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GIVING EFFECT TO EQUAL PROTECTION: *ADARAND CONSTRUCTORS, INC. v. PENA*

by

LESLIE GENTILE

The principles of equal protection embody some of the most deeply cherished ideals of Americanism - that all persons are to be treated equally under the law, entitled to the same freedoms and rights, and deserving of the same opportunities. The current clamor for strict adherence to a "colorblind"¹ constitution seems on first consideration to be in accord with these ideals. Surely, a society in which people are judged by the "content of their character"² rather than by the "color of their skin"³ is a desired actuality. To fashion jurisprudential doctrine, however, on the premise that colorblindness is a present reality does a grave injustice to the very ends it purports to serve.

Affirmative action has been the primary tool of governmental redress of our long history of racial discrimination and its attendant harms.⁴ The present political climate has placed this issue squarely in the forefront, as the scramble to divide what is perceived to be an ever-decreasing pie becomes more furious.⁵ Affirmative action has come to be seen as a significant culprit in the fray, and charges of reverse discrimination have become increasingly more strident.⁶ The United States Supreme Court has injected its voice into the debate most recently with *Adarand Constructors, Inc. v. Pena*,⁷ and held that federal and state affirmative action programs must meet the most stringent standard of constitutional review, that of strict scrutiny.

This Note will examine affirmative action jurisprudence, and explore the broader implications of the Court's present narrow course. Section II⁸ presents a brief historical background of the cases preceding *Adarand*, and traces the Court's fragmented approach to this issue and its deep divisiveness over the correct standard of review. Section IV⁹ examines the tension between the colorblind approach and the requirements of equal protection within the inescapable reality of our racist society. Finally, Section V¹⁰ calls for a focus by the Court on outcome, rather than a myopic fixation on process, toward the larger end of the realization of equality in fact.

II. BACKGROUND

Equal protection jurisprudence has haltingly developed the remedial principle that the use of racial classifications is sometimes permissible as long as race-conscious laws, passed by the majority, remedy the effects of past discrimination against a racial minority.¹¹ This benign application of race-consciousness is the direct inverse of the invidious racial discrimination of our nation's past.¹²

The tortured development of benign racial classification analysis can be traced through the line of cases that begins with *Regents of the University of California v. Bakke*,¹³

followed by *Fullilove v. Klutznick*,¹⁴ *Wygant v. Jackson Board of Education*,¹⁵ *City of Richmond v. J.A. Croson Co.*,¹⁶ and *Metro Broadcasting, Inc. v. FCC*.¹⁷ The common difficulty throughout these cases has been in the determination of which standard of judicial review¹⁸ is required by the Equal Protection Clause of the Fourteenth Amendment,¹⁹ and the equal protection component of the Due Process Clause of the Fifth Amendment.²⁰ Equal protection is given the same application to those similarly situated.²¹ The practical effect of this principle is that the Court has traditionally protected the interests only of suspect classes.²²

A. Regents of the University of California v. Bakke

The Constitutionality of a benign racial classification was first considered by the Court in *Regents of the University of California v. Bakke*.²³ Under review was the University of California-Davis' special minority admissions program. The Court held that the program was unconstitutional, and ordered that Bakke be admitted to the school, but determined that it would be permissible to consider race as a factor in admissions programs generally.²⁴ Justice Powell found that any discrimination on the basis of race, even against white males (the historically privileged group), required strict scrutiny, and expressed doubt that any racial preference could ever be benign.²⁵ Further, he determined that it would be unfair to require innocent members of the white majority to bear the burden of redressing harms for which they were not directly responsible.²⁶

Writing for the Dissent, Justice Brennan advocated the use of the intermediate scrutiny test which Justice Powell had found inappropriate.²⁷ Rejecting out of hand the suggestion that the Constitution is, or should be, colorblind, the dissent determined that race-conscious group remedies may be in consonance with the Equal Protection Clause of the Fourteenth Amendment.²⁸ Because of the deep division of the Court, *Bakke* provided little guidance in determining the appropriate test for evaluation of benign race classifications.

B. Fullilove v. Klutznick

In *Fullilove v. Klutznick*,²⁹ the Court considered a federal minority ten percent set-aside program.³⁰ A splintered Court upheld the program, with six Justices concurring in judgment, but no more than three agreeing on a single rationale.³¹ Chief Justice Burger rejected application of either test articulated in *Bakke*, strict or intermediate scrutiny, and simply declared the *Fullilove* program constitutional.³² Justice Marshall's concurrence again found the correct level of scrutiny to be intermediate.³³ Relying on arguments that later became the basis for the holdings in *Croson* and *Adarand*, Justice Stewart's dissent asserted that strict scrutiny should apply to the challenged *Fullilove* program.³⁴

While a true consensus regarding the correct standard of review remained unforged, *Fullilove* articulated at least some general principles.³⁵ First, a majority of the Court agreed that it was permissible to require "innocent" non-minorities to share the burden of remedying past discrimination.³⁶ Second, the Court appeared more willing to give deference to remedial actions fashioned at the federal level.³⁷ Finally, specific findings of

past discrimination need not precede the use of benign race classifications, at least at the federal level.³⁸

C. Wygant v. Jackson Board of Education

*Wygant v. Jackson Board of Education*³⁹ involved an equal protection challenge to lay-off provisions that provided for protections of minority employees at the expense of non-minorities with greater seniority.⁴⁰ The plurality struck down the provision,⁴¹ which became a casualty of the strict scrutiny analysis applied by four members of the Court.⁴²

Justice Marshall's dissent, joined by Justices Brennan and Blackmun, argued that intermediate scrutiny should apply, and found that the Board's remedy satisfied this standard.⁴³ The dissenting opinion of Justice Stevens expressed the idea that benign racial classifications should be analyzed within the context of their future impact, and that no rigid judicial test should be applied.⁴⁴

D. City of Richmond v. J. A. Croson Co.

*City of Richmond v. J. A. Croson Co.*⁴⁵ presented the Court with essentially the same federal statute it had previously upheld in *Fullilove*.⁴⁶

Justice O'Connor, writing the first majority opinion in an affirmative action case, applied the strict standard of review to the Richmond program, and found it to be in violation of the Equal Protection Clause of the Constitution.⁴⁷ The Majority determined that Richmond neither demonstrated a sufficiently compelling interest in the use of race-conscious remedies, nor tailored the program narrowly enough to address a specifically identified past racial harm.⁴⁸

Justices Marshall, Brennan, and Blackmun bitterly dissented, criticizing the majority insistence upon strict scrutiny as a myopic reading of the Fourteenth Amendment.⁴⁹ Justice Marshall found that the Richmond plan was sufficiently narrowly tailored to fulfill the requirements of intermediate scrutiny, the standard he deemed applicable, and that even under strict scrutiny, the program would survive.⁵⁰

The *Croson* decision elicited strong reaction.⁵¹ *Croson* was viewed by many commentators as significantly hindering governmental efforts to achieve racial justice.⁵² Doctrinally, *Croson* marked a turning point in that a majority of the Court agreed for the first time on the standard of review appropriate to remedial race-conscious programs, that of strict scrutiny.⁵³

E. Metro Broadcasting, Inc. v. FCC

In *Metro Broadcasting, Inc. v. FCC*,⁵⁴ the Court upheld a Federal Communications Commission policy that gave preferences to certain minority and female applicants for broadcast station licenses.⁵⁵ A five-four majority applied intermediate scrutiny to conclude that the two challenged programs, a minority preference in issuing licenses, and

the distress sale policy, were constitutional.⁵⁶ Justice Brennan, writing for the Majority, found a non-remedial prospective goal, that of fostering broadcast diversity, to be a sufficiently important interest.⁵⁷ Relying on *Fullilove*, the Court applied the intermediate standard, and found that the FCC programs satisfied that test.⁵⁸ In a strongly worded harbinger of her *Adarand* decision, Justice O'Connor's dissent, joined by Chief Justice Rehnquist and Justices Scalia and Kennedy, advocated strict scrutiny of the minority programs, relying on reasoning similar to that of her majority opinion in *Croson*.⁵⁹

It is essential that the rigid and formal doctrinal analysis employed in the quest for the correct standard of review of benign race classifications does not obfuscate the critical overarching issue in these cases: Should society be prevented from, or assisted in attempting to solve its debilitating racial problems through the remedy of affirmative action?⁶⁰

III. STATEMENT OF THE CASE

A. Facts

Adarand Constructors, Inc. is a Colorado highway guardrail subcontracting company owned and managed by a white male.⁶¹ Adarand brought suit to challenge the constitutionality of a federal program designed to provide contract awards for disadvantaged business enterprises (DBEs).⁶²

A subcontracting compensation clause (SCC) program⁶³ of the challenged federal program, implemented in Colorado through the Central Federal Lands Highway Division (CFLHD),⁶⁴ awards incentive payments to prime contractors who subcontract with DBEs.⁶⁵ No rigid quotas are involved in the program.⁶⁶ A prime contractor is not required to hire DBEs as a condition of eligibility for award of the prime contract, and can choose to exercise the incentive option or ignore it completely.⁶⁷

In 1989, a prime highway contract was awarded to Mountain Gravel & Construction Company (Mountain Gravel), who then solicited bids for the guardrail portion of the highway project.⁶⁸ Under the subcontracting compensation clause, the prime contractor receives additional compensation of ten percent of the contract's value if it subcontracts to DBEs.⁶⁹ In consideration of the additional compensation, Mountain Gravel hired Gonzales Construction Company (Gonzales), a certified DBE, despite the fact that Adarand submitted the lowest bid.⁷⁰

B. Procedural History

In 1992, Adarand brought suit in the District Court of Colorado, alleging violations of the equal protection guarantees of the Fifth and Fourteenth Amendments.⁷¹ The District Court held that the federal program at issue required analysis pursuant to the intermediate standard of *Fullilove*⁷² and *Metro Broadcasting*,⁷³ and not, as Adarand sought, the strict scrutiny analysis given the state program in *Croson*.⁷⁴ The District Court granted summary judgment in favor of the government.⁷⁵

On appeal, the Tenth Circuit affirmed on grounds different from those relied upon by the District Court.⁷⁶ Adarand petitioned the Supreme Court for a *writ of certiorari*, which was granted.⁷⁷ By a five-four vote, the Court vacated the Tenth Circuit's decision and remanded the case for reconsideration, recognizing that its decision would alter the playing field in some important respects.⁷⁸

C. U.S. Supreme Court - Majority Opinion

In her majority opinion, Justice O'Connor determined that strict scrutiny⁷⁹ is the single standard of review to be applied to all race-conscious actions, whether benign or invidious, state or federally mandated.⁸⁰ *Metro Broadcasting* is overruled insofar as it is inconsistent with that holding.⁸¹

While acknowledging the uncertain legacy of prior affirmative action holdings, the Court announced that three general propositions had been established with respect to analysis of governmental racial classifications.⁸² The Court examined its approach to this analysis as incorporating skepticism, consistency, and congruence.⁸³ Skepticism requires that any racial classification resulting in different treatment is inherently suspect.⁸⁴ Consistency requires that the standard of review is independent of the race of those burdened or benefitted by a racial classification.⁸⁵ Finally, congruence requires that equal protection analysis under the Fifth (federal actions) and Fourteenth Amendments (state and local actions) be the same.⁸⁶

On the basis of this foundation, the Court advanced two arguments for its requirement that strict scrutiny be applied for all race-based measures.⁸⁷ First, the Court found that strict scrutiny analysis was essential to ensure that a racial preference is in fact benign.⁸⁸ The Court reasoned that strict scrutiny is needed to "smoke out" illegitimate uses of race by demonstrating that the goal sought is important enough to warrant the use of this "highly suspect" tool.⁸⁹

The second argument set forth by the Court was that the use of a standard less than strict scrutiny effectively rejected the newly identified proposition of congruence between the level of judicial review applicable to both federal and state affirmative action programs.⁹⁰ Thus, by refusing to follow the standard required by *Metro Broadcasting*, and looking instead to the teachings of *Croson*, the Court concluded that it did not depart from the fabric of law;⁹¹ rather, it restored it.⁹²

D. Dissent

The Dissent, authored by Justice Stevens, argued that controlling precedent demands the application of intermediate scrutiny to the federal program challenged in *Adarand*.⁹³ Justice Stevens addressed the three propositions identified by the Court, and concluded that the majority decision had departed from *stare decisis*.⁹⁴

Justice Stevens concurred that, as a general matter, skepticism is "a good statement of law and of common sense."⁹⁵ His application of the term, however, led him to announce

that, because uniform standards are often anything but uniform, skepticism should be used to evaluate the majority's propositions of "consistency" and "congruence" and stare decisis, as well as the underlying issue in this case.⁹⁶ He criticized the Court's concept of "consistency" for assuming that there is no significant difference between the invidious and oppressive use of race as a tool of subjugation, and the benign use of race to foster equality in a racist society.⁹⁷ The concept of "congruence" as defined by this Court was found by Justice Stevens to be untenable, in that it ignores the difference between an action taken by Congress to implement an affirmative action program, and a similar action taken by a state or local entity.⁹⁸ Finally, Justice Stevens found that the Court had misapplied the concept of stare decisis.⁹⁹ Justice Stevens noted that members of the *Adarand* Majority rejected the same federal-state dichotomy they had distinguished in *Croson*, and by so doing, it was the *Adarand* Court who departed from settled law.¹⁰⁰

IV. ANALYSIS

A. *The Standard of Review*

The raging debate over which is the correct standard of review with regard to race-based governmental actions seems to have found at least some momentary repose in *Adarand*, where for the first time a majority of the Court agreed on the appropriate standard of review.¹⁰¹ However, this type of consensus may not bring the conciliation hoped for.¹⁰² The Court remains closely divided on this issue, as the five-four decision in this case indicates. Writing for a bare majority, Justice O'Connor acknowledged that racial discrimination is still a serious problem in this country.¹⁰³ The Court nonetheless tightened the judicial noose around the neck of federal affirmative action programs by mandating strict scrutiny as the single standard of review for all race conscious actions.¹⁰⁴

The Court's insistence on the same strict standard for both invidious discrimination and remedial race-based actions that seek to benefit members of a minority elevates form over substance, and ignores the intended purpose of equal protection.¹⁰⁵ The *Adarand* Majority reasoned that a heightened standard of review is necessary to ferret out classifications which purport to be benign, but which in reality are malign, and to ensure that the legislative goal is important enough to warrant the use of this "highly suspect tool."¹⁰⁶

While the concerns expressed by the Court are valid, the reasoning which impels the Court's insistence on strict scrutiny of benign race classifications is flawed for three reasons. First, in placing benign racial classifications on the same level as the traditional malicious racism they seek to ameliorate, the Court ignores the profound difference in motivation between the acts.¹⁰⁷ Unlike the historic racism directed against non-whites in this country, both on a private and institutional level, affirmative action programs do not arise from hostility or antipathy toward the white majority.¹⁰⁸ In fact, since these programs are devised and implemented by the legislature, and the legislature is composed of a majority of white members, it is the white major ity legislature that institutes the race-conscious classification.¹⁰⁹ When the majority imposes a burden upon itself, the usual assumptions of suspectness do not apply.¹¹⁰ There is no invidious intent in benign

racial classifications.¹¹¹ To interpret equal protection as requiring the doling out of societal "goodies" in the same amount to everyone, irrespective of race, ignores the reality that some already have, and have always had, considerably more to begin with.¹¹² Measures intended to include those who have been systematically excluded because of race must consider race in order to meaningfully attack the harms of racism.¹¹³ Further, since remedial race-conscious programs are legislatively imposed, they can be similarly terminated when they have served their purpose. The same is obviously not true of invidious racial prejudice against minorities.

Second, white males are not a suspect class.¹¹⁴ White males as a group cannot be said to fulfill any of the traditional criteria of suspectness.¹¹⁵ Additionally, after thirty years of affirmative action, there has been no perceptible shift in the nation's power structure.¹¹⁶ White males continue to exercise more influence, have more economic power, and enjoy greater access to the benefits of this society than minorities.¹¹⁷ The modest gains made by minorities as beneficiaries of affirmative action have not caused any serious erosion of the superior economic and political position historically enjoyed by white males.¹¹⁸ Therefore, the benefits of achieving the racial justice promised by equal protection outweigh the incidental burdens imposed by benign race classifications.¹¹⁹

Finally, no fundamental right is implicated in *Adarand's* constitutional claim.¹²⁰ The Court has not found that the Constitution provides a fundamental right to employment, and certainly not to a particular employment, within its guarantees, and has demonstrated a resolute refusal to expand the list of rights recognized as fundamental.¹²¹ Therefore, strict scrutiny should not apply to the claim presented in *Adarand*.

The intermediate scrutiny analysis reiterated by Justice Marshall in *Croson*¹²² as the appropriate standard for review of benign race classifications should be the standard used in *Adarand*, and in all affirmative action analysis. The two-prong test requires that the program serves important governmental objectives and be substantially related to the achievement of those ends.¹²³ Strict scrutiny erects a daunting, likely insurmountable, hurdle for race-based affirmative action programs.¹²⁴ Intermediate scrutiny affords a heightened level of judicial review to safeguard constitutional rights, while providing meaningful redress of past and continuing racial discrimination, as intended by equal protection. Further, this level of review permits the constitutional survival of prophylactic measures directed toward the continuing realization of the economic equality of minorities.¹²⁵ The Court's narrow reading of equal protection, and its rigid adherence to strict scrutiny through *Croson* and now *Adarand*, effectively hamstring the government's ability to address the harms wrought by racism in this country.¹²⁶

B. "Colorblindness": Decontextual Denial

A major theme throughout the Justice O'Connor's *Adarand* opinion, and throughout the Court's affirmative action jurisprudence generally,¹²⁷ is that of a race-neutral, or "colorblind"¹²⁸ application of the law. Strict scrutiny is the implementing tool for colorblind constitutionalism as applied to benign race classifications.¹²⁹

The colorblind principle is touted as a neutral method of constitutional analysis which therefore requires no moral justification.¹³⁰ This premise is

fallacious for two reasons. First, the so-called neutral standard is actually the norm of whiteness.¹³¹ This normative basis operates from a set of unstated and unexamined assumptions which position the dominant white reality as a "neutral" touchstone.¹³² Second, the colorblind principle removes the action from the context of reality, and subordinates equality of outcome to slavish and narrow adherence to form.¹³³

Unspoken white norms comprise the essence of the social structure in this country.¹³⁴ In light of this pervasive reality, the view that race can never be considered in a decision-making process is too simplistic.¹³⁵ Justice O'Connor's commitment to the colorblind principle to ensure neutrality belies the fact that some decidedly non-neutral analysis has already occurred in making that assessment.¹³⁶ Before a decision can be made not to consider race, race must first be considered.¹³⁷ Operating from a position of whiteness - as-norm, this process becomes automatic and unnoticed, and therefore discounted.¹³⁸

The effect of colorblind analysis is to decontextualize, thereby disaggregating and diluting the significance of the harm.¹³⁹ As applied to affirmative action jurisprudence, this becomes manifest in the strict scrutiny requirements of *Croson* and *Adarand*, and in the subsequent quantum of factual predicate required.¹⁴⁰ The *Adarand* Court's dogmatic refusal to consider affirmative action in its broader context has the perverse result of using the strict tool intended to protect civil rights to strike down the very programs it was devised to foster, thereby preserving the status quo at its present level of white domination.¹⁴¹ By adopting the colorblind principle and strict scrutiny as the prevailing constitutional rule, the Court ignores, at its peril, the lessons of history and cultural reality.¹⁴² Proponents of the colorblind principle would do well to bear in mind that there are none so blind as those that will not see.¹⁴³

V. CONCLUSION

The sad paradox of affirmative action is that the very problem it seeks to correct provides the source of its apparent undoing. Racism is indisputably a pernicious, pervasive, and present force in our society.¹⁴⁴ While efforts to apportion the benefits and burdens inherent in our social order in an equal manner are no doubt, in most cases, sincerely motivated, within the context of our racist reality these distributions are too often simply not equitable in effect.

To achieve in actuality the ideals promised by equal protection, the judicial perspective must broaden to consider actions within the meaning of their context, and not as isolated events and intellectual exercises that occur within a vacuum. A myopic fixation on process at the annihilation of outcome loses sight of the intended purpose. The Court must realign its focus on the broader meaning of equal protection so that an equitable share of the bounties of this society is not foreclosed to anyone because of race, ethnicity, or gender. Equal Protection is a requirement for equality in fact. Affirmative action is

profoundly different from state sanctioned racism used to preserve the white-dominant status quo.¹⁴⁵ The Court should recognize and respond to the distinction.

1. Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).
2. Martin Luther King, Jr., Speech at Civil Rights March on Washington (Aug. 28, 1963).
3. *Id.*
4. The 1968 Kerner Commission report on racial disorders, prompted by the riots of the 1960s, provided ample documentation of American institutional discrimination against blacks. Roger Wilkins, *Racism Has Its Privileges: The Case For Affirmative Action*, 260, 12 NATION 409 (1995). Affirmative action requires institutions to search for qualified candidates in places beyond their ordinary searches or businesses. *Id.* Affirmative action was first set forth in Executive Order 11,246 by Lyndon Johnson as an effectuation of the anti-discrimination requirements of the civil rights legislation of the 1960s. William L. Kandel, *Affirmative Action and the Glass Ceiling: Contract Compliance and Litigation Avoidance*, EMPLOY RELATIONS L.J., Sept. 1, 1995, at 15. Its goal is to remove nonmerit barriers to upward social and economic mobility. *Id.* at 15. Executive Order 11,246 requires that a federal contractor "will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, or national origin." Exec. Order No. 11,256, C.F.R. 339 (1964-1965 Comp.), *reprinted as amended in* [42 U.S.C. § 2000e-5\(g\)\(1\)](#) (1993). These requirements were implemented through regulations promulgated by the Nixon-Ford administration, found at 41 C.F.R. Part 60.
5. Columbia University anthropologist Katherine Newman, author of DECLINING FORTUNES: THE WITHERING OF THE AMERICAN DREAM, suggests that affirmative action offers a convenient, if misguided scapegoat for the very real economic problems facing the generation of late baby boomers, regardless of their race or gender. Jonathan Tilove, *Negative Attitudes on Affirmative Action: Preferences Not Needed, Opponents Say*, CLEV. PLAIN DEALER, May 21, 1995, at A7. Other factors cited as contributors to the climate of economic uncertainty include warp-speed technological change that is rendering many occupations and whole industries obsolete, cutbacks in defense manufacturing resulting from the end of the Cold War, and growing competition in the global marketplace. Cecil Johnson, *Affirmative Action, Negative Reaction*, FORTH WORTH STAR-TELEGRAM, Apr. 6, 1995, at 29. Working-class whites have been the ones most hurt by these changes. Barry Bearak & David Lauter, *Series: Affirmative Action: The Paradox of Equality. Last of three parts.*, L.A. TIME, Nov. 5, 1991, at 1. Further blame for unemployment can be leveled at the damaging decisions of corporations that export manufacturing operations to low-wage countries, or at the Federal Reserve, which imposes interest rate hikes that slow down the economy, or the corporate downsizing fad, which has caused the disappearance of jobs in the middle ranks of employees. Wilkins, *supra* note 4, at 414.
6. Within the past year alone, fifteen states have proposed civil rights initiatives that would repeal affirmative action, the most notable being the California effort led by academics Glynn Custred and Tom Wood. Tilove, *supra* note 5, at A7. *See also* Julian

Beltrame, *Attack on Affirmative Action; Republicans Feed on Backlash Against Programs Helping Minorities*, OTTAWA CITIZEN, Feb. 18, 1995, at B3. Examples given of reverse discrimination include Larry Mackin, 37, who was denied a place as a Boston firefighter, despite receiving a perfect score on the civil service exam, because the city was under a consent decree to hire one minority for every white to compensate for a long history of discrimination. Mackin sued Boston for reverse discrimination and lost. Tilove, *supra* note 5. Politicians who have taken up the reverse discrimination battle cry include Republicans Bob Dole, Newt Gingrich, Phil Gramm, and California governor and former presidential hopeful Pete Wilson. Beltrame, *supra*.

7. [115 S. Ct. 2097 \(1995\)](#).

8. *See infra* pp. 3-13.

9. *See infra* pp. 20-31.

10. *See infra* pp. 33-33.

11. *See* Laurence H. Tribe, *Joint Statement: Constitutional Scholars' Statement on Affirmative Action After City of Richmond v. J. A. Croson Co.*, 98 YALE L.J. 711 (1989).

12. *See id.* at 1711-12.

13. 438 U.S. 265 (1978) (striking down an admissions program which reserved a specified number of places in each entering class for disadvantaged minority students).

14. 448 U.S. 448 (1980) (upholding a federal set-aside program which meant 10% of federal funds granted for local public works projects to be used to secure the services of minority-controlled business).

15. 476 U.S. 267 (1980) (striking down a program which provided minority teachers greater protection from lay-offs than white teachers with more seniority to achieve racial balance among the teaching staff).

16. 488 U.S. 469 (1989) (holding that strict scrutiny must be applied to local race-based actions, whether benign or invidious, and striking down a contractor set-aside program upon application of this standard).

17. [497 U.S. 547 \(1990\)](#) (upholding a federal program which awarded preferences to minority-owned applicants for broadcast licenses under an intermediate scrutiny analysis).

18. There are three standards of judicial review in equal protection analysis: rational relationship test (extremely deferential; classification is rationally related to a legitimate governmental purpose), *see, e.g.*, *United States v. Carolene Prod.*, 304 U.S. 144 (1938) (holding that legislation regulating economics and commerce will be given great

deference); intermediate scrutiny (classification must serve an important governmental purpose and be substantially related to that purpose), *see, e.g.*, *Craig v. Boren*, 429 U.S. 190 (1976) (striking down a state law that prohibited the sale of certain alcoholic beverages to men under age 21 but permitted such sales to women the same age); and strict scrutiny (most stringent; statute must be necessary and narrowly tailored to achieve a compelling governmental interest), *see, e.g.*, *Korematsu v. United States*, 323 U.S. 214 (1944) (finding that any racial classification is immediately suspect). *See also* Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 96 HARV. L. REV. 1, 8-24 (1972). One commentator has described strict scrutiny as "strict in theory and fatal in fact," and the rational relationship test (minimal scrutiny) as "minimal . . . in theory and virtually none in fact." *Id.* at 8.

Strict scrutiny must be applied to those statutes that create suspect classifications or burden a fundamental right. *Korematsu*, 323 U.S. at 216. Any racial classification is "immediately suspect." *Id.* at 216. A suspect classification is created whenever a law burdens a racial minority because of its race. *Id.*

19. The Fourteenth Amendment provides, in relevant part: ". . . Nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws" [U.S. CONST. amend. XIV](#), § 1.

20. The Fifth Amendment provides, in relevant part: ". . . No person shall . . . be deprived of life, liberty, or property, without due process of law" [U.S. CONST. amend V](#).

21. LAWRENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1438 (1988). Problems arise, however, in the imposition of value judgments which necessarily underlie determinations of what constitutes equality. GERALD GUNTHER, *CASES AND MATERIALS ON CONSTITUTIONAL LAW* 607 (1991). "To say that persons who are alike must be treated alike does not tell us how to determine whether persons are alike or not for the purposes of the classifications inherent in virtually all legislations." *Id.*

22. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978). Justice Stone's footnote four of *Carolene Prod.*, 304 U.S. at 152 n.4, gave rise to modern equal protection jurisprudence. John H. Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L.R EV. 723, 729-32 (1974) [hereinafter Ely, *Reverse Racial Discrimination*]. Justice Stone indicated that invidious racial classifications should be reviewed at a heightened level, because the ordinary political process is not effective in preventing such invidious classifications. *Carolene Prod.*, 304 U.S. at 152 n.4. "[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." *Id.* A "discrete and insular minority" that has been historically relegated to a position of political powerlessness is deemed to demonstrate the traditional indicia of suspectness. *Id.* However, when a racial classification benefits a minority (is benign), there does not appear to be any support for judicial distrust of the political process, and therefore no

need for a heightened, or strict standard of review. Ely, *Reverse Racial Discrimination*, *supra*, at 731.

The political process theory derived from the *Carolene Products* footnote is most notably expressed by John Ely, who posits that minorities who lack power to protect their interest in the political process, by virtue of their minority status, require a greater level of judicial protection. *See* JOHN H. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

Racial classifications have been deemed to be suspect because a minority has been repeatedly disadvantaged, and these disadvantages can not be rationally defended. Ely, *Reverse Racial Discrimination*, *supra*, at 731. Any legislation that singles out this minority for disadvantage should make us immediately suspicious. *Id.* Professor Ely also argues that classifications which disadvantage racial minorities are suspicious because they are based on generalizations that traits of the dominant class are superior to traits of the minority class. *Id.* at 732. However, when a classification seeks to benefit minorities (benign classification), these assumptions of suspectness do not control the classification. *Id.* at 731. A law which favors a minority over the white majority is not suspect if it is enacted by the white majority through the political process. *Id.* at 736. "Whether or not it is more blessed to give than to receive, it is surely less suspicious." *Id.*

23. *Bakke*, 438 U.S. at 265.

24. *Bakke*, 438 U.S. at 271. A majority was not reached by the badly fragmented *Bakke* Court, and Justice Powell's opinion announced the Court's decision. *Id.* at 269. Nine Justices wrote six separate opinions. *Id.* at 265. Justice Powell rejected the University's argument that strict scrutiny should not be applied to race-conscious programs whose purpose was benign. *Id.* at 290-91. Justice Powell disputed that the Court had ever required a "discrete and insular minority" to be the subject of the classification before strict scrutiny would apply. *Id.* at 289-90 (citing *United States v. Carolene Prod.*, 304 U.S. 144, 152 n.4 (1938)). *See supra* note 22.

25. *Id.* at 298. Justice Powell determined that even "benign" racial classifications are dangerous because they reinforce stereotypes which stigmatize the racial group that receives the benefits. *Id.* at 294-95. Further, he reasoned, the white majority is itself composed of various ethnic minority groups, who may also have suffered past discrimination. *Id.* at 295-96. Therefore, any racial or ethnic classifications merit strict review, thereby ensuring equal protection to individuals, rather than to groups. *Id.* at 295-98.

26. *Id.* at 298. Justice Powell concluded that a general purpose of redressing societal discrimination was too amorphous to justify action which would place a burden on non-minorities. *Id.* at 320. Applying the test of strict scrutiny, Justice Powell found that the University's program could meet neither the compelling governmental interest prong, nor was it sufficiently narrowly tailored to meet the ends it purported to serve, and must therefore fail. *Id.* at 313-15.

27. *Bakke*, 438 U.S. at 357 (Brennan, J., concurring in part, dissenting in part). The dissent was joined by Justices White, Marshall, and Blackmun. *Id.* at 269. Justice Brennan determined that strict scrutiny should not apply because no fundamental right was implicated in the Davis plan, and whites as a class do not have the traditional indicia of suspectness. *Id.* at 357. *See supra* note 18. When a classification burdens a group who is sufficiently powerful to protect itself in the democratic political process, there is no need for the heightened judicial protection afforded by strict scrutiny review. *Bakke*, 438 U.S. at 357-59. *See also supra* note 22 (discussing the political process theory as expressed by Professor Ely). The racial classification used by Davis was not found to stigmatize either the white majority or the minorities it benefitted, as minority students were required to fulfill all the usual academic requirements to achieve their degrees, and therefore were not branded as inferior. *Bakke*, 438 U.S. at 357-78. The program's racial classification did not permit or prohibit activities because of irrelevant and irrational beliefs about race. *Id.* After applying intermediate scrutiny, Justice Brennan found Davis' purpose of remedying past societal discrimination sufficiently important to meet the test. *Id.* at 362, 369.

28. *Id.* at 355.

[A] state government may adopt race-consciousness programs if the purpose of such programs is to remove the disparate racial impact its actions might otherwise have had and if there is a reason to believe that the disparate impact is itself the product of past discrimination, whether its own or that of society at large.

Id. at 369.

29. 448 U.S. 448 (1980).

30. *Id.* at 453-54. Construction grants for minority business enterprises (MBE's) were made available pursuant to the Federal Public Works Employment Act of 1977, Pub. L. 95-28, 91 Stat. 116 (*codified as amended at* [42 U.S.C. §§ 6701-6736](#) (1988)). *Id.*

A minority business enterprise is defined by the Act as:

a business [where] at least 50 per centum of which is owned by minority group members or, in case of a publicly owned business, at least 51 per centum of the stock which is owned by minority members. For the purposes of the preceding sentence, minority group members are citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aluets.

Id. at 454 (quoting § 103(f)(2) of the Public Works Employment Act of 1977, Pub. L. 95-28, 91 Stat. 116, 42 U.S.C. § 6705(f)(2) (1988), which amended the Local Public Works Capital Development and Investment Act of 1976, Pub. L. 94-369, 90 Stat. 999, 42 U.S.C. § 6701 (1976)).

There are three types of MBE (minority business enterprise) set-aside programs. Charlotte F. Westerhaus, Note, *Resurrecting State and Local Race-Conscious Set-Aside Programs*, 67 IND. L.J. 169, 170-71 (1991). The first type requires that an established percentage of the total number of state or municipal contracts awarded each year be set aside and assigned to minority-owned businesses. *Id.* The second type requires that all prime contractors spend a percentage of the contract price with minority-owned subcontractors. *Id.* The third type requires that a prime contractor submit its bid with an "affirmative action plan" which commits the contractor to hire a specific percentage of minority-owned subcontractors. *Id.*

31. Chief Justice Burger's opinion, which was joined by Justices White and Powell, found that Section Five of the Fourteenth Amendment gave Congress extraordinary powers to enforce the Fourteenth Amendment, and that Congress had the authority to intervene into state action which perpetuates the effects of past discrimination. *Fullilove*, 448 U.S. at 507. Chief Justice Burger also concluded that because of the extreme and pervasive nature of the deliberate exclusion of minorities from the construction industry, a finding which was supported by the legislative history, a specific finding of discrimination under this statute was not necessary. *Id.* at 478. Further, he emphasized that extreme deference should be given Congress in carrying out its legislative function. *Id.* at 472. Section Five of the Fourteenth Amendment provides that "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article." [U.S. CONST. amend. XIV](#), § 5.

32. *Fullilove*, 448 U.S. at 492 (opinion of Burger, C.J.).

33. *Id.* at 517 (Marshall, J., concurring). The Concurrence, which was joined by Justices Brennan and Blackmun, found the *Fullilove* program to be constitutional under this standard. *Id.* at 519.

34. *Id.* at 551-52 (Stewart, J., dissenting). Justice Stewart expanded on Justice Powell's *Bakke* opinion, determining that the colorblind constitution requires strict scrutiny of all racial classifications, and that equal protection is an individual right. *Id.* at 523-27. He further determined that a specific finding of past discrimination by the government was in fact required in affirmative action programs. *Id.* at 526-27. This requirement of an actual finding of past discrimination laid the groundwork for future invalidation of remedial race-conscious programs. *See City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 504-05 (1989) (requiring that specific findings of particularized acts of past discrimination are necessary to engage in race-conscious relief with regard to state/local actions). *See also Adarand Constructors v. Peña*, 115 S. Ct. 2097, 2112-14 (1995) (holding that race-conscious remedial acts by either federal or state/local entities must demonstrate with particularized findings specific discriminatory acts to justify their use).

35. Norman J. Fry, *Lamprecht v. FCC: A Looking-Glass into the Future of Affirmative Action?*, 61 GEO. WASH. L. REV. 1895, 1917 (1993) (predicting that, based on his previous judicial opinions, especially in *Lamprecht v. FCC*, and Supreme Court precedent, the addition of Clarence Thomas to the Court will move toward the limitation

of federal affirmative action programs, focusing on the doctrinal tension between the concepts of individual rights and group rights).

36. *Fullilove*, 448 U.S. at 484. A total of six Justices (Chief Justice Burger, Justices White, Powell, Marshall, Brennan, and Blackmun) agreed with this position. *Id.* "It is not a constitutional defect in this program that it may disappoint the expectations of non-minority firms." *Id.* A colorblind application of the Constitution was not required in remedial race-based actions. *Id.*

37. *Id.* at 480. This position was supported by the broad grant of authority granted to Congress by the Fourteenth Amendment to effectuate such relief. *Id.*

38. *Id.* at 478.

39. 476 U.S. 267 (1986).

40. *Id.* at 272-73.

41. *Id.* at 284-85. The plurality was expressed in three opinions written by five Justices. *Id.* at 276. The opinion written by Justice Powell found that the Board was limited to remedying its own past discrimination. *Id.* at 274-76. The Board's assertion that minority students needed minority teachers as role models to offset prior societal discrimination was not found by the Court to be a sufficiently compelling interest. *Id.* at 278.

42. *Id.* at 274. The fact that the burden of the racial classification was imposed upon the white, or non-minority race, was not significant to these Justices. *Id.* at 273-74. *See also supra* note 22 (discussing the political process theory, as expressed by Professor Ely).

43. *Id.* at 301-03. However, Justice Marshall found that sufficient evidence existed to also satisfy strict scrutiny, and that basing layoffs on seniority could sometimes be weighed against other policy considerations, such as remedying past discrimination. *Id.*

44. *Id.* at 318. *See also* Kathleen M. Sullivan, *Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 HARV.L. REV. 78 (1986) (arguing that limiting affirmative action to those who have been specifically wronged dooms such actions to "factual predicate" litigation, and undermines their voluntary undertaking, thereby preventing remedy for racial harms, suggesting instead a proscriptive model of corrective justice by broadening the concept of who has been victimized by past discrimination).

45. 488 U.S. 469 (1989).

46. *Id.* at 477-78. In a conscious effort to withstand a constitutional challenge, Richmond fashioned its remedial program after the federal set-aside program which the Court had upheld in *Fullilove*. *Id.* at 528 (Marshall, J., dissenting). In *Croson*, the set-aside program under review was enacted at the local, and not federal level. *Id.* Further, the Richmond set-aside reserved thirty percent of the total dollar amount of city construction contracts

for minority business enterprises, instead of the ten percent required by the federal program in *Fullilove*. *Id.*

47. *Id.* at 505. The Majority found that Richmond had failed to articulate a sufficiently compelling interest to warrant awarding public contracts on the basis of race. *Id.* at 499. While conceding that Richmond's deplorable history of purposeful racial exclusion had contributed to a lack of business opportunities for blacks, this alone, the Majority determined, could not serve as sufficiently particularized findings to justify the burden placed on the innocent white non-minority. *Id.* at 499-506. Richmond's argument, and the statistical evidence it presented to support it, was flatly rejected. *Id.* The Majority further determined that lack of race-neutral alternative remedies and the thirty percent set-aside rendered Richmond's redress flagrantly overinclusive. *Id.*

48. *Id.*

49. *Id.* at 528, 530 (Marshall, J., dissenting). Justice Marshall found that it was necessary to consider the contrast between population and work force to help gauge the real extent of exclusion of minorities. *Id.* at 530-35. This position stressed equal results, even if some marginal inequalities were imposed in the process, and viewed the problem in a more expansive context. *Id.* The dissenters argued that the burden imposed on the white businesses was "relatively light" within the context of the "overall construction contracting opportunities." *Id.* at 549. The thirty percent of the Richmond plan translated to only three percent of the actual dollars expended in overall construction contracts in the city, and contained a waiver provision where compliance was not possible. *Id.* at 543. The Richmond plan had a "minimal impact on innocent third parties," and was therefore a tolerable means to gradually move minority contractors into the construction business. *Id.* at 548.

50. *Id.* at 536-48 (Marshall, J., dissenting). Justice Marshall asserted, consistent with his opinion in *Fullilove*, that strict scrutiny was unsuitable for analysis of remedial racial classifications because of the daunting barrier it erected to providing a remedy for the invidious discrimination still rampant in our society. *Id.* at 555-57. He found the Majority's requirement of strict review tantamount to suggesting that racism was a thing of the past, which was certainly not the case. *Id.* at 552-53. He further concluded that it was entirely appropriate to consider the program within the broader context of Richmond's past discriminatory practices. *Id.* at 542.

51. Fearing that the *Croson* decision would cause local governments to abandon race-based remedial measures, a "Constitutional Scholars' Conference", headed by Laurence Tribe, was convened to advise local governments with guidelines which would assist in the development of standards for these programs which would fulfill the *Croson* requirements. See Tribe, *supra*, note 11. Other criticisms of *Croson* include: Michael Rosenfeld, *Decoding Richmond: Affirmative Action and the Elusive Meaning of Constitutional Equality*, 87 MICH. L. REV. 1729 (1989) (arguing that a process-based, strict scrutiny approach cannot sufficiently address the issues inherent in affirmative action, and that the reconciliation of affirmative action with other equal protection issues

to effectuate constitutional equality requires a substantive approach. *Croson* is remarkable because it provides "stark contrast between the apparent simplicity and clarity of the legal test that the Court embraces and that test's inability to account coherently for the complexities inherent in the controversy that it purports to resolve." *Id.* at 1793. See also RUSSELL W. GALLOWAY, JUSTICE FOR ALL? THE RICH AND THE POOR IN SUPREME COURT HISTORY, 1790-1990 177 (1991) ("*Croson* stood the equal protection clause on its head, converting it from a bulwark of equality to a guarantee of inequality and holding, for the first time ever, that governmental affirmative action programs containing remedial racial classification as unconstitutional unless strict scrutiny is satisfied."); and Kathleen M. Sullivan, *City of Richmond v. J. A. Croson Co.*: *The Backlash Against Affirmative Action*, 64 TUL. L. REV. 1609 (1990) (presenting *Croson* as the Supreme Court's reaction to a perceived societal backlash against affirmative action by addressing the resentment of the displaced, and arguing that it is paradoxical to consider white resentment in the judicial review of affirmative action legislation while simultaneously discounting black resentment of laws with racially disparate effect).

52. See Tribe, *supra* note 11. In this Statement, non-federal government entities were cautioned against the complete abandonment of affirmative action remedies, and were urged to only reevaluate their plans in accord with the dictates of *Croson*. *Id.* at 1712. "It would defy. . . the fundamental purpose of the equal protection clause to conclude that the Constitution forbids all such remedial measures, or requires that such measures be treated in exactly the same way as the invidious discrimination of the nation's past." *Id.*

53. *Croson*, 488 U.S. at 498-508 (O'Connor, J., majority opinion); *Id.* at 520 (Scalia, J., concurring in the judgment). Further, a plurality refused to extend the same power to implement equal protection remedies to the states as that wielded by the federal government. *Id.* at 521. Finally, by applying strict scrutiny, the *Croson* Court afforded virtually no deference to the city and severely curtailed Richmond's ability to effectuate a meaningful remedy by which to address the compounded harms caused by many years of unchecked invidious racism. Fry, *supra* note 35, at 1920.

54. [497 U.S. 547 \(1990\)](#).

55. [Id. at 550-52](#).

56. [Id. at 552](#).

57. [Id. at 564-65](#). Because the consideration of race is relevant to remedying the continuing effects of past discrimination, benign race classifications were constitutionally permissible "to the extent that they [served] important governmental interests and [were] substantially related to [the] achievement of those objectives." *Id.*

58. [Id. at 550](#). Key to the Court's analysis was the fact that Congress condoned, and later required, the FCC to continue the minority ownership programs. *Id.* at 552. The Court therefore determined that the program conformed to the requirements of the equal protection component of the Fifth Amendment. *Id.*

59. *Supra* notes 47-48 and accompanying text.

60. Sally Morris, *One More Battle in the Ongoing War Over Affirmative Action: Metro Broadcasting, Inc. v. FCC*, 26 NEW ENG. L. REV. 921, 939 (1992).

61. [Adarand Constructors v. Pena, 115 S. Ct. 2097, 2101-02 \(1995\)](#).

62. *Id.* The challenged program, the Federal Construction Procurement Program (FCPP), is funded by § 106(a)(8) of the Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub. L. 100-17 § 106, 101 Stat. 132 (STURAA). Section 106(c) of STURAA incorporates by reference 15 U.S.C. 637(d) of the Small Business Act (SBA), which sets forth the criteria under which designated minorities are certified as presumptively "disadvantaged," and thereby designated as a Disadvantaged Business Enterprise (DBE). There is a presumption that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, women, and other minorities or any other persons found to be disadvantaged under section 8(a) of the Small Business Act. [15 U.S.C. §637](#) (d) (1994). The presumption is rebuttable upon a showing that the minority-owned business is not in fact economically disadvantaged. The "8(a) program" confers automatic eligibility for subcontractor compensation clause (SCC) of the type at issue in *Adarand*. To qualify for eligibility under the SCC program, businesses must demonstrate annually that they are indeed economically disadvantaged. *Adarand*, [115 S. Ct. at 2102-04](#). *Adarand* is not eligible, under these provisions, for a presumption of qualification for certification as a DBE. Brief of Petitioners at 10, [Adarand Constructors v. Pena, 115 S. Ct. 2097](#) (1995) (No. 93-1841).

63. [Adarand Constructors v. Pena, 115 S. Ct. 2097, 2099 \(1995\)](#). Most federal agency contracts must contain a Subcontractor Compensation Clause (SCC) of the type at issue here, which gives a prime contractor a financial incentive to hire subcontractors certified as small business controlled by socially and economically disadvantaged individuals, thereby designated as a Disadvantaged Business Enterprise (DBE). *Id.* at 2102. *See supra* note 62.

64. [Adarand](#), *115 S. Ct. at 2102*. The Central Federal Lands Highway Division (CFLHD) is part of the Federal Highway Administration (FHWA) of the United States Department of Transportation (DOT). *Id.*

65. *Adarand Constructors v. Pena*, 16 F.3d 1537, 1540 (10th Cir. 1994), *vacated*, 115 S. Ct. 2097 (1995).

66. Brief of Respondents at 19, *Adarand Constructors v. Pena*, 115 S. Ct. 2097 (1995) (No. 93-1841).

67. *Id.* The Tenth Circuit found this point significant in determining the SCC program to be constitutional. *Adarand*, 16 F.3d at 1546 ("The prime contractor . . . had the option, not the obligation, of subcontracting with a DBE. . . .").

68. [Adarand](#), 115 S. Ct. at 2101.
69. Brief of Respondents at 18, *Adarand Constructors v. Pena*, 115 S. Ct. 2097 (1995) (No. 93-1841). The compensation amount is offered as "full compensation for locating, selecting, training, and assisting DBE subcontractors. . . ." *Id.*
70. Brief of Petitioners at 11, *Adarand Constructors v. Pena*, 115 S. Ct. 2097 (1995) (No. 93-1841).
71. *Adarand Constructors v. Skinner*, 790 F. Supp. 240 (D. Colorado 1992), *aff'd*, 16 F.3d 1537 (10th Cir. 1994), *vacated*, 115 S. Ct. 2097 (1995). Also invoked were the privileges and immunities guaranteed by 42 U.S.C. § 1983 and § 2000(d) (Title VI). *Id.*
72. *Fullilove v. Klutznick*, 448 U.S. 448 (1980).
73. [Metro Broadcasting v. F.C.C.](#), 497 U.S. 547 (1990).
74. *City of Richmond v. J. A. Croson Co.* 488 U.S. 469 (1989).
75. *Adarand*, 790 F. Supp. at 240.
76. *Adarand Constructors v. Pena*, 16 F.3d 1537 (10th Cir. 1994), *vacated*, 115 S. Ct. 2097 (1995). The Tenth Circuit determined that the lower court had misapplied the complicated scheme of interrelated statutes implicated by the program, but found that the judgment should be affirmed regardless of that error. *Adarand*, 16 F.3d at 1539-40. A detailed discussion of the statutory relationships is beyond the scope of this Note.
77. [Adarand](#), 115 S. Ct. at 2097.
78. [Id. at 2118](#). The Tenth Circuit must decide whether the interests served by the program are "compelling" under a strict scrutiny analysis, and whether the program is sufficiently narrowly tailored to serve those purposes. *Id.* Also to be decided are unresolved questions concerning details of the complex regulatory schemes implicated by the use of subcontractor compensation clauses. *Id.*
79. *See supra* note 18.
80. [Adarand](#), 115 S. Ct. at 2112.
81. [Id.](#)
82. [Id. at 2111](#).
83. [Id.](#)
84. [Id.](#)

85. [*Id.*](#)

86. [*Id.*](#) The Court pointed to its well-established principle that the Fifth and Fourteenth Amendments protect persons, not groups, as the foundation for its three propositions. *Id.* at 2112. The principle of the constitutional protection of individual rights was announced by the Court in *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948). *Adarand*, 115 S. Ct. at 2111.

87. [*Adarand*, 115 S. Ct. at 2112](#). These arguments therefore also supported overruling *Metro Broadcasting*. *Id.*

88. [*Id.*](#) Justice O'Connor is not comfortable with leaving the evaluation of which classifications are in fact benign to a case-by-case determination, as Justice Stevens advocates in his dissent. *Id.*

89. [*Id.*](#) Also, the Court favored strict scrutiny to ensure that the means-end fit is sufficiently close to eliminate the possibility of prejudicial motive. *Id.*

90. [*Id.*](#) The Court observed that the weakening of one proposition would also undermine the other two (skepticism of all racial classifications and consistency of treatment irrespective of the race of the burdened or benefitted group). *Id.* The Court found that *Metro Broadcasting*, through its application of intermediate scrutiny, had done precisely this, and therefore was "a significant departure from much of what had come before it." *Id.*

91. [*Adarand*, 115 S. Ct. at 2116](#).

92. *Id.* Justice Stevens, in his dissent, takes issue with this contention. [*Id.* at 2127 \(Stevens, J., dissenting\)](#). He states that "[p]roviding a different answer to a similar question . . . cannot fairly be characterized as merely 'restoring' previously settled law." *Id.*

93. [*Id.* at 2126-30 \(Stevens, J., dissenting\)](#). Justice Stevens was joined by Justice Ginsberg in dissent. Justice Souter, joined by Justices Ginsberg and Breyer, also filed a separate dissent.

94. [*Adarand*, 115 S. Ct. at 2126-27 \(Stevens, J., dissenting\)](#).

95. [*Id.*](#)

96. [*Id.*](#)

97. [*Id.* at 2120](#). Justice Stevens identifies as an "essential dichotomy" of equal protection jurisprudence the distinction between the two considerations of race, and notes that when a court becomes "preoccupied with abstract standards, it risks sacrificing common sense at the altar of formal consistency." *Id.* at 2122.

98. [Adarand, 115 S. Ct. at 2123-24 \(Stevens, J., dissenting\)](#). Justice Stevens substantiated his reasoning by pointing to the deference due Congress as a co-equal branch and as the National Legislature, the specific constitutional mandate given to Congress to enforce the Fourteenth Amendment, and the consistent recognition of these actualities by the Court in prior affirmative action cases. *Id.*

99. [Id. at 2126](#). Justice Stevens was particularly critical of the *Adarand* Court's overruling of *Metro Broadcasting*, and undermining of *Fullilove* by "recasting the standard on which it rested and by calling even its holding into question." *Id.* Both of these earlier cases decided important, unique, and difficult questions, despite the *Adarand* Court's disingenuous insinuations to the contrary. *Id.* at 2128. That the *Adarand* Court provided a different answer to a similar question "cannot fairly be characterized as merely 'restoring' previously settled law." *Id.*

100. [Id. at 2127](#). Further, Justice Stevens argued that *Fullilove* should govern in this case, and that the carefully crafted scheme outlined in *Adarand* should be affirmed, especially when considered against the significantly less flexible statute that survived strict scrutiny in *Fullilove*. *Id.* at 2128-30.

101. The *Croson* Court was able to arrive at a consensus regarding the standard to be used in all state and local remedial race actions, pursuant to the Fourteenth Amendment. *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989). However, the *Adarand* Majority marked the first time the Court enunciated a single standard of review for all racial classifications, imposed by federal (implicating Fifth Amendment requirements), state, or local actors. [Adarand, 115 S. Ct. at 2112](#).

102. One bizarre possibility which could result from the universal application of strict scrutiny to all race-based actions, regardless of benign or invidious purpose, would be to subject remedial programs addressing racial discrimination to a more stringent standard of review than that applied to gender-based remedial programs, which are only subject to intermediate scrutiny. [Adarand, at 2122](#) (Stevens, J., dissenting). The net effect would be gender-based affirmative action programs which are more easily upheld than race-based affirmative actions. The obvious irony is that women will enjoy better treatment under the Equal Protection Clause than blacks, who were the intended primary beneficiary group of the Fourteenth Amendment. *Id.* Justice Stevens raised this specter in his dissent, rebuking the majority's claim to "consistency." *Id.* See also Roy L. Brooks, *The Affirmative Action Issue: Law, Policy, and Morality*, 22 Conn. L. Rev. 323, 350 (1990). This possibility was also noted by Professor Michael Rosenfeld, who observed: "This is not the first time the court [sic] has come up with a test that does not make sense in the real world." Susan E. Kinsman, *Business Operated by Women Escape Blow to Affirmative Action*, HARTFORD COURANT, June 16, 1995, at A 15.

103. *Adarand*, 115 S. Ct. at 2117. "The unhappy persistence of both the practice and the lingering effects of racism in this country is an unfortunate reality, and the government is not disqualified from acting in response to it." *Id.*

104. [Id. at 2108-14.](#)

105. Tribe, *supra* note 11, at 1712.

It would defy not only the Supreme Court's decisions but the fundamental purposes of the equal protection clause to conclude that the Constitution forbids all such inclusive remedial measures [as affirmative action], or requires that such measures be treated in exactly the same way as the invidious discrimination of the nation's past.

Id. The *Adarand* Majority bases its position on the premise that equal protection guarantees must mean the same to each individual in application, without regard to race. [Adarand, 115 S. Ct. at 2108](#) ("Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination." (quoting Regents of Univ. of California v. Bakke, 438 U.S. 265, 289-90 (1978))). However, the *Adarand* Court ignores the fundamental distinction between invidious discrimination against the minority, and the incidental costs imposed by the majority on themselves to "provide a benefit to a disadvantaged minority." *Adarand*, 115 S. Ct. at 2122 (Stevens, J., dissenting). The latter can be "entirely consistent with the ideal of equality." *Id.* at 2123.

106. [Id. at 2113-14.](#)

107. Justice Stevens noted: "There is no moral or constitutional equivalence between a policy that is designed to perpetuate a caste system and one that seeks to eradicate racial subordination." [Adarand, 115 S. Ct. at 2120 \(Stevens, J., dissenting\)](#).

In his dissent in *Croson*, Justice Marshall elaborated on this point to illustrate his reasoning for opposing the Court's adoption of strict scrutiny as the standard of review of benign race classifications.

Racial classifications 'drawn on the presumption that one race is inferior to another or because they put the weight of government behind racial hatred and separatism' warrant the strictest judicial scrutiny because of the very irrelevance of these rationales. By contrast, racial classifications drawn for the purpose of remedying the effects of discrimination that itself was race-based have a highly pertinent basis: [the persistence of continuing racism] continues to scar our society.

City of Richmond v. J. A. Croson Co., 488 U.S. 469, 551 (1989) (Marshall, J., dissenting).

108. Herman Swartz, *The 1986 and 1987 Affirmative Action Cases: It's All Over But the Shouting*, 86 MICH. L. REV. 524, 548 (1987).

109. [Cf. Adarand, 115 S. Ct. at 2123 n.5 \(Stevens, J., dissenting\)](#) (discussing the ability of the legislature to alter a program if it becomes apparent that it stigmatizes the intended

beneficiaries, and noting that this would not be the case for a government action based on invidious discrimination).

110. Ely, *supra* note 22, at 735-36.

111. To equate the incidental burdens, or "discriminatory" effect suffered by white males as a result of affirmative action programs to the centuries of calculated and systematic racism to which minorities (especially blacks) have been subjected in this country is "morally offensive." Swartz, *supra* note 108, at 551.

Can one seriously equate a preference intended to remedy centuries of discrimination even if only 'societal discrimination' the existence of which all concede with the brutality inflicted on blacks and other minorities by racist laws and practices? The preference may take away some benefits from some white men, but none of them is being beaten, lynched, denied work, forced to take the dirtiest jobs, or stigmatized as an inferior being. [The problems white men experience because of set-aside programs] are not in the same moral universe as the brutalities inflicted by racism on blacks.

Id. at 551-52.

112. One commentator argues that affirmative action remedies are not "reverse discrimination," but, from a group perspective, simply a "self-correcting mechanism employed by elite white males on behalf of their group. . . . When white male power-brokers decide to give minorities and females a bigger (albeit, still relatively small) piece of the American pie, that can hardly be called 'reverse discrimination' it can only be called sharing." Brooks, *supra* note 102, at 352.

Despite thirty years of affirmative action, recent statistics indicate that white males still disproportionately receive most societal benefits. While women and minority males comprise 57% of the U.S. workforce, they are employed in only 7% of the job categories. Kandel, *supra* note 4, at 21. The top executive ranks of large corporations remain controlled by white males. *Id.* The senior managers at Fortune 500 and Fortune 1000 companies are 97% and 95% men respectively. *Id.* at 22. Blacks are twice as likely to be denied bank loans and have unemployment rates that are sometimes double that of whites. Ellen Debenport, *Clinton Says Affirmative Action Good For America*, St. Petersburg Times, July 20, 1995, at A1. Women still earn only 72% as much as men do for comparable jobs, and a 1993 Wall Street Journal report showed that in the 1990-91 recessions, blacks lost 59,479 jobs, while whites *gained* 71,144 jobs. Donna Britt, *I'll Go With My Feelings on Affirmative Action*, Newsday, July 25, 1995, at A26. In 1993, the median income of white households was \$32,960 and only \$19,533 for black households; in 1992, 46.6% of black children under age 18 lived in poverty, compared with 16.9% of white children; black babies in the U.S. are twice as likely to die within the first year of life as white babies, and black women are more than twice as likely to die within five years of a breast cancer diagnosis as are white women; in November, 1994, the

unemployment rate for black adults was 9.2%, more than double the 4.3% for whites, and 31.7% of black teenagers looking for work could not find it, compared with 12.9% of white youths similarly looking. Carl T. Rowan, *The Myths About Affirmative Action*, SAN DIEGO UNION-TRIBUNE, Jan. 3, 1995, at B7.

113. In his dissent in *Bakke*, Justice Blackmun declared: "In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently". *Regents of the Univ. of California v. Bakke*, 438 U.S. 265, 407 (1978) (Blackmun, J., separate opinion).

114. A suspect class is identified by statute, and refers to a group which has been historically victimized by purposeful discrimination. *See supra* notes 18, 22. Classifications which disfavor such groups are subject to strict scrutiny. *See San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973). The Court has identified only race and national origin as grounds for suspect classification. In its famous footnote four in *United States v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938), the Court indicated that a more heightened level of scrutiny may be appropriate when governmental action is motivated by "prejudice against discrete and insular minorities," who would thereby be a suspect class. *Id.* The Court has identified "traditional indicia of suspectness" as whether a group has been "saddled with such disabilities, or subjected to such history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Rodriguez*, 411 U.S. at 28.

Professor Laurence Tribe defines suspect classifications as those groups which require special judicial protection because the "widespread, insistent prejudice against them" causes them to be "perennial losers in the political struggle." LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1454 (1988).

115. *See id.*

116. Brooks, *supra* note 102, at 353. *See supra* note 112.

117. Brooks, *supra* note 102, at 354. *See supra* note 112.

118. Federal construction contracts of the type in contention in *Adarand*, awarded to minority contractors as mandated by section 8(a) of the Small Business Act, account for approximately 3% of all federal construction contracts. In the wake of *Adarand* small business owner Harold Roach commented:

The thing you ought to try to understand is that you're talking about 3 percent of federal work. You got to always think about the reciprocal: Who's getting the 97 percent? What it boils down to is the Supreme Court is saying, I guess, we want non-minorities to have all the federal contracts.

Lon Wagner, *Affirmative Action Decision: Businesses Weigh Impact of Ruling*, PILOT-STAR, June 14, 1995, at D1. *See supra* note 112.

119. *But see* *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 527 (1989) (Scalia, J., concurring in judgment) (quoting in part ALEXANDER BICKEL, *THE MORALITY OF CONSENT* 133 (1975)) (arguing that all race-conscious classifications, however "benign," are unconstitutional because they violate the sense of equal worth and dignity of those adversely affected by them. Even though benefits accrue that clearly outweigh the light burdens imposed, the race-conscious measure can not be any more acceptable.).

120. A fundamental right is one that is explicitly or implicitly protected by the Constitution, thereby triggering strict scrutiny. Examples are the right of interstate travel, voting, and criminal appeals. *See* *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973) (holding that there was no fundamental right to equality in public school education); Gunther, *supra* note 18, at 8-16 (discussing fundamental rights analysis in equal protection doctrine).

121. *Id.*

122. 488 U.S. 469, 535 (1989) (Marshall, J., dissenting).

123. *See supra* note 18.

124. Strict scrutiny review of remedial race classifications has been roundly criticized by commentators. In the wake of *Croson*, affirmative action programs were either scuttled, or so watered down in an effort to achieve the strict scrutiny mandate of *Croson* as to make them ineffective to remedy discrimination against minorities. In other words, they no longer fulfilled the purpose for which they were intended. *See* RUSSELL W. GALLOWAY, *JUSTICE FOR ALL?: THE RICH AND THE POOR IN SUPREME COURT HISTORY 1790-1990* at 177 (1991) (asserting that *Croson* turned the meaning of equal protection on its head by requiring strict scrutiny of affirmative action, which would ensure the continuation of racial inequality); Brooks, *supra* note 102, at 348-50 (asserting that the strict factual predicate requirement of *Croson* would have a chilling effect on voluntary employer affirmative action programs, and that this requirement protects the interests of white males); Nicole Duncan, *Croson Revisited: A Legacy of Uncertainty in the Application of Strict Scrutiny*, 26 COLUM. HUM. RTS. L. REV. 679, 681-83 (1995) (arguing that strict scrutiny standard applied to affirmative action has caused a muddling of the law because it is devoid of substantive content, and that programs which survive strict scrutiny are ineffective in advancing legitimate state interests. "The [incomprehensible] logic behind the *Croson* decision has as its premise the goals of affirmative action as inherently opposing the guarantees of equal protection of the Fourteenth Amendment." *Id.* at 702); Janice R. Franke, *Defining The Parameters of Permissible State and Local Affirmative Action Programs*, 24 GOLDEN GATE U. L. REV. 387, 402 (1994) (asserting that state and local affirmative action programs have been severely harmed under the judicial standards of *Croson*); Rosenfeld, *supra* note 51, at

1761-62 (arguing that the formal application of strict scrutiny to affirmative action is incorrect because it elevates form by ignoring substance and decontextualizes and disaggregates evidence).

The factual predicate mandate of specific findings required for the strict scrutiny imposed by *Croson* and now expanded by *Adarand* places an enormous and costly burden on the intended beneficiaries of equal protection. After *Croson*, affirmative action programs were devastated, and nearly 2,000 lawsuits were spawned, eventually eliminating nearly half of all local and state remedial programs. *Supreme Court Strikes Blow to Preferences*, SMALL BUS. PRESS, June 19, 1995. The cost of statistical disparity studies of the type now required by the Court is staggering, and some courts refuse to accept even this type of evidence as sufficient, based on their readings of *Croson*. A federal court in Philadelphia ruled against such evidence in January, rejecting economist Andrew Brimmer's report as "unadorned speculation." Ted Gest, *Back to the Politicians A Supreme Court Ruling will Fuel The Fight Over Affirmative Action; California*, U.S. NEWS & WORLD REP., June 26, 1995, at 38-39. *Adarand* can only make the burden greater.

An early example of the evisceration of affirmative action programs in the wake of *Adarand* is found in a recent Defense Department announcement, indicating that it will suspend a major contracting rule that last year resulted in \$1 billion in federal business for minority firms. The Court's ruling in *Adarand* was given as the reason for the program's demise. Ann Devroy, *Pentagon to Suspend Set-Aside Rule*, CLEV. PLAIN DEALER, Oct. 22, 1995, at A19.

125. *Cf. Adarand Constructors v. Pena*, 115 S. Ct. 2097, 2128-30 (1995) (Stevens, J., dissenting) (discussing the specific program at issue, and finding it to include carefully crafted forward-looking components).

126. Justice Ginsberg expressed her misgivings over use of the strict scrutiny label, which the majority in *Adarand* insisted on applying to benign race-based programs, because "[t]hat label has usually been understood to spell the death of any governmental action to which a court may apply it." *Adarand*, 115 S. Ct. at 2120 n.1 (Ginsberg, J., dissenting).

127. The colorblind principle did not become contentious until the affirmative action debate began in earnest. Barbara J. Flagg, *"Was Blind, But Now I See": White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 1009-10 (1993).

This shift in theoretical perspective, from the 'neutral' to the avowedly substantive, coincided, of course, with the conceptualization of the 'innocent' white 'victim' of affirmative action. One has to rephrase [Alexander] Bickel's famous remark: Whose ox was being gored at the time when colorblindness took center stage in the equality debate?

Id. See BICKEL, *supra* note 119. See also Frances L. Ansley, *Stirring the Ashes: Race, Class and the Future of Civil Rights Scholarship*, 74 CORNELL L. REV. 993, 1005-23 (1989) (identifying recent change in the affirmative action discourse and analyzing the concept of the "innocent" white affirmative action "victim").

128. For a thorough history of the colorblind principle, from its 1840 inception as an abolitionist argument to its present use in opposition to affirmative action, see ANDREW KULL, *THE COLOR-BLIND CONSTITUTION* (1992) (arguing that the current judicial latitude in this area is too broad and that colorblindness is necessary to prevent further racial subordination).

Contemporaneous legislative history suggests that the Fourteenth Amendment did not intend to exclude all race-conscious actions. See Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753 (1985). The colorblind principle is not found in the text of the Constitution, nor has it been explicitly adopted by the Court. See Laurence H. Tribe, *In What Vision of the Constitution Must the Law Be Color-Blind?*, 20 J. MARSHALL L. REV. 201 (1986). However, the Court did adopt one rule consistent with the colorblind principle by requiring that discriminatory intent be shown in equal protection actions. *Washington v. Davis*, 426 U.S. 229 (1976).

Professor Tribe has observed:

[T]he notion that all racial classifications - the ostensibly and evidently benign no less than the overly malign - are equally "suspect" is not supported by constitutional text, principal, or history Viewing the fourteenth amendment as requiring all race distinctions to be condemned as instances of inequality derives less from any genuine analysis of what the fourteenth amendment has ever meant than from the most sweeping activist reading of *Brown v. Board of Education* . . . [When so read], *Brown* revises the fourteenth amendment . . . by directing the courts . . . to create a general right never to be disadvantaged by law on account of one's race

LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 16-22, at 1525-26 (2d ed. 1988). *But see* William Bradford Reynolds, *Individualism v. Group Rights: The Legacy of Brown*, 93 YALE L. J. 995,998 (1984) (arguing that "colorblindness" is a "moral imperative"); William Van Alstyne, *Rites of Passage: Race, the Supreme Court, and the Constitution*, 46 U. CHI. L. REV. 775, 790-91 (1979) (arguing that the Constitution requires protection against improper use of race by government motivated by political expedience).

129. Neil Gotanda, *A Critique of "Our Constitution is Colorblind,"* 44 STAN. L. REV. 1, 48 (1991) (examining the Court's use of colorblind constitutionalism as a collection of legal themes functioning as a racial ideology which fosters, preserves, and legitimates

white racial domination). See Paul Brest, *Affirmative Action and the Constitution: Three Theories*, 72 IOWA L. REV. 281 (1987).

130. Barbara J. Flagg, *Enduring Principle: On Race, Process, and Constitutional Law*, 82 CAL. L. REV. 935, 960 (1994).

131. Flagg, *supra* note 130, at 968 (discussing this phenomenon as "transparency theory," positing that because whiteness is the social norm, whites tend to equate it with racelessness and to relegate whiteness to the realm of the subconscious, perceiving characteristics associated with them as "race-neutral;" arguing that formal, process-oriented jurisprudence of the type underlying the application of strict scrutiny to affirmative action is "transparently white").

132. T. Alexander Aleinkoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1060, 1105 (1991) (arguing that racial equality will not be possible until blacks are included as full partners in the American experience, that color consciousness, not colorblindness, is required to achieve racial justice).

133. "The victim/perpetrator dichotomy may be recast starkly as the difference between equality of results and equality of opportunity, between de facto and de jure segregation, between substantive and formal equality." ALAN FREEMAN, ANTIDISCRIMINATION LAW: THE VIEW FROM 1989, IN THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 126 (1990).

134. Flagg, *supra* note 130, at 953-58. See generally Gotanda, *supra* note 129.

135. This colorblind position is offered by Justice O'Connor in her [Adarand opinion](#), 115 S. Ct. 2097, 2112 (1995), and by Justice Scalia in his concurrence, [Id. at 2118](#).

136. Gotanda, *supra* note 129, at 4-6 (describing this two-part process of recognition of racial affiliation followed by deliberate suppression of racial considerations as "nonrecognition"). See Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

137. *Id.*

138. *Id.*

139. See also *supra* note 124. In his *Croson* dissent, Justice Marshall bitterly criticized the majority for their "disingenuous . . . disaggregat[ion] of Richmond's local evidence, attacking it piecemeal, and thereby concluding that no single piece of evidence . . . 'standing alone' . . . suffices to prove past discrimination. But items of evidence do not, of course, 'stan[d] alone' or exist in alien juxtaposition; they necessarily work together, reinforcing or contradicting each other." *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 540-41 (1989) (Marshall, J., dissenting). Justice Marshall indicted the Majority for their "unwillingness to come to grips" with the reality of why blacks continue to be

excluded from Richmond's construction industry. *Id.* For a probing discussion of likely reasons for this unwillingness, see Lawrence, *supra* note 136, at 331-36 (arguing that racism is an inescapable experience shared by all Americans, and that because the conscious reality finds it unacceptable, racism is relegated to the unconscious, but that it is no less a factor in our attitudes and actions); Flagg, *supra* note 130, at 1017 n.22 ("Becoming self-consciously white can be a painful process, because whiteness situates us as heirs of a legacy of exploitation and domination of nonwhites, a history upon which most would likely prefer not to dwell.").

140. One commentator describes this decontextualization of evidence as the *Croson* Court's use of "rhetorical devices which diminished the importance of real facts," and compares this to the process of rendering "extrinsic" otherwise probative evidence under the Parol Evidence Rule. Patricia Williams, *The Obliging Shell: An Informal Essay on Formal Equal Opportunity*, 87 MICH. L. REV. 2128, 2129-30 (1989).

[A]s I think about the *Croson* opinion, I cannot help but marvel at how, against a backdrop of richly textured facts and proof on both local and national scales, in a city where more than 50% of the population is black and in which fewer than 1% of contracts awarded are to minorities, . . . not only was 30% too great a set-aside, but that there was *no proof* of discrimination.

Id. See also Kimberle Williams Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988) (asserting that racial subordination continues despite ostensible reforms).

141. Gotanda, *supra* note 129, at 48-50. Justice Marshall discussed this point in his *Croson* dissent, stating that "all persons have equal worth, and it is permissible . . . for government to take account of race to eradicate the present effects of race-based subjugation denying that basic equality." *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 559 (1989) (Marshall, J., dissenting). To limit race-conscious relief "would freeze the status quo that is the very target of all desegregation processes." *Id.* at 538 (quoting *McDaniel v. Barresi*, 402 U.S. 39, 41 (1971)).

142. *But see* Morris B. Abram, *Affirmative Action: Fair Shakers and Social Engineers*, 99 HARV. L. REV. 1312, 1321-22 (1986) (arguing that affirmative action leads to political unrest and stigmatizes its beneficiaries); Richard A. Posner, *The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 SUP. CT. REV. 1, 12 (arguing that affirmative action encourages racial divisiveness); Reynolds, *supra* note 128, at 1002-03 (arguing that mandatory busing is detrimental to public education).

143. *Jeremiah 5:21* (Matthew Henry, *Commentaries [1708-1710], Jeremiah 20*).

144. Dr. W.E.B. DuBois' prescient observation, made in 1904, identified racism as presenting the most significant problem of the twentieth century. W.E.B. DUBOIS, *THE SOULS OF BLACK FOLK* 13 (1904).

145. Morris, *supra* note 60, at 961.