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Interpreting Constitutions Comparatively: Some Cautionary Notes, with Reference to Affirmative Action

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I. INTRODUCTION

It has now become the conventional wisdom that many justices on the United States Supreme Court are thinking about the relevance of comparative constitutional law to the interpretation of the United States Constitution.[1] An emerging conservative critique of doing so questions the democratic legitimacy of the practice. I believe that those questions are badly formed,[2] but that *other* questions are worth raising about the (perhaps)

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[1] Justice Scalia noted the value of transnational comparisons for those who are *designing* a constitution, while expressing skepticism about their relevance to the interpretation of an already existing constitution. Printz v. United States, 521 U.S. 898, 921 n.11 (1997). The issue of affirmative action suggests one such design-relevant use of comparative constitutional law. There seems to me reason to think that constitutions that contain both a general equality clause and a ban on discrimination based on specified grounds will in the ordinary course be interpreted to render unconstitutional affirmative action programs relying on the specified grounds. Contemporary constitution designers favoring affirmative action might then think it wise to include an express authorization of affirmative action (or an exception from the equality provisions for affirmative action programs). For a brief discussion, see Mark Tushnet, *United States: Supreme Court Rules on Affirmative Action*, 2 INT'L. J. CONST. L. 158, 172-73 (2004).

[2] For my analysis, see Mark Tushnet, *Transnational/Domestic Constitutional Law*, 37 LOY. L.A. L. REV. (forthcoming 2004).

emerging practice. In this comment I identify some reasons for caution about the use of transnational comparative law in interpreting domestic constitutions.[3] Some reasons are *institutional*, others arise from the *doctrinal context* within which particular constitutional controversies arise.

I emphasize at the start that I am offering some cautionary notes, not knock-down arguments against the use of transnational comparisons in domestic constitutional interpretation.[4] Such comparisons can be useful, especially in bringing to mind possibilities that might otherwise be overlooked or thought too utopian to be considered as part of a real-world constitution. Here Justice Brandeis's observation, "If we would guide by the light of reason, we must let our minds be bold,"[5] seems relevant. And yet, I will suggest in conclusion, letting our minds be bold might not lead us all to think about transnational constitutional comparisons.

II. INSTITUTIONAL CONSIDERATIONS

Constitutions combine substantive norms, such as commitments to free speech and equality, with institutional arrangements, such as federalism and parliamentary government. The substantive norms are implemented within the institutional arrangements, and particular institutional arrangements are sometimes more compatible with some interpretations of the substantive norms than with others.[6]

Perhaps the most accessible example is whether hate speech regulation is compatible with constitutional norms of free expression. Those who

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[3] I use the term *transnational* to refer both to the domestic constitutional law of other nations and to international law, particularly international human rights law. My comments do not deal with issues of constitutional interpretation when international law is directly applicable domestically, with two minor exceptions. First, some formulations of some norms of international law give a "margin of appreciation" to domestic legal systems, thereby allowing them to determine what their domestic constitutions mean within a range that can be either expansive or limited. For a discussion of this and similar aspects of the interpretation of international norms by international tribunals, see Gerald Neuman, *Human Rights and Constitutional Rights: Harmony and Dissonance*, 55 STAN. L. REV. 1863, 1871-72 (2003). Second, it is unclear whether there is an international law norm, domestically applicable without legislative action, imposing a duty to promote equality. Such a norm might influence the interpretation of domestic equality provisions, although whether in favor of or against affirmative action is unclear to me.

[4] I believe my cautions are appropriate for all (or nearly all) domestic constitutions, even those, such as the South African Constitution, that authorize reliance on transnational comparisons (S. AFR. CONST. § 39(1))—but for present purposes confine my observations to the interpretation of the United States Constitution.

[5] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

[6] My thinking about this question has been influenced by my colleague Vicki Jackson, and in particular her argument that federalism might consist of discrete packages of institutional arrangements. *See* Vicki C. Jackson, *Comparative Constitutional Federalism and Transnational Judicial Discourse*, 2 INT'L. J. CONST. L. 91, 94-96 (2004); Vicki C. Jackson, *Narratives of Federalism: Of Continuities and Comparative Constitutional Experience*, 51 DUKE L.J. 223, 226 (2001). I emphasize that my observations are only influenced by her analysis, that she has not indicated whether she agrees with my observations, and that I actually disagree with aspects of her argument about federalism.

favor hate speech regulation in the United States often refer to transnational constitutional norms—the existence of hate speech regulation in Canada,[7] the existence in some international human rights treaties of a *duty* to regulate hate speech[8]—in defending the proposition that hate speech regulation should not be treated as unconstitutional under the First Amendment to the United States Constitution.[9] They argue, quite rightly, that the fact that modern liberal democracies do in fact regulate hate speech without descending into totalitarian tyrannies where the government engages in extensive thought control shows that the mere existence of hate speech regulations is compatible with general norms of free expression. They conclude that hate speech regulation in the United States could be adopted without risking anything other than making the United States more like Canada—not, in their view, an obviously bad thing.

What the argument overlooks, though, is the institutional context within which hate speech regulations are implemented. One principle—among many—that (everywhere) guides the interpretation of constitutional protections of free expression is that those protections are designed to counteract a tendency on the part of government officials to overreact to perceived threats to order. Criminal law enforcement is much more highly centralized in other constitutional systems than it is in the United States. Great Britain's hate crime statute requires that prosecutions be authorized by the Attorney General, a single official.[10] Even in Canada's federal system, criminal law enforcement is centralized in each province's Attorney General.[11] The risk of abusive prosecutions for hate speech is reduced by this centralization and the attendant responsibility for, and public visibility of, decisions to prosecute. Compare the United States, where thousands of local district attorneys have the power to initiate and carry prosecutions through.[12] The way the United States federal system is organized, that is,

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[7] *See, e.g.*, The Queen v. Keegstra, [1990] 3 S.C.R. 697, 698 (Can.).

[8] International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, art. 20(2), 999 U.N.T.S. 171, 178 ("Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."); International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, art. 4(a), 660 U.N.T.S. 195, 220 (stating parties "[s]hall declare as an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination").

[9] *See, e.g.*, Mari J. Matsuda, *Public Response to Racist Speech:Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2341-48 (1989) (describing the development of international human rights law in connection with hate speech); john a. powell, *As Justice Requires/Permits: The Delimitation of Harmful Speech in a Democratic Society*, 16 LAW & INEQUALITY 97, 147-50 (1998) (discussing *Keegstra*).

[10] Race Relations Act, 1965, c. 73, § 6(3) (Eng.).

[11] Criminal Code, R.S.C., ch. C-34, § 505 (1970) (Can.) (giving provincial attorneys general primary law enforcement authority); Constitution Act, 1867, 30 & 31 Vict., c. 3, § 92(14) (Eng.) (allocating criminal law enforcement to Canadian provinces upon the grant of independence).

[12] In general, state attorneys general lack the power to displace local prosecutors except in highly limited circumstances.

increases the risk that clearly inappropriate prosecutions for hate speech will be brought. And, finally, that risk is relevant to determining whether a domestic constitutional provision protecting free expression should be interpreted to permit or prohibit criminal hate speech regulations. The institutional context of criminal law enforcement in the United States and elsewhere must be taken into account in determining how to interpret the *substantive* commitment to free expression.[13]

Institutional considerations also bear on the question of affirmative action. Here those questions deal primarily with the way in which constitutional systems conceptualize the relation between courts and legislatures.

The starting point is the observation that affirmative action programs are the legislative equivalent of, or substitute for, judicial enforcement of constitutional equality norms interpreted to invalidate laws with a disparate impact on protected classes—or, equivalently, judicial enforcement of equality norms against private parties pursuant to the state action or horizontal effect doctrine.[14] That is, a system *needs* legislatively adopted affirmative action programs only when its courts have refrained from expansive applications of a constitutional equality norm in cases of disparate impact.[15]

The United States Supreme Court offered an *institutional* explanation for its reluctance to make such expansive applications. Noting that race and wealth were correlated in the United States, the Court observed that an expansive disparate impact doctrine would cast constitutional doubt on a wide range of laws:

> A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public ser-

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[13] My argument deals with criminal enforcement of hate speech regulations. Other contexts—hate speech regulations by school boards and government employers, for example—involve much more decentralized decision-making, even in Canada and the United Kingdom.. It might be, then, that Canadian and British commitments to free expression permit criminal hate speech regulation but ought not be interpreted to authorize non-criminal regulations.

[14] I believe these points are reasonably well known, or at least reasonably well-established, but for demonstrations, see Gary Peller & Mark Tushnet, *State Action and "A New Birth of Freedom"*, 92 GEO. L.J. (forthcoming 2004); Mark Tushnet, *State Action, Social Welfare Rights, and the Judicial Role: Some Comparative Observations*, 3 CHI. J. INT'L L. 435, 435-36 (2003).

[15] It seems to me worth noting as well that, at least in the United States, judicial enthusiasm for disparate impact rules moved in tandem with legislative enthusiasm for affirmative action programs in the 1960s, and that this collaboration ended as what I have called a new constitutional order came into being. For a discussion of the kind of collaboration between courts and legislatures this illustrates, see Mark Tushnet, *The Supreme Court and the National Political Order: Collaboration and Confrontation*, *in* THE SUPREME COURT AND AMERICAN POLITICAL DEVELOPMENT (Ronald Kahn & Ken I. Kersch eds., forthcoming).

> vice, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.[16]

Placing all these laws under a constitutional cloud was problematic, in the Court's view, because doing so would give the courts a general supervisory role over essentially *all* legislation. Or, put another way, an expansive disparate impact doctrine would replace legislatures with courts as the primary definers of public policies with disparate impact, which is to say, all public policies.

Note, though, that this argument depends on a particular conception of the institutional relations between courts and legislatures, one in which the courts necessarily have the last say. I have called this conception one of *strong-form* judicial review,[17] contrasting it with another conception, in which courts exercise *weak-form* review.[18] In weak-form systems, the courts' constitutional interpretations are expressly offered as simple declarations by the courts, without any implications for the resolution of particular cases. Alternatively, those interpretations can be overturned with relative ease, by a legislature "overriding" the interpretations or by a simple amendment process. A court in a weak-form system could be less reluctant to adopt an expansive disparate impact doctrine because it would know that doing so would not necessarily disturb the legislature's primary role in making public policy. But, an expansive disparate impact doctrine is the equivalent of judicially mandated affirmative action programs—mandated, that is, to the extent that the courts have the power to require legislatures to

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[16] Washington v. Davis, 426 U.S. 229, 248 (1976); *see also* Neuman, *supra* note 3, at 1878 (discussing the reliance by the South African Constitutional Court on "institutional factors" in refusing to require the government to provide a minimum core of social and economic rights).

[17] The strength of strong-form review can vary, as it has in the United States. The idea of judicial *finality* lies at the heart of strong-form systems. But, finality should be distinguished from judicial *exclusivity*, where only the courts are authorized to articulate constitutional interpretations. A court in a strong-form system might use legislative actions to inform its own (final) interpretation. Or, it might acknowledge the power of legislatures to advance constitutional *values* beyond the point where the court itself would go, without conceding that in doing so the legislatures are actually offering authoritative constitutional *interpretations*. The Supreme Court denied Congress the power to interpret the Constitution in *City of Boerne v. Flores*, invalidating the application of the Religious Freedom Restoration Act ("RFRA") to state and local governments because the Act could not be considered one "enforcing" the provisions of the Fourteenth Amendment as interpreted by the Supreme Court. City of Boerne v. Flores, 521 U.S. 507 (1997). Lower courts have applied that statute to the actions of the national government, though. *See, e.g.*, Kikimura v. Hurley, 242 F.3d 950, 960 (10th Cir. 2001) (stating that RFRA as applied to the federal government is separable from the portion declared unconstitutional, and therefore remains independently applicable to federal officials); *In re* Young, 141 F. 3d 854, 859 (8th Cir. 1998) (reaching the same conclusion). The reason is such applications are plainly within the enumerated powers of Congress (the powers that authorize the affected actions), and Congress has the power to structure its exercise of its acknowledged powers by referring to the values of the First Amendment.

[18] Mark Tushnet, *Alternative Forms of Judicial Review*, 101 MICH. L. REV. (forthcoming 2004).

act. Weak-form systems that adopted such an expansive doctrine would be committed to judicial encouragement of affirmative action programs within the constraints of their form of judicial review. Although not logically required to do so, those courts would, I suspect, be more ready to uphold legislatively mandated programs as well.

So, to summarize, the constitutional status of affirmative action is intimately related to constitutional doctrine regarding disparate impact, and that doctrine is closely connected to the institutional form judicial review takes.

Another facet of the affirmative action issue—actually, the same facet seen from a different angle—reveals a similar relation between constitutional doctrine and institutional arrangements. The United States Supreme Court has never taken the position that affirmative action is constitutionally *required*; its decisions go only so far as to say that it is sometimes *permitted*.[19] One reason that might be offered for refusal to require affirmative action would invoke the characteristics of courts as decision-makers. Designing a good affirmative action program is a complex task that must take into account a wide range of variables—characteristics of the institution that is to employ affirmative action (schools, police departments, and so on through the range of possibilities), characteristics of the pool from which participants in the program are drawn, and much more. Courts, it might be said, are not particularly well-suited to designing complex programs. They do well in articulating clear rules that can guide others, but their typical methods—characteristically, command-and-control—are not good ones for developing complex programs for bureaucracies that face ever-changing political and social environments, and that have their own bureaucratic characteristics.[20]

Once again, an approach to substantive equality provisions in a constitution is here connected to a particular understanding of courts as institutions. Command-and-control regulation has indeed been characteristic of United States courts. Today, though, there are new forms of judicial intervention, which allow for and indeed encourage interactions between courts and bureaucracies in developing reforms that can evolve as both courts and bureaucrats gain a better understanding of the nature of the problems they

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[19] One qualification: one could take *Green v. New Kent County School Board* and its requirement that school systems that engaged in intentional racial discrimination remedy that discrimination by ensuring that all their schools be "just schools," which was taken to mean that no school would be racially identifiable, to be a requirement that such systems engage in affirmative action. Green v. New Kent County Sch. Bd., 391 U.S. 430 (1968). The lifespan of the *Green* rule was short, and any mandate it contained for affirmative action never matured into clear doctrine.

[20] I here summarize a fairly well-established critique of United States courts' performance in so-called institutional reform litigation. A recent example is ROSS SANDLER & DAVID SCHOENBROD, DEMOCRACY BY DECREE: WHAT HAPPENS WHEN COURTS RUN GOVERNMENT (2003) (proposing limits on court power that would instruct judges as to how and when to apply institutional reform litigation).

are confronting.[21] In constitutional systems where judicial review takes one of these new forms, the case for interpreting the constitution to require affirmative action in some situations is substantially stronger than it is where judicial review takes the form it typically has in the United States.

I have argued that substantive constitutional doctrine is sometimes closely tied to institutional arrangements. Drawing on another constitutional system's *substantive* approach to a problem like affirmative action may be misleading when that approach is tied to its *institutional* arrangements. Or, at least, someone who urges that we examine that system's substantive approach ought to attend to the possibility that we could do so profitably only if we also examined—and considered adopting—the relevant institutional arrangements. My sense is that there is more enthusiasm for examining substantive approaches than for examining institutional ones,[22] which suggests some caution in drawing upon comparative constitutional law for (merely) substantive analysis.

III. DOCTRINAL CONSIDERATIONS

This Section uses an example from Indian constitutional law to develop some cautionary notes about the importance of doctrinal context in using comparative constitutional material in interpreting a domestic constitution. The example is the doctrine of the "creamy layer" in the Indian law of affirmative action. To simplify the "creamy layer" doctrine: beneficiary classes are typically materially deprived and socially subordinated. The "creamy layer" of a beneficiary class consists of those members who are not particularly materially deprived, and who (therefore) may experience less social subordination than other members of the class. In some contexts, the Supreme Court of India has said, affirmative action programs must exclude members of the "creamy layer" of the beneficiary class if the

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[21] Here I refer to the idea of democratic experimentalism associated with Charles Sabel and his collaborators. *See, e.g.*, Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998) (arguing that democratic experimentalism, where citizens are enabled to utilize their local knowledge to fit solutions to their own circumstances, is better suited to protect the constitutional ideal than are doctrines of federalism and the separation of powers); James Liebman & Charles Sabel, *A Public Laboratory Dewey Barely Imagined: The Emerging Model of School Governance and Legal Reform*, 28 N.Y.U. REV. L. & SOC. CHANGE 183 (2003) (describing how a combination of movements toward standards, changing goals of desegregation and school finance litigation, and state and federal legislation have converged to create a promising experimentalist framework for school reform).

[22] For a relatively rare example in the legal literature of an argument using comparative constitutional law for purposes of institutional comparisons and reform suggestions, see Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633 (2000). *But see* Steven G. Calabresi, *The Virtues of Presidential Government: Why Professor Ackerman Is Wrong to Prefer the German to the U.S. Constitution*, 18 CONST. COMM. 51 (2001) (indicating the resistance to such arguments).

programs are to survive constitutional scrutiny.[23]

Discussions of affirmative action in the United States sometimes invoke ideas similar to that of the "creamy layer."[24] Suggesting the weakness of justifications for including the children of relatively well-to-do African Americans in affirmative action programs in higher education, critics provide anecdotes of a Vietnamese boatperson rejected while the African American daughter of an engineer was accepted, or "the wealthy daughter of a black ambassador . . . preferred over a comparably qualified white welfare daughter . . . ."[25] Proponents of class-based affirmative action, such as Richard Kahlenberg,[26] argue that such programs are better social policy—and are perhaps the only constitutionally permissible policies—because they *exclude* relatively well-to-do members of racial minorities (the "creamy layer," although Kahlenberg does not use the term),[27] while *including* badly-off members of the racial majority.

Reconciling the Supreme Court's decisions in the University of Michigan undergraduate and law school cases is not easy,[28] but one way of doing so might invoke the idea of the creamy layer. According to Justice O'Connor, the law school's program was constitutionally permissible because it took race into account as part of a review of an applicant's entire file.[29] According to Chief Justice Rehnquist, the undergraduate program was unconstitutional because, rather than giving each application "individualized consideration," it "automatically distribute[d] 20 points to every single applicant" from underrepresented groups.[30]

The undergraduate program had two characteristics that distinguished it from the law school program: a *large number* of points that were *automatically* awarded.[31] But, I believe, the number of points cannot be the constitutional sticking point. Justice O'Connor's opinion did not deny,

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[23] *See* Indra Sawhney v. Union of India, 80 A.I.R. 1993 S.C. 477, 558-60 (describing the "creamy layer" test).

[24] A LEXIS search of the United States and Canadian Law Reviews database on January 8, 2004, found nine references to the "creamy layer" doctrine.

[25] RICHARD D. KAHLENBERG, THE REMEDY: CLASS, RACE, AND AFFIRMATIVE ACTION 44 (1996) (relying on anecdotes reported in DINESH D'SOUZA, ILLIBERAL EDUCATION: THE POLITICS OF RACE AND SEX ON CAMPUS 33-34 (1991), and Joseph Adelson, *Living With Quotas*, COMMENT., May 1978, at 27).

[26] *See generally id.* (arguing for a move from race-based to class-based affirmative action).

[27] Kalhenberg's index indicates only two passing references to India. *Id.* at 10 (noting Martin Luther King, Jr.'s references to affirmative action programs in India); *id.* at 131 (referring to a sociological study analogizing job hierarchies in the United States to the Indian caste system).

[28] Seven Justices believed that the two programs were constitutionally indistinguishable, with four concluding that both were unconstitutional and three concluding that both were constitutionally permissible.

[29] *See* Grutter v. Bollinger, 123 S. Ct. 2325, 2343 (2003) (referring to the law school's "highly individualized, holistic review of each applicant's file").

[30] Gratz v. Bollinger, 123 S. Ct. 2411, 2428 (2003).

[31] *Id.* at 2414.

because it could not, that race would be dispositive in some cases.[32] Further, her opinion found no constitutional problems associated with the law school admissions director's practice of tracking admissions on a daily basis.[33] Despite the admissions officers' testimony that "they never gave race any more or less weight based on the information contained in these reports,"[34] I am hard-pressed to understand why they even looked at the daily reports except to make sure that "enough" minorities were being admitted—and to take some action, for example adjusting the weight being given race in the holistic review, if the tracking reports were disappointing. Yet, if the weight given race can vary during an admissions season, and perhaps across admissions seasons,[35] the problem with the undergraduate program could not be that race was given "too much" weight because at some point the law school's system might give a particular applicant's race the *same* heavy weight that was given to all members of underrepresented minorities in the undergraduate admissions process.[36]

The difficulty with the undergraduate program, then, was that race was *always* given some weight. In contrast, at least conceptually, the holistic review of applicant files in the law school's admissions process might lead to the race of a minority applicant being given no weight at all, or almost none. Justice O'Connor stressed that the law school program took into account a "broad range of qualities and experiences that may be considered valuable contributions to student body diversity."[37] It seems reasonably clear that, as Justice O'Connor understood the law school's program, there was a real chance that an applicant from the "creamy layer" of a racial minority group would get a smaller advantage from his or her race than would an applicant from a worse-off sector of the same minority group.[38] And that, finally, is how the "creamy layer" concept operates in Indian constitutional law.

In sum, ideas akin to the "creamy layer" concept can be found in discussions of the constitutionality and policy wisdom of affirmative action programs in the United States. Yet, that concept functions within the doctrinal framework of Indian constitutional law, whereas the doctrinal

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[32] *Grutter*, 123 S. Ct. at 2344 (asserting that the criticism that race would be "outcome determinative" was applicable to "any plan that uses race as one of many factors").

[33] *Id.* at 2343.

[34] *Id.*

[35] *See id.* (noting that the percentages of minorities varied from one class to another between 1993 and 2000).

[36] In addition, the courts would have difficulties if the constitutional rule were that schools could give some weight to race, but not too much weight. If twenty points is too much, what about ten points? Five?

[37] *Grutter*, 123 S. Ct. at 2344.

[38] *See id.* (observing that the "Law School frequently accepts nonminority applicants with grades and test scores lower than underrepresented minority applicants . . . who are rejected").

framework of United States constitutional law is quite different. That difference suggests that the relevance of the "creamy layer" concept to United States constitutional interpretation might be rather limited.

The differences between the Indian doctrinal context and the American one arise from the constitutionally permissible justifications for affirmative action in each system. Again without exploring Indian constitutional law in detail, I would describe the justifications for affirmative action there as invoking notions of compensatory justice, notions of distributive justice, and the idea that it is permissible to focus on the relative status of groups rather than on individuals.

The ideas underlying each of these justifications are simple. Compensatory justice comes into play because individual members of subordinated groups are worse off today as a result of the subordination over time of the groups of which they are members. Affirmative action programs give them something roughly equivalent today to what they have been denied in the past.[39] Distributive justice comes into play because the shares of social goods held by members of subordinated groups are smaller than they should be (according to a constitutionally permissible notion of distributive shares), and affirmative action programs adjust distributive shares. Finally, affirmative action programs are designed to improve the status of beneficiary groups relative to other groups, whatever their impact on individuals.

Yet, United States constitutional doctrine rules out *any* of these justifications for affirmative action. The Supreme Court has addressed compensatory justice in two ways. Affirmative action programs can benefit those who can be shown to have been themselves the victims of discrimination.[40] In addition, affirmative action as compensatory justice is, in United States constitutional doctrine, designed to address what the Supreme Court calls "societal" discrimination. And, according to the Court, such discrimination cannot justify affirmative action programs.[41]

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[39] Or, roughly equivalent to the value today of what they would have accumulated had they not been discriminated against in the past.

[40] City of Richmond v. J.A. Croson Co., 488 U.S. 469, 509 (1989) ("If the city of Richmond had evidence before it that nonminority contractors were systematically excluding minority businesses from subcontracting opportunities, it could take action to end the discriminatory exclusion . . . . In the extreme case, some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion."). *But see id.* at 524 (Scalia, J., concurring in the judgment) ("In my view there is only one circumstance in which the States may act *by race* to 'undo the effects of past discrimination': where that is necessary to eliminate their own maintenance of a system of unlawful racial classification. If, for example, a state agency has a discriminatory pay scale compensating black employees in all positions at 20% less than their nonblack counterparts, it may assuredly promulgate an order raising the salaries of 'all black employees' to eliminate the differential."). Note that Justice Scalia's example appears to include the possibility of raising the salaries of all *current* black employees, including those who were not employed when the pay scale was expressly discriminatory.

[41] *See id.* at 505 ("To accept Richmond's claim that past societal discrimination alone can serve as the basis for rigid racial preferences would be to open the door to competing claims for 'remedial relief' for every disadvantaged group.").

Societal discrimination might also refer to distributive injustice—discrimination in *today's* distributive shares, without regard to the historical origins of that injustice. Understood in that way, the Supreme Court's disapproval of societal discrimination as a justification for affirmative action would come into play again. Further, the Court has indicated that disparate impact alone—again, a phenomenon implicating only questions of distributive justice—is insufficient to justify affirmative action.[42]

Finally, the entire thrust of United States affirmative action law is individual-focused, to the point where it is actually difficult to locate a citation for the proposition that improving the condition of a subordinated group is not a permissible goal of affirmative action.[43] But, of course, the focus in the Michigan affirmative action cases on the necessity for holistic review of the files of individual applicants merely confirms the individualistic focus of United States affirmative action law.

The "creamy layer" idea cannot inform United States constitutional law to the very large extent that the idea is bound up with compensatory or distributive justice or group-oriented justifications for affirmative action. The United States doctrine now appears to admit only one justification for broad affirmative action programs—the promotion of diversity in settings where diversity advances other important goals of the institutions adopting affirmative action programs.[44] Is the "creamy layer" idea relevant to that justification?

Here too some comparative (social) analysis seems relevant. Years ago it was said about race relations in Brazil that "money whitens" the skin.[45] A classic study by Marvin Harris demonstrated how perceived so-

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[42] *Cf. id.* at 509 ("Where there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality's prime contractors, *an inference of discriminatory exclusion could arise.*") (emphasis added).

[43] For one such indication from a concurring opinion, see Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 239 (1995) (Scalia, J., concurring in part and concurring in the judgment) ("In the eyes of government, we are just one race here. It is American.").

[44] Here my formulation tries to generalize beyond the specific context of education in the Michigan affirmative action cases, although it is not clear to me that there are many other settings in which diversity would matter much. For example, although I can imagine a diversity-based argument dealing with awarding construction contracts, I doubt that the present Court would find the argument persuasive. *But cf.* Grutter v. Bollinger, 123 S. Ct. 2325, 2349 (Scalia, J., concurring in part and dissenting in part) ("If it is appropriate for the University of Michigan Law School to use racial discrimination for the purpose of putting together a 'critical mass' that will convey generic lessons in socialization and good citizenship, surely it is no less appropriate—indeed, *particularly* appropriate—for the civil service system of the State of Michigan to do so.").

[45] Legal scholars have relied on the saying in recent scholarship, although I do not know whether it accords with current Brazilian social reality. *See, e.g.*, Tanya Kateri Hernandez, *Multiracial Matrix: The Role of Race Ideology in the Enforcement of Antidiscrimination Laws, A United States-Latin America Comparison*, 87 CORNELL L. REV. 1093, 1106-07 (2002) (discussing the idea that "money whitens" the skin in the context of self-classification of race by Brazilians).

cial class could make ambiguous perceived skin color.[46] A simplified description of the study is this: Harris assembled a number of drawings of people with different skin colors, hair forms, lip, nose, and sex types as measured by an objective scale.[47] The respondents were asked to describe the person in each drawing in order to elicit a response that included the drawing subject's race.[48] The language of race in Brazil contains a rather finely differentiated scale of terms describing a person's perceived skin color. The Harris study respondents provided 492 categorizations and each of the drawings "was identified by at least twenty different lexical combinations."[49] The result of the study was that there existed a correlation between class and race—the darker the skin, the lower the imputed class.[50]

This study might have interesting implications for a diversity-based justification of affirmative action. It suggests that, in a society where money whitens the skin, the experiences of the "creamy layer" in a subordinated racial group might not be all that different from the experiences of members of the dominant racial group. Members of the "creamy layer" would be perceived by others to be members of the dominant group, and so would not have distinctive experiences of the sort that adds diversity. So, for example, a dark-skinned person of African descent driving an expensive car in Brazil would not be stopped by the police more often than would a lighter-skinned person of European descent.[51] A law school criminal procedure class's discussion of the effects of race on police investigations might not benefit from diversity in experiences from having the darker-skinned person in it. Affirmative action programs in Brazil could exclude the "creamy layer" without impairing the goal of achieving diversity.

Of course I devised this example to make the point that the assumed Brazilian experience is quite different from the actual experience in the United States. The phenomenon known as stops or arrests for "driving while black" ("DWB") is well-known in the United States.[52] DWB is an "offense" committed by an African American driving an expensive car, particularly in a neighborhood where the police typically observe few Afri-

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[46] Marvin Harris, *Referential Ambiguity in the Calculus of Brazilian Racial Identity*, *in* AFRO-AMERICAN ANTHROPOLOGY: CONTEMPORARY PERSPECTIVES 75-86 (Norman E. Whitten, Jr. & John F. Szwed eds., 1970).

[47] *Id.* at 76.

[48] *Id.*

[49] *Id.*

[50] *Id.* at 85.

[51] Again, this example is qualified because it assumes that the phrase "money whitens" continues to describe Brazilian social reality.

[52] A LEXIS search on February 1, 2004, in the United States and Canadian Law Reviews database found 339 articles referring to "driving while black." The most prominent is David A. Harris, *The Stories, the Statistics, and the Law: Why "Driving While Black" Matters*, 84 MINN. L. REV. 265 (1999).

can Americans doing so.[53] Some drivers arrested for DWB come from the "creamy layer" of the African American community. So, in the United States, the diversity justification for affirmation action programs *is* available even for members of the "creamy layer." Or, put another way, although the Indian Supreme Court devised the "creamy layer" doctrine as a means of *excluding* members of the creamy layer from the benefits of affirmative action programs, given the rationales for such programs in India, *including* the "creamy layer" in United States affirmative action programs is consistent with the only justification for affirmative action the Supreme Court has found acceptable.[54]

The example I have developed deals with the relation between the "creamy layer" idea and the justifications for affirmative action. That same relation is relevant to Justice Ginsburg's invocation of the "international understanding of the office of affirmative action" in the Michigan Law School case.[55] Justice Ginsburg echoed international conventions specifying that affirmative action programs should be temporary to support the majority's conclusion that race-conscious affirmative action programs "must have a logical end point."[56]

On the face of it, though, the connection between the diversity justification for affirmative action and the need for an end point is obscure, while the connection between compensatory or distributive justifications and that need is obvious. At some point, compensation will have been paid, or material goods will be distributed in the normatively desired way. At that point the justifications for affirmative action disappear, and ordinary prohibitions on discrimination would kick in to invalidate affirmative action programs. One might be skeptical about the claim that achieving the compensatory or distributive goals of affirmative action will happen quickly. Still, the connection between the justifications and the end point is clear enough.

That cannot be said about the prospect that the passage of time (alone) will eliminate the basis of the diversity justification for affirmative action.

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[53] I cannot resist citing the logical extension of the "driving while black" phenomenon to what has been called "breathing while black." *See* Brown v. City of Oneonta, 221 F.3d 329 (2d Cir. 2000), *amending and vacating* 195 F.3d 111 (2d Cir. 1999). Columnist Bob Herbert came up with the phrase "breathing while black" to describe the case. Bob Herbert, *Breathing While Black*, N.Y. TIMES, Nov. 4, 1999, at A29. For a more sympathetic discussion of racial and ethnic profiling in the context of airport security and traffic stops, see FREDERICK F. SCHAUER, PROFILES, PROBABILITIES, AND STEREOTYPES 175-98 (2003).

[54] I believe that this perception is what underlies the otherwise confusing discussion in Justice O'Connor's opinion in Grutter v. Bollinger, 123 S. Ct. 2325, 2341 (2003) ("Just as growing up in a particular region or having particular professional experiences is likely to affect an individual's views, so too is one's own, unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters.").

[55] *Id.* at 2347 (Ginsburg, J., concurring).

[56] *Id.* at 2345-46.

The different experiences members of racial minorities bring to their classes are rooted in culture, and whatever improvements in material conditions there might be seem unlikely to do much—as least within twenty-five years, the Court's purported "end point"—to alter culture-based experiences. Indeed, the remainder of Justice Ginsburg's opinion might be taken as her argument that the Court had mistakenly denied justificatory force to compensatory and distributional rationales for affirmative action. She cited, among other things, evidence about material resources available in their schools to African American children to support her claim that "many minority students encounter markedly inadequate and unequal educational opportunities."[57] That claim fits much more comfortably in an analytic framework of compensation and distribution than in one allowing only diversity as a justification for affirmative action.

In sum, Justice Ginsburg's invocation of "international understanding[s]" about affirmative action may overlook the particular doctrinal context within which United States affirmative action cases must be decided.

IV. CONCLUSION

Learning about the way other constitutional systems address particular questions of constitutional law might enhance our ability to interpret our own Constitution. I have argued, though, that we must be aware of the way in which institutional and doctrinal contexts limit the relevance of comparative information. On questions that matter a great deal, direct appropriation of another system's solution seems unlikely to succeed.[58]

Perhaps the best argument for examining foreign experiences with problems that parallel those in a domestic constitutional system is that the examination may bring to mind possibilities that would otherwise be overlooked, or may allow us to frame new questions. Even here, though, questions might arise.

Learning about other constitutional systems is costly. Sometimes one needs to learn another language. Even if materials are available in a language with which one is familiar, one must worry about the degree to

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[57] *Id.* at 2348.

[58] In the field of comparative law generally, Alan Watson's work on legal transplants has become canonical. *See generally* ALAN WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW (2d ed. 1993). Referring almost exclusively to private law, Watson argues that the phenomenon of legal transplants—direct appropriation of ideas from one legal system into another—is quite widespread and often entirely successful. *Id.* at 21, 95-96. Watson's argument has a positive component and a negative one: transplants often do something reasonably well, to the point that trying to come up with something better is not worth the effort, and legal elites rarely are threatened by private law transplants. He acknowledges that the latter component might not be available in connection with transplants of public law, and particularly constitutional, doctrines. *Id.* at 8. The relative lack of interest in structural issues in recent discussions of comparative constitutional law (*see supra* note 22) suggests that the reasons Watson has for limiting his thesis to private law are indeed correct.

which the available information actually captures the underlying reality of the other nation's constitutional culture. And, of course, constitutional systems are *systems*, so that even if one has a good grasp on the way another constitutional system deals with a particular problem, one might not fully understand the way in which that solution fits together with other aspects of the constitutional system.

Suppose, though, that these cost considerations are found to be small. Still, it is not entirely clear that looking elsewhere is actually a productive way of coming up with new approaches to existing problems. Consider the "creamy layer" idea. As I have indicated, the idea has been developed—although without being given the arresting label—in domestic discussions of affirmative action. I do not discount the value of a label, but I do wonder whether knowing much more about the Indian constitutional law of affirmative action would help United States constitutionalists develop an approach to affirmative action that takes the "creamy layer" idea into account in a productive way.[59]

Perhaps, then, we "let our minds be bold"[60] by studying comparative constitutional law simply because the subject has intrinsic intellectual interest, and because knowing more rather than less is generally a good thing. The instrumental value of learning comparative constitutional law may not be as large as some recent discussions suggest.[61]

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[59] The idea that affirmative action programs should be time-limited came up in the discussions within the Court when it was considering *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). *See* JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 487 (1994) (discussing Justice John Paul Stevens's suggestion during the Court's discussion of *Bakke* that "preferences might be acceptable as a temporary measure but not as a permanent solution," and that "perhaps . . . blacks would not need these special programs much longer."). Here too, there appears to have been no need to consult non-U.S. materials in order to come up with the idea of limiting the length of time in which affirmative action programs could operate.

[60] See *supra* note 5 and accompanying text.

[61] I include my original foray into the field in this category. Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L. J. 1225 (1999).