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Affirmative Action

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AFFIRMATIVE ACTION

Judge Leon Lazer:

Next on our agenda are the issues of affirmative action and equal rights. We have two very distinguished guests who are going to be discussing those issues for us.

Professor Douglas Scherer of Touro Law School is one of our outstanding academic stars. He is a graduate of Suffolk University Law School, and has recieved a Masters of Law from Harvard Law School. He formerly practiced in Boston, Massachusetts, and served as the Legislative Chairman of the NAACP for the Boston Branch and the New England Region. He served as Legal Advisor on Civil Rights to the Governor of Massachusetts, and for three years, served as a Commissioner of the the Massachusetts Commission Against Discrimination. At the Law School, he specializes in both constitutional law and employment discrimination law. He has founded, at another law school, the Discrimination Law Clinic, which was a joint project between New York Law School and the New York City Commission on Human Rights, and is the Director for Minority Affairs. So, not only does he have the intellectual qualifications, but he also has the experience.

It is my pleasure to introduce you to Professor Scherer.

Professor Douglas Scherer:

Thank you Judge Lazer. I was asked to discuss two topics. First, I was asked to compare the two most recent affirmative action decisions by the Supreme Court, *Croson*¹ from the 1988 Term and *Metro*² from the 1989 Term. Second, I was asked to discuss the Civil Rights Act of 1990.³

1. *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706 (1989).

2. *Metro Broadcasting, Inc. v. Federal Communications Comm'n*, 110 S. Ct. 2997 (1990).

3. S. 2104, 101st Cong., 1st Sess., 136 CONG. REC. 9944-46 (1990).

I am going to do this in a somewhat summary fashion, since I think most of us are primarily interested in hearing Mr. Dunne speak.

Croson, from the 1988 Term, is a case in which a majority of the Supreme Court applied strict scrutiny in reviewing and invalidating a thirty percent minority set-aside construction contract program established by the City Council of Richmond, Virginia.⁴ The opinion of Justice O'Connor, for four members of the Court, acknowledged that providing remedy for victims of past discrimination is a compelling governmental objective.⁵ Her conclusion, however, was that the thirty percent set-aside program was not a narrowly tailored means for achieving that objective.⁶ Justice Scalia also employed strict scrutiny language,⁷ becoming the fifth Justice who would employ strict scrutiny review for remedial race-conscious programs. However, it would appear that his approach is significantly more stringent than that of Justice O'Connor.⁸ Justice Kennedy⁹ seemed to be somewhere between Justices O'Connor and Scalia in his approach to affirmative doctrine, and he agreed with both that the challenged program was invalid.¹⁰

4. *Croson*, 109 S. Ct. at 729.

5. *Id.* at 720. Chief Justice Rehnquist, Justice White and Justice Kennedy joined Justice O'Connor's opinion.

6. *Id.* at 728. "Under Richmond's scheme, a successful black, Hispanic, or Oriental entrepreneur from anywhere in the country enjoys an absolute preference over other citizens based solely on their race. We think it obvious that such a program is not narrowly tailored to remedy the effects of prior discrimination." *Id.* at 729.

7. *Id.* at 735 (Scalia, J., concurring).

8. *Id.* at 739. Justice Scalia suggested that he would not permit any race-conscious measure as a means for remedying past discrimination. "But those who believe that racial preferences can help to 'even the score' display, and reinforce, a manner of thinking by race that was the source of the injustice and that will, if it endures within our society, be the source of more injustice still." *Id.*

9. *Id.* at 734 (Kennedy, J., concurring in part and concurring in the judgment). Justice Kennedy wrote:

[Justice Scalia's] opinion would make it crystal clear to the political branches, at least those of the States, that legislation must be based on criteria other than race. Nevertheless, given that a rule of automatic invalidity for racial preferences would be a significant break with our precedents that require a case-by-case test, I am not convinced we need adopt it at this point.

Id.

10. *Id.* at 735.

There was a dissent by three members of the Court, authored by Justice Marshall, in which intermediate level scrutiny was employed.¹¹ This basically is the type of judicial scrutiny that was used by Justices Brennan, Marshall, White and Blackmun in the 1978 *Bakke*¹² case, which dealt with an affirmative action admissions program of a medical school. If intermediate level scrutiny is used, there must be an important governmental objective, with means that are substantially related to achievement of that objective.¹³ This basically is the judicial scrutiny test used for gender-based discrimination and the *Croson* dissenters believed that it is the appropriate test for remedial race-conscious affirmative action programs. In any event, they were the dissenters and *Croson* seemingly established that strict scrutiny applies to remedial affirmative action programs of state and local governments.¹⁴ To the extent that this is correct, it is appropriate to consider the opinion of Justice O'Connor as the view of the Court.

It is important to recognize that all members of the Court other than Justice Scalia have agreed that the need to remedy identifiable acts of prior discrimination provides an appropriate basis for race-conscious affirmative action, although these eight disagree over the doctrinal approach that is appropriate. The major distinctions between the majority and the dissent in *Croson* relate to the precision with which prior acts of discrimination must be identified, and to the "narrow tailoring" requirement under which the remedial program must be narrowly tailored to remedy identified discrimination, and the precision with which prior acts of discrimination must be proven.

In *Metro Broadcasting v. Federal Communications Commission*,¹⁵ decided on June 27, precisely three months ago, the

11. *Id.* at 743. Justice Marshall was joined by Justices Brennan and Blackmun.

12. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (a white male whose application to a state medical school was rejected brought an action challenging the legality of the school's special admissions program under which 16 of the 100 positions in the class were reserved for "disadvantaged" minority students).

13. *Id.* at 359.

14. *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706, 743 (1989).

15. 110 S. Ct. 2997 (1990).

Supreme Court concluded that two race-conscious programs of the Federal Communications Commission were constitutional.¹⁶ Justice Brennan's majority opinion for five members of the Court applied intermediate level scrutiny,¹⁷ the same scrutiny advocated by the *Croson* dissenters the year before.¹⁸ *Croson* was distinguished on the basis that the Commission's program was "mandated by Congress,"¹⁹ rather than by a state or local government. The majority concluded that broadcast diversity was an important governmental objective, one that is closely related to first amendment concerns and the objectives of the Federal Communications Act. The majority concluded that the means used, the "distress sale" program and use of an "enhancement" factor for minority ownership in comparative hearings, were substantially related to achievement of the important governmental objective of broadcast diversity.²⁰ There was a dissent by Justice O'Connor, joined by three other members of the Court,²¹ in which she vigorously argued that it was error for the Court not to have employed strict scrutiny.²² She viewed strict scrutiny as being appropriate for all race-conscious affirmative action measures.²³ She also objected to the fact that, in *Metro*, a non-remedial objective was being achieved by race-conscious means. One of the more interesting aspects of *Metro* is the fact that the Court accepted broadcast diversity as a non-remedial objective, and as being appropriate as a basis for race-conscious governmental action.²⁴ Justice O'Connor correctly noted that Congress was not exercising its remedial powers under section five of the

16. *Id.* at 3009.

17. *Id.* Justices Marshall, White, Blackmun and Stevens concurred with Justice Brennan.

18. *See supra* note 11 and accompanying text.

19. *Metro*, 110 S. Ct. at 3008.

20. *Id.* at 3026.

21. *Id.* at 3028 (O'Connor, J., dissenting). Justice O'Connor was joined in her dissent by Chief Justice Rehnquist, Justice Scalia and Justice Kennedy.

22. *Id.* at 3029.

23. *Id.* "'Strict scrutiny' requires that . . . racial classifications must be determined to be necessary and narrowly tailored to achieve a compelling state interest." *Id.*

24. *Id.* at 3008-09.

fourteenth amendment, which would be the basis for congressional action designed to remedy identifiable past discrimination.²⁵

Justices Scalia and Kennedy joined the dissent of Justice O'Connor.²⁶ However, they both seemed to be to her right with regard to affirmative action. In fact, they went so far as to compare the Commission's benign affirmative action program with apartheid in South Africa and with the case of *Plessy v. Ferguson*,²⁷ the case that established the pernicious "separate but equal" doctrine.²⁸

That is the line-up on the Court in *Metro* and *Croson*. Our tenth player in all of this, Judge David Souter, in testimony before the Senate Judiciary Committee, stated that in his view government must do more than end discrimination. It must undo discrimination as well.²⁹ He referred to *Metro* and *Croson* in ways that demonstrated, to my satisfaction, that he has read them and understands them, and suggests that the important focus of the Court in the future will be on the fact-dependent requirement that programs be narrowly tailored to achieve remedial or "benign" objectives.³⁰

I would now like to talk for a moment about the Civil Rights Act of 1990.³¹ To some extent, I am doing this to give you a basis for your dialogue with Mr. Dunne. I am going to refer to

25. *Id.* at 3031 (O'Connor, J., dissenting). The dissent stated that "[t]he FCC and Congress are clearly not acting for any remedial purpose and the Court today expressly extends its standard to racial classifications that are not remedial in any sense." *Id.*

26. *Id.* at 3044 (Rehnquist, C.J., Scalia, O'Connor, Kennedy, JJ., dissenting).

27. 163 U.S. 537 (1896).

28. *Id.* at 551. In *Plessy*, the Supreme Court affirmed the constitutionality of a Louisiana statute providing for separate railway carriages for white and black persons. The Court rejected the idea that racial segregation imposed by government "stamps the colored race with a badge of inferiority," and reasoned that social inequalities cannot be remedied by legislation, but must be overcome by voluntary consent of individuals. *Id.*

29. N.Y. Times, Sept. 15, 1990, at 10, col. 4. Souter responded, "I think it goes without saying that when we consider the power of the judiciary to remedy discrimination which has been proven before the judiciary, the appropriate response is not simply to say stop doing it. The appropriate response, wherever it is possible, is to say, undo it." *Id.*

30. *See id.*

31. S. 2104, 101st Cong., 1st Sess., 136 CONG. REC. 9944-46 (1990).

the Act in its original form. The basic motivation for the Act was to reverse the results in employment discrimination cases from the 1988 Term,³² brought under Title VII of the 1964 Civil Rights Act or under section 1981, the current version of one of the post-Civil War Civil Rights Acts.³³ Perhaps the most significant of these cases was *Wards Cove*,³⁴ in which the Court reversed, in part, the 1971 decision of *Griggs v. Duke Power Co.*³⁵ *Griggs* approved the disparate impact theory of violation for Title VII cases. Under disparate impact theory, once a plaintiff has proven that an employment practice has a disparate impact connected to gender, race, religion or national origin, an employer is required to prove that the employment practice is justified by business necessity. *Wards Cove* shifted the business necessity burden of proof to the plaintiff, forcing the plaintiff to prove a negative, the absence of business necessity.³⁶ The Civil Rights Act of 1990 would shift the business necessity burden of proof back to the defendant³⁷ and, in its original form, defined business necessity as "essential to effective job performance."³⁸ In a situation in which a number of employment practices seem to combine to cause disparate im-

32. See *Jett v. Dallas Indep. School Dist.*, 109 S. Ct. 2702 (1989); *Patterson v. McLean Credit Union*, 109 S. Ct. 2363 (1989); *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115 (1989).

33. Civil Rights Act of 1964, §§ 701, 703(a), 42 U.S.C. §§ 2000e to 2000e-2(a)(i) (1988).

34. *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115 (1989). The Court stated that "the persuasion burden here must remain with the plaintiff, for it is he who must prove that it was because of such individual's race, color, etc., that he was denied a desired employment opportunity." *Id.* at 2126.

35. 401 U.S. 424 (1971). The Court noted that Congress placed the burden of demonstrating that any given requirement of employment has a definite relationship to the employment in question on the employer. *Id.* at 432.

36. *Wards Cove*, 109 S. Ct. at 2126.

37. Civil Rights Act of 1990, S. 2104, 101st Cong., 1st Sess., 136 CONG. REC. 9944-46 § 4 (1)(A) (1990): "[A] complaining party demonstrates that an employment practice results in a disparate impact on the basis of race, color, religion, sex or national origin, and the respondent fails to demonstrate that such practice is required by a business necessity." *Id.*

38. *Id.* The Civil Rights Act of 1990, in its original form, defined the phrase "required by business necessity" to mean that challenged selection methods "bear a significant relationship to successful performance of the job," and that other practices "bear a significant relationship to business objective of the employer." *Id.*

pact, the Act would require the defendant to establish that each of the practices either does not cause disparate impact or is justified by business necessity.³⁹ This would place on the party with better access to relevant information the burden of explaining the reasons for the disparate impact that is causing harm to employees or applicants for employment because of their gender, race, religion or national origin.

*Martin v. Wilks*⁴⁰ was a case from the 1988 Term that opened Title VII decrees to challenge by intervening third parties⁴¹ without time limits. Standards employed in the past for intervention of this nature, designed to protect settlement decrees and, thus, encourage settlement, were ignored or eliminated by the Court. The Civil Rights Act of 1990 would shield these decrees, whether they result from litigation or settlement negotiations, unless the decrees are the product of such things as duress, collusion or fraud, or unless the court lacked subject matter jurisdiction.⁴²

Lorance v. AT & T Technologies, Inc.,⁴³ also from the 1988 Term, dealt with seniority systems that are shielded by a provision of Title VII from disparate impact challenge, unless a particular seniority system is the product of an intent to discriminate. Under *Lorance*, a seniority system that is the product of an intent to discriminate must be challenged within the normal Title VII statute of limitations period, running from the date of *adoption* of the system, even if it takes many years before the system results in discriminatory impact on someone.⁴⁴ The Civil Rights Act of 1990 would modify the statute of limita-

39. *Id.*

40. 109 S. Ct. 2180 (1989).

41. *Id.* at 2182-83. A group of white firefighters sued alleging they were being denied promotions in favor of less qualified black firefighters. *Id.* They claimed the city made promotion decisions on the basis of race in reliance on certain consent decrees. The district court held that the white firefighters were precluded from challenging employment decisions taken pursuant to the decrees, even though these firefighters had not been parties in the proceedings in which the decrees were entered. *Id.* The Supreme Court held that if you had a discrimination claim you would not be precluded from litigating your claim in court. *Id.*

42. Civil Rights Act of 1990, S. 2104, 101st Cong., 1st Sess., 136 CONG. REC. 9944-46 § 6 (1990).

43. 109 S. Ct. 2261 (1989).

44. *Id.* at 2268-69.

tions in such a case so that the time period for filing of a Title VII charge would begin to run when an individual actually suffers discrimination because of the seniority system.⁴⁵

In *Independent Federation of Flight Attendants v. Zipes*,⁴⁶ a case from the 1988 Term, dealt with the prevailing party's attorney's fees provisions of Title VII. In *Zipes*, the Court held that prevailing plaintiffs in Title VII cases were not entitled to receive attorney's fees from defendants' awards when the plaintiffs successfully defend against claims brought by intervening third parties.⁴⁷ This presents a major problem for plaintiffs if an affirmative action remedy is sought from the court or has been agreed to by a defendant.⁴⁸ Under the Civil Rights Act of 1990, the plaintiff would be entitled to an award of attorney's fees from the original defendant for successful defense against claims brought by intervening third parties.⁴⁹

Finally, in *Patterson v. McLean Credit Union*,⁵⁰ a case that received extensive publicity, the Court considered the scope of section 1981 of the United States Code, the current version of a post-Civil War Civil Rights Act that prohibits racial discrimination in contracting.⁵¹ The Court reversed well established precedent and concluded that this statute applies only to the initial making of a contract.⁵² Therefore, an employer is prohibited from discriminating on the basis of race in establishing an employment relationship, but, the day after hire, may insult, harass, terminate or otherwise discriminate with impunity on a racial basis.⁵³ The Civil Rights Act of 1990 would reverse

45. Civil Rights Act of 1990, S. 2104, 101st Cong., 1st Sess., 136 CONG. REC. 9944-46 § 7 (1990).

46. 109 S. Ct. 2732 (1989).

47. *Id.* at 2738.

48. *Id.* at 2740 (Blackmun, J., concurring).

49. Civil Rights Act of 1990, S. 2104, 101st Cong., 1st Sess., 136 CONG. REC. 9944-46 § 9(4) (1990).

50. 109 S. Ct. 2363 (1989).

51. 42 U.S.C. § 1981 (1988).

52. *Patterson*, 109 S. Ct. at 2374.

53. *Id.* at 2373. In *Patterson*, the plaintiff was employed by the defendant credit union for ten years until she was laid off. She claimed that her supervisor periodically stared at her for several minutes at a time, and gave her too many tasks to perform, including jobs like sweeping and dusting that were not given to white em-

the *Patterson* case and would expand the scope of section 1981 to include all aspects of the employer-employee relationship.⁵⁴

There are some provisions in the Act that are new. For example, there is a provision providing for compensatory and punitive damages.⁵⁵ There is a change in the statute of limitations period from 180 days to two years.⁵⁶ There is a prohibition against defense counsel coercing a waiver of plaintiff's attorney's fees as a condition of settlement⁵⁷ and there is a provision that attempts to clarify causation burdens of proof.⁵⁸ However, despite public comments by President Bush and others, there is nothing in the Act that, even remotely, would cause an employer, who is not an idiot, to use a flat quota and hire unqualified persons. And, with that, I will finish my comments.

Judge Leon Lazer:

Our next speaker is the Chief of the Civil Rights Division of the Department of Justice, Assistant Attorney General John R. Dunne, who is known to people throughout the state and especially to us on Long Island. He has served for twenty-four years as a member of the State Senate, and during that time, he served as chairman of the Insurance Committee, the Crime and Corrections Committee, and the Judiciary Committee. The Judiciary always regarded him as a good friend.

He is a past president of the Nassau County Bar Association, Nassau County Legal Aid Society. He is a graduate of Yale Law School, and served as law secretary to Supreme Court Justice Thomas P. Farley. He has also written an article in the *Touro Law Review*⁵⁹ as well as other publications.⁶⁰ He is a former partner of Rivkin, Radler, Dunne and Bayh.

ployees. She also claimed that she was passed over for promotion, not offered training for higher level jobs, and denied wage increases because she was black. *Id.*

54. Civil Rights Act of 1990, S. 2104, 101st Cong., 1st Sess., 136 CONG. REC. 9944-46 § 8 (1990).

55. *Id.* § 8(a)(A), (B).

56. *Id.* § 7(a)(1), (2).

57. *Id.* § 9(2).

58. *See id.* § 4(4), (5).

59. Dunne & Serio, *Surrogate Parenting After Baby M: The Ball Moves to the Legislature's Court*, 4 TOURO L. REV. 161 (1988).

60. *See, e.g.,* Dunne, *Intercompany Transactions Within Insurance Holding Companies*, 20 THE FORUM 445 (1984).

It is a pleasure and an honor to have with us the man who is in charge of civil rights for the United States of America today, John Dunne.

Honorable John Dunne:

Leon, thank you very much for your very kind words and warm welcome. Let me tell you it is good to be home. I have been away for six months and I am very pleased to be home with you here on Long Island. Obviously, I am quite honored to participate in your second annual conference on the Supreme Court and local government law.

Since I am at the home of Dean Glickstein, I should make a reference to my dear friend Howard. He and I were classmates at Yale Law School. We were members of the class of 1954, which has had a proud heritage of providing, at least during the Democratic Administration, leaders in the civil rights division. Howard was involved, as all of you know, as the Executive Director of the Civil Rights Commission of the United States. Its first director was also a classmate of ours. The second director was Bill Taylor, another classmate. I understand that when Howard Glickstein went before the Senate Judiciary Committee for confirmation and they were reviewing his resume, one of the senators said, "I cannot understand it, apparently you have got to be a member of the class of Yale '54 in order to hold this exalted position." We have not held a monopoly on it, but Howard's imprint in the area of civil rights has been a long and lasting one. In fact, if I may just note on a very personal level, before I went to Washington to undertake my responsibilities, Howard gave me a copy of a report which he had prepared as the executive director of a task force under President Carter's administration to make proposals for reorganization of the Federal Equal Employment Enforcement Activities. And, if I may presume on you, Howard, I took from your concluding paragraph of that report, a benchmark for my undertaking the responsibilities across the street in the Department of Justice. As you concluded, adequate resources, strong

commitment and good management are now recognized as essential ingredients of an effective civil rights program. The proliferating of civil rights responsibilities among government agencies also suggests that some reorganization of programs is required. That reorganization has begun. Its impact on strong efficient and effective enforcement is yet to be seen.

On another personal level, it is good just to be back with friends such as Judge Pratt, who was a year ahead of us at law school and, as you all know, was the leader of his class, and of course, to be with Justices Vincent Ballella and Lawrence Bracken, who were old friends from political days, as well as professional ones.

I would like to address a topic which your committee assigned to me today, namely the Supreme Court's decision of last Term, *Metro Broadcasting v. Federal Communications Commission*,⁶¹ and, in particular, how that decision fits in with the Supreme Court's decision in the prior Term as Professor Scherer had pointed out in *City of Richmond v. Croson*.⁶²

If you will indulge me since I am speaking from a prepared text, this is not like the free wheeling days when I was in the legislature, where I could say whatever I wanted, all of these remarks are pre-cleared, so let me stick to the text, and maybe do a little elaboration when it comes to straight answers.

In *Metro*, the Court, as Professor Scherer pointed out, in a five to four decision with Justice Brennan writing for the majority, Justice Stevens concurring alone and dissents being filed by Justices O'Connor and Kennedy, upheld two programs under which the F.C.C. gives preferences to minority owned companies applying for broadcast licenses.⁶³ Under the one program, the F.C.C. awards an enhancement or extra credit to minority owned applicants when it is evaluating competing applications in comparative or competing licensing proceedings.⁶⁴ Under the other program, current broadcast license holders whose qualifications to continue to hold their licenses have come into question, are permitted to avoid revocation hearings

61. 110 S. Ct. 2997 (1990).

62. 109 S. Ct. 706 (1989).

63. *Metro*, 110 S. Ct. at 3002.

64. *Id.* at 3004-05.

by transferring, in advance thereof, their licenses to minority owned firms at distress sale prices defined in the statute as being no more than seventy-five percent of their market value.⁶⁵ The Supreme Court concluded that these programs indeed passed constitutional muster under the equal protection guarantees of the fifth amendment.⁶⁶

At the previous Term, in *Croson*, the Court had struck down a program under which the City of Richmond, Virginia required city contractors to subcontract thirty percent of their work to minority owned business enterprises.⁶⁷ A majority of the Court declared that this program violated the equal protection clause of the fourteenth amendment because the justification for it failed to meet the rigorous strict scrutiny standard applicable to racial classifications.⁶⁸ There was no showing, for example, that existing minority contractors in the Richmond area were under-represented in their participation in the city contracts or that there had actually been discrimination against minority contractors.⁶⁹ Therefore, it could not be said that the set aside was necessary to remedy past discrimination.⁷⁰

Let me just pause and make an observation here. It is regrettable that such a bad case for affirmative action was able to reach the Supreme Court. All the predicates, as the Court pointed out in *Croson*, were most unfavorable for a decision other than what the majority rendered.⁷¹ To give you an example, the program the city adopted was a straight lift from the federal program for affirmative action. The City of Richmond also required under its thirty percent set aside, that among those beneficiaries should be our Aleutian friends from Alaska,⁷² which indicated how little real thought and rele-

65. *Id.* at 3005.

66. *Id.* at 3002.

67. *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706, 713 (1989).

68. *Id.* at 720-21.

69. *Id.* at 727.

70. *Id.* at 729.

71. *Id.* at 724.

72. *Id.* at 713.

vance, and, if you will, narrow tailoring or focusing was made in the adoption of that program.

To understand the reasons for the different results in these two cases, it is necessary to explore the significant differences in the programs under review.

To begin with, the Court in *Metro* found it to be of overriding importance that the F.C.C.'s minority preferences had been expressly approved and, as the Court pointed out, "indeed mandated by [the United States] Congress."⁷³ The majority explained that while *Croson* had set the standards for evaluating racial preferences adopted to state and local legislatures, that same standard was not applicable to programs adopted by the federal legislature.⁷⁴ As the majority explained, quoting from former Chief Justice Burger's opinion in *Fullilove v. Klutznick*:⁷⁵

When a program employing a benign racial classification is adopted by an administrative agency at the explicit direction of Congress, we are bound to approach our task with appropriate deference to the Congress, a co-equal branch charged by the Constitution with the power to 'provide for the [] general Welfare of the United States' and 'to enforce, by appropriate legislation,' the equal protection guarantees of the Fourteenth Amendment.⁷⁶

The Court went on stating "[w]e explained that deference was appropriate in light of Congress' institutional competence as the national legislature, as well as Congress' powers under the Commerce Clause, the Spending Clause and the Civil War Amendments."⁷⁷

In contrast, the Court in *Croson* had rejected such deference to the judgments of state or local legislative bodies as inconsistent with the fourteenth amendment.⁷⁸ As Justice O'Connor explained in her *Croson* plurality opinion:

The Civil War Amendments themselves worked a dramatic change in the balance between congressional and state power over matters of

73. *Metro Broadcasting, Inc. v. Federal Communications Comm'n*, 110 S. Ct. 2997, 3008 (1990).

74. *Id.* at 3009.

75. *Id.* at 3008 (citing *Fullilove v. Klutznick*, 448 U.S. 448 (1980)).

76. *Id.*

77. *Id.*

78. *City of Richmond v. J.A. Croson, Co.*, 109 S. Ct. 706, 719 (1989).

race. Speaking of the thirteenth and fourteenth amendments in *Ex Parte Virginia* the Court stated: 'they were intended to be, what they really are, limitations of the powers of the States and enlargements of the power of Congress.'⁷⁹

Justice O'Connor continued, "that Congress may identify and redress the effects of society-wide discrimination does not mean that, *a fortiori*, the States and their political subdivisions are free to decide that such remedies are appropriate."⁸⁰ Section one of the fourteenth amendment is an explicit constraint, and Justice O'Connor underlined, "an explicit *constraint* on state power and the states must undertake any remedial efforts in accordance with that provision."⁸¹

There are practical reasons for the distinction as well. As the majority in *Metro* explained, quoting Justice Scalia's concurring opinion in *Croson*:

As a matter of "social reality and governmental theory," the Federal Government is unlikely to be captured by a minority racial or ethnic group and used as an instrument of discrimination. Justice Scalia explained that "the struggle for racial justice has historically been a struggle by the national society against oppression in the individual States," because of the "heightened danger of oppression from political factions in small, rather than large, political units."⁸²

Therefore, rather than applying the strict scrutiny it had applied in the locally legislated program in *Croson*, which Professor Scherer explained to you was the concern of Justice O'Connor, the Court in *Metro* turned to the standard it had applied to a federal set-aside in the *Fullilove*⁸³ case. It held that the "benign race conscious measures mandated by Congress . . . 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."⁸⁴ This was true, to quote the Court, "even if those measures are not remedial in the sense of being designed

79. *Id.*

80. *Id.*

81. *Id.* (emphasis in original).

82. *Metro Broadcasting, Inc. v. Federal Communications Comm'n*, 110 S. Ct. 2997, 3009 (1990) (citing Scalia, J., concurring opinion in *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706, 737 (1989)).

83. *Fullilove v. Klutznick*, 448 U.S. 448 (1980).

84. *Metro*, 110 S. Ct. at 3008-09.

to compensate victims of past governmental or societal discrimination.”⁸⁵ In that regard, I think it is well to look briefly at the opening paragraph of Justice Stevens’ very short concurring opinion where he stated quite clearly that, “[t]oday the Court squarely rejects the proposition that a governmental decision that rests on a racial classification is never permissible except as a remedy for a past wrong.”⁸⁶ This standard differs in significant respects from the standard applied in *Croson* where the Court held that a locally legislated set aside must serve a compelling state interest, that such an interest must be remedial, and that the program under review must be narrowly tailored to serve that interest.⁸⁷ As Justice O’Connor’s plurality opinion concluded, a local government seeking to justify a racial preference must show, “a strong basis in evidence that the preference was necessary.”⁸⁸

In *Metro*, by contrast, the Court applied a less rigorous test. Instead of a compelling state interest, a federally legislated program must serve an important governmental interest, not a compelling but an important governmental interest, not limited to remedying past discrimination.⁸⁹ And rather than being necessary and narrowly tailored to such interest, it must substantially relate to that interest.⁹⁰ Moreover, the Court made it clear that while it would examine carefully the actions that Congress had taken, it would give great weight to those legislative determinations as well as to the expertise of the Federal Communications Commission.⁹¹

The Court found an important governmental interest in the F.C.C.’s goal of promoting programming diversity.⁹² Relying on its earlier decisions delineating the F.C.C.’s regulatory role, the Court explained:

85. *Id.* at 3009.

86. *Id.* at 3028 (Stevens, J., concurring).

87. *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706, 729 (1989).

88. *Id.* at 730.

89. *Metro Broadcasting, Inc. v. Federal Communications Comm’n*, 110 S. Ct. 2997, 3008-09 (1990).

90. *Id.*

91. *Id.* at 3011.

92. *Id.* at 3010.

[I]t is axiomatic that broadcasting may be regulated in light of the rights of the viewing and listening audience, not a particular segment of it, but the rights of the viewing and listening audience, and that the 'wildest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.' Safeguarding the public's right to receive a diversity of views and information over the airwaves is therefore and integral component of the F.C.C.'s mission.⁹³

Next, the Court found that the F.C.C.'s minority ownership policies were, in the language of the Court, "substantially related to [] the Government's interest" in programming diversity.⁹⁴ In reaching this conclusion, the Court relied on the findings of both the F.C.C. and Congress. So let us look at what some of these were.

First, the Court found that the F.C.C. had determined, after considerable study, that minority participation in broadcast ownership was essential to the promotion of programming diversity.⁹⁵ This determination was credited by the Court, not only because of the Commission's expertise, but also because it was consistent with long-standing F.C.C. practices.⁹⁶ As the Court stated:

[F]rom its inception, public regulation of broadcasting has been premised on the assumption that diversification of ownership will broaden the range of programming available to the broadcast audience. Thus, it is upon *ownership* that public policy places primary reliance with respect to diversification of content, and that historically has proved to be significantly influential with respect to editorial comment and the presentation of news.⁹⁷

Second, the F.C.C.'s determination has been confirmed by Congress, which as recently as 1988 required the F.C.C. to continue both of the programs at issue.⁹⁸ The Court did not rely solely on this recent legislative action, however, but rather on what it described as "the long history of congressional sup-

93. *Id.*

94. *Id.* at 3011.

95. *Id.*

96. *Id.* at 3012.

97. *Id.*

98. *Id.*

port for the policies," as evidenced by congressional hearings and legislative action over two decades.⁹⁹

The Court concluded, "As revealed by the historical evolution of current federal policy, both Congress and the Commission have concluded that the minority ownership programs are critical means of promoting broadcast diversity. We must give great weight to their joint determination."¹⁰⁰

The Court found that the F.C.C.'s policies were substantially related to the goal of promoting broadcast diversity in other respects as well. Both the Commission and Congress had considered and tried numerous alternative ways of promoting minority ownership. The use of minority preferences had been adopted only after these other means had proven unsuccessful,¹⁰¹ thus, the idea of narrowly tailored. The Court found that the policies, which were directed at the barriers faced by minorities seeking to enter the broadcast industry, were appropriately limited in extent and duration with provisions for administrative review and had limited effect on the legitimate expectations on non-minorities.¹⁰²

In contrast to this abundance of evidence that the F.C.C. programs were substantially related to their purpose, in *Croson*, the Court found that there was no showing that Richmond's minority business set-aside was necessary to the achievement of its asserted purpose as a remedy for past discrimination or even that such past discrimination had existed.¹⁰³ Mind you, there was no evidence in the legislative record of a finding of past discrimination in the placing of contracts for the City of Richmond, nor was there any showing that the city had tried alternative non-discriminatory means of assisting minority businesses.¹⁰⁴

Finally, the Court, in *Metro*, rejected the contention that linking minority ownership and broadcast diversity rested on

99. *Id.* at 3012-13.

100. *Id.* at 3016.

101. *Id.* at 3022-23.

102. *Id.* at 3024.

103. *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706, 727 (1989).

104. *Id.*

impermissible racial or ethnic stereotyping.¹⁰⁵ Rather than reflecting an assumption that all members of a minority group would necessarily share the same perspective or prefer the same type of programming, the policy was based on the belief that, as the Court held, "[a] broadcasting industry with representative minority participation will produce more variation and diversity than will one whose ownership is drawn from a single racially and ethnically homogenous group."¹⁰⁶ In support of this assumption, the Court cited empirical evidence that minority broadcast ownership does, in fact, result in the devotion of greater time to news topics of minority interest and contributes to the avoidance of racial and ethnic stereotypes and to an increase in minority employment.¹⁰⁷ As the Court stated:

While we are under no illusion that members of a particular minority group share some cohesive, collective viewpoint, we believe it a legitimate inference for Congress and the Commission to draw that as more minorities gain ownership and policymaking roles in media, varying perspectives will be more fairly represented on the airwaves.¹⁰⁸

The Court held that such an assumption was constitutionally permissible, citing to Justice Powell's statement in the *Bakke*¹⁰⁹ case that a rationally diverse student body was a permissible and desirable goal.¹¹⁰

Now, what are we doing about it? The civil rights division has filed only one brief regarding the impact of the Court's decision in *Metro*. That was in a case involving a challenge to the constitutionality of Executive Order 11246 which requires government contractors to take affirmative action in employment including, in some cases, the adoption of goals and time-

105. *Metro Broadcasting, Inc. v. Federal Communications Comm'n*, 110 S. Ct. 2997, 3016 (1990).

106. *Id.* at 3016-17.

107. *Id.* at 3017 n.31.

108. *Id.* at 3018.

109. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (a student denied admittance to medical school sued the University, claiming that the admissions scheme violated the equal protection clause, as well as Title XI of the 1964 Civil Rights Act).

110. *Metro Broadcasting, Inc. v. Federal Communications Comm'n*, 110 S. Ct. 2997, 3017 (1990).

tables.¹¹¹ It is our position, the position of the Civil Rights Division, expressed in a case arising out of a program adopted by the department of transportation for affirmative action, that the executive order does not require preferential treatment of minorities or women, and that, therefore, no equal protection issue is even presented. But, we have stated in our brief that if such an issue is presented, that the Executive Order has been specifically approved by Congress and should be upheld as a valid remedial measure under the same standards as the F.C.C.'s programs in *Metro*.¹¹²

Let us talk about the future. The future of *Metro* is placed in some doubt, of course, by the departure of Justice Brennan, who authored the opinion and provided the crucial fifth vote for the majority opinion—I do not really see his vote as providing the crucial fifth vote, I see Justice White as having provided the crucial fifth vote, keeping in mind that Justice White was the fifth vote in the *Ward's Cove*¹¹³ decision.

In addition, I think it would do well to once again make reference to Justice Stevens' decision—and from all indication and gossip around the beltway, he is going to be on the bench for sometime—he, being part of the majority, stated in his concurrence: "I remained convinced, of course, that racial or ethnic characteristics provide a relevant basis for disparate treatment only in extremely rare situations and that it is therefore 'especially important that the reasons for any such classification be clearly identified and unquestionably legitimate.'"¹¹⁴ He said that "[i]n addition the Court demonstrates that this case falls within the extremely narrow category of governmental decisions for which racial or ethnic heritage may provide a rational basis for differential treatment."¹¹⁵

111. Memorandum in Support of Defendant's Motion for Summary Judgment at 3, *Stouffer Foods Corp. v. Dole*, No. 7.89-2149-3 (D.S.C. filed July 26, 1990).

112. *Id.* at 7.

113. *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115 (1989) (predominantly white salmon cannery workers did not establish discrimination based on race).

114. *Metro Broadcasting, Inc. v. Federal Communications Comm'n*, 110 S. Ct. 2997, 3028 (1990) (citing *Fillilove v. Klutznick*, 578 U.S. 448, 534-35 (1980)).

115. *Id.*

I draw that to your attention, not attempting to advocate one position or another, but I think if we are talking about the future, those words ought to be included. Where soon to be Justice Souter will stand on that issue, we cannot be sure. But whether *Metro* is going to be applied in other cases or narrowed and distinguished, only time will tell. I am sure it will be revisited since there are a number of issues left open by the Court's decisions in this area. Because we in the Civil Rights Division must deal with these issues on a case-by-case basis with reference to the particular facts presented in each case, I am going to try to avoid giving you my views on these issues, but I will describe, if I may, the kinds of questions that I anticipate will be coming up and will no doubt be faced by you.

First, just how explicit must Congress be when it approves a program instituted by a federal agency? How clear must that mandate be to that federal agency?

Second, what level of scrutiny, strict, intermediate—as was suggested by some of the dissenters in the *Croson* case¹¹⁶—or rational basis, is appropriate where a racial preference program has been instituted by a federal agency without specific congressional approval? Is the agency's expertise, which was recognized by the Court in *Metro*, standing alone, entitled to deference from the courts?

Third, what is the implication of Court's holding that a racial preference may be upheld even if it is not remedial as long as it serves an important governmental interest? Is this principle limited to congressionally approved programs or might it also apply to programs adopted by other entities, such as a public university seeking a diverse student body? What other governmental purposes may justify rational preference?

These and other questions are what makes being in Washington and particularly in the Civil Rights Division such an exciting assignment. Not the least of which is the ongoing discussion and at times debate and tense negotiations that I have been involved in from the day I started, on April 2nd, with

116. *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706, 752 (1989) (Marshall, J., dissenting).

regard to the Kennedy-Hawkins Civil Rights Act of 1990.¹¹⁷ This discussion and debate—I am going to take off my hat as head of the division and put on my hat as part of the Bush Administration—this debate is something that has been going on in the political arena, and despite the criticism which I have recently received from some southern Democrats, who argue that what we are trying to do is enforce the voting rights act which is a corrupt plot by the Bush Administration to help Republicans. We can talk about that later.

This is a political issue where there are conflicting views. We believe—and there is no question about it—that whether it is the original version of house bill four thousand or its present amended form, the bill goes far beyond restoring the law to where it was prior to that series of Supreme Court decisions that Brad Reynolds and other panelists discussed last year.¹¹⁸

The President has repeatedly said if you want *Griggs*,¹¹⁹ he will sign a bill that has *Griggs* language in it, which for nineteen years, he states, did not create quotas. Despite the fact that the present form of the Kennedy-Hawkins bill states it is intended to codify *Griggs*,¹²⁰ the language that they put into the bill to codify business necessity which is the real hanging point in the discussions, does not take language out of *Griggs*.¹²¹ What we are concerned about is that while the footnote in the bill says this is intended to codify *Griggs*, the opportunity to actually codify the language used in *Griggs* nineteen years ago is not being utilized.

The President is willing to support a bill which shifts the burden clearly and unequivocally, something which was not so under *Griggs*, to the defendant-employer to justify by business necessity his various employment and other business practices. We are willing to correct the inequity that resulted from the

117. H.R. 4000, 101st Cong., 2d Sess., 136 CONG. REC. 9944-46 (1990).

118. See Symposium, *The Supreme Court and Local Government Law, Employment Discrimination*, 6 TOURO L. REV. 55 (1989).

119. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (employment practice that operates to exclude blacks that cannot be shown to be related to job performance is prohibited even without discriminatory intent).

120. H.R. 4000, 101st Cong., 2d Sess., 136 CONG. REC. 9944-46 (1990).

121. *Id.*

*Patterson*¹²² case changing section 1981,¹²³ which everyone for over a century thought applied to the performance as well as the making of contracts and protecting against discrimination.¹²⁴ We are prepared to correct *Lorance v. AT & T Technologies*¹²⁵ in order to protect the pension benefits and other benefits of employees. We are still in disagreement with regard to how the Congress and the President should respond to the decisions in *Price Waterhouse v. Hopkins*,¹²⁶ the *Zipes*¹²⁷ case, and in *Martin v. Wilkes*.¹²⁸ Today, the Rules Committee of the House is to determine when the bill prepared by the Conference Committee with caps on punitive damages will be considered. I want to reaffirm to you that the President and Governor Sununu, who has personally been involved in negotiations as recently as Monday or Tuesday with Senator Kennedy, we are trying to work toward a civil rights bill which will restore the law to where it was, and hopefully that will be achieved.

I am afraid I have spoken too long. Perhaps we can mix it up with a few questions which will bring greater clarification to these issues.

Professor Gary Shaw:

I am concerned with the effect of the *Metro*¹²⁹ case on *Croson*.¹³⁰ It seems to me, when I read *Croson* and the F.C.C. case, *Metro*, the big distinction is that *Croson* is state and *Metro* is federal. The Court goes through the analysis of the

122. *Patterson v. McLean Credit Union*, 109 S. Ct. 2363 (1989) (black employee harassed and fired because of race).

123. 42 U.S.C. § 1981 (1988).

124. *Patterson*, 109 S. Ct. at 2369.

125. 109 S. Ct. 2261 (1989) (must show discriminatory intent in the operation of a seniority system having disparate impact on men and women).

126. 109 S. Ct. 1775 (1989) (accounting firm liable for refusing partnership to a female based on her gender).

127. *Independent Fed'n of Flight Attendants v. Zipes*, 109 S. Ct. 2732 (1989) (civil rights attorney's fees cannot be recovered unless intervenor's action was frivolous, unreasonable or without foundation).

128. 109 S. Ct. 2180 (1989) (allowing white firefighters to intervene in consent decrees that they were not original parties to).

129. *Metro Broadcasting, Inc. v. Federal Communications Comm'n*, 110 S. Ct. 2997 (1990).

130. *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706 (1989).

relationship between states and federal government as it was affected by the fourteenth amendment.¹³¹ Mr. Dunne, you seem to focus on the fact that in *Croson* the real problem was that the means by which Richmond wanted to achieve its objective was not sufficiently narrowly tailored.¹³² When I read *Croson*, I agreed with that aspect of it, but I also read some language in *Croson* as saying that states cannot be involved in non-remedial objectives, such as diversity.¹³³ Do you think that the result of *Metro* is that if a state came up with a sufficiently narrowly tailored program, it could implement a non-remedial objective or do you think that it stayed the same after *Metro*?

Honorable John Dunne:

I would have serious doubts that the Supreme Court would go very far beyond that decision. I think that you would probably lose Justice White and you might very well lose Justice Stevens on that. My guess would be whether you like the prospect or not, that the Supreme Court would not approve a non-remedial response by a state or local legislative body.

Professor Gary Shaw:

Is it because it is simply never a compelling state interest or because as a practical matter the state could never come up with a sufficiently narrowly tailored program to meet that kind of objective?

Honorable John Dunne:

I do not think it would be an allowable activity for the states to attempt to impose a non-remedial solution.

Professor Douglas Scherer:

I am not sure that I would agree with that. My problem is that I think the two cases are in conflict in a way that needs to be resolved at some point in time. I think that it is perhaps a false distinction to view *Croson* as reflecting the limits on state

131. *Id.* at 719-21 (plurality opinion of O'Connor, J.); *Metro*, 110 S. Ct. at 3030-32 (O'Connor, J., dissenting).

132. *Croson*, 109 S. Ct. at 728-30.

133. *Id.* at 727-28.

and local action, and *Metro* as a demonstration that Congress, under section five¹³⁴ or through other portions of section one,¹³⁵ could go farther to remedy discrimination. The reason is that, ultimately, regardless of how far Congress could go in accomplishing remedial objectives, I think that all you have done is define the outer limits of section one, the prohibition section. I always, no matter how many times I go through the analysis, come to the conclusion that anything that violates the Constitution as done by state and local government would violate the Constitution as done by Congress. I question whether there is a true distinction that can be made, even though people are viewing *Metro* and *Croson* as distinguishing between the powers of Congress and the powers of state and local government.

It was interesting to see in *Metro* that Justice O'Connor had moved away from the loose language in *Croson* about the power of Congress under section five, which seemed to be a way to justify *Metro* and make it harmonious with *Croson*. She seems to be rejecting that now,¹³⁶ and certainly Kennedy and Scalia have rejected that in their separate dissent in *Metro*.¹³⁷

Therefore, it would seem to me that to the extent that the Court was willing to accept a non-remedial objective in *Metro*, it would similarly be willing to accept the idea of a non-remedial objective of state and local government. Maybe it is a little too convoluted. I would suspect that five years from now you are not going to distinguish between congressional and state and local governmental power, because I think that is a dis-

134. U.S. CONST. amend. XIV, § 5 provides: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." *Id.*

135. U.S. CONST. amend. XIV, § 1 provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Id.

136. See *Croson*, 109 S. Ct. at 719-21; *Metro*, 110 S. Ct. at 3030-32 (O'Connor, J., dissenting).

137. *Metro Broadcasting, Inc. v. Federal Communications Comm'n*, 110 S. Ct. 2997, 3045 (1990) (Kennedy, J., dissenting).

inction that will not hold up. What is going to happen though, as this issue works its way out in cases and as Justice Souter applies his intellect to it, I do not really know.

Professor Gary Shaw:

I would be interested to know if the Justice Department has worked out what its position would be on the proper approach to review remedial race-conscious affirmative action programs by state and local government. Is there an adoption of the O'Connor plurality approach? How would the Justice Department approach the narrowly tailored issue?

Honorable John Dunne:

I do not want to be coy on this, Professor Shaw. This is a new area of concern for us. First of all, in response to your question, there has been no decision with regard to what our overall policy would be. However, I offer you exhibit A, the brief that we recently filed, and I will tell you it was the product of extensive discussion within the division, that took what I thought was a strong position supporting the principle of *Metro*. In addition, we are going to be very vigorous in enforcing not only the directives of the Executive Order that requires affirmative action within the various departments, but also, we are going to be faithful to President Bush's commitment to the concept of affirmative action. He has been strong in that position as far as I am concerned. Some who have heard his utterances with regard to the debate over the Civil Rights Act of 1990¹³⁸ may think that he is fudging a little. I do not believe he is, but honest people disagree on that. I assure you that our position is going to be to stand behind the Court's clear indication that they still believe that affirmative action principles are alive. It is up to you and I guess other courts to determine how well they are surviving, but the President is committed to that position.

138. See *supra* notes 119-27 and accompanying text.

