Five Supreme Court Constitutions: Race-Based Scrutiny Past, Present, and Future

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Five Supreme Court Constitutions: Race-Based Scrutiny Past, Present, and Future*

I. INTRODUCTION

Since the birth of the U.S. Constitution, one of its most persistent questions has concerned the disparate treatment of races. Like an organism that gradually accommodates environmental stresses, the Constitution has evolved in response to its changed surroundings.

In the Constitutional Conventions, the principal question of race-based scrutiny was how to treat African-Americans and Native-Americans differently from caucasians. Later, constitutional amendments and Supreme Court decisions changed the question to whether to treat racial minorities differently. Recently the Supreme Court has moved closer to disallowing disparate treatment of racial minorities altogether.

After the Fifth and Fourteenth Amendments were ratified, the Court repeatedly asked two questions: first, whether the federal government, which is limited only by the Fifth Amendment’s Due Process Clause, must be held to the same standard as the states, which are limited by the Equal Protection Clause of the Fourteenth Amendment; and second, whether benign discrimination is as suspect as malicious discrimination. The changing answers to these two questions have repeatedly rewritten the practical effect of the Constitution, even though the text controlling race-based scrutiny remains unmodified. It would thus appear that as to race-based scrutiny, our nation has had a series of different constitutions governing racial issues.

This paper explores the development of constitutional race-based scrutiny, focussing on the Supreme Court’s recent role in creating the

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1. See U.S. CONST. art. I, § 2 (Three-fifths Compromise and untaxed Indians excluded from census apportioning Congressional representatives).
2. See U.S. CONST. amend. V, XIV.
4. See, e.g., Adarand Constructors Inc. v. Pena, 115 S. Ct. 2097 (1995). The term "benign discrimination" refers to race-based classifications designed to benefit racial minorities or correct past injustices, such as “affirmative action” programs.
5. The term “malicious discrimination” has been defined as race-based classifications designed to adversely affect racial minorities. See, e.g., Yick Wo v. Hopkins, 118 U.S. 356 (1886).
constitution that exists today. Part II briefly traces the textual changes that introduced a new constitutional framework to racial discrimination analysis. Part III reviews various ways the Court has fleshed out the constitutional text. Part IV dissects the new rule announced in Adarand Constructors, Inc. v. Pena, which holds that strict scrutiny applies uniformly to all government racial discrimination cases. Part V concludes with a look forward to a constitution the Court is preparing to create under which race-based laws will be struck down as per se illegal.

II. THE CONSTITUTION AS IT EVOLVED TEXTUALLY

A. The Unamended Constitution

Nothing in the Constitution's text precludes any state or federal entity from drafting statutes or policies that treat persons differently based on their race. In fact, before the Fifth and Fourteenth Amendments were added, the Constitution not only permitted racial discrimination, but endorsed it. The drafters effectively adopted the policy that African-Americans were not equally protected when the drafters agreed to the three-fifths compromise. Although on its face the Constitution distinguished only between "free persons" and "others," the real controversy was over how to apportion Congressional representatives and taxes based on the number of black slaves. The unamended Constitution also relegated Indians to an underprivileged class by excluding them for apportionment purposes if they were untaxed.

Both of these racially discriminatory classes might be justified by arguing that the distinction was based purely on citizenship, since slaves could be deemed lesser citizens without regard to race, and that untaxed Indians were arguably citizens of foreign nations. But the facts that the vast majority of blacks in the United States were slaves, and that the Constitution explicitly mentioned Indians by race rather than by citizenship, undermine a "pure citizenship" analysis. The unamended Constitution not only permitted, but affirmatively sanctioned racial discrimination.

7. See Detroit Bank v. United States, 317 U.S. 329, 337 (1943) (suggesting that because the Fifth Amendment does not contain an equal protection clause it does not restrict federal discriminatory legislation, and implies that only the Fourteenth Amendment prohibits state discrimination).
8. See generally U.S. CONST. art. 1, § 3.
B. The Pre-Civil War Fifth Amendment

The passage of the Fifth Amendment imposed a new requirement that before persons could be deprived of life, liberty, or property, they had to be afforded due process. But even assuring due process did not require that laws be drafted to impact each race equally. In Detroit Bank v. United States, the Court recognized that "the Fifth [Amendment] contains no equal protection clause and it provides no guaranty against discriminatory legislation by Congress." Consequently, as originally interpreted, the Fifth Amendment allowed both the states and the federal government to enact discriminatory laws. The only protection afforded a minority citizen subject to such laws was the right to demand due process in the execution of a discriminatory law.

C. The Fourteenth Amendment

As far as racial discrimination analysis is concerned, the modern textual Constitution was born in 1868, when the Fourteenth Amendment prohibited state racial discrimination for the first time:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Thus, the text prohibited the states from enacting discriminatory laws, but remained silent about whether the federal government was subject to that requirement.

10. See U.S. Const. amend. V.
12. Id. at 337. Detroit Bank post-dated passage of the Fourteenth Amendment which did include an equal protection clause, but the effect of the Fourteenth Amendment was explicitly directed only at the states and was assumed to have no effect on Congress. See U.S. Const. amend. XIV, § 1.
13. U.S. Const. amend. XIV, § 1. The term "citizen" was broadly defined in the first sentence of the Amendment to include "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof." Id. Consequently, former black slaves born in the United States became citizens.
14. Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2105 (1995); see also Detroit Bank, 317 U.S. at 337 ("Unlike the Fourteenth Amendment the Fifth Amendment provides no guaranty against discriminatory legislation by Congress."); Helvering v. Lerner Stores Corp., 314 U.S. 463, 468 (1941) ("A claim of unreasonable classification or inequality in the incidence or application of a tax raises no question under the Fifth Amendment which contains no equal protection clause."); LaBelle Iron Works v. United States, 256 U.S. 377, 392 (1921) (holding cases decided under the Fourteenth Amendment inapposite to Fifth Amendment issue since the "Fifth Amendment has no equal protection clause").
II. THE CONSTITUTION AS REWRITTEN BY THE COURT

Although the text of the Constitution treating racial discrimination has remained unchanged since the passage of the Fifth and Fourteenth Amendments, the effective Constitution—the body of law defined by courts interpreting the Constitution—has undergone numerous changes. It is now a dramatically different creature than it once was. During this evolutionary process, the U.S. Supreme Court has effectively created four different constitutions with respect to racial discrimination since the Fourteenth Amendment was ratified. These constitutions have been progressively more suspicious of using race to determine citizen rights as they gradually require stricter scrutiny of both state or federal actions. Each of these four constitutions narrowed the definition of legal race-based classifications and together they point toward ultimately adopting a fifth constitution disallowing all race-based classifications as per se illegal.

A. The Court’s First Constitution: Plessy v. Ferguson and Not-So-Strict Scrutiny of State Racial Classifications

As noted above, the Supreme Court originally interpreted the Fifth and the Fourteenth Amendments as operating independently of one another because the more restrictive Fourteenth Amendment applied on its face only to the states.\(^\text{15}\) The federal government was thus free to enact any racially discriminatory law so long as it did not deny due process under the Fifth Amendment. States, on the other hand, were barred from enforcing maliciously discriminatory laws.\(^\text{16}\)

However, despite the explicit mandate that states grant all citizens equal protection, these restrictions on state freedom to discriminate were surprisingly loose. In Plessy v. Ferguson,\(^\text{17}\) the Court upheld a state statute requiring "separate but equal" buses for blacks and whites.\(^\text{18}\) The Court justified its holding by narrowly construing the Fourteenth Amendment:

The object of the [Fourteenth] amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either.

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15. See Detroit Bank, 317 U.S. at 337.
16. Id.
17. 163 U.S. 537 (1896).
18. Id. at 548-49.
Laws permitting, and even requiring, their separation... do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power.\textsuperscript{19}

This analysis explicitly upheld the use of color as a valid criterion for state law applications. Not only was race a valid factor, it could be the only factor as long as one could argue that the rights of different races were roughly equal.


1. Malicious State Discrimination

Eventually, the Court broadened the definition of unconstitutional malicious discrimination when it overruled \textit{Plessy} in \textit{Brown v. Board of Education}\textsuperscript{20} and declared segregated public schools to be inherently unequal, and therefore unconstitutional\textsuperscript{21}. A dramatically different constitution—a second constitution—was thus created to govern race-based state laws. Race was no longer an acceptable factor unless the state could satisfy strict scrutiny. To meet this test, states were required to show a compelling interest furthered by the most narrowly tailored means possible.

The \textit{Brown v. Board of Education} decision took an important step when it held that malicious discrimination violated the Equal Protection Clause of the Fourteenth Amendment. By finding that "[s]eparate educational facilities are inherently unequal," \textit{Brown} implied that segregation was malicious discrimination and paved the way for the Court to strike down numerous segregation laws.\textsuperscript{22} Eventually the Court not only held that "a State may not constitutionally require segregation of

\begin{itemize}
\item \textsuperscript{19} \textit{Id.} at 544.
\item \textsuperscript{20} 347 U.S. 483 (1954).
\item \textsuperscript{21} \textit{Id.} at 493.
\item \textsuperscript{22} \textit{Brown}, 347 U.S. at 495.
\end{itemize}
public facilities,” but found other laws based strictly on racial classifications unconstitutional because they were malicious.

But the Brown holding only applied to the states and did not extend to the federal government. The Court held that “by reason of the segregation complained of, [the black plaintiffs were] deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment. This disposition makes unnecessary any discussion whether such segregation also violates the Due Process Clause of the Fourteenth Amendment.” Had the Court reached this second issue, it might have limited the federal government indirectly by virtue of the parallel due process clauses in the Fifth and Fourteenth Amendments. But it opted to use a different case involving federal activity to test malicious discrimination under the Fifth Amendment.

2. Malicious Federal Discrimination

Bolling v. Sharpe provided the Supreme Court with the opportunity to expand Brown to govern federal race-based actions. Interestingly, Bolling was decided on the same day as Brown and relied heavily on Brown’s reasoning. Because it arose out of a challenge to segregated schools in the District of Columbia, which is part of the federal government, the Fifth Amendment applied and the Fourteenth Amendment did not. This posed a difficult question for the Court because equal protection of the laws under the Fourteenth Amendment “is a more explicit safeguard of prohibited unfairness than ‘due process of law’ [required by the Fifth Amendment], and, therefore, [the Court did] not imply that the two are always interchangeable phrases.”

The Court answered this difficult question with surprising ease and brevity, holding that federal race-based classifications were subject to the same scrutiny that applied to state actions: “[I]t would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government. We hold that racial segregation in the public schools of the District of Columbia is a denial of the due process of law guaranteed by the Fifth Amendment to the Constitution.”

28. Id. at 500.
29. Id. at 498.
30. Id. at 499.
31. Id. at 500.
Although the Court does not explicitly state the minimum standards that state and federal governments must satisfy for malicious discrimination to pass constitutional muster, the Court does say that racial segregation in public schools fails to be "reasonably related to any proper governmental objective," and that "[c]lassifications based solely upon race must be scrutinized with particular care, since they are ... constitutionally suspect." However, later cases explain that in order to satisfy the Constitution, invidious discriminatory classifications must pass the "most rigid scrutiny."


Beginning in the 1970's, the Court faced a new discrimination question: whether benign discrimination (governmental programs designed to benefit minorities) should be subject to the same strict scrutiny as malicious discrimination. The Court struggled with this highly controversial issue for more than a decade, rendering only plurality opinions. Then, in 1989 and 1990, the Court finally provided majority holdings that established the level of scrutiny applicable to benign discrimination. Thus, a third constitution was born.

1. The Plurality Opinions

The first of the plurality cases was Regents of the University of California v. Bakke. In that case the Court upheld the use of race in medical school admissions to a state university. Justice Powell, who wrote the disposition of the case, called for "the most exacting judicial examination" of benign discrimination. But he stood alone in his vote for such a high standard. Four dissenting justices voted for an intermediate standard requiring important governmental objectives substantially

32. Id.
33. Id. at 499.
37. Id. at 291 (Powell, J., plurality).
related to those objectives. The other four justices decided the case exclusively on statutory grounds.

Two years later, in *Fullilove v. Klutznik*, the Court upheld a federal affirmative action program, though again without a majority opinion. Three justices voted to uphold the statute at issue under a nondescript “most searching examination” test to determine constitutionality. Three justices opted for intermediate scrutiny; three others dissented, demanding strict scrutiny.

In 1986, the Court produced a third plurality opinion in *Wygant v. Jackson Board of Education* when it struck down a school board’s policy of laying off non-minority teachers to extend an affirmative preference to minority teachers. Four justices argued for strict scrutiny. Justice White concurred in the judgment and Justice Stevens dissented, neither indicating the degree of scrutiny to apply. Three dissenting justices voted for intermediate scrutiny. Still, the Court remained without a final word on benign discrimination.

2. Benign State Discrimination

Finally, in 1989, the Court produced its first clear majority decision determining the test for benign governmental discrimination. *City of Richmond v. J.A. Croson Co.* arose out of a city requirement that general contractors under contract with the city award at least thirty-percent of the dollar amount of each contract to minority subcontractors. For the first time, the Court had sufficient votes to create a majority holding that established a single standard. Justice Scalia agreed with Justice O’Connor (and the three members of the Court who joined her opinion) that “strict scrutiny must be applied to all governmental classifications by race, whether or not its asserted purpose is ‘remedial’

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38. *Id.* at 358-59 (Brennan, J., dissenting, joined by White, Marshall, and Blackmun, JJ.).
39. *Id.* at 411-12, 421 (Stevens, J., dissenting, joined by Burger, C.J., Stewart and Rehnquist, JJ.).
40. 448 U.S. 448 (1980).
41. *Id.* at 491-92 (Burger, C.J., plurality, joined by White and Powell, JJ.).
42. *Id.* at 518-19 (Marshall, J., concurring, joined by Brennan and Blackmun, JJ.).
43. See *id.* at 523 (Stewart, J., dissenting, joined by Rehnquist, J.); *id.* at 537 (Stevens, J., dissenting).
44. 476 U.S. 267 (1986).
45. *Id.* at 273.
46. *Id.* at 273 (Powell, J., plurality, joined by Burger, C.J., Rehnquist, J.); *id.* at 285 (O’Connor, J., concurring).
47. *Id.* at 294-95 (White, J., concurring); *id.* at 313-20 (Stevens, J., dissenting).
48. *Id.* at 301-02 (Marshall, J., dissenting, joined by Brennan and Blackmun, JJ.).
or "benign." However, the holding was limited to state entities because the case did not involve federal action and therefore did not require the Court to construe the Fifth Amendment due process limitations on the federal government.

3. Benign Federal Discrimination

One year later, in *Metro Broadcasting, Inc. v. FCC*, the Court faced the question it avoided in *Croson*. In *Metro Broadcasting* the justices treated a Fifth Amendment challenge to the Federal Communications Commission's race-based preferences for minority-controlled broadcasting stations in awarding television and radio licenses. This time the majority distinguished its holding in *Croson* and held that benign federal discrimination was subject only to intermediate scrutiny. Thus, benign federal racial classifications were found "constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives." The Court limited *Croson*’s strict scrutiny standard as applicable only to state entities, justifying the lower federal standard by arguing that the Court owed greater deference to Congress, a coequal branch of government that is not as susceptible to "factional politics" as the states.

This series of benign discrimination cases created a third constitution by applying two different analytical standards: strict scrutiny, which applied to malicious state, malicious federal, and benign state discrimination; and intermediate scrutiny, which applied only to benign federal discrimination.

III. THE COURT’S NEW CONSTITUTION: *ADARAND’S STRICT SCRUTINY OF BENIGN FEDERAL RACIAL CLASSIFICATIONS*

A. The Court’s New Holding

The Court’s most recent affirmative action case revisits the holding of *Metro Broadcasting*, overrules it, and introduces a fourth Constitution to race-based scrutiny by sharply limiting benign federal discrimination. In *Adarand Constructors, Inc. v. Pena*, the Court held that “all racial discrimination cases are now to be determined by the unconstitutional application of the standards developed under *Croson*, *Metro Broadcasting*, and the two cases that immediately followed *Metro Broadcasting*. This result is required not only because the Court’s prior cases have left the Fifth Amendment analysis in such a state of confusion, but also because the Court is not competent to develop a new system of Fifth Amendment scrutiny that is consistent with the principles of the Constitution."

50. *id.* at 520 (Scalia, J., concurring); *id.* at 493 (O’Connor, J., joined by Rehnquist, C.J., White and Kennedy, JJ.).
52. *id.* at 547.
53. *id.* at 564-65.
classifications imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests." 56 For the first time the Court explicitly held that every kind of discrimination—malicious state, malicious federal, benign state, and benign federal—is not only immediately suspect, but must be sufficiently compelling and narrowly tailored to withstand a most rigorous constitutional standard. 57

B. The Majority's Survey of Prior Case Law

The majority relied on prior case law to support its affirmative holding and to justify overruling otherwise binding precedent. In order to impose its new, uniform strict scrutiny standard, the Court felt compelled to overrule Metro Broadcasting which established the lower, intermediate scrutiny as the applicable standard in cases involving federal benign discrimination. 58

The majority revisited many of the prior race-based scrutiny cases to extract "three general propositions with respect to governmental racial classifications": 1) skepticism of any racial or ethnic criteria; 2) consistency in drafting and applying the law to individuals without regard to race; and 3) congruence between the Fourteenth Amendment limitations on state actions and Fifth Amendment limitations on federal actions. 59 These 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." 60 This conclusion, the majority argued, was unwritten but clearly established law violated by Metro Broadcasting's aberrant holding. 61

The Adarand majority began its survey of racial classification analysis by looking at Hirabayashi v. United States 62 and Korematsu v. United States, 63 cases dealing with wartime restrictions on Japanese-

56. Id. at 2113.
57. Id. at 2112.
58. See Metro Broadcasting, 497 U.S. at 564-65.
60. Id. at 2112.
61. Id. at 2113.
62. 320 U.S. 81 (1943).
63. 323 U.S. 214 (1944).
American citizens. The \textit{Adarand} majority emphasized that even in these early cases, the Court observed that "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality; . . . making racial discriminations . . . in most circumstances irrelevant and therefore prohibited." This, said O'Connor in \textit{Adarand}, planted the seeds that matured in later cases as the tripartite propositions that required \textit{Metro Broadcasting}'s rejection.

Having argued that strict scrutiny was established in its first race-based scrutiny cases, the majority touts \textit{Bolling v. Sharpe} as holding that this strict standard applied equally to both state and federal actions. The \textit{Bolling} case, says the \textit{Adarand} majority, emphasized the congruent requirements of both state and federal governments. "[I]t would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government." \textit{McLaughlin v. Florida}, for example, invalidated race-based state legislation by relying on cases that arose out of race-based federal laws. This, notes the \textit{Adarand} majority, suggests that "the \textit{McLaughlin} Court understood the standards

\begin{itemize}
  \item 64. The \textit{Hirabayashi} case considered a curfew imposed exclusively on persons of Japanese ancestry. 320 U.S. at 83. The \textit{Korematsu} case arose out of an order excluding Japanese descendants from the "West Coast war area." 323 U.S. at 218.
  \item 65. \textit{Hirabayashi}, 320 U.S. at 100.
  \item 66. The majority asserts that "the Court first faced a Fifth Amendment equal protection challenge to a federal racial classification" in \textit{Hirabayashi}. \textit{Adarand}, 115 S. Ct. at 2106.
  \item 67. 347 U.S. 498 (1954).
  \item 68. \textit{Adarand}, 115 S. Ct. at 2109.
  \item 69. \textit{Id.} at 2111 (quoting \textit{Bolling}, 347 U.S. at 500).
  \item 70. \textit{Id.} at 2107 (quoting \textit{Bolling}, 347 U.S. at 499 (quoting \textit{Gibson v. Mississippi}, 162 U.S. 565, 591 (1896))) (emphasis added by \textit{Adarand} majority).
  \item 71. \textit{Id.}
  \item 72. \textit{Adarand}, 115 S. Ct. at 2107.
  \item 73. 379 U.S. 184 (1964).
  \item 74. The Court quotes \textit{McLaughlin}'s citations to \textit{Bolling}, \textit{Korematsu}, and \textit{Hirabayashi}. \textit{Adarand}, 115 S. Ct. at 2107 (quoting \textit{McLaughlin}, 379 U.S. at 191-92).
\end{itemize}
for federal and state racial classifications to be the same.”

O’Connor then cites *Weinburger v. Wiesenfeld* as an explicit statement that equal protection claims under the Fifth and Fourteenth Amendments have “always been precisely the same.”

The Court then tracks race-based scrutiny through a series of benign discrimination cases that had been interpreted as establishing a lesser standard for benign discrimination. However, the Court rebuffs such interpretation, claiming that the cases could not and did not undermine the three established propositions demanding uniform strict scrutiny because those cases produced only plurality opinions incapable of setting binding precedent. The *Adarand* Court stated that “[t]he Court’s failure to produce a majority opinion in *Bakke*, *Fullilove*, and *Wygant* left unresolved the proper analysis for remedial race-based governmental action.”

The answer to the confusion over what rule controlled benign discrimination came in part in *Richmond v. J. A. Croson Co.*, argued the majority, when “the Court finally agreed that the Fourteenth Amendment requires strict scrutiny of all race-based action by state and local governments.” In other words, *Croson* simply made explicit what prior cases since *Hirabayashi* had implied: race-based distinctions must be viewed narrowly regardless of the alleged benign or malicious impetus behind them. The Court then reasoned that *Croson*, as the first Supreme Court case containing a true majority opinion, established the first binding precedent dealing specifically with benign discrimination.

Having argued that prior cases established skepticism, consistency, and congruence as the paramount principles underlying race-based analysis, and having downplayed *Bakke*, *Fullilove*, and *Wygant* as decisions lacking binding precedent, the Court was prepared to challenge the majority holding of *Metro Broadcasting*. *Metro Broadcasting* distinguished between the powers of the federal government and those of the states, holding that malicious discrimination was always subject to

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75. *Adarand*, 115 S. Ct. at 2107.
77. *Adarand*, 115 S. Ct. at 2109. (quoting *Weinburger*, 420 U.S. at 638 n.2). The Court also relies on *Buckley v. Valeo*, 424 U.S. 1, 93 (1976) (“Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment.”) and *United States v. Paradise*, 480 U.S. 149, 166, n.16 (1987) (Brennan, J., plurality) (Fifth and Fourteenth Amendments are coextensive).
78. *Adarand*, 115 S. Ct. at 2108.
82. *Adarand*, 115 S. Ct. at 2110.
strict scrutiny, but that the federal government should be allowed greater leeway when discriminating for benign purposes. Consequently, "'benign' federal racial classifications . . . 'are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives.'" In other words, Metro Broadcasting required intermediate scrutiny.

The Court characterizes Metro Broadcasting as an aberration, deviating from prior precedent in two ways. First, it "turned its back" on Croson’s explanation that activities are not readily classified as benign or malicious and therefore must always be subjected to strict scrutiny: "Indeed, the purpose of strict scrutiny is to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool." Second, Metro Broadcasting flatly violated the congruence proposition by applying different standards of review to state and federal actions, and consequently undermining skepticism of race-based classifications and consistency of treatment without regard to race. "Metro Broadcasting was thus a significant departure from much of what had come before it."

Such deviation required correction, according to the Court. "We think that well-settled legal principles pointed toward a conclusion different from that reached in Metro Broadcasting. We do not depart from the fabric of the law; we restore it."

B. Questioning the Adarand Majority’s Historical Survey of Race-Based Scrutiny

A close look at the Adarand majority’s characterization of race-based scrutiny raises serious questions. In Adarand the Court argued that early cases established unwritten law that was consistently adhered to until Metro Broadcasting unjustifiably deviated, and that the Court was merely extrapolating the evolutionary trend expressed in cases up to Croson to arrive at the holding in Adarand. However, Adarand does not simply make explicit what was previously implied.

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84. Adarand, 115 S. Ct. at 2112 (quoting Metro Broadcasting, 497 U.S. at 564-65) (emphasis added by the Adarand majority).
85. Id. (quoting Croson, 488 U.S. at 493 (O'Connor, J., plurality)).
86. Id.
87. Id.
88. Id. at 2115.
The first problem in the majority's analysis is the way it continually refers to the text of previous decisions while virtually ignoring their outcome. For example, the *Adarand* Court rests its premise on the statements in *Hirabayashi* and *Korematsu* that racial classifications are subject to the strictest scrutiny. However, these cases actually upheld the incarceration and curfews imposed on Japanese-Americans solely because of their race, giving little more than lip service to the strict scrutiny of which the Court had written. Thus, the outcome of the cases suggests that the early Court adopted a far lower standard than the *Adarand* Court contends. The *Adarand* Court's analysis is in serious question because unless a true strict scrutiny standard was originally established to analyze federal actions, the Court cannot honestly argue that *Metro Broadcasting* deviated from the three long-standing, consistently followed propositions of skepticism, consistency, and congruence.

The majority claims to be baffled by *Korematsu*’s inexplicable holding, implying that the Court actually established a meaningful strict scrutiny standard based on the three propositions and then failed to follow it. But after looking to the language of the cases, such surprise appears to be unjustified or feigned. The *Hirabayashi* Court explicitly found that “the Fifth Amendment contains no equal protection clause and it restrains only such discriminatory legislation by Congress as amounts to a denial of due process,” thereby showing that the Court was not committed to the proposition of congruence. Then, in *Plessy*-like fashion, *Hirabayashi* and *Korematsu* upheld the discriminatory classification under the highest scrutiny, which was actually a weak intermediate scrutiny at best.

The *Adarand* Court's problem with emphasis on a textual holding while ignoring the disposition of the cases continues when it discusses *Fullilove*. The Court dismisses that case as non-binding authority simply because it failed to produce a true majority opinion. The Court thus implies that a plurality opinion is little more than academic, persuasive authority that may be easily ignored. By doing this, the Court carefully crafts its analysis to relegate the disposition to little more than procedural

89. *Id.* at 2107.
90. 320 U.S. at 100.
91. "Intermediate scrutiny" falls between the elevated requirements of strict scrutiny and the relaxed rational basis standard. Unlike strict scrutiny which requires a compelling state interest furthered by narrowly tailored means, intermediate scrutiny requires only "important governmental objectives" that are "substantially related to achievement of those objectives." *See* *Metro Broadcasting*, Inc. v. FCC, 497 U.S. 547, 565 (1990).
92. *See Adarand*, 115 S. Ct. at 2109 (failure to produce a majority opinion left issue unresolved).
history, when in fact Fullilove approved a federal affirmative action program that depended purely on racial minority ownership.\footnote{93. The fact that the Bakke and Wygant dispositions struck down affirmative action programs does not save the Adarand Court’s treatment of Fullilove. The Bakke and Wygant decisions were also plurality opinions that scrutinized affirmative action programs. However, they dealt with state-run affirmative action programs rather than federal programs as in Fullilove and Adarand. Since the Adarand Court was wrestling with whether scrutiny of federal actions must be as strict as the scrutiny of state actions, the Bakke and Wygant dispositions cannot support Adarand’s holding. Thus, Fullilove remains problematic in considering the Adarand majority’s argument.}

The most vexing problem with the Adarand majority’s analysis is that Metro Broadcasting specifically held\footnote{94. Metro Broadcasting was decided five to four.} that benign federal discrimination was subject to intermediate scrutiny.\footnote{95. Metro Broadcasting, 497 U.S. at 564-65.} In so doing, that Court rejected the strict scrutiny established by Croson.\footnote{96. Id. at 565-66.}

We hold that benign race-conscious measures mandated by Congress—even if those measures are not “remedial” in the sense of being designed to compensate victims of past governmental or societal discrimination—are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives.\footnote{97. Id. at 564-65 (emphasis added).}

The Adarand Court could not explain away Metro Broadcasting as a mere plurality decision as it had done with Fullilove. It had to recognize it as clear precedent and stare decisis.

Justice Steven’s dissent recognizes this difficulty: “As was true of Metro Broadcasting,” he writes, “the Court in Fullilove decided an important, novel, and difficult question.”\footnote{98. Adarand Construction, Inc. v. Pena, 115 S. Ct. 2097, 2128 (1995).} Therefore, “[p]roviding a different answer to a similar question today cannot fairly be characterized as merely ‘restoring’ previously settled law.”\footnote{99. Id.} Aberration or not, precedent must be followed under the doctrine of stare decisis. Allowing a collection of holdings to imply a set of propositions that may trump a clear holding is incongruent with the doctrine of stare decisis and leaves that doctrine to future abuse.

In the end, the problems with the Adarand Court’s analysis shows that the Court cannot realistically argue that it simply took the principles of the Constitution and made them explicit by correcting the aberrant holding in Metro Broadcasting. The propositions that the Court relies on were not established as clearly as the Court suggests, nor were they
adhered to as consistently as the Court would have a reader believe. Contrary to the Court’s arguments, Adarand creates yet another constitution.

IV. THE FINAL CONSTITUTION APPLYING THE EQUAL PROTECTION CLAUSE

Indeed, Adarand does more than break from the past to establish a new uniform standard of race-based scrutiny. It looks forward to a time when a future Court will impose an even higher standard. In the majority opinion, the two concurring opinions, and even in the dissents, the members of the Court all anticipate “the time when race will become a truly irrelevant, or at least insignificant, factor.” 100 The constitution defined in Adarand is not the final constitution.

A. The Majority Carefully Limited Its Holding

Justice O’Connor’s majority opinion carefully and repeatedly stressed that it adopted only a strict scrutiny standard rather than a more restrictive per se rule against all racial classifications. 101 “Strict scrutiny,” she writes in response to the dissent’s objections, “does take ‘relevant differences’ into account—indeed, that is its fundamental purpose[—]precisely to distinguish legitimate from illegitimate uses of race in governmental decisionmaking.” 102 Invariably, consistent treatment of different races is not required, says the Court, because even though consistency as a principle forms much of the basis for the Court’s holding, a critical difference between consistency and strict scrutiny does exist:

The principle of consistency simply means that whenever the government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution’s guarantee of equal protection. It says nothing about the ultimate validity of any particular law; that determination is the job of the court applying strict scrutiny. 103

The majority distinguishes consistency from strict scrutiny in an attempt to allay the dissent’s fear that “strict scrutiny is ‘strict in theory, but fatal in fact.’” 104 A perfectly consistent rule would be a per se

100. See, e.g., Adarand, 115 S. Ct. at 2113 (majority opinion) (quoting Fullilove v. Klutznik, 448 U.S. 448, 545 (Stevens, J., dissenting)); see also discussion infra Part IV.B.
101. Id. at 2112.
102. Id.
103. Id.
104. Id. at 2114 (quoting Fullilove, 448 U.S. at 519 (Marshall, J., concurring)).
rule. But the need for some race-based remedies to survive is justified, says the Court, because of the "unfortunate reality" that "both the practice and the lingering effects of racial discrimination against minority groups" persists.¹⁰⁵

The Court cites *United States v. Paradise*¹⁰⁶ as evidence that where there is "pervasive, systematic, and obstinate discriminatory conduct" by a government, a narrowly tailored race-based remedy can and will survive strict scrutiny.¹⁰⁷ In *Paradise*, the Court recognized that the Alabama Department of Public Safety had a history of continuous, blatant discrimination against blacks. To correct this violation of the Fourteenth Amendment, the district court ordered the State to hire one black trooper for every new white trooper hired, until blacks comprised approximately twenty-five percent of the state trooper force.¹⁰⁸ On appeal, the Court in *Paradise* upheld the district court order because of the compelling governmental interest in remedying past and present discrimination.¹⁰⁹ The *Adarand* majority ratified that conclusion in order to underscore its commitment to a class of affirmative action programs, even if that class is significantly restricted to programs which satisfy the "'narrow tailoring' test this Court has set out in previous cases."¹¹⁰

**B. The Court Anticipates a per se Rule**

*Adarand* suggests in its several opinions that the time will come when minority preferences like those upheld in *Paradise* will not survive constitutional analysis. The majority suggests this when it adopts the language of Justice Stevens' dissenting opinion in *Fullilove*. Justice Stevens had said that because benign racial discrimination "can only exacerbate rather than reduce racial prejudice, it will delay the time when race will become a truly irrelevant or at least insignificant factor."¹¹¹

By adopting Steven's forward-looking statement, the majority appears to be doing more than simply using the tactical devise of using the words of the most vocal dissenter against himself.¹¹² The statement meshes

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105. *Id.*


107. *Adarand*, 115 S. Ct. at 2117 (citing *Paradise*, 480 U.S. at 167 (Brennan, J., plurality); *id.* at 190 (Stevens, J., concurring); *id.* at 196 (O'Connor, J., dissenting)).


109. *Id.* at 167.


111. *Id.* at 2114 (majority opinion) (quoting Fullilove v. Klutznik, 448 U.S. 448, 545 (Stevens, J., dissenting)) (emphasis added).

112. In *Adarand*, Justice Stevens wrote a dissent almost twice as long as the two dissenting opinions by Justice Breyer and Justice Ginsburg combined. Consequently, the majority attacks Justice Stevens' analysis throughout its own opinion.
with the holding of *Adarand* which takes another step in the gradual elimination of race as a legitimate consideration. Thus, the majority appears to advocate the ultimate adoption of a truly consistent rule, a rule more frigid than the slightly permissive strict scrutiny it presently embraces.

The concurring opinions argue more openly for a per se rule against race-based classifications. Justice Scalia flatly asserts that “[i]n the eyes of government, we are just one race here. It is American.” As a result, “government can never have a ‘compelling interest’ in discriminating on the basis of race in order to ‘make up’ for past racial discrimination in the opposite direction. . . . Under our Constitution there can be no such thing as either a creditor or a debtor race.” Under Justice Scalia’s reasoning, no affirmative action program would be constitutional. He thus espouses a per se rule without specifically calling it so.

Justice Thomas argues as aggressively as Justice Scalia for adoption of principles that would create in essence a per se rule against racial classifications. “Government cannot make us equal,” he says, “it can only recognize, respect, and protect us as equal before the law.” But in so doing, “under our Constitution, the government may not make distinctions on the basis of race.”

Two of the three dissenting opinions also suggest a commitment to a time when courts will not allow race-based classifications. Justice Souter, with whom Justices Ginsburg and Breyer joined, closed his dissenting opinion by pointing out that some affirmative action programs are justified now, in part because the time will come when they will no longer be needed or allowed:

> When the extirpation of lingering discriminatory effects is thought to require a catch-up mechanism, like the racially preferential inducement under the statutes considered here, the result may be that some members of the historically favored race are hurt by that remedial mechanism, however innocent they may be of any personal responsibility for any discriminatory conduct. When this price is considered reasonable, it is in part because it is a price to be paid only temporarily . . . Justice Powell wrote . . . that the “temporary nature of this remedy ensures that a race-conscious program will not last longer than the discriminatory effects it is designed to eliminate.”

114. *Id.*
115. *Id.* at 2119 (Thomas, J., concurring).
116. *Id.*
Since Justice Souter expects the price of affirmative action to be paid only temporarily, it is evident that he anticipates a time when racial distinctions will be unconstitutional.

In her dissent, Justice Ginsburg wrote "separately to underscore not the differences the several opinions in this case display, but the considerable field of agreement" among the justices "that together speak for a majority of the Court."118 One of the points she makes is that _Ada-rand_ 's holding is not intended to be the final chapter on race-based classifications. "I see today's decision as one that allows our precedent to evolve, still to be informed by and responsive to changing conditions."119 Her own opinion and her concurrence with Justice Souter show that she expects social evolution through "carefully designed affirmative action program[s]" to eventually achieve de facto equal protection of minorities.120 This, in turn, will allow the Court to eliminate minority preference entirely, and thereby remove race as a permissible factor in governmental classifications.

V. CONCLUSION

On occasion persons have referred to the Constitution as a "living Constitution,"121 suggesting that as society changes, constitutional interpretation must account for that development. Perhaps nowhere is the life of the Constitution more apparent than in race-based scrutiny. This area of law has evolved from being racist on its face, to subtly condoning racism, to strictly denouncing it unless racial classifications are absolutely necessary. The Supreme Court has reaffirmed that this constitutional evolution has not ended as the Court looks ahead to yet another constitution in which racial distinctions will be per se unlawful.

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118. _Id._ at 2134 (Ginsburg, J., dissenting).
119. _Id._ at 2136.
120. _See id._ at 2134 (Souter, J., dissenting, with Ginsburg and Bryer, JJ.).