MBELDEF

Minority Business Enterprise Legal Defense and Education Fund, Inc.

Parren J. Mitchell
Founder and Chairman

Anthony W. Robinson
President

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OFFICE OF SECRETARY

July 7, 1995

**VIA HAND DELIVERY**

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Mr. William Caton
Secretary
Federal Communications Commission
1919 M Street, Northwest
Washington, D.C. 20554

Re: Comments on: PP Docket No. 93-253
GN Docket No. 90-314
GN Docket No. ~~93-252~~

Dear Mr. Caton:

The Minority Business Enterprise Legal Defense and Education Fund, Inc. (MBELDEF) is a non-profit public interest organization founded in 1980 by former Maryland Congressman Parren J. Mitchell. In the past, we have offered comments to the Federal Communications Commission (FCC) in the following dockets: PR Docket No. 89-553, PR Docket No. 93-253, PR Docket No. 93-252, PP Docket No. 93-253, MM Docket No. 149 and MM Docket No. 91-140.

Of special interest to MBELDEF has been competitive bidding rules for certain broadband Personal Communications Systems (PCS) licenses/spectrum blocks as well as the FCC's general efforts to encourage ownership diversity within the FCC marketplace.

In the FCC's Further Notice of Proposed Rulemaking released on June 23, 1995, comments were requested from interested parties concerning the FCC's decision to eliminate all race and gender based provisions contained in its bidding rules for the C Block Auction. In addition, the FCC has requested comments concerning the likely effect that the recent decision of Adarand Constructors v. Pena 63 U.S.L.W. 4523 will have upon its substantive efforts to enact and continue such race and gender based provisions.

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## Introduction

On June 13, 1995, the day after the Adarand decision was released, Chairman Reed E. Hundt addressed MBELDEF and twenty co-sponsoring organizations concerning opportunities for minorities and women. In that speech, he emphasized the FCC's commitment to ensure the meaningful participation of minorities and women within the communications revolution. On June 22, 1995 some nine days later, the Washington Post reported that the FCC was about to eliminate preferences for women and minorities in the C Block Auction. On that same day, we directed correspondence to the Chairman expressing our "supreme disappointment" that the above noted preferences would be eliminated for the C Block. We have noted that the opening paragraph of the Further Notice of Proposed Rulemaking the FCC states, "...In preparing these measures, we are mindful of the Commission's obligation and commitment to ensure that the designated entities are afforded opportunities to participate in the provision of spectrum-based services. We are committed to this goal.....We also emphasize that our tentative conclusion to eliminate race and gender based measures does not indicate that we have concluded that race and gender based measures are inappropriate for future spectrum auctions."

Accordingly, MBELDEF makes the following comments concerning efforts to encourage diversity of ownership in the era following Adarand.

## Adarand Constructors v. Pena

Attached hereto as Appendix A is a fourteen page analysis performed by MBELDEF of the Adarand case. In order to completely understand the full implications of Adarand, we recommend that this analysis be studied in conjunction with the decision itself. In our view, it is not appropriate to attempt to provide a synopsis of this case in a mere few paragraphs. However, we do offer the following observations:

1. In writing the majority opinion, Justice O"Connor was careful to point out that the "strict scrutiny" standard was one that could be met and has been met in the past. She expressly stated that the tougher standard now imposed on Congress was not intended to be "strict" in theory and "fatal" in fact. She further observed, "the unhappy persistence of both practice and the lingering effects of racial discrimination against minority groups

in this country is an unfortunate reality, and government is not disqualified from acting in response to it." "When race based action is necessary to further a compelling interest, such action is within constitutional restraints if it satisfies the "narrow tailoring" that this Court set out in previous cases".

2. No government program or statute was declared unconstitutional by Adarand. Furthermore, no FCC program has been invalidated by that decision.

3. Several issues concerning affirmative action and "strict scrutiny" remain unresolved by Adarand. They include:

a. Whether Section 5 of the Fourteenth Amendment affords Congress greater latitude that the States and greater deference from the courts in evaluating the reasonableness of race based remedies?

b. What quantity and quality of evidence is required to satisfy the strict scrutiny standard?

c. Whether strict scrutiny is really "fatal scrutiny" in practice?

d. Whether gender preferences will be held to a lesser standard than strict scrutiny, thereby making it easier to remedy gender discrimination than it is to remedy racial discrimination, despite the latter being the central purpose of the Fourteenth Amendment?

e. Will Congress be able to rely upon factual predicates established by local governments in defense of federal affirmative action programs?

## The FCC Should Perform a Disparity Study To Satisfy the Requirements of Adarand With Respect to Race and Gender Specific Programs

When the Supreme Court declared Richmond's MBE ordinance unconstitutional in the matter of City of Richmond v. J. A. Croson, 488 U.S. 469 (1989), many state and local jurisdictions fearing the threat of legal challenges, voluntarily abandoned their programs. As of 1988, over 190 cities and 36 states had adopted MWBE programs. By 1990, 15 cities, counties, and states voluntarily dismantled their programs, 35 state and local governments were evaluating the status of their programs, and 27 cities, counties and states were facing legal challenges. Presently, there are at

least 90 jurisdictions and agencies that were re-evaluating their MWBE programs and over 30 had voluntarily suspended them. As of August 1993, 55 programs had been sued nationwide; fifteen of them had been successfully defended. Of those successfully defended, most had completed a disparity study, or had programs tied to federal funding (intermediate scrutiny standard at that time). See: Minority Business Development Strategies: A Mosaic Formula by John A. Turner, Jr. and Courtney M. Billups. National Bar Association Magazine Volume 8 Number 6 (Nov-Dec 1994).

Reference is made to Concrete Works of Colorado v. City and County of Denver, 823 F.Supp 821 (D.Colo. 1993). This case involved a Croson challenge to a local ordinance designed to enhance opportunities for minority and women owned businesses. The ordinance was enacted after a disparity study was performed. The ordinance stated that in order to certified as a minority or woman owned enterprise, a business must be 51% owned, managed, and controlled by the minority or woman seeking certification. Additionally, that business must be able to establish proof of past discrimination in the marketplace. Such a business must have been in existence for at least three months and must not exceed certain annual revenue levels. Upon a motion for Summary Judgment, the Chief Judge of that Court upheld the ordinance and ruled that this ordinance did not have the defects that doomed the City of Richmond in Croson. It specifically ruled that this remedy was "narrowly tailored" to redress the consequences of discrimination. Upon appeal, the Tenth Circuit upheld the logic of the Court's ruling concerning the study, but reversed the decision on other grounds. See: 1994 WL 515981 (10th Cir.(Colo)). Ultimately, the Supreme Court denied certiorari on March 6, 1995 while Adarand was still pending. This case was a victory for the proponents of the study.

The lesson to be learned in Concrete Works is that if a sufficiently "narrowly tailored" statute is enacted following a properly constructed disparity study, it will be upheld. Croson and, arguably, Adarand merely set forth a "formula" for the construction of a successful study. This conclusion is especially significant since Justice O"Connor wrote the Court's opinion in both Croson and Adarand.

Thus, with respect to any race or gender specific program, it is clear that the FCC can satisfy Adarand by performing a disparity study which establishes a sufficient "compelling governmental interest".

Contractors Association of Eastern Pennsylvania v. Philadelphia 6 F.3d (3 Cir 1993) contains a very good analysis of the issues that a disparity study should address. There is a need for substantive quantitative and anecdotal analyses of the marketplace concerning topics such as procurement records, capital market analyses, barriers to market entry etc. Interviews with businesspersons and business leaders along with econometrical analyses are essential. While the viability of the Pennsylvania statute in question has been problematic over the years for other reasons, the decision in this case is very instructive. Furthermore, it cited all of the existing cases on this topic.

One other question that is often raised is whether a study conducted after the enactment of a program can validate that program. Coral Construction Co. v. King County, 941 F.2d 910 (9th Cir. 1991) and Eastern Contractors Association supra state that such "post enactment" data is acceptable to support existing programs.

In the view of MBELDEF, therefore, the FCC may use a post enactment study to support an existing race or gender conscious program.

Conclusion

To quote our Founder, we must be ever vigilant to insure that we take steps to desegregate the markeplace and promote more diversity of FCC ownership. Feel free to contact me or our Director of Telecommunications Policy, John A. Turner, if you have any questions.

Very truly yours,

Anthony W. Robinson
President

cc: All Commissioners

MBELDEF

*Minority Business Enterprise Legal Defense and Education Fund, Inc.*

*Parren J. Mitchell*
*Founder and Chairman*

*Anthony W. Robinson*
*President*

**MEMORANDUM**

**TO:** The Honorable Parren J. Mitchell, Chairman
Anthony W. Robinson, President
MBELDEF Board of Directors and Members
Other Interested Parties

**FROM:** Franklin M. Lee
Chief Counsel, MBELDEF

**RE:** An Analysis of the June 12, 1995, U.S. Supreme Court Decision in Adarand Constructors, Inc. v. Pena

**DATE:** June 23, 1995

## I. Statement of the Case

In 1989, the Central Federal Lands Highway Division (CFLHD), which is part of the United States Department of Transportation (DOT), awarded the prime contract for a highway construction project in Colorado to Mountain Gravel & Construction Company. Mountain Gravel then solicited bids from subcontractors for the guardrail portion of the project. Adarand, a Colorado-based highway construction company specializing in guardrail work, submitted the low bid. Gonzales Construction Company submitted a higher bid.

Gonzales Construction Company is certified as a small business controlled by "socially and economically disadvantaged individuals." However, the record in this case is presently unclear as to which federal or local statute or regulatory scheme provided for the certification of Gonzales Construction Company. Accordingly, it is uncertain as to whether Gonzales Construction Company was certified as a Disadvantaged Business Enterprise ("DBE") by virtue of a rebuttable presumption of disadvantage based solely upon race. It is also unclear whether Adarand sought to be certified as a socially and economically disadvantaged firm or could have been certified as such.

The prime contract's terms provided that Mountain Gravel would receive additional compensation via the Subcontractor Compensation Clause ("SCC") if it hired DBE subcontractors. Adarand was not certified as a DBE. Therefore, in order to qualify for additional compensation, Mountain Gravel decided to award the subcontract to Gonzales despite Adarand's lower bid. Nevertheless, Mountain

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Gravel's chief estimator submitted an affidavit in support of Adarand's lawsuit attacking the constitutionality of that additional compensation. That affidavit stated that Mountain Gravel would have accepted Adarand's bid had it not been for the additional payment it received by hiring Gonzales instead.

Federal law requires that a subcontracting clause similar to the one used here must appear in most federal agency contracts. Such subcontractor clauses must state that "[t]he contractor shall presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities, <u>or any other individual found to be disadvantaged by the [Small Business] Administration</u> pursuant to section 8(a) of the Small Business Act." 15 U.S.C. §§ 637(d)(2), (3). [Emphasis added.]

After losing the guardrail subcontract to Gonzales because of the subcontracting compensation clause, Adarand filed suit against various federal officials in the U.S. District Court for Colorado, claiming that the race-based presumptions involved in the use of subcontracting compensation clauses violate Adarand's right to equal protection under the Fifth Amendment of the U.S. Constitution. The District Court granted the Government's motion for summary judgment. <u>Adarand Constructors, Inc. v. Skinner</u>, 790 F. Supp. 240 (1992). The Court of Appeals for the Tenth Circuit affirmed. 16 F.3d 1537 (1994). These lower court decisions were predicated upon "a lenient standard, resembling intermediate scrutiny" set forth in <u>Fullilove v. Klutznick</u>, 448 U.S. 448 (1980), in assessing the constitutionality of federal race-based action. This "lenient standard" was further developed in <u>Metro Broadcasting, Inc. v. FCC</u>, 497 U.S. 547 (1990). The U.S. Supreme Court granted Petitioner Adarand's request for a Writ of Certiorari. 512 U.S. _____ (1994).

Petitioner Adarand sought declaratory and injunctive relief against any future use of subcontractor compensation clauses.

The issues presented to the Supreme Court in this case were as follows:

1. Whether Adarand has standing to seek forward-looking relief?

2. Whether race-based rebuttable presumptions used in some certification determinations under the federal Subcontracting Compensation Clause are subject to "strict scrutiny" under the Fifth Amendment?

   (a) Is there sufficient justification to depart from the doctrine of stare decisis in overturning the Fullilove and Metro Broadcasting decisions?

   (b) Is strict scrutiny "strict in theory, but fatal in fact"?

3. Is the factual record in this case adequately developed to permit a decision on the merits?

   (a) Does the record clearly indicate whether a race-based classification resulted in Adarand's lost contract?

   (b) Does the record reveal the relevance of distinctions among various schemes for the certification of DBE firms as to application of "strict scrutiny" in this case?

These issues were addressed by the Supreme Court in an opinion delivered on June 12, 1995.

## II. The Holding

In a narrow 5 to 4 majority decision, Justice O'Connor delivered the opinion of the Supreme Court vacating the Tenth Circuit decision in this case and remanding the case back to the lower courts for trial under a "strict scrutiny" standard for federally-enacted race-based classifications.

Justice O'Connor was joined in the majority opinion by Chief Justice Rehnquist, Justice Kennedy, Justice Scalia, and Justice Thomas. Justices Scalia and Thomas issued their own concurring opinions.

Specifically, the majority of the Court held as follows:

1. Adarand has standing to seek forward-looking relief in this case.

2. To the extent that any race-based rebuttable presumptions played a role in the federal Subcontracting Compensation Clause at issue in this case, they must be reviewed under a "strict scrutiny" standard. This means that all government classifications (federal, state, and local) that are based on race are inherently suspect and can only be upheld if they address a "compelling interest" and if they are "narrowly tailored" in furthering that interest.

   (a) Justice O'Connor was joined only by Justice Kennedy in holding that there was sufficient justification to depart from the doctrine of stare decisis in overturning the Fullilove and Metro Broadcasting decisions insofar as they established a more lenient standard than strict scrutiny for evaluating race-based classifications enacted by Congress.

   (b) The majority decision specifically held that "strict scrutiny" was not to be "strict in theory, but fatal in fact." "The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it." The majority opinion cited the 1987 case of United States v. Paradise, 480 U.S. at 167, as an example of where "pervasive, systematic, and obstinate discriminatory conduct" justified a narrowly tailored race-based remedy.

3. The factual record in this case is not adequately developed at this time to permit a decision on the merits. Accordingly, the decision below was vacated and remanded for trial.

   (a) The record does not clearly indicate whether a race-based classification resulted in Adarand losing a contract.

   (b) As various schemes for DBE certification may be implicated in this case, and as some of these schemes may be race neutral or may at least affect the ap-

> plication of "strict scrutiny" in this case, the case must be remanded so that these and other relevant facts can be fully developed in the record. "The question whether any of the ways in which the Government uses subcontractor compensation clauses can survive strict scrutiny, and any relevance distinctions such as these may have to that question, should be addressed in the first instance by the lower courts."

Justices Stevens, Ginsburg, Souter, and Breyer dissented from the majority opinion in three separate dissenting opinions. The first dissenting opinion was issued by Justice Stevens, joined by Justice Ginsburg. The second dissenting opinion was issued by Justice Souter, joined by Justices Ginsburg and Breyer. The third dissenting opinion was issued by Justice Ginsburg, joined by Justice Breyer.

## III. Reasoning

### A. Adarand Has Standing

Justice O'Connor concluded that Adarand had standing to seek forward-looking relief because it had made an adequate showing that sometime in the relatively near future it will bid on another government contract that offers financial incentives to a prime contractor for hiring disadvantaged subcontractors. Adarand claimed to bid on every guardrail project in Colorado. According to the majority opinion, precedent required that Adarand allege that the future use of the subcontractor compensation clauses constitutes "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." The Court reasoned that Adarand need not demonstrate that it was or will be the low bidder on a government contract since the injury of this kind results from a discriminatory classification that prevents the plaintiff from competing on an equal footing. The aggrieved party "need not allege that he would have obtained the benefit but for the barrier in order to establish standing."

B. Strict Scrutiny Applies

Justice O'Connor reviewed prior "Equal Protection" precedents including Hirabayashi v. United States, 320 U.S. 81 (1943); Korematsu v. United States, 323 U.S. 214 (1944); and Bolling v. Sharpe, 347 U.S. 497 (1954), to establish that the prohibition of discrimination against any citizen because of race applied equally to the Federal Government and the State governments. O'Connor also cited later cases in contexts other than school desegregation that did not distinguish between the duties of the Federal Government and the States to avoid racial classifications. Loving v. Virginia, 388 U.S. 1, 11 (1967), cited Korematsu for the proposition that "the Equal Protection Clause demands that racial classifications . . . be subjected to the 'most rigid scrutiny'." See also United States v. Paradise, 480 U.S. 149, 166 n.16 (1987) (plurality opinion of Brennan, J.) ("[T]he reach of the equal protection guarantee of the Fifth Amendment is coextensive with that of the Fourteenth").

Having established a congruence between equal protection analysis under the Fifth and Fourteenth Amendments, Justice O'Connor then followed the line of recent cases in which "strict scrutiny" was articulated as the applicable standard for State-based racial classifications. See Regents of University of California v. Bakke, 438 U.S. 265, 287-288 (1978); Wygant v. Jackson Board of Education, 476 U.S. 267 (1986); and Richmond v. J. A. Croson Co., 488 U.S. 469 (1989).

Justice O'Connor then went on to characterize these historical precedents on equal protection analysis as consistently embracing three principles:

1. Skepticism - any governmental preference based on race has been subjected to close review, examination, and scrutiny.

2. Consistency - the standard of review for such racial classifications is not affected by the race of the beneficiary of that classification.

3. Congruence - equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment.

Therefore, Justice O'Connor concluded that because "strict scrutiny" was the appropriate standard of review for racial classifications promulgated by State Governments under the Fourteenth Amendment, it necessarily followed that strict scrutiny was also the appropriate standard of review for racial classifications promulgated by the Federal Government under the Fifth Amendment.

In reaching this conclusion, the Court acknowledged at least two precedents that contained contrary language suggesting that a lesser standard of review should be imposed for Congressionally enacted racial classifications. See Fullilove v. Klutznick, 448 U.S. 448 (1980), and Metro Broadcasting v. FCC, 497 U.S. 547 (1990). However, Justice O'Connor diminished the importance of these two precedents by characterizing them as being inconsistent with the doctrine of well-reasoned prior precedents that were "intrinsically sounder." Moreover, Justice O'Connor noted that this "strict scrutiny" standard had proven to be a workable one over time in that there were instances wherein governmental race-based preferences had survived strict scrutiny. See United States v. Paradise, 480 U.S. at 167. See also, Fullilove v. Klutznick, 448 U.S., at 496 (Powell, J., concurring) (Justice Powell expressed his view that the plurality opinion had essentially applied "strict scrutiny" as described in his Bakke opinion, i.e., it had determined that the set-aside was "a necessary means of advancing a compelling governmental interest" - and had done so correctly.). Accordingly, to the extent that Fullilove and Metro Broadcasting contained language suggesting a more lenient standard than strict scrutiny for federal racial classifications, they were expressly overruled and/or limited.

C. The Record Is Not Adequately Developed to Reach Merits

There were several reasons given by Justice O'Connor for remanding the case instead of deciding it on the merits:

1. The legal landscape has been significantly altered by this decision;

2. The Court of Appeals upheld the challenged statutes and regulations on the basis of the application of a somewhat different standard than that enunciated here (i.e., "narrowly tailored to achieve [their] significant governmental purpose of providing sub-

contracting opportunities for small disadvantaged business enterprises");

3. The Court of Appeals did not address the question of whether there was "any consideration of the use of race-neutral means to increase minority business participation" in government contracting; and

4. Unresolved questions remain concerning the details of complex regulatory regimes implicated by the use of subcontractor compensation clauses. For example, the Small Business Administration's 8(a) program requires an individualized inquiry into the disadvantage of every participant, whereas the DOT's regulations implementing STURAA § 106(c) do not require such individualized inquiries.

Accordingly, the majority decided that it was best to remand this case so that these questions could be addressed, and the relevance of any factual distinctions could be explored in the first instance by the lower courts.

## IV. Analysis of Concurring Opinions

There were separate concurring opinions written by Justices Thomas and Scalia.

Justice Thomas expressly agreed with the majority's opinion that all government classifications based on race are subject to strict scrutiny. He then severely criticized Justice Stevens' and Justice Ginsburg's dissents and characterized them as advocating "a racial paternalism exception to the principle of equal protection." He stated that it was irrelevant whether a government's racial classifications are drawn by those who wish to oppress a race or by those who have a sincere desire to help those thought to be disadvantaged. He stated further that while it is true that invidious discrimination is an engine of oppression and that remedial racial preferences reflect a desire to foster equality in society, there can be no doubt that "racial paternalism and its unintended consequences can be as poisonous and pernicious as any other form of discrimination." He claimed that so-called "benign" discrimination stamps minorities with a badge of inferiority and

may cause them to develop dependencies or to adopt an attitude that they are "entitled" to preferences.

Comment: [Curiously, Justice Thomas failed to address the long-standing stigmas of inferiority placed upon minorities by invidious racial discrimination and the harmful effects that result from such racial exclusion when left unremedied. The racial stereotypes of incompetence and inferiority were born long before affirmative action. These negative stereotypes and stigmas could only flourish in the absence of concrete examples to the contrary. Indeed, it was affirmative action that resulted in the introduction of qualified minorities into fields of endeavor from which they had previously been excluded, thereby shattering the mythical racial stereotypes of inferiority and incompetence.]

Justice Scalia declined to join Justice O'Connor in her opinion regarding the appropriateness of departure from the doctrine of stare decisis in this case. However, while Justice Scalia embraced the opinion of the Court insofar as it imposed "strict scrutiny" on all government racial classifications, he stated further that in his view, government can never have a "compelling interest" in discriminating on the basis of race in order to "make up" for past racial discrimination in the opposite direction. While Justice Scalia believed it would be unlikely, if not impossible, that the challenged program would survive under his understanding of strict scrutiny, he was content to leave that to be decided on remand.

Comment: [This makes Justice Scalia the first and (with the possible exception of Justice Thomas) the only Justice to take the position that strict scrutiny is fatal scrutiny.]

## V. Analysis of Dissenting Opinions

There were three dissenting opinions. Justice Stevens was joined by Justice Ginsburg in a dissent that made the following points:

1. The doctrine of stare decisis requires this Court to follow the controlling precedents of Fullilove and Metro Broadcasting and affirm the judgment below.

2. The Court's concept of "skepticism" when reviewing governmental racial classifications is a sound one. However, as the opinions in Fullilove demonstrate, substantial agreement on the standard to be applied does not necessarily lead to agreement on the resolution of those cases. Accordingly, the Court's comments on "consistency", "congruence", and stare decisis should be evaluated with skepticism also.

3. The concept of "consistency" should not require the Court to view an attempt by the majority to exclude members of a minority race from a regulated market as equivalent to a subsidy that enables a relatively small group of newcomers to enter that market. Such differences are relevant and should affect the application of a "strict scrutiny" standard. Benign and well-intentioned racial classifications should be afforded greater deference than invidious and pernicious racial classifications. The "consistency" approach embraced by the majority will produce the anomalous result that the Government can more easily enact affirmative action programs to remedy discrimination against women than it can enact affirmative action programs to remedy discrimination against African Americans - even though the primary purpose of the Equal Protection Clause was to end discrimination against the former slaves. When a Court becomes preoccupied with abstract standards, it risks sacrificing common sense at the alter of formal consistency.

4. The majority's opinion regarding the concept of "congruence" incorrectly assumes there is no difference between a decision by Congress to adopt an affirmative action program and such a decision by a State or a municipality. Congressional action is due greater deference by the Court than State action because of Section 5 of the Fourteenth Amendment. As Justice O'Connor noted in her plurality opinion in Croson, ". . . Congress, unlike any State or political subdivision, has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment. The power to 'enforce' may at times also include the power to define situations which Congress determines

threatens principles of equality and to adopt prophylactic rules to deal with those situations. The Civil War Amendments themselves worked a dramatic change in the balance between Congressional and State power over matters of race." Croson, 488 U.S. at 490.

Comment: [Justice O'Connor and Justice Scalia are completely silent in their response to Justice Stevens' references to their prior opinions differentiating Congressional authority under Section 5 of the Fourteenth Amendment from State authority.]

5. The majority opinion improperly rejected the doctrine of stare decisis in this case. This was only the third case decided by this Court in which the constitutionality of a federal affirmative action program was considered. Prior to this decision, the programs were upheld. See Fullilove v. Klutznick, 448 U.S. 448 (1980), and Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990). There was no inconsistency in those two prior opinions. Therefore, as these were the only existing precedents that were on point, the Adarand decision was an unjustifiable departure from settled law.

6. In any event, the program at issue in Adarand is far less objectionable and far more narrowly tailored than the one that was upheld in Fullilove. Moreover, the Congressional record is far stronger in support of affirmative action than it was in 1980 in Fullilove.

Justice Souter was joined by Justice Ginsburg and Justice Breyer in a dissent that made the following points:

1. Stare decisis compels the application of Fullilove. Although Fullilove did not reflect a doctrinal consistency, its several opinions produced a result on shared grounds that Adarand did not attack: that discrimination in the construction industry has been subject to government acquiescence, with effects that remain and that may be addressed by some preferential treatment falling within

the Congressional power under Section 5 of the Fourteenth Amendment.

2. Nothing in the Adarand majority opinion disturbs current precedent regarding the "broad" and "unique" powers of Congress to remedy discrimination under Section 5 of the Fourteenth Amendment.

3. The transition from the Fullilove plurality view to today's strict scrutiny standard for federal affirmative action does not signal a change in the standard by which the burden of a remedial racial preference is to be judged as reasonable or not at any given time. When some members of the historically favored race are hurt by racially preferential remedies, however innocent they may be of any personal responsibility for any discriminatory conduct, the reasonableness of this price is determined by several factors. These factors include the temporary nature of the remedy, facts about the current effects of past discrimination, the necessity for a preferential remedy, and the suitability of the preferential scheme.

Justice Ginsburg was joined by Justice Breyer in a dissent that made the following points:

1. Large deference is owed by the Judiciary to Congress' institutional competence and constitutional authority to overcome historic racial subjugation.

2. Justice Harlan, the advocate of a "color-blind" Constitution, stated:

> "The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty."

Plessy v. Ferguson, 163 U.S. 537 (1896).

3. The lingering effects of a system of racial caste only recently ended are evident in our workplaces, markets, and neighborhoods. Job applicants with identical resumes, qualifications, and interview styles still experience different receptions, depending on their race. White and African American consumers still encounter different deals. People of color looking for housing still face discriminatory treatment by landlords, real estate agents, and mortgage lenders. Minority entrepreneurs sometimes fail to gain contracts though they are the low bidders, and they are sometimes refused work even after winning contracts. Bias, both conscious and unconscious, reflecting traditional and unexamined habits of thought, keeps up barriers that must come down if equal opportunity and nondiscrimination are ever genuinely to become this country's law and practice.

4. Court review under a "strict scrutiny" standard of review can ensure that preferences are not so large as to trammel unduly upon the opportunities of others or interfere too harshly with legitimate expectations of persons in once-preferred groups. However, "strict scrutiny" should also differentiate between the use of a "welcome mat" and a "no trespassing sign."

## VI. Unanswered Questions

The following issues concerning affirmative action and "strict scrutiny" have been left unresolved by the Adarand decision:

1. Whether Section 5 of the Fourteenth Amendment affords Congress greater latitude than the States and greater deference from the courts in evaluating the reasonableness of race-based remedies?

2. What quantity and quality of evidence is required to satisfy the strict scrutiny standard?

3. Whether strict scrutiny is really "fatal scrutiny" in practice?

4. Whether gender preferences will be held to a lesser standard than strict scrutiny, thereby making it easier to remedy gender

discrimination than it is to remedy racial discrimination, despite the latter being the central purpose of the Fourteenth Amendment?

5. Whether voluntary race-based preferences will more easily withstand "strict scrutiny" than rigid mandatory race-based preferences?

6. Will Congress be able to rely upon factual predicates established by local governments in defense of federal affirmative action programs?

## VII. Future Implications

In all likelihood, it will be at least two-to-three years before the Supreme Court revisits these issues in Adarand or a similar case that is currently in the trial stage. Until that time, we are not likely to have any greater clarity on the quantum and quality of evidence that the strict scrutiny standard imposes on government. As Justice Souter's dissenting opinion pointed out, even Justice O'Connor had previously acknowledged in Croson that Congress' broad power under Section 5 of the Fourteenth Amendment to remedy the effects of discrimination is "unlike [that of] any state or political subdivision." While this issue has been delicately sidestepped for the moment, it remains to be seen whether the Supreme Court's future application of strict scrutiny to Congressional authority will precipitate a constitutional crisis between these supposedly "co-equal" branches of government.

Similarly, while the current Congressional record with respect to marketplace discrimination and appropriate race-based remedies is certainly far more extensive and compelling than the record relied upon successfully in Fullilove, it remains to be seen whether the Court is honest in its claim that strict scrutiny is "not fatal in fact." It is likely that for the immediate future, this question will be answered on a case-by-case basis. (Only Justice Scalia has expressly indicated otherwise.) Accordingly, in the interim, Congressional remedies for discrimination should remain intact until such time as they are challenged and overturned in court.

FML/smb