SUPREME COURT OF THE UNITED STATES

No. 93–1841

ADARAND CONSTRUCTORS, INC., PETITIONER *v.* FEDERICO PENA, SECRETARY OF TRANSPORTATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

[June 12, 1995]

JUSTICE O'CONNOR announced the judgment of the Court and delivered an opinion with respect to Parts I, II, III-A, III-B, III-D, and IV, which is for the Court except insofar as it might be inconsistent with the views expressed in JUSTICE SCALIA's concurrence, and an opinion with respect to Part III-C in which JUSTICE KENNEDY joins.

Petitioner Adarand Constructors, Inc., claims that the Federal Government's practice of giving general contractors on government projects a financial incentive to hire subcontractors controlled by "socially and economically disadvantaged individuals," and in particular, the Government's use of race-based presumptions in identifying such individuals, violates the equal protection component of the Fifth Amendment's Due Process Clause. The Court of Appeals rejected Adarand's claim. We conclude, however, that courts should analyze cases of this kind under a different standard of review than the one the Court of Appeals applied. We therefore vacate the Court of Appeals' judgment and remand the case for further proceedings.

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 contract. Adarand, a Colorado-based highway construction company specializing in guardrail work, submitted the low bid. Gonzales Construction Company also submitted a bid.

The prime contract's terms provide that Mountain Gravel would receive additional compensation if it hired subcontractors certified as small businesses controlled by "socially and economically disadvantaged individuals," App. 24. Gonzales is certified as such a business; Adarand is not. Mountain Gravel awarded the subcontract to Gonzales, despite Adarand's low bid, and Mountain Gravel's Chief Estimator has submitted an affidavit stating that Mountain Gravel would have accepted Adarand's bid, had it not been for the additional payment it received by hiring Gonzales instead. *Id.*, at 28–31. Federal law requires that a subcontracting clause similar to the one used here must appear in most federal agency contracts, and it also requires the clause to 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, or any other individual found to be disadvantaged by the [Small Business] Administration pursuant to section 8(a) of the Small Business Act." 15 U. S. C. §§637(d)(2), (3). Adarand claims that the presumption set forth in that statute discriminates on the basis of race in violation of the Federal Government's Fifth Amendment obligation not to deny anyone equal protection of the laws.

These fairly straightforward facts implicate a complex scheme of federal statutes and regulations, to which we now turn. The Small Business Act, 72

Stat. 384, as amended, 15 U. S. C. §631 *et seq.* (Act), declares it to be "the policy of the United States that small business concerns, [and] small business concerns owned and controlled by socially and economically disadvantaged individuals, . . . shall have the maximum practicable opportunity to participate in the performance of contracts let by any Federal agency." §8(d)(1), 15 U. S. C. §637(d)(1). The Act defines "socially disadvantaged individuals" as "those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities," §8(a)(5), 15 U. S. C. §637(a)(5), and it defines "economically disadvantaged individuals" as "those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged." §8(a)(6)(A), 15 U. S. C. §637(a)(6)(A).

In furtherance of the policy stated in §8(d)(1), the Act establishes "[t]he Government-wide goal for participation by small business concerns owned and controlled by socially and economically disadvantaged individuals" at "not less than 5 percent of the total value of all prime contract and subcontract awards for each fiscal year." 15 U. S. C. §644(g)(1). It also requires the head of each Federal agency to set agency-specific goals for participation by businesses controlled by socially and economically disadvantaged individuals. *Ibid.*

The Small Business Administration (SBA) has implemented these statutory directives in a variety of ways, two of which are relevant here. One is the "8(a) program," which is available to small businesses controlled by socially and economically disadvantaged individuals as the SBA has defined those terms. The 8(a) program confers a wide range of benefits on participating businesses, see, *e. g.*, 13 CFR §§124.303–124.311, 124.403 (1994); 48 CFR

subpt. 19.8 (1994), one of which is automatic eligibility for subcontractor compensation provisions of the kind at issue in this case, 15 U. S. C. §637(d)(3)(C) (conferring presumptive eligibility on anyone "found to be disadvantaged . . . pursuant to section 8(a) of the Small Business Act"). To participate in the 8(a) program, a business must be "small," as defined in 13 CFR §124.102 (1994); and it must be 51% owned by individuals who qualify as "socially and economically disadvantaged," §124.103. The SBA presumes that Black, Hispanic, Asian Pacific, Subcontinent Asian, and Native Americans, as well as "members of other groups designated from time to time by SBA," are "socially disadvantaged," §124.105(b)(1). It also allows any individual not a member of a listed group to prove social disadvantage "on the basis of clear and convincing evidence," as described in §124.105(c). Social disadvantage is not enough to establish eligibility, however; SBA also requires each 8(a) program participant to prove "economic disadvantage" according to the criteria set forth in §124.106(a).

The other SBA program relevant to this case is the "8(d) subcontracting program," which unlike the 8(a) program is limited to eligibility for subcontracting provisions like the one at issue here. In determining eligibility, the SBA presumes social disadvantage based on membership in certain minority groups, just as in the 8(a) program, and again appears to require an individualized, although "less restrictive," showing of economic disadvantage, §124.106(b). A different set of regulations, however, says that members of minority groups wishing to participate in the 8(d) subcontracting program are entitled to a race-based presumption of social *and* economic disadvantage. 48 CFR §§19.001, 19.703(a)(2) (1994). We are left with some uncertainty as to whether participation in the 8(d) subcontracting program requires an individualized showing of economic disadvantage. In any event, in both the 8(a) and the 8(d) programs, the presumptions of disadvantage are rebuttable if a third party comes forward with evidence suggesting that the participant is not, in fact, either economically or socially disadvantaged. 13 CFR §§124.111(c)-(d), 124.601–124.609 (1994).

The contract giving rise to the dispute in this case came about as a result of the Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub. L. 100–17, 101 Stat. 132 (STURAA), a DOT appropriations measure. Section 106(c)(1) of STURAA provides that "not less than 10 percent" of the appropriated funds "shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals." 101 Stat. 145. STURAA adopts the Small Business Act's definition of "socially and economically disadvantaged individual," including the applicable race-based presumptions, and adds that "women shall be presumed to be socially and economically disadvantaged individuals for purposes of this subsection." §106(c)(2)(B), 101 Stat. 146. STURAA

also requires the Secretary of Transportation to establish "minimum uniform criteria for State governments to use in certifying whether a concern qualifies for purposes of this subsection." §106(c)(4), 101 Stat. 146. The Secretary has done so in 49 CFR pt. 23, subpt. D (1994). Those regulations say that the certifying authority should presume both social and economic disadvantage (*i. e.*, eligibility to participate) if the applicant belongs to certain racial groups, or is a woman. 49 CFR §23.62 (1994); 49 CFR pt. 23, subpt. D, App. C (1994). As with the SBA programs, third parties may come forward with evidence in an effort to rebut the presumption of disadvantage for a particular business. 49 CFR §23.69 (1994).

The operative clause in the contract in this case reads as follows:

> "*Subcontracting*. This subsection is supplemented to include a Disadvantaged Business Enterprise (DBE) Development and Subcontracting Provision as follows:
>
> "Monetary compensation is offered for awarding subcontracts to small business concerns owned and controlled by socially and economically disadvantaged individuals. . . .
>
> "A small business concern will be considered a DBE after it has been certified as such by the U. S. Small Business Administration or any State Highway Agency. Certification by other Government agencies, counties, or cities may be acceptable on an individual basis provided the Contracting Officer has determined the certifying agency has an acceptable and viable DBE certification program. If the Contractor requests payment under this provision, the Contractor shall furnish the engineer with acceptable evidence of the subcontractor(s) DBE certification and shall furnish one certified copy of the executed subcontract(s).

. . . . .

"The Contractor will be paid an amount computed as follows:

"1. If a subcontract is awarded to one DBE, 10 percent of the final amount of the approved DBE subcontract, not to exceed 1.5 percent of the original contract amount.

"2. If subcontracts are awarded to two or more DBEs, 10 percent of the final amount of the approved DBE subcontracts, not to exceed 2 percent of the original contract amount." App. 24–26.

To benefit from this clause, Mountain Gravel had to hire a subcontractor who had been certified as a small disadvantaged business by the SBA, a state highway agency, or some other certifying authority acceptable to the Contracting Officer. Any of the three routes to such certification described above—SBA's 8(a) or 8(d) program, or certification by a State under the DOT regulations—would meet that requirement. The record does not reveal how Gonzales obtained its certification as a small disadvantaged business.

After losing the guardrail subcontract to Gonzales, Adarand filed suit against various federal officials in the United States District Court for the District of Colorado, claiming that the race-based presumptions involved in the use of subcontracting compensation clauses violate Adarand's right to equal protection. The District Court granted the Government's motion for summary judgment. *Adarand Constructors, Inc.* v. *Skinner*, 790 F. Supp. 240 (1992). The Court of Appeals for the Tenth Circuit affirmed. 16 F. 3d 1537 (1994). It understood our decision in *Fullilove* v. *Klutznick*, 448 U. S. 448 (1980), to have adopted "a lenient standard, resembling intermediate scrutiny, in assessing" the constitutionality of federal race-based action. 16 F. 3d, at 1544. Applying that "lenient standard," as further developed in *Metro*

Broadcasting, Inc. v. *FCC*, 497 U. S. 547 (1990), the Court of Appeals upheld the use of subcontractor compensation clauses. 16 F. 3d, at 1547. We granted certiorari. 512 U. S. ___ (1994).

Adarand, in addition to its general prayer for "such other and further relief as to the Court seems just and equitable," specifically seeks declaratory and injunctive relief against any *future* use of subcontractor compensation clauses. App. 22–23 (complaint). Before reaching the merits of Adarand's challenge, we must consider whether Adarand has standing to seek forward-looking relief. Adarand's allegation that it has lost a contract in the past because of a subcontractor compensation clause of course entitles it to seek damages for the loss of that contract (we express no view, however, as to whether sovereign immunity would bar such relief on these facts). But as we explained in *Los Angeles* v. *Lyons*, 461 U. S. 95 (1983), the fact of past injury, "while presumably affording [the plaintiff] standing to claim damages . . . , does nothing to establish a real and immediate threat that he would again" suffer similar injury in the future. *Id.*, at 105.

If Adarand is to maintain its claim for forward-looking relief, our cases require it to allege that the use of subcontractor compensation clauses in the future constitutes "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 560 (1992) (footnote, citations, and internal quotation marks omitted). Adarand's claim that the Government's use of subcontractor compensation clauses denies it equal protection of the laws of course alleges an invasion of a legally protected interest, and it does so in a manner that is "particularized" as to Adarand. We note that,

contrary to the respondents' suggestion, see Brief for Respondents 29–30, Adarand need not demonstrate that it has been, or will be, the low bidder on a government contract. The injury in cases of this kind is that a "discriminatory classification prevent[s] the plaintiff from competing on an equal footing." *General Contractors* v. *Jacksonville*, 508 U. S. ___, ___ (1993) (slip op., at 11). The aggrieved party "need not allege that he would have obtained the benefit but for the barrier in order to establish standing." *Id.*, at ___ (slip op., at 9).

It is less clear, however, that the future use of subcontractor compensation clauses will cause Adarand "imminent" injury. We said in *Lujan* that "[a]lthough `imminence' is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to insure that the alleged injury is not too speculative for Article III purposes—that the injury is `*certainly* impending.'" *Lujan*, *supra*, at 565, n. 2. We therefore must ask whether Adarand has 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.

We conclude that Adarand has satisfied this requirement. Adarand's general manager said in a deposition that his company bids on every guardrail project in Colorado. See Reply Brief for Petitioner 5–A. According to documents produced in discovery, the CFLHD let fourteen prime contracts in Colorado that included guardrail work between 1983 and 1990. Plaintiff's Motion for Summary Judgment in No. 90–C-1413, Exh. I, Attachment A (D. Colo.). Two of those contracts do not present the kind of injury Adarand alleges here. In one, the prime contractor did not subcontract out the guardrail work; in another, the prime contractor was itself a disadvantaged business, and in such cases the contract generally does not

include a subcontractor compensation clause. *Ibid.*; see also *id.*, Supplemental Exhibits, Deposition of Craig Actis 14 (testimony of CFLHD employee that 8(a) contracts do not include subcontractor compensation clauses). Thus, statistics from the years 1983 through 1990 indicate that the CFLHD lets on average one and one half contracts per year that could injure Adarand in the manner it alleges here. Nothing in the record suggests that the CFLHD has altered the frequency with which it lets contracts that include guardrail work. And the record indicates that Adarand often must compete for contracts against companies certified as small disadvantaged businesses. See *id.*, Exh. F, Attachments 1–3. Because the evidence in this case indicates that the CFLHD is likely to let contracts involving guardrail work that contain a subcontractor compensation clause at least once per year in Colorado, that Adarand is very likely to bid on each such contract, and that Adarand often must compete for such contracts against small disadvantaged businesses, we are satisfied that Adarand has standing to bring this lawsuit.

The Government urges that "[t]he Subcontracting Compensation Clause program is . . . a program based on *disadvantage*, not on race," and thus that it is subject only to "the most relaxed judicial scrutiny." Brief for Respondents 26. To the extent that the statutes and regulations involved in this case are race neutral, we agree. The Government concedes, however, that "the race-based rebuttable presumption used in some certification determinations under the Subcontracting Compensation Clause" is subject to some heightened level of scrutiny. *Id.*, at 27. The parties disagree as to what that level should be. (We note, incidentally, that this case concerns only classifications based explicitly on

race, and presents none of the additional difficulties posed by laws that, although facially race neutral, result in racially disproportionate impact and are motivated by a racially discriminatory purpose. See generally *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U. S. 252 (1977); *Washington* v. *Davis*, 426 U. S. 229 (1976).)

Adarand's claim arises under the Fifth Amendment to the Constitution, which provides that "No person shall . . . be deprived of life, liberty, or property, without due process of law." Although this Court has always understood that Clause to provide some measure of protection against *arbitrary* treatment by the Federal Government, it is not as explicit a guarantee of *equal* treatment as the Fourteenth Amendment, which provides that "No *State* shall . . . deny to any person within its jurisdiction the equal protection of the laws" (emphasis added). Our cases have accorded varying degrees of significance to the difference in the language of those two Clauses. We think it necessary to revisit the issue here.

Through the 1940s, this Court had routinely taken the view in non-race-related cases that, "[u]nlike the Fourteenth Amendment, the Fifth contains no equal protection clause and it provides no guaranty against discriminatory legislation by Congress." *Detroit Bank* v. *United States*, 317 U. S. 329, 337 (1943); see also, *e. g.*, *Helvering* v. *Lerner Stores Corp.*, 314 U. S. 463, 468 (1941); *LaBelle Iron Works* v. *United States*, 256 U. S. 377, 392 (1921) ("Reference is made to cases decided under the equal protection clause of the Fourteenth Amendment . . . ; but clearly they are not in point. The Fifth Amendment has no equal protection clause"). When the Court first faced a Fifth Amendment equal protection challenge to a federal racial classification, it adopted a similar approach, with most unfortunate results. In *Hirabayashi* v.

United States, 320 U. S. 81 (1943), the Court considered a curfew applicable only to persons of Japanese ancestry. The Court observed—correctly—that "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality," and that "racial discriminations are in most circumstances irrelevant and therefore prohibited." *Id.*, at 100. But it also cited *Detroit Bank* for the proposition that the Fifth Amendment "restrains only such discriminatory legislation by Congress as amounts to a denial of due process," *ibid.*, and upheld the curfew because "circumstances within the knowledge of those charged with the responsibility for maintaining the national defense afforded a rational basis for the decision which they made." *Id.*, at 102.

Eighteen months later, the Court again approved wartime measures directed at persons of Japanese ancestry. *Korematsu* v. *United States*, 323 U. S. 214 (1944), concerned an order that completely excluded such persons from particular areas. The Court did not address the view, expressed in cases like *Hirabayashi* and *Detroit Bank*, that the Federal Government's obligation to provide equal protection differs significantly from that of the States. Instead, it began by noting that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect . . . [and] courts must subject them to the most rigid scrutiny." 323 U. S., at 216. That promising dictum might be read to undermine the view that the Federal Government is under a lesser obligation to avoid injurious racial classifications than are the States. Cf. *id.*, at 234–235 (Murphy, J., dissenting) ("[T]he order deprives all those within its scope of the equal protection of the laws as guaranteed by the Fifth Amendment"). But in spite of the "most rigid scrutiny" standard it had just set forth, the Court then inexplicably relied on "the

principles we announced in the *Hirabayashi* case," *id.*, at 217, to conclude that, although "exclusion from the area in which one's home is located is a far greater deprivation than constant confinement to the home from 8 p. m. to 6 a. m.," *id.*, at 218, the racially discriminatory order was nonetheless within the Federal Government's power.[1]

In *Bolling* v. *Sharpe*, 347 U. S. 497 (1954), the Court for the first time explicitly questioned the existence of any difference between the obligations of the Federal Government and the States to avoid racial classifications. *Bolling* did note that "[t]he `equal protection of the laws' is a more explicit safeguard of prohibited unfairness than `due process of law,'" *id.*, at 499. But *Bolling* then concluded that, "[i]n view of [the] decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government." *Id.*, at 500.

Bolling's facts concerned school desegregation, but its reasoning was not so limited. The Court's observations that "[d]istinctions between citizens solely because of their ancestry are by their very nature odious," *Hirabayashi*, 320 U. S., at 100, and that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect," *Korematsu*, 323 U. S., at 216, carry no less force in

---

[1]Justices Roberts, Murphy, and Jackson filed vigorous dissents; Justice Murphy argued that the challenged order "falls into the ugly abyss of racism." *Korematsu*, 323 U. S., at 233. Congress has recently agreed with the dissenters' position, and has attempted to make amends. See Pub. L. 100–383, §2(a), 102 Stat. 903 ("The Congress recognizes that . . . a grave injustice was done to both citizens and permanent resident aliens of Japanese ancestry by the evacuation, relocation, and internment of civilians during World War II").

the context of federal action than in the context of action by the States—indeed, they first appeared in cases concerning action by the Federal Government. *Bolling* relied on those observations, 347 U. S., at 499, n. 3, and reiterated "`that the Constitution of the United States, in its present form, forbids, so far as civil and political rights are concerned, discrimination *by the General Government, or by the States*, against any citizen because of his race,'" *id.*, at 499 (quoting *Gibson* v. *Mississippi*, 162 U. S. 565, 591 (1896)) (emphasis added). The Court's application of that general principle to the case before it, and the resulting imposition on the Federal Government of an obligation equivalent to that of the States, followed as a matter of course.

Later cases in contexts other than school desegregation did not distinguish between the duties of the States and the Federal Government to avoid racial classifications. Consider, for example, the following passage from *McLaughlin* v. *Florida*, 379 U. S. 184, a 1964 case that struck down a race-based state law:

> "[W]e deal here with a classification based upon the race of the participants, which must be viewed in light of the historical fact that the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States. This strong policy renders racial classifications `constitutionally suspect,' *Bolling* v. *Sharpe*, 347 U. S. 497, 499; and subject to the `most rigid scrutiny,' *Korematsu* v. *United States*, 323 U. S. 214, 216; and `in most circumstances irrelevant' to any constitutionally acceptable legislative purpose, *Hirabayashi* v. *United States*, 320 U. S. 81, 100." *Id.*, at 191–192.

McLaughlin's reliance on cases involving federal action for the standards applicable to a case involving state legislation suggests that the Court understood

the standards for federal and state racial classifications to be the same.

Cases decided after *McLaughlin* continued to treat the equal protection obligations imposed by the Fifth and the Fourteenth Amendments as indistinguishable; one commentator observed that "[i]n case after case, fifth amendment equal protection problems are discussed on the assumption that fourteenth amendment precedents are controlling." Karst, The Fifth Amendment's Guarantee of Equal Protection, 55 N. C. L. Rev. 541, 554 (1977). *Loving* v. *Virginia*, which struck down a race-based state law, cited *Korematsu* for the proposition that "the Equal Protection Clause demands that racial classifications . . . be subjected to the `most rigid scrutiny.'" 388 U. S. 1, 11 (1967). The various opinions in *Frontiero* v. *Richardson*, 411 U. S. 677 (1973), which concerned sex discrimination by the Federal Government, took their equal protection standard of review from *Reed* v. *Reed*, 404 U. S. 71 (1971), a case that invalidated sex discrimination by a State, without mentioning any possibility of a difference between the standards applicable to state and federal action. *Frontiero*, 411 U. S., at 682–684 (plurality opinion of Brennan, J.); *id.*, at 691 (Stewart, J., concurring in judgment); *id.*, at 692 (Powell, J., concurring in judgment). Thus, in 1975, the Court stated explicitly that "[t]his Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment." *Weinberger* v. *Wiesenfeld*, 420 U. S. 636, 638, n. 2 (1975); see also *Buckley* v. *Valeo*, 424 U. S. 1, 93 (1976) ("Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment"); *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"). We do not understand a few contrary suggestions appearing in cases in which we found special deference to the political branches of the Federal Government to be appropriate, *e. g.*, *Hampton* v. *Mow Sun Wong*, 426 U. S. 88, 100, 101–102, n. 21 (1976) (federal power over immigration), to detract from this general rule.

Most of the cases discussed above involved classifications burdening groups that have suffered discrimination in our society. In 1978, the Court confronted the question whether race-based governmental action designed to *benefit* such groups should also be subject to "the most rigid scrutiny." *Regents of Univ. of California* v. *Bakke*, 438 U. S. 265, involved an equal protection challenge to a state-run medical school's practice of reserving a number of spaces in its entering class for minority students. The petitioners argued that "strict scrutiny" should apply only to "classifications that disadvantage `discrete and insular minorities.'" *Id.*, at 287–288 (opinion of Powell, J.) (citing *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152, n. 4 (1938)). *Bakke* did not produce an opinion for the Court, but Justice Powell's opinion announcing the Court's judgment rejected the argument. In a passage joined by Justice White, Justice Powell wrote that "[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color." 438 U. S., at 289–290. He concluded that "[r]acial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination." *Id.*, at 291. On the other hand, four Justices in *Bakke* would have applied a less stringent standard of review to racial classifications "designed to further remedial purposes," see *id.*, at 359 (Brennan, White, Marshall, and Blackmun, JJ., concurring in judgment in part and dissenting in

part). And four Justices thought the case should be decided on statutory grounds. *Id.*, at 411–412, 421 (STEVENS, J., joined by Burger, C. J., Stewart, and REHNQUIST, JJ., concurring in judgment in part and dissenting in part).

Two years after *Bakke*, the Court faced another challenge to remedial race-based action, this time involving action undertaken by the Federal Government. In *Fullilove* v. *Klutznick*, 448 U. S. 448 (1980), the Court upheld Congress' inclusion of a 10% set-aside for minority-owned businesses in the Public Works Employment Act of 1977. As in *Bakke*, there was no opinion for the Court. Chief Justice Burger, in an opinion joined by Justices White and Powell, observed that "[a]ny preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees." 448 U. S., at 491. That opinion, however, "d[id] not adopt, either expressly or implicitly, the formulas of analysis articulated in such cases as [*Bakke*]." *Id.*, at 492. It employed instead a two-part test which asked, first, "whether the *objectives* of th[e] legislation are within the power of Congress," and second, "whether the limited use of racial and ethnic criteria, in the context presented, is a constitutionally permissible *means* for achieving the congressional objectives." *Id.*, at 473. It then upheld the program under that test, adding at the end of the opinion that the program also "would survive judicial review under either `test' articulated in the several *Bakke* opinions." *Id.*, at 492. Justice Powell wrote separately to express 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. 448 U. S., at 496 (concurring opinion). Justice Stewart (joined by then-JUSTICE REHNQUIST) dissented, arguing that the

Constitution required the Federal Government to meet the same strict standard as the States when enacting racial classifications, *id.*, at 523, and n. 1, and that the program before the Court failed that standard. JUSTICE STEVENS also dissented, arguing that "[r]acial classifications are simply too pernicious to permit any but the most exact connection between justification and classification," *id.*, at 537, and that the program before the Court could not be characterized "as a `narrowly tailored' remedial measure." *Id.*, at 541. Justice Marshall (joined by Justices Brennan and Blackmun) concurred in the judgment, reiterating the view of four Justices in *Bakke* that any race-based governmental action designed to "remed[y] the present effects of past racial discrimination" should be upheld if it was "substantially related" to the achievement of an "important governmental objective"—*i. e.*, such action should be subjected only to what we now call "intermediate scrutiny." 448 U. S., at 518–519.

In *Wygant* v. *Jackson Board of Ed.*, 476 U. S. 267 (1986), the Court considered a Fourteenth Amendment challenge to another form of remedial racial classification. The issue in *Wygant* was whether a school board could adopt race-based preferences in determining which teachers to lay off. Justice Powell's plurality opinion observed that "the level of scrutiny does not change merely because the challenged classification operates against a group that historically has not been subject to governmental discrimination," *id.*, at 273, and stated the two-part inquiry as "whether the layoff provision is supported by a compelling state purpose and whether the means chosen to accomplish that purpose are narrowly tailored." *Id.*, at 274. In other words, "racial classifications of any sort must be subjected to `strict scrutiny.'" *Id.*, at 285 (O'CONNOR, J., concurring in part and concurring in judgment). The plurality then concluded that the school board's interest in

"providing minority role models for its minority students, as an attempt to alleviate the effects of societal discrimination," *id.*, at 274, was not a compelling interest that could justify the use of a racial classification. It added that "[s]ocietal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy," *id.*, at 276, and insisted instead that "a public employer . . . must ensure that, before it embarks on an affirmative-action program, it has convincing evidence that remedial action is warranted. That is, it must have sufficient evidence to justify the conclusion that there has been prior discrimination," *id.*, at 277. Justice White concurred only in the judgment, although he agreed that the school board's asserted interests could not, "singly or together, justify this racially discriminatory layoff policy." *Id.*, at 295. Four Justices dissented, three of whom again argued for intermediate scrutiny of remedial race-based government action. *Id.*, at 301–302 (Marshall, J., joined by Brennan and Blackmun, JJ., dissenting).

The Court's failure to produce a majority opinion in *Bakke*, *Fullilove*, and *Wygant* left unresolved the proper analysis for remedial race-based governmental action. See *United States* v. *Paradise*, 480 U. S., at 166 (plurality opinion of Brennan, J.) ("[A]lthough this Court has consistently held that some elevated level of scrutiny is required when a racial or ethnic distinction is made for remedial purposes, it has yet to reach consensus on the appropriate constitutional analysis"); *Sheet Metal Workers* v. *EEOC*, 478 U. S. 421, 480 (1986) (plurality opinion of Brennan, J.). Lower courts found this lack of guidance unsettling. See, *e. g.*, *Kromnick* v. *School Dist. of Philadelphia*, 739 F. 2d 894, 901 (CA3 1984) ("The absence of an Opinion of the Court in either *Bakke* or *Fullilove* and the concomitant failure of the Court to articulate an analytic framework supporting the judgments makes the position of the lower

federal courts considering the constitutionality of affirmative action programs somewhat vulnerable"), cert. denied, 469 U. S. 1107 (1985); *Williams* v. *New Orleans*, 729 F. 2d 1554, 1567 (CA5 1984) (en banc) (Higginbotham, J., concurring specially); *South Florida Chapter of Associated General Contractors of America, Inc.* v. *Metropolitan Dade County, Fla.*, 723 F. 2d 846, 851 (CA11), cert. denied, 469 U. S. 871 (1984).

The Court resolved the issue, at least in part, in 1989. *Richmond* v. *J. A. Croson Co.*, 488 U. S. 469 (1989), concerned a city's determination that 30% of its contracting work should go to minority-owned businesses. A majority of the Court in *Croson* held that "the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification," and that the single standard of review for racial classifications should be "strict scrutiny." *Id.*, at 493–494 (opinion of O'CONNOR, J., joined by REHNQUIST, C. J., White, and KENNEDY, JJ.); *id.*, at 520 (SCALIA, J., concurring in judgment) ("I agree . . . with JUSTICE O'CONNOR's conclusion that strict scrutiny must be applied to all governmental classification by race"). As to the classification before the Court, the plurality agreed that "a state or local subdivision . . . has the authority to eradicate the effects of private discrimination within its own legislative jurisdiction," *id.*, at 491–492, but the Court thought that the city had not acted with "a `strong basis in evidence for its conclusion that remedial action was necessary,'" *id.*, at 500 (majority opinion) (quoting *Wygant*, *supra*, at 277 (plurality opinion)). The Court also thought it "obvious that [the] program is not narrowly tailored to remedy the effects of prior discrimination." 488 U. S., at 508.

With *Croson*, the Court finally agreed that the Fourteenth Amendment requires strict scrutiny of all race-based action by state and local governments.

But *Croson* of course had no occasion to declare what standard of review the Fifth Amendment requires for such action taken by the Federal Government. *Croson* observed simply that the Court's "treatment of an exercise of congressional power in *Fullilove* cannot be dispositive here," because *Croson*'s facts did not implicate Congress' broad power under §5 of the Fourteenth Amendment. *Croson*, 488 U. S., at 491 (plurality opinion); see also *id.*, at 522 (SCALIA, J., concurring in judgment) ("[W]ithout revisiting what we held in *Fullilove* . . . , I do not believe our decision in that case controls the one before us here"). On the other hand, the Court subsequently indicated that *Croson* had at least some bearing on federal race-based action when it vacated a decision upholding such action and remanded for further consideration in light of *Croson*. *H. K. Porter Co.* v. *Metropolitan Dade County*, 489 U. S. 1062 (1989); see also *Shurberg Broadcasting of Hartford, Inc.* v. *FCC*, 876 F. 2d 902, 915, n. 16 (CADC 1989) (opinion of Silberman, J.) (noting the Court's action in *H. K. Porter Co.*), rev'd *sub nom. Metro Broadcasting, Inc.* v. *FCC*, 497 U. S. 547 (1990). Thus, some uncertainty persisted with respect to the standard of review for federal racial classifications. See, *e. g.*, *Mann* v. *City of Albany, Ga.*, 883 F. 2d 999, 1006 (CA11 1989) (*Croson* "may be applicable to race-based classifications imposed by Congress"); *Shurberg*, *supra*, at 910 (noting the difficulty of extracting general principles from the Court's fractured opinions); *id.*, at 959 (Wald, J., dissenting from denial of rehearing en banc) ("*Croson* certainly did not resolve the substantial questions posed by congressional programs which mandate the use of racial preferences"); *Winter Park Communications, Inc.* v. *FCC*, 873 F. 2d 347, 366 (CADC 1989) (Williams, J., concurring in part and dissenting in part) ("The unresolved ambiguity of *Fullilove* and *Croson* leaves it impossible to reach a firm opinion as to the evidence of discrimination

needed to sustain a congressional mandate of racial preferences"), aff'd *sub nom. Metro Broadcasting*, *supra*.

Despite lingering uncertainty in the details, however, the Court's cases through *Croson* had established three general propositions with respect to governmental racial classifications. First, skepticism: "`[a]ny preference based on racial or ethnic criteria must necessarily receive a most searching examination,'" *Wygant*, 476 U. S., at 273 (plurality opinion of Powell, J.); *Fullilove*, 448 U. S., at 491 (opinion of Burger, C. J.); see also *id.*, at 523 (Stewart, J., dissenting) ("[A]ny official action that treats a person differently on account of his race or ethnic origin is inherently suspect"); *McLaughlin*, 379 U. S., at 192 ("[R]acial classifications [are] `constitutionally suspect'"); *Hirabayashi*, 320 U. S., at 100 ("Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people"). Second, consistency: "the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification," *Croson*, 488 U. S., at 494 (plurality opinion); *id.*, at 520 (SCALIA, J., concurring in judgment); see also *Bakke*, 438 U. S., at 289–290 (opinion of Powell, J.), *i. e.*, all racial classifications reviewable under the Equal Protection Clause must be strictly scrutinized. And third, congruence: "[e]qual protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment," *Buckley* v. *Valeo*, 424 U. S., at 93; see also *Weinberger* v. *Wiesenfeld*, 420 U. S., at 638, n. 2; *Bolling* v. *Sharpe*, 347 U. S., at 500. Taken together, these three propositions lead to the conclusion that any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny. Justice Powell's defense of this

conclusion bears repeating here:

> "If it is the individual who is entitled to judicial protection against classifications based upon his racial or ethnic background because such distinctions impinge upon personal rights, rather than the individual only because of his membership in a particular group, then constitutional standards may be applied consistently. Political judgments regarding the necessity for the particular classification may be weighed in the constitutional balance, [*Korematsu*], but the standard of justification will remain constant. This is as it should be, since those political judgments are the product of rough compromise struck by contending groups within the democratic process. When they touch upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest. The Constitution guarantees that right to every person regardless of his background. *Shelley* v. *Kraemer*, 334 U. S. [1, 22 (1948)]." *Bakke*, 438 U. S., at 299 (opinion of Powell, J.) (footnote omitted).

A year later, however, the Court took a surprising turn. *Metro Broadcasting, Inc.* v. *FCC*, 497 U. S. 547 (1990), involved a Fifth Amendment challenge to two race-based policies of the Federal Communications Commission. In *Metro Broadcasting*, the Court repudiated the long-held notion that "it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government" than it does on a State to afford equal protection of the laws, *Bolling*, *supra*, at 500. It did so by holding that "benign" federal racial classifications need only satisfy intermediate scrutiny, even though *Croson* had recently concluded that such classifications enacted by a State must satisfy strict scrutiny.

"[B]enign" federal racial classifications, the Court said, "—even if those measures are not `remedial' in the sense of being designed to compensate victims of past governmental or societal discrimination—are constitutionally permissible to the extent that they serve *important* governmental objectives within the power of Congress and are *substantially related* to achievement of those objectives." *Metro Broadcasting*, 497 U. S., at 564–565 (emphasis added). The Court did not explain how to tell whether a racial classification should be deemed "benign," other than to express "confiden[ce] that an `examination of the legislative scheme and its history' will separate benign measures from other types of racial classifications." *Id.*, at 564, n. 12 (citation omitted).

Applying this test, the Court first noted that the FCC policies at issue did not serve as a remedy for past discrimination. *Id.*, at 566. Proceeding on the assumption that the policies were nonetheless "benign," it concluded that they served the "important governmental objective" of "enhancing broadcast diversity," *id.*, at 566–567, and that they were "substantially related" to that objective, *id.*, at 569. It therefore upheld the policies.

By adopting intermediate scrutiny as the standard of review for congressionally mandated "benign" racial classifications, *Metro Broadcasting* departed from prior cases in two significant respects. First, it turned its back on *Croson*'s explanation of why strict scrutiny of all governmental racial classifications is essential:

> "Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are `benign' or `remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. Indeed, the purpose of strict

> scrutiny is to `smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen `fit' this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype." *Croson*, *supra*, at 493 (plurality opinion of O'CONNOR, J.).

We adhere to that view today, despite the surface appeal of holding "benign" racial classifications to a lower standard, because "it may not always be clear that a so-called preference is in fact benign," *Bakke*, *supra*, at 298 (opinion of Powell, J.). "[M]ore than good motives should be required when government seeks to allocate its resources by way of an explicit racial classification system." Days, Fullilove, 96 Yale L. J. 453, 485 (1987).

Second, *Metro Broadcasting* squarely rejected one of the three propositions established by the Court's earlier equal protection cases, namely, congruence between the standards applicable to federal and state racial classifications, and in so doing also undermined the other two—skepticism of all racial classifications, and consistency of treatment irrespective of the race of the burdened or benefited group. See *supra*, at 21–22. Under *Metro Broadcasting*, certain racial classifications ("benign" ones enacted by the Federal Government) should be treated less skeptically than others; and the race of the benefited group is critical to the determination of which standard of review to apply. *Metro Broadcasting* was thus a significant departure from much of what had come before it.

The three propositions undermined by *Metro Broadcasting* all derive from the basic principle that the Fifth and Fourteenth Amendments to the Constitution protect *persons*, not *groups*. It follows from that principle that all governmental action based on race —a *group* classification long recognized as "in most

circumstances irrelevant and therefore prohibited," *Hirabayashi*, *supra*, at 100—should be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed. These ideas have long been central to this Court's understanding of equal protection, and holding "benign" state and federal racial classifications to different standards does not square with them. "[A] free people whose institutions are founded upon the doctrine of equality," *ibid.*, should tolerate no retreat from the principle that government may treat people differently because of their race only for the most compelling reasons. Accordingly, we hold today that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests. To the extent that *Metro Broadcasting* is inconsistent with that holding, it is overruled.

In dissent, JUSTICE STEVENS criticizes us for "deliver[ing] a disconcerting lecture about the evils of governmental racial classifications," *post*, at 1. With respect, we believe his criticisms reflect a serious misunderstanding of our opinion.

JUSTICE STEVENS concurs in our view that courts should take a skeptical view of all governmental racial classifications. *Post*, at 1–2. He also allows that "[n]othing is inherently wrong with applying a single standard to fundamentally different situations, as long as that standard takes relevant differences into account." *Post*, at 6. What he fails to recognize is that strict scrutiny *does* take "relevant differences" into account—indeed, that is its fundamental purpose. The point of carefully examining the interest asserted by the government in support of a racial classification, and the evidence offered to show that the classification is needed, is precisely to

distinguish legitimate from illegitimate uses of race in governmental decisionmaking. See *supra*, at 24–25. And JUSTICE STEVENS concedes that "some cases may be difficult to classify," *post*, at 5, and n. 4; all the more reason, in our view, to examine all racial classifications carefully. Strict scrutiny does not "trea[t] dissimilar race-based decisions as though they were equally objectionable," *post*, at 5; to the contrary, it evaluates carefully all governmental race-based decisions *in order to decide* which are constitutionally objectionable and which are not. By requiring strict scrutiny of racial classifications, we require courts to make sure that a governmental classification based on race, which "so seldom provide[s] a relevant basis for disparate treatment," *Fullilove*, *supra*, at 534 (STEVENS, J., dissenting), is legitimate, before permitting unequal treatment based on race to proceed.

JUSTICE STEVENS chides us for our "supposed inability to differentiate between `invidious' and `benign' discrimination," because it is in his view sufficient that "people understand the difference between good intentions and bad." *Post*, at 5. But, as we have just explained, the point of strict scrutiny is to "differentiate between" permissible and impermissible governmental use of race. And JUSTICE STEVENS himself has already explained in his dissent in *Fullilove* why "good intentions" alone are not enough to sustain a supposedly "benign" racial classification: "[E]ven though it is not the actual predicate for this legislation, a statute of this kind inevitably is perceived by many as resting on an assumption that those who are granted this special preference are less qualified in some respect that is identified purely by their race. Because that perception—*especially when fostered by the Congress of the United States*—can only exacerbate rather than reduce racial prejudice, it will delay the time when race will become a truly irrelevant, or at least insignificant, factor. *Unless*

Congress clearly articulates the need and basis for a racial classification, *and also tailors the classification to its justification*, the Court should not uphold this kind of statute." *Fullilove*, *supra*, at 545 (dissenting opinion) (emphasis added; footnote omitted); see also *id.*, at 537 ("Racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification"); *Croson*, *supra*, at 516–517 (STEVENS, J., concurring in part and concurring in judgment) ("Although [the legislation at issue] stigmatizes the disadvantaged class with the unproven charge of past racial discrimination, it actually imposes a greater stigma on its supposed beneficiaries"); *supra*, at 24–25; but cf. *post*, at 5–6 (STEVENS, J., dissenting). These passages make a persuasive case for requiring strict scrutiny of congressional racial classifications.

Perhaps it is not the standard of strict scrutiny itself, but our use of the concepts of "consistency" and "congruence" in conjunction with it, that leads JUSTICE STEVENS to dissent. According to JUSTICE STEVENS, our view of consistency "equate[s] remedial preferences with invidious discrimination," *post*, at 6, and ignores the difference between "an engine of oppression" and an effort "to foster equality in society," or, more colorfully, "between a `No Trespassing' sign and a welcome mat," *post*, at 2, 4. It does nothing of the kind. The principle of consistency simply means that whenever the government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection. It says nothing about the ultimate validity of any particular law; that determination is the job of the court applying strict scrutiny. The principle of consistency explains the circumstances in which the injury requiring strict scrutiny occurs. The application of strict scrutiny, in turn, determines whether a compel-

ling governmental interest justifies the infliction of that injury.

Consistency *does* recognize that any individual suffers an injury when he or she is disadvantaged by the government because of his or her race, whatever that race may be. This Court clearly stated that principle in *Croson*, see 488 U. S., at 493–494 (plurality opinion); *id.*, at 520–521 (SCALIA, J., concurring in judgment); see also *Shaw* v. *Reno*, 509 U. S. ___, ___ (1993); *Powers* v. *Ohio*, 499 U. S. 400, 410 (1991). JUSTICE STEVENS does not explain how his views square with *Croson*, or with the long line of cases understanding equal protection as a personal right.

JUSTICE STEVENS also claims that we have ignored any difference between federal and state legislatures. But requiring that Congress, like the States, enact racial classifications only when doing so is necessary to further a "compelling interest" does not contravene any principle of appropriate respect for a co-equal Branch of the Government. It is true that various Members of this Court have taken different views of the authority §5 of the Fourteenth Amendment confers upon Congress to deal with the problem of racial discrimination, and the extent to which courts should defer to Congress' exercise of that authority. See, *e. g.*, *Metro Broadcasting*, *supra*, at 605–606 (O'CONNOR, J., dissenting); *Croson*, *supra*, at 486–493 (opinion of O'CONNOR, J., joined by REHNQUIST, C. J., and White, J.); *id.*, at 518–519 (KENNEDY, J., concurring in part and concurring in judgment); *id.*, at 521–524 (SCALIA, J., concurring in judgment); *Fullilove*, *supra*, at 472–473 (opinion of Burger, C. J.); *id.*, at 500–502, and nn. 2–3, 515, and n. 14 (Powell, J., concurring); *id.*, at 526–527 (Stewart, J., dissenting). We need not, and do not, address these differences today. For now, it is enough to observe that JUSTICE STEVENS' suggestion that any Member of this Court has repudiated in this case his

or her previously expressed views on the subject, *post*, at 9–13, 17, is incorrect.

"Although adherence to precedent is not rigidly required in constitutional cases, any departure from the doctrine of *stare decisis* demands special justification." *Arizona* v. *Rumsey*, 467 U. S. 203, 212 (1984). In deciding whether this case presents such justification, we recall Justice Frankfurter's admonition that "*stare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience." *Helvering* v. *Hallock*, 309 U. S. 106, 119 (1940). Remaining true to an "intrinsically sounder" doctrine established in prior cases better serves the values of *stare decisis* than would following a more recently decided case inconsistent with the decisions that came before it; the latter course would simply compound the recent error and would likely make the unjustified break from previously established doctrine complete. In such a situation, "special justification" exists to depart from the recently decided case.

As we have explained, *Metro Broadcasting* undermined important principles of this Court's equal protection jurisprudence, established in a line of cases stretching back over fifty years, see *supra*, at 11–23. Those principles together stood for an "embracing" and "intrinsically soun[d]" understanding of equal protection "verified by experience," namely, that the Constitution imposes upon federal, state, and local governmental actors the same obligation to respect the personal right to equal protection of the laws. This case therefore presents precisely the situation described by Justice Frankfurter in *Helvering*: we cannot adhere to our

most recent decision without colliding with an accepted and established doctrine. We also note that *Metro Broadcasting*'s application of different standards of review to federal and state racial classifications has been consistently criticized by commentators. See, *e. g.*, Fried, *Metro Broadcasting, Inc. v. FCC*: Two Concepts of Equality, 104 Harv. L. Rev. 107, 113–117 (1990) (arguing that *Metro Broadcasting*'s adoption of different standards of review for federal and state racial classifications placed the law in an "unstable condition," and advocating strict scrutiny across the board); Devins, *Metro Broadcasting, Inc. v. FCC*: Requiem for a Heavyweight, 69 Texas L. Rev. 125, 145–146 (1990) (same); Linder, Review of Affirmative Action After *Metro Broadcasting v. FCC:* The Solution Almost Nobody Wanted, 59 UMKC L. Rev. 293, 297, 316–317 (1991) (criticizing "anomalous results as exemplified by the two different standards of review"); Katz, Public Affirmative Action and the Fourteenth Amendment: The Fragmentation of Theory After *Richmond v. J.A. Croson Co.* and *Metro Broadcasting, Inc. v. Federal Communications Commission*, 17 T. Marshall L. Rev. 317, 319, 354–355, 357 (1992) (arguing that "the current fragmentation of doctrine must be seen as a dangerous and seriously flawed approach to constitutional interpretation," and advocating intermediate scrutiny across the board).

Our past practice in similar situations supports our action today. In *United States* v. *Dixon*, 509 U. S. ___ (1993), we overruled the recent case of *Grady* v. *Corbin*, 495 U. S. 508 (1990), because *Grady* "lack[ed] constitutional roots" and was "wholly inconsistent with earlier Supreme Court precedent." *Dixon*, *supra*, at ___, ___ (slip op., at 14–15, 22–23). In *Solorio* v. *United States*, 483 U. S. 435 (1987), we overruled *O'Callahan* v. *Parker*, 395 U. S. 258 (1969), which had caused "confusion" and had rejected "an unbroken line of decisions from 1866 to 1960."

Solorio, *supra*, at 439–441, 450–451. And in *Continental T. V., Inc.* v. *GTE Sylvania Inc.*, 433 U. S. 36 (1977), we overruled *United States* v. *Arnold, Schwinn & Co.*, 388 U. S. 365 (1967), which was "an abrupt and largely unexplained departure" from precedent, and of which "[t]he great weight of scholarly opinion ha[d] been critical." *Continental T. V.*, *supra*, at 47–48, 58. See also, *e. g.*, *Payne* v. *Tennessee*, 501 U. S. 808, 830 (1991) (overruling *Booth* v. *Maryland*, 482 U. S. 496 (1987), and *South Carolina* v. *Gathers*, 490 U. S. 805 (1989)); *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658, 695–701 (1978) (partially overruling *Monroe* v. *Pape*, 365 U. S. 167 (1961), because *Monroe* was a "departure from prior practice" that had not engendered substantial reliance); *Swift & Co.* v. *Wickham*, 382 U. S. 111, 128–129 (1965) (overruling *Kesler* v. *Department of Public Safety of Utah*, 369 U. S. 153 (1962), to reaffirm "pre-*Kesler* precedent" and restore the law to the "view . . . which this Court has traditionally taken" in older cases).

It is worth pointing out the difference between the applications of *stare decisis* in this case and in *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. ___ (1992). *Casey* explained how considerations of *stare decisis* inform the decision whether to overrule a long-established precedent that has become integrated into the fabric of the law. Overruling precedent of that kind naturally may have consequences for "the ideal of the rule of law," *id.*, at ___ (slip op., at 12). In addition, such precedent is likely to have engendered substantial reliance, as was true in *Casey* itself, *id.*, at ___ (slip op., at 14) ("[F]or two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail"). But in this case, as we have explained,

we do not face a precedent of that kind, because *Metro Broadcasting* itself *departed* from our prior cases—and did so quite recently. By refusing to follow *Metro Broadcasting*, then, we do not depart from the fabric of the law; we restore it. We also note that reliance on a case that has recently departed from precedent is likely to be minimal, particularly where, as here, the rule set forth in that case is unlikely to affect primary conduct in any event. Cf. *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U. S. ___, ___ (1995) (slip op., at 6) (declining to overrule *Southland Corp.* v. *Keating*, 465 U. S. 1 (1984), where "private parties have likely written contracts relying upon *Southland* as authority" in the ten years since *Southland* was decided).

JUSTICE STEVENS takes us to task for what he perceives to be an erroneous application of the doctrine of *stare decisis*. But again, he misunderstands our position. We have acknowledged that, after *Croson*, "some uncertainty persisted with respect to the standard of review for federal racial classifications," *supra*, at 21, and we therefore do not say that we "merely restor[e] the *status quo ante*" today, *post*, at 17. But as we have described *supra*, at 11–25, we think that well-settled legal principles pointed toward a conclusion different from that reached in *Metro Broadcasting*, and we therefore disagree with JUSTICE STEVENS that "the law at the time of that decision was entirely open to the result the Court reached," *post*, at 17. We also disagree with JUSTICE STEVENS that Justice Stewart's dissenting opinion in *Fullilove* supports his "novelty" argument, see *post*, at 19, and n. 13. Justice Stewart said that "[u]nder our Constitution, any official action that treats a person differently on account of his race or ethnic origin is inherently suspect and presumptively invalid," and that "`[e]qual protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment.'" *Fullilove*, *supra*, at 523, and n.

1. He took the view that "[t]he hostility of the Constitution to racial classifications by government has been manifested in many cases decided by this Court," and that "our cases have made clear that the Constitution is wholly neutral in forbidding such racial discrimination, whatever the race may be of those who are its victims." *Id.*, at 524. Justice Stewart gave no indication that he thought he was addressing a "novel" proposition, *post*, at 19. Rather, he relied on the fact that the text of the Fourteenth Amendment extends its guarantee to "persons," and on cases like *Buckley, Loving, McLaughlin, Bolling, Hirabayashi*, and *Korematsu*, see *Fullilove*, *supra*, at 524–526, as do we today. There is nothing new about the notion that Congress, like the States, may treat people differently because of their race only for compelling reasons.

"The real problem," Justice Frankfurter explained, "is whether a principle shall prevail over its later misapplications." *Helvering*, 309 U. S., at 122. *Metro Broadcasting*'s untenable distinction between state and federal racial classifications lacks support in our precedent, and undermines the fundamental principle of equal protection as a personal right. In this case, as between that principle and "its later misapplications," the principle must prevail.

Our action today makes explicit what Justice Powell thought implicit in the *Fullilove* lead opinion: federal racial classifications, like those of a State, must serve a compelling governmental interest, and must be narrowly tailored to further that interest. See *Fullilove*, 448 U. S., at 496 (concurring opinion). (Recall that the lead opinion in *Fullilove* "d[id] not adopt . . . the formulas of analysis articulated in such cases as [*Bakke*]." *Id.*, at 492 (opinion of Burger, C. J.).) Of course, it follows that to the extent (if any) that *Fullilove* held federal racial classifications to be

subject to a less rigorous standard, it is no longer controlling. But we need not decide today whether the program upheld in *Fullilove* would survive strict scrutiny as our more recent cases have defined it.

Some have questioned the importance of debating the proper standard of review of race-based legislation. See, *e. g.*, *post*, at 6–7 (STEVENS, J., dissenting); *Croson*, 488 U. S., at 514–515, and n. 5 (STEVENS, J., concurring in part and concurring in judgment); cf. *Metro Broadcasting*, 497 U. S., at 610 (O'CONNOR, J., dissenting) ("This dispute regarding the appropriate standard of review may strike some as a lawyers' quibble over words"). But we agree with JUSTICE STEVENS that, "[b]ecause racial characteristics so seldom provide a relevant basis for disparate treatment, and because classifications based on race are potentially so harmful to the entire body politic, it is especially important that the reasons for any such classification be clearly identified and unquestionably legitimate," and that "[r]acial classifications are simply too pernicious to permit any but the most exact connection between justification and classification." *Fullilove*, *supra*, at 533–535, 537 (dissenting opinion) (footnotes omitted). We think that requiring strict scrutiny is the best way to ensure that courts will consistently give racial classifications that kind of detailed examination, both as to ends and as to means. *Korematsu* demonstrates vividly that even "the most rigid scrutiny" can sometimes fail to detect an illegitimate racial classification, compare *Korematsu*, 323 U. S., at 223 ("To cast this case into outlines of racial prejudice, without reference to the real military dangers which were presented, merely confuses the issue. Korematsu was not excluded from the Military Area because of hostility to him or his race"), with Pub. L. 100–383, §2(a), 102 Stat. 903–904 ("[T]hese actions [of relocating and interning civilians of Japanese ancestry] were carried out without adequate security

reasons . . . and were motivated largely by racial prejudice, wartime hysteria, and a failure of political leadership"). Any retreat from the most searching judicial inquiry can only increase the risk of another such error occurring in the future.

Finally, we wish to dispel the notion that strict scrutiny is "strict in theory, but fatal in fact." *Fullilove*, *supra*, at 519 (Marshall, J., concurring in judgment). 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. As recently as 1987, for example, every Justice of this Court agreed that the Alabama Department of Public Safety's "pervasive, systematic, and obstinate discriminatory conduct" justified a narrowly tailored race-based remedy. See *United States* v. *Paradise*, 480 U. S., at 167 (plurality opinion of Brennan, J.); *id.*, at 190 (STEVENS, J., concurring in judgment); *id.*, at 196 (O'CONNOR, J., dissenting). When race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the "narrow tailoring" test this Court has set out in previous cases.

Because our decision today alters the playing field in some important respects, we think it best to remand the case to the lower courts for further consideration in light of the principles we have announced. The Court of Appeals, following *Metro Broadcasting* and *Fullilove*, analyzed the case in terms of intermediate scrutiny. It upheld the challenged statutes and regulations because it found them to be "narrowly tailored to achieve [their] *significant governmental purpose* of providing subcontracting opportunities for small disadvantaged business enterprises." 16 F. 3d, at 1547 (emphasis

added). The Court of Appeals did not decide the question whether the interests served by the use of subcontractor compensation clauses are properly described as "compelling." It also did not address the question of narrow tailoring in terms of our strict scrutiny cases, by asking, for example, whether there was "any consideration of the use of race-neutral means to increase minority business participation" in government contracting, *Croson*, *supra*, at 507, or whether the program was appropriately limited such that it "will not last longer than the discriminatory effects it is designed to eliminate," *Fullilove*, *supra*, at 513 (Powell, J., concurring).

Moreover, unresolved questions remain concerning the details of the complex regulatory regimes implicated by the use of subcontractor compensation clauses. For example, the SBA's 8(a) program requires an individualized inquiry into the economic disadvantage of every participant, see 13 CFR §124.106(a) (1994), whereas the DOT's regulations implementing STURAA §106(c) do *not* require certifying authorities to make such individualized inquiries, see 49 CFR §23.62 (1994); 49 CFR pt. 23, subpt. D, App. C (1994). And the regulations seem unclear as to whether 8(d) subcontractors must make individualized showings, or instead whether the race-based presumption applies both to social *and* economic disadvantage, compare 13 CFR §124.106(b) (apparently requiring 8(d) participants to make an individualized showing), with 48 CFR §19.703(a)(2) (1994) (apparently allowing 8(d) subcontractors to invoke the race-based presumption for social and economic disadvantage). See generally Part I, *supra*. We also note an apparent discrepancy between the definitions of which socially disadvantaged individuals qualify as economically disadvantaged for the 8(a) and 8(d) programs; the former requires a showing that such individuals' ability to compete has been impaired "as compared to others in the same or

similar line of business *who are not socially disadvantaged*," 13 CFR §124.106(a)(1)(i) (1994) (emphasis added), while the latter requires that showing only "as compared to others in the same or similar line of business," §124.106(b)(1). 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.

Accordingly, the judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.