No. 93-1841

In The

Supreme Court of the United States

October Term, 1994

ADARAND CONSTRUCTORS, INC.
Petitioner,

v.

FEDERICO PENA, SECRETARY OF THE DEPARTMENT OF TRANSPORTATION, et al.,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

BRIEF AMICUS CURIAE OF THE FEDERALIST SOCIETY, OHIO STATE UNIVERSITY COLLEGE OF LAW CHAPTER, IN SUPPORT OF PETITIONER ADARAND CONSTRUCTORS, INC.

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QUESTION PRESENTED

Whether Race or Gender-Based Affirmative Action Programs Adopted By Congress Are Subject to Strict Scrutiny Under the Equal Protection Component of the Fifth Amendment's Due Process Clause.

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Pursuant to Supreme Court Rule 37, the Ohio State University student chapter of the Federalist Society respectfully submits this brief amicus curiae in support of petitioner Adarand Constructors, Inc.. Written consent to the filing of this brief has been granted by counsel for all parties. Copies of the letters of consent have been lodged with the Clerk of this Court.

INTEREST OF AMICUS

The Federalist Society at the College of Law of The Ohio State University is a student chapter of The Federalist Society. The Federalist Society is a national organization comprised of members of the legal community who regard themselves as philosophically conservative or libertarian and who are dedicated to

preserving the rule of law. On the basis of personal experience, the membership of the Ohio State University Chapter (which chapter includes women and members of minority groups and is typical of other student chapters) believes that preferences for women or minorities are socially divisive, even when adopted by a disinterested authority as a narrowly-tailored remedy for identified, purposeful discrimination. The membership anticipates that tensions between people of different races and sexes will grow at the national level of government. The membership fears, however, that structural factors unanticipated by James Madison in *The Federalist No. 10* render the national legislature susceptible to race and gender factional tyranny.

INTRODUCTION

The right to equal protection of the laws is a personal right. *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948). At the heart of this right lies the principle that government must treat citizens as individuals, not merely as "representatives" of a group. *See Metro Broadcasting, Inc. v. Federal Communications Commission*, 497 U.S. 547, 602 (1990) (O'Connor, J., dissenting) (citing other authority). To ensure respect for the individual, in a series of cases decided before *Metro Broadcasting* the Court subjected racial classifications to strict scrutiny regardless of the class of persons purported to benefit by the classifications. *Id.* at 603 (O'Connor, J., dissenting) (citing various

authorities).[1] In *Metro Broadcasting* the Court departed from this position. There the Court held that "benign" race-conscious measures could include measures unrelated to the compensation of discrimination victims. *Id.* at 564-65. The Court also held that any such "benign" measures would be upheld if specifically mandated by Congress and

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[1] For similar reasons the Court has given an intermediate level of scrutiny to gender classifications. This level of scrutiny respects the possibility of relevant differences between the sexes but permits the Court to identify illegitimate classifications reflecting archaic stereotypes or overbroad generalizations. Amicus contends that affirmative action programs rarely exist because of real differences between the sexes. Therefore, for the same reasons that support the use of strict scrutiny with regard to racial classifications, Amicus believes that programs designed to advantage women by disadvantaging the men against whom they compete should be subject to strict scrutiny. This rule would accord with the moral imperative of equal protection. Legal preferences and impediments alike are anathema to the concept of equality before the law.

substantially related to the achievement of important governmental objectives. *Id.*

Amicus submits that *Metro Broadcasting* was incorrectly decided and that this case proves its error. This case involves government action to encourage intentional race and gender discrimination by a private party.[2]

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[2] The court below found the actions of the prime contractor in this case to be unobjectionable. *See Adarand Constructors Inc. v. Pena*, 16 F.3d 1537, 1542 n.9 (10th Cir. 1994). It failed to note, however, that private "reverse" racial discrimination in the formation of contracts is forbidden by 42 U.S.C. § 1981. *See McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 295-96 (1976). So too is discriminatory contractual interference by third persons. *Faraca v. Clements*, 506 F.2d 956, 959 (5th Cir. 1975), *cert. denied*, 422 U.S. 1006 (1975). It is not clear that Congress ever authorized prime contractors to violate § 1981. Thus, this case presents an independent basis for finding an equal protection violation by respondent. The prime contractors are state actors because highway construction has traditionally been the exclusive prerogative of the

Amicus respectfully urges the Court to address both the race and gender discrimination issues in this case.[3] Joint consideration of the race and gender classifications shows that the

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government, which is a basis for finding state action. *See Jackson v. Metropolitan Edison Co.*, 419 U.S. 343, 353 (1974). Furthermore, the government dangled the financial carrot that encouraged the prime contractor to be an instrument of the Department of Transportation's goals. *Cf. Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) (significant encouragement grounds for state action).

[3] In *Metro Broadcasting* the Court did not examine the constitutional difficulties attending a joint race- and gender- preference program. *See Metro Broadcasting*, 497 U.S. at 558 n.7. As a result, the case gives the erroneous impression that it involved the burdening of a "majority" group. The opposite was true in that case and is true here. Joint race and gender preference programs are aimed at a national minority-- a subgroup of white males. The gender preference appears to be properly before the Court in this case because the court below erroneously held that petitioner lacked standing to challenge the gender preference. *See infra* note 9 and accompanying text.

challenged program discriminates against white males, a national minority.[4] That two courts below readily accepted this discrimination in reliance on *Metro Broadcasting* demonstrates how easily *Metro Broadcasting* can sanction legislative "retribution" against members of a currently unfashionable minority. *Cf. Korematsu v United States*, 323 U.S. 214, 240 (1944) (Murphy, J., dissenting) (treatment of individual on basis of race opens door to discriminatory actions against other minority groups "in the passions of tomorrow"). Magnanimous as were the framers of the Fourteenth Amendment, it is doubtful that they

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[4] In 1991 there were 92,399,000 white males in the United States. At the same time there were some 159,778,000 other persons in the United States. *U.S. Department of Commerce, Statistical Abstract of the United States 1993*, 22 (1993).

created that amendment to sanction unfavorable treatment of a national minority group such as white males.

Amicus respectfully requests the Court to reconsider and overrule *Metro Broadcasting*. Such decision would be appropriate because *Metro Broadcasting* wrongly deviated from this Court's equal protection jurisprudence. Furthermore, it was decided only recently and is not the type of decision upon which ordinary people have placed reliance. Therefore, the doctrine of *stare decisis* should pose no obstacle to overruling *Metro Broadcasting*. There are no settled expectations to be disrupted.

STATEMENT OF THE CASE

Mountain Gravel & Construction, a prime contractor, sought bids from subcontractors to complete a construction project awarded to it by the Department of Transportation. *Adarand Constructors, Inc. v. Pena*, 16 F.3d 1537, 1541-42 (10th Cir. 1994). Petitioner Adarand Constructors submitted the lowest bid. *Id.* at 1542. Instead of doing business with Adarand, however, Mountain Gravel awarded the subcontract to a "disadvantaged business enterprise" (DBE)[5] that had submitted a higher bid.

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[5] For purposes of this case a subcontractor qualifies as a DBE if it qualifies as a DBE under Section 106(c) of the Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub. L. No. 100-17, 101 Stat. 132 (1987) (STURAA). *See Adarand Constructors, Inc. v. Pena*, 16 F.3d 1537, 1540-41 (10th Cir. 1994). The regulations implementing the STURAA affirmative action program focus on the racial, sexual, and "reverse glass ceiling" structure of small business

Id. at 1542.[6] From all appearances this decision to discriminate on the basis of status was motivated by bounty-- the opportunity to earn $10,000 from the Department of Transportation. *See id.*

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concerns. They create a presumption of disadvantage that operates in favor of minorities and women but against white males. *See* 49 C.F.R. §§ 23.61, 23.62 (1994). Although rebuttable, this presumption is discriminatory on its face. *See Milwaukee County Pavers Ass'n v. Fiedler*, 922 F.2d 419, 421-22 (7th Cir. 1991) (Posner, J.), *cert. denied*, 500 U.S. 954 (1991). *Accord, O'Donnell Construction Co. v. District of Columbia*, 815 F. Supp. 473, 482 (D. D.C. 1992). In practice this presumption may well be decisive.

[6] The principals of Adarand Constructors appear to be both women and men. *See Adarand Constructors, Inc. v. Skinner*, 790 F. Supp. 240, 241 n.1 (D. Colo. 1992), *aff'd, Adarand Constructors, Inc. v. Pena*, 16 F.3d 1537 (10th Cir. 1994). From what can be gathered from the published opinion, the men and women of Adarand Constructors seem to fall outside of the DBE category because they have not arranged their business relationships in such a way as to take advantage of the Department of Transportation regulations.

This amount could be earned under the Subcontractor Compensation Clause (SCC) program adopted within the Department as a device for meeting Department "goals" for participation of DBEs in federal contracts. *See id.*[7] Under the SCC program the government pays private persons to do business with DBE subcontractors rather than nonDBE subcontractors.[8]

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[7] The Small Business Act requires federal agencies to set an annual "goal" for DBE participation that presents the "maximum practicable opportunity for . . . small business concerns owned and controlled by socially and economically disadvantaged individuals to participate in the performance of contracts let by such agency." *See* 15 U.S.C.A. § 644(g)(1) (1994).

[8] Under the SCC program . . . [p]rime contractors whose DBE subcontracts exceed 10% of the overall contract amount are eligible for incentive payments of up to 1.5% of the original

As is evident from the facts, the SCC program operates like a random set-aside to keep "white male enterprises" (undoubtedly the classification of most nonDBEs) from participating on projects. The difference between the SCC program and a traditional "sheltered market" set-aside is that white male enterprises are permitted the dignity of competing for the relevant contracts. It is only if they demonstrate that they are the best in the competition that they are randomly subject to retroactive disqualification on the basis of race and gender. Thus, the program is arbitrary in two respects. First, it sanctions random disqualification. Second, it sanctions

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> contract amount for utilization of one DBE, or up to 2% for hiring two or more DBEs.

Adarand Constructors, Inc. v. Pena, 16 F.3d 1537, 1540 (10th Cir. 1994).

disqualification on the irrelevant grounds of race and gender.

Petitioner sought, but was denied, injunctive and declaratory relief from the SCC program. *See Adarand Constructors, Inc. v. Skinner*, 790 F. Supp. 240, 245 (D. Colo. 1992). The United States Court of Appeals for the Tenth Circuit affirmed that decision. *See Adarand Constructors, Inc. v. Pena*, 16 F.3d 1537, 1547 (10th Cir. 1994). In doing so, that court refused to pass judgment on the issue of gender discrimination. Petitioner Adarand, the court reasoned, had failed to present evidence that the gender preference element of the DBE program had prevented it from bidding for federal subcontracts on an equal basis. *See id.* at 1543 (10th Cir. 1994) (citing *Northeast Florida Chapter of the Associated General*

Contractors of America v. City of Jacksonville, __ U.S. __, 113 S. Ct. 2297, 2303 (1993)).[9]

SUMMARY OF ARGUMENT

Equal protection principles confer rights to individuals, not groups. To protect those rights the Court has

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[9] This ruling seems erroneous. The SCC program can only work by subjecting white male subcontractors to a systematic, government-erected price disadvantage in their dealings with prime contractors. The heart of the program is a government payment to the prime contractor for hiring DBEs over nonDBEs. Absent this payment, the DBE's bid would typically be economically unattractive to the prime contractor. The purpose and effect of the payment is, at a minimum, to cover the prime contractor's extra costs of doing business with uncompetitive DBEs. That is, the program artificially lowers DBE bids *regardless of whether the DBEs are women-owned business enterprises or minority-owned business enterprises*. Therefore, a bidder like Adarand should have standing. The "injury in fact," the inability to compete on equal footing with DBEs bidding on the same contract, is established by the SCC program itself.

traditionally given searching scrutiny to legislation that bears the marks of crude majoritarianism or thoughtless stereotyping. The Court uncharacteristically lessened its equal protection vigilance, however, in *Metro Broadcasting*. That decision should be overruled. It poses a grave threat to the rights of individuals.

There is good reason to overrule *Metro Broadcasting*. First, the decision lacked sound doctrinal support. Second, the national legislature is susceptible to factional tyranny when faction is organized along lines of race and gender. Third, there is reason to believe that some justices in the *Metro Broadcasting* majority might reconsider their positions in light of developing demographic and political trends.

ARGUMENT

I. STRICT SCRUTINY IS THE PROPER STANDARD FOR DETERMINING THE CONSTITUTIONALITY OF RACE OR GENDER-BASED AFFIRMATIVE ACTION PROGRAMS ADOPTED BY CONGRESS.

A. *Metro Broadcasting* Should Be Overruled.

1. *Metro Broadcasting* Provided No Judicially Manageable Standards for "Benevolence."

Some members of this Court have questioned the existence of "benign" racial classifications. *See, e.g., Metro Broadcasting*, 497 U.S. at 609 (O'Connor, J., dissenting) (contradiction in terms); *Regents of the University of California v. Bakke*, 438 U.S. 265, 294 n.34 (Opinion of Powell, J.) (not innocuous). Others have been confident about the existence of such classifications. *See, e.g., Metro Broadcasting*, 497 U.S. at 564 n.12 (Brennan, J., contending that "examination of the legislative scheme

and its history" will reveal "benign" classifications).[10] Until *Metro Broadcasting*, however, the notion of "benevolence" was essentially confined to a remedial context. As a consequence, threats of majoritarianism and disrespect for the rule of law were minimized.

In *Metro Broadcasting* the Court removed the hinges from a Pandora's box by severing the link between remedy and benevolence. By severing this link the Court abandoned the closest thing it had to a standard for "benevolence." As a result, the judiciary is bereft of standards; "[u]ntethered to narrowly confined remedial notions, 'benign'

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[10] This approach is questionable. Even if it had no other defects, it invites legislatures to enact legislation that will work great harm on certain classes of individuals until the legislation is successfully challenged in the courts.

carries with it no independent meaning, but reflects only acceptance of the current generation's conclusion that a politically acceptable burden, imposed on particular citizens on the basis of race, is reasonable." *Metro Broadcasting*, 497 U.S. at 609-10 (O'Connor, J., dissenting).

2. Re-Linking "Benevolence" to "Remedy" Will Not Solve the Problem.

The ease with which the *Metro Broadcasting* majority cast aside a critical antimajoritarian limitation is disturbing. But it would be no less disturbing if the Court were merely to reinstate that limitation, for the probability that remedial classifications are "benevolent" is falling rapidly. The political power of women and minorities has grown dramatically since the notion

of "benign discrimination" first entered the law. As it continues to grow, it becomes increasingly untenable to view even "remedial" statutes (especially those allegedly designed to remedy wide-scale discrimination) as untainted by the bias of race or gender politics. In other words, it is extremely difficult to tell whether legislation is truly remedial.

It is crucial to realize that our Nation is not one of black and white, but one of divergent communities. *Metro Broadcasting,* 497 U.S. at 610 (O'Connor, J., dissenting). As various groups have joined the list of "beneficiaries" of affirmative action programs, one group has been conspicuously excluded from that list-- white males. White males, however, are a shrinking minority of the

population.[11] And as the political power of women and minorities has increased,[12] that of white males has

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[11] In 1991 there were approximately 92,399,000 white males in this country and approximately 159,778,000 persons in other groups. *U.S. Department of Commerce, Statistical Abstract of the United States 1993*, 22 (1993). The percentage of white males in this country is declining as the percentage of persons in other groups increases. *See id.* at 25. Members of the latter groups are not prohibited from voting because of their race (*see U.S. Const., amend. XV*) or sex (*see U.S. Const., amend. XIX*).

[12] In 1989, there were two women in the Senate and 25 in the House of Representatives. Roger H. Davidson & Walter J. Oleszek, *Congress and Its Members* (3d. ed. 1989). After the 1992 election, however, women comprised 11% of the House and 7% of the Senate. *See* Rick Wartzman, *Power of the Purse: Women are Becoming Big Spenders in Politics and on Social Causes, Wall. St. J.*, Oct. 17, 1994, at A1, A5. Between 1870 and 1970, only some 34 African Americans had served in the Congress. *See generally* Maurine Christopher, *America's Black Congressmen* (1971). As this brief is written, however, the number of African Americans contemporaneously holding seats in Congress exceeds that number. *See, e.g.*, Frank McCoy, *Can the Black Caucus Be Bipartisan?*, Black Enterprise, Jan. 1994,

waned. Even those who believe in "group rights" must concede that, if it has not already happened, at some time affirmative action programs that disadvantage white males must represent legislation whereby politically dominant groups benefit at the expense of a politically weaker white male minority group.

As an empirical matter, at the national level of government the tide may already have turned. The political power of women and minorities cannot be accurately gauged by counting heads in Congress. Women and minorities bring pressure to bear on white male politicians in many ways.[13] Women and

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at 22 (Caucus has 38 members).

[13] Women are dramatically increasing their political activism and giving, for example. *See* Rick Wartzman, *Power of the Purse: Women are Becoming Big Spenders in*

minority politicians, separately or together, can themselves wield power.[14] The Congressional Black Caucus, for example, has members who by reason of

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Politics and on Social Causes, *Wall. St. J.*, Oct. 17, 1994, at A1, A5. And as long ago as the early 1970s it was apparent that women were casting more ballots than men. *See* Marjorie Lansing, *The American Woman: Voter and Activist in Women in Politics* 5 (Jane S. Jaquette ed., 1974) ("Demographically, it is clear that women will continue to be a majority of the voting age population for some time. Therefore, any tendency for them to vote as a cohesive bloc has implications. . . .").

[14] For a variety of what might be termed "economic" reasons, small groups in an organization like Congress can be disproportionately effective. *See generally* Mancur Olson, The Logic of Collective Action (2nd ed. 1971). Indeed, groups representing the "interests" of the majority of legislators in a body such as Congress might never coalesce. *See generally id.* Thus, for example, there is no Congressional White Male Caucus. There is, however, a Congressional Black Caucus comprised of members who "typically see themselves as representing members of their race wherever they may live." Roger H. Davidson & Walter J. Oleszek, *Congress and Its Members* 119 (3d ed. 1990).

their seniority hold great power on committees.[15] As a cohesive bloc,[16] the Congressional Black Caucus wields power as a pivotal holdout group of legislators. *Cf. Brief Amici Curiae for the Congressional Black Caucus et al.*, at 1-2, *Metro Broadcasting v. Federal Communication Commission* (No. 89-453) (objective of original members "reaffirmed through the legislative and

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[15] *See, e.g.*, R.S. Dunham, *The New Face of Power: Urban and Black*, Bus. Week, Apr. 18, 1994, at 126. This source of power might decline if the Court upholds congressional term limit legislation. On the other hand, however, term limit legislation holds significant potential for removing many white male incumbents and increasing the demographic diversity of the Congress.

[16] Cohesion is apparently maintained by threat of banishment. *See, e.g.*, Frank McCoy, *Can the Black Caucus Be Bipartisan?*, Black Enterprise, Jan. 1994, at 22 (members of 38-member Congressional Black Caucus considered expulsion of Republican member holding differing views).

political successes of the Caucus").

The significance of these changes in the political landscape is that it is no longer defensible to be satisfied with discriminatory legislation, even when that legislation is accompanied by something more than a "mere recitation of a benign purpose." *Compare Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 (1975). Even narrowly-tailored enactments purporting to remedy identified discrimination presuppose legislative findings of discrimination. The objectivity of such findings, however, must be seriously questioned.[17] When

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[17] An aside regarding findings of racial discrimination: A recently published book finds that racism is not widespread in America but that "many otherwise unprejudiced white Americans draw the line at preferential treatment . . . ." *See Civil Rights and Wrongs*, The Economist, Nov. 27, 1993, at 97 (reviewing Paul Sniderman and Thomas Piazza, The Scar of Race (1993)). If minority advancement

the risk of self-interest is so great, the legislature loses its fact-finding competence. Consequently, the moral imperative of equal protection will not be satisfied unless federal affirmative action legislation is subject to the most exacting judicial scrutiny. Absent searching judicial inquiry into the justification for affirmative action measures, there is no way to determine which classifications are remedial and which are motivated by race or gender politics. Strict scrutiny must be used to "smoke out" illegitimate uses of classifications. *See City of Richmond v.*

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is impeded by prejudice, and if what members of minority groups perceive to be prejudice is a reflection of resentment attributable to preferences, then it would seem that the goal of minority advancement would best be served by eliminating preferences. Even advocates of preferences should concede that any means to an end can yield diminishing marginal returns.

J.A. Croson Co., 488 U.S. 469, 493 (Opinion of O'Connor, J.).

Strict scrutiny would also serve important structural goals. To ask whether exclusions may have overriding benefits for all social groups in particular circumstances places the antidiscrimination principle at the mercy of the vagaries of empirical conjecture and frees judges to enact their personal values into constitutional doctrine. *See* Richard Posner, *The* De Funis *Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 Sup. Ct. Rev. 1, 25-26. Giving strict scrutiny to classifications that disadvantage white males is a necessary step towards fulfilling the ideals of equal protection.

3. *Metro Broadcasting* Lacked Substantial Foundation in Law and "Social Reality."

a. *Fullilove* Provided No Support for *Metro Broadcasting*

The *Metro Broadcasting* decision relied heavily on *Fullilove v. Klutznick*, 448 U.S. 448 (1980). *See, e.g., Metro Broadcasting v. Federal Communications Commission*, 497 U.S. 547, 564-5 (1990). *Fullilove*, in turn, had placed great weight on the "institutional competence" of Congress. *See id.* at 563 (citing *Fullilove*, 448 U.S. at 490). But the "institutional competence" discussed in *Fullilove* was predicated on the authority of Congress to enact legislation to enforce the Fourteenth Amendment. *See, e.g., Fullilove*, 448 U.S. at 483 (Opinion of Burger, C.J.). That authority, which derives from section five of the

amendment, authorizes Congress to enforce "by appropriate legislation" the amendment's dictate that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." *See U.S. Const., amend. XIV.* Although frequently described as a "remedial power," the words of this grant contemplate no more than prophylactic, neutral legislation to safeguard rights belonging to all persons. *Cf. City of Richmond v. J.A. Croson Co*, 488 U.S. 469, 518 (1989) (Kennedy, J., concurring) ("The process by which a law that is an equal protection violation when enacted by a State becomes transformed to an equal protection guarantee when enacted by Congress poses a difficult proposition. . . ."). But regardless of the scope of the section five powers, by its terms the section five authority has

no application to cases which do not involve States. Therefore *Fullilove* could not possibly have supported the *Metro Broadcasting* decision.

A more important observation is that congressional competence remains an open question even when States are involved. *See, e.g., Fullilove*, 448 U.S. at 499 (Powell, J., concurring) (question for the Court whether Congress is competent to make findings of unlawful discrimination). And if that question is answered in the affirmative, it remains true that institutional competency has never been viewed as displacing the role of the Court in defending the Constitution. *See, e.g., id.* at 473 (Opinion of Burger, C.J.) (citing *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 103 (1973)). Thus, the *Metro*

Broadcasting majority could not properly have concluded that congressional affirmative action programs are subject to anything less than strict scrutiny. The Court has never abdicated its unique oversight role in this area of the law.

b. *Metro Broadcasting* Overlooked Abundant Precedent Holding the Federal Government to the Same Equal Protection Standards that Govern States

Equal protection analysis under the Fifth Amendment is the same as that under the Fourteenth Amendment. *See Fullilove*, 448 U.S. at 517 n.2 (Marshall, J., concurring) (citing *Buckley v. Valeo*, 424 U.S. 1, 93 (1976) (per curiam)); *see also Croson*, 488 U.S. at 634 (Kennedy, J., concurring). *Croson* held that *all* race classifications are tested under strict scrutiny. *City of Richmond v. J.A.*

Croson Co., 488 U.S. 469, 494 (plurality); *id.* at 520 (Scalia, J., concurring). *Metro Broadcasting*, however, ignored these precedents. *See Metro Broadcasting*, 497 U.S. at 603 (O'Connor, J., dissenting) (Court's application of lessened equal protection standard to congressional actions without support in cases or Constitution); *id.* at 634 (Kennedy, J., dissenting) (many precedents effectively overruled by majority's opinion). Therefore, *Metro Broadcasting*'s departure from these standards was unwarranted by law. It was also unwarranted by "social reality."

c. *Metro Broadcasting's* National-Local Dichotomy Is a Dangerous Misunderstanding of Madisonian Theory

The *Metro Broadcasting* majority suggested that Congress is a body that "stands above factional politics." *Metro Broadcasting*, 497 U.S. at 566. *Compare City of Richmond v. J.A. Croson, Co.*, 488 U.S. 469, 522 (1989) (Scalia, J., concurring) (objectivity and flexibility "already to be doubted in a national legislature"). Nothing in "social reality" supports the suggestion that Congress stands above factional politics. In fact, that suggestion misunderstands the core of Madisonian interest group theory.

It is true that Madison believed the likelihood of oppression from faction to be greater in smaller political units than larger ones. His belief was

grounded in a logic similar to that present in the economist's model of perfect competition. Freedom from the tyranny of faction, he thought, like freedom from the evil of monopoly, would more likely be realized when factions in the (political) market were numerous and relatively small. With factions relatively small, none could be expected systematically to predominate. Because smaller political markets could be expected to contain fewer factions than the larger political market of a geographically expansive republic, the evil of faction would find more ready expression at the local level.[18] With

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[18] Madison wrote the following:

> [T]he smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party [and] . . . the more

few "players," each would be relatively large in the sense of having the capacity to produce palpable effects on political outcomes. With relatively few factions, a single faction or a small set of factions would more likely emerge as a political monopolist.

The *Metro Broadcasting* majority seems to have overlooked the essence of Madisonian theory. The reason Madison supposed the national legislature to be an unlikely venue for oppressive faction was assumption that legislative competition at the national level would

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> easily will they concert and execute their plan of oppression. Extend the sphere and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens. . . .

The Federalist No. 10, at 83 (James Madison) (Clinton Rossiter ed., 1961).

involve many small, distinctive interests. This assumption may have been valid when women and members of racial minority groups were prohibited from voting and politics was largely a matter of competing economic interests. It is not valid today, when faction is increasingly organized along the noneconomic dimensions of race and gender.

To be sure, it was not only just, but also efficient, to extend the voting franchise to women and racial minorities. Representative democracies do not function as such if they lack a mechanism for registering the preferences of a sizeable portion of the populace. But if members of Congress of any race or gender believe that it is their role to represent people of a certain race or gender rather than people of a certain

state or district, the system's immunity from the evil of factional tyranny is compromised. When faction is organized along the dimensions of race and gender the national legislature is susceptible to tyrannies of the majority because "extending the sphere" does not increase the number of genders or races. Factional organization along lines of race and gender has left this country with a competition between a limited number of players: men, women, whites and minorities. This limited competition yields the equivalent of an oligopolistic market -- an environment conducive to strategic behavior among market participants. Strategic behavior can manifest itself in many pernicious forms. For example, groups purporting to represent women and members of racial minority groups might combine to cause

legislators to prey upon members of the white male minority. The only way to prevent this sort of evil is to give full effect to the equal protection component of the Due Process Clause. "Extending the sphere" does not prevent tyranny of the majority when faction is reduced to race and gender.

4. Models Used By Members of the *Metro Broadcasting* Majority Counsel Adoption of Strict Scrutiny.

The concerns raised by a "social reality" unanticipated by Madison can be illustrated by reference to models which, although neither part of the Constitution nor necessarily valid, were sometimes invoked by members of the *Metro Broadcasting* majority. One model, for example, theorized about the likelihood of "benign" discrimination. Politically dominant groups, it assumed, are unlikely

to harm members of their own group.[19] This model, however, suggests that policies burdening white males should be given strict scrutiny. White males constitute a national minority and their political power, at least on the basis of numbers, is outweighed by that of women

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[19] *See* John H. Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. Chi. L. Rev. 723, 735-36 (1974) ("when the group that controls the decision making process classifies so as to advantage a minority and disadvantage itself, the reasons for being unusually suspicious, and, consequently, employing a stringent brand of review, are lacking."). This model can be criticized on a number of grounds, including its suggestion that equal protection rights belong to groups rather than individuals. Those who have relied upon the model in the past, however, must surely accept it implications for the present, *viz.*, that there *is* reason to distrust race and gender-conscious legislation when it disadvantages white males and white males are a demographic minority. *Cf. id.*, quoted in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 496 (Opinion of O'Connor, J.) ("of course it works both ways. . . .").

and minorities. The national legislature cannot be regarded as a competent judge of legislation containing classifications that disadvantage white males when the political decisionmakers, or *at least* the interests behind them, "benefit" from the enactment of the legislation.

Another model periodically invoked by members of the *Metro Broadcasting* majority counsels special judicial solicitude for "discrete and insular" outsider groups. This model derives from footnote four of *United States v. Carolene Products Co.*, 304 U.S. 144, 152, n.4 (1938). The "footnote four" model is not a doctrinal component of equal protection jurisprudence. *See, e.g., Kovacs v. Cooper*, 336 U.S. 77, 90-91 (1949) (Frankfurter, J., concurring); *Sugarman v. Dougall*, 413 U.S. 634, 655-57 (1973) (Rehnquist, J., dissenting). It

must be conceded, however, that several members of the *Metro Broadcasting* majority placed great credence in it. Without accepting footnote four, one can see its implications for this case. Combined minority and gender preferences obviously burden white males, a minority group defined by an (ordinarily) immutable trait. Yet this same class is the target of an increasingly hostile social discourse. The social discourse draws from the critical theory that flourishes in many universities, including state universities. It is fair to say that some of this theory, as actually written or as (allegedly) misinterpreted, can be reduced to a message of hatred directed at white males. *Compare Brown v. Board of Education*, 347 U.S. 483, 494 (1954) (state school practices directed against

self-esteem of different class of students). The footnote four model, then, recommends special judicial solicitude for the increasingly isolated class of white males. This conclusion follows directly from the footnote four model and the premise that a number of women and minority group males are demanding "payback" policies that disadvantage white male individuals on the theory that women and minority group members are victims of past and present white male oppression. One need not reach this conclusion by resort to public choice economic theory. *Cf., generally, Daniel A. Farber & Philip P. Frickey, Is* Carolene Products *Dead? Reflections on Affirmative Action and the Dynamics of Civil Rights Legislation*, 79 Cal. L. Rev. 686 (1991) (questioning suggestion that "footnote four" should be "flipped" to

provide protection for members of unorganized majority groups).

Justice Marshall might have agreed that legislation burdening white males is dangerous. He wrote that

> No single talisman can define those groups likely to be the target of classifications offensive to the Fourteenth Amendment [because] 'political powerlessness' . . . is neither necessary . . . nor sufficient. . . [and discreteness and insularity must] be viewed from a social and cultural perspective as well as a political one. . . . [b]ecause prejudice spawns prejudice.[20]

These "footnote four" considerations apply in isolated segments of the governmental structure, such as agencies

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[20] *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 471 n.24 (Marshall, J., dissenting). *See also Regents of the University of California v. Bakke*, 438 U.S. 265, 361 (1978) (Opinion of Brennan, White, Marshall, and Blackmun, JJ.) ("any statute must be stricken that . . . singles out those least well represented in the political process to bear the brunt of a benign program").

within the Department of Transportation. Four justices in the *Metro Broadcasting* majority maintained that judicial scrutiny of agency action should be especially rigorous when a decision raises footnote four considerations. *See Industrial Union Department, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607, 695 n.9 (1980) (Marshall, J., dissenting).

5. Even When Race and Gender Preferences Are Not Combined, Illegitimate Majoritarian Forces May Be at Work.

There is no reason to be less vigilant when federal affirmative action legislation features only a race or gender preference. One cannot tell whether illegitimate majoritarian processes are at work by viewing legislation in isolation. Legislation

claimed to be "benign" may, when viewed with other pieces of legislation, reveal malignancy. Legislation that does not appear to trammel the interests of white males may, when bundled with other legislation, reveal a design to produce net benefits for women and minorities at the expense of white males.

If the legislative process is iterated (which it is), and if there are only a few "players" (as when faction is organized along lines of race and gender), there exists significant room for strategic behavior consciously designed to harm one of the other "players" (for example, white males). While it is possible that "tit for tat" behavior could eventually produce socially harmonious behavior amongst the

"players,"[21] the Fourteenth Amendment does not permit experimentation. It demands equal protection of the *laws*. To provide that protection, something akin to the "step transaction" doctrine of tax law[22] might be required to identify classifications designed to harm a minority group. Reviewing seemingly collateral legislation for strategic behavior, however, would be an arduous task for the judiciary. The better approach to defending equal protection

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[21] *See generally* Robert Axelrod, The Evolution of Cooperation (1984) (in repeated game with no definite ending point, "tit for tat" strategy leads to cooperation).

[22] There are several variations of the "step transaction" doctrine. *See, e.g., Stephen A. Lind et al., Fundamentals of Corporate Taxation* 500-502 (3d. ed. 1991). All recognize, however, that several discrete transactions viewed in combination may reveal an improper purpose that could not be detected by viewing the transactions in isolation.

rights would be to subject all nonneutral federal affirmative action programs to strict scrutiny.

6. *Stare Decisis* Does Not Prevent the Court from Overruling *Metro Broadcasting*.

The doctrine of *stare decisis* should not stand in the way of overruling *Metro Broadcasting*, which represents a deviation from the Court's understanding of equal protection principles. The doctrine of *stare decisis* is not absolute. *See Hertz v. Woodman*, 218 U.S. 205, 212 (1910). Furthermore, reliance on the doctrine is inappropriate when a case involves unworkable standards. *See Garcia v. San Antonio Metro Transit Authority*, 469 U.S. 528, 546 (1985). *Metro Broadcasting* uses an unworkable standard-- "benevolence."

Metro Broadcasting is not

longstanding and venerated precedent. Nor, as a test of acts of Congress, is it the sort of precedent upon which ordinary people have relied. No hardship would occur were *Metro Broadcasting* overruled. Therefore, Amicus respectfully urges the Court to overrule that case.

CONCLUSION

For the reasons given, Amicus urges the Court to reverse the judgment of the court of appeals, overrule *Metro Broadcasting*, and extend the application of strict scrutiny to gender classifications in federal legislation designed to advance women by disadvantaging the men against whom they compete.

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Respectfully submitted,

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