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# A Historical Review of Affirmative Action and the Interpretation of Its Legislative Intent by the Supreme Court

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# A HISTORICAL REVIEW OF AFFIRMATIVE ACTION AND THE INTERPRETATION OF ITS LEGISLATIVE INTENT BY THE SUPREME COURT

**by**

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"It is not the words of the law but the internal sense of it that makes the law. The letter of the law is the body; the sense and reason of the law is the soul."[1]

## I. INTRODUCTION

In its recent decision in *Adarand Constructors v. Pena,*[2] the United States Supreme Court determined that federal racial classifications should receive strict scrutiny, thereby making it more difficult for these programs to pass constitutional muster. In an opinion authored by Justice O'Connor, the Majority argued that there is a similarity between affirmative action programs employing racial classifications for the benefit of minorities and invidious racial classifications excluding African-Americans from equal employment opportunities.[3] This interpretation fails to take into account the actuality that federal affirmative action programs emanate from Titles VI and VII of the Civil Rights Act of 1964,[4] which were meant to alleviate discrimination against minorities and women. The Supreme Court has consistently understood that "[T]he alleviation of discrimination against African-Americans was the import of the Fourteenth Amendment."[5] Further, the majority of these programs do not require employers to hire minorities or women,[6] but merely encourage government employers, or private employers receiving government contracts, to treat all citizens fairly by becoming more inclusive in the employment process. The *Adarand* court has lost sight of the spirit of not only the Fourteenth Amendment, but also of the landmark remedial legislation enacted in 1964.

The Supreme Court should respect the original intent of the framers of the Fourteenth Amendment and the Civil Rights Acts, and acknowledge the underlying rationale for affirmative action programs in formulating the appropriate analysis to be used in scrutinizing federal, state, and private affirmative action programs. Particularly, the Court should understand the historical context motivating the enactments of the Fourteenth Amendment and the 1964 Civil Rights Act.[7] Therefore, I argue that by applying a strict contructionist interpretation to the legislative intent of these civil rights laws, the Supreme Court should affirm the underlying rationale for affirmative action programs and return to a more lenient level of scrutiny when analyzing these programs.[8]

In Part I, I will discuss the history of pre-affirmative action programs. This involves an analysis of the original intent of the Fourteenth Amendment, its related remedial legislation,[9] as well as several of the New Deal Acts prohibiting employment discrimination. Part II will analyze the advent of affirmative action, from its inception with the 1957 and 1960 Civil Rights Acts, and trace its development through Executive

Orders 12250 and 12259, which constitute the last major expansion in affirmative action doctrine. Part III will examine the period between 1978 and 1991, where the Supreme Court's attempts to find a consistent interpretation of the Equal Protection Clause and the level of scrutiny applicable to affirmative action programs will be addressed. Part IV will examine *Adarand*,[10] and the reasoning behind the decision. Finally, I will conclude with the direction courts should take in future cases involving affirmative action programs.

## II. PART I: THE PRE-AFFIRMATIVE ACTION ERA

The first major piece of civil rights legislation in the United States, the Thirteenth Amendment, was enacted to abolish slavery.[11] This amendment was the first proactive advancement in race relations in the history of this country, and was designed to end the virulent racism that had always been present. President Lincoln's Emancipation Proclamation not only liberated the slaves in the Confederacy, but allowed slavery to continue in unincorporated areas.[12] Therefore, it was necessary to alter the Constitution in order to put an end to slavery in all parts of the country.

### *A. The 1864 and 1865 Freedmen's Bureau Bills*

The Thirteenth Amendment, while liberating former slaves, did not solve the problem of racism directed toward newly-freed slaves by their fellow citizens, nor did it address the problem of assimilating the newly-freed slaves into white society. As a result, Congress proposed the 1864 Freedmen's Bureau Bill with the specific intent to provide special assistance to the newly freed slaves.[13] This legislation specifically designated African-Americans as the beneficiaries of programs meant to assist in the transition from slavery.[14] Proponents of the bill argued that it was necessary in order to atone for the past discrimination visited against the former slaves.[15] They also argued that the provision of race specific benefits would allow the former slaves to become self-sufficient, and would prevent them from becoming wards of the nation.[16] Thus, as is the case today, proponents of race conscious measures advanced the ideology that providing measures to assist those who have been and are presently discriminated against benefits the nation as a whole, because these members of society will be able to contribute to the community, and will not exist as liabilities to the nation.

Opponents of the Freedmen's Bureau Bill employed arguments very similar to those who oppose affirmative action today. Their main argument questioned the logic of promulgating legislation that was specifically intended to benefit only African-Americans.[17] The opponents considered it unfair that impoverished white citizens would not benefit from this bill. Here lies the origin of the notion that legislation should apply to all citizens equally, and that ours should be a "colorblind society."[18] This argument glosses over past and present inequities in favor of a system that allows the continuation of those inequities.[19]

The final version of the bill did not pass until 1865, when it was amended in order to include white refugees as beneficiaries.[20] In practice, though, the majority of the benefits went to freedmen.[21] Therefore, by the end of the Civil War, the nation had taken its first,

halting steps to provide special assistance to remedy past discrimination. The constitutionality of providing such programs to one racial group exclusively was still an open question, but the Freedmen's Bureau Bills nevertheless acknowledged the race of the individuals entitled to receipt of the benefits of the programs.

### *B. The Fourteenth Amendment*

The Fourteenth Amendment was enacted primarily to guarantee the constitutionality of the race conscious measures established in the Freedmen's Bureau Acts, which were subsequently affirmed through the Civil Rights Act of 1866,[22] and to address the problems of racism during the post Civil War period.[23] In fact, Congress debated the Fourteenth Amendment and the 1866 Freedmen's Bureau Bill [24] simultaneously.[25] This historical fact illustrates that the two provisions are inseparable. The reasoning behind one is also the reasoning behind the other. In the case of both, the protection of the equal rights of African-Americans was of primary focus.[26] The Fourteenth Amendment was meant to validate race conscious policies found in the Civil Rights Act of 1866 [27] and the Freedmen's Bureau Act of 1866.[28]

Amending the Constitution became necessary because of President Johnson's decision to veto the original versions of the 1866 Freedmen's Bureau Act and the Civil Rights Act of 1866. In both cases, the President made classic conservative arguments. Johnson claimed that providing special provisions to former slaves while not providing the same provisions for unfortunate whites was unfair.[29] In his veto of the 1866 Civil Rights Act, President Johnson explained that, in his mind, the distinction between race in the bill would benefit African-Americans while unfairly disadvantaging whites.[30] This rhetoric is very similar to the race baiting tactics currently employed by many of those arguing against present day affirmative action programs, where whites are thought of as being pitted against African-Americans.[31]

Both the Freedmen's Bureau and Civil Rights Act of 1866 were meant to provide the newly freed slaves with some opportunity to become viable members of the society. Achieving this goal necessarily required measures that applied directly to the group that had been wronged for the previous three centuries. Yet when Congress attempted to enact such a remedy, those against providing assistance to the downtrodden determined that the one characteristic that caused the former slaves to be enslaved, i.e., the color of their skin, could not now be used to thwart efforts to ameliorate the condition of ex-slaves. In the twisted, conservative logic, assisting African-Americans might unfairly injure white citizens.

In contrast, proponents of the 1866 Acts supported race conscious measures because such action directly assisted those who had been discriminated against. The proponents openly acknowledged race as a factor and felt that because it had been a factor in the enslavement and continued discrimination against the ex-slaves, it could now be taken into account in fashioning a remedy for nearly 300 years of inequality.[32] Therefore, Congress overrode President Johnson's veto of the Civil Rights Act of 1866, and subsequently passed a new Freedmen's Bureau Bill that was even more race specific than

the previously vetoed Freedmen's Bureau legislation.[33] Johnson also vetoed the 1866 Freedmen's Bureau Act, but once again his veto was subsequently overridden.[34]

The Fourteenth Amendment was enacted by the Congress during the same debates and discussions concerning the effective provision of remedies for past and present discrimination for former slaves. Therefore, the Amend ment must be analyzed in this context, which acknowledges the effects of discrimination on African-Americans, and must be recognized as being designed to guarantee the constitutionality of race conscious measures employed to improve their situation.[35]

In 1875, the Supreme Court began to retreat from assisting Congressional efforts to assimilate African-Americans into post-civil war society. The Civil Rights Act of 1875 [36] was enacted to provide African-Americans with equal access to public accommodations, including inns, public consequences, theaters, and "other places of public amusement."[37] By its terms, the Act applied to private individuals,[38] and made violations criminal misdemeanors.[39] Several white owners of private hotels, theaters, and railroads had policies excluding African-Americans, and were indicted under the Act. They challenged the Act as an invalid exercise of Congress' enforcement powers pursuant to the Thirteenth and Fourteenth Amendments. In a case that came to be known simply as the *Civil Rights Cases,*[40] the Supreme Court consolidated the challenges for resolution of the issues presented.[41]

The Court first rejected the government's contention that the Civil Rights Act of 1875 could be promulgated under Congress's enforcement power in Section Five of the Fourteenth Amendment.[42] The court noted that the Fourteenth Amendment only applied to *state* action, and could not be used to regulate private conduct.[43] Thus, the court held that Congress had no power to prevent private theater owners, innkeepers, and railroad operators from discriminating against African-Americans.

Second, the Court rejected the proposition that Section 2 of the Thirteenth Amendment [44] gave Congress the power to enact the Civil Rights Act of 1875.[45] Although the Court acknowledged that the Thirteenth Amendment not only abolished slavery,[46] but also prohibited the imposition of any "badges or incidents of slavery,"[47] the Court determined that private policies of discrimination against African-Americans did not amount to imposing a "badge or incident" of slavery on them.[48] In so holding, the Court reiterated the notion that Congress should make no attempt to enact race-conscious laws, and that ours should be a "colorblind" society:

> When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men's rights are protected.[49]

In his lengthy dissent, Justice Harlan argued that the majority failed to acknowledge the intent of the framers of the Thirteenth Amendment to eliminate all "burdens and disabilities which constitute badges of slavery and servitude."[50] Harlan considered overt, private acts of discrimination to be such "badges of slavery."[51] Harlan also argued that the Fourteenth Amendment was enacted to secure and protect the rights of African-Americans as citizens of this country,[52] and that the Amendment vested in them a right of exemption from race discrimination.[53] Harlan explained that the framers of the Four teenth Amendment intended to confer upon Congress the power to redress "the great danger to the equal enjoyment by [African-American] citizens of their rights, as citizens, . . . [posed], not altogether [by] unfriendly state legislation, but [also] [by] the hostile actions of corporations and individuals in the states."[54]

Justice Harlan thus examined, and would have implemented, the true intent of the Thirteenth and Fourteenth Amendments to provide special legal protections for African-American citizens. The modern-day Supreme Court could learn from Justice Harlan's example, and should have likewise respected the original intent of the Fourteenth Amendment in analyzing the constitutionality of affirmative action programs.

### *C. The New Deal Era Laws*

During the Great Depression, economic hardship and massive unemployment forced the government to provide programs to assist the citizenry. The Roosevelt Administration implemented many laws for this purpose, and included in them prohibitions against racial discrimination.[55] These New Deal laws required employers to be inclusive in their employment practices, and constituted the first attempt to do so since the era of "separate but equal" legislation introduced during the 19th Century.[56] Indeed, the Public Works Administration, which was created pursuant to the National Industrial Recovery Act,[57] provided for quotas in employment in order to assure employment inclusiveness.[58] President Roosevelt also issued the first executive order prohibiting employment discrimination based on race.[59]

By the end of the New Deal Era, the government had made its first attempt since Reconstruction to eliminate discrimination. Though the group meant to be protected was not specified, it is obvious from the surrounding circumstances that such legislation was meant to address discrimination against African-American and other minority citizens, because these were the individuals being discriminated against. These programs were specifically meant to provide equality in employment opportunity and encouraged employers to be more inclusive in providing employment.[60] Therefore, these requirements provided the ground work for future programs to eliminate employment discrimination.

## III. PART II: THE ADVENT OF AFFIRMATIVE ACTION

During the period from 1954 to 1978, the nation made great strides in resolving the dilemma of race relations in America. This naturally had the effect of addressing employment discrimination and examining methods for achieving its elimination. This

also required an examination of the overall effect centuries of discrimination had on the employment opportunities of African-Americans. Furthermore, an examination of the effect of existent discrimination was necessary. In response to these questions, the government decided laws both prohibiting discrimination in employment and providing some type of remedial programs were necessary. Affirmative action programs benefiting those recipients of past and present discrimination were borne out of this atmosphere.

### *A. The End of Separate but Equal*

The Supreme Court decision in *Brown v. Board of Education*,[61] began the process of dismantling the officially segregated society that had been in place throughout the entire history of the United States, but discrimination in employment continued.

To determine the extent of discrimination, then Vice-President Richard Nixon, pursuant to the Committee on Government Contracts, conducted a review and compiled a report addressing the overall situation concerning the effects of race on employment. In the report, it was determined that, "the indifference of employers to establishing a positive policy of non-discrimination hinders qualified applicants and employees from being hired and promoted on the basis of equality."[62] Nixon further determined that schools, training institutions, recruitment, and referral services emulated this nonchalance concerning the inclusion of African-Americans.[63] In effect, this general apathy served to perpetuate the problems of inequity that minimized opportunities for African-American citizens.

The report demonstrated that even if overt discrimination did not exist, a covert, societal type of discrimination flourished. This covert type of discrimination had no malicious intent, but the effect still denied employment opportunities to African-Americans. Covert discrimination operates to perpetuate the status quo, and to retain discriminatory policies and practices. It provides a comfort level for those employing it, allowing the retention of certain presumptions concerning the efficacy of long standing practices. The comfort level itself is not an act of discrimination, because it is important to maximize economic efficiency by reducing racial friction in the workplace. Thus present problems were solved with solutions that have been used in the past. The problem is that the comfort level was achieved during a period when African-Americans and other minorities were not welcomed, thereby excluding them from becoming part of the accepted norm. Therefore, in the employment context, African-Americans were, and still are, excluded because society wants to retain the comfort level, which manifests itself in what Vice President Nixon referred to as "indifference". Though this is not overt discrimination, the effect is equally invidious.[64]

Therefore, in the employment arena, African-Americans still suffered from the residue of the "separate but equal" era. If not for the blatant racism instituted during that era, African-American citizens might have received an opportunity to participate more fully in society, thereby making their inclusion the norm.

To address the inequities of employment discrimination, President Kennedy issued Executive Order 10,925,[65] which prohibited discrimination and required contractors to

pledge to take affirmative action to ensure that applicants for employment be considered without regard to race. The import of the order, therefore, was to eliminate racial discrimination against African-Americans by those entities receiving government contracts.[66]

### *B. The Civil Rights Act of 1964, Titles VI & VII*

Congress strengthened Executive Order 10,925 by incorporating it into Titles VI and VII of the Civil Rights Act of 1964, thereby providing the legislative basis for equal employment opportunity laws and affirmative action programs.[67] The United States Senate explicitly noted that the Act included the affirmative action program set forth in Executive Order 10,925 in the administration provisions of Title VII.[68] Congress thus illustrated its intent that Title VII would bring about the elimination of discrimination against African-Americans. The overall effect of passing Title VI and Title VII was congressional recognition of Executive Order 10,925.

#### 1. Title VI

Title VI of the Civil Rights Act of 1964, codified at 42 U.S.C. § 2000d,[69] prohibits any program or activity that receives federal financial assistance from discriminating on the basis of race, color, or national origin.[70] Section 2000d-1 authorizes federal agencies to issue regulations enforcing section 2000d.[71] Each federal agency is required to formulate its own rules to determine whether the beneficiaries of their agency's aid are in compliance with provisions proscribing discrimination against minorities. This is a far reaching provision, considering the number of private entities that receive federal aid or enter into contracts with the government. Therefore, the overall effect of the legislation is to provide some regulatory authority for government agencies to prohibit discrimination by private entities receiving federal funds..

Where the beneficiary of a federal contract or aid is found to be in violation of section 2000d, the donor agency or department may issue a sanction in the form of termination, discontinuance of assistance, or any other legally authorized penalty.[72] Due Process requires that no penalty may be enforced until the party in violation receives an opportunity for a hearing to determine noncompliance.[73] Furthermore, where an agency determines that the beneficiary is not in compliance, and a sanction is levied, any action taken against the violator is limited to the particular program in violation, and does not effect other unrelated programs involving the same entity.[74] The agency narrowly enforces the statute so that it will not arbitrarily penalize an other wise fair institution or entity. When an action of termination or discontinuance of a grant, loan or contract is imposed, the head of the acting agency is required to file a written report with the appropriate committees in the House and Senate explaining the grounds for the action.[75] Therefore, any beneficiary of a government grant or other financial aid is subject to substantial incentives to comply with the non-discrimination requirements of the individual agency.

#### 2. Title VII

Title VII of the Civil Rights Act [76] defines the terms used in its Equal Employment Opportunity provisions. Title VII's definition of "person" includes almost all public and private entities, thereby providing private sector employees with the ability to seek redress of grievances if their employer is intentionally engaging in discriminatory employment practices.[77] Title VII exempts small businesses from compliance by providing that it applies only to businesses with fifteen or more employees.[78] The gender protecting language, "on the basis of sex," is interpreted to provide that pregnant women receive equal treatment on the job, notwithstanding their pregnancy. Also, the Civil Rights Act of 1991 amended this section to include the "Glass Ceiling Act of 1991," which addresses the problem of minorities and women not receiving access to upper management level positions.[80]

Section 2000e-2 provides that it is an unlawful employment practice to discriminate against a person because of race, sex, national origin, or religion.[81] All aspects of employment are protected from discriminatory activities by employers, including hiring, firing, compensation, and terms, conditions or privileges of employment.[82] Title VII also makes it unlawful for an employer to classify employees or applicants in any way that would tend to deprive individuals of equal employment opportunities.[83] This section provides the basis for lawsuits by both minorities and non-minorities, when a party believes that employment discrimination is occurring. Section 2000e-2 also provides that preferential treatment is not required if there is a statistical imbalance between the work force and the general population.[84] Therefore, claims that federal affirmative action provisions require racial or gender quotas are untrue, indeed such strict quotas would be in violation of Title VII.[85]

Section 2000e-4 [86] creates the Equal Employment Opportunity Commission. The Commission is granted the authority to provide federal agencies, and other entities subject to this Title, with technical assistance in compliance. Section 2000e-5 [87] confers authority on the Commission to prevent a party from engaging in unlawful employment practices. The Commission is vested with the authority to make an investigation of any employer alleged to be engaged in discriminatory employment practices. If the investigation shows reasonable cause to believe the charge, the Commission will attempt to apply informal methods to alleviate the problem.[88] If within thirty days there is no agreement, the Commission may bring a civil action against the employer.[89] If the employer is a public agency or political subdivision, the case will be referred to the Department of Justice, which may bring a civil action at its discretion.

Where an individual alleging an unlawful employment practice resides in a state that has its own anti-discrimination laws, and its own state agency governing these complaints, the EEOC will not file any charges for sixty days in order to give the state agency an opportunity to act. Similarly, if a complaint is first filed with the EEOC, the EEOC will notify the appropriate state agency and allow them to apply state law before taking any action.[90] The overall intent is to allow state agencies to implement their own programs and proceed ings to eliminate discrimination, thereby providing a more effective mechanism for achieving the congressional goal of eliminating employment discrimination.

Section 2000e-5 permits a court to enjoin anyone found to be intention ally engaging in an unlawful employment practice. The injunction may in clude an order to implement an affirmative action plan, reinstatement, back pay, and any other equitable relief that the court deems appropriate.[91]

### *C. Equal Opportunity in Federal Employment*

Section 2000e-16 [92] prohibits discrimination in federal employment by providing that all personnel actions affecting employees or applicants will be non-discriminatory. The EEOC is authorized to enforce this policy, and it has accordingly issued procedural regulations [93] to carry out this responsibility.[94] These regulations should provide only a general outline, because each agency is required to formulate its own policy. The requirement is that each agency provide training and education programs which are intended to provide the greatest opportunity for employees to succeed. The agencies must also provide information concerning the efforts that are being undertaken within the agency, in terms of interagency functions, to provide a legitimate equal employment opportunity program. Therefore, the overall intent is to provide a federal government work force that offers opportunities equally. Section 2000e-17,[95] provides that companies with approved affirmative action programs will not have government contracts denied because of an Equal Employment Opportunity order unless the company has substantially deviated from the original plan.

### *D. The Civil Rights Act of 1991*

In 1991, Title VII was amended [96] in response to the United States Supreme Court's decision in *Ward's Cove Packing Co. v. Antonio*.[97] In *Wards Cove,* the Court weakened the scope and effectiveness of federal civil rights protections by requiring an employment discrimination plaintiff to identify the specific employment practice that is challenged, and to illustrate how that practice creates a "disparate impact."[98] After the plaintiff satisfies this burden, the Court explained that the employer would receive an opportunity to rebut the prima facie case by demonstrating that the challenged practice serves, in a significant way, legitimate employment interests.[99] In summary, the Court determined that under a disparate impact theory of employment discrimination, the ultimate burden of proof is on the plaintiff.[100]

Congress amended Title VII to require an employer to justify its employment practices that caused a disparate impact.[101] This amendment was intended to overrule *Wards Cove*.[102] In effect, then, after the plaintiff demonstrates that an employment practice has a disparate impact, typically through the use of statistical data, the entire burden of proof *shifts* to the employer. The Act also provides that a demonstration of business necessity will no longer protect an employer engaging in intentional discrimination.[103] Thus, by shifting the burden of proof, Congress reaffirmed its interest in requiring employers to maintain equal employment opportunity by eschewing employment practices having discriminatory effects.

Overall, nothing in the federal statutes requires a private firm to incorporate affirmative action programs into its employment strategy. The private sector can only be required to undertake affirmative action when ordered by a court, upon a finding that the employer engaged in intentional discrimination.[104] Upon such a finding, a court will have authority to order the non complying firm to take "affirmative action" to remedy the situation.[105] Therefore, Congress intended Title VII to prohibit only overt discrimination; it does not require private affirmative action plans for a firm that is not receiving government funds. Conversely, employees of private firms receiving federal funds retain the right to enforce minimal equal employment opportunity requirements by obtaining court ordered affirmative action. The government itself is also required to adhere to its own affirmative action requirements.

This examination of the federal statutes is intended to provide a more appropriate understanding of the legislative intent behind Title VII. Under Title VII, Congress provided three differing standards for: 1) purely private firms: 2) private firms receiving federal funds: and 3) federal agencies. These standards are contingent on the ability of the government to eliminate employment discrimination. Therefore the Court should take this into consideration when encountering affirmative action cases involving the federal government. The overall intent behind these important civil rights statutes, and the federal government's ability to realize its goal of equal employment, should be paramount. Therefore, courts should relax the level of scrutiny, depending on the amount of federal involvement, thereby providing greater deference to congressional intent to be more proactive where federal funds are involved.

### *E. The Executive Orders*

A number of Executive Orders were issued beginning in 1965 to facilitate the legislative intent of Titles VI and VII to eliminate the effects of prior discrimination. In 1965, President Lyndon Johnson issued Executive Order No. 11,246,[106] which required government contractors to implement a non-discrimination policy in their employment practices. The order provided that each contractor must include, in the contract itself, a written affirmation not to discriminate on the basis of race.[107] The Department of Labor was empowered to investigate employee complaints, and to verify compliance by reviewing the contractor's employment records [108] If the Secretary of Labor found non-compliance, he or she was empowered to either cancel, suspend, or terminate the contract.[109] These same requirements continue to apply to federal contracts today pursuant to section 602 of Title VII [110] and administrative regulations.

Affirmative action programs further evolved during the late 1960s and throughout the 1970s. The first and most important action came in August of 1969 when President Richard Nixon issued Executive Order 11,478,[111] which superseded Executive Order 11,246. This order required all federal agencies and departments to implement "affirmative programs" to effectuate the policy prohibiting discrimination and to provide equal employment opportunity.[112] The EEOC was entrusted with the responsibility of administering the program.[113]

In 1978, President Jimmy Carter issued Executive Order 12,067,[114] which granted the EEOC authority to develop standards and guidelines for federal agencies to follow in complying with equal employment opportunity laws. In October of 1978, President Carter issued Order No. 12,086,[115] designating the Secretary of Labor as the party responsible for enforcing Parts II and III of Order No. 11,246 the Johnson Order requiring non-discrimination provisions in government contracts. Order 12,086 directed the Secretary of Labor to ensure compliance.

In 1980, President Carter issued Executive Order 12,250 [116]which required the Department of Justice to insure that all federal agencies extending financial assistance properly enforce Title VI of the Civil Rights Act. Section 2000d-1 originally provided for approval of agency rules by the President, but pursuant to Executive Order 12,250, the approval function was delegated to the Attorney General. Also under Order 12,250, the Attorney General's authority was delegated to the Assistant Attorney General, Civil Rights Division. The authority of the Assistant Attorney General was extended to cover the issuance of directives and the initiation of other actions deemed necessary to enforce Title VI. Later in 1980, Executive Order 12,259 [117] was issued. It encouraged the Attorney General and heads of executive agencies to work together to provide consistency among the federal agencies in the implementation of these provisions.

Each agency is required to submit proposed regulations enforcing Title VI to the Assistant Attorney General, Civil Rights Division. After approval, the agency regulations would then be published, thereby providing all potential beneficiaries with a complete understanding of the correct guidelines.[118] Each federal agency must provide for the collection of data and information from federal assistance applicants and recipients.[119] Each potential beneficiary is also required to submit to the donor agency information concerning the beneficiary's past civil rights record, and the enforcement mechanisms used to assure that the beneficiary is providing equal opportunity.[120] The particular agency's civil rights office will review the potential beneficiary's record to determine whether the beneficiary should receive the federal aid. This takes the form of a written assurance of compliance. Agencies must also maintain a program of post-approval review to assure that the beneficiary maintains non-discriminatory policies.[121] The effect of these orders is to maximize governmental authority to require private firms to use nondiscriminatory employment practices.

The Attorney General provides guidelines for the enforcement of Title VI in order to provide a framework from which the agencies may implement their own rules.[122] These guidelines supply alternative remedies in situations where an agency determines that a beneficiary is not complying with Title VI. The guidelines are intended to assist agency heads in pursuing a course of action that will effectively address the situation of a noncomplying beneficiary of federal funds.

Pursuant to these guidelines, the ultimate sanction the agency may levy against a potential beneficiary is refusal to grant aid or termination of aid. However, safeguards are in place to protect potential beneficiaries from being denied aid arbitrarily. For example, before sanctions may be imposed, the agency must determine that it cannot obtain

compliance voluntarily, and alternative courses of action will not attain compliance.[123] The potential beneficiary is also afforded an opportunity for judicial review,[124] thereby providing the applicant due process rights similar to those of an actual beneficiary. Alternatively, the agency may pursue court enforcement or administrative actions if voluntary compliance cannot be achieved.

The guidelines further provide for the situation in which the beneficiary is allowed to receive one time or non continuing aid. In these situations, where the requisite assurances have not been satisfied, the recommendation is for the agency to withhold aid until the potential beneficiary complies with the Title VI requirements.

State agencies receiving federal financial assistance must also comply with these requirements by establishing Title VI compliance programs to assure that beneficiaries of their programs are in compliance.[125] Each state program must have a person in charge of enforcement, and the enforcement must satisfy federal minimum standards. This requirement is meant to provide an injured party with a local outlet, and it also allows for local regulation of state and local companies and agencies.

Overall, the period between 1958 and 1980 saw the United States' greatest advancement in the area of providing equal employment opportunity for all citizens. The catalyst for these initiatives was the racial and gender discrimination that the 1964 Civil Rights Act sought to eliminate. Moreover, the legislature's imposition of affirmative action requirements on an employer with government contracts suggests that Title VII was meant to apply in a more strict fashion toward entities receiving federal funds. Subsequent executive orders implemented this mandate. Therefore, two of the three branches of government clearly supported and advanced the purpose of Title VII, leaving it to the Supreme Court to determine the constitutionality of these actions and the actions of private entities complying with the equal employment opportunity laws.

## IV. PART III: THE COURT'S ATTEMPT TO FIND CONSENSUS

During the 1980s, the Supreme Court struggled to determine the correct level of scrutiny that affirmative action programs must satisfy in order to remain constitutionally permissible. The process of determining an applicable standard was made even more difficult because of the shifting legal theories used by plaintiffs in asserting their cause of action, and because in each case a different type of affirmative action program was being questioned. Actions challenging affirmative action programs brought during this period were variously resolved by the Fourteenth Amendment, the Fifth Amendment and Title VII of the 1964 Civil Rights Act, thereby requiring different constitutional interpretations of different racial or gender classifications. The Court was also required to decide the constitutionality of different types of affirmative action. These differing approaches involved distinguishing between the status of the entity implementing the affirmative action program.

In this section, I will analyze the Court's interpretations of these different types of affirmative action programs by examining the basis upon which these decisions were

made. Particular attention will be paid to the Court's acknowledgment and interpretation of the legislative intent behind the federal legislation at issue.

### *A. Voluntary Private Affirmative Action*

Voluntary private affirmative action has thus far been the least controversial of all affirmative action programs.[126] The issue involved concerns the ability of a private entity to use proactive measures to remedy past and present discrimination. Private affirmative action is unique because neither the Fifth nor the Fourteenth Amendment is applicable; there is no government action involved. Therefore, plaintiffs seeking redress from private affirmative action programs are required to use Title VII.

The seminal case in this area is *United Steelworkers v. Weber*.[127] *Weber* involved an affirmative action plan contained within a collective bargaining agreement between Kaiser Aluminum & Chemical Corporation and the United Steelworkers. The plan was meant to eliminate the imbalance that existed in the company's nearly all-white craft workforce. The company decided to begin a new training program to teach employees the necessary skills to become a craft worker, and made the program available to both Af rican-Americans and whites. However, because African-Americans had his torically been excluded from craft unions, the bargaining agreement required fifty percent of the new trainees to be African-American. This requirement would remain in place until the percentage of African-American craft work ers in the plant approximated the percentage of African-Americans in the local community.

Brian Weber, a white production worker wishing to participate in the training program, was not chosen to participate, even though he had more seniority than several of the African-American workers chosen. Thereafter, Weber challenged the plan as being discriminatory on the basis of race in violation of Title VII. Weber argued that a literal interpretation of sections 703(a) and (b) prohibited race-conscious affirmative action plans. He also argued that the analysis of Title VII should be applied evenly, regardless of the race of the allegedly injured party. This argument is presently used by opponents of affirmative action, who assert that the civil rights laws should apply equally to blacks as well as whites. While the Court acknowledged some empathy for this argument, it nonetheless interpreted Title VII in light of the legislative intent.

Writing for the Majority, Justice Brennan explained that Title VII should be interpreted within the historical context of its creation.[128] When Congress created Title VII, it intended to provide protections to African-American citizens in the arena of employment, thereby giving them a fair and equal opportunity to be included within society's economic sphere.[129] The Court determined that affirmative action achieved this goal, and it would be counterproductive and contrary to the intent of the law to eliminate programs intended to further the goal.[130]

Justice Brennan next proceeded to interpret section 703(j), which explicitly prohibits quotas, to allow for affirmative action programs. Brennan explained that if the legislature intended to prohibit all voluntary private affirmative action, it would have declared that

an employer is not required to engage in affirmative action to balance its workforce, and such actions would be impermissible.[131] Indeed, the intent of Title VII was to avoid undue federal intrusion [132] an idea with which most conservatives should feel most comfortable. In conclusion, Justice Brennan explained that Congress enacted Title VII to eliminate the last vestiges of discrimination in this country,[133] and because affirmative action programs were helpful to this endeavor,[134] they were permissible under the Act.

As can be seen from the majority opinion in *Weber*, the Court understood the legislative intent of Title VII, and specifically followed its mandate. In so doing, the Court laid out a judicial standard to determine the permissibility of private affirmative action programs according to this understanding. The Court determined that the purpose of the plan must: 1) be to eliminate conspicuous racial imbalance in traditionally segregated job categories, 2) not be an absolute bar to the interests of white employees, or otherwise "unnecessarily trammel" their interests, and 3) be a *temporary* measure intended merely to achieve racial balance rather than to maintain racial balance.[135] Therefore, by following the legislative intent of Title VII, the Court confirmed the permissibility of affirmative action programs, but limited their scope to prevent any abuses that might occur.

### *B. Court Ordered Programs*

Under Section 706(g) of Title VII and the Fourteenth Amendment, federal courts have the authority to order public and private employers to implement race or gender conscious affirmative action programs. This remedy is provided only in the most egregious of circumstances, and only when the remedy is narrowly tailored to minimize the burden on white employees.[136] This remedy is also difficult to terminate because it must satisfy the same criteria to be terminated as was required to impose it. A court-ordered program will only be ended when the defendant-employer illustrates that it has achieved a stable racial balance that will not be immediately destroyed.[137] The nature of the alleged injury relates to the program's constitutionality. There fore, the reviewing court must determine whether the lower courts' relief was tailored narrowly enough to accomplish the desired remedy.

The first court-ordered affirmative action case was *Firefighters v. Stotts*,[138] in which a group of African-American firefighters filed a class action suit charging the city fire department with discriminatory hiring and promotion practices. The parties subsequently agreed to a consent decree to remedy these practices.[139] Later, the African-American firefighters sought an injunction against the fire department to prevent it from following its seniority system when the department made layoff decisions. The African-American firefighters argued that, by following the seniority system, they would be the first to be laid off and they would lose the gains they achieved pursuant to the consent decree. The district court agreed, and ordered that layoffs be made in a manner that would protect the newly hired African-American firefighters, thereby circumventing the seniority system.[140] The firefighters union appealed to the Supreme Court. The Court held that because Title VII specifically protects bona fide seniority systems, and because the union was not a party to the consent decree, the district court abused its discretion in ordering the injunction.[141]

The Court found that the original consent decree did not address the issue of layoffs, nor did it suggest that the seniority system in place should be ignored.[142] Also, it interpreted Title VII to protect bona fide seniority systems.[143] The Court determined that the district court had abused its discretion in altering the seniority system in favor of the African-American firefighters, because the district court inadvertently granted competitive seniority to the minority firefighters.[144] The Court explained that pursuant to section 706(g), a court may grant competitive seniority only to those victims who have directly suffered from intentional discrimination.[145] Unfortunately, the African-American firefighters did not address in their brief the issue of whether the department's seniority system intentionally discriminated against the African-American firefighters. In the absence of an argument to the contrary, the Court presumed that any discriminatory effects were unintentional.[146] Therefore, by basing its decision on the questionable interpretation that only those intentionally discriminated against may receive "competitive seniority," the Court disregarded the legislative intent of Title VII as recognized in *United Steelworkers,* namely to eliminate the effects of prior discrimination.

In *Sheet Metal Workers' v. EEOC*,[147] the government brought suit under Title VII to enjoin a labor union and its apprenticeship committee from discriminating on the basis of race. The district court ordered the defendants to set a 29% minority membership goal to be met by a specified date, and appointed an administrator to make sure that this goal was reached. After the union failed to reach these goals, the court, several years later, imposed a fine and ordered the union to implement an amended affirmative action program to increase minority participation. The union unsuccessfully challenged the validity of these orders on Title VII and equal protection grounds.

The Supreme Court, in a plurality opinion written by Justice Brennan,[148] again interpreted section 706(g) as not prohibiting federal courts from ordering race-conscious relief to remedy past discrimination in appropriate circumstances.[149] The Court also indicated that such relief was not restricted to direct victims of past intentional discrimination.[150] The Court rejected the EEOC's argument that the legislative history of Section 706(g) revealed that it was intended to benefit only identified victims of intentional discrimination, but instead concluded that Title VII could also provide relief for those whom were unintentionally discriminated against.[151] However, the Court explained that the purpose of section 706(g) was to assure employers that they would not violate the statute by merely having a racial imbalance in the work force.[152] This would prohibit a court from requiring an employer to adopt racial preferences merely to correct a work force imbalance, thereby precluding any inequities in the implementation of court-ordered affirmative action.[153]

In the final analysis, the Court decided that the district court's order was not prohibited, because the union had a history of persistent and egregious discrimination and the orders did not require union membership for those who had been refused admission for non-discriminatory reasons. The Court also explained that Title VII's purpose is realized by allowing courts to order race conscious relief as a class remedy.[154] Therefore, because the motivation be hind the order was to attack the effects of intentional and continuing

discriminatory practices against the class which the union refused to address, the district court's order did not violate Title VII.[155]

The next case to come before the Court was *International Association of Firefighters v. City of Cleveland*.[156] In this case, minority firefighters filed a class action against the city of Cleveland, claiming violations of Title VII for discrimination on the basis of race in hiring and promoting. The district court adopted, over the union's objection, a consent decree that had been agreed to by the plaintiffs and the city. The decree required a specified number of promotions to be given to minority firefighters over a four year period. The union appealed to the Supreme Court.

Again the Court was called upon to interpret section 706(g), this time in relation to a consent decree awarding hiring and promotional preferences to minority union members who were not direct victims of an employer's intentional discrimination. Adhering to the legislative intent of Title VII, the Court acknowledged that reasonable race-conscious measures meant to achieve the purposes of Title VII were allowable in situations where the measures imposed were *voluntary*.[157] Moreover, because Section 706(g) does not regulate voluntary agreements providing race conscious relief, the district courts are not constrained by the Section 706(g) limits when approving consent decrees.[158] Therefore, the Court allowed the parties to come to their own solution without overly burdensome intervention. This interpretation comports with the true intent of Congress by allowing remedial relief to achieve the goals of Title VII.

The final case in this area was *United States v. Paradise*.[159] In *Paradise,* the Supreme Court reviewed a district court order requiring the Alabama Department of Public Safety to promote one African-American trooper for every white trooper promoted to the rank of corporal. This requirement was limited in duration, and the African-American trooper promoted must have been "qualified" for the position. The same one-to-one ratio was also required for upper rank promotions.[160]

The district court order was based on findings that the department had a long history of excluding African-Americans from employment and promotions, thereby providing a basis for a claim of persistent or egregious discrimination. The department also failed to adhere to prior court orders.[161] Despite past recalcitrance, the department complied with the immediate order by promoting eight African-Americans and whites to corporal.[162] It also submitted an affirmative action plan that provided for fair promotional procedures as required by the court.[163] Thereafter, the district court discontinued the one to one promotional requirement, and allowed the department's program to control promotions, because the department had complied with the federal court's mandate. Unfortunately, the United States intervened. The Department of Justice challenged the district court order, claiming that it violated the Equal Protection Clause of the Fourteenth Amendment, as it overburdened non-minority troopers.[164]

The Supreme Court upheld the court order, and held that the promotional requirement did not constitute an equal protection violation. Once again writing for a plurality, Justice Brennan emphasized that race-conscious affirmative action is a well-established remedy

for past and present discrimination.[165] The Court declined to formally adopt strict scrutiny as the appropri ate measure of the constitutionality of affirmative action programs.[166] Justice Brennan recognized the Court's inability to reach a consensus on this issue, and in so doing, the Court once again avoided the question of the correct level of scrutiny to be applied to affirmative action. Brennan dodged the issue of assuming *arguendo* that strict scrutiny applied, and missed an opportunity to demonstrate that the program could thereunder pass constitutional muster.[167] Brennan determined that the race-conscious relief ordered was necessary to serve the compelling governmental interest of ending the department's long term, open, and pervasive discrimination in its hiring and promotional practices.[168] Brennan also found the societal interest in ensuring compliance with federal court orders to be compelling, because of the department's history of noncompliance with similar federal court orders.[169] The promotional requirement also satisfied the narrowly-tailored requirement, because it was specifically focused to remedy the effect of the department's discriminatory exclusion of African-Americans from the upper ranks.[170]

The Court disagreed with the government's assertion that the program overburdened non-beneficiaries on several grounds. First, the program was temporary and did not require the department to make gratuitous promotions or to create positions in order to fill them with African-Americans.[171] Second, the provisions of the order requiring prompt implementation of the race-neutral promotional procedures were found to be necessary to ensure immediate compliance with prior court orders, and to eliminate the harm caused by the department's previous delays in implementing the procedures.[172] Third, the Court felt that deference should be granted to district court orders redressing Fourteenth Amendment problems, because the lower courts had first hand experience with such problems.[173] Therefore, the government's argument was deemed unpersuasive, thereby validating the district court's authority to implement affirmative action programs.

Overall, the opinions of the Court in court-ordered affirmative action cases support an interpretation of the Fourteenth Amendment and Title VII that recognizes the history of these enactments and acknowledges the intent of their framers to provide a remedy to groups that suffered from historic discrimination. By making such an acknowledgment, the federal courts are able to deal directly with these problems. Therefore, regardless of which standard is applied, support for fair and equitable affirmative action programs is available.

### *C. Voluntary State and Local Affirmative Action*

Voluntary state and local affirmative action programs involve situations where public employers or governing bodies, at the state or local level, institute programs intended to provide equal employment opportunity to minorities or women. These programs are subject to the Fourteenth Amendment's Equal Protection Clause, because government action is involved. Therefore, an analysis of these cases is appropriate to a proper understanding of equal protection.

The case of *Wygant v. Board of Education* [174] involved a collective bargaining agreement between a teacher's union and a local board of education. The agreement provided that when layoffs were required, those teachers with the least seniority would be laid off first, *except at no time would there be a higher percentage of minority personnel laid off than the current percentage of minority personnel employed at the time of the layoff*.[175] As a result, the school district laid off several non-minority teachers with greater seniority over minority teachers with less seniority. Thereafter, the white teachers challenged the layoff policy, claiming that it violated the Equal Protection Clause.

The Supreme Court supported the petitioners claim and found that the layoff provisions violated equal protection under the Fourteenth Amendment. The Court held that redressing societal discrimination was not a sufficiently compelling reason to justify the lay off provision in the affirmative action program.[176] To justify such programs, the Court required that the respondents provide a specific showing of prior discrimination by the governmental entity.[177] The Court claimed that general societal discrimination was insufficient to provide a compelling state interest, because such discrimination had no relationship to the prior discriminatory hiring practices that the affirmative action program sought to redress.[178] Without a showing of direct discrimination, the Court believed, the potential for abuse was high, because the program could be continued after its legitimate remedial purpose had been satisfied.[179]

This reasoning, unfortunately, does not take into account the intent of the Equal Protection Clause, and fails to protect those African-American teachers who had previously been discriminated against. Indeed, such reasoning turns the whole intent of the Fourteenth Amendment on its head by doing the opposite of what it was intended to accomplish.[180]

*Johnson v. Transportation Agency* [181] stands as the only major opinion determining the legality of a gender-based affirmative action program under Title VII.[182] In *Johnson*, the Santa Clara Country Transportation Agency voluntarily adopted an affirmative action program in which the gender of the employee was considered as a factor in making promotions. The agency adopted the plan "to achieve a statistically measurable yearly improvement in hiring and promoting minorities and women in job classifications where they are under-represented. . . . [T]he long-term goal is to attain a work force whose composition reflects the proportion of minorities and women in the area labor force."[183] The plan did not require or establish hiring quotas to reach the stated objective.[184] The agency relied on empirical statistical data to determine the extent of female and minority under-representation in its work force.[185] Acting under this program, the agency promoted a female employee ahead of a male employee who scored higher on the qualification exam. The male employee sued claiming a Title VII violation.

In determining the validity of a voluntary affirmative action plan under Title VII, the Court held that the principles articulated in *Steelworker's v. Weber* must guide the analysis.[186] To be valid, the plan must first be designed to correct a "manifest imbalance," where women are under-represented in "traditionally segregated job categories."[187] To determine whether such an imbalance exists, the Court approved the comparison of the

percentages of women in the workforce with those of the general population in jobs for which no special skill is required.[188] This requirement of showing a statistical imbalance is consistent with *Weber* and the purpose of Title VII, which is to encourage affirmative action.[189]

The second consideration was whether the plan, as implemented, "unnecessarily trammeled" the rights of male employees.[190] The Court reasoned that because the applicant's sex was one of many factors the agency considered, a male applicant's sex did not operate as a complete bar to promotion.[191] Further, male applicants would still remain eligible for other, non-program promotions.[192] The Court also noted that the agency's affirmative action plan was temporary, and it sought to attain a balanced workforce rather than to maintain such a balance.[193] The Court concluded that for these reasons, the agency's voluntary affirmative action program did not unnecessarily trammel Johnson's equal employment rights.

This test, where the Court looks for a manifest imbalance in the workforce and then checks to ensure that the rights of non-beneficiaries of the affirmative action program are not unduly trammeled, can be seen as a form of more lenient scrutiny of voluntary affirmative action programs under Title VII. Employing a more lenient scrutiny thus serves the goals of not only Title VII, but also of the Equal Protection Clause, namely, to afford minorities equal employment opportunities.

In *City of Richmond v. J.A. Croson Co.,* [194] the City Council of Richmond passed an ordinance requiring prime contractors awarded city contracts to subcontract at least thirty percent of the dollar amount of each contract to minority owned businesses. The plan was later challenged on equal protection grounds by a prime contractor who had lost a city contract after being denied a waiver by the city.

The Court applied strict scrutiny to the program, and determined that it was unconstitutional.[195] The Court held that the city did not prove a compelling governmental interest sufficient to justify the program because there were no findings of prior discrimination that would allow for race-conscious relief.[196] Thus, the Court reverted to the *Wygant* analysis, in which a state or locality is required to make a showing of prior intentional discrimination in order to be successful in defending its remedial plan. The Court determined that the strict numerical set aside required more than assertions that discrimination in the construction industry was prevalent or societal.[197] Indeed, even though the city cited factors, such as a lack of working capital, an inability to meet bonding requirements, and a lack of training and experience, contributing to continued discrimination in the field, the Court responded that specific acts of prior discrimination were required in order for race conscious remedies to be applied.[198]

The Court's requirement of intentional past discrimination, of course, does not comport with the intent of the Fourteenth Amendment. Requiring specific instances of overt discrimination before affirmative action programs are permissible does not assist African-Americans in being assimilated as full members of the society. Indeed, Justice Marshall, in his dissent, explained that there is a vast difference between race conscious remedies

employed by a State seeking to remedy the effects of past societal discrimination and those meant to perpetuate it.[199] Therefore, Justice Marshall rejected the strict scrutiny approach and advocated an intermediate level of scrutiny, under which the city ordinance in question would have passed.[200]

Overall, the Court is applying differing standards depending on the nature of the claim filed. Under a Title VII analysis, voluntary state or local affirmative action program is allowed, assuming that it can survive the two-part *Weber* test. The Title VII analysis would allow the majority of affirmative action programs to survive so long as they were fair to both beneficiaries and non-beneficiaries. This analysis comports with the legislative intent of Title VII. In contrast, when applying a Fourteenth Amendment equal protection analysis, the Court reverts to a strict scrutiny standard, which requires a compelling state interest, and a program narrowly tailored to serve that interest. The application of strict scrutiny to a program under review is, of course, nearly fatal in fact,[201] and does not serve the intent of the framers of the Fourteenth Amendment. Indeed, by applying strict scrutiny, the Court prevents the Equal Protection Clause from achieving its intended purpose.

### *D. Voluntary Federal Affirmative Action*

Until the recent *Adarand* decision, affirmative action programs initiated by the federal government were consistently analyzed under an intermediate level of scrutiny. These programs were afforded a more relaxed standard because of the Court's deference to Congress. The Court seemed to be tacitly supporting Congress in continuing the process of realizing the overall goal of the Fourteenth Amendment and Title VII to eliminate the effect of discrimination in the work place.

In *Fullilove v. Klutznick*,[202] the Court approved the provision of the Public Works Employment Act of 1977 [203] requiring that ten percent of federal funds awarded to state and local government entities, for local public works projects, must be used to purchase services or supplies from minority owned businesses.[204] The program was challenged by several contractor associations claiming that the provision violated the concept of equal protection inherent in the Due Process Clause of the Fifth Amendment.[205]

The Court asserted that the congressional objective was to ensure that those contractors receiving federal funds would not use practices that would allow the effects of past discrimination in public contracting to continue.[206] The Court held that Congress had the power to enact such legislation pursuant to the Commerce Clause, because the Act imposed economic regulations on private contractors receiving public funds. The Court further held that Congress could also impose such requirements on state governments pursuant to its enforcement powers contained in Section Five of the Fourteenth Amendment.[207]

The Court explained that the 10% set-aside program at issue in the case was limited and properly tailored to remedy the effects of prior discrimination, and was thus permissible even though some "innocent" parties may be burdened.[208] The Court permitted this type

of remedy because Congress has broad remedial powers to enforce equal protection guarantees. The Court explained that the provision could apply to specified minority groups only because it was not designed simply to benefit those groups, but to remedy the effects of prior discrimination by infusing some degree of equity into the contracting process.[209] In other words, the legislation was meant to dismantle the good-old-boy network. Indeed, the Court understood that Congress had authority to employ racial criterion in order to accomplish remedial objectives, particularly where federal funds are involved.[210] Overall, the *Fullilove* Court acknowledged congressional authority to implement the legislative intent of the Fourteenth Amendment and other equal protection laws through the use of proactive programs.

Similarly, in *Metro Broadcasting v. FCC*,[211] the Court determined that two minority-inclusive policies, adopted by the FCC to comply with its statutory duty to promote diversity in programming under the Communications Act of 1934,[212] were valid. One policy provided an "enhancement" to minority owned or operated businesses applying for a radio or television broadcasting license to be used as a weighing factor to determine whether such applicants would receive a license. The other policy allowed stations in danger of losing their licenses to transfer the license to a qualifying minority business. Both programs were challenged under the Fifth Amendment Due Process Clause.

The Court upheld the FCC policies, thereby granting appropriate deference to the congressional intent that these programs remain in place.213 The racial components of these policies were examined under an intermediate level of scrutiny, under which the program needed merely to serve an "important" government purpose, and be "substantially related" to the achievement of that purpose.[214] The Court recognized that the promotion of broadcast diversity constituted an important purpose, and the program instituted by the FCC was sufficiently related to that goal. Therefore, the affirmative action program did not establish an equal protection violation.[215]

Overall, until the Court's recent decision in *Adarand,* it was assumed that federal affirmative action programs were constitutional as long as they did not overstep their bounds and become unfair to non-beneficiaries. Although the *Fullilove* Court did not resolve the question of which specific standard would be applied to federal affirmative action programs, the *Metro Broadcasting* Court settled on a standard of intermediate scrutiny. This standard gives proper deference to congressional power to enact affirmative action programs that attempt to realize the goal of putting an end to racial discrimination.

## V. PART IV: THE *ADARAND* CASE

In *Adarand Constructors, Inc. v. Pena*,[216] the Supreme Court reconsidered the proper level of scrutiny applicable to federal affirmative action set-asides. A federal contractor for a highway construction project, Mountain Gravel & Constructors Co. (MGC), received additional compensation, pursuant to the contract with the Department of Transportation (DOT), for hiring "disadvantaged" firms as subcontractors. "Disadvantaged" firms are defined by the Small Business Act as being owned by "Black

Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities, or any other individual found to be disadvantaged."[217] DOT established a ten percent set aside for all disadvantaged firms in federal highway contracts pursuant to the Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURAA),[218] which provides that not less than ten percent of funds appropriated for highway contracts be expended for the benefit of socially and economically disadvantaged firms.[219]

Adarand Constructors, a non-minority firm, submitted the lowest bid on the $100,000 contract, but did not receive the contract; MCG awarded the subcontract to Gonzales Company, a minority firm, despite the fact that Adrand's bid was $1,700 lower. MGC testified that Adarand would have received the contract but for the incentive provided pursuant to STURAA regulations.[220] Adarand thereafter filed suit. Both the Federal District Court for the District of Colorado and the Court of Appeals for the Tenth Circuit found in favor of DOT. Adarand appealed to the Supreme Court, arguing that the racial classification, and the presumption of economic and social disadvantage, are an unfair burden on white firms that do not benefit from this presumption. Adarand also argued that the 1.5% compensation for hiring "disadvantaged" firms impermissibly burdened his equal protection rights as a non-beneficiary.

### *A. Opinion*

The Court began with a historical overview of the Fifth Amendment Due Process Clause and its relation to equal protection. It recounted the Japanese curfew internment cases,[221] which granted almost unlimited deference to federal regulations by separating the obligations of equal protection as between the states and federal government.[222] As time went by, the Court began to recognize that the Due Process Clause in the Fifth Amendment incorporated the idea of equal protection.[223] Indeed, by 1975, the Court explicitly provided that the equal protection provisions in the Fifth and Fourteenth Amendments were equivalent.[224] Therefore, the Court agreed with Adarand that its claim pursuant to the Fifth Amendment provided sufficient grounds upon which to base an equal protection violation. This decision allowed the Court to apply a Fourteenth Amendment equal protection analysis to the regulation at issue.

After determining that a Fourteenth Amendment analysis should apply, despite the fact that Adarand brought suit under the Fifth Amendment, the Court next reviewed a procession of affirmative action cases where affirmative action programs were challenged pursuant to the Fourteenth Amendment. In all of the cases discussed, the burdened group was a member of the majority in the citizenry. In the early cases *Regents of the University of California v. Bakke*,[225] *Fullilove v. Klutznick*,[226] and *Wygant v. Board of Education* [227] the Court could not assemble a majority, but a plurality of the Court both validated and invalidated affirmative action programs. In these decisions, the Justices disagreed on the level of scrutiny to be applied to affirmative action programs which provide a preference based on race and are intended to address discrimination and its effects on those burdened. The conservative Justices supported the application of strict scrutiny.[228] Under this analysis, any racial classification would be a suspect classification and, therefore, receive the most involved examination of the need for the program and the extent to

which the program achieved that need without exceeding its limits. The liberal Justices, on the other hand, considered such programs to be benign in nature, as the intent of the programs was to remedy past discrimination and its lingering effects. These justices supported an intermediate level of scrutiny.[229] Under this approach remedial programs initiated to combat past and present racial discrimination would receive a less strenuous level of review and have a better opportunity to survive a constitutional inquisition. Consequently, Justice O'Connor determined that there was no prior consensus on the proper standard to be applied concerning race-conscious classifications under equal protection analysis.[230]

The Court next discussed the strict scrutiny analysis applied in *Richmond v. Croson*,[231] citing it as the controlling precedent on the issue.[232] The Court extended *Croson* to make strict scrutiny applicable to all government programs that involve race.[233] Unfortunately, the Court overruled its decision in *Metro Broadcasting, Inc. v. FCC*,[234] which determined that race-conscious federal programs intended to benefit minorities constituted "benign" discrimination and, therefore, were subject to an intermediate level of scrutiny.[235]

Justice O'Connor supported the Court's decision to abandon *Metro* Broadcasting by claiming that the prior Supreme Court opinions in this area up to *Croson*

> had established three general propositions with respect to governmental racial classifications. First, skepticism: any preference based on racial or ethnic criteria must necessarily receive a most searching examination. Second, consistency: the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification, i.e., all racial classifications reviewable under the Equal Protection Clause must be strictly scrutinized. And third, congruence: equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment.[236]

The Court determined that the *Metro Broadcasting* decision threatened the efficacy of these three basic principles by incorrectly interpreting the Fourteenth and Fifth Amendments to protect groups rather than persons.[237] Adhering to these three propositions, the Court held that any governmental classification based on race must be subject to strict scrutiny.[238]

Concerning the "skeptical" prong of the argument, Justice O'Connor applied a strict level of scrutiny intended to take "relevant differences" into account in order to determine the legitimacy of the use of race.[239] The determination of which programs pass muster will, of course, be made by the Supreme Court, but both benign and invidious discrimination will now be analyzed under the same strict scrutiny criterion.

The consistency argument arises out of a strict literal interpretation of the equal protection provisions; an individualistic interpretation in which group identity is insignificant and individual rights control. Thus, the Court will measure government action by its effect on the individual, and examine an affirmative action program through

the same lens as any other governmental action where race is considered. The new test requires the federal government to demonstrate that a compelling governmental interest is involved.[240] The congruence argument is explained through the Court's earlier historical analysis in determining that the Fourteenth and Fifth Amendment equal protection provisions employ the same analysis.[241]

Overall, the Court held that federal classifications must serve a compelling governmental interest and be narrowly tailored to further that interest in order to be valid.[242] The Court intones that only in cases of overt discrimination will the validity of federal affirmative action programs be upheld. The Majority alluded to *United States v. Paradise* [243] as an illustration of the type of facts necessary to justify an affirmative action program. [244] In *Paradise*, the Court validated an affirmative action program because of the "pervasive, systematic, and obstinate discriminatory conduct of the Alabama Department of Public Safety."[245] Therefore, only in these most outrageous situations will the Court approve a program to remedy discriminatory practices. In all other cases, the harshness of strict scrutiny will find programs intended to provide equal opportunity to be unconstitutional because they breach equal protection.

In dissent, Justice Stevens explained that the major deficiency in the majority opinion is that it fails to acknowledge the difference between race conscious regulations intended to assist individuals that have been discriminated against and race-conscious regulations intended to further discriminate against such individuals.[246] Particularly, Justice Stevens found that the consistency argument espoused by the Majority contradicts the legislative intent of the Fourteenth Amendment, by its inability to differentiate between oppression and assistance.[247]

Ever since the enactment of the Fourteenth Amendment, ensuring the constitutionality of the Freedmen's Bureau Bills,[248] it has consistently been understood to afford special benefits on minorities in general, and African-Americans in particular. Justice Harlan understood this intent, and fought vigorously to uphold it in his dissent from the Majority's opinion in the *Civil Rights Cases*.[249] Most of the Presidents serving in this century have also understood this intent. President Roosevelt made the first attempt to eliminate discrimination against African-Americans in the employment context,[250] by enforcing the rights that the Fourteenth Amendment conferred upon that entire group. President Kennedy continued the crusade.[251] President Johnson oversaw the enactment of the Civil Rights Acts of 1964 and 1965, which took great strides in fulfilling the promises made by the Fourteenth Amendment.[252] President Nixon coined the term "affirmative action," and ordered a race-conscious program to ensure the equal employment opportunities of African-Americans in federal departments and agencies.[253] President Carter issued a number of executive orders designed to ensure employment inclusiveness.[254]

Additionally, the Supreme Court's opinions upholding court-ordered affirmative action programs under Section 706(g) of Title VII, and its deference to congressionally mandated affirmative action programs, further demonstrate the true intent of the Civil Rights Acts to effectuate the guarantees of the Fourteenth Amendment.[255] The Court's

opinion in *Adarand* directly contravenes this well-established, historical understanding of the intent and practical application of the Fourteenth Amendment.

## VI. CONCLUSION

The federal government, along with all other employers in the United States, has historically exercised both overt and covert discrimination against African-Americans, other minorities, and women.[256] Because of this past and present reality, the current judicial trend to eliminate affirmative action programs is a very troubling development. The involvement of politicians in the national rhetoric [257] should not have been unanticipated, because of the political benefits of opposing affirmative action, but it is unsettling to observe the Supreme Court taking such a hostile position as well.[258] The effect of the majority opinion in *Adarand* is to support a particular political philosophy instead of remaining politically neutral.[259]

A Court composed primarily of strict constitutional constructionists is supposed to adhere to the original intent of the Framers of the Constitution. Therefore, under normal circumstances, the Court as presently constituted would be expected to render decisions based on an understanding of the original intent of the Fourteenth Amendment. Contrary to the Majority in *Adarand,* the framers of the Fourteenth Amendment and the civil rights laws intended for race to be considered as a factor in the legislative decision making process. The Majority's simplified "colorblind" analysis of the Constitution directly contradicts the intent of the Fourteenth Amendment to acknowledge racial inequities present in the nation, and to address them directly with race-conscious remedies. It is a more practical method for providing employment inclusion to take race into account when making employment decisions than is the Majority's analysis, which declines to allow the consideration of race.[260]

As the legislative intent of laws attempting to level the playing field have shown, it is necessary to acknowledge race as a factor and provide some remedial action in order to alleviate the historic problem of racial inequity. Therefore, it should have been incumbent upon those members of the Majority in *Adarand* to follow the legislative intent of laws attempting to ensure equal employment opportunity through affirmative action programs. Simply stated, the *Adarand* opinion misinterprets the original intent of the Equal Protection Clause, cripples congressional efforts to implement that intent through civil rights legislation, and should be overturned at the Court's first opportunity to do so.

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1. The Civil Rights Cases, 109 U.S. 3, 26 (1883) (Harlan, J., dissenting).

2. Adarand Constr. v. Pena, 115 S. Ct. 2097 (1995).

3. *Id.* at 2114. In explaining the newfound principle of consistency, Justice O'Connor explained that, "whenever the government treats any person unequally because of his or her race, that person suffers an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection." *Id.*

4. 42 U.S.C. §2000d (1994) and 42 U.S.C. §2000e (1994) respectively.

5. *See* Miller v. Johnson, 115 S. Ct. 2475, 2497 (1995) (O'Connor, J., concurring) ("[T]he driving force behind the adoption of the Fourteenth Amendment was the desire to end legal discrimination against blacks."); *Ex parte* Virginia, 100 U.S. 339 (1879); Strauder v. West Virginia, 100 U.S. 303, 310 (1879) ("Its [the Fourteenth Amendment's] aim was against discrimination because of race or color."); Slaughter-House Cases, 83 U.S. (16 Wall) (1873) (while not involving civil right issues, the Court expressly acknowledged the Fourteenth Amendment's intention to end discrimination against African-Americans). *See also* C. MILLER, THE SUPREME COURT AND THE USES OF HISTORY 135-38 (1969); Robert M. Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287, 1295 (1982); Michael J. Gerhardt, *The Ripple Effects of* Slaughter-House*: A Critique of a Negative Rights View of the Constitution*, 43 VAND. L. REV. 409, 416-420 (1990).

6. *See, e.g.,* Equal Employment Opportunity Commission, BRIEFING BOOK ON THE STATUS OF EQUAL EMPLOYMENT OPPORTUNITY IN THE AMERICAN WORKFORCE (March 24, 1995) (providing the differing statistical balance as between minorities, women, and white males). "Affirmative action is lawful *only when it is designed to respond to a demonstrated and serious imbalance in the work force, is flexible, time-limited, applies only to qualified workers, and respects the rights of non-minorities and men*." *Id.* [emphasis added].

7. Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment,* 71 VA. L. REV. 753 (1985). This argument was advanced in the Amicus Curiae Brief for the NAACP Legal Defense Fund in *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), as it pertains to the Fourteenth Amendment. Schnapper meticulously reviews the arguments advanced for and against the earliest forms of reparations for African-Americans during the Reconstruction Era. *See also*, John P. Frank & Robert F. Munro, *The Original Understanding of "Equal Protection of the Law,"* WASH. U. L.Q. 421 (1972) (discussing the political realities of the time and explaining how the Fourteenth Amendment was intended to satisfy the abolitionist faction of the Republican party); James E. Jones, Jr., *The Origins of Affirmative Action*, 21 U.C.

DAVIS L. REV. 383 (1988) (discussing the history of affirmative action and examining the expansion of these remedial programs). Therefore, the most accurate reflection of the intent of the Fourteenth Amendment must be analyzed in relation to the era of Reconstruction. *See also* Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955) (providing a point by point discussion by the legislators enacting the Fourteenth Amendment and their intention to end discrimination against the freedmen); U.S. COMMISSION ON CIVIL RIGHTS, FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT; A REPORT (1970). The report by the Commission explains that the meaning behind the Equal Protection Clause of the Fourteenth Amendment, the Executive Orders of the previous Presidents, the Civil Rights Act of 1964, and the many other civil rights laws, were intended to combat the denial of the right to full equality in the nation. The general tenor of the Commission also shows an understanding of the real discrimination visited against minorities.

8. Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 309-316 (1991) (explaining the inconsistency in the arguments made by those members of the Supreme Court who are opposed to the constitutionality of affirmative action programs because these are also the same Justices who claim to demand conformity with the original intent of the Framers). Also, as will be discussed later, the Court previously applied an intermediate level of scrutiny when analyzing cases involving affirmative action programs.

9. The Civil Rights Acts of 1866, 1875, 1964, 1965, 1991, and The Freedmen's Bureau Acts of 1864 and 1866.

10. Adarand Constr. v. Pena, 115 S. Ct. 2097 (1995).

11. U.S. CONST. amend. XIII, § 1, provides: "[n]either slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." Section 2 granted Congress the power to enforce Section 1. *See* G. Sidney Buchanan, *The Quest For Freedom: A Legal History of the Thirteenth Amendment*, 12 HOUS. L. REV. 1, 7-8 (1974) (providing an excellent background understanding of the implementation of the Thirteenth Amendment and its purpose).

12. *See* Irving Dillard, *The Emancipation Proclamation in the Perspective of Time*, 23 LAW IN TRANSITION 95, 95-100 (1963) (examining the pre-emancipation proclamation mind set of President Lincoln, as well as his many attempts and strategies to bring the nation together without actually freeing the slaves). Dillard provides that the Emancipation Proclamation liberated slaves only in Confederacy controlled areas. *Id. See also* Jones, *supra* note 7, at 388.

13. The Freedmen's Bureau Bill of 1864 was introduced by Representative Eliot on January 19, 1863. It did not become law until March 3, 1865. Act of March 3, 1865, ch. 90, 13 Stat. 507, 508. *See* PAUL PIERCE, THE FREEDMEN'S BUREAU: A CHAPTER IN

THE HISTORY OF RECONSTRUCTION (1904). *See also* W.E. BURGHARDT DU BOIS, BLACK RECONSTRUCTION (1935) (providing the most extensive review of the Reconstruction Era); KENNETH M. STAMPP, THE ERA OF RECONSTRUCTION 1865-1877 122-128 (1966).

14. IRA BERLIN ET AL., FREEDOM, A DOCUMENTARY HISTORY OF EMANCIPATION 1861-1867 (1985).

15. CONG. GLOBE, 38th Cong., 1st Sess. 2800 (1864). *See also* LOUIS HENRY BRONSON, FREEDMEN'S BUREAU A PUBLIC POLICY ANALYSIS (1971) (providing an excellent review of the Freedmen's Bureau debates with a disclosure of the underlying rationales of the proponents and opponents). For the contemporary argument, see Herbert O. Reid, Sr., *Assault on Affirmative Action: The Delusion of a Color-Blind America*, 23 HOW. L.J. 381, 427 (explaining that race conscious programs are necessary in order to eliminate discrimination and its effects).

16. H.R. REP. NO. 2, 38th Cong., 1st Sess. 572-573 (1864). Rep. Eliot stated "[This bill] will enable the Government to help into active, educated, and useful life a nation of freedmen who otherwise would grope their way to usefulness through neglect and suffering to themselves, and with heavy and needless loss to us." *Id. See also* VICTORIA MARCUS OLDS, THE FREEDMEN'S BUREAU AS A SOCIAL AGENCY (1967); BRONSON, *supra* note 15, at 87.

17. H.R. REP. NO. 2, 38th Cong., 1st Sess. 2-4 (1864) ("Why the freedmen of African descent should become these marked objects of special legislation, to the detriment of the unfortunate whites, your committee fails to comprehend."). *See* BRONSON, *supra* note 15 (expounding on the deep-seated racial animus imbued in such rationales). *See also* Morris B. Abram, *Affirmative Action: Fair Shakers and Social Engineers*, 99 HARV. L. REV. 1312, 1320 (1986) (making the contemporary argument that race conscious programs are tantamount to a racial spoils system).

18. H.R. REP. NO. 2, 38th Cong., 1st Sess. 566 (1864) (Rep. Schenck argued that indigent whites should be included because they shared many of the problems confronting freedmen.). *See also* William B. Reynolds, *Individualism vs. Group Rights: The Legacy of Brown*, 93 YALE L.J. 995, 1000 (1984) (making the contemporary argument that any type of racial classification is improper).

19. John E. Morrison, *Colorblindness, Individuality, and Merit: An Analysis of the Rhetoric Against Affirmative Action*, 79 IOWA L. REV. 313 (1994) (addressing the use of the primary terms employed in the debate over affirmative action). Morrison states that the term "colorblindness" is used as a red herring to impede efforts to deal with race inequity. It is also deemed a symptom of white guilt.

20. Freedmen's Bureau Act of March 3rd, 1865, 38th Cong., 2d Sess., Ch. 90, 13 Stat. 507 (1865).

21. Robert Benham, *Affirmative Action from a State Perspective: Old Myths and New Realities*, 21 GA. L. REV. 1095, 1100 (1987) (explaining that the Freedmen's Bureau extended benefits to non African-Americans only to provide "essential human needs," (food and clothing), for destitute citizens).

22. Civil Rights Act of 1866 § 1 (current version at 42 U.S.C. § 1981 and §1982 (1994)). *See* BERNARD SCHWARTZ, STATUTORY HISTORY OF THE UNITED STATES, CIVIL RIGHTS PART 1 99-101 (1970). The Civil Rights Act of 1866 was intended to prohibit discrimination, by having jurisdiction over both federal and state law. More importantly though, the Act did not attempt to supersede or abolish any of the race conscious programs present in the Freedmen's Bureau. *See also* Schnapper, *supra* note 7, at 788.

23. Eugene Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323, 1329-30 (discussing how the hearings by the Joint Committee on Reconstruction displayed the many abuses which African-Americans suffered from because of their race. The hearings provided support for those Congressmen wishing to provide strong reform through legislation).

24. 39th Cong., 1st Sess., ch. 200, 14 stat. 173 (1866).

25. HARRY J. CARMEN ET AL., A HISTORY OF THE AMERICAN PEOPLE, SINCE 1865 29-31 (1961). The Amendment and bill were being debated simultaneously in different chambers while the Fourteenth Amendment was being debated in the House, the Freedmen's Bureau Act was being debated in the Senate; every single senator that voted for the Amendment also voted for the Freedmen's Bureau Act.

26. J. G. RANDALL & DAVID DONAL, THE CIVIL WAR AND RECONSTRUCTION (1961). *See also* Benham, *supra* note 21.

27. Joel William Friedman, *The Burger Court and the Prima Facie Case in Employment Discrimination Litigation: A Critique*, 65 CORNELL L. REV. 1, 34 (1979).

28. K.G. Jan Pillai, *Affirmative Action: In Search of a National Policy*, 2 TEMP. POL. & CIV. REG. L. REV. 1, 27-28 (1992); Douglas D. Sherer, *Affirmative Action Doctrine and the Conflicting Messages of Croson*, 38 KAN. L. REV. 281, 285-88 (1990); Schwartz, *supra* note 20, at 219-21 (explaining that for the majority in Congress, section 1 of the Fourteenth Amendment was intended to elevate the provisions of the 1866 civil rights statute to constitutional standing, thereby maintaining the capacity of the Freedmen's Bureau to execute its mandate). Lori Jayne Hoffman, Note, *Fatal in Fact: An Analysis of the Application of the Compelling Governmental Interest Legislation of Strict Scrutiny in* City of Richmond v. J.A. Croson Co., 70 B. U. L. R EV. 889, 893-94 (1990).

29. *See* Schnapper, *supra* note 7, at 769 (citing President Johnson's veto speech).

30. Aviam Soifer, *Status, Contract, and Promises Unkept,* 96 YALE L.J. 1916, 1945 (1987) ("President Andrew Johnson's Controversial February 1866 veto message concerning the Freedmen's Burreau Bill illustrated a new emphasis on avoiding paternalism at almost all costs, and certainly at the cost of protecting the freedmen." Johnson claimed that the bill would discriminate against millions of the white race, who are honestly toiling from day to day for their subsistence.).

31. Terry Eastland, *The Case Against Affirmative Action*, 34 WM. & MARY L. REV. 33, 35 (1992) (arguing that whites should not be required to atone for their descendants by being disadvantaged by affirmative action).

32. *See* Christopher Mellevoid, Patterson v. McLean Credit Union: *Denying the Equality of Effect in the Right to Contract*, 11 PACE L. REV. 411, 420-21 (1991).

33. Schnapper, *supra* note 7, at 772-774 (discussing four new race-conscious measures included in the second version of the bill).

34. The Senate voted 33 to 12 and the House voted 104 to 33 to override Johnson's veto. CONG. GLOBE, 39th Cong., 1st Sess. 3842, 3850 (1866). *See also* Donald H. Zeigler, *A Reassessment of the Younger Doctrine in Light of the Legislative History of Reconstruction,* 1983 DUKE L.J. 987, 998 (1983).

35. Schnapper, *supra* note 7, at 785 (explaining that the Fourteenth Amendment was introduced into the House in an attempt to improve the situation of African-Americans); Robert C. Power, *Affirmative Action and Judicial Incoherence*, 55 OHIO ST. L.J. 79, 159 (1994); Scherer, *supra* note 28, at 288.

36. Ch. 114, 18 stat. 335 (1875) (codified as amended at 18 U.S.C. § 243 (1994)).

37. Civil Rights Act of 1875 § 1.

38. Civil Rights Act of 1875 § 2.

39. *Id.*

40. The Civil Rights Cases, 109 U.S. 3 (1883).

41. One Civil Rights Case was Robinson and Wife v. Memphis & Charleston R. Co., 109 U.S. 3 (1883), where a train conductor refused to allow plaintiff's wife to sit in the ladies car because she was of African descent. *Id.* at 5.

42. 109 U.S. at 18-19. Section 5 provides that: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

43. *Id.* at 12 (citing Virginia v. Rives, 100 U.S. 313 (1880), *Ex parte* Virginia, 100 U.S. 339 (1880) and United States v. Cruikshank, 92 U.S. 542 (1876), all limiting the reach of the Fourteenth Amendment).

44. U.S. CONST. amend. XIII, § 2 ("Congress shall have the power to enforce this article by appropriate legislation.").

45. *The Civil Rights Cases*, 109 U.S. at 25.

46. *Id.* at 20.

47. *Id.*

48. *Id.* at 24-25. ("It would be running the slavery argument into the ground to make it apply to every act of discrimination which a person may see fit to make as to the guests he will entertain, or as to the people he will take into his coach or cab or car, or admit to his concert or theater, or deal with in other matters of intercourse or business.").

49. *Id.* at 25.

50. The Civil Rights Cases, 109 U.S. 3, 35. (1883) (Harlan, J., dissenting).

51. *Id.* at 42.

52. *Id.* at 47.

53. *Id.* at 49-50.

54. *Id.* at 52.

55. Jones, *supra* note 7, at 392 (citing the Unemployment Relief Act of 1933, Ch. 17, § 1, 48 Stat. 22,23 (1933)); Civilian Conservation Corps Act, ch. 383, § 8, 50 Stat. 319, 320 (1937); Civilian Pilot Training Act, ch. 244, § 2, 53 Stat. 855, 856 (1939); National Youth Administration Appropriation Act, ch. 428, § 20, 54 Stat. 580, 583 (1940); Nurses Training Act, ch. 126, § 1, 57 Stat. 153 (1943)). *See id.* at 393 (citing regulations issued by the Roosevelt Administration pursuant to the National Industrial Recovery Act of 1933, ch. 90, 48 Stat. 195 (1933)).

56. *See* William E. Fosbath, *Why is this Rights Talk Different From All Other Rights Talk? Demoting the Court and Reimagining the Constitution*, 46 STAN. L. REV. 1771, 1803 (1994). Separate but equal laws were officially deemed constitutional pursuant to the Supreme Court decision in Plessy v. Ferguson, 163 U.S. 537 (1896), *overruled by* Brown v. Board of Educ., 347 U.S. 483 (1954), in which the Court determined that there was no violation of the Constitution when the use of facilities was separated by race, so long as the segregated facilities were "equal;" of course the determination of whether they were equal became very suspect.

57. National Industrial Recovery Act, of June 16, 1933, ch. 90, 48 stat. 195 (1933), repealed by Act of Sept. 6, 1966, Pub. L. 89-554, § 8(a), 80 stat. 648.

58. James E. Jones, Jr., *The Genesis and Present Status of Affirmative Action in Employment: Economic, Legal, and Political Realities*, 70 IOWA L. REV. 901, 905 (1985).

59. Executive Order No. 8,802, 3 C.F.R. 957 (1938-43 comp.); Robert A. Margo, *Explaining Black-White Wage Convergence*, *1940-1950*, 48 INDUST. & LAB. REL. REV. 470, 473 (1995); Ronald Turner, *Thirty Years of Title VII's Regulatory Regime: Rights, Theories, and Realities*, 46 ALA. L. REV. 375, 379-380 (1995). *See* Michael K. Braswell et al., *Affirmative Action: An Assessment of its Continuing Role in Employment Discrimination Policy*, 57 ALB. L. REV. 365, 367 (1993) (The concept of a federal mandate of equal opportunity in the workplace can be "traced to . . . . an executive order issued by President Roosevelt in 1941 that prohibited defense contractors from discriminating on the basis of race, and that charged both employers and unions with a duty 'to provide for the full and equitable participation of all workers in defense industries without [racial] discrimination.'").

60. *See, e.g.,* PUAL BURNSTEIN, DISCRIMINATION, JOBS AND POLITICS: THE STRUGGLE FOR EQUAL EMPLOYMENT OPPORTUNITY IN THE U.S. SINCE THE NEW DEAL 125-155 (1985); Braswell, *supra* note 59, at 367.

61. 347 U.S. 483 (1954).

62. Jones, *supra* note 7, at 395 (citing PRESIDENT'S COMMITTEE ON GOVERNMENT CONTRACTS, PATTERNS FOR PROGRESS: FINAL REPORT TO PRESIDENT EISENHOWER (1960)).

63. *Id.*

64. Charles R. Lawrence III, *The Id, The Ego, and Equal Protection: Reckoning With Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (discussing the effect of unconscious racism). My analysis assumes this reality in its more benign manifestation.

65. Exec. Order No. 10,925, 3 C.F.R. 339 (1964-65 comp.).

66. Eastland, *supra* note 28, at 33 (acknowledging that the intent of Exec. Order No. 10,925 was to benefit African-Americans).

67. Jones, *supra* note 7, at 397.

68. *Id.* (citing MICHAEL SOVERN, LEGAL RESTRAINTS ON RACIAL DISCRIMINATION 109-110 (1966) (quoting 110 Cong. Rec. 2574-75 (1964)). The sections in the Civil Rights Act relating to affirmative action are found at 42 U.S.C. §§ 2000d (Title VI) and

2000e (Title VII). These crucial statutes will be discussed later in order to fully understand their relation to contemporary affirmative action programs.

69. *See* Title VI of the Civil Rights Act of 1964, Pub. L. No. 88-352. 78 Stat. 241 (codified at 42 U.S.C. §§ 2000d et seq. (1994)).

70. *Id.* ("No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."). Unlike Title VII of the Civil Rights Act of 1964, Title VI does not protect against gender discrimination.

71. 42 U.S.C. § 2000d-1 (1994) (Title VI of the Civil Rights Act of 1964, § 602).

72. *Id.* ("Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record. . . .").

73. *Id.* (providing an "opportunity for a hearing"). Procedural due process analysis seeks to determine whether the government has provided sufficient procedural protections against erroneously or arbitrarily depriving a person of their life, liberty, or property. Thibodeaux v. Bordelon, 740 F.2d 329, 336 (5th Cir. 1984). In order to sustain a procedural due process attack, it must be shown that a deprivation of a liberty interest existed, within the meaning of the Fifth or Fourteenth Amendment, and that the procedures utilized in that deprivation were not adequate. *See* Mathews v. Eldridge, 424 U.S. 319, 332 (1975). In *Mathews,* the Court held that the specific requirements of the Due Process Clause depend on three factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

*Id.* at 335. Based on a balancing of these three factors, a determination can be made regarding the procedural sufficiency of a particular practice. *See id.* at 347.

74. 42 U.S.C. § 2000d-1 (1994) ("[T]ermination . . . shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found. . . .").

75. *Id.* ("[T]he head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved

a full written report of the circumstances and the grounds for such action." (referring to a termination or refusal to grant funds to a prior beneficiary found in noncompliance)).

76. Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 stat. 241, 253 (codified at 42 U.S.C. §2000e (1994)).

77. 42 U.S.C. § 2000e(a) (1994). The statute provides:

> The term "person" includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under Title 11, or receivers.

*Id.*

78. 42 U.S.C. § 2000e(b) (1994).

79. 42 U.S.C. § 2000e(k) (1994). Section 2000e(k) states, in relevant part:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work . . . .

*Id.*

80. Civil Rights Act of 1991, Pub. L. No. 102-166, § 202, 105 Stat. 1081 (codified at 42 U.S.C. § 2000e (1994)).

81. 42 U.S.C. § 2000e-2 (1994) (Civil Rights Act of 1964 § 703).

82. § 2000e-2(a). Subsection (a)(1) provides:

> It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

*Id.*

83. § 2000e-2(a)(2). Subsection (a)(2) states:

> It shall be an unlawful employment practice for an employer to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

*Id.*

84. § 2000e-2(j). Subsection (j) admonishes:

> Nothing contained in this subchapter [42 U.S.C. §§ 2000e et seq.] shall be interpreted to require any employer . . . to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race . . . employed by any employer . . . in comparison with the total number or percentage of persons of such race . . . in any community, State, section or other area.

*Id.*

85. The Supreme Court has held that quotas are illegal under both Title VII and the Fourteenth Amendment.

86. 42 U.S.C. § 2000e-4 (1994) (Civil Rights Act of 1964 § 705).

87. 42 U.S.C. § 2000e-5 (1994) (Civil Rights Act of 1964 § 706).

88. § 2000e-5(b). Subsection (b) provides:

> If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation and persuasion.

*Id.*

89. § 2000e-5(f).

90. § 2000e-5(c).

> In the case of an alleged unlawful employment practice occurring in a State ... which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute

> criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (a)[(b)] by the person aggrieved before the expiration of sixty days after proceedings have been commenced under State or local law. . . .

*Id.* This provision must be read in conjunction with § 2000e-5(d), which requires the Commission to inform the State in which the alleged violation occurred and allow the State to act before commencing its own enforcement proceedings.

91. The constitutionality of injunctions issued by federal courts will be addressed *infra* notes 136-73.

92. 42 U.S.C. § 2000e-16 (1994) (Civil Rights Act of 1964 § 717).

93. The EEOC can issue only procedural regulations. 42 U.S.C. § 2000e-12. It cannot issue substantive "rules." Dobbins v. Local 212, 292 F. Supp. 413 (D.C. Ohio 1968). While the EEOC's interpretation of title VII is entitled to "great deference," Griggs v. Duke Power Co., 91 S. Ct. 849, its interpretation is not binding on the court. General Electric Co. v. Gilbert, 97 S. Ct. 401, 410 (1976). However, an employer who in good faith relies on EEOC guidance may claim immunity from liability. 42 U.S.C. 2000e-12(b).

94. The procedural regulations are set forth in 29 C.F.R. § 1607 et. seq. (1995).

95. 42 U.S.C. § 2000e-17 (1994) (Civil Rights Act of 1964 § 718).

96. *See, e.g.,* Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991).

97. 490 U.S. 642 (1989). *See generally* Charles J. Cooper, Wards Cove Packing Co. v. Antonio*: A Step Toward Eliminating Quotas in the American Workplace*, 14 HARV. J.L. & PUB. POL'Y 84 (1991) (discussing *Wards Cove* and its intended effect).

98. *Wards Cove*, 490 U.S. at 656-57. The court demanded that employment discrimination plaintiffs show a disparity between the racial composition of those employed in a particular position and that of the qualified members of the relevant labor pool. Further, the Court held that the plaintiff must also demonstrate causation between the employment policy and the disparity.

99. *Id.* at 659.

100. *Id.*

101. Civil Rights Act of 1991, Pub. L. 102-166, §§ 105(a), 106, 107, 105 Stat. 1074 (codified at 42 U.S.C. § 2000e-2 (1994)).

102. 42 U.S.C. § 2000e-2(k)(1)(C) (1994). ("The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of 'alternative employment practice.'"). *Wards Cove*, 490 U.S. 642, was decided June 5, 1989.

103. 42 U.S.C. § 2000e-2(k)(2) (1994).

104. 42 U.S.C. § 2000e-5(g)(1) (1994).

105. *Id.* ("If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice and order such affirmative action as may be appropriate. . . .").

106. Exec. Order No. 11,246, 30 Fed. Reg. 12,319 (1965), *reprinted as amended in* 42 U.S.C. § 2000e (1994).

107. *Id.* at § 202.

108. *Id.* at § 206(a).

109. *Id.* at § 209(a)(5).

110. 42 U.S.C. § 2000d-1 (1994).

111. Exec. Order No. 11,478, 34 Fed. Reg. 12,985 (1969), *reprinted as amended in* 42 U.S.C. § 2000e (1994). The Order stated:

> It is the policy of the Government of the United States to provide equal opportunity in Federal employment for all persons, to prohibit discrimination in employment because of race, color, religion, sex, national origin, handicap, or age, and to promote the full realization of equal employment opportunity through a continuing affirmative program in each executive department and agency.

*Id.*

112. *Id.* at § 2.

113. *Id.* at § 3.

114. Exec. Order No. 12,067, 43 Fed. Reg. 28,967 (1978), *reprinted as amended in* 42 U.S.C. § 2000e (1994) (This order basically implemented Reorg. Plan No. 1 of 1978, 43 Fed. Reg. 19,807 (1978)).

115. Exec. Order No. 12,086, 43 Fed. Reg. 46,501 (1978), *reprinted as amended in* 42 U.S.C. § 2000e (1994).

116. Exec. Order No. 12,250, 45 Fed. Reg. 72,995 (1980), *reprinted in* 42 U.S.C. § 2000d-1 (1994).

117. Exec. Order No. 12,259, 46 Fed. Reg. 1,253 (1980), *reprinted in* 42 U.S.C. § 2000 d-1 (1994).

118. 28 C.F.R. § 42.404 (1994).

119. 28 C.F.R. § 42.405 (1994).

120. 28 C.F.R. § 42.406(a) (1994).

121. 28 C.F.R. § 42.407(c) (1994).

122. Exec. Order No. 12,250 § 1-201, 45 Fed. Reg. 72,995 (1980), *reprinted in* 42 U.S.C. 2000d-1 (1994).

123. 42 U.S.C. § 2000d-1 (1994) (Civil Rights Act of 1964 § 602) ("No such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means.").

124. 42 U.S.C. § 2000d-2 (1994) (Civil Right Act of 1964 § 603) (requiring judicial review option in accordance with § 10 of the Administrative Procedure Act, and such agency action is not limited by unreviewable agency discretion).

125. 42 C.F.R. § 410 (1994).

126. Only one major court decision in this area has been decided.

127. 443 U.S. 193 (1979) (the 5-2 decision was the greatest degree of consensus of any case in which affirmative action was at issue).

128. *Weber*, 443 U.S. at 201 (citing 110 Cong. Rec. 6548 (1964) ("[Title VII] must therefore be read against the background of the legislative history of Title VII and the historical context from which the Act arose . . . Congress' primary concern . . . was with 'the plight of the Negro in our economy.'")).

129. *Id.* at 203 (citing 110 CONG. REC. 6548 (1964) ("The crux of the problem was to open up employment opportunities for Negroes in occupations which have been traditionally closed to them . . . ." (referring to the intent of the framers of Title VII)).

130. *Id.* at 204. Justice Brennan explained:

> It would be ironic indeed if a law triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had 'been excluded from the American dream for so long,' constituted the first legislative prohibition of all voluntary, private, race conscious efforts to abolish traditional patterns of racial segregation and hierarchy.

*Id.*

131. *Id.* at 205.

132. *Id.* at 206-07.

133. United Steelworkers v. Weber, 443 U.S. 193, 204 (1979).

134. *Id.* at 208 ("The purposes of the plan mirror those of the statute. Both were designed to break down old patterns of racial segregation and ierarchy.").

135. *Id*. at 208 (stating the reasons why the voluntary affirmative action program was constitutional under Title VII of the Civil Rights Act of 1964).

136. George Rutherglen, *After Affirmative Action: Conditions and Consequences of Ending Preferences in Employment*, 1992 U. ILL. L. REV. 339, 357 (1992).

137. *Id.* at 358.

138. Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984).

139. *Id.* at 565.

140. *Id.* at 567.

141. *Id.* at 583.

142. *Id.* at 574.

143. *Id.* at 575.

144. Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561, 579 (1984).

145. *Id* at 579-83 (interpreting § 706(g) of Title VII through its previous decision in Teamsters v. United States, 431 U.S. 324 (1977), which awarded relief only to "actual" victims of discrimination). Determining actual victims is very problematic though, because it requires a definition which will explain the limits of who is actually discriminated against. According to Senator Humphrey:

> No court order can require hiring, reinstatement, admission to membership, or payment of back pay for anyone who was not fired, refused employment or advancement or admission to a union by an act of discrimination forbidden by this title. This is stated expressly in the last sentence of section 707(e) [enacted without relevant changes as §706(g)] . . . Contrary to the allegations of some opponents of this title, there is nothing in it that will give any power to the Commission or to any court to require . . . firing . . . of employees in order to meet a racial 'quota' or to achieve a certain racial balance. That bugaboo has been brought up a dozen times; but it is non existent.

*Stotts,* 477 U.S. at 580-581 (1984) (citing the Senator's remarks in 110 CONG. REC. 6549 (1964)).

146. *Id.* at 579.

147. Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421 (1986).

148. The Plurality consisted of Justices Brennan, Marshall, Blackmun, and Stevens. Justice Powell, in his separate concurring opinion, agreed that remedial action was not limited to only those directly discriminated against.

149. *Id.* at 482-83. Six of the Justices agreed that race conscious relief for Title VII violations were appropriate in the proper circumstances. Justice Brennan defined "appropriate circumstances" as situations where courts are "confronted with an employer or labor union that has engaged in persistent or egregious discrimination or *such relief may be necessary to dissipate the lingering effects of pervasive discrimination.*" *Id.* at 445 (emphasis added). This rationale supports the understanding that Title VII was enacted specifically to address discrimination visited against minorities.

150. *Id.* at 483.

151. *Id.* at 445 n.25.

152. *Id.* at 453.

153. Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421, 475 (1986). The Court advised district courts to use discretion in imposing such remedies. The Court all but forbade the district courts from ordering an affirmative action plan when the only evidence is an imbalanced workforce. The courts can, however, use the existence of a racially imbalanced workforce as a factor in determining if judicial relief is necessary.

154. *Id.* at 474-75 (stating that employing a *Stotts* interpretation in this case would "distort" the language of Title VII and would not achieve the intent of the equal employment opportunity purpose).

155. *Id.* The Plurality also determined that the order did not violate the Fifth Amendment's Equal Protection Clause because it served a compelling government interest and was narrowly tailored to serve that interest. *Id.* at 481. In dictum, Justice Brennan explained that the burden on non-minorities would have been insignificant. *Id.*

156. Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501 (1986).

157. *Id.* at 515-18. The fact that the affirmative action program approved in *Firefighters* was established pursuant to a consent decree distinguishes this case from *Stotts.* A consent decree is not the same as a § 706(g) injunction. The district court can approve a consent decree even if the consent decree provides "relief" greater than that which the district court is authorized to order under § 706(g). *Id.* at 526, 528. Therefore, because the Court was reviewing the district court's power to approve a consent decree, and not reviewing its power to issue a § 706(g) injunction, *Stotts* is distinguishable.

158. *Id.* at 519-21. By reviewing the legislative history, the Court realized that the intent of the section was to protect managerial prerogatives from overly burdensome judicial intervention. *Id.* The statutory limits on the district court's power to *modify* a disputed consent decree are not implicated when the original decree was wholly voluntary. *Id.* at 528.

159. 480 U.S. 149 (1987).

160. *Id.* at 163 (concerning upper rank promotions, the officer promoted had to be qualified, the rank promoted to had to be less than 25% African-American, and the order remained in effect so long as the department had not developed and implemented a promotion plan for the particular rank that was fair to African-American troopers).

161. *Id.* at 162-63 (stating that Alabama had not complied with prior similar court orders).

162. *Id.* at 165.

163. United States v. Paradise, 480 U.S. 149, 165 (1987).

164. The Reagan Justice Department was infamous for its lax enforcement of equal employment opportunity laws. Neal Devins, *Affirmative Action After Reagan*, 68 Texas L. Rev. 353, 353 (1989) (It was the intent of the Reagan Justice Department to limit race-conscious affirmative action.).

165. *Paradise*, 480 U.S. at 166.

166. *Id.*

167. *Id.* at 167. *See infra* notes 147-167 and accompanying text.

168. *Paradise*, 480 U.S. at 171.

169. *Id.* at 170-71.

170. United States v. Paradise, 480 U.S. 149, 180 (1987) (stating that the requirements were meant to help the department achieve its goal in an expeditious manner).

171. *Id.* at 177-78.

172. *Id.* at 179-81.

173. *Id.* at 184-85.

174. Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986).

175. *Id.* at 270.

176. *Id.* at 274, 279-84. Justice Powell explained that an attempt to remedy societal discrimination by providing role models for minority schoolchildren was not a compelling state interest. *Id.*

177. *Id.* at 274. (citing Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 308 (1977)). In order to demonstrate prior discrimination, a comparison must be shown between the racial composition of the school's teaching staff and the racial composition of the qualified public school teachers in the labor market). *Hazelwood,* 433 U.S. at 308.

178. *Wygant*, 476 U.S. at 274.

179. *Id.* at 275-76.

180. The Fourteenth Amendment was intended to assure the constitutionality of race-conscious measures intended to address the problems of racism against African-Americans. *See supra* notes 22-35.

181. 480 U.S. 616 (1987).

182. The petitioners in both Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1988), and City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989), based their claims on a Fourteenth Amendment equal protection violation.

183. *Johnson,* 480 U.S. at paragraph one of the syllabus.

184. *Id.*

185. *Id.* at 621.

186. *Id.* at 631.

187. *Id.* (quotation marks omitted).

188. Johnson v. Transportation Agency, 480 U.S. 616, 632 (1987). If the job is one requiring special skill or training, then the employer may compare the percentages of its minorities in those positions to the percentage of minorities in the general population who have those same special skills.

189. *Id.* at 632-33. It should also be noted that an employer's plan must also avoid "blind hiring," or hiring based solely on statistics, and which does not take individual qualifications into account. *Id.* at 637.

190. *Id.* at 637.

191. *Id.* at 638.

192. *Id.*

193. *Id.* at 639.

194. 488 U.S. 469 (1989).

195. *Id.* at 498-506.

196. *Id.* at 499-500.

197. *Id.* at 498-99.

198. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 497-98 (1989).

199. *Id.* at 551-52 (Marshall, J., dissenting).

200. *Id.* at 535-36 (Marshall, J., dissenting).

201. Fullilove v. Klutznick, 448 U.S. 448, 519 (1980) (Marshall, J., dissenting) (Justice Marshall coined the phrase, "strict in theory, but fatal in fact," in referring to the imposition of a strict scrutiny standard.).

202. 448 U.S. 448 (1980).

203. Pub. L. No. 95-28, 91 Stat. 116 (1977) (codified in significant part at 42 U.S.C. §§ 6705(e)-6707(j) (1994)).

204. *Fullilove,* 448 U.S. at 492.

205. Because the Equal Protection Clause of the Fourteenth Amendment does not apply to the federal government, there was some initial confusion as to whether Congress must respect equal protection principles. In Bolling v. Sharpe, 347 U.S. 497 (1954), the Supreme Court held that the Due Process Clause of the Fifth Amendment encompasses the notion of equal protection of the laws, and that federal legislation could thereby be challenged as unconstitutional on equal protection grounds.

206. Fullilove v. Klutznick, 448 U.S. 448, 473 (1980).

207. *Id.* at 475-80. Section Five of the Fourteenth Amendment provides, "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5. This has been interpreted to grant Congress vast authority to implement legislation designed to achieve its goal.

208. *Id.* at 484 (citing Franks v. Bowman Trans. Co., 424 U.S. 747, 777 (1976)).

209. *Fullilove*, 448 U.S. at 473 (The Court interpreted the provision at issue in the Act to ensure that beneficiaries of federal funds would not allow the effects of prior discrimination to continue.).

210. *Id.* at 490.

211. 497 U.S. 547 (1990).

212. 47 U.S.C. §§ 151-757 (1994).

213. *Metro Broadcasting*, 497 U.S. at 600 (Congress enacted legislation ending the agency's examination of the policies in question, thereby prohibiting any alteration in the policies).

214. *Id.* at 565.

215. *Id.* at 582-83. The Court explained that the conclusion that greater minority ownership of telecommunications stations produced greater broadcast diversity was reached pursuant to a great amount of empirical evidence and was not based on mere stereotypes. *Id.*

216. 115 S. Ct. 2097 (1995).

217. Small Business Act, 15 U.S.C. § 637(d)(3)(c) (1994). The Small Business Act further stipulates that members of the designated racial and ethnic minority groups are pressured to be socially disadvantaged. 15 U.S.C. §§ 637(a)(5), 637(d)(2), (3); 13 C.F.R. § 124.105(b)(1) (1994). Non-minority firms are entitled to challenge an award to a minority firm by rebutting the presumption that the firm is economically disadvantaged. 13 C.F.R. §§ 124.111(c), (d) 124.105(b)(1) (1994).

218. Pub. L. No. 100-17, 101 Stat. 132 (1987). *See also Adarand,* 115 S. Ct. at 2103.

219. STURAA § 106(c)(1). *See also Adarand,* 115 S. Ct. at 2103.

220. Pursuant to the contract, "The Contractor will be paid an amount computed as follows: 1. If a subcontract is awarded to one DBE, (Disadvantaged Business Enterprise), 10 percent of the amount of the approved DBE subcontract, not to exceed 1.5 percent of the original amount." Adarand Constr. v. Pena, 115 S. Ct. 2097, 2104 (1995).

221. *Id* at 2106. (These were the unfortunate cases decided during World War II which supported the federal decision to intern and impose strict curfews on Japanese-American citizens). *See, e.g.,* Korematsu v. United States, 323 U.S. 214 (1944); Hirabayashi v. United States, 320 U.S. 81 (1943).

222. The Fourteenth Amendment applied only to state action, therefore no protection was provided for discriminatory federal action because the Fifth Amendment only referred to the right to receive due process of the law.

223. Adarand Constr. v. Pena, 115 S. Ct. 2097, 2107 (1995) (citing McLaughlin v. Florida, 379 U.S. 184 (1964); Bolling v. Sharpe, 347 U.S. 497 (1954)).

224. *Adarand,* 115 S. Ct. at 2108 (citing Buckley v. Valeo, 424 U.S. 1 (1976); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975)). The *Buckley* Court explained that the equal protection analysis of the Fifth and Fourteenth Amendments are co-equals. 424 U.S. 1 (1976).

225. 438 U.S. 265 (1978) (plurality opinion) (employing a strict scrutiny test in finding an affirmative action program adopted by a university medical school in violation of the Fourteenth Amendment Equal Protection Clause, but allowed the school to consider race as a factor in making its admissions decisions).

226. 448 U.S. 448 (1980). *See supra* notes 201-10 and accompanying text.

227. 476 U.S. 267 (1986). *See supra* notes 174-80 and accompanying text.

228. This group included Justices Powell, Stewart, Rehnquist and Stevens.

229. This group included Justices Brennan, Blackmun, and Marshall.

230. Adarand Constr. v. Pena, 115 S. Ct. 2097, 2109-10 (1995).

231. 488 U.S. 469 (1989). *Croson*, as discussed previously, involved a 30% set aside program in Richmond, Va., and was challenged pursuant to the Fourteenth Amendment. The *Croson* Court held that "strict-scrutiny" should be applied in all actions involving race by a state or local government. Therefore, programs such as the 30% set-aside involved did not pass constitutional muster because the court felt that the city did not

demonstrate strong enough evidence to prove either that the remedial action was necessary or narrowly tailored. Therefore, the Court invalidated the Richmond program.

232. *Adarand*, 115 S. Ct. at 2110 ("With *Croson*, the Court finally agreed that the Fourteenth Amendment requires strict scrutiny of all race-based action by state and local governments.").

233. *Id.* at 2117.

234. 497 U.S. 547 (1991).

235. *Adarand,* 115 S. Ct. at 2113.

236. *Id.* at 2111 (internal quotations and citations omitted).

237. *Id.* at 2112. (Justice O'Connor also asserts that the basic principles of the Fifth and Fourteenth Amendments are to protect persons not groups).

238. Adarand Constr. v. Pena, 115 S. Ct. 2097, 2113 (1995).

239. *Id.* at 2111 (citing Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 273 (plurality opinion); Fullilove v. Klutznick, 448 U.S. 448, 491 (1980); *Fullilove*, 448 U.S. at 523 (Stewart, J., dissenting)).

240. *Adarand,* 115 S. Ct. at 2111 (citing City of Richmond v. J.A. Croson Co., 488 U.S. 469, 494 (1989) (plurality opinion); *Croson,* 488 U.S. at 520 (Scalia, J., concurring); Regents of the Univ. of California v. Bakke, 438 U.S. 265, 289-90 (1978) (Powell, J., concurring)). Justice O'Connor argues that the application of consistency is effective in differentiating between discrimination meant to oppress and discrimination meant to remedy.

241. *Adarand,* 115 S. Ct. at 2111 (citing Buckley v. Valeo, 424 U.S. 1, 93 (1976); Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975); Bolling v. Sharpe, 347 U.S. 497, 500 (1954)).

242. *Adarand,* 115 S. Ct. at 2113.

243. 480 U.S. 149 (1978).

244. *Adarand,* 115 S. Ct. at 2117.

245. *See supra* notes 159-73 and accompanying text.

246. *Adarand,* 115 S. Ct. at 2120 (Stevens, J., dissenting).

247. *Id.* at 2122. Justice Stevens explained:

> Today's lecture about "consistency" 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 former slaves*. (emphasis added).

*Id.*

248. *See supra* notes 13-31 and accompanying text.

249. *See supra* notes 50-54 and accompanying text.

250. *See supra* notes 55-60 and accompanying text.

251. *See supra* notes 49-51 and accompanying text.

252. *See supra* notes 65-66 and accompanying text.

253. *See supra* notes 111-13 and accompanying text.

254. *See supra* notes 114-25 and accompanying text.

255. *See supra* part III.

256. *See, e.g.,* Charles R. McManis, *Racial Discrimination in Government Employment: A Problem of Remedies for Unclean Hands*, 63 GEO. L.J. 1203 (1975).

257. Such as the Open Letter and Executive Order W-124-95, both issued by Governor Pete Wilson of California, proclaiming his objection to affirmative action on purely rhetorical grounds.

258. Adarand Constr. v. Pena, 115 S. Ct. 2097, 2120-2131 (1995) (Stevens, J., dissenting) (disagreeing with the Majority's use of the "congruence" argument, Justice Stevens was also disturbed by the Court's disregard of *stare decisis*).

259. Klarman, *supra* note 8, at 309.

260. Barbara J. Flagg, "*Was Blind, But Now I See": White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 1013 (1993) (arguing that whites should be skeptical about the concept of race neutrality because it perpetuates the inequitable status quo; therefore, the author supports the use of race-conscious remedies to attain the desired outcome of racial equity).