Missouri Law Review

Volume 89 | Issue 1 Article 13

Winter 2024

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Recommended Citation

Kate Frerking, *Reality Check: The Aim of Affirmative Action May Often Miss the Mark of Equal Protection*, 89 Mo. L. Rev. ()

Available at: https://scholarship.law.missouri.edu/mlr/vol89/iss1/13

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NOTE

Reality Check: The Aim of Affirmative Action May Often Miss the Mark of Equal Protection

Mark One Elec. Co. v. City of Kansas City, 44 F.4th 1061 (8th Cir. 2022).

Kate Frerking [*]

I. INTRODUCTION

The American justice system is built around basic guarantees of procedural due process. The Constitution assures certain procedural rights such as notice, an opportunity to be heard, and an impartial jury,[1] not because these rights always ensure successful outcomes, but because they reflect notions of fairness, protection, and equality the nation views as fundamental. While the ultimate goal is that "justice" is served, the Constitution protects "process," not outcome. If the desire is results-driven, why did the Framers prioritize protecting process over outcome?

The answer partially lies in the feasibility of protecting one versus the other. The government ensures litigants equal treatment by providing certain guaranteed procedural protections; it is ill-equipped and poorly positioned to guarantee litigants equal outcomes. The answer primarily lies, however, in the imperative need for equality of process and equality of application under the law. A great deal of subjectivism, lack of certainty, difficult line-drawing, and a systemic mistrust would occur if the government sought to ensure that trials achieve a particular result.

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[1] U.S. CONST. amend. V, VII; Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542 (1985).

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Such efforts would ultimately undermine the equal treatment of litigants that procedural protections guarantee.

Amendment XIV, and the Equal Protection Clause specifically, is no different.[2] Rather than offering the substantive guarantee of equal outcomes, it offers procedural protection by merely requiring that laws be equally applied to all citizens.[3] Like protections afforded to litigants, the government is well-positioned to ensure the equal treatment of its citizens under the law while being poorly situated to ensure that, through it, its citizens achieve equal results. Affirmative action programs highlight this reality, as evidenced by *Mark One*.[4] In seeking to remedy the socioeconomic results of discrimination through government intervention, rather than preventing disparate treatment under the Constitution, the aim of affirmative action may often miss the mark of equal protection.

This Note discusses *Mark One*'s approval of a personal net worth limitation as a valid narrow tailoring measure for a governmental affirmative action program and details the consequences of the line-drawing that accompanies outcome-based government efforts. Part II describes the facts, procedural posture, and ultimate holding in *Mark One*. Part III summarizes the legal background of affirmative action, including its roots, its evolution in the realm of government contracting under the Supreme Court's jurisprudence, and pertinent Eighth Circuit precedent. Part IV details the Eighth Circuit's determination that a personal net worth limitation, as implemented in a government contracting affirmative action program, is a valid narrow tailoring measure. Part V distinguishes two competing interpretations of the Equal Protection Clause, posits that one's interpretation of the Clause tends to predetermine his or her beliefs regarding the pragmatism and goals of affirmative action, and ultimately demonstrates the problematic line-drawing that follows when the government seeks to ensure outcomes it is poorly positioned to achieve.

II. FACTS AND HOLDING

Since 1996, the city of Kansas City, Missouri ("the City") has maintained a Minority Business Enterprises and Women's Business Enterprises Program ("the Program").[5] In response to the impact of

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[2] U.S. CONST. amend. XIV, § 1 ("No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

[3] *Id.*; *see also* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181, 201 (2023) ("To its proponents, the Equal Protection Clause represented a 'foundation[al] principle'—'the absolute equality of all citizens of the United States politically and civilly before their own laws.'").

[4] Mark One Elec. Co. v. City of Kansas City, 44 F.4th 1061 (8th Cir. 2022).

[5] *Id.* at 1062; *see also What is a Minority Business Enterprise?*, HRZONE, https://www.hrzone.com/hr-glossary/what-is-a-minority-business-enterprise [https://perma.cc/8CE4-RQZF] (last visited Jan. 3, 2024) (defining a Minority

discrimination on minority-owned and women-owned businesses, the Program encourages the government to give preference to such business enterprises as subcontractors on city contracts.[6] To qualify, a business "must demonstrate by written documentation or affidavit that it has suffered from past race or gender discrimination in the city and in the applicable trade or industry."[7] Five additional requirements must also be met for Program certification: the entity must (1) be at least 51% owned, managed, and independently controlled by one or more minorities or women; (2) have a real and substantial presence in the Kansas City metropolitan area; (3) meet business size standards imposed by the federal Small Business Administration according to 13 C.F.R. §121.201; (4) perform a commercially useful function; and (5) be certified by the City's civil rights and equal opportunity department.[8]

To determine whether the Program would survive the constitutional scrutiny to which affirmative action programs are subject, the City conducted a disparity study in 2016.[9] The study concluded that the City had a compelling interest in continuing the Program because "minorities and women continue to suffer discriminatory barriers to full and fair access to [Kansas City] and private sector contracts."[10] However, the study provided additional recommendations to ensure the Program was narrowly tailored.[11] The pertinent recommendation was the addition of a personal net worth limitation, similar to the limitation utilized by the United States Department of Transportation Disadvantaged Business Enterprises program.[12]

Business Enterprise as a term referring to a company that is at least 51% owned, managed, and operated by a member of at least one of the following groups: African Americans, Hispanic Americans, Asian Americans, and Native Americans).

[6] *Mark One*, 44 F.4th at 1062.

[7] *Id.* at 1063; *see also* KAN. CITY, MO. CODE OF GEN. ORDINANCES ch. 3, art. IV, § 3-461(b) (2021).

[8] *Mark One*, 44 F.4th at 1062–63; *see also* KAN. CITY, MO. CODE OF GEN. ORDINANCES ch. 3, art. IV, § 3-421(a)(34), (47) (2021) (detailing requirements for certification as minority business enterprises and women's business enterprises).

[9] *Mark One*, 44 F.4th at 1063 ("The Disparity Study analyzed data from 2008 to 2013 and provided quantitative and qualitative evidence of race and gender discrimination.").

[10] *Id.*

[11] *Id.*

[12] *See Disadvantaged Business Enterprise: Eligibility*, U.S. DEP'T OF TRANSP. (May 3, 2022), https://www.transportation.gov/civil-rights/disadvantaged-business-enterprise/eligibility [https://perma.cc/M8WV-CV79] ("Only disadvantaged persons having a personal net worth of less than $1.32 million can be considered as a potential qualified DBE."); *see also* Subash S. Iyer, *Resolving Constitutional Uncertainty in Affirmative Action Through Constrained Constitutional Experimentation*, 87 N.Y.U. L. REV. 1060 (2012) (detailing the efficacy of the Department of Transportation's

Based on the study, the City amended the Program to incorporate a personal net worth limitation.[13] The limitation requires an entity to establish that its owner's personal net worth is equal to or less than $1.32 million—the amount determined by the Department of Transportation as applicable to its Disadvantaged Business Enterprises program.[14] The amended provision went into effect October 1, 2020.[15]

Mark One Electric ("Mark One") was originally certified as a Women's Business Enterprise in 1996.[16] Despite satisfying all other requirements of the City's Program, the new personal net worth limitation caused Mark One to lose its certification.[17] Consequently, the day after the amendment went into effect, Mark One initiated a § 1983 action against the City in the United States District Court for the Western District of Missouri, challenging the personal net worth limitation.[18]

Although conceding that the 2016 disparity study provided a "strong basis in evidence" for the City to take remedial action, Mark One challenged the personal net worth limitation on narrow tailoring grounds.[19] Mark One argued the limitation was not narrowly tailored to remedy past discrimination, and the Program as a whole was not narrowly tailored because of the personal net worth limitation.[20] In support, Mark One claimed the study's recommendation to add the personal net worth limitation was "not supported by either qualitative or quantitative analysis," constituted an "arbitrary and capricious re-definition of who qualifies as a women or minority," and was unconstitutional because it

Disadvantaged Business Enterprise as a remedial contracting affirmative action program).

[13] *Mark One*, 44 F.4th at 1063.

[14] *Id.*; *see* KAN. CITY, MO. CODE OF GEN. ORDINANCES ch. 3, art. IV, § 3-421(a)(36) (2021) (defining personal net worth for purposes of MBE/WBE certification).

[15] *Mark One*, 44 F.4th at 1064.

[16] *Id.*

[17] *Id.*

[18] *Id.*; *see also Civil Rights in the United States: Introduction & Secondary Sources*, U. OF MINN. L. SCH. L. LIBR. (Feb. 2023) https://libguides.law.umn.edu/c.php?g=125765&p=2893387#:~:text=Section%201983%20provides%20an%20individual,civil%20rights%20that%20already%20exist [https://perma.cc/X8X7-7FAT] ("Section 1983 [of Title 42 of the United States Code] provides an individual the right to sue state government employees and others acting 'under color of state law' for civil rights violations.").

[19] *Mark One*, 44 F.4th at 1064; *see also* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 500 (1989) (requiring the city to demonstrate a "strong basis in evidence" supporting its conclusion that race-based remedial action is necessary to further its interest in remedial action); *see also* Adarand Constructors, Inc. v. Slater, 228 F.3d 1147, 1168 (10th Cir. 2000) (recognizing "local disparity studies" as a strong basis in evidence).

[20] *Mark One*, 44 F.4th at 1064.

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was "not specifically and narrowly framed to accomplish the [C]ity's purpose."[21]

Mark One sought both a temporary restraining order and a preliminary injunction to stop the City's enforcement of the limitation.[22] The district court denied both motions, finding that Mark One failed to demonstrate a likelihood of success on the merits.[23] Upon a subsequent motion to dismiss the complaint, the City argued the personal net worth limitation constituted a valid narrow tailoring measure for the Program.[24] In response, Mark One asserted its complaint alleged sufficient facts to state a claim under § 1983.[25] Ultimately, the district court granted the City's motion to dismiss the complaint upon a finding that the personal net worth limitation was permissible as a matter of law.[26]

Mark One appealed the decision to the United States Court of Appeals for the Eighth Circuit.[27] Mark One again argued that neither the personal net worth limitation itself, nor the Program as a whole, were narrowly tailored.[28] In a *de novo* review of the constitutional validity of the Program and its personal net worth limitation, the Eighth Circuit affirmed the district court's decision, rejecting Mark One's narrow tailoring arguments.[29] The Eighth Circuit held that the personal net worth limitation for Program qualification constituted a rational, race-and-gender-neutral narrow tailoring measure.[30]

III. LEGAL BACKGROUND

Though the term "affirmative action" began as a mere equal protection ideal, that ideal has developed into a widely discussed, hotly debated concept. Today, social, legislative, and judicial attention shapes affirmative action's impact in both employment and educational settings. This Section details the term's idealistic beginnings and summarizes its long, turbulent journey with constitutional scrutiny. With a specific focus on affirmative action's role in government contracting, this Section lays

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[21] *Id.*

[22] *Id.*

[23] *Id.*; *see also Injunction: Temporary Injunctions*, CORNELL L. SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/injunction [https://perma.cc/49MY-9K9H] (last visited Jan. 3, 2024) ("In determining whether to grant or deny a preliminary injunctive relief, the courts generally look to several of the factors including: (1) the plaintiff's likelihood of prevailing on the merits . . . .").

[24] *Mark One*, 44 F.4th at 1064.

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *Id.* at 1065–66.

[29] *Id.* at 1065–67.

[30] *Id.* at 1067.

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the foundation for the court's analysis in *Mark One* by addressing key decisions of the United States Supreme Court and relevant Eighth Circuit precedent.

A. Affirmative Action Meets Constitutional Scrutiny

In 1961 President Kennedy coined the term "affirmative action" with an Executive Order requiring government contractors to "take affirmative action to ensure that applicants are employed, and that employees are treated during employment without regard to their race, creed, color, or national origin."[31] Devised in the wake of the Civil Rights Movement, the idea of affirmative action sought to ensure equal treatment of minority groups who long endured discrimination in the field of opportunity.[32] While rooted in the underpinnings of the Equal Protection Clause, over time, the validity and scope of affirmative action proved to present difficult constitutional questions.[33] It was not until seventeen years after President Kennedy's Executive Order that an affirmative action program, in the context of higher education, first came before the Supreme Court.[34]

In *Regents of University of California v. Bakke*, a plurality of the Court invalidated the University of California's medical school admissions practice of reserving a certain number of spaces in its entering class for minority students.[35] Justice Powell, in his plurality opinion, detailed the "serious problems of justice connected with the idea of preference" in the realm of racial classifications.[36] He emphasized

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[31] Exec. Order No. 10,925, 26 Fed. Reg. 1977 (Mar. 6, 1961); *see also* David Marcus, *It's Time to Admit Affirmative Action has Failed*, FOX NEWS (Feb. 11, 2022), https://www.foxnews.com/opinion/affirmative-action-race-preferences-harvard-david-marcus [https://perma.cc/92SN-ZCPQ] ("But in 1965 Lyndon Johnson, with his own executive order, tweaked the intent of affirmative action to promote full realization of equal opportunity . . . . It was no longer enough for governmental systems . . . to be color-blind, they had to actually produce diversity.").

[32] *See The Adarand Case*, TEACH DEMOCRACY, https://www.crf-usa.org/brown-v-board-50th-anniversary/the-adarand-case.html [https://perma.cc/WB3M-RQ3V] (last visited Jan. 3, 2023) ("By the 1960s, the civil rights movement was pressing Congress to do something about racial discrimination in employment . . . . When it came to awarding public works projects like the vast interstate highway system, few minority-owned companies got the work.").

[33] *See id.* ("Since the late 1970s, the Supreme Court has decided a series of affirmative action cases. The question is almost all of these cases has been: Does this affirmative action program . . . violate the 14th Amendment's guarantee of equal protection under the law? The court has been deeply divided on the issue . . . .").

[34] *See* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 269 (1978) (plurality opinion).

[35] *Id.* at 269–71.

[36] *Id.* at 298 (noting that the justice problems connected with the idea of preference include the lack of clarity as to whether a preference is benign, the potential

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consistency and continuity as the bedrock principles of constitutional exposition, noting "the mutability of a constitutional principle based upon shifting political and social judgments undermines the chances for consistent application of the Constitution . . . ."[37] It was the need for a consistent and uniform standard which incentivized the plurality to determine that all racial distinctions call for the highest form of judicial scrutiny.[38] *Bakke*, therefore, injected the first notion of heightened constitutional scrutiny into the realm of affirmative action.

B. Strict Constitutional Scrutiny and The Narrow Tailoring Requirement

The status of affirmative action programs remained uncertain in the years following *Bakke*, standing on shaky ground both in the social context and under constitutional framework. Even today, the challenges plaguing these programs are those of which Justice Powell warned in 1978: (1) the instability of attaching transitory "preference" principles to an important constitutional protection, and (2) the danger of inevitable line-drawing these preference principles entail.[39] Strict constitutional scrutiny ensures these challenges are closely, and thoughtfully, examined.

Levels of constitutional scrutiny are frameworks that courts have developed to analyze the validity of laws alleged to violate the Constitution.[40] Strict scrutiny, the highest form of review, is the doctrinal manner by which a court examines the individual interests at stake, along with the benevolence or malevolence of the government action at issue.[41] It is commonly applied in two situations where particularly sensitive interests are at stake: violations of fundamental rights and suspect classifications under the Equal Protection Clause.[42]

The "daunting two-step examination" of strict scrutiny requires that the government demonstrate its action is narrowly tailored, or "necessary," to further a compelling government interest.[43] While some government

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of preferential programs to reinforce stereotypes, and the inequity involve in forcing innocent person's to "bear the burden of redressing grievances not of their making").

[37] *Id.* at 299.

[38] *Id.* ("When [political judgments] touch upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest.").

[39] *Id.* at 298–99.

[40] Paul Gowder, *Note on Levels of Scrutiny*, H2O: 14TH AMEND. COURSE, https://opencasebook.org/casebooks/699-14th-amendment-course/resources/2.2.2-note-on-levels-of-scrutiny/ [https://perma.cc/M59T-AQFY] (last visited Jan. 3, 2024).

[41] *Id.*

[42] *Id.*

[43] *Strict Scrutiny*, CORNELL L. SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/strict_scrutiny [https://perma.cc/69UJ-JDR2] (last

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interests are obviously "compelling," such as the protection of human safety, other interests are not so clearly deemed "compelling."[44] In the affirmative action context, case law has generally established the scope of what may constitute a compelling government interest.[45]

In the context of education, a university's desire to enroll a "critical mass" of minority students to promote a diverse educational experience was historically deemed a compelling interest.[46] However, the Court's most recent ruling on education-based affirmative action programs in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College* rejected this interest.[47] A majority of the Court determined that Harvard and UNC's asserted interest in the use of race for admissions decisions was "inescapably imponderable," noting its "elusive nature" in failing to invite meaningful judicial review and lack of measurability with respect to degree and duration.[48] This decision departs from the previously discussed affirmative action precedent, raising new questions regarding the future validity of not only affirmative action policies, but also diversity programs and initiatives at large. As a result, universities, programs, and applicable entities are left wondering how their policies may be impacted and how best to ensure their initiatives are compliant with the law.

In the context of government contracting, ameliorating the effects of identified past discrimination through remedial action passes muster as a compelling interest so long as the government demonstrates a "strong basis in evidence" to support the necessity of its action.[49] While identifying a sufficient compelling interest is by no means a seamless endeavor, and the High Court has recently emphasized that its "acceptance

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visited Jan. 3, 2024); *see* Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll., 600 U.S. 181, 206 (2023) ("Any exception to the Constitution's demand for equal protection must survive a daunting two-step examination known in our cases as 'strict scrutiny'").

[44] *Students for Fair Admissions*, 600 U.S. at 207 ("[O]ur precedents have identified only two compelling interests that permit resort to race-based government action . . . . The second is avoiding imminent and serious risks to human safety in prisons, such as a race riot.").

[45] *See generally* City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (identifying two potentially compelling interests as eradicating current, identified discrimination and remedial action toward past, identified discrimination); Grutter v. Bollinger, 539 U.S. 306 (2003) (recognizing the attainment of the educational benefits that accompany a diverse study body as a compelling interest).

[46] *See Grutter*, 539 U.S. at 340.

[47] *See Students for Fair Admissions*, 600 U.S. at 214–15.

[48] *See id.*

[49] *See id.* at 207 ("[O]ur precedents have identified only two compelling interests that permit resort to race-based government action. One is remediating specific, identified instances of past discrimination that violation the Constitution . . . ."); *see also City of Richmond*, 488 U.S. at 491–92, 500.

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of race-based state action has been rare for a reason," courts have generally been more willing to give deference to the government on this prong.[50]

The narrow tailoring requirement, however, has historically proved more difficult to surmount. Often described as "fatal-in-fact," the government's burden to prove its action is narrowly tailored is a heavy one.[51] Not only does the government's action have to be the "least-restrictive means" available, it must also effectively achieve the interest at which it is aimed.[52] Often, this analysis requires a government showing of individualized inquiries, holistic consideration, race-neutral alternatives, and even durational limitations.[53] Although government action can often be successfully framed within the compelling interest prong, many, if not most, affirmative action programs are invalidated at this narrow tailoring prong.[54]

Early challenges to affirmative action programs saw litigants struggle to craft their programs carefully enough to satisfy the high threshold of strict scrutiny and the narrow tailoring requirement, specifically. Further, these challenges prompted a divided Court to wrestle with the purpose, scope, and results of such a seemingly insurmountable standard.

C. The Evolution of Affirmative Action in Government Contracting

Following the Supreme Court's decision in *Bakke*, uncertainty lingered as to the validity of affirmative action programs given the Court's failure to reach a majority consensus. It was not long before the issue returned to the Court.[55] In *City of Richmond v. J.A. Croson*, although a majority of the Court struck down an affirmative action program in government contracting, Justice O'Connor's opinion provided helpful guidance, and a bit of hope, for future affirmative action programs.[56]

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[50] *See* Fisher v. Univ. of Tex. at Austin, 579 U.S. 365, 376 (2016) ("[T]he decision to pursue [its compelling interest] . . . is, in substantial measure, an academic judgment to which some, but not complete, judicial deference is proper."); *but see Students for Fair Admissions*, 600 U.S. at 208.

[51] *City of Richmond*, 488 U.S. at 552 (Marshall, J., dissenting) ([G]overnmental programs . . . should not be subjected to conventional 'strict scrutiny'—scrutiny that is strict in theory, but fatal in fact.").

[52] Gowder, *supra* note 40.

[53] *See* Grutter v. Bollinger, 539 U.S. 306, 337, 342 (2003); *see also* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237–38 (1995).

[54] *See Adarand Constructors*, 515 U.S. at 237–38 (on remand, the district court determined the program was not sufficiently narrowly tailored because it lacked "individualized inquiries" into whether the participants were socially or economically disadvantaged).

[55] *City of Richmond*, 488 U.S. 469.

[56] *Id.* at 511.

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Croson involved a challenge to the City of Richmond's 30% "set-aside" for minority small businesses in government construction contracts.[57] Writing for the majority, Justice O'Connor determined the city failed to demonstrate a compelling interest in granting government contracts where the city presented no evidence pointing to identified past discrimination in the Richmond construction industry.[58] Although explicitly recognizing that a local government *may* have a compelling interest in eradicating the effects of discrimination within its own jurisdiction, the Court reasoned that the city must present a "strong basis in evidence" that race-based remedial action is necessary to eradicate such identified effects.[59] According to the Court, a general, "amorphous claim that there has been past discrimination" cannot justify such action.[60]

Although the program at issue in *Croson* did not survive strict scrutiny, the opinion detailed several key cornerstones of the Court's affirmative action jurisprudence with respect to government contracting. First, building on Justice Powell's call for heightened scrutiny in *Bakke*, *Croson* solidified strict scrutiny as the applicable form of review required by Amendment XIV for all state affirmative action programs in all contexts.[61] Additionally, *Croson* provided the blueprint for surmounting the compelling interest prong of strict scrutiny, at least in the government contracting context. Although the City of Richmond's interest was not itself deemed compelling, Justice O'Connor identified two state interests the Court *may* find compelling: (1) eradicating current, identified discrimination supported by a "strong basis in evidence" and (2) remedial action toward past, identified discrimination.[62]

While affirmative action programs still lacked the Court's stamp of constitutional approval, the principles articulated by Justice O'Connor in *Croson* provided direction to future litigants and indicated the Court's willingness to recognize at least some compelling interests.[63] Strict scrutiny involves two analyses, though, and the compelling interest prong is the smaller of two giants. *Croson* may have been a "win" for affirmative action, but it was merely the poster child for small victories.

The Supreme Court's final delve into affirmative action in government contracting came in a 1995 landmark case which, on remand, was the first affirmative action program to survive constitutional

[57] *Id.* at 477–78.

[58] *Id.* at 510–11.

[59] *Id.* at 500.

[60] *Id.* at 499.

[61] *Id.* at 493–94 ("[T]he standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification.").

[62] *Id.* at 500, 509.

[63] *Id.* at 509.

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scrutiny.[64] In *Adarand Constructors v. Pena* (*Adarand I*), a Colorado subcontractor challenged the Department of Transportation's Disadvantaged Business Enterprises program when the program failed to award him the guardrail portion of a federal highway project.[65] While the Court failed to reach the merits of the claim, the Court extended *Croson* and held that the equal protection component of Amendment V also requires strict judicial scrutiny of all race-based action taken by the federal government.[66] On remand to determine whether the challenged program satisfied strict scrutiny, the Tenth Circuit (*Adarand II*) reversed the district court and held that the Disadvantaged Business Enterprises program was narrowly tailored to serve a compelling government interest.[67]

Thus, *Adarand II* set the standard for constitutionally approved affirmative action programs. The Department of Transportation's Disadvantaged Business Enterprises program at issue in the case remains the litmus test by which many courts, including the Eighth Circuit, measure constitutional conformity.

D. Eighth Circuit Precedent

In 2003, only three years after the Tenth Circuit upheld the Department of Transportation's Disadvantaged Business Enterprises program in *Adarand II*, petitioners in Nebraska and Minnesota similarly challenged the program as implemented in their respective states.[68] The cases were consolidated before the Eighth Circuit in *Sherbrooke Turf v. Minnesota Department of Transportation*.[69]

Determining that the government's compelling interest was "readily" established in *Adarand II*, the court's analysis focused primarily on whether the Disadvantaged Business Enterprises program was narrowly tailored.[70] Relying on Supreme Court precedent, the Eighth Circuit

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[64] Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).

[65] *Id.* at 204–05 (The Department of Transportation's Disadvantaged Business Enterprises program is a federally administered program designed to provide preference in the granting of highway contracts to socially and economically disadvantaged business enterprises.).

[66] *Id.* at 224 (quoting Bolling v. Sharpe, 347 U.S. 497, 500 (1954)) ("Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment.").

[67] Adarand Constructors, Inc. v. Slater, 228 F.3d 1147, 1177–78 (10th Cir. 2000) (Six factors guided the Tenth Circuit's narrow tailoring inquiry: "(1) the availability of race-neutral alternative remedies; (2) limits on the duration of the programs; (3) flexibility; (4) numerical proportionality; (5) the burden on third parties; and (6) over-or-under-inclusiveness.").

[68] Sherbrooke Turf, Inc. v. Minn. Dep't of Transp., 345 F.3d 964, 967 (8th Cir. 2003).

[69] *Id.*

[70] *Id.* at 969–73.

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defined narrow tailoring as requiring that "the means chosen to accomplish the government's asserted purpose [is] specifically and narrowly framed to accomplish that purpose."[71] The court relied on six factors that guided the Tenth Circuit's narrow tailoring analysis in *Adarand II*, including "(1) the availability of race-neutral alternative remedies; (2) limits on the duration of the programs; (3) flexibility; (4) numerical proportionality; (5) the burden on third parties; and (6) over-or-under-inclusiveness."[72] It ultimately found three aspects of the program dispositive with respect to narrow tailoring: (1) the program placed an emphasis on the use of race-neutral means to increase minority business participation; (2) the program had substantial flexibility, including waivers, exemptions, and a net worth limitation; and (3) because the program directed benefits at all small businesses owned and controlled by the socially and economically disadvantaged, race was relevant but not determinative.[73]

Pertinent to its later decision in *Mark One*, the court concluded that the program's net worth limitation ensured flexibility and reduced the impact on third parties by introducing race-and-gender neutral requirements for eligibility.[74] In light of these aspects, the court held that the Department of Transportation's Disadvantaged Business Enterprises program satisfied strict scrutiny.[75] Accordingly, *Sherbrooke Turf* was the relevant precedent in Mark One's challenge to Kansas City's affirmative action program for government contracts.

IV. INSTANT DECISION

The vast majority of challenges to affirmative action programs focus on the programs' exclusive effects on historically "advantaged" groups. Following *Sherbrooke Turf*, affirmative action returned to the Eighth Circuit almost twenty years later in *Mark One*. Though Mark One challenged an affirmative action program's exclusionary effect,[76] the nature of the effect was different. Rather than excluding advantaged groups, the Program at issue excluded groups that it was allegedly designed to benefit. Thus, the Eighth Circuit was presented with a novel issue.

The court's analysis began with the bedrock principle of prior judicial decisions: race-based affirmative action programs are subject to strict

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[71] *Id.* at 971 (quoting Grutter v. Bollinger, 539 U.S. 306, 333 (2003)).

[72] *See Adarand Constructors*, 228 F.3d at 1177–78; *see also Sherbrooke Turf*, 345 F.3d at 972.

[73] *Sherbrooke Turf*, 345 F.3d at 972.

[74] *Id.* at 971.

[75] *Id.* at 973–74.

[76] *See generally* Mark One Elec. Co. v. City of Kansas City, 44 F.4th 1061 (8th Cir. 2022).

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scrutiny.[77] With this "first foundation" in mind, the court stipulated that the Program was constitutional only if it was narrowly tailored to further a compelling government interest.[78] Though Mark One was a women-owned business rather than a minority-owned business, the court emphasized both parties' acquiescence to review of the Program under the strictest scrutiny.[79]

Turning to strict scrutiny's two-part framework, the court began with the first prong and sought to discern the City's compelling interest.[80] Citing *Croson*, the court noted that the City's conclusion that race-based action was necessary to further its interest must be supported by a "strong basis in the evidence."[81] Because the "compelling interest" prong was not in dispute, the court's discussion of step one was brief. The court asserted that Mark One did not dispute that the City had a compelling interest in taking action to remedy the effects of both race and gender discrimination in City contract opportunities.[82] Mark One further conceded, according to the court, that the 2016 Disparity Study afforded a strong basis in evidence to further that interest.[83]

With respect to strict scrutiny's second prong, the court established that the Program must also be narrowly tailored—a requirement by which "the means chosen to accomplish the government's asserted purpose are specifically and narrowly framed to accomplish that purpose."[84] According to the court, the plaintiff carries the burden to prove that an affirmative action program is not narrowly tailored.[85] Citing several cases as precedent, the court indicated that it would look to certain factors in the narrow tailoring determination, including "the efficacy of alternative remedies, the flexibility and duration of the race-conscious remedy, the

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[77] *Id.* at 1065.

[78] *Id.*

[79] *Id.*; *see also* Gowder, *supra* note 40 (Gender-based classifications are ordinarily subject only to intermediate scrutiny—a lower standard of review requiring only that the government demonstrate that its action is substantially related to meet an important interest. The Program would almost certainly survive intermediate scrutiny which is likely the reason that neither party contested its review under the higher bar of strict scrutiny.).

[80] *Mark One*, 44 F.4th at 1065 (recognizing that "stopping perpetuation of racial discrimination" and "remediating the effects of past discrimination in government contracting" are both compelling government interests).

[81] *Id.* (citing City of Richmond v. J.A. Croson Co., 488 U.S. 469, 491–92, 500 (1989)).

[82] *Id.*

[83] *Id.*

[84] *Id.* (quoting Grutter v. Bollinger, 539 U.S. 306, 333 (2003)).

[85] *Id.*

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relationship of the numerical goals to the relevant labor market, and the impact of the remedy on third parties."[86]

According to the court, Mark One challenged the Program's personal net worth limitation from two angles: (1) the limitation itself was not narrowly tailored, and (2) the limitation disrupted the narrow tailoring of the Program as a whole.[87] The court rejected Mark One's first argument that the personal net worth limitation should be independently assessed under strict scrutiny apart from the Program as a whole.[88] The court discussed Mark One's failure to offer authority for the premise that an individual narrow tailoring measure is subject to strict scrutiny in isolation—especially a measure like net worth which differentiates on a non-suspect classification.[89] While the Program as a whole must be supported by a strong basis in evidence under strict scrutiny, the court determined that the City need not provide a separate strong basis in evidence for the personal net worth limitation.[90]

The court similarly rejected Mark One's second challenge that the personal net worth limitation disrupts the overall narrow tailoring of the Program with its exclusion of minority and women business enterprises that have experienced discrimination.[91] Here, the court relied on its own precedent in *Sherbrooke Turf* as dispositive.[92] Recognizing no distinction between the City's personal net worth limitation and the Department of Transportation's limitation at issue in *Sherbrooke Turf*, the court noted it previously found such a limitation to be a valid narrow tailoring measure.[93] The limitation, according to the court, was a race-and-gender-neutral eligibility measure which serves two of the narrow tailoring factors by ensuring flexibility in an affirmative action program and reducing its impact on third parties.[94]

The court acknowledged, upon Mark One's argument, that the personal net worth limitation excludes certain minority and women's business enterprises from the Program despite these entities having experienced race-and-gender-based discrimination in the marketplace.[95]

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[86] *Id.* (quoting Sherbrooke Turf, Inc. v. Minn. Dep't of Transp., 345 F.3d 964, 971 (8th Cir. 2003)); *see also* Adarand Constructors, Inc. v. Slater, 228 F.3d 1147, 1177–78 (10th Cir. 2000); *see also* United States v. Paradise, 480 U.S. 149, 171, 187 (1987).

[87] *Mark One*, 44 F.4th at 1065–66.

[88] *Id.*

[89] *Id.* at 1066.

[90] *Id.* (noting that an individual narrow tailoring measure which itself differentiates on a non-suspect classification is subject only to rational basis review).

[91] *Id.*

[92] *Id.*

[93] *Id.*

[94] *Id.*

[95] *Id.*

However, the court emphasized the City's lack of obligation to make its Program "as broad as may be legally permissible."[96] The City must only direct its resources in a rational manner not motivated by a discriminatory purpose which, according to the court, there was no complaint of in this case.[97]

The court noted that the personal net worth limitation may be unnecessary, and the Program may survive strict scrutiny without it.[98] However, under Eighth Circuit precedent, the court affirmed the district court and held that the personal net worth limitation in the Program was a rational, race-and-gender neutral narrow tailoring measure.[99]

V. COMMENT

Affirmative action's clash with constitutional scrutiny in the courts exemplifies the tension between upholding constitutional principles and reforming social policies. A desire to "remedy the effects of past discrimination" seems to be the settled compelling interest accepted by the courts in the government contracting context. It is a noble interest in theory, though its aim may often miss its mark in practice.

President Kennedy's Executive Order, which birthed the idea of affirmative action, established the roots of the idea in eliminating discrimination.[100] In other words, the Order sought to enforce the Equal Protection Clause by requiring that employers *treat* people equally. However, as the social and legal landscape around affirmative action has evolved, the "mark" has seemingly shifted from eliminating discrimination to eliminating the socioeconomic effects of discrimination. Programs implemented under the guise of affirmative action, and the lines drawn to tailor these programs to meet their stated interests, seek to ensure equal outcomes for, rather than equal treatment of, their beneficiaries.

If the historical goal of affirmative action was to protect minority groups pursuant to the Equal Protection Clause, the consequences accompanying the modern "aim" of affirmative action efforts often detract from its original mark. Equal treatment does not limit itself to socioeconomic qualifications, and the modern, targeted focus on such criteria gives credence to Justice Powell's warning about the dangers associated with "hitching the meaning of the Equal Protection Clause to transitory considerations."[101]

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[96] *Id.*

[97] *Id.*

[98] *Id.* at 1067.

[99] *Id.* at 1066.

[100] Exec. Order No. 10,925, 26 Fed. Reg. 1977 (Mar. 6, 1961).

[101] Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 298 (1978) (plurality opinion); *see also* Students for Fair Admissions, Inc. v. President and Fellows of

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Affirmative action jurisprudence demonstrates the intersection of competing theories regarding the Equal Protection Clause's proper interpretation. Moreover, the theory to which one subscribes tends to inform one's belief regarding affirmative action's effectiveness in advancing the underpinnings of the Equal Protection Clause. *Mark One* epitomizes the problems associated with trying to remedy discrimination's socioeconomic externalities via government action rather than preventing its harms under the Constitution. On its face, the Equal Protection Clause requires that the government treat people equally; stretching it further proves to be a rocky endeavor.

A. A Tale of Two Theories: Equal Outcomes versus Equal Opportunities

Competing theories concerning the proper interpretation of the Equal Protection Clause plagues courts' understanding of its intended meaning and purpose, along with courts' affirmative action jurisprudence generally. Though the Clause's mere thirteen words appear straightforward, the Supreme Court has struggled to settle on one understanding of its scope and protection. What does it mean to ensure "the equal protection of the laws"?[102]

The two prevailing interpretive theories have unique significance in the realm of affirmative action, diverging with respect to what exactly the Equal Protection Clause guarantees.[103] One theory is that the Equal Protection Clause acts as a substantive guarantee of "equal outcomes."[104] Distinguishing between the great harms of "invidious discrimination" and the benign agenda of "remedial race-based preferences," proponents of

Harvard Coll., 600 U.S. 181, 276 (2023) (Thomas, J., concurring) ("Not only is [defining everyone by their skin color] *exactly* the kind of factionalism that the Constitution was meant to safeguard against, . . . but it is a factionalism based on ever-shifting sands.").

[102] U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

[103] It is noteworthy that the divergence of theories was first given effect in *Yick Wo v. Hopkins*, where the Court reformulated the Equal Protection Clause's guarantee of "the equal protection of the laws" to "protection of equal laws." 118 U.S. 356 (1886). In *Yick Wo*, laundromat owners from China were not receiving the "equal protection of the laws" when California enacted a law that, although applied equally on its face to all laundromat owners, was enforced in a discriminatory manner against Chinese laundromat owners. *Id.* The distinction ultimately reflected competing understandings of what the Equal Protection Clause generally protects: procedure or substance.

[104] Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 274 (1995) (Ginsburg, J., dissenting) ("Congress surely can conclude that a carefully designed affirmative action program may help to realize, finally, the 'equal protection of the laws' the Fourteenth Amendment has promised since 1868.").

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this theory posit that the latter reflects a desire to foster equality while the former seeks to maintain the power of a favored majority.[105] Perhaps most notably, supporters of this theory believe that barriers external to the laws prevent certain groups from achieving "equal opportunity and nondiscrimination."[106] They essentially suggest that, given the history of minority subjugation and the consequent disparity of opportunity in the United States, the government should *affirmatively act* to ensure that equal *results* are achieved for all.[107]

Conversely, the other theory stands for the proposition that Amendment XIV's Equal Protection Clause is a procedural guarantee of "equal opportunities" under equal laws.[108] Though acknowledging that the lingering effects of discrimination in the United States are an "unfortunate reality,"[109] subscribers to this theory fail to acquiesce in the notion that race-based classifications can ever be truly benign.[110]

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[105] *Id.* at 243 (Stevens, J., dissenting) ("Invidious discrimination is an engine of oppression, subjugating a disfavored group to enhance or maintain the power of the majority. Remedial race-based preferences reflect the opposite impulse: a desire to foster equality in society."); *see also* Theodore M. Shaw, *The Unfinished Work of the Equal Protection Clause*, NAT'L CONST. CTR., https://constitutioncenter.org/the-constitution/amendments/amendment-xiv/clauses/702 [https://perma.cc/FLJ2-YPP3] (last visited Jan. 3, 2024) ("Jurisprudence and discourse that disembodies present day racial inequality from our history of legally imposed racial subordination is either tone deaf to history or intellectually dishonest, as is the notion that there is moral or legal symmetry between efforts to address the effects of that history, on the one hand, and invidious discrimination, on the other.").

[106] *Adarand Constructors*, 515 U.S. at 273–74 (Ginsburg, J., dissenting) (arguing that different treatment in job markets, housing markets, and government contracting opportunities "keeps up barriers that must come down if equal opportunity and nondiscrimination are ever genuinely to become this country's law and practice.").

[107] City of Richmond v. J.A. Croson Co., 488 U.S. 469, 511 (1989) (Stevens, J., concurring in part) ("A central purpose of the Fourteenth Amendment is to further the national goal of equal opportunity for all our citizens."); *Adarand Constructors*, 515 U.S. at 237 (explaining that the "government is not disqualified from acting in response" to the lingering effects of racial discrimination); *Id.* at 273 (Ginsburg, J., dissenting) (recognizing "Congress' authority to act affirmatively, not only to end discrimination, but also to counteract discrimination's lingering effects.").

[108] Fisher v. Univ. of Tex. at Austin, 570 U.S. 297, 316 (2013) (Thomas, J., concurring) (quoting Missouri v. Jenkins, 515 U.S. 70, 120–21 (1995) (Thomas, J., concurring)) ("The Equal Protection Clause guarantees every person the right to be treated equally by the State, without regard to race. 'At the heart of this [guarantee] lies the principle that the government must treat citizens as individuals, and not as members of racial, ethnic, or religious groups.'").

[109] *Adarand Constructors*, 515 U.S. at 237 (describing the lingering effects of racial discrimination in the United States as an "unfortunate reality").

[110] *Fisher*, 570 U.S. at 330 (Thomas, J., concurring) ("Racial discrimination is never benign. '[B]enign' 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."); *see also* Michael

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Moreover, they recognize the limitations of the government's remedial power, especially with respect to manipulating outcomes. Laws designed to suppress a race and laws designed to provide benefits on the basis of race are constitutionally equivalent in substance, even if they appear to advance notions of equality in form.[111] In recognizing the plethora of potential harms accompanying race-based classifications, those who adhere to the "equal opportunities" theory agree with Justice Harlan's contention in his renown *Plessy v. Ferguson* dissent, positing that the Constitution is colorblind.[112] Therefore, not only should the government proceed with the highest skepticism in scrutinizing any action that classifies based on race,[113] but the government should *affirmatively act* only to guarantee the laws "recognize, respect, and protect" all people equally.[114] Any further affirmative action is inconsistent with the proper role of the government.

To no surprise, the theory to which one subscribes frames how one views the practicalities, drawbacks, and wisdom of affirmative action. Those adhering to the "equal outcomes" theory are generally proponents of affirmative action, believing it is the government's role—moreover, the government's duty—to ensure equal results for its citizens. Conversely, those in the "equal opportunities" camp believe the government is required

B. Rappaport, *Originalism and the Colorblind Constitution*, 89 NOTRE DAME L. REV. 71, 78 (2013) (detailing Justice Thomas' *Grutter* argument that "[t]he Constitution abhors classifications based on race, not only because those classifications can harm favored races or are based on illegitimate motives, but also because every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all.").

[111] *Adarand Constructors*, 515 U.S. at 240 (Thomas, J., concurring in part) ("I believe that there is a 'moral [and] constitutional equivalence,' . . . between laws designed to subjugate a race and those that distribute benefits on the basis of race in order to foster some current notion of equality."); *see also City of Richmond*, 488 U.S. at 527–28 (Scalia, J., concurring in part) ("[T]hose 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.").

[112] Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting) ("Our constitution is color-blind, and neither knows nor tolerates classes among citizens."), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954); *see also Adarand Constructors*, 515 U.S. at 239 (Scalia, J., concurring in part) ("[U]nder our Constitution, there can be no such thing as either a creditor or a debtor race. That concept is alien to the Constitution's . . . rejection of dispositions based on race . . . .").

[113] *Adarand Constructors*, 515 U.S. at 224 (explaining that skepticism is one of the three primary principles upon which the Court's affirmative action jurisprudence has proceeded).

[114] *Id.* at 240 (Thomas, J., concurring in part) ("Government cannot make us equal; it can only recognize, respect, and protect us as equal before the law.").

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to ensure equal treatment; it should not, and in fact *cannot*, successfully do more.[115]

B. Reality Check

Affirmative action programs, like the City's in *Mark One*, aim to even the score for minority groups. On the premise that past discrimination prevented minority groups from attaining certain outcomes, affirmative action programs strive to provide redress through favorable treatment of those groups. In theory, these programs seek to provide "the equal protection of the laws" by pursuing equal outcomes.

The City's Program at issue in *Mark One* provides an interesting case study as to the realities of pursuing equal outcomes in practice and where lines must be drawn to achieve them. The Program itself was designed to remedy the effects of discrimination on minority groups in government contracting.[116] To ensure its Program would survive constitutional scrutiny, and the narrow tailoring requirement specifically, the City implemented the personal net worth limitation.[117]

Personal net worth, at first glance, seems to be an unusual choice for introducing a narrow tailoring measure into a race-and-gender based affirmative action program. How is one's personal net worth predictive of whether he or she has experienced discrimination in the past? Moreover, how is personal net worth predictive of whether he or she is continuing to experience discrimination currently? Even assuming *arguendo* that it *may* be predictive, it is at most a very crude measurement. A personal net worth limitation merely draws a line that enables the government to narrowly tailor its program to achieve a more even score. The line is consistent with, and perhaps even reflective of, the equal outcomes logic, even though there may be a number of places where this line could be drawn.

This logic follows directly from the causal relationship between discrimination and opportunity. Putting moral consequences aside, when do minority contractors care that they have experienced, or are still experiencing, discrimination in government contracting? They care when that discrimination results in fewer contract awards, because fewer contract awards result in fewer monetary opportunities. Fewer monetary opportunities, in turn, reflect a lower personal net worth. Therefore, proceeding on the logic of the City in *Mark One*, minority businesses are disadvantaged in the marketplace only when discrimination *causes* a lower personal net worth. This is the discrimination the City's program sought to remedy.

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[115] *Id.*

[116] Mark One Elec. Co. v. City of Kansas City, 44 F.4th 1061, 1062 (8th Cir. 2022).

[117] *Id.* at 1063.

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By this logic, the use of personal net worth as a predictor mirrors the modern "mark" of affirmative action: equal outcomes. In *Mark One*, the plaintiff argued that the personal net worth limitation excludes minority businesses the Program is otherwise designed to benefit.[118] However, the reality is that the groups it excludes are not the groups deprived of equal outcomes from the City's perspective. Mark One may claim it has experienced discrimination as a minority owned business, but those experiences have not disadvantaged its business in a way the Program was designed to counteract. The court acknowledges the reality of the City's motivation in its opinion by stating that, "the City does not have a constitutional obligation to make its Program as broad as may be legally permissible . . . ."[119] If the Equal Protection Clause truly guarantees equal outcomes, the government's intervention prioritizes those groups that are *most* disadvantaged, and the line is drawn accordingly. Here, that line is minority business falling below a certain personal net worth threshold.[120]

The upshot is that the idealism of the equal outcomes theory often necessitates a reality check, and those who subscribe to the theory must accept the premise that crude line-drawing enables the government to implement its results-driven efforts by narrowly targeting groups *most* in need of government intervention. This is so, even if the line excludes groups who have in fact experienced past discrimination.[121] Consequently, the theory may seek to ensure equal outcomes, but it rarely ensures equal treatment—a result that is difficult to reconcile with Amendment's XIV's command.

C. Mark One: Winning the Battle but Losing the War

In *Mark One*, the Eighth Circuit upheld an affirmative action program designed to benefit minority-owned businesses despite the Program's exclusion of otherwise qualified members of that group.[122] The City's proffered justification for this result was that the excluded businesses attained a certain level of wealth.[123] Although not explicitly stated by the City or the court, the *underlying* justification seemed to center on the premise that the attainment of a certain level of wealth implies that discrimination, though experienced, does not result in a business's disadvantage. Consequently, one might argue that the government must

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[118] *Id.* at 1066.

[119] *Id.*

[120] *Id.* at 1063.

[121] *See* Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll., 600 U.S. 181, 268 (2023) (Thomas, J., concurring) ("Even taking the desire to help on its face, what initially seems like aid may in reality be a burden, including for the very people it seeks to assist.").

[122] *Mark One*, 44 F.4th at 1067.

[123] *Id.* at 1066.

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only intervene on behalf of the *most* disadvantaged groups because, at least from an economic standpoint, equality of outcome has already been achieved for those who have reached a particular threshold of wealth.

Herein lies the problem created by the pursuit of equal outcomes. In seeking to ensure equal outcomes, the government must determine which groups most require preferential treatment to achieve them. However, as Justice Powell pointed out in *Bakke*, there are a host of problems associated with "preference."[124] One problem identified by Justice Powell, and particularly relevant here, is the line-drawing problem:

> Courts may be asked to validate burdens imposed upon individual members of a particular group in order to advance the group's general interest.[125] Nothing in the Constitution supports the notion that individuals may be asked to suffer otherwise impermissible burdens in order to enhance the societal standing of their ethnic groups.[126]

This problem arises in cases like *Mark One*, where the City implements, and the court validates, a program that places an "impermissible burden" on individuals within a group in order to bolster the opportunities available to the group as a whole. Although that "impermissible burden" is the *effect* of the line-drawing created by the net worth limitation, its *cause* is ultimately the fact that the government classified individuals on an improper basis in the first place. Justice Brennan described these "immediate, direct costs of benign discrimination" as the "natural consequence of our governing processes . . . ."[127] However, there is nothing natural about "basing decisions on a factor that ideally bears no relationship to an individual's worth or needs."[128] At the very least, it is hard to label as "benign."[129]

Upon analyzing the effects of the personal net worth limitation in *Mark One*, it is evident that attempts to even the score with group classification can result in disparate treatment of some group members. In the case at hand, the disparate treatment was the product of discrimination's failure to similarly situate all members of the group—at

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[124] Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 298 (1978).

[125] *Id.* (citing United Jewish Orgs. v. Carey, 430 U.S. 144, 172–73 (Brennan, J., concurring in part)).

[126] *Id.*

[127] *Carey*, 430 U.S. at 174 (Brennan, J., concurring in part).

[128] *Id.* at 173.

[129] Fisher v. Univ. of Tex. at Austin, 570 U.S. 297, 330 (2013) (Thomas, J., concurring) ("Racial discrimination is never benign. '[B]enign' 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.").

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least from an economic standpoint. The result was a program that, though aimed at remedying a harm experienced by all members, benefited only those who experienced that harm in a particular way.

This begs the question: Is affirmative action accomplishing the mark at which it aims? If that mark is equal outcomes, then *Mark One* exemplifies the reality check with which affirmative action's proponents must live. Subscription to this theory necessarily implicates an acquiescence in line-drawing, even when it "discriminates against the exact individuals a program is designed to benefit." It certainly prevents the possibility of equal treatment—a goal the government is far better positioned to attain.

Desiring that the government affirmatively act in any manner other than equal treatment asks the government to play a role at which it is ill-equipped and poorly positioned to succeed. It opens the door to outcomes like *Mark One*, where an affirmative action program is upheld despite its disappointing consequences for members of the groups it was supposedly designed to elevate. The continued implementation, promotion, and validation of affirmative action may win the "equal outcomes" battle, but it often loses the "equal opportunities" war. Amendment XIV surely envisioned a result different than that.

VI. CONCLUSION

Affirmative action's roots took hold when President Kennedy first demanded equal treatment. Though this early idea of affirmative action sought to enforce the equal treatment guaranteed by the Constitution, today's pursuit seeks to remedy socioeconomic externalities and other harms outside the scope of the Equal Protection Clause's intended purpose. The goals of modern affirmative action reflect the uncertainties of "hitching the meaning of the Equal Protection Clause to transitory considerations," and *Mark One* exemplifies the collateral damage.

Mark One furthers overarching efforts to achieve equal outcomes, yet it does so at the expense of equal treatment. It is the inevitable consequence of asking the government to provide solutions it lacks the ability to secure. Though much damage has been done, perhaps revisiting the exact guarantees of "equal protection," and focusing the government's action on that endeavor, better reflects the original admonitions of the Equal Protection Clause.