THE FEDERAL GOVERNMENT AS A CONSTITUTIONAL NICHE IN AFFIRMATIVE ACTION CASES

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Although the U.S. Supreme Court has held that the same strict scrutiny standard applies to both state and federal affirmative action, federal courts often appear to apply a more deferential form of strict scrutiny to the federal government's use of race. Analyzing the entire corpus of published federal court decisions between 1990 and 2003, I show that federal affirmative action laws are twice as likely to survive as state efforts. Moreover, lower federal courts commonly admit that they are giving unusual deference to federal actors or, alternatively, rely on reasoning that implicitly but effectively allows the federal government to use race in ways barred to states. I conclude that federal courts treat the federal government as a special niche when it comes to affirmative action, and I examine some of the reasons for, and implications of, this practice.

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INTRODUCTION

There is burgeoning law and literature on tailoring constitutional rights—the practice of shaping individual rights to fit the unique institutional contexts of particular governmental actors.[1] Whereas traditional constitutional rights theory and doctrine treat all governmental actors as essentially the same,[2] with only a few exceptions,[3] tailoring counters that one-size-fits-all approach,[4] giving some governmental actors unusual leeway to regulate in ways that burden rights. Perhaps the foremost example of this type of tailoring is *Grutter v. Bollinger*,[5] in which the U.S. Supreme Court upheld a public law school's race-based affirmative action admissions policy.[6] Although the Court had previously suggested that only remedial goals could justify race-conscious policies, out of deference to the school's "educational judgment that . . . diversity is essential to its educational mission,"[7] *Grutter* upheld the school's use of race to achieve diversity—a nonremedial goal. Applying what the Court insisted was strict scrutiny, it nevertheless announced that the school's educational judgment "is one to which we defer"[8] because "universities occupy a special niche in our constitutional tradition."[9] Using this analysis, the Court effectively molded, or tailored, equal protection doctrine to fit the distinct context of public universities. Similar rights tailoring has also been used in the context of the military[10] and prisons.[11]

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1. *See* Ira C. Lupu & Robert W. Tuttle, *Federalism and Faith*, 56 EMORY L.J. 19 (2006); Mark D. Rosen, *The Surprisingly Strong Case for Tailoring Constitutional Principles*, 153 U. PA. L. REV. 1513 (2005) [hereinafter Rosen, *Tailoring*]; Mark D. Rosen, *Institutional Context in Constitutional Law: A Critical Examination of Term Limits, Judicial Campaign Codes, and Anti-Pornography Ordinances*, 21 J.L. & POL. 223 (2005); Frederick Schauer, *Towards an Institutional First Amendment*, 89 MINN. L. REV. 1256 (2005) [hereinafter Schauer, *Institutional First Amendment*]; Richard C. Schragger, *The Role of the Local in the Doctrine and Discourse of Religious Liberty*, 117 HARV. L. REV. 1810 (2004); Frederick Schauer, *The Supreme Court, 1997 Term—Comment: Principles, Institutions, and the First Amendment*, 112 HARV. L. REV. 84 (1998).

2. *See* Rosen, *Tailoring*, *supra* note 1, at 1515–16; Schauer, *Institutional First Amendment*, *supra* note 1, at 1257–58.

3. *See infra* notes 10–11 and accompanying text.

4. Rosen, *Tailoring*, *supra* note 1, at 1516.

5. 539 U.S. 306 (2003).

6. *Id.*

7. *Id.* at 328.

8. *Id.*

9. *Id.* at 329.

10. *See* Rumsfeld v. Forum for Academic & Institutional Rights (FAIR), 547 U.S. 47, 58 (2006) ("'[J]udicial deference . . . is at its apogee' when Congress legislates under its authority to raise and support armies." (quoting Rostker v. Goldberg, 453 U.S. 57, 70 (1981))).

11. *See* Turner v. Safley, 482 U.S. 78 (1987) (allowing prisons to infringe inmates' fundamental constitutional rights whenever the burdensome policy is reasonably related to legitimate penological interests).

Since the mid-twentieth century era of incorporation,[12] courts have generally refused to tailor fundamental rights along federalism lines; treating federal and state burdens on fundamental rights in essentially the same way has become the norm in American constitutional law. One of the few areas in which the tailoring debate has been vigorously joined is affirmative action. In the 1980s, when fractured majorities of the Court began to apply strict scrutiny to race-based affirmative action, several Justices argued that a lesser standard should apply to affirmative action policies adopted by the federal government.[13] The Supreme Court briefly accepted this proposal and applied a more deferential standard to federal affirmative action plans.[14] However, in 1995, in *Adarand Constructors, Inc. v. Pena*,[15] the Court emphatically rejected the notion of federal-state tailoring in the affirmative action context, holding that "all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny."[16]

Despite the Court's holding in *Adarand*, do federal courts, in practice, tend to treat federal affirmative action laws more leniently than they treat state and local governments' affirmative action plans? This Article reports the results of a comprehensive study of all published federal court decisions ruling on the constitutionality of federal and state affirmative action policies over a fourteen-year period. I find considerable evidence that federal courts tailor the equal protection right to give unusual leeway to the federal government in the context of affirmative action, regardless of the formalities of equal protection doctrine. After detailing this evidence and offering some explanations for the underlying pattern, I address some implications the affirmative action cases have for the tailoring of rights more generally.

I. THE REJECTION OF FEDERAL-STATE TAILORING IN EQUAL PROTECTION DOCTRINE

The text of the Fourteenth Amendment, guaranteeing equal protection of the laws, binds only state governments.[17] When the Supreme Court read

12. In the mid-1900s, the U.S. Supreme Court gradually interpreted nearly all of the protections of the Bill of Rights to apply to the states as well as the federal government. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 499–505 (3d ed. 2006).

13. *See infra* text accompanying notes 23–26.

14. *See infra* text accompanying notes 26–29.

15. 515 U.S. 200 (1995).

16. *Id.* at 227.

17. *See* U.S. CONST. amend. XIV.

that provision to prohibit segregated public schools in *Brown v. Board of Education*,[18] however, it also read an implicit guarantee of equal protection to apply—through the Fifth Amendment's Due Process Clause—to the federal government. *Bolling v. Sharpe*,[19] a *Brown* companion case, involved a challenge to racially segregated schools in the District of Columbia, a federal enclave not covered by the Fourteenth Amendment.[20] The Fifth Amendment, which does apply to the District of Columbia, does not have any explicit requirement that the federal government provide equal protection of the laws.[21] For pragmatic reasons, however, the Warren Court in *Bolling* read the Fifth Amendment to bind the federal government in the same way that the Fourteenth Amendment binds the states. Without much elaboration, the Court concluded: "In view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government."[22]

Despite Chief Justice Warren's strong pronouncement, the tailoring of the equal protection principle remained more than imaginable to many Supreme Court Justices, at least when it came to benign, integration-oriented affirmative action. In 1980's *Fullilove v. Klutznick*,[23] Chief Justice Burger, writing for three Justices, argued that while all racial classifications call for "close examination," when reviewing affirmative action policies adopted in accordance with federal law, the Court should be "bound to approach [its] task with appropriate deference to the Congress."[24] In contrast to state laws, a measure of deference to federal laws was called for, according to Chief Justice Burger, because the U.S. Congress is "a co-equal branch" of government, has unique institutional competence as the national legislature, and is formally empowered to enforce the guarantees of the Civil War Amendments[25] through legislation.[26] A majority of the Court agreed with this argument in 1990's *Metro Broadcasting v. FCC*[27] and applied an intermediate level of review to uphold a federal minority preference imposed

18. 347 U.S. 483 (1954).
19. 347 U.S. 497 (1954).
20. *See id.* at 498.
21. *See* U.S. CONST. amend. V.
22. *See Bolling*, 347 U.S. at 500.
23. 448 U.S. 448 (1980) (plurality opinion).
24. *Id.* at 472.
25. U.S. CONST. amend. XIII (outlawing slavery); *id.* at amend. XIV (guaranteeing equal protection of the laws); *id.* at amend. XV (barring denial of the right to vote on the basis of race).
26. *Fullilove*, 448 U.S. at 472.
27. 497 U.S. 547 (1990).

on radio and television broadcasters.[28] In contrast, just one year earlier, a Court majority had coalesced around the applicability of strict scrutiny to state and local government affirmative action policies in *City of Richmond v. J.A. Croson Co.*[29]

Despite *Metro Broadcasting*, however, lower courts continued to be uncertain about the appropriate standard of review for federal affirmative action policies. In part, this was due to conflicting signals from the Supreme Court. In 1987, three years before *Metro Broadcasting*, the Justices applied strict scrutiny to a race-conscious quota put in place by a federal district court as part of a consent decree in the race discrimination lawsuit *United States v. Paradise*.[30] Although there was no majority opinion in *Paradise*, seven of the nine Justices applied strict scrutiny to the consent decree, and the opinions of both the controlling plurality and the dissenters clearly analyzed the issue as one involving a federal governmental actor.[31] As Justice O'Connor's dissent phrased it, the question was whether the "Federal Government has a compelling interest in remedying past and present discrimination" sufficient to give the district court authority to order the remedial quota.[32] *Metro Broadcasting*, however, did not even mention *Paradise*, much less purport to overrule or modify it. As a result, in the early 1990s, some federal courts applied strict scrutiny to federal affirmative action laws (including judicial orders), while others applied the more deferential intermediate scrutiny of *Metro Broadcasting*.[33]

In *Adarand Constructors, Inc. v. Pena*,[34] decided in 1995, the Supreme Court finally clarified the matter, unambiguously declaring that federal and state laws employing racial classifications were subject to the exact same strict scrutiny standard, with no special deference due either to federal laws or to Congress.[35] In her majority opinion in *Adarand*, Justice O'Connor argued that *Metro Broadcasting* was a singular exception to the Court's long history of treating all racial classifications in accordance with three overarching principles: "skepticism" of any governmental use of race, "consistency" in reviewing all uses of race with strict scrutiny, and

28. *Id.*
29. 488 U.S. 469 (1989).
30. 480 U.S. 149 (1987) (plurality opinion).
31. *See id.* at 167; *id.* at 186 (Powell, J., concurring); *id.* at 196 (O'Connor, J., dissenting).
32. *Id.* at 196 (O'Connor, J., dissenting).
33. For strict scrutiny cases, see, for example, *Stuart v. Roache*, 951 F.2d 446 (1st Cir. 1991); *Sims v. Montgomery County Commission*, 873 F. Supp. 585 (M.D. Ala. 1994). For intermediate scrutiny cases, see, for example, *Adarand Constructors, Inc. v. Pena*, 16 F.3d 1537 (10th Cir. 1994).
34. 515 U.S. 200 (1995).
35. *Id.* at 227.

"congruence" between the commands of the Fifth and Fourteenth Amendments.[36] "Taken together," O'Connor explained, "these three propositions lead to the conclusion that any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny."[37] Thus, the doctrinal rule in affirmative action cases is that the governmental body enacting the law is irrelevant to judicial review.

II. EQUAL PROTECTION TAILORING IN PRACTICE

Despite doctrinal formalities, do federal courts, in practice, tend to treat federal affirmative action laws with more leniency than state affirmative action laws? To determine the answer to this question, this Part reviews evidence drawn from the entire corpus of federal court decisions adjudicating race-based affirmative action over a multiyear period. If doctrine formally requires similar treatment, how would one determine if federal courts treat federal and state laws differently? This can be done in at least three ways: First, one can see whether federal affirmative action laws are upheld more frequently than state and local affirmative action laws. Second, one can see if federal courts use language in their opinions that suggests distinct treatment of federal and state actors. Third, even in the absence of language to that effect, one can also look at whether courts' reasoning effectively permits the federal government more leeway to adopt race-conscious policies. For example, do courts uphold federal laws that are relatively broad while striking down similar (or narrower) state laws? Examining the outcomes, language, and reasoning of the affirmative action decisions uncovers ample evidence of relatively lenient judicial treatment of federal laws.

A. Methodology

To begin formulating an answer to the question of whether the federal government is treated as a special constitutional niche in the context of affirmative action law, I collected every published federal court decision (district court, circuit court, and Supreme Court) between 1990 and 2003. During that time there were 69 published federal court decisions reaching

36. *Id.* at 223–24.
37. *Id.* at 224.

a final ruling on the merits[38] of a race-based affirmative action program under strict scrutiny. The vast majority of these decisions ($n = 48$) ruled on state laws, with federal affirmative action policies being less frequent ($n = 21$). The state laws were a mix of public contracting policies, educational policies governing school admissions or administration, and public hiring policies. The federal laws also included public contracting policies, in addition to broadcasting regulations and judicially implemented consent decrees settling race discrimination lawsuits.

Originally, I set out to analyze only post-*Adarand* cases because that decision clarified once and for all the appropriate level of scrutiny applicable to federal affirmative action laws. Yet, within this time frame (1995–2003), there were not enough federal laws upon which to make a comparison and from which to draw reliable inferences ($n = 11$). To gain a better handle on the potential role of tailoring, I decided to look at decisions dating back to 1990, the year after the *Croson* Court clarified that state affirmative action laws were to be judged under strict scrutiny. This posed a problem for decisions adjudicating federal laws, however, because between 1990 and 1995, courts applied intermediate scrutiny in some cases and strict scrutiny in others. Because including the intermediate scrutiny cases might skew the results—as this type of review is, by nature, more lenient than the strict scrutiny applied to state laws—I only included in this study those post-1990 decisions on federal laws in which courts applied strict scrutiny. All intermediate scrutiny decisions were omitted. I report below the statistics comparing state laws with all federal laws both in the period from 1990 to 2003 and in the period from 1996 to 2003.

In addition to omitting intermediate scrutiny cases, I excluded two types of decisions involving unusual race classifications: electoral districting plans and invidiously discriminatory laws that harmed minorities. The former are arguably a form of affirmative action,[39] but the controlling doctrine for the use of race in electoral districting is fundamentally different than the one for ordinary racial classifications. In contrast to ordinary racial classifications, states are allowed to consider race in districting without triggering strict scrutiny, so long as race is not the predominant consideration.[40] As for invidious laws discriminating against minorities, I only discovered three

38. No preliminary injunction cases and no decisions in which a subsequent court ruled on the merits of the same constitutional claim were included.

39. *See* Adam Winkler, *Sounds of Silence: The Supreme Court and Affirmative Action*, 28 LOY. L.A. L. REV. 923, 956–57 (1995).

40. *See* Pamela S. Karlan, *Easing the Spring: Strict Scrutiny and Affirmative Action After the Redistricting Cases*, 43 WM. & MARY L. REV. 1569, 1582–83 (2002).

instances in my census of equal protection strict scrutiny cases in the covered period. On the suspicion that courts might treat such laws differently than other forms of race-consciousness, I excluded these cases so as to avoid any potential for skewing the results. I should note, however, that two of the three decisions adjudicated the constitutionality of state laws and invalidated them;[41] the third decision adjudicated and upheld the race-conscious actions of federal government officers.[42]

B. Basic Survival Rates

The first indication that federal courts may be treating the federal government more leniently than state governments is the remarkable difference in the respective survival rates of state and federal affirmative action policies challenged in federal court. Of the 21 federal affirmative action policies adjudicated under strict scrutiny between 1990 and 2003, 10 survived review, for a survival rate of 48 percent. Of the 48 state affirmative action laws, however, federal courts upheld merely 11, for a survival rate of 23 percent. Federal affirmative action laws were more than twice as likely as state affirmative action laws to survive judicial review.[43]

Comparing the state law cases to post-*Adarand* federal law cases, the same pattern emerges, though it is weaker. The survival rate of federal laws between 1996 and 2003 was 36 percent (4 survivors out of 11 decisions), compared to a survival rate of 23 percent rate for all state laws. While consistent with the overall findings in terms of the greater likelihood of federal laws to survive review, the number of observed decisions adjudicating federal laws is so small that one decision in either direction would make a huge difference in the survival rate. This is precisely the problem that led to the inclusion of pre-*Adarand* decisions adjudicating federal affirmative action laws under strict scrutiny.

These data are intriguing because of their suggestion that federal laws may receive relatively lenient judicial scrutiny compared to state laws. These results alone, however, do not tell us if there is in fact lenient scrutiny for federal laws or if some other explanation might be determinative. It may be, for example, that federal laws survive review at a higher rate than state laws because federal law is generally a "higher quality product than

41. *See* Wallace v. Calogero, 286 F. Supp. 2d 748 (E.D. La. 2003); Santiago v. Miles, 774 F. Supp. 775 (W.D.N.Y. 1991).

42. *See* United States v. Travis, 837 F. Supp. 1386 (E.D. Ky. 1993).

43. At $p = .041$, this variation was statistically significant.

state law"[44]—that is, as drafted, federal laws are more likely to satisfy constitutional standards. Many federal policies using race are adopted by federal district courts as part of consent decrees settling discrimination suits. One would expect federal judges, who are relatively well versed in applying constitutional doctrine, to put in place race-conscious measures likely to fit existing doctrinal requirements and precedents. One might also expect that Congress and executive agencies will adopt relatively sound laws and regulations due to the availability of legal counsel, access to large staffs, and vetting by affected interest groups. States, and especially local governments, by contrast, are less likely to benefit from the resources available to the federal government and from interest group participation in lawmaking. A local public school is more likely to put in place policies restricting constitutional rights without input from legal counsel and evaluation by affected organized interest groups; hence, one should not expect those policies to comport with existing constitutional doctrine as often as federal laws.

This is an explanation with which I am sympathetic, as I have argued elsewhere that there is variation in the constitutional quality of some types of laws burdening constitutional rights.[45] Moreover, there is some evidence in the case law of qualitative differences between federal and state laws. For example, in about half of state and local affirmative action cases (24 of 49 decisions, or 49 percent), courts found that the state or local governmental entity failed to introduce sufficient evidence of past discrimination, a constitutional requirement for adopting affirmative action for remedial purposes.[46] Federal affirmative action policies only rarely failed to meet this constitutional requirement (2 of 21 decisions, or 10 percent), possibly indicating that federal officials are more attentive to extant doctrinal demands.

While the quality of lawmaking at the different levels of government may explain part of the variation between the survival rates of federal and

44. Jonathan R. Macey, *Federal Deference to Local Regulators and the Economic Theory of Regulation: Toward a Public-Choice Explanation of Federalism*, 76 VA. L. REV. 265, 272 (1990). For additional insights into the potential qualitative differences in state and federal lawmaking, see John P. Dwyer, *The Role of State Law in an Era of Federal Preemption: Lessons From Environmental Regulation*, LAW & CONTEMP. PROBS., Summer & Autumn 1997, at 203, 218; William P. Marshall, *Federalization: A Critical Overview*, 44 DEPAUL L. REV. 719, 723 (1995); Thomas S. Ulen, *Economic and Public-Choice Forces in Federalism*, 6 GEO. MASON. L. REV. 921, 940 (1998); Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 81 TEX L. REV. 1, 77 (2004).

45. *See* Adam Winkler, Free Speech Federalism (2007) (unpublished manuscript, on file with author).

46. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 500 (1989).

state affirmative action laws, there are good reasons to suspect that deference is also at play. Most importantly, federal judges themselves often claim to be employing a measure of deference in adjudicating federal laws. Less explicitly, some judges rely on reasoning that favors the federal government. It is to this language and reasoning of deference that I now turn.

C. The Language of Deference

One obvious indication of tailoring comes from the language used in judicial opinions. Even if courts are supposed to apply the same strict scrutiny standard, judges might reveal a measure of deference through the words they use to explain and justify their rulings. This language of deference, it turns out, is found in a surprising number of decisions adjudicating federal affirmative action laws. Deferential language is far rarer, however, in decisions ruling on state laws.

1. Federal Judicial Orders

Language suggesting a measure of deference to the federal government is found most frequently in decisions adjudicating the constitutionality of affirmative action policies put in place by federal courts themselves. Two-thirds of the federal affirmative action "laws" adjudicated under strict scrutiny between 1990 and 2003 were judicial orders implementing consent decrees in discrimination lawsuits. Although these judicial orders force state or local governmental actors to enact affirmative action programs—such as a race-conscious hiring policy imposed on a local fire department to settle a previous race discrimination lawsuit[47]—they are effectively adopted by federal judges. The parties play a role in shaping the decree, but without the affirmative assent of the presiding federal judge, the affirmative action policy would not be adopted. Hence, when the Supreme Court considered the constitutionality of a consent decree requiring the State of Alabama to hire more minority state troopers in *United States v. Paradise*,[48] the Justices characterized the relevant governmental interests as those of the federal government.[49]

Paradise is not a case covered at length in constitutional law casebook discussions of affirmative action, yet the case continues to play an influential role in federal courts. Because consent decrees comprise the majority of constitutional controversies involving federal race-based affirmative action,

47. *See* Martinez v. City of St. Louis, 327 F. Supp. 2d 1002 (E.D. Mo. 2003).
48. 480 U.S. 149 (1987) (plurality opinion).
49. *Id.* at 167; *id.* at 186 (Powell, J., concurring); *id.* at 196 (O'Connor, J., dissenting).

Paradise—the last major Supreme Court decision on the constitutionality of a race-conscious consent decree—is often looked to for guidance. Although there was no majority opinion in *Paradise*, six Justices clearly affirmed the validity of consent decrees mandating racial preferences, including even the quota-like "one-black-for-one-white" promotion requirement imposed on the Alabama state troopers at issue in the case.[50]

Linking the otherwise fractured Justices was the shared sentiment that district court judges should be afforded a degree of deference not usually granted governmental officials who adopt race-conscious policies. According to Justice Brennan's plurality opinion, "[i]n determining whether this order was 'narrowly tailored,' we must acknowledge the respect owed a district judge's judgment that specified relief is essential to cure a violation of the Fourteenth Amendment. . . . [T]he choice of remedies to redress racial discrimination is . . . left . . . to the sound discretion of the trial court."[51] The basis for such discretion was the relative expertise of the trial judge overseeing a discrimination lawsuit. "The district court," Brennan continued, "has firsthand experience with the parties and is best qualified to deal with the 'flinty, intractable realities of day-to-day implementation of constitutional commands.'"[52] The trial judge, not the appellate court, "'was in the best position to judge whether an alternative remedy . . . would have been effective.'"[53] Concurring, Justice Stevens contended that the special status of a district court in fashioning a remedial order meant that strict scrutiny should not apply at all to this type of race-conscious lawmaking[54]: "[T]he District Court had broad and flexible authority to remedy the wrongs resulting from [a constitutional] violation—exactly the opposite of the . . . suggestion that the judge's discretion is constricted by a 'narrowly tailored to achieve a compelling governmental interest' standard."[55]

In the years since *Paradise*, the decision and its application of deferential strict scrutiny review of race-based consent decrees have remained mostly unacknowledged by the Supreme Court. Perhaps due to the absence of a clear majority opinion, the Court has never felt compelled to explain how *Paradise* fits within the framework of later decisions such as *Croson*, which mandated strict scrutiny for remedial uses of race by state governments,

50. *Id.* at 185–86; *id.* at 189 (Powell, J., concurring); *id.* at 195 (Stevens, J., concurring).
51. *Id.* at 184–85 (plurality opinion) (internal quotations and citations omitted).
52. *Id.* at 185 (quoting Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15 (1971)).
53. *Id.* at 185 (quoting Sheet Metal Workers v. EEOC, 478 U.S. 421, 486 (1986) (Powell, J., concurring)).
54. *Id.* at 190–91 (Stevens, J., concurring).
55. *Id.* at 193.

and *Adarand*, which held that even race-conscious policies adopted by the federal government were subjected to strict scrutiny. But for the lower courts, *Paradise* remains a primary focus of attention and the principle of deference espoused by the Justices profoundly shapes the lower courts' current approach to strict scrutiny in consent decree cases. In *Macklin v. City of Boston*,[56] for example, the First Circuit echoed the *Paradise* plurality in arguing that a "significant measure of deference is owed to the trial court's conclusion" that a race-conscious policy is necessary.[57]

Even after the Supreme Court in *Adarand* insisted that all uses of race trigger the same vigorous scrutiny, regardless of the identity of the governmental actor, the lower courts continued to voice the appropriateness of deferring to district courts when ruling on the constitutionality of consent degrees. Thus, in *United States v. Secretary of Housing & Urban Development*,[58] the Second Circuit recognized that an unusual measure of respect was due the trial judge's judgment because of his expertise with the parties and the underlying context.[59] And in *Walker v. City of Mesquite*,[60] the Fifth Circuit explained that, even in spite of strict scrutiny's applicability, "we will deferentially examine the district court's findings because this is a complicated case in which the district court has more than a decade's worth of experience."[61]

To be sure, there were instances of courts rejecting race-conscious policies adopted as part of consent decrees. But, overall, consent decrees mandating affirmative action were far more likely than other types of race-based preferences to be upheld. Of 14 consent decrees reviewed between 1990 and 2003, 50 percent were upheld, compared to 26 percent of state and federal public employment and contracting policies; 27 percent of state educational diversity policies; and 0 percent of federal broadcasting diversity policies. Even where federal courts rejected consent decrees under strict scrutiny, the reasons were often consistent with *Paradise*'s call to respect district court judges. In 3 of the 7 decisions rejecting consent decree mandates, the reviewing courts held that the goals established by the district courts had been met in the years since and, thus, the race-conscious policy was no longer necessary under the district court's

56. 969 F.2d 1273 (1st Cir. 1992).
57. *Id.* at 1277.
58. 239 F.3d 211 (2d Cir. 2001).
59. *Id.* at 220.
60. 169 F.3d 973 (5th Cir. 1999).
61. *Id.* at 982.

own terms.[62] In one other decision, the reviewing court held that intervening Supreme Court precedent clearly invalidated the preference policy established initially by the decree.

Under the influence of *Paradise*, the lower federal courts often approach one type of race-conscious affirmative action—judicially ordered consent decrees—with an explicit measure of deference to the enacting governmental official. With consent decrees being the most common type of affirmative action adopted by the federal government (14 of 21 decisions), federal courts regularly apply an overtly tailored, more deferential form of strict scrutiny to federal affirmative action plans.

2. Other Federal Affirmative Action Laws

Deference to federal actors is not found exclusively in consent decree cases. Even excluding all affirmative action decisions involving a consent decree, federal affirmative action laws still survive at a relatively high rate (43 percent). Although the number of observed federal affirmative action laws adopted by nonjudicial lawmakers is small ($n = 7$)—hindering conclusive analysis—the survival rate is at least consistent with the larger pattern. Additionally, examples of deferential language or reasoning can also be found in decisions adjudicating federal laws adopted by Congress or executive agencies, although such deference appears less frequently than in consent decree cases.

An example of a decision in which the court used deferential language in considering the constitutionality of a congressional affirmative action law is *Jacobs v. Barr*.[63] The law in *Jacobs* was an unusual—and unusually direct—form of a race-conscious remedy, providing reparations for Japanese Americans who were interned during World War II. The plaintiff, an American of German ancestry, sued, claiming that the reparations law was not narrowly tailored to further the governmental interest in remedying wrongful internment because payments were available only to people of Japanese ancestry and not to those of Germans descent. Although uncertain about the appropriate standard to apply, the D.C. Circuit Court of Appeals held that the law "survive[d] even strict scrutiny analysis."[64] Despite the skepticism usually required by strict scrutiny,

62. *See* Detroit Police Officers Ass'n v. Young, 989 F.2d 225 (6th Cir. 1993); Martin v. City of St. Louis, 327 F. Supp. 2d 1002 (E.D. Mo. 2003); N. State Law Enforcement Officers Ass'n v. Charlotte-Mecklenburg Police Dept., 862 F. Supp. 1445 (W.D. N.C. 1994).

63. 959 F.2d 313 (D.C. Cir. 1992).

64. *Id.* at 318.

the court explained that it would "give 'great weight'" to the finding of Congress that, unlike German Americans—who were interned only on the basis of individualized suspicion of spying—Japanese Americans were interned on the basis of racial prejudice.[65] The very basis upon which the court seemed to defer to Congress—the question of the need for a race-conscious remedy for past discrimination—has been identified by the Supreme Court as a question as to which courts are to employ the utmost skepticism of government.

D. Implicit Deferential Treatment

In numerous federal court decisions ruling on federal affirmative action policies, courts do not openly admit to treating the federal government more leniently, but the decisions nevertheless suggest relatively deferential scrutiny. In these cases, courts rely on reasoning that effectively gives the federal government more leeway than state governments in using race.

Consider *Paganucci v. City of New York*,[66] which upheld a consent decree requiring racially conscious promotions in a city police department that had previously engaged in malign racial discrimination.[67] The court first stated that strict scrutiny applied:

> The legal standards applicable to a consent decree which embodies a race-based remedy and to which a public employer is a party are analogous to those used in determining the validity of a public employer's affirmative action plan. A voluntary, race-conscious affirmative action plan does not violate constitutional standards if it is narrowly tailored to serve a compelling state interest."[68]

But then the court gave the consent decree only the most cursory scrutiny. The strict scrutiny discussion was little more than a citation to the fact that "the remedial action at issue was taken pursuant to a consent decree which was subjected to review and approval by the district court before it was permitted to take effect,"[69] and that the district judge's opinion claimed to have found "sufficient predicate" for using race.[70] Because the entering judge believed the race-conscious remedy to be necessary and appropriate, the *Paganucci* court did not undertake its own substantive review. Perhaps in

65. *Id.* at 318–19 (quoting Metro Broad., Inc. v. FCC, 497 U.S. 547, 569 (1990)).
66. 785 F. Supp. 467 (S.D.N.Y. 1992).
67. *Id.*
68. *Id.* at 477.
69. *Id.*
70. *Id.* (internal quotation marks omitted).

light of *Paradise*'s concerns for respecting the discretion of trial judges, *Paganucci*'s reticence to second-guess a remedial order is understandable. In any event, the *Paganucci* court still did not subject the judicial order to the same presumption of unconstitutionality that strict scrutiny traditionally requires.

Evidence of relatively lenient treatment of federal laws is also found in the reasoning of a handful of decisions that excuse Congress from strict scrutiny's requirement of specific findings of identifiable past discrimination. Whereas *City of Richmond v. J.A. Croson Co.*[71] required the city to provide evidence of past discrimination in particular industries and geographic locations to justify the extension of race-conscious remedies, federal courts permit the federal government to adopt nationwide affirmative action laws even without evidence of past discrimination in every state. When Minnesota and Nebraska contractors challenged a federal public contracting preference on the ground that Congress had not made findings of past discrimination in those states, the Eighth Circuit Court of Appeals insisted that "[w]hen the program is federal, the inquiry is (at least usually) national in scope," and Congress could apply its remedy in all states without having to show "strong evidence of race discrimination in construction contracting *in Minnesota and Nebraska*."[72] In the *Adarand Constructors, Inc. v. Slater*[73] dispute itself, on remand to the Tenth Circuit, the court of appeals explained that Congress still had broader power to remedy past discrimination than did state and local governments: "[T]he scope of [Congress' remedial] interest" is not necessarily "as geographically limited as that of a local government."[74] In an intriguing twist, the court, by carving out extra room for the federal government to act, upheld the very law that occasioned the Supreme Court's strident demand for "skepticism," "consistency," and "congruence." In a post-*Adarand* case employing the same reasoning, *In re Sherbrooke Sodding Co.*,[75] the federal court went further, explicitly acknowledging that the federal identity of the governmental actor impacted the court's constitutional analysis. "Congress is certainly not a city council," the court noted, and "[t]he degree of specificity required in the findings of discrimination and the breadth of the discretion in the choice of remedies

71. 488 U.S. 469 (1989).
72. Sherbrooke Turf, Inc. v. Minn. Dep't of Transp., 345 F.3d 964, 970–71 (8th Cir. 2003).
73. 228 F.3d 1147 (10th Cir. 2000).
74. *Id.* at 1165.
75. 17 F. Supp. 2d 1026 (D. Minn. 1998).

may vary with the nature and authority of the governmental body."[76] In other words, not all governmental actors are the same, and Congress has more leeway than other actors to adopt race-conscious policies. Even without any explicit invocation of deferential review, this is the epitome of institutional tailoring.

E. State Affirmative Action Laws

In contrast to federal affirmative action laws, state and local governments' uses of race are less likely to receive deferential scrutiny by federal courts. Not only is the survival rate of state and local affirmative action laws less than half the survival rate for federal laws, the opinions themselves also betray little hint of deferential scrutiny. In the vast majority of federal court decisions adjudicating state and local affirmative action, courts employ a truly rigorous and uncompromising strict scrutiny, second-guessing (and rejecting) all justifications offered by the governmental officials.[77]

Where federal courts uphold state and local race-based affirmative action, some of the concerns that appear to spur deferential scrutiny of federal laws are also at play. So although explicit language of deference was found in only 2 of 48 federal decisions adjudicating state and local law, these decisions echoed institutional concerns about the relative expertise of a governmental actor vis-à-vis the reviewing court. Both the state affirmative action cases involved educational institutions: *Grutter v. Bollinger*[78] and *Hunter v. Regents of the University of California*.[79] Both decisions claimed that, despite the applicability of strict scrutiny, some degree of deference to educational officials was warranted out of respect for educators' specialized knowledge, experience, and skill. As noted earlier, *Grutter* explains that judges should "defer" to law school officials' "educational judgment" about what type of student body best serves the law school's "educational mission."[80] In *Hunter*, the Ninth Circuit upheld the race-conscious admission policy of a laboratory elementary school run by

76. *Id.* at 1034 (internal quotation marks omitted).

77. *See, e.g.*, Eng'g Contractors Ass'n of S. Fla., Inc. v. Metro. Dade County, 122 F.3d 895 (11th Cir. 1997) (rejecting a public contracting preference due to a lack of evidence of prior discrimination); Podberesky v. Kirwan, 38 F.3d 147 (4th Cir. 1994) (invalidating a university scholarship program limited to African American students for being overbroad); Mallory v. Harkness, 895 F. Supp. 1556 (S.D. Fla. 1995) (holding unconstitutional a statute requiring one-third of appointees to a judicial nominating commission to be women or minorities).

78. 539 U.S. 306 (2003).

79. 190 F.3d 1061 (9th Cir. 1999).

80. *See supra* notes 5–9 and accompanying text.

the University of California, Los Angeles, on the ground that a racially conscious admissions policy was necessary to create a racially diverse student body.[81] Such diversity was necessary, according to school officials, so that the school could satisfy its institutional mission: conducting academic research into the urban educational environment. "[I]n evaluating whether [the school's] use of race/ethnicity in its admissions process is narrowly tailored," the *Hunter* court explained, "we recognize . . . that courts should defer to researchers' decisions about what they need for research."[82] Courts must avoid the "'second-guessing of legitimate academic judgments.'"[83]

Both *Grutter* and *Hunter* thus depart from traditional strict scrutiny by adopting a stance of deference when that standard formally requires courts to be skeptical. Strict scrutiny, after all, is a second-guessing game. Yet it is one that *Grutter* and *Hunter* refuse to play. These decisions are, nevertheless, consistent with the federal court opinions that employ a measure of deference in adjudicating federal affirmative action laws under strict scrutiny. In each case, deference is founded on the relative expertise of a lawmaker to make a determination that using race is justified in the particular circumstances.

Grutter and *Hunter* remain, nonetheless, exceptional. Federal courts are not generally so deferential to state educational institutions, at least not in affirmative action cases. Of the 9 other federal court decisions ruling on the merits of an educational institution's race-conscious policy, only 1 survived (11 percent). Outside of *Grutter* and *Hunter*, educational institutions have not benefited much from being a special niche, with courts apparently content to second-guess and vigorously challenge most educational affirmative action policies. For every *Grutter*, there is a *Gratz*.[84] Or, rather, there are several *Gratzs*.

In another decision upholding a state or local affirmative action policy, the federal court seemed to have been swayed by the active involvement of the federal government in pushing the governmental entity to adopt a race-conscious policy. In *Concrete Works of Colorado, Inc. v. City of Denver*,[85] the Tenth Circuit upheld a racial preference in public contracting.[86] The court emphasized three pieces of evidence that justified

81. 190 F.3d at 1064–65.
82. *Id.* at 1066.
83. *Id.* at 1067 (quoting Univ. of Pa. v. EEOC, 493 U.S. 182, 199 (1990)).
84. 539 U.S. 244 (2003) (invalidating a racial preference used for undergraduate admissions to the University of Michigan).
85. 321 F.3d 950 (10th Cir. 2002).
86. *Id.*

the factual determination that Denver had been sufficiently complicit in past discrimination, each of which related to the federal government: a grievance filed against the city by the U.S. Department of Housing and Urban Development for failure to include racial minorities in public contracts; a U.S. General Accounting Office report determining that city contracting practices adversely affected minority participation; and a U.S. Department of Transportation threat to withdraw federal financial assistance from a city contracting project because of city policies that operated to bar minority contractors from qualifying for contacts.[87] The fact that the federal government had thrown its weight behind the push for racial inclusion thus played a prominent role in justifying the city's reliance on racial criteria in its public contracting program.

Deference was rarely found in federal court decisions ruling on the constitutionality of state and local affirmative action. Only two decisions, *Grutter* and *Hunter* employ explicit language of deference, and one other decision evokes the authority of the federal government's own conclusion of past wrongdoing to justify current remedial measures. None of the other decisions on state or local laws, moreover, rely on reasoning that may be fairly said to be especially deferential. Even where federal courts uphold a state or local policy, the courts appear to engage in vigorous scrutiny of the evidence and arguments made by the state or local governmental officials. On occasion, such scrutiny results in a challenged law being upheld, but this occurs infrequently given the relatively large number of disputes over state and local laws.

III. NICHE-PICKING THE FEDERAL GOVERNMENT

Why would federal courts treat the federal government as a special constitutional niche even when applying strict scrutiny and in spite of *Adarand Constructors, Inc. v. Pena*'s[88] clear command to the contrary? The precise answer is elusive, but this Part identifies and analyzes a few potential explanations for the practice.

A. Institutional Comity

First, to the extent courts defer to Congress or executive branch agencies, it might be partially due to the longstanding constitutional norm

87. *Id.* at 960–61.
88. 515 U.S. 200 (1995).

of interbranch comity. This norm calls for federal judges to show respect for the judgments of Congress and the executive, which are coequal branches of the federal government. Obviously, federal courts are empowered to invalidate federal laws that run afoul of the U.S. Constitution. According to the comity norm, however, courts should be especially reluctant to do so.

The interbranch comity norm is part philosophical and part strategic. Philosophically, federal courts are supposed to exercise restraint in order to maintain their authority and legitimacy in the face of more democratic and representative branches. Thus, a traditional measurement of so-called judicial activism is the number of federal laws invalidated by courts.[89] Strategically, federal courts ought to show a measure of deference to Congress and the executive for institutional self-preservation. Despite the cliché that the Supreme Court is the final arbiter of constitutional meaning, political scientists have long recognized that stable legal orders are the result of equilibria reached among multiple political actors; the judiciary is just one particularly influential player in that game.[90] As *Roe v. Wade*[91] shows, a judicial ruling is not stable when many important political players do not concur. As a result, courts must seek to minimize the hostility engendered by their rulings and co-opt, rather than confront, the other branches.[92] According to William Eskridge and Philip Frickey, "there is a growing body of empirical evidence indicating that the Court bends its decisions to avoid overrides or other political discipline."[93] The predominant threat of discipline comes from other federal actors, with state and local governments a considerably less potent pressure. Whereas the federal government has numerous carrots and sticks

89. *See, e.g.*, Keenan D. Kmiec, Comment, *The Origin and Current Meanings of "Judicial Activism,"* 92 CAL. L. REV. 1441, 1463 (2004).

90. William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court, 1993 Term—Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 29 (1994).

91. 410 U.S. 113 (1973).

92. *See* LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE, at xiii (1998) ("[J]ustices are strategic actors who realize that their ability to achieve their goals depends on a consideration of the preferences of others, of the choices they expect others to make, and of the institutional context in which they act."); William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523 (1992); John Ferejohn & Barry Weingast, *Limitation of Statutes: Strategic Statutory Interpretation*, 80 GEO. L.J. 565, 566 (1992). The separation-of-powers game is mostly studied in the context of statutory interpretation, but, as Barry Friedman argues, also has salience in constitutional cases. *See* Barry Friedman, *The Politics of Judicial Review*, 84 TEX. L. REV. 257, 313–16 (2005).

93. Eskridge & Frickey, *supra* note 90, at 37.

with which to influence and discipline the federal judiciary—promotion,[94] court packing[95] (and unpacking[96]), jurisdiction stripping,[97] subtle salary erosion,[98] and budgetary control[99]—state and local governments have no direct means to do so, and, effectively, can do little more than complain loudly about aggressive judicial review.

The general norm of interbranch comity has special relevance in the context of affirmative action. This norm, the reader will recall, informed both Chief Justice Burger's opinion in *Fullilove v. Klutznick* and the majority decision in *Metro Broadcasting v. FCC*.[100] Additionally, in *City of Richmond v. J.A. Croson Co.*,[101] the controlling plurality opinion, written by Justice O'Connor, explicitly noted that Congress has more constitutional power than state and local governments to redress past discrimination because of the enforcement power of Section 5 of the Fourteenth Amendment.[102]

94. *See* LAWRENCE BAUM, THE PUZZLE OF JUDICIAL BEHAVIOR (1997); Susan B. Haire et al., *Appellate Court Supervision in the Federal Judiciary: A Hierarchical Perspective*, 37 LAW & SOC'Y REV. 143, 147 (2003) ("Like all professionals, judges prefer to be held in high esteem by their colleagues and may desire promotion and elevation to a higher court." (citations omitted)). Some studies have found that judges were more likely to be promoted to an appeals court if they upheld the Federal Sentencing Guidelines. *See* Mark A. Cohen, *Explaining Judicial Behavior or What's "Unconstitutional" About the Sentencing Commission?*, 7 J.L. ECON. & ORG. 183 (1991); Gregory C. Sisk et al., *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1377, 1383 (1998) (observing a correlation between judges upholding the Federal Sentencing Guidelines and judges' likelihood of being promoted to the circuit level).

95. *See* William H. Rehnquist, *Judicial Independence*, 38 U. RICH. L. REV. 579, 592–93 (2004) (describing President Franklin Roosevelt's court-packing plan).

96. *See* Barry Friedman, *The History of the Countermajoritarian Difficulty, Part II: Reconstruction's Political Court*, 91 GEO. L.J. 1, 39 (2002) ("In 1866, after the war was over and Andrew Johnson was in the White House, Congress reduced the size of the Court to seven . . . . Many believe that the reduction in size to seven was enacted precisely to deprive Andrew Johnson of appointees who might oppose congressional measures.").

97. *See id.* at 25–37 (describing congressional action stripping courts of jurisdiction and effectively extinguishing any chance of a judicial ruling on the constitutionality of Reconstruction); Maxim O. Mayer-Cesiano, Comment, *On Jurisdiction-Stripping: The Proper Scope of Inferior Federal Courts' Independence From Congress*, 8 U. PA. J. CONST. L. 559, 560 (2006) (discussing legislation to strip federal courts of habeas jurisdiction for Guantanamo detainees). The U.S. Congress has considered, but has not yet adopted, bars on federal courts' jurisdiction to hear challenges to the federal Defense of Marriage Act, *see* H.R. 1100, 109th Cong. § 2 (2005), and challenges to the mandatory recitation of the Pledge of Allegiance in public schools, *see* Pledge Protection Act of 2005, H.R. 2389, 109th Cong. § 2 (2005); Constitution Restoration Act of 2005, S. 520, 109th Cong. §§ 101–02 (2005).

98. *See* Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 85 (1991); Marcia Coyle, *Federal Judicial Pay Continues to Erode*, NAT'L L.J., July 31, 2006, http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1154077532466.

99. *See* Robert D. Tollison, *Public Choice and Legislation*, 74 VA. L. REV. 339, 345–46 (1988).

100. *See supra* text accompanying notes 23–27.

101. 488 U.S. 469 (1989).

102. *Id.* at 490–91.

Indeed, as others have noted, a persuasive reading of the Fourteenth Amendment is that it was originally intended to expand federal power to remedy discrimination while simultaneously limiting states' power to adopt race-conscious laws.[103]

B. Trust

A second reason for the relatively lenient treatment of federal affirmative action laws, and the correspondingly harsh treatment of state affirmative action laws, may relate to trust. Modern constitutional adjudication is, in large part, a search for legislative motive, especially when it comes to fundamental rights protected by strict scrutiny. Judges are not asked simply whether a law violates the Constitution; they are asked to determine whether the governmental objective or goal behind the law is sufficiently important to warrant some burden on individual rights. When it comes to matters of race, federal judges may analyze governmental motives through the lens of history in ways that help federal laws but hurt state laws.

The civil rights movement was arguably the most significant constitutional development of the twentieth century. In this crucible, state governments fared poorly, earning a certain degree of distrust. As Barry Friedman writes, "[t]he states, by the 1950s and 1960s, had sullied their reputations as protectors of civil rights," and states' rights was a rallying cry of those opposed to the inclusion and equality of racial minorities.[104] Localism has since been associated with, according to David Barron, a "deep-seated intuition that local governments are islands of private parochialism which are likely to frustrate the effective enforcement of federal constitutional rights."[105]

By contrast, as Richard Schragger notes, current constitutional thought "asserts that rights-protecting institutions like the Court or the federal government are required to constrain local exercises of power that oppress minorities."[106] Whereas state governments lost traditional power over racial matters in the mid-twentieth century, the federal government came to be viewed as the protector of minority rights owing to *Brown v.*

103. *See Ex Parte* Commonwealth of Virginia, 100 U.S. 339, 345 (1879).

104. Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 372 (1997).

105. David J. Barron, *The Promise of Cooley's City: Traces of Local Constitutionalism*, 147 U. PA. L. REV. 487, 487–88 (1999); *see also Croson*, 488 U.S. at 523 (Scalia, J., concurring) (stating that "racial discrimination against any group finds a more ready expression at the state and local than at the federal level"); Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346 (1990).

106. Schragger, *supra* note 1, at 1822.

Board of Education[107] and landmark legislation, such as the Civil Rights Act[108] and the Voting Rights Act.[109] The success of the federal government—both the elected branches and the courts—in combating Jim Crow and establishing legal remedies for racial discrimination may continue to redound to its benefit in the field of race to this day.

Moreover, to the extent strict scrutiny is designed to uncover illicit motives, it would be surprising if that test did not result in a relatively high number of at least one type of federal affirmative action being upheld: race-conscious remedies ordered by federal judges as part of consent decrees. Who should a federal judge trust more than other federal judges? Not only are federal judges likely to be demographically similar, all federal judges are, in a sense, institutional colleagues joined together in a common mission under Article III. Moreover, appellate courts are ordinarily supposed to defer to trial courts about factual issues, and some of the basic issues that must be addressed in the affirmative action context—about the existence of past discrimination and the nature of an effective response—are inherently fact-based. Even if *Croson* and *Adarand* call for skepticism of governmental actors generally, such skepticism is harder for federal judges to muster when considering the actions of other federal judges.

IV. IMPLICATIONS

If federal courts approach federal laws differently than state and local laws—even when applying the same formal standard of review—then judges are effectively tailoring the equal protection right along federalism lines. I examine two potential implications of this judicial tailoring here. First, the mostly unacknowledged special treatment of the federal government bespeaks the durability of institutional context in constitutional law. Second, the affirmative action decisions cast light on an important question about the emerging practice of tailoring rights along institutional lines: What kinds of institutions should be given the unusual regulatory latitude that comes from being a special constitutional niche?

107. 347 U.S. 483 (1954).

108. Civil Rights Act of 1964, 42 U.S.C. §§ 2000a–h (2000).

109. Voting Rights Act of 1965, 42 U.S.C. §§ 1973, 1973c (2000); *see* Friedman, *supra* note 104, at 372.

A. The Durability of Institutional Context (and the Limits of Doctrine) in Constitutional Law

Writing about the First Amendment freedom of speech, Fred Schauer has argued that courts prefer to base doctrine on categories that reflect overarching principles rather than on categories that reflect institutions.[110] Wariness of institutionally grounded doctrine stems in part, he suggests, from the contingent and dynamic nature of institutions. "[U]nderstanding nonlegal institutions, describing them, and then designing doctrine around them would take appellate courts into empirical realms in which they are uncomfortable and as to which appellate records are likely to be particularly deficient."[111] Yet, it may be precisely the empirical nature of governmental institutions—their sheer unavoidable reality—that leads courts to shape their decisionmaking to fit them, even when controlling doctrine instructs otherwise. Doctrine cannot completely overcome engrained perspectives, attitudes, and understandings. The underlying concerns once expressed about judicial involvement with a particular governmental institution still press upon the judge, even if a formal rule says those concerns are irrelevant.

To illustrate, consider the Supreme Court's rejection of institutional tailoring in the context of prisons in *Johnson v. California*.[112] The Court, per Justice O'Connor, refused to exempt prisons from the Fourteenth Amendment's requirement that all governmental uses of race be subject to strict scrutiny.[113] Defending a longstanding prison rule requiring temporary racial segregation of inmates, California prison officials had argued that the Court should apply the same deferential scrutiny usually applied to burdens on prison inmates' constitutional rights. In *Turner v. Safley*,[114] an earlier O'Connor opinion, the majority argued that "courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform." Prison management "is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources."[115] Hence, "[s]ubjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative

110. Schauer, *Institutional First Amendment*, *supra* note 1, at 1259.
111. *Id.* at 1266.
112. 543 U.S. 499 (2005).
113. *Id.* at 515.
114. 482 U.S. 78 (1987).
115. *Id.* at 84–85 (quoting Prownier v. Martinez, 416 U.S. 396, 405 (1974)).

solutions to the intractable problems of prison administration."[116] Justice O'Connor's opinion in *Johnson*, however, rejected making prisons a special constitutional niche for purposes of equal protection. But even here, the underlying institutional concerns remained on the surface. In remanding the controversy to the lower court, the Court warned that "[p]risons are dangerous places, and the special circumstances they present may justify racial classifications in some contexts."[117] Institutions—their missions, needs, and environments—are not easily ignored.

In all of the collected affirmative action decisions, there was only one prison-like case, and, unsurprisingly, the court in that case seemed to approach the policy with reduced skepticism. In *Wittmer v. Peters*,[118] a Seventh Circuit Court of Appeals decision authored by Judge Posner, the court applied the "skeptical, questioning, beady-eyed scrutiny that the law requires,"[119] yet upheld a racial preference for hiring at a state correctional boot camp. The governmental goal for hiring preference was unusual, at least as Judge Posner phrased it: "[B]lack inmates [were] believed unlikely to play the correctional game of brutal drill sergeant and brutalized recruit unless there [were] some blacks in authority in the camp."[120] Recognizing the boot camp's institutional "mission of pacification and reformation," the court was willing to believe the boot camp's expert witnesses, who, despite having "had little experience with boot camps" and relying on "social scientific literature" from different contexts, nevertheless "opined" that racial diversity in supervisory roles was necessary for camp discipline.[121] At the same time, the court dismissed the challengers' expert witnesses who testified against the need for racial balance for relying on "naked conclusions."[122] Under traditional strict scrutiny, however, skepticism is supposed to be aimed at the government's claims, rather than at those of the challenger. The government, not the challenger, bears the burden of showing the necessity of using race.

The *Wittmer* court made an important observation about the frailty of broad doctrinal constitutional rules in the face of unforeseen institutional pressures. The challengers in *Wittmer* argued that, under *Croson*—the prevailing word on affirmative action at the time—only a past history of

116. *Id.* at 89.
117. *Johnson*, 543 U.S. at 515.
118. 87 F.3d 916 (7th Cir. 1996).
119. *Id.* at 918.
120. *Id.* at 920.
121. *Id.*
122. *Id.*

discrimination could justify racial preferences.[123] As a plurality in *City of Richmond v. J.A. Croson Co.*[124] had warned, "[c]lassifications based on race carry a danger of stigmatic harm. Unless they are *strictly reserved for remedial settings*, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility."[125] Judge Posner's response in *Wittmer* was simply to insist that the Justices, and other federal judges who ruled similarly, could not have meant what they wrote:

> A judge would be unreasonable to conclude that no other consideration except a history of discrimination could ever warrant a discriminatory measure unless every other consideration had been presented to and rejected by him. The dicta on which the plaintiffs rely were uttered in cases that did not involve, by judges who had never had cases that involved, the racial composition of a prison's staff. Such cases were not, at least insofar as one can glean from the opinions, present to the minds of the judges when they considered and rejected other grounds for discrimination and expressed that rejection in the sweeping dicta that we have mentioned.[126]

Doctrine bends easily in the face of institutional reality, especially when the doctrinal rules are crafted ex ante without sufficient attention to the many different contexts in which those rules will operate.

The story is the same with regard to the federal government in affirmative action cases. The Court itself has recognized the special role the federal government plays in remedying this country's history of race discrimination. And despite its formal rejection of a distinct standard of review in *Adarand Constructors, Inc. v. Pena*,[127] the underlying reasons for deference remain. Moreover, the *Adarand* majority may not have fully considered the entire range of federal governmental actors to whom the doctrinal rule of equal skepticism would be applied. Nowhere in the majority opinion, for instance, is there any discussion of how strict scrutiny might apply to a consent decree issued by a federal district court to resolve a racial discrimination claim—an issue the Court had faced before. Yet the traditions of comity to other Article III actors and of deference to the factual judgments of trial courts make the issues raised by skepticism in this institutional context unique. To the extent *Adarand* applies to federal consent decrees, strict scrutiny asks the appellate

123. *Id.* at 919.
124. 488 U.S. 469 (1989) (plurality opinion).
125. *Id.* at 493 (emphasis added).
126. *Wittmer*, 87 F.3d at 919.
127. 515 U.S. 200 (1995).

courts to go against impulse and exercise "skeptical, questioning, beady-eyed scrutiny" of their own colleagues.

Adarand, as a doctrinal pronouncement of institutionally blind judicial review, has been undermined by the simple fact that not all governmental actors are the same: Institutional differences matter. Legislatures and executive agencies act in response to different pressures and institutional mandates from federal district courts. When a federal court adopts an affirmative action plan as part of a consent decree, it is not catering to electoral pressures or the demands of interest groups seeking greater access to the public trough. Instead, the court is remedying a constitutional violation, and the extent to which race must be used to level the playing field is greater in that circumstance. There is little reason to suspect illicit motives on the part of federal judges, and thus correspondingly little need to use a tool supposedly designed to smoke out invidiousness.

The untenable nature of equal skepticism has manifested itself quite directly in the Supreme Court in the years since *Adarand*. Justice O'Connor might insist that *Grutter v. Bollinger*[128] applied the same strict scrutiny to the University of Michigan Law School's affirmative action policy that *Croson* applied to Richmond's minority set-asides, but ample language in her majority opinion suggests a more lenient review. *Grutter* describes the "tradition of giving a degree of deference to a university's academic decisions" and invokes the need to respect "educational autonomy."[129] As commentators have widely recognized, "the continuous drumbeat of deference, deference, deference rings out loud and clear"[130] in *Grutter*. Moreover, in contrast to strict scrutiny's well-established presumption that a race-conscious law is unconstitutional, which places a heavy burden on the government to justify its use of race, *Grutter* states that "'good faith' on the part of a university is 'presumed' absent a 'showing to the contrary.'"[131] That is what one expects from rational basis review, not from strict scrutiny.

The explicit use of deference in *Grutter*, however, may be one of the decision's strengths. At least the Court acknowledges that race-conscious affirmative action policies in the university context ought to be treated

128. 539 U.S. 306 (2003).

129. *Id.* at 328–29.

130. Lackland H. Bloom, Jr., Grutter *and* Gratz*: A Critical Analysis*, 41 HOUS. L. REV. 459, 470 (2004).

131. *Grutter*, 539 U.S. at 329 (quoting Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 318–19 (1978)).

differently than race-conscious affirmative action policies adopted by other governmental actors. This is precisely the open, explicit admission of judicial thinking that the democratic norm of public justification requires. As a result of this overt use of deference, scholars can properly analyze the Court's ruling in *Grutter*, and lawmakers, including other judges, know to approach university affirmative action differently than other types of affirmative action. To be sure, *Grutter* only goes half way. The Court's insistence that the usual strict scrutiny standard was being applied significantly diminishes the value of the Court's open use of deference elsewhere in the opinion. But, despite this flaw, *Grutter* is a step in the right direction for its overt, rather than covert, judicial tailoring of the equal protection right.

B. Quality Tailoring

There seems to be a considerable amount of tailoring of the equal protection principle along institutional lines, with the federal government, and potentially prisons and educational institutions, receiving unusual leeway from courts. One might ask, then, whether the tailoring is being done for the right reasons and with positive results.

One element that unites the tailoring found in various equal protection decisions is deference to particular governmental institutions on the basis of institutional mission or expertise. In *Grutter*, for example, the law school received a measure of deference because the Court believed that educators are best situated to determine whether diversity is "essential to [the school's] educational mission" and because the "complex educational judgments" involved lie "primarily within the expertise of the university."[132] In *Hunter*, deference was owed to researchers for similar reasons,[133] and in *Wittmer*, the boot camp's institutional mission of reform appeared to influence the result.[134] In numerous consent decree cases, federal courts defer to the district court judges who are best acquainted with the facts and the circumstances of the underlying controversy.[135] This, too, may be thought of as deference based on institutional mission and expertise. Part of the inherent mission of trial courts is to craft remedies for legal violations, and trial judges are more likely than appellate judges to have a sufficiently detailed, expert understanding of the facts and to know what

132. *Id.* at 328.
133. 190 F.3d 1061, 1067 (9th Cir. 1999).
134. Wittmer v. Peters, 87 F.3d 916, 920 (7th Cir. 1996).
135. *See supra* Part II.C.1.

type of remedy is warranted. In large part, then, constitutional niches are determined by the fact that particular governmental institutions have unique missions as well as unusual expertise in accomplishing those missions.

This kind of institutional awareness is, on the surface, a worthwhile counterweight to the institutional blindness that often marks constitutional doctrine in an age of formal equivalence, congruence, and consistency. But one is forced to wonder what the boundaries of such an approach are—or whether there are any at all. Which governmental institutions do not have unique missions and special expertise? Environmental agencies, health agencies, public libraries, transportation agencies, law enforcement offices, workplace safety agencies, financial market regulators, and any number of other governmental bodies all have identifiable institutional missions that drive their activities. Their officers often operate in circumstances in which they have the specialized skill, expertise, and understanding that laypeople lack; that is why they are officers of that governmental agency and not some other. Perhaps the only governmental agencies lacking such clearly identifiable missions and expertise are legislative bodies. But still, legislatures are usually the ones trusted to make the factual inquiries necessary for public policy judgments (at least outside of the area of fundamental rights). Does this mean that every governmental institution with a mission and expertise is a special constitutional niche? If so, what remains of skeptical judicial review, and to exactly which governmental entities does it still apply?

Rights tailoring might be better served by looking not only to institutional mission and expertise, but also to whether the particular governmental actor can generally be trusted to adopt laws that comport with existing constitutional principles. Deferring to federal district courts, for example, makes sense not merely because trial judges are experts at doing their jobs. It also makes sense because the jobs in which they are experts verse them in constitutional law, make them unusually adept at understanding what policies can satisfy existing doctrine, and discourage them from acting in ways likely to be reversed by a reviewing court. Orders issued by this branch are thus especially likely to be constitutionally sound. If federal district courts should receive deferential treatment, it might be because they do not need the usual amount of oversight when they happen to burden fundamental rights.

Congress, too, is arguably the type of institution warranting a degree of deference on the basis of trustworthiness. As James Madison argued in *The Federalist* No. 10, local prejudices can more easily take hold in smaller

jurisdictions, leading to the adoption of laws oppressing minority rights.[136] At the federal level, however, the battle of competing factions will tend to moderate legislation.[137] Modern public choice theory concurs with Madison's analysis. Because of the large range of interests represented at the national level, potentially oppressive interest groups have a harder time pushing through federal, as compared to state, legislation.[138] Members of Congress and congressional committees—unlike many local governmental entities, such as city councils or public school boards—also enjoy large staffs populated with lawyers to scrutinize proposed legislation. This vetting provides an additional measure of protection against unanticipated infringements of individual rights. If this analysis is correct, deferring to Congress may be a good idea. Yet, it is a good idea not because of congressional expertise or some identifiable congressional mission, but because the structural process through which federal legislation must go tends to result in higher quality, constitutionally sound laws.[139]

Tailoring based on the relative trustworthiness of the governmental institution, however, might lead to a very different approach in the context of educational institutions and prisons. These are governmental institutions that may not warrant much deference at all. Public educational institutions, such as universities, are bureaucratic entities with hierarchical leadership that is not necessarily well versed in constitutional law—in contrast to a federal district court—or open to the sort of competing interest group pressures that force Congress to consider constitutional values in devising policy. As a result, the race-conscious measures adopted by educational institutions may not be deserving of judicial trust. Take as an example one educational institution's race-conscious affirmative action policy culled from recent case law: a racially segregated voting system for a junior high school's homecoming queens.[140] Is this the type of governmental action that deserves less scrutiny simply because it was adopted by an educational institution? Perhaps courts will only afford deference to institutions of higher learning, such as universities and graduate schools—although in *Hunter v. Regents of the University of California*,[141] deference to educators reached all the way down to elementary schools. But even in

136. *See* THE FEDERALIST NO. 10, at 83 (James Madison) (Clinton Rossiter ed., 1961).
137. *See id.*
138. *See* sources cited *supra* note 44.
139. *See* Norman R. Williams II, Note, *Rising Above Factionalism: A Madisonian Theory of Judicial Review*, 69 N.Y.U. L. REV. 963, 985 (1994).
140. *See* Godby v. Montgomery County Bd. of Educ., 996 F. Supp. 1390 (M.D. Ala. 1998).
141. 190 F.3d 1061 (9th Cir. 1999).

the context of universities, bureaucratic, relatively unaccountable policymaking may breed similarly defective laws. One sees this in the private university context, as illustrated by the ban on interracial dating infamously adopted by Bob Jones University in 1975.[142]

Prisons may be even less likely than educational institutions to adopt constitutionally sound policies. Courts should acknowledge prison administrators' need to discipline inmates and maintain a safe environment for inmates and staff, as the Court did in *Johnson v. California*.[143] But acknowledgment should also be given to the likelihood that those concerns, coupled with the general distrust of prison inmates by prison officials, are often going to overwhelm any constitutional calculus about prisoners' rights. Nothing in either the institutional structure of prisons or their officials' expertise will necessarily breed respect for inmates' constitutional rights. The racial segregation policy at issue in *Johnson* is indicative; California's racial segregation in prisons appeared to be merely the result of longstanding practice rather than thoughtful administrative policy.[144] Based on the well-documented history of mistreatment of prisoners, it would not be unreasonable to think that prisons are exactly the type of governmental institution that should receive the most skeptical judicial scrutiny. But owing to the current judicial focus on institutional mission and expertise, deference to prison officials is likely to continue and possibly even expand.

CONCLUSION

Judicial tailoring of constitutional rights is a phenomenon that is both generally unrecognized and easily misunderstood. Looking only to doctrine—especially the Supreme Court's articulation of it—one will not always see the ways in which the identity of the governmental actor behind a challenged law influences judicial review. The Supreme Court rules infrequently in any area of law, and the predominant focus among scholars on Supreme Court decisions obscures what is happening in the lower federal courts. Equal protection law is no exception. In the fourteen years covered by my study, the Supreme Court ruled on the constitutional merits of only 2 race-conscious affirmative action policies—in

142. The policy was detailed in *Bob Jones University v. United States*, 461 U.S. 574 (1983), in which the Supreme Court upheld the denial of a tax exemption to the fundamentalist Christian university.

143. 543 U.S. 499 (2005).

144. *See id.* at 508–09.

Grutter v. Bollinger[145] and its companion case, *Gratz v. Bollinger*[146]—whereas the lower federal courts addressed 67 such policies. The action, if you will, is in the lower courts. And looking to what is happening in the lower courts, one finds trends that run counter to the official pronouncements of the Supreme Court, such as the tailoring of equal protection to favor the federal government. Even while the Supreme Court insists on congruence and consistency among all governmental uses of race, the lower courts subtly engage in a contrary practice.

In the wake of this analysis, many more questions about tailoring remain: Is this a justifiable practice? Are there areas of law in which federal courts ought to reverse the pro-federal perspective and favor instead state or even local governments? A number of scholars writing about religious freedom have proposed just such an approach,[147] and even Justice Thomas has stated his preference to read the First Amendment's Establishment Clause to limit only the federal government and not the states.[148] To be sure, tailoring is only just beginning to receive the attention that, if my findings in the equal protection area are any indication, it most certainly warrants. In light of the general reluctance of courts to admit to the vertical tailoring of rights, we may need more empirical studies to ferret out the practice and give us a good sense about when, where, and how tailoring actually occurs.

145. 539 U.S. 306 (2003).
146. 539 U.S. 244 (2003).
147. *See generally* Schragger, *supra* note 1.
148. *See* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 49 (2004) (Thomas, J., concurring) (arguing against incorporation of the Establishment Clause).

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