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# Adarand Constructors v. Pena: Madisonian Theory as a Justification for Lesser Constitutional Scrutiny of Federal Race-Conscious Legislation

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# *Adarand Constructors v. Pena*: Madisonian Theory as a Justification for Lesser Constitutional Scrutiny of Federal Race-Conscious Legislation

## I. INTRODUCTION

*Adarand Constructors v. Pena*[1] (Adarand) demonstrates a provocative irony. The same constitutional arguments that were engaged to strike down discriminatory actions against America's minorities are now being leveled against affirmative action programs.[2] The equal protection guarantees of the Due Process Clauses of the Fifth and Fourteenth Amendments are now regularly employed to attack any law making a distinction based upon race.[3] At the root of the irony lies the issue to be treated in this Note: Does the Constitution require courts to apply the same level of scrutiny to benign race-conscious legislation enacted by the federal government as it does to parallel state-originated legislation?[4]

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1. 115 S. Ct. 2097 (1995).

2. For a concise framing of the political and moral motivations behind the Affirmative Action debate, see DUANE LOCKARD & WALTER F. MURPHY, BASIC CASES IN CONSTITUTIONAL LAW 248-49 (3d ed. 1992); JOHN HART ELY, DEMOCRACY & DISTRUST 170-72 (1980); John Hart Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723 (1974).

3. Race-based distinctions are of two types: benign and invidious. Benign racial classifications are those that grant enhanced opportunities to minority races with the intention of ameliorating the past effects of invidious discrimination. In contradistinction to benign discrimination is invidious discrimination, or discrimination that deliberately subjugates or separates a target group. *See* Brown v. Board of Educ., 347 U.S. 483 (1954) (striking down separate but equal doctrine); *see also* Hirabayashi v. United States, 320 U.S. 81, 105 (1943) (upholding curfews imposed on persons of Japanese ancestry); Korematsu v. United States, 323 U.S. 214, 224 (1944) (upholding an executive order excluding people of Japanese ancestry from a described west coast military area). Justice O'Connor argues that since it may not be readily apparent which legislative actions are benign as opposed to invidious, strict scrutiny must be applied to *all* race-based classifications. *Adarand*, 115 S. Ct. at 2112 (quoting City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989)). Justice Stevens argues that such distinctions are so clear as to require only intermediate scrutiny of federal enactments of remedial race-based programs. *Id.* at 2120-23 (Stevens, J., dissenting).

4. Also ironic about *Adarand* is that it demonstrates what may be

This Note argues that given the history and text of the Fifth and Fourteenth Amendments of the Constitution, and when understood in light of James Madison's Theory of the Large Republic, the decision to implement affirmative action programs by the National Legislature is less constitutionally suspect than the same types of decisions made by state legislatures.[5] As a result, this Note concludes that the holding

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characterized as a reverse Madisonian dilemma: Rather than deliberating on how to protect the individual rights of a minority against an eclipsing majority, the Court was called to reflect on whether a majority can legitimately discriminate against itself, or more specifically, whether a majority can choose to burden *individuals* within its own ranks in order to affirmatively assist minority *groups*. The *Adarand* majority argues that as a basic principle, the Fifth and Fourteenth Amendments protect individuals, not groups. *Adarand*, 115 S. Ct. at 2112-13. While the case relies in part on the accuracy of this statement, an investigation of its veracity is outside of the scope of this Note.

5. To say that affirmative action programs are constitutionally permissible is not to make a judgment about their legitimacy on moral or political grounds. It is entirely consistent to hold that affirmative action programs may be able to withstand constitutional scrutiny, at whatever level (minimal, intermediate, or strict), while at the same time being opposed to them morally or politically. The role of judges, according to some, is precisely to distinguish between what are constitutional questions and ruling on them, and what are political questions, deferring those to congressional competence. This Note refrains from drawing a political or moral judgment on affirmative action programs, and will address only the constitutional issues raised by *Adarand*.

At the root of various brands of activist judicial philosophy is the proposition that judges ought to assume a policy-making role and, impliedly, that the Constitution can be made to speak to many moral or political issues that it does not address, when interpreted according to the original intent of the Framers. One prominent scholar states:

> The function of the Justices . . . is to immerse themselves in the tradition of our society and of kindred societies that have gone before, in history and in the sediment of history which is law, and . . . in the thought and the vision of the philosophers and the poets. The Justices will then be fit to extract "fundamental presuppositions" from their deepest selves, but in fact from the evolving morality of our tradition.

ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 236 (2d ed. 1986). As some would argue, Bickel's theory of judicial review assigns to judges the responsibility "of injecting principle into government in a way that other governmental bodies are less equipped to do." *See* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 189-90 (1990).

Many scholars agree, however, that the Constitution does not and could not address every issue of morality and politics churned up by a pluralistic society. One of the assumptions of this Note is that the Constitution, if it is to remain the law in the sense that most of us understand it—*i.e.*, the embodied will of the people—ought not to be stretched to speak in areas where it is silent. *See id.* at 187-240.

For a statement treating the constitutionality of affirmative action, see Laurence H. Tribe et al., *Constitutional Scholars' Statement on Affirmative Action*

in *Adarand*, that remedial race-based programs implemented by whatever level of government, state or federal, must be subjected to strict scrutiny,[6] rather than some lower level of scrutiny, is erroneous.

Part II of this Note will trace the precursor cases to *Adarand* to show that the Court had failed to produce a clear constitutional framework within which to scrutinize both federal and state race-conscious programs, and, that when it finally did, its decision was based upon the Court-created doctrine of a Fifth Amendment equal protection component. Part III traces the logic of the *Adarand* case itself. Part IV criticizes the reasoning of the Adarand Court on three points. First, the text and history of the Constitution reveal that there is no equal protection component in the Fifth Amendment. The idea that the Fifth Amendment does contain equal protection guarantees is an outgrowth of the notion of Substantive Due Process, also a creation of activists courts. Second, the history and text of the Fifth and Fourteenth Amendments justify the conclusion that equal protection analysis was intended to be different between federal and state race-based programs. Third, at the level of theory, Madison's notion of the large republic vindicates the difference between federal and state review standards applied to benign racial classifications. In consequence of these arguments, this Note concludes that efforts by the national legislature to craft remedial race-based measures are less constitutionally suspect than similar actions by the states.

## II. BACKGROUND

### A. *Early Affirmative Action Decisions*

Prior to the *Adarand* decision, the Court had failed to articulate a workable constitutional analysis for remedial race-based governmental actions.[7] Three cases, none of which pro-

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*after* City of Richmond v. J.A. Croson Co., 98 YALE L.J. 1711 (1989). The scholars argue that the *Croson* holding that race-conscious remedies by local and state governments should be strictly scrutinized was decided incorrectly. *Id.* at 1712. The scholars' statement is signed by an imposing bloc of thirty scholars from law schools nationwide, including such well-knowns as John Hart Ely, Guido Calabresi, and Paul Brest. *Id.* at 1714-16. *But see* Charles Fried, *Affirmative Action After* City of Richmond v. J.A. Croson Co.: *A Response to the Scholars' Statement*, 99 YALE L.J. 155 (1989).

6. *Adarand*, 115 S. Ct. at 2113-14.

7. The confusion created by the Court's lack of guidance in this matter be-

duced a majority opinion, demonstrate the Court's fractured thinking.

In the first, *Regents of the University of California v. Bakke*,[8] a state-run medical school's practice of reserving a number of spaces for minority students was challenged under the equal protection component of the Fourteenth Amendment. In the opinion announcing the Court's judgment, Justice Powell rejected the argument that "strict scrutiny" should apply only to "classifications that disadvantage 'discrete and insular minorities,'"[9] and instead concluded that "[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color."[10] However, four Justices argued that a less stringent standard of review is appropriate for racial classifications "designed to further remedial purposes"[11] or benign racial classifications.

In *Fullilove v. Klutznick*,[12] the Court struggled with the proper standard of review for remedial race-based actions instituted by the *federal government*. The result was a splintered decision. Chief Justice Burger, joined by Justices White and Powell, argued in their plurality decision that *any* race or ethnic based preference must "receive a most searching examination" as to its constitutionality.[13] Justice Powell wrote separately to opine that the plurality opinion had, in effect, adopted the "strict scrutiny" test of *Bakke*.[14] Justices Stewart and

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came manifest in an outcry from lower federal courts. *See, e.g.*, Kromnick v. School Dist. of Philadelphia, 739 F.2d 894, 901 (3d Cir. 1984), *cert. denied*, 469 U.S. 1107 (1985) ("The absence of an Opinion of the Court . . . and the concomitant failure of the Court to articulate an analytical framework supporting the judgments makes the position of the lower federal courts considering the constitutionality of affirmative action programs somewhat vulnerable."); Williams v. New Orleans, 729 F.2d 1554, 1567-69 (5th Cir. 1984) (en banc) (Higginbotham, J., concurring specially); South Fla. Chapter of Assoc. Gen. Contractors v. Metropolitan Dade County, 723 F.2d 846, 851 (11th Cir. 1984), *cert. denied*, 469 U.S. 871 (1984).

8. 438 U.S. 265 (1978).

9. *Id.* at 288 (quoting United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938)).

10. *Id.* at 289-90.

11. *Id.* at 359 (Brennan, White, Marshall, and Blackmun, JJ., concurring in part and dissenting in part).

12. 448 U.S. 448 (1980). In this case, several associations of contractors filed suit alleging that they sustained economic injury due to enforcement of set-asides for minority contractors. They brought their claim under the Fifth Amendment Due Process Clause. *Id.*

13. *Id.* at 491 (plurality opinion).

14. *Id.* at 496 (stating that the plurality opinion had essentially determined

Rehnquist, in a dissenting opinion, argued that the federal government should be held to the same strict standard as the states when enacting racial classifications.[15] Conversely, Justice Marshall (joined by Justices Brennan and Blackmun) argued, like the four justices in *Bakke*, "that the proper inquiry is whether racial classifications designed to further remedial purposes serve important governmental objectives and are substantially related to achievement of those objectives"[16]—that is, if they survived intermediate scrutiny.[17]

In *Wygant v. Jackson Board of Education*,[18] the Court grappled with the question of whether a school board could adopt race-based preferences in its decisions regarding which teachers to lay off. In his plurality opinion, Justice Powell wrote that "the level of scrutiny does not change merely because the challenged classification operates against a group that historically has not been subject to governmental discrimination."[19] The plurality employed a two-part analysis, asking "whether the layoff provision is supported by a compelling state purpose and whether the means chosen to accomplish that purpose are narrowly tailored."[20] Justice O'Connor echoed in her opinion the proposition that "racial classifications of any sort must be subjected to 'strict scrutiny.'"[21] The decision was opposed by four Justices, three of whom advocated intermediate scrutiny of remedial race-based government actions.[22] As a whole, the Court struck down this particular race-based classification, but, as is evident, the justices failed to produce a clear analytical framework within which to analyze remedial programs.

Hence, these cases demonstrate how sharply divided the Court was on the proper treatment of remedial race-based

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that the set-aside in question was "a necessary means of advancing a compelling governmental interest").

15. *Id.* at 523 (Stewart and Rehnquist, JJ., dissenting).

16. *Id.* at 519 (citing *Bakke*, 438 U.S. 265, 359 (1978)).

17. Adarand Constructors v. Pena, 115 S. Ct. 2097, 2109 (1995) (citing *Fullilove*, 448 U.S. at 518-19).

18. 476 U.S. 265 (1986).

19. *Id.* at 273.

20. *Id.* at 274. This language is similar to the strict scrutiny test applied in *Adarand*, which states that racial classifications, to withstand strict scrutiny, must be "narrowly tailored measures that further compelling governmental interests." 115 S. Ct. at 2113.

21. *Wygant*, 476 U.S. at 285; *see also infra* note 33.

22. *Wygant*, 476 U.S. at 301-02 (Marshall, J., dissenting).

measures. Although clear positions were advocated and repeated in various opinions, no clear and authoritative precedent surfaced to guide lower courts.

### *B. State and Local Race-Based Remedial Programs*

From the Court's scattered analysis, *City of Richmond v. J.A. Croson Co.*[23] emerged to hold that the Fourteenth Amendment required strict scrutiny of all race-based actions by state and local governments. Because *Croson*'s analysis was limited *only* to remedial race-based actions instituted by state and local governments, *Croson* did not establish the standard of review for federally imposed programs.[24] However, from the cases up through *Croson*, the *Adarand* Court drew three general principles relating to governmental racial classifications.[25] The first of the maxims adopted in *Adarand* is skepticism: "[a]ny preference based on racial or ethnic criteria must necessarily receive a most searching examination."[26] The second proposition is consistency: "the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefitted by a particular classification."[27] The third proposition is congruence: "[e]qual protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment."[28]

### *C.* Metro Broadcasting*'s divergence from* Croson

A year later, in *Metro Broadcasting, Inc. v. FCC*,[29] the Court repudiated the "congruence" principle by striking down a Fifth Amendment challenge to two race-based policies of the Federal Communications Commission.[30] The Court held that

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23. 488 U.S. 469 (1989).

24. *Adarand*, 115 S. Ct. at 2110 ("*Croson* of course had no occasion to declare what standard of review the Fifth Amendment requires for such action taken by the Federal Government.").

25. *Id.* at 2111.

26. *Id.* (quoting Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 273 (1986)).

27. *Id.* (quoting *Croson*, 488 U.S. at 494).

28. *Id.* (quoting Buckley v. Valeo, 424 U.S. 1, 93 (1976)). The constitutional legitimacy of this third principle—congruence—will be examined in Part IV.

29. 497 U.S. 547 (1990).

30. The *Metro Broadcasting* Court here specifically attacked the congruence principle articulated in *Bolling*, which stated that "'it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government' than it does on a State to afford equal protection of the laws." *Adarand*, 115 S. Ct. at 2111 (citing *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954)).

remedial federal government race-based programs would be held to the lesser standard of "intermediate scrutiny."[31] To reach this conclusion the Court stated 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.'"[32]

*Metro Broadcasting* was important because it undermined *Croson*'s explanation of the necessity of applying a strict scrutiny standard[33] and because it explicitly contradicted the "congruence" principle.[34] The *Adarand* decision explicitly overruled *Metro Broadcasting*.[35]

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31. *Metro Broadcasting*, 497 U.S. at 564-65.

32. *Id.* at 564.

33. In *Croson*, Justice O'Connor explained the need to review all race-based classifications with strict scrutiny:

> Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are "benign" or "remedial" and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. 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. The test also ensures that the means chosen "fit" this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.

City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (plurality opinion). In *Metro Broadcasting*, the Court did not explain how to determine whether a racial classification is benign, it stated only that it was confident that "'an examination of the legislative scheme and its history' will separate benign measures from other types of racial classifications." 497 U.S. 547, 564 n.12 (1990) (citation omitted).

34. *Adarand*, 115 S. Ct. at 2112. Part IV develops *Metro Broadcasting*'s rejection of the congruence principle. It suffices here to observe that rejecting the congruence principle also undermines the skepticism and consistency principles. *Adarand*, 115 S. Ct. at 2112. After *Metro Broadcasting*, benign racial classifications enacted by the Federal Government were to be treated less skeptically than others, and the race of the benefited group was central to determining which standard of review to apply. *Id.*

35. *Id.* at 2113.

## III. *ADARAND CONSTRUCTORS V. PENA*

### *A. Facts*

In 1989, Adarand Constructors, a Colorado-based highway construction company owned by a white male, lost its bid for a guardrail subcontract notwithstanding the fact that its bid was the lowest. The subcontract winner was Gonzales Construction Company (Gonzales), certified as a small business controlled by socially and economically disadvantaged individuals. The General Contractor, Mountain Gravel & Construction Company (Mountain Gravel) had been awarded the prime contract from the Central Federal Lands Highway Division (CFLHD), a branch of the United States Department of Transportation (DOT).[36]

Pursuant to federal law,[37] the terms of the prime contract provided that if Mountain Gravel chose subcontractors certified as socially and economically disadvantaged,[38] additional compensation would be awarded to the general contractor.[39]

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36. *Id.* at 2102.

37. Similar subcontracting clauses are found in most federal agency contracts pursuant to federal law, which also requires the clause to state that "the contractor shall presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities, or any other individual found to be disadvantaged by the [Small Business] Administration pursuant to section 8(a) of the Small Business Act." 15 U.S.C. § 637(d)(3)(C) (1994) (quoting 15 U.S.C. § 637(a)). In this case, the DOT funds appropriated to the construction project were authorized under the Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURAA), Pub. L. No. 100-17, 101 Stat. 132 (1987). Section 106(c)(1) of STURAA provides that "not less than 10 percent of the amounts authorized to be appropriated . . . shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals." 101 Stat. 145 (1987). Section 106(c)(2)(B) adopts the Small Business Act's definition of "socially and economically disadvantaged individuals." 101 Stat. 146 (1987) (quoting 15 U.S.C. § 637(a)).

38. The Small Business Act, 72 Stat. 384 (codified as amended at 15 U.S.C. §§ 631-56 (1994)), establishes that the policy of the federal government toward small businesses owned by socially and economically disadvantaged individuals is to afford them the "maximum practicable opportunity to participate in the performance of contracts let by any Federal Agency. . . ." 15 U.S.C. § 637(d)(1) (1994). Socially disadvantaged individuals are identified as "those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities." 15 U.S.C. § 637(a)(5) (1994). "Economically disadvantaged individuals are those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged." 15 U.S.C. § 637(a)(6)(A) (1994).

39. The contract stated, in pertinent part:

Mountain Gravel's Chief Estimator submitted an affidavit avouching that Mountain Gravel would have granted the subcontract to Adarand had it not been for the financial incentive received for hiring Gonzales.[40]

Adarand sought relief in the Federal District Court, District of Colorado,[41] on the theory that the race-based presumption of the statute[42] violated the constitutional guarantee of equal protection. The District Court rejected the claim, the Court of Appeals affirmed,[43] and certiorari was granted.[44]

### *B. Reasoning*

*Adarand* holds that all legislation creating racial classifications engendered by any level of government—federal, state, or local—must undergo strict scrutiny.[45] In reaching this conclusion, the Court relied on three premises: first, that the Fifth Amendment has an equal protection component; second, that the criteria developed in the cases up through *Croson* are applicable in reviewing federal race-based laws; and third, that the right to equal protection is an *individual* guarantee that cannot be infringed by remedial assistance to a *group*.

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*Subcontracting*. This subsection is supplemented to include a Disadvantaged Business Enterprise (DBE) Development and Subcontracting Provision as follows: "Monetary compensation is offered for awarding subcontracts to small business concerns owned and controlled by socially and economically disadvantaged individuals. . . .

A small business concern will be considered a DBE after it has been certified as such by the U.S. Small Business Administration or any State Higbway Agency. . . .

The Contractor will be paid an amount computed as follows:

1. If a subcontract is awarded to one DBE, 10 percent of the final amount of the approved DBE subcontract, not to exceed 1.5 percent of the original contract amount.

2. If subcontracts are awarded to two or more DBEs, 10 percent of the final amount of the approved DBE subcontracts, not to exceed 2 percent of the original contract amount."

*Adarand*, 115 S. Ct. at 2103-04.

40. *Id.* at 2102.

41. Adarand Constructors v. Skinner, 790 F. Supp. 240 (D. Colo. 1992).

42. 15 U.S.C. § 637(d)(2-3) (1994).

43. Adarand Constructors v. Pena, 16 F.3d 1537, 1547 (10th Cir. 1994).

44. Adarand Constructors v. Pena, 115 S. Ct. 41 (1994).

45. Adarand Constructors v. Pena, 115 S. Ct. 2097, 2113 (1995).

*1. The Fifth Amendment's equal protection component*

The first premise upon which the *Adarand* court built its holding is that the Fifth Amendment Due Process Clause contains an equal protection component,[46] and that the same analysis employed to give content to Fourteenth Amendment Equal Protection guarantees can give content to the Fifth Amendment Due Process Clause.[47]

*2. The extension of the three general propositions to* Adarand

The second premise emphasized by the *Adarand* Court was that the three general principles (skepticism, consistency, and congruence)[48] should comprise the proper constitutional analysis for federal race-based actions. Having affirmed the parity of equal protection analysis between the Fifth and Fourteenth Amendments, the *Adarand* Court naturally looked to the same structural framework it discerned from the cases up through *Croson*. However, because *Metro Broadcasting* had rejected the "congruence" principle,[49] the *Adarand* Court overruled *Metro Broadcasting*, with a direct assault on its underlying rationale. The Court held that *Metro Broadcasting*'s holding, that the federal government is to be held to "intermediate scrutiny" only, is invalid, first, because strict scrutiny is the only method by which courts can distinguish between benign and invidious race-based classifications, and second, because rejecting the "congruence" principle would effectively undermine the first two principles.[50]

*3. The personal right to equal protection of the laws*

*Adarand's* third and final premise is that the Fifth and Fourteenth Amendments protect individuals, not groups, and thus require any race-based classification to pass strict

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46. For an analysis of the textual and historical differences between the Fifth and Fourteenth Amendments, see *infra* part IV.

47. This conclusion is an accretion built by the cumulative additions of various cases that will be discussed in Part IV.

48. "Congruence" refers to the notion that equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment.

49. *See supra* note 33.

50. *Adarand Constructors v. Pena*, 115 S. Ct. at 2097, 2112 (1995); *see supra* note 33.

scrutiny.[51] Borrowing from *Hirabayashi v. United States*,[52] the *Adarand* majority reasoned that any governmental action based on race is necessarily a group classification and viewed as "irrelevant and . . . prohibited,"[53] and thus subject to detailed judicial scrutiny to ensure that the *personal* right to equal protection has not been endangered.[54]

*4. Constitutional test for race-based classifications*

Based on the above premises the *Adarand* majority concluded that all racial classifications, whether they originate at the federal, state, or local level, must, to withstand strict scrutiny analysis, be "narrowly tailored measures that further compelling governmental interests."[55]

## IV. ANALYSIS

The *Adarand* decision rests on the principle that equal protection analysis is the same under the Fifth and Fourteenth Amendments. Given this assumption, it follows that the level of constitutional scrutiny applied to federal and state race-based programs must be congruent. The aim of this Part is to advance three arguments that undermine the congruence principal. First, neither the history nor the text of these Amendments supports the assumption that equal protection analysis ought to be the same when applied to federal and state or local legislation. The congruence notion is unfounded in the original intention of the drafters of the respective Amendments, and is a derivation from the notion of Substantive Due Process. Second, the history and text of the Fifth and Fourteenth Amendments support the conclusion that equal protection analysis was intended to differ between federal and state race-based programs. Third, political theory, derived from a Madisonian notion of equal protection, justifies the Supreme Court in differentiating between the state and the federal government in its equal protection analysis.

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51. *Adarand*, 115 S. Ct. at 2112-13.
52. 320 U.S. 81 (1943).
53. *Id.* at 100.
54. *Adarand*, 115 S. Ct. at 2112-13.
55. *Id.* at 2113.

### A. *The Fifth Amendment Contains no Equal Protection Component*

#### *1. Textual evidence*

The most reliable means of discerning the intent of the drafters[56] of the Fifth and Fourteenth Amendments is to first consider the plain meaning of the texts. The Fourteenth Amendment states, in pertinent part, "No *State* shall . . . 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."[57] Section 5 of the Fourteenth

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56. For purposes of this paper, the original intent (textualist) position will be assumed. This orientation to constitutional interpretation holds that judges deciding constitutional issues ought to limit themselves to enforcing norms that are clearly stated or implicit in the Constitution. ELY, *supra* note 2, at 1. Policy decisions are made by elected officials who are endowed with the public trust of representing their electorate. These elected officials are thus accountable to the public. Judges, conversely, ought to interpret the laws created by the political branches in a manner that approximates, to the degree possible, the intent of the legislators of the law. Were judges to make decisions based on something other than the intent of the drafters (*e.g.*, personal notions of morality) it would unjustifiably usurp power properly belonging to the political branches. *Id.* at 4-9.

Professor Ely observes that the popularity of the original intent position is due to the fact that "it better fits our usual conceptions of what law is and the way it works," *id.* at 3, and that it avoids the "obvious difficulties [non-originalist theories] encounter[] in trying to reconcile [themselves] with the underlying democratic theory of our government." *Id.* at 4. While Professor Ely's own theory of judicial review differs from a pure original intent position, his observations about interpretivism are nevertheless accurate and informative.

For clear expositions of the original intent position, see generally BORK, *supra* note 5; MICHAEL J. GERHARDT & THOMAS D. ROWE, JR., CONSTITUTIONAL THEORY, ARGUMENTS AND PERSPECTIVES 97-127 (1993); Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085, 1085-1103 (1989); Henry Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723 (1988); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989). For a discussion of common objections to the original intent approach, see Richard Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226 (1988), wherein the author discusses the idea that adherence to the original intentions is (1) impossible, because historical sources are inevitably indeterminate, *id.* at 243, (2) self contradictory, since the Founders may not have desired that their intentions be so narrowly construed regarding the lawfulness of certain governmental action, *id.* at 259, and (3) wrong, because it results in bad government and bad law, *id.* at 284. For recent commentaries on interpretation theory and its relevance to the original intent approach, see STANLEY FISH, DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES (1989); GERHARDT & ROWE, *supra* note 56, at 64-95; SANFORD LEVINSON & STEVEN MAILLOUX, INTERPRETING LAW AND LITERATURE: A HERMENEUTIC READER (1988); and J.M. Balkin, *Deconstructive Practice and Legal Theory*, 96 YALE L.J. 743 (1987).

57. U.S. CONST. amend. XIV, § 1 (emphasis added).

Amendment adds, "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."[58] The Fifth Amendment holds that "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."[59] Three important points emerge from the most rudimentary comparison of the Fifth and Fourteenth Amendments. First, the Fourteenth Amendment applies only to the states, and not to the federal government. Second, Congress is empowered specifically to enforce the Fourteenth Amendment's provisions through legislation. Third, the equal protection component is found only in the Fourteenth Amendment.While both Amendments have identical language with respect to their due process guarantees, the text of the Fifth Amendment lacks an explicit equal protection component.

Since the Fifth Amendment is now regularly cited as the basis of federal equal protection, the question becomes, from where in its language can an equal protection component be inferred? The answer comes from an expansive reading of the meaning of due process, whereby the Due Process Clause is imbued with a substantive element.

### 2. *Substantive Due Process*

Because the Fifth Amendment does not specifically mention a requirement that federal legislation not abridge the equal protection of the laws, courts derived it from the notion of Substantive Due Process.[60] Substantive Due Process is the notion that the term "due process" refers not just to a guarantee of fair *procedures*, but that it can speak to the *substantive* content of a law.[61] In other words, the substance of a law may be so discriminatory as to amount to a denial of due process of law.[62] The notion that the Due Process Clause contains a substantive element, and thus that equal protection exists within its meaning, is a creation of the last fifty years, and results from an activist expansion of the meaning of the Fifth Amendment.

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58. *Id.* amend. XIV, § 5.

59. *Id.* amend. V.

60. For an exhaustive treatment of the origin of Substantive Due Process and its contemporary uses, see GERALD GUNTHER, CONSTITUTIONAL LAW 432-600 (12th ed. 1991).

61. BORK, *supra* note 5, at 31-32.

62. *See* Bolling v. Sharpe, 347 U.S. 497, 499-500 (1954); *see also infra* note 76.

*3. The creation of Fifth Amendment equal protection*

In the 1940s, it was routinely held in cases like *Detroit Bank v. United States*[63] that "[u]nlike the Fourteenth Amendment the Fifth contains no equal protection clause and it provides no guaranty against discriminatory legislation by Congress."[64] However, in *Hirabayashi v. United States*[65] the Court observed that because distinctions between citizens according to their ancestry are "odious to a free people"[66] and generally "irrelevant,"[67] the Fifth Amendment may "restrain[] . . . such discriminatory legislation by Congress as amounts to a denial of due process."[68] While *Hirabayashi* thus recognized that the substance of a law may discriminate in violation of due process, later cases would parlay this principle into the idea that the Fifth Amendment possesses equal protection guarantees equivalent to those of the Fourteenth Amendment.

Soon after *Hirabayashi*, the Court, in *Korematsu v. United States*,[69] took another step toward recognizing equal protection guarantees in the Fifth Amendment. The Court stated that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. . . . [C]ourts must subject [such restrictions] to the most rigid scrutiny."[70] While *Hirabayashi* and *Detroit Bank* addressed the differing review standards for the state and federal governments, the *Korematsu* decision failed to address the issue specifically, and in a bewildering turn, went on to uphold a racially discriminatory order to ban people of Japanese ancestry from entering particular sectors of a city.[71]

From the springboards of *Hirabayashi* and *Korematsu*, the Court took its most drastic leap toward finding an equal protection guarantee in the Fifth Amendment in *Bolling v. Sharpe*.[72]

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63. 317 U.S. 329 (1943); *see also* Helvering v. Lerner Stores, 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."); La Belle Iron Works v. United States, 256 U.S. 377, 392 (1921) (stating that the Fifth Amendment has no Equal Protection Clause).

64. *Detroit Bank*, 317 U.S. at 337.

65. 320 U.S. 81 (1943).

66. *Id.* at 100.

67. *Id.*

68. *Id.*

69. 323 U.S. 214 (1944).

70. *Id.* at 216.

71. *Id.* at 223-24.

72. 347 U.S. 497 (1954).

While prior to the *Bolling* decision the Court recognized the possibility that the term "due process" might include a substantive element,[73] the *Bolling* decision was the first instance in which the Court actually found a violation of Substantive Due Process.[74] In *Bolling*, the plaintiffs challenged the school segregation laws of the District of Columbia, which were governed by federal law. The challenge posed a unique problem for the Court, for it had recently struck down a state segregation law in *Brown v. Board of Education*,[75] based on the Fourteenth Amendment Equal Protection Clause, but had no explicit equal protection clause that it could apply to federal actions. In response to this dilemma the Warren Court looked to the Fifth Amendment Due Process Clause. This substantial expansion of the content of the Fifth Amendment was justified by an opinion that is surprisingly cursory, given its import, and based upon a conclusory argument that amounts to an emotional appeal. States Justice Warren: "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."[76]

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73. *See supra* notes 65-72 and accompanying text.

74. *See* Eugene Doherty, *Equal Protection under the Fifth and Fourteenth Amendments: Patterns of Congruence, Divergence and Judicial Deference*, 16 OHIO N.U. L. REV. 591, 597 (1989).

75. 347 U.S. 483 (1954).

76. Bolling v. Sharpe, 347 U.S. 497, 500 (1954). Chief Justice Warren's opinion shows an unsubtle reliance on Substantive Due Process:

> The Fifth Amendment . . . does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The "equal protection of the laws" is a more explicit safeguard of prohibited unfairness than "due process of law," and, therefore, we do not imply that the two are always interchangeable phrases. *But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process.*

*Id.* at 499 (citations omitted) (emphasis added). While it may be "unthinkable as a matter of morality and politics" that the federal government would be allowed to segregate while the states were not, scholars have charged that the Court in *Bolling* unjustifiably expanded the content of the Fifth Amendment Due Process Clause in its attempt to advance its social agenda. *See* BORK, *supra* note 5, at 83-84. Professor Bork criticized the *Bolling* decision as "a clear rewriting of the Constitution" by the Warren Court. *Id.* at 83. In finding that the language of the Due Process Clause contained a substantive element, namely, that the term "due process" contains an equal protection element, the Court infused the clause with content that was not intended by the Founders. *Id.* at 83-84. Because the Court would have been hard pressed to strike down federal segregation laws without extending the reach of the Fifth Amendment Due Process Clause, instead it expanded its

The importance of *Bolling* is enormous. Today it is regularly cited for the proposition that the Fifth Amendment has an equal protection component, and that equal protection analysis under the Fifth Amendment is the same as under the Fourteenth Amendment.[77] As a result, federal legislation is now frequently attacked on equal protection grounds.[78] Moreover, ironically, its holding is the basis of the congruence principle, by which affirmative action programs instituted by the federal government are attacked, as in *Adarand*.

*4. Criticism of Fifth Amendment equal protection based in Substantive Due Process*

If we accept Professor Ely's suggestion that "the most important datum bearing on what was intended is the constitutional language itself,"[79] then the notion of Substantive Due Process is internally contradictory:

> [T]here is simply no avoiding the fact that the word that follows "due" is "process." No evidence exists that "process" meant something different a century ago from what it does now . . . . We apparently need periodic reminding that "substantive due process" is a contradiction in terms—sort of like "green pastel redness."[80]

Professor Ely continues that it is "gibberish . . . syntactically"[81] that the Fifth Amendment was intended to have an equal protection component. He states:

> [T]he fact that "due process," read responsibly, means due *process* is something we may be able to shrug off in the context of the Fourteenth Amendment, which contains other

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powers in what Bork calls a clear case of "social engineering from the bench." *Id.* at 84. The better course of action would have been to allow the segregation question to be decided in the political branches, rather than to usurp that power by over-stretching the text of the Fifth Amendment. *Id.*

77. United States v. Paradise, 480 U.S. 149, 166 n.16 (1987) ("[T]he reach of the equal protection guarantee of the Fifth Amendment is coextensive with that of the Fourteenth."); 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."); Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975) ("This Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment.").

78. BORK, *supra* note 5, at 83.

79. ELY, *supra* note 2, at 16.

80. *Id.* at 18. By the same token, "Procedural Due Process" is redundant. *Id.*

81. *Id.* at 32.

> phrases that do seem to mean what "due process" has wrongly been read to mean. In the Fifth Amendment, however, the Due Process Clause stands alone.[82]

Another critic of Substantive Due Process, Professor Bork, observes the following regarding the proposition that Fifth and Fourteenth Amendment Equal Protection is congruent:

> This [rests] on no precedent or history. In fact, history compels the opposite conclusion. The framers of the fourteenth amendment adopted the due process clause of the fifth amendment but thought it necessary to add the equal protection clause, obviously understanding that due process, the requirement of fair procedures, did not include the requirement of equal protection in the substance of state laws.[83]

It seems clear that the notion that there is an equal protection component in the Fifth Amendment results from an expanded interpretation of the Due Process Clause.[84] The activist moti-

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82. *Id.* at 33 (footnote omitted).

83. BORK, *supra* note 5, at 83 (citations omitted).

84. *See id.* at 31-32. Bork calls Substantive Due Process an "ever flowing fount of judicial power," *id.* at 32, for in pouring substantive content into a procedural provision, any law violating a particular court's moral or political sensibilities can be arbitrarily identified as violating due process. Justice Black argued in *In re* Winship, 397 U.S. 358, 377-86 (1970) (dissenting), that when judges do this "our Nation ceases to be governed according to the 'law of the land' and instead becomes one governed ultimately by the 'law of the judges.'" *Id.* at 378. Notwithstanding the illegitimacy of Substantive Due Process, it has been used in various contexts throughout the history of the Court. *See, e.g.*, Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856) (Taney, J.) (holding that the Fifth Amendment's provision that no person shall be deprived of life, liberty, and property, without due process of law supported the legitimacy of slave ownership); Lochner v. New York, 198 U.S. 45 (1905) (striking down a state law limiting the work hours of bakery employees); Roe v. Wade, 410 U.S. 113 (1973) (creating a constitutional right to abortion). Substantive Due Process was often relied on, according to Bork, when there was no explicit constitutional basis (as in the above contexts) on which to ground a decision. BORK, *supra* note 5, at 32.

There have been attempts, however, to show how Substantive Due Process may be grounded in the original understanding. For example, one author argues that since the term "Due Process of Law" comes from Magna Carta's Law-of-the-Land Clause, its meaning can be gleaned from a study of the use of both phrases in seventeenth-century England, and seventeenth and eighteenth-century America. Robert E. Riggs, *Substantive Due Process in 1791*, 1990 WISC. L. REV. 941. This author concludes with the statement that even though the original intent of the Founders can never be conclusively determined, the informed person in 1791 may have understood the Due Process Clause to have both a substantive and procedural content. It is also the author's conclusion that even if "due process" could have been understood to have a substantive element, certainly it was not within the original intention that Substantive Due Process be used as widely as it is to-

vation for expanding judicial power probably arises from the unwarranted fear that the Courts must sit with tied hands when the federal government enacts facially discriminatory legislation.[85]

### *B. Historical and Textual Support for Differentiating Between State and Federal Equal Protection*

The history of the Fifth and Fourteenth Amendments supports the conclusion that equal protection analysis ought to be applied differently between the states and the federal government. The Fourteenth Amendment was born in the immediate post-Civil War Era, and was created, together with the Thirteenth and Fifteenth Amendments, principally to expand the franchise to America's black minority.[86] The Fourteenth Amendment was also meant to limit the power of the states to legislate in the area of race.[87] Hence, it has the effect of strengthening the powers of the federal government in the area of race while weakening that of the states.[88] Given this intent

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day—i.e., as a warrant to strike down economic regulation, or as the basis for a right to privacy to protect abortion or contraception rights. *Id.* at 1004-05.

85. Though the thesis of this Note is that there is no equal protection component in the Fifth Amendment, Professor Ely suggests that such power may legitimately exist in the Ninth Amendment. ELY, *supra* note 2, at 34-41.

86. *See* Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872). The text and history of the three post-Civil war amendments were aimed at creating "the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him." *Id.* at 80-81; *see also* BORK, *supra* note 5, at 37.

87. Steven G. Calabresi, *A Madisonian Interpretation of the Equal Protection Doctrine*, 91 YALE L.J. 1403, 1420 (1982).

88. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 520-24 (1989) (Scalia, J., concurring) ("[I]t is one thing to permit racially based conduct by the Federal Government—whose legislative powers concerning matters of race were explicitly enhanced by the Fourteenth Amendment—and quite another to permit it by the precise entities against whose conduct in matters of race that Amendment was specifically directed."). *Id.* at 521-22 (citations omitted). In a plurality opinion in *Croson*, Justice O'Connor wrote:

> Congress, unlike any State or political subdivision, has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment. The power to "enforce" may at times also include the power to define situations which *Congress* determines threaten principles of equality and to adopt prophylactic rules to deal with those situations. The Civil War Amendments themselves worked a dramatic change in the balance between congressional and state power over matters of race."

*Id.* at 490 (citations omitted); *see also* Kenneth L. Karst, *The Fifth Amendment's Guarantee of Equal Protection*, 55 N.C. L. REV. 541 (1977) (stating that the emer-

of the drafters and ratifiers of the Fourteenth Amendment, the Court had repeatedly held that the federal government has special powers under section 5 of the Fourteenth Amendment.[89] In contrast, the Fifth Amendment, together with the entire Bill of Rights, was introduced by the Anti-Federalists as a measure to temper what they feared were over-extensive powers granted to the federal government. In an effort to protect the private domain of individuals against encroachments by this centralized power, the Bill of Rights was, and is today, an explicit check on federal powers. However, it contains no mention of an equal protection component, nor does its history suggest that it would contain such. Thus, the presence of an Equal Protection Clause in the Fourteenth Amendment, and its absence in the Fifth Amendment suggests that the function of the latter "differs from and is additive to, the protection guaranteed by the former."[90]

Professor Ely makes the additional argument that if the founders had intended to limit the federal government's ability to enact race-conscious legislation, they would have done so explicitly.[91] Clearly the drafters of the Fourteenth Amend-

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gence of the Fourteenth Amendment limitations on the states both empowered Congress to impose national guarantees of racial equality on the states, and highlighted the absence of parallel limitations against the federal government); Hans A. Linde, *Judges, Critics, and the Realist Tradition*, 82 YALE L.J. 227, 232-34 (1972) (noting that the Equal Protection Clause of 1868 [Fourteenth Amendment] imposed upon the states congressionally enforceable standards of equal treatment beyond those imposed on the federal government by the Fifth Amendment of 1791); Henry Siedzikowski, *Federalism and a New Equal Protection*, 24 VILL. L. REV. 557 (1979) (treating the issue of whether constitutional restrictions on the powers of government are equally applicable to all levels of government).

89. *See* Fullilove v. Klutznick, 448 U.S. 448, 490 (1980); Katzenbach v. Morgan, 384 U.S. 641, 646-47 (1966); *see also* Calabresi, *supra* note 87.

90. Hampton v. Mow Sun Wong, 426 U.S. 88, 100 n.17 (1976). By granting Congress specific authority to enforce (with legislation) the equal protection guarantees in the Fourteenth Amendment, U.S. CONST. amend. XIV, § 5, the Constitution strengthens Congressional power to institute race-conscious programs while at the same time weakening state power in that area. Adarand Constructors v. Pena, 115 S. Ct. 2097, 2124 (1995) (Stevens, J., dissenting). Justice Scalia has stated that "[a] sound distinction between federal and state (or local) action based on race rests not only upon the substance of the Civil War Amendments, but upon social reality and governmental theory." *Croson*, 448 U.S. at 522. Such a distinction is "appropriate in light of the Congress' institutional competence as the National Legislature." *Adarand*, 115 S. Ct. at 2124.

91. ELY, *supra* note 2, at 33. Professor Ely quotes Justice Holmes to demonstrate that state legislation demands greater scrutiny: "I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several states." *Id.* (quoting OLIVER WENDELL HOLMES,

ment (the Reconstruction Congress) knew how to bind their successors when it was their intent to do so.[92] This is evident in the language of the Fifteenth Amendment, also a post-Civil War measure, wherein the drafters provided that the right to vote should not be abridged or denied "*by the United States* or by any State"[93] on account of race. Against this backdrop it seems apparent that the Reconstruction Congress's intent *not* to bind itself by the equal protection Clause was a conscious consideration.[94]

### *C. Justifications for Relying on Congressional Competence in Enacting Benign Race Conscious Programs*

Based on the text and the history of the Fifth and Fourteenth Amendments, strong arguments exist for applying different levels of constitutional scrutiny to federal and state race-based legislation. In addition, Madisonian theory offers a further justification as to why race conscious enactments by the federal legislature are less suspect than those by state legislatures.

In his dissent in the *Adarand* case, Justice Stevens points out that, in adopting the congruence prong of *Adarand*'s equal protection analysis, the majority assumes that there is no difference between a decision by Congress to adopt an affirmative action program and a similar decision by a state or municipali-

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COLLECTED LEGAL PAPERS 295-96 (1920)).

92. *Id.*

93. U.S. CONST. amend. XV (emphasis added).

94. ELY, *supra* note 2, at 33. Professor Ely's argument here is subject to some limitations. It cannot be conclusively inferred from the drafters' silence regarding an equal protection guarantee (in the Fourteenth Amendment) limiting the federal government that they did not believe the federal government was subject to equal protection guarantees, or that they did not believe one existed elsewhere. It is possible that the drafters of the Fourteenth Amendment decided not to limit the federal government (in the Fourteenth Amendment) as they limited the states because they felt the Fifth Amendment *already* limited the federal government in the way in which a federal equal protection guarantee would if it were included in the Fourteenth Amendment.

However, if Professor Ely's argument is not conclusory, it is at least evidentiary. Thus, that the drafters of the Fifteenth Amendment explicitly disallowed the abridgment of the right to vote by both the federal and state governments in the Fifteenth Amendment is evidence that the omission of a limitation on the federal government in the Fourteenth Amendment was intended. The fact that there was no judicial precedent construing the Fifth Amendment to include an equal protection component prior to the Civil War is further evidence that the drafters of the Fourteenth Amendment did not believe that the Fifth Amendment contained such a limitation.

ty.[95] Both the constitutional text and Madisonian theory contradict this assumption.[96]

*1. Madisonian trust in the national legislature*

What are the reasons for trusting race-based legislation enacted by a national legislature more than similar enactments by states or municipalities? Such a reliance on the competence of the national legislature is based in the theory that the national legislature stands above the kind of factional politics that are more likely to dominate at the state level. The argument for deference to a national legislature in matters of racial classifications is rooted in James Madison's theory of the large republic. Madison's theory demonstrates that as a practical matter, racial discrimination against any group is much less likely to occur at the federal level than it is at the state level. States Madison:

> The smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plan of oppression. Extend the sphere and you take in a *greater variety of parties and interests*; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be *more difficult* for all

95. Adarand Constructors v. Pena, 115 S. Ct. 2097, 2123 (1995) (Stevens, J., dissenting).

96. In Metro Broadcasting v. FCC, 497 U.S. 547 (1990), the Court articulated the preeminence of the need to defer to Congress' institutional competence when a benign racial classification is employed to accomplish a remedial intent. Justice Brennan writes, "It is of overriding significance in these cases that the FCC's minority ownership programs have been specifically approved—indeed, mandated—by Congress." *Id.* at 563. In both the *Adarand* and *Metro Broadcasting* decisions, the rationale employed by *Fullilove* became the basis of reliance. Chief Justice Burger, in a plurality decision, observed that although "[a] program that employs racial or ethnic criteria . . . calls for close examination," when a program employing a benign racial classification is adopted by an administrative agency at the explicit direction of Congress, "we are bound to approach our task with appropriate deference to the Congress, a co-equal branch charged by the Constitution with the power to 'provide for the . . . general Welfare of the United States' and 'to enforce, by appropriate legislation,' the equal protection guarantees of the Fourteenth Amendment." Fullilove v. Klutznick, 448 U.S. 448, 472 (1980).

> who feel it to discover their own strength and to act in unison with each other.[97]

Madison's theory contemplates that two characteristics of large, commercial republics would protect against self-interested factions. First, the existence of a variety of interests prevents any one interest from dominating the political arena.[98] The argument holds that extending the sphere of the republic to gather in a wider geographical area inevitably leads to a greater variety of factional elements, for differing parts of the country give rise to differing industries, economic interests, and ideologies—each spawning its own faction.[99] In order to express itself in any form in national legislation, a faction is required to harmonize its interests with those of enough factions to comprise a majority.[100] The result is legislation compromised of its abusive measures, addressed to the broader interests of a structurally tempered majority, and less likely to discriminate against any particular minority.

The second characteristic of the large republic that protects minority rights is that majorities face organizational costs and inherent communication problems.[101] Minorities, whose solidarity is formed by a common, narrow interest, have a much easier time of organizing to raise their voice in a national legislature. The "silent majority" is inherently more sluggish in its ability to reify and voice its common interest.[102] Madison's prescience is undeniable as history has borne out his vision that the federal government would be more protective of minority rights than the states.[103]

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97. THE FEDERALIST NO. 10, at 63-64 (James Madison) (Jacob E. Cooke ed. 1961) (emphasis added).

98. Calabresi, *supra* note 87, at 1403, 1405-11 (1982). The Founders, in studying democratic experiments of the past, had concluded that overpowering majority factions had been the downfall of past democracies. Overbearing majorities had been the instruments of oppression to minorities in the Greek City States. *See generally* JOHN B. BURY, A HISTORY OF GREECE (2d ed. 1913). The Framers also had the advantage of recent hindsight in colonial legislatures, where factional interests ruled at the expense of minorities. *See generally* FORREST MCDONALD, E PLURIBUS UNUM: THE FORMATION OF THE AMERICAN REPUBLIC, 117-90, 199-207 (1965).

99. Calabresi, *supra* note 87, at 1407.

100. *Id.*

101. *Id.* at 1408.

102. *Id.* at 1405-11.

103. *Id.* at 1404 n.4. Here Calabresi presents various instances in which the federal government has been more protective of minority rights than those of the states. For instance, during the Colonial period, a mercantile minority sought to

Social reality and political theory, hence, support the notion that the federal government can be trusted to a greater extent than the states in enacting race-conscious legislation. The structure of the national legislature in Madison's large republic tempers the kind of factional politics that breed abuses against minorities at the state and local level. Thus, benign racial classifications created by Congress in pursuance of its constitutionally mandated stewardship to enforce the dictates of the Fourteenth Amendment ought to require less scrutiny than race conscious measures by the states. Justice Stevens properly argues that such measures represent

> our Nation's consensus, achieved after hard experience throughout our sorry history of race relations, that the Federal Government must be the primary defender of racial minorities against the States, some of which may be inclined to oppress such minorities. A rule of "congruence" that ignores a purposeful "incongruity" so fundamental to our system of government is unacceptable.[104]

### 2. *Other areas in which the Court distinguishes between the states and the federal government in equal protection analysis*

That different levels of scrutiny may be applied to federal and state or local governments in the area of race-conscious legislation is supported by the fact that equal protection analysis is disparate as between the state and federal governments in other areas, such as alienage. In *Hampton v. Mow Sun Wong*,[105] even though the Court struck down a Civil Service Commission regulation barring resident aliens from employment in the federal competitive civil service, the Court recognized that "overriding national interests may provide a justification for a citizenship requirement in the federal service

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protect itself from various attempts at debtor's relief in the state legislatures by backing the ratification of the Constitution. *Id.* Both before and after the Civil War, the federal government could be counted on to be more friendly to the rights of the black minority than were the states, who were dominated by factional politics. *Id.* Even today, national organizations of Black and Hispanic voters successfully obtained continued federal supervision of state and local election procedures with the extension of the Voting Rights Act for a period of twenty-five more years. *See* Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131 (1982). Such a measure was seen as a necessity to secure minority rights. *Id.*

104. Adarand Constructors v. Pena, 115 S. Ct. 2097, 2126 (1995) (Stevens, J., dissenting).

105. 426 U.S. 88 (1976).

even though an identical requirement may not be enforced by a State."[106] In the opinion, Justice Stevens determined that it was unnecessary to scrutinize the alien ban under the equal protection component of the Fifth Amendment.[107] Instead, he stated that notwithstanding the fact that both Amendments require the same type of equal protection analysis,

> the two protections are not always coextensive. Not only does the language of the two Amendments differ, but more importantly, there may be overriding national interests which justify selective federal legislation that would be unacceptable for an individual State. On the other hand, when a federal rule is applicable to only a limited territory, such as the District of Columbia or an insular possession, and when there is no special national interest involved, the Due Process Clause has been construed as having the same significance as the Equal Protection Clause.
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> In this case, we deal with a federal rule having nationwide impact [and involving a] paramount federal power.[108]

Thus, the Court here suspended its parallel equal protection analysis where an "overriding national interest"[109] justified disparate treatment of state and federal legislation.[110]

Indian Law is another forum in which equal protection analysis is less stringent when applied to the federal government than to the states. The federal government routinely cre-

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106. *Id.* at 101.

107. GUNTHER, *supra* note 60, at 686.

108. *Hampton*, 426 U.S. at 100. But see David F. Levi, *The Equal Treatment of Aliens: Preemption or Equal Protection?*, 31 STAN. L. REV. 1069 (1979) and Note, *State Burdens on Resident Aliens: A New Preemption Analysis*, 89 YALE L.J. 940 (1980) wherein the authors suggest that such disparate treatment between state and federal governments in alienage ought to be justified on preemption rather than equal protection grounds.

109. *Hampton*, 426 U.S. at 100.

110. Wide discretion is given to Congress as a result. *See* Mathews v. Diaz, 426 U.S. 67 (1976). In *Mathews* the Court held that Congress could condition an alien's eligibility for participation in a federal Medicare program on admission for permanent residence and a continuous five-year residence in the United States. *Id.*; *see* GUNTHER, *supra* note 60. Justice Stevens wrote that Congress regularly makes rules under its "broad power over naturalization and immigration" that would be unacceptable if applied to citizens. *Mathews*, 426 U.S. at 79-80. For further discussion of the proposition that the Fifth Amendment's Equal Protection Clause is not as strong as that of the Fourteenth Amendment where important national interests are involved, see *In re* Alien Children Educ. Litig., 501 F. Supp. 544, 566 n.43 (S.D. Tex. 1980); Karl Manheim, *State Immigration Laws and Federal Supremacy*, 22 HASTINGS CONST. L.Q. 939, 1018 n.503 (1995); and Suzanne B. Langford, 11 ST. MARY'S L.J. 549, 562-63 (1979).

ates classifications in which Indians are treated differently. In *Morton v. Mancari*,[111] the Court stated that "[l]iterally every piece of legislation dealing with Indian tribes and reservations . . . single[s] out for special treatment a constituency of tribal Indians living on or near reservations. If these laws . . . were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased . . . ."[112] The states are much more restricted with respect to Indian affairs than the federal government, in part because of federal preemption, but also due to the Equal Protection Clause.[113]

Thus, in fora other than race-based classifications in affirmative action programs, the Court has shown deference to the federal government over the states. If Congress determines that benign racial classifications serve important national interests, then these areas of the law provide a rationale for reviewing affirmative action measures with lesser equal protection scrutiny.[114]

## V. CONCLUSION

This Note argues that there is no constitutional basis for strictly reviewing benign racial classifications at the federal level. Employing a strict scrutiny standard inappropriately ignores congressional competence. The history and text of the Fifth and Fourteenth Amendments demonstrate that there is no basis for an equal protection limitation on the federal government that is as extensive as Fourteenth Amendment Equal Protection prohibitions on state governments. Indeed, the histo-

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111. 417 U.S. 535 (1974).

112. *Id.* at 552.

113. Calabresi, *supra* note 87, at 1428. For cases demonstrating the principle that even absent affirmatively preemptive congressional action, the states are often barred from legislating with respect to Indian affairs, see McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973) and California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987). *See also* Antoine v. Washington, 420 U.S. 194, 204-05 (1975) (stating that Congress has plenary and preemptive power over Indian affairs); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16.14 (2d ed. 1988).

114. In Calabresi, *supra* note 87, at 1429 n.104, the author identifies classifications based on illegitimacy as another area of the law in which more deference is shown to the federal government than to the states. *See also* Siedzikowski, *supra* note 88 (discussing whether different standards should exist as between state and federal governments with regard to illegitimacy). Additionally, the fact that the Court strikes down proportionally more state laws than federal statutes is evidence that there are fewer violations in fact at the federal level than at the state level. Calabresi, *supra* note 87, at 1429 n.105.

ry and text of the Fifth and Fourteenth Amendments allow for vast differences in the way in which federal and state race-based classifications are constitutionally reviewed. Moreover, Madisonian theory demonstrates that federal enactments of race-based classifications warrant a much lower level of scrutiny than state enactments. Other areas of the law provide analogies to justify lesser scrutiny of federal race-based enactments.

Although the *Adarand* majority assures us that strict scrutiny will not be "'strict in theory, but fatal in fact,'"[115] only further development of the case law will tell if this assurance can be trusted. In the aftermath of the *Adarand* decision, it is likely that federal affirmative action programs, when subjected to the kind of strict scrutiny prescribed by the Court, will be dealt a debilitating blow. Perhaps more fundamental than *Adarand*'s probable impact on affirmative action, however, is its illustration of the broad power the Court now wields in matters perhaps more legitimately left to the competence of elected representatives.

*Russell N. Watterson, Jr.*

115. Adarand Constructors v. Pena, 115 S. Ct. 2097, 2117 (1995) (quoting Fullilove v. Klutznick, 448 U.S. 448, 519 (1980) (Marshall, J., concurring)).