PART FIVE

LAW

Racial and Ethnic Classifications in American Law

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WHEN DOES THE U.S. CONSTITUTION allow government officials to discriminate based on race? This question has occupied the American judiciary for at least 130 years, and to this day it remains in considerable measure unanswered.

At least since the 1940s, courts have said that governmental race classifications—policies that sort people by racial categories—are presumptively impermissible, though acceptable if the government gives a very good justification for them. The legal rule is the so-called "strict scrutiny" test: to pass constitutional master, a race-based policy (whether it benefits whites or nonwhites) must be "narrowly tailored to a compelling governmental interest." The U.S. Supreme Court enunciated this test as to state laws in the *City of Richmond v. J. A. Croson Co.* case (1989) and as to federal laws in *Adarand Constructors v. Peña* (1995).[1] But this principle was endorsed only by a five-to-four majority and is thus somewhat precarious.

"Narrow tailoring" and "compelling government interest," moreover, are such vague phrases that creative judges could use them to uphold or strike down virtually any race-based program they wish. The test's sub-

stantive meaning must therefore come not from its words but from the decisions—again, usually ones made by narrow majorities—that apply the test and therefore implicitly elaborate it.

In determining the constitutional legitimacy of a race-conscious government policy, then, a court must answer three questions. First, does it indeed involve a racial classification? Second, is the government's justification one that the courts have recognized as "compelling"? And, third, is the race-conscious government action "narrowly tailored," carefully designed to target the specific problem that is said to justify the race-based policy?

When is something considered a racial classification? Courts have been close to unanimous in concluding that any different treatment based on race, whether it amounts to a quota, a "plus factor" favoring a particular racial group, or any other race-based decision making, triggers strict scrutiny. (Rigid quotas are considered especially constitutionally suspect because they are less likely to be "narrowly tailored" to whatever interest they seek to serve, though even quotas have sometimes been upheld.)[2] Policies that set "goals" and "timetables" are treated like all other preference programs and must likewise face strict scrutiny.[3]

It is harder to tell whether racially targeted "outreach" programs will be treated as race classifications. Consider, for instance, an advertising program targeted solely at blacks and aimed at increasing the number of black applicants and therefore of black employees. On the one hand, such a program does not involve actual discriminatory treatment of any individual, which is why these programs are often popular even among those who generally oppose race preferences. On the other hand, the advertising campaign does aim to provide a certain valuable benefit (information) to people of a particular group, which is why antidiscrimination statutes have generally been read as applying to such targeted recruitment the same way that they apply to more tangible forms of discrimination.[4] Few cases have addressed this question, so no consensus has emerged.

A facially race-neutral program does not become a race classification simply because it has an unintentionally different impact on one racial

group than on another.[5] Thus, for instance, a preference for police officers who speak Spanish is itself perfectly acceptable, unless it is proved to be a mere pretext for preferring people who are ethnically Hispanic.[6] Intent, not impact, is the question. Of course, it is often hard to determine the precise intentions behind a particular rule; because of this, courts are generally reluctant to infer that a facially race-neutral rule is intended to discriminate based on race, unless there is strong evidence of such an intention.

Once a court concludes that a government program involves a racial classification, it asks whether it is narrowly tailored to a compelling government interest. Here is what the precedents tell us about what this means.

1. The desire to remedy societal discrimination cannot justify a governmental race classification; that was the Supreme Court's holding in the *Croson* case.[7] Thus, for instance, the University of Michigan cannot defend its race preference system by saying, "Blacks have gotten a raw deal for many generations, and are still getting it today, and our preference for blacks and discrimination against whites is a rough payback."

2. A government agency's desire to remedy its own identified past discrimination, or to counteract others' identified present discrimination, does justify race-based programs that are carefully designed to compensate for this wrong. Thus, for instance, a government employer that finds it has discriminated against blacks in the recent past may set up a preference system that aims to increase black representation to roughly the level of black participation in the qualified labor pool. It doesn't matter that this compensates black applicants against whom the employer has not discriminated at the expense of white applicants who have not benefited from discrimination at the employer's hands—the preference for a race can indeed be justified by past discrimination against that race.[8] Similarly, a government agency that shows, using statistically valid "disparity studies," that there is discrimination by contractors against minority subcontractors may set up a preference program for contractors that use minority subs.[9] On the other hand, the University of Texas cannot just say, "We discriminated against black applicants until the late 1960s, so we have to discrim-

inate in favor of blacks today"—too much time has passed to assume that the past discrimination by the University of Texas has direct consequences for admissions now.[10]

For an agency to implement a preference program under this rubric, it need not have been found guilty of discrimination in court: the agency may act based on a "strong basis in evidence" that this discrimination had taken place.[11] As one might guess, it is not entirely clear exactly what evidence suffices to show this.

3. The desire to have a particular racial balance for its own sake—for instance, wanting to have a university that "looks like America"—does not justify race classifications.[12]

4. What if a public university (or a government employer) argues that it wants to have a certain racial mix not for its own sake but for the greater "intellectual diversity" of ideas, outlooks, and experiences that such a mix would supposedly yield? This is one of the big unresolved questions. Justice Lewis Powell endorsed this argument in *Regents of the University of California v. Bakke* (1978), but he was the only Justice to do so. The U.S. Court of Appeals for the Fifth Circuit rejected this argument in *Hopwood v. Texas* (1996), but since then the Nevada Supreme Court has accepted it as applied to university faculty hiring.[13]

5. A university is unlikely to win with an argument that admitting more medical or law students of a particular race is narrowly tailored to the interest in providing better medical and legal services to communities of that race. Though the Court has never ruled on this specific question, it is clear that race generally may not be used as a proxy for various attributes, even when it is a statistically accurate proxy. Instead of relying on stereotypical assumptions about the skills or education possessed by members of a certain group, for instance, employers and educators must measure the skills or education of the applicants directly.[14] Similarly, for future community service: schools may give preference to applicants who have track records of past community service or to people who commit themselves to engage in such service in the future, but they cannot assume that, say,

blacks are more likely to go back to serve poor black communities (even if that's a statistically sound prediction).

6. The government generally cannot justify race-based decisions by pointing to the public's race-conscious attitudes. Thus, for instance, the government may not refuse to integrate a park for fear of racist violence. The government may not refuse to hire black policemen on the theory that some whites will reject their authority. When deciding on child custody, a court may not take into account the possibility that placing a child with a parent who has remarried across races will lead to the child's being shunned or even attacked by his peers.[15]

What about similar arguments in support of preferences that help minorities? For instance, may the government prefer nonwhite teachers because nonwhite students will supposedly be more inspired by having them as role models? May the government prefer Hispanic policemen because Hispanic members of the public will trust the police more if they see more Hispanics on the force? May the government prefer black guards for a boot camp for juvenile offenders on the theory that the mostly black inmates may react better to the black guards than to white guards?

In these questions, the matter is less clear. The role model justification was rejected in *Croson*,[16] but the police and prison "operational needs" argument is more controversial. Even Judge Richard Posner, who is generally skeptical of race preferences,[17] wrote an opinion upholding the preference for black boot camp guards and suggesting that the same rationale might apply to police forces.[18]

7. Most judges—even including Justice Antonin Scalia, who would impose a close to total ban on governmental race classifications—have accepted that in certain very narrow circumstances the government may consider race in order to avoid imminent violence. This is especially true of violence by prisoners; the law may normally refuse to give effect to public prejudices, insisting instead that the public conform its behavior to the law's demands, but many prisoners have already shown their (often violent) unwillingness to comply with legal norms. Thus, courts have suggested that race-segregated lockdowns following prison riots may be constitu-

tional and have upheld some race-based cellmate selections for violently racist prisoners.[19]

8. The strict scrutiny framework leaves room for courts to recognize still other interests as "compelling." Thus, for instance, the U.S. Court of Appeals for the Ninth Circuit Court recently upheld a race-based admission policy at a UCLA-run experimental elementary school on the grounds that the policy was needed to have a more lifelike educational experiment.[20] One can question whether the government has a truly compelling interest in such experimentation and whether an artificially integrated school in any event particularly serves this interest, given that most schools are much more segregated; but these judges bought the argument, as judges applying strict scrutiny always can. Similarly, some courts have taken the view that preservation of a child's "cultural heritage," or more broadly "the child's best interests," are compelling enough interests to justify race-based adoption policies.[21]

Racial classifications are thus sometimes tolerated by the U.S. Constitution as currently interpreted. It is important to note, however, that they are not *required:* even those classifications that are not forbidden by the U.S. Constitution may be curtailed by Congress, by state legislatures, or by the voters directly through the initiative process.[22]

What broader practical or political conclusions can one draw from the above?

(a) The law is vague enough that die-hard race preference supporters can implement such policies while plausibly arguing that each policy is somehow narrowly tailored to a compelling interest. A court might, several years later, strike down such a policy, but the supporters can often try again with a slightly revised policy or with a supposedly fuller factual record. Only a per se ban on preferences, or a diminution in the zeal of the preference supporters, could prevent this. Nonetheless, strict scrutiny, as applied by the courts in recent years, seems a tough enough test that more pragmatic government officials who don't want to bother with the cost, hassle, and uncertainty of litigation may abandon their preference plans and shift to race-neutral solutions.

(b) The law's vagueness leaves lower court judges plenty of latitude to write opinions that go whichever way they like. A few justifications—for instance, remedying historical discrimination by society at large, maintaining racial proportionality for its own sake, and providing role models—will probably have to be rejected by any conscientious judge because the Supreme Court precedent on these issues is so clear. Still, there are enough permissible (or not clearly forbidden) justifications and enough wiggle-room in "narrow tailoring" that many programs may be upheld by judges who want to uphold them. Federal courts have struck down most of the preference programs that they have faced in recent years, but this has more to do with the skepticism of the judges who have applied the doctrine than with the innate force of the doctrine itself.

(c) The Supreme Court has usually been split five-to-four on preferences. Were, say, Chief Justice William Rehnquist or Justice Sandra Day O'Connor to step down and be replaced by a more propreference Justice, the antipreference rule might well be reversed or at least undermined. The composition of the lower courts is also vital; lower court judges who are ideologically inclined to support race-based policies can exploit the law's vagueness to uphold preferences.

(d) It is a mistake to say that the Court's decisions establish a per se rule of color blindness. These decisions hold that race preferences are disfavored by the Constitution, but not that preferences are always illegal. To take one example, the notion that a government agency may hire black applicant X over white applicant Y today because it discriminated against black applicant Z and in favor of white applicant W some years ago is far from a color-blind approach. The Court might be wrong and the antipreferences movement might be right, but the movement must recognize the limits to how much it can base its arguments on the Court's decisions.

(e) It is equally a mistake to argue that antipreferences initiatives are unnecessary because the Constitution already severely limits race preferences. Opponents of antipreferences initiatives (such as California's Prop. 209) often make this argument, but it is just not so.[23]

Some courts continue to accept the desire for intellectual diversity as

a justification for race preferences, and many government agencies continue to urge this argument; the "remedying identified discrimination" rationale is potentially quite broad; and some other justifications for race-based policies remain possibly available. Given all this, and given the number of judges (federal and state) who sympathize with race preferences, race preferences are hardly limited to any narrow, uncontroversial area.

And just as important, the U.S. Supreme Court is closely split on this question and may easily reverse itself in years to come. It is therefore wise for voters who oppose race-based policies not to rely simply on the Justices but to make sure themselves that state statutes, state constitutions, and federal statutes mandate color blindness.

Notes

1. 488 U.S. 469 (1989); 515 U.S. 200 (1995).

2. See, e.g., *United States v. Paradise*, 480 U.S. 149 (1987) (upholding "a 50% promotional quota in the upper ranks" of the Alabama Department of Public Safety); *Davis v. City and County of San Francisco*, 890 F.2d 1438, 1447 (9th Cir. 1989) (upholding a Fire Department quota that mandated "the hiring of minorities and women in percentages equal to their representation in the labor market . . . and the promotion of minorities and women in percentages equal to their representation in the relevant labor market"); *Middleton v. City of Flint*, 810 F. Supp. 874 (E.D. Mich. 1993) (upholding "a 1:1 quota" in promotions); *Aiken v. City of Memphis*, 37 F.3d 1155 (6th Cir. 1995) (stating that a "20% promotion 'floor'" based on race was constitutional); *Quirin v. City of Pittsburgh*, 801 F. Supp. 1486, 1491 (W.D. Penn. 1992) (striking down a particular quota plan, but making clear that some quotas are constitutional); *North State Law Enforcement Officers Ass'n v. Charlotte-Mecklenburg Police Dep't*, 862 F. Supp. 1445, 1457 (W.D. N.C. 1994) (same); *Associated General Contractors v. City of New Haven*, 791 F. Supp. 941, 949 (D. Conn. 1992) (dictum) (same); *Mallory v. Harkness*, 895 F. Supp. 1556 (S.D. Fla. 1995) (same).

3. *Bras v. California Public Utilities Comm'n*, 59 F.3d 869, 874 (9th Cir. 1995); *Lutheran Church–Missouri Synod v. FCC*, 141 F.3d 344, 352–54 (D.C. Cir. 1998).

4. See, e.g., *Lutheran Church–Missouri Synod v. FCC*, 141 F.3d 344, 351 (D.C. Cir. 1998) (suggesting, but not deciding, that race-based outreach should be treated the same way as race-based hiring decisions); Eugene Volokh, "The California Civil Rights Initiative: An Interpretive Guide," *UCLA Law Review* 44 (1997): 1335, 1349–53 (discussing this point in more detail).

5. *Washington v. Davis*, 425 U.S. 229, 242 (1976).

6. See, e.g., *Hernandez v. New York*, 500 U.S. 352, 375 (1991) (criteria based on language skills are not per se criteria based on ethnicity).

7. *Croson*, 488 U.S. at 498.

8. See, e.g., *Billish v. City of Chicago*, 989 F.2d 890, 893 (7th Cir. 1993) (en banc).

9. *Croson*, 488 U.S. at 509.

10. See, e.g., *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996).

11. *Croson*, 488 U.S. at 500.

12. Ibid., at 507; *Regents v. Bakke*, 438 U.S. 265, 307 (1978) (Powell, J.).

13. *Regents v. Bakke*, 438 U.S. 265, 307 (1978) (Powell, J.); *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996); *University & Community College Sys. of Nevada v. Farmer*, 113 Nev. 90 (1997). See also *Wessmann v. Gittens*, 160 F.3d 790 (1st Cir. 1998) (taking a skeptical look at the diversity justification but not dismissing it entirely).

14. See, e.g., *Powers v. Ohio*, 499 U.S. 400, 410 (1991); *Croson*, 488 U.S. at 501.

15. *Watson v. Memphis*, 373 U.S. 526, 533 (1963) (park); *Baker v. City of St. Petersburg*, 400 F.3d 294, 301 (5th Cir. 1968) (police); *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) (child custody).

16. *Croson*, 488 U.S. at 497–98.

17. See Richard A. Posner, "The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities," *1974 Supreme Court Review*, p. 1.

18. *Wittmer v. Peters*, 87 F.3d 916, 919 (7th Cir. 1996); see also *Barhold v. Rodriguez*, 863 F.2d 233, 238 (2d Cir. 1988) (police officers); *Talbert v. City of Richmond*, 648 F.2d 925, 931–32 (4th Cir. 1981) (police officers), suggested to no longer be good law; *Hayes v. North State Law Enforcement Officers Ass'n*, 10 F.3d 207, 213 (4th Cir. 1993); *Detroit Police Officers' Ass'n v. Young*, 608 F.2d 671, 695–96 (6th Cir. 1979) (police officers), recognized as no longer being good law; *Michigan Road Builders Ass'n, Inc. v. Milliken*, 834 F.2d 583 (6th Cir. 1987); *Minnick v. California Dep't of Corrections*, 95 Cal. App. 3d 506 (1979) (prison guards), certiorari dismissed on procedural grounds, 452 U.S. 105 (1981). On the other side, see *Hayes v. North State Law Enforcement Officers Ass'n*, 10 F.3d 207, 213 (4th Cir. 1993), which explicitly says that the question whether operational needs may justify race classifications is not resolved; and *Croson*, 488 U.S. at 493, and *Hopwood*, 78 F.3d at 944, which suggest that race classifications may only be justified by the desire to remedy past discrimination.

19. *Croson*, 488 U.S. at 521 (Scalia, J., concurring in the judgment); *Lee v. Washington*, 390 U.S. 333, 334 (1968) (Black, Harlan, and Stewart, JJ., concurring); *Harris v. Greer*, 750 F.2d 617, 619 (7th Cir. 1984) (dictum); see also *Weathers v. Gasparini*, 1998 WL 8853, *4 (N.D. Ill. Jan. 8); *Waler v. Walker*, 654 So. 2d 1049, 1050 (Fla. App. 1995); *Abbott v. Smaller*, 1990 WL 131359, *3 n.2 (E.D. Pa. Sept. 5) (dictum).

20. *Hunter v. Brandt*, 1999 WL 694865 (9th Cir. Sept. 9), available at http://laws.findlaw.com/9th/9755920.html.

21. In re Adoption/Guardianship No. 2633, 646 A.2d 1036 (M.D. App. 1994); In

re Moorehead, 75 Ohio App. 3d. 711, 723, 600 N.E.2d 778, 785 (1991); Petition of D.I.S., 494 A.2d 1316 (D.C. 1985).

22. *Coalition for Economic Equity v. Wilson*, 110 F.3d 1431 (9th Cir. 1997).

23. See, e.g., Marci A. Hamilton, "The People: The Least Accountable Branch," *U. of Chicago Roundtable* 4 (1997) (arguing that Prop. 209 is unconstitutional in part because under the Supreme Court's precedents, "affirmative action may only be employed constitutionally to battle proven historical discrimination").