracts awarded to small business concerns and small business concerns owned and operated by socially and economically disadvantaged individuals. The Government-wide goal for participation by small business contracts shall be established at not less than 20 percent of the total value of all prime contract awards for each fiscal year. The Government-wide goal for participation by small business concerns owned and controlled by socially and economically disadvantaged individuals shall be established at not less than 5 percent of all prime contract and subcontract awards. Notwithstanding the Government-wide goal, each agency shall have an annual goal that presents, for that agency, the maximum practicable opportunity for small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals to participate in the performance of contracts let by such agency. The Administration and the Administrator of the Office of Federal Procurement Policy shall, when exercising their authority pursuant to paragraph (2), insure that the cumulative annual prime contract goals for all agencies meet or exceed the annual Government-wide prime contract goal established by the President pursuant to this paragraph. 15 U.S. C. § 644(g)(1)(1988 & Supp. V 1993).

[2] 15 U.S.C. § 637 (d)(3)(C) (Supp. V 1993). Such a business is independently owned and operated, is not dominant in its field of operation, and has annual gross receipts not in excess of the level set by regulation for the industry in which the business operates. 15 U.S.C. § 632 (a)(1) - (3) (Supp. V 1993).

[3] 15 U.S.C. § 637(a)(5) (Supp. V 1993).

[4] 15 U.S.C. § 637(a)(6)(A) (Supp. V 1993).

[5] 15 U.S.C. § 637(d)(3)(C) (Supp. V 1993). The STURAA also provides that, in the context of highway construction, "women shall be presumed to be socially and economically disadvantaged individuals." Pub. L. No. 100-17, 106(c)(2)(B), 101 Stat. 146 (1987).

[6] 790 F. Supp. 240 (D. Colo. 1992).

[7] 448 U.S. 448 (1980).

[8] 497 U.S. 547 (1990).

[9] 16 F.3d 1537 (10th Cir. 1994). The district court had mistakenly applied the *Fullilove* test to the constitutionality of the federal highway funding provisions of the Surface Transportation Assistance Act of 1982 and the Surface Transportation and Uniform Relocation Act of 1987. On appeal to the Tenth Circuit, both parties agreed that the issue involved solely the constitutional challenge to the SBA's rebuttable presumption.

[10] 16 F.3d at 1544.

previously applied this analysis in upholding the constitutionality of the DBE program.[11]

HOLDING

The United States Supreme Court, in a fractured plurality decision consisting of six different opinions (including two concurrences and three dissents), determined that all classifications based on race must satisfy strict scrutiny under the Due Process Clause of the Fifth Amendment.[12] To the extent that *Metro Broadcasting, Inc. v. FCC*[13] suggests a less stringent scrutiny of federal legislation, as opposed to state and local actions, it is overruled. Essentially, the Court extended its holding in *City of Richmond v. J.A. Croson Co.*[14] to benign race-conscious federal actions. The Court remanded the case for determination of whether the legislation at issue was narrowly tailored to meet a compelling governmental interest.

ANALYSIS/APPLICATION

The plurality opinion, written by Justice O'Connor, was joined *in toto* by only Justice Kennedy and carried a majority only to the extent that is was consistent with Justice Scalia's concurring opinion. Justice Thomas and the Chief Justice joined the opinion except for a discussion of stare decisis not addressed in this note.

Justice O'Connor, in the primary opinion, determined that the Court's previous decisions regarding governmental racial classifications established three general propositions. First, any preference based on racial or ethnic criteria must be viewed skeptically, because "[a]ny preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees."[15] Second, consistency demands that "the standard of review under the Equal Protection Clause is not dependent upon the race of those burdened or benefitted by a particular classification."[16] Finally, the Court stated that congruence required equal protection analysis to be identical under both the Fifth and the Fourteenth Amendments.[17]

Supreme Court affirmative action jurisprudence continues to reflect fundamentally different understandings of the role race and ethnicity play in American society. The *Adarand* Court was confronted with a series of previous plurality decisions susceptible to a variety of interpretations. The Court attempted to reconcile conflicting rationales and judgments among *Fullilove*, *Croson*, and *Metro Broadcasting*.

In *Univ. of California v. Bakke*[18], the Court first addressed the level of scrutiny applicable to race-based governmental action designed to benefit, as opposed to burdening, groups that have suffered discrimination. *Bakke*, however, did not produce a majority opinion and has therefore provided little guidance on the issue. In *Fullilove*, the Court upheld Congress's inclusion of a ten percent set-aside for minority-owned businesses in the Public Works Employment Act of 1977. Again, there was no opinion for the Court. Chief Justice Burger indicated, however, that "[a]ny preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure it does not conflict with constitutional guarantees."[19] This opinion adopted a two-part test, asking first "whether the objectives of th[e] legislation are within the power of Congress," and second, "whether the limited use of racial and ethnic criteria . . . is a constitutionally permissible means for achieving the Congressional objectives."[20]

In *Metro Broadcasting*, the Court made explicit what was implicit in *Fullilove*. Specifically, the Court stated that because of Congress's broad powers in matters of race, benign race-conscious federal legislation required only intermediate scrutiny. These powers were seen as derived from an "amalgam" of sources,[21] including

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[11] This analysis had been applied by the Utah Department of Transportation as a prerequisite to the receipt of federal funds. *Ellis v. Skinner*, 961 F.2d 912 (10th Cir.), cert. denied sub nom. *Ellis v. Card*, ___ U.S. ___, 113 S. Ct. 374 (1992).

[12] The Fifth Amendment provides that "[n]o person. . . shall be deprived of life, liberty, or property, without due process of law. . . " U.S. Const. amend V.

[13] 497 U.S. 547 (1990) (5-4).

[14] 488 U.S. 469 (1989).

[15] *Adarand*, at 2111, (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 491 (1980) (opinion of Burger, C.J.).

[16] *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 494 (1984) (plurality opinion); *id.*, at 530 (Scalia, J., concurring in judgment).

[17] *Adarand*, at 2111, quoting *Buckley v. Valeo*, 424 U.S. 1, 93 (1976). Interestingly, none of the authority explains this proposition. Both *Adarand* and *Buckley* cite to *Weinberger v. Weisenfeld*, 420 U.S. 636, 638 n. 2 (1975). However, *Weinberger* involved an issue of gender discrimination in the distribution of social security insurance benefits, and did not discuss racial discrimination. Moreover, of the five cases cited in the *Weinberger* footnote, only one involved an allegation of racial discrimination. That case, *Bolling v. Sharpe*, 347 U.S. 497 involved the application of *Brown v. Board of Education*, 347 U.S. 483 (1954) to the District of Columbia's public school system. In holding that *Brown* was applicable to the District through the due process clause of the Fifth Amendment, the Court based its decision on the rationale that "it would be unthinkable that the same Constitution [that forbade public school segregation in the states] would impose a lesser duty on the Federal Government." *Bolling*, at 499. Nowhere is there a statement that the Constitution does not impose either the same or a greater duty.

[18] 438 U.S. 265 (1978) (plurality opinion).

[19] 448 U.S. at 491.

[20] *Id.*, at 493.

[21] *Metro Broadcasting*, 497 U.S. at 564 n. 11 (quoting *Fullilove*, 448 U.S. at 473 (opinion of Burger, C.J.)).

Congress's "institutional competence as the National Legislature",[22] its constitutional powers under the Spending Clause,[23] the Commerce Clause,[24] and the enforcement clauses of the Civil War Amendments. After *Metro Broadcasting*, lower courts uniformly adopted the *Fullilove* approach as clarified by *Metro Broadcasting*, and applied intermediate scrutiny to benign race-conscious federal legislation.[25]

Between *Fullilove* and *Metro Broadcasting*, however, the Court decided *Croson*.[26] This case involved the City of Richmond's determination that thirty percent of its contracting work should go to minority-owned businesses. A plurality of the Court held that the Fourteenth Amendment required strict scrutiny of all race-based action by state and local governments. The City of Richmond argued that *Fullilove*'s rationale should be extended to benign race-conscious action by state and local governments. The plurality rejected this argument, stating: What appellant ignores is that Congress, unlike any State or political subdivision, has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment. The power to "enforce" may at times also include the power to define situations which Congress determines threaten principles of equality and to adopt prophylactic rules to deal with those situations.[27]

By subjecting state and local affirmative action programs based on race to strict scrutiny, while requiring that federal programs meet only intermediate scrutiny, *Croson* created a conflict regarding the rights afforded citizens under the Equal Protection Clause of the Fourteenth Amendment and the equal protection component of the Due Process Clause of the Fifth Amendment. *Adarand* seemingly resolves this conflict.

The *Adarand* plurality determined that the Court's decision in *Metro Broadcasting*, by squarely rejecting the "congruence" proposition, had also "undermined the other two — skepticism of all racial classifications, and consistency of treatment irrespective of the race of the burdened or benefitted group."[28] The Court relied on the principle that the Fifth and Fourteenth Amendments protect *persons*, not *groups*.[29] Furthermore, the Court determined that strict scrutiny was required precisely to distinguish between permissible and impermissible racial classifications, adopting *Croson*'s analysis on this point.

Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. Indeed, the purpose of strict scrutiny is to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen 'fit' this compelling goal so that there is little or no possibility that the motive was illegitimate racial prejudice or stereotype.[30]

Justice Thomas, concurring in part and concurring in the judgment, expanded upon this rationale and argued that applying anything less than strict scrutiny to affirmative action programs "undermine[s] the moral basis of the equal protection principle."[31] Justice Thomas views affirmative action programs as racial paternalism and argues that such programs are just as violative of equal protection as discrimination inspired by malicious prejudice because they "stamp minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are 'entitled' to preferences."[32]

In contrast, dissenting Justices Stevens and Ginsburg argued that remedial, race-conscious legislation is distinct facially and in application from prejudicial discrimination. Thus, the two justices challenge the existence of a "consistency" proposition, and insist that "[t]here is no moral or constitutional equivalence between a policy that is designed to perpetuate a caste system and one that seeks to eradicate racial subordination."[33] To these justices, the proposition treats differences as though they were similarities and disregards "the difference between a 'No Trespassing' sign and a welcome mat."[34]

Additionally, Justices Stevens, Ginsburg, and Breyer disagreed with the plurality's determination that strict scrutiny is not "strict in theory, fatal in fact."[35] The Court's

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[22] *Id.*

[23] U.S. const. Art. I, Section 8, Cl. 1.

[24] U.S. const. Art. I, Section 8, Cl. 3.

[25] See, e.g., *Harrison & Burrowes Bridge Constructors, Inc. v. Cuomo*, 981 F.2d 50, 57 (2d Cir. 1992); *Ellis v. Skinner*, 961 F.2d 912, 915 (10th Cir.), cert. denied, 113 S. Ct. 374 (1992); *Tennessee Asphalt Co. v. Farris*, 942 F.2d 969, 975 (6th Cir. 1991); *Milwaukee County Pavers Ass'n v. Fielder*, 922 F.2d 419, 423-424 (7th Cir.), cert. denied, 500 U.S. 954 (1991); see also *O'Donnell Construction Co. v. District of Columbia*, 963 F.2d 420, 423 (D.C. Cir. 1992); *id.* at 429 (Ginsburg, J. concurring).

[26] 488 U.S. 469 (1989) (plurality opinion).

[27] *Croson*, 488 U.S. at 490. Significantly, and perhaps foreshadowing *Adarand*, only Chief Justice Rehnquist and Justice White joined this part of Justice O'Connor's opinion in *Croson*.

[28] *Adarand*, 115 S. Ct. at 2112. Justice O'Connor noticeably avoids mentioning *Fullilove* at all in this section of her opinion and fails to address the distinction between federal and state affirmative action legislation created in *Croson*.

[29] *Id.*

[30] *Id.* (citing *Croson*, 488 U.S. at 493) (plurality opinion of O'Connor, J.). This part of *Croson* was joined by Chief Justice Rehnquist, Justice White and Justice Kennedy.

[31] *Id.* at 2119 (Thomas, J. concurring in part and concurring in the judgment).

[32] *Id.*

[33] *Adarand*, at 2120 (Stevens, J. dissenting).

[34] *Id.* at 2121.

[35] *Adarand*, at 2117 (plurality opinion of O'Connor, J.) (quoting *Fullilove*, 448 U.S. at 519) (opinion of Marshall, J. concurring in judgment)).

decision in *Adarand* produces a majority opinion only if Justice Scalia's opinion concurring in part and concurring in the judgment is added.[36] Justice Scalia believes that "government can never have a 'compelling interest' in discriminating on the basis of race in order to 'make up' for past racial discrimination in the opposite direction."[37] Presumably, therefore, the lower court on remand can only uphold the rebuttable presumption if it finds that Congress's purpose in enacting the SBA and the Department of Transportation statutes was something other than redress for past racial discrimination. This approach requires the district court on remand to address "facts about the current effects of past discrimination, the necessity for a preferential remedy, and the suitability of this particular preferential scheme."[38] Justice Scalia frankly admits that "[i]t is unlikely, if not impossible, that the challenged program would survive under this understanding of strict scrutiny. . . ."[39]

CONCLUSION

Adarand fuels the debate over the future of remedial, race-conscious programs. Republican presidential candidates have already made affirmative action an issue in the 1996 campaign. On the other hand, the California Board of Regents's decision to end affirmative action in hiring and admissions was met by active student protests.

Like the cases preceding *Adarand*, the opinion asks more questions than it answers. The continued vitality of legislation promulgated under Section 5 of the Fourteenth Amendment is undecided. *Fullilove* and *Adarand* are fundamentally in conflict, and must be reconciled in future cases.[40]

The emphasis placed on the individual nature of equal protection guarantees suggests that class actions under the Federal Rules of Civil Procedure based on racial discrimination may now be foreclosed.[41] Justice O'Connor's opinion specifically retreated from recognition of racial or ethnic characteristics as identifying a cognizable "class". Additionally, Justice Scalia emphatically argued that remedying past racial discrimination in general cannot meet the test of a compelling governmental interest needed to sustain benign, race-conscious measures. This suggests that future plaintiffs will need to show racial or ethnic discrimination with much greater specificity. Moreover, since the SBA's rebuttable presumption is unlikely to meet the requirements of Justice Scalia's concurrence, future cases may demonstrate that a more particularized showing of discriminatory intent or purpose is now required to make out a prima facie case of racial or ethnic discrimination.

Finally, the dissent suggests that the standard of review in deciding challenges to gender-conscious affirmative action programs is now in question. *Adarand* creates a potential equal protection paradox — if all affirmative action programs based on race or ethnicity are subject to strict scrutiny, are all affirmative action programs based on gender to be reviewed under a standard of intermediate scrutiny? The dissent believes this to be the case, and pointed out that under this scenario, *Adarand* "will produce the anomalous result that the Government can more easily enact affirmative-action programs to remedy discrimination against women than it can enact affirmative-action programs to remedy discrimination against African Americans — even though the primary purpose of the Equal Protection Clause was to end discrimination against the former slaves."[42]

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[36] Chief Justice Rehnquist, and Justices Thomas and Kennedy joined Justice O'Connor's opinion, except for a discussion of stare decisis in section III-C of the opinion, which only Justice Kennedy joined. Justices Ginsberg, Souter, Stevens and Breyer dissented. Therefore, the opinion achieves a majority only to the extent that Justice Scalia joins Justice O'Connor's opinion.

[37] *Adarand*, at 2118 (Scalia, J. concurring in part and concurring in the judgment).

[38] *Id.* at 2132 (Ginsburg and Breyer, J.J., dissenting).

[39] *Adarand*, at 2119 (opinion of Scalia, J. concurring in part and concurring in judgment).

[40] "[W]e need not decide whether the program upheld in *Fullilove* would survive strict scrutiny as our more recent cases have defined it." *Adarand*, 115 S. Ct. at 2117 (plurality opinion).

[41] See *Moss v. Lane Co.*, 50 F.R.D. 122 (W.D. Va. 1970), rev'd on other grounds, 471 F.2d 853 (4th Cir. 1973) (holding that Federal Rule of Civil Procedure 23(a) is to be interpreted liberally to allow class actions in civil rights cases); see also *Wofford v. Safeway Stores, Inc.*, 78 F.R.D. 460 (1978); *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555 (2d Cir. 1968); *Esplin v. Hirschi*, 402 F.2d 94 (10th Cir. 1968).

[42] *Adarand*, 115 S. Ct. at 2122 (Stevens, J. dissenting).