**Adarand Constructors v. Pena**

515 U.S. 200

Case Year: 1995

Case Ruling: 5-4, Remanded

FACTS

This case involves the validity of minority preferences in federal construction projects. What is challenged is a clause in Federal Highway Division contracts issued under the Federal Construction Procurement Program. These contracts are authorized by two statutes: the Small Business Act of 1954, as amended (SBA), and the Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURAA). The preference policy calls for the prime contractor to be paid a bonus if at least 10 percent of the overall contract amount is subcontracted to "disadvantaged business enterprises" (DBEs), small businesses that are minority owned and operated. In 1989 the Federal Highway Division awarded a prime contract for highway work in Colorado to Mountain Gravel and Construction Company. Adarand Constructors, owned and operated by a white male, submitted the lowest subcontract bid to do guardrail work on the project. However, the guardrail contract was issued to Gonzales Construction, a minority-owned firm. Because Mountain Gravel awarded the subcontract to a DBE, it received a $10,000 bonus. Adarand filed suit against Secretary of Transportation Federico Peña, claiming that the preference policy violated the Due Process Clause of the Fifth Amendment. The federal program was upheld at the trial level. The Tenth Circuit Court of Appeals affirmed, holding that Supreme Court precedent allowed more latitude to the federal government in implementing race-conscious programs (Metro Broadcasting v. Federal Election Commission, 1990) than was permitted the states (City of Richmond v. J. A. Croson Co., 1989). Adarand requested Supreme Court review.

JUSTICE O'CONNOR ANNOUNCED THE JUDGMENT OF THE COURT AND DELIVERED A OPINION . . . WHICH IS FOR THE COURT EXCEPT INSOFAR AS IT MIGHT BE INCONSISTENT WITH THE VIEWS EXPRESSED IN JUSTICE SCALIA'S CONCURRENCE. . . .

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." 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. . . .

In Bolling v. Sharpe (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'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 [v. United States, 1943], and that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect," Korematsu [v. United States, 1944], carry no less force in 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. . . .

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, 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; and subject to the 'most rigid scrutiny,' Korematsu v. United States; and 'in most circumstances irrelevant' to any constitutionally acceptable legislative purpose, Hirabayashi v. United States."

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. . . . Loving v. Virginia [1967], 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.' " The various opinions in Frontiero v. Richardson (1973), which concerned sex discrimination by the Federal Government, took their equal protection standard of review from Reed v. Reed (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. 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 [1975]; see also Buckley v. Valeo (1976); United States v. Paradise (1987). . . .

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 [1978] 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.' "Bakke did not produce an opinion for the Court, but Justice Powell's opinion announcing the Court's judgment rejected the argument. . . .

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 (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.". . .

In Wygant v. Jackson Board of Ed. (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.". . . In other words, "racial classifications of any sort must be subjected to 'strict scrutiny.' " (O'CONNOR, J., concurring in part and concurring in judgment). . . .

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. . . .

The Court resolved the issue, at least in part, in 1989. Richmond v. J. A. Croson Co. 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.". . .

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. . . .

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, Fullilove, McLaughlin, Hirabayashi. . . . 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, Bakke. . . . And third, congruence: "[e]qual protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment," Buckley v. Valeo, Weinberger v. Wiesenfeld, Bolling v. Sharpe. 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. . . .

A year later, however, the Court took a surprising turn. Metro Broadcasting, Inc. v. FCC (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. 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. . . .

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. . . .

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. 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--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. . . .

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. . . . It is so ordered.

JUSTICE SCALIA, CONCURRING IN PART AND CONCURRING IN THE JUDGMENT.

I join the opinion of the Court . . . except insofar as it may be inconsistent with the following: In my 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. Individuals who have been wronged by unlawful racial discrimination should be made whole; but under our Constitution there can be no such thing as either a creditor or a debtor race. That concept is alien to the Constitution's focus upon the individual. . . . To pursue the concept of racial entitlement--even for the most admirable and benign of purposes--is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred. In the eyes of government, we are just one race here. It is American.

It is unlikely, if not impossible, that the challenged program would survive under this understanding of strict scrutiny, but I am content to leave that to be decided on remand.

JUSTICE THOMAS, CONCURRING IN PART AND CONCURRING IN THE JUDGMENT.

That these programs may have been motivated, in part, by good intentions cannot provide refuge from the principle that under our Constitution, the government may not make distinctions on the basis of race. As far as the Constitution is concerned, it is 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. There can be no doubt that the paternalism that appears to lie at the heart of this program is at war with the principle of inherent equality that underlies and infuses our Constitution.

These programs not only raise grave constitutional questions, they also undermine the moral basis of the equal protection principle. Purchased at the price of immeasurable human suffering, the equal protection principle reflects our Nation's understanding that such classifications ultimately have a destructive impact on the individual and our society. Unquestionably, "[i]nvidious [racial] discrimination is an engine of oppression." It is also true that "[r]emedial" racial preferences may reflect "a desire to foster equality in society." But there can be no doubt that racial paternalism and its unintended consequences can be as poisonous and pernicious as any other form of discrimination. So-called "benign" discrimination teaches many that because of chronic and apparently immutable handicaps, minorities cannot compete with them without their patronizing indulgence. Inevitably, such programs engender attitudes of superiority or, alternatively, provoke resentment among those who believe that they have been wronged by the government's use of race. These programs stamp minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are "entitled" to preferences. . . .

In my mind, government-sponsored racial discrimination based on benign prejudice is just as noxious as discrimination inspired by malicious prejudice. In each instance, it is racial discrimination, plain and simple.

JUSTICE STEVENS, WITH WHOM JUSTICE GINSBURG JOINS, DISSENTING.

The Court's concept of "consistency" assumes that there is no significant difference between a decision by the majority to impose a special burden on the members of a minority race and a decision by the majority to provide a benefit to certain members of that minority notwithstanding its incidental burden on some members of the majority. In my opinion that assumption is untenable. There is no moral or constitutional equivalence between a policy that is designed to perpetuate a caste system and one that seeks to eradicate racial subordination. Invidious discrimination is an engine of oppression, subjugating a disfavored group to enhance or maintain the power of the majority. Remedial race-based preferences reflect the opposite impulse: a desire to foster equality in society. No sensible conception of the Government's constitutional obligation to "govern impartially," Hampton v. Mow Sun Wong (1976), should ignore this distinction. . . .

The Court's concept of "congruence" assumes that there is no significant difference between a decision by the Congress of the United States to adopt an affirmative-action program and such a decision by a State or a municipality. In my opinion that assumption is untenable. It ignores important practical and legal differences between federal and state or local decisionmakers. . . .

The Court's holding in Fullilove surely governs the result in this case. . . . In no meaningful respect is the current scheme more objectionable than the 1977 Act. Thus, if the 1977 Act was constitutional, then so must be the SBA and STURAA. . . .

My skeptical scrutiny of the Court's opinion leaves me in dissent. The majority's concept of "consistency" ignores a difference, fundamental to the idea of equal protection, between oppression and assistance. The majority's concept of "congruence" ignores a difference, fundamental to our constitutional system, between the Federal Government and the States. And the majority's concept of stare decisis ignores the force of binding precedent. I would affirm the judgment of the Court of Appeals.

JUSTICE SOUTER, WITH WHOM JUSTICE GINSBURG AND JUSTICE BREYER JOIN, DISSENTING.

I agree with JUSTICE STEVENS's conclusion that stare decisis compels the application of Fullilove. Although Fullilove did not reflect doctrinal consistency, its several opinions produced a result on shared grounds that petitioner does not attack: that discrimination in the construction industry had 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. Once Fullilove is applied, as Justice Stevens points out, it follows that the statutes in question here (which are substantially better tailored to the harm being remedied than the statute endorsed in Fullilove) pass muster under Fifth Amendment due process and Fourteenth Amendment equal protection. . . .

JUSTICE GINSBURG, WITH WHOM JUSTICE BREYER JOINS, DISSENTING.

The divisions in this difficult case should not obscure the Court's recognition of the persistence of racial inequality and a majority's acknowledgment of Congress' authority to act affirmatively, not only to end discrimination, but also to counteract discrimination's lingering effects. Those effects, reflective of a system of racial caste only recently ended, are evident in our workplaces, markets, and neighborhoods. . . . 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.

Given this history and its practical consequences, Congress surely can conclude that a carefully designed affirmative action program may help to realize, finally, the "equal protection of the laws" the Fourteenth Amendment has promised since 1868.