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Moving Away From a Strict Scrutiny Standard for Affirmative Action

Implications for Public Management

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This article addresses the concept of strict scrutiny, the burden of persuasion test used by the courts to determine the constitutionality of affirmative action. Through a systematic analysis of U.S. Supreme Court decisions, it illustrates that strict scrutiny has been applied in an inconsistent, arbitrary manner and, therefore, should not serve as the basis for judicial review of affirmative action programs. It shows that the rule of law established under the Civil Rights Act provides an equally if not more compelling basis for judging the legality of affirmative action programs. Relying on the legal standards advanced by the courts under civil rights statutes provides managers with greater flexibility in developing and implementing affirmative action programs. In effect, the ability of governments to promote diversity of their workforces is greatly enhanced.

Keywords: *affirmative action; strict scrutiny; equal protection; Gratz v. Bollinger; Grutter v. Bollinger*

Introduction

In June 2003, marking the 25th anniversary of its decision on affirmative action in *Regents of the University of California v. Bakke* (1978), the U.S. Supreme Court issued a landmark ruling upholding the use of affirmative action in admissions at the University of Michigan's Law School. In *Grutter v. Bollinger* (2003), the Court majority opined that the racial diversity of a study body can be a sufficiently compelling interest on the part of a state university to warrant the use of a race-conscious admissions program under the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. The Court applied the judicial test known as strict scrutiny, which asks whether the use or expression of racial classifications in public policies have a compelling government interest and are sufficiently narrowly tailored to achieve their stated purpose.

The concept of strict scrutiny, which has evolved haphazardly over time, is relied on to determine equal protection questions. It is the burden of persuasion test under which the constitutionality of affirmative action has been judged. As its name implies, it is an exacting test. In contrast, the application of statutory law—namely, Title VII of the Civil Rights

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Act of 1964, as amended—has produced a different, more malleable set of criteria for judging the legality of affirmative action.

Through a systematic analysis of U.S. Supreme Court decisions, this article illustrates that the concept of strict scrutiny has been applied in an inconsistent, arbitrary manner and, therefore, should not serve as the basis for judicial review of affirmative action programs. It shows that the rule of law established under the Civil Rights Act—which with its previous incarnations (i.e., the Civil Rights Acts of 1886 and 1871) was designed to enact the spirit of the constitutional mandate of equal protection—provides an equally if not more compelling basis for judging the legality of affirmative action programs. Relying on the legal standards advanced by the courts under civil rights statutes provides managers with greater flexibility in developing and implementing affirmative action programs. In effect, the ability of governments to promote diversity of their workforces is greatly enhanced.

Judicial Review Under Strict Scrutiny

As U.S. Supreme Court Justice Lewis Powell stated in *Owen v. City of Independence* (1980), “Constitutional law is what the courts say it is” (p. 669). The High Court creates standards for judicial review that are sometimes not even tied to its own precedents. Strict scrutiny is a legal standard created by the courts as the basis for review of cases brought under the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. Because the U.S. Constitution is the “supreme” law of the nation, the courts may apply higher standards in equal protection cases than in those based on statutory law. Civil rights laws, such as Title VII, are based on the Commerce Clause and apply to the private sector as well as to the public sector. In interpreting such statutes, the courts are apt to use the standard called for by Congress, adopted by the enforcement agency, or that which most appropriately reflects congressional intent. Challenges to private action can only be litigated under statutory law. In the interests of uniformity, the courts have applied the same terms and standards developed under statutes identically to the public and private sectors.

In challenges brought forth under the Equal Protection Clause to the Fourteenth Amendment, courts are called on to determine whether government actions that make distinctions among citizens on the basis of a “highly suspicious” or suspect classification,¹ or which otherwise interfere with a highly valued right, can be justified. Depending on the circumstances, there are a number of judicial tests that the courts have invoked. They include (a) rational basis scrutiny, (b) intermediate scrutiny, and (c) strict scrutiny. The rational basis analysis is the least exacting level of scrutiny, where courts must determine whether a government action that discriminates on the basis of a nonsuspect classification (e.g., age²) is rationally related to a legitimate government interest. If the court determines the existence of such a relationship, then the action is presumed constitutional. For example, homelessness is not a suspect classification warranting heightened scrutiny to ensure equal protection under the Fourteenth Amendment. In *Tobe v. Santa Ana* (1995), the California Supreme Court upheld a Santa Ana, California, ordinance prohibiting people from camping on the street. The ordinance was challenged as an equal protection violation insofar as it punished homeless people merely because of their status of being homeless. In applying the rational basis test, the

Tobe Court upheld the ordinance arguing that there was a rational relationship between the city's goal of maintaining its streets and its prohibition against camping in those streets.³

Judicial review based on intermediate scrutiny is applied when the government is accused of discriminating on the basis of certain important but not suspect classifications such as, according to the U.S. Supreme Court, gender,⁴ illegitimacy, and alienage.⁵ Under intermediate scrutiny, courts analyze whether a government action can be "substantially related" to a compelling government interest. For example, in *United States v. Virginia* (1996), a challenge was brought against the exclusionary male-only admissions policy of the Virginia Military Institute (VMI). The state of Virginia offered to create an all-female military institute and argued this dual arrangement would contribute to diversity. The U.S. Supreme Court first ruled that

parties who seek to defend gender-based government action must demonstrate an exceedingly persuasive justification for that action. . . . Neither federal nor state government acts compatibly with equal protection when a law or official policy denies to women, simply because they are women, full citizenship stature-equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities. To meet the burden of justification, a State must show at least that the [challenged] classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives. (*Virginia*, 1996, p. 515)

The Court also found that Virginia's fear that the admission of women would deteriorate the program is not rationally related to the successful admission of women to federal academies. The Court ordered VMI to open its doors to women.

Strict scrutiny, the most rigorous standard of judicial review, is applied when the government is accused of discriminating on the basis of certain suspect classifications, defined by the courts as race, religion, or national origin. Evolving over time, strict scrutiny is a two-pronged analysis, asking (a) whether there is a compelling government interest in the policy or program in question (e.g., to redress past discrimination) and (b) whether the program is sufficiently narrowly tailored to meet its specified goals (e.g., whether there are alternative programs that could be employed that do not classify people by, for instance, race). One of the earliest instances in which a form of strict scrutiny was applied is *Korematsu v. United States* (1944),⁶ which involved the government's establishment of Japanese internment camps during World War II. The Court was asked to address the constitutionality of the U.S. government's practice of summarily relocating citizens to detention camps solely on the basis of their race. At the outset, the Court stated that

it should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions. (*Korematsu*, 1944, p. 214)

Although "rigid scrutiny" had no specific contours at the time, the Court proceeded to weigh the abridgment of Japanese Americans' civil rights against the U.S. government's "need" for internment policies and actions. The Court ruled for the government as a matter of preserving national security during a time of war.

The Evolution of Strict Scrutiny as Applied to Affirmative Action Programs

In its first substantive ruling on affirmative action,⁷ *Regents of the University of California (UC) v. Bakke* (1978), the U.S. Supreme Court argued that the affirmative action program developed by the University of California (UC) Davis Medical School must be subjected to a strict scrutiny test because it relied on racial classifications. It may be recalled that the UC Davis program reserved 16 admissions slots out of 100 for students of color, specifically including “Blacks, Chicanos, Asians, and American Indians,” for the purposes of ameliorating discrimination against such groups and also increasing the pool of “minority doctors” who may ultimately practice in disadvantaged communities. However, the Court, after much rumination about the importance of strict scrutiny, applied an intermediate scrutiny test.

The Court’s plurality opinion⁸ in *Bakke* began by acknowledging that it had not yet offered a precise definition of strict scrutiny for application to affirmative action in equal protection cases.⁹ The Court stated that “because our prior cases are in many respects inapposite to that before us now, we find it necessary to define with precision the meaning of that inexact term, ‘strict scrutiny’” (*Bakke*, 1978, p. 357). Announcing the judgment of the Court, Justice Powell stated that “for purposes of the equal protection clause, racial and ethnic distinctions of any sort were inherently suspect and thus called for the most exacting judicial examination” (*Bakke*, 1978, p. 291).

The Court further stated that a rational basis analysis was neither appropriate nor rigorous enough for a race-conscious program. It argued that

the fact that this case does not fit neatly into our prior analytic framework for race cases does not mean that it should be analyzed by applying the very loose *rational-basis* [italics added] standard of review that is the very least that is always applied in equal protection cases. (*Bakke*, 1978, p. 358)

Notwithstanding, the Court then commenced to invoke the standards of intermediate scrutiny, an inchoate form, as noted earlier, of strict scrutiny. The *Bakke* Court stated that

a number of considerations—developed in gender-discrimination cases but which carry even more force when applied to racial classifications—lead us to conclude that racial classifications designed to further remedial purposes “must serve important governmental objectives and must be *substantially related* [emphasis added]¹⁰ to achievement of those objectives.” (*Bakke*, 1978, p. 359)

The Court, thus, strongly articulated the importance of applying strict scrutiny to affirmative action cases, but it did not expressly do so here. Nor did it offer a clear definition of strict scrutiny, despite having said that it would “define with precision the meaning of that inexact term, ‘strict scrutiny’” (*Bakke*, 1978, p. 357). In fact, the Court acknowledged its wide discretion in defining or applying strict scrutiny. The Court stated that “we do not pause to debate whether our cases establish a ‘two-tier’ analysis, a ‘sliding scale’ analysis, or something else altogether. It is enough for present purposes that strict scrutiny is applied at least in some cases” (*Bakke*, 1978, p. 357, n. 30).

Ultimately, the Court pieced together a judgment from six separate opinions that found that (a) race may be considered in admissions programs if it serves a compelling government

interest; (b) the UC Davis affirmative action program was unconstitutional because it relied on a numerical rating system (i.e., reserving 16 seats for students of color); and (c) Alan Bakke be admitted to the UC Davis Medical School.

The next instance in which the U.S. Supreme Court applied a level of scrutiny analysis to affirmative action was *Fullilove v. Klutznick* (1980). This case involved the constitutionality of a particular form of affirmative action program known as federal set-asides, which seek to earmark a portion of federal contracting dollars to businesses owned by women or people of color. These programs seek only to redress discrimination but also to “direct funds into the minority business community, a sector of the economy sorely in need of economic stimulus” (*Fullilove*, 1980, p. 459).

Fullilove involved a constitutional challenge to the “minority business enterprise” (MBE) component of the 1977 Public Works Employment Act. This provision required that at least 10% of federal funds disbursed under the Public Works Act be set aside for MBEs. In *Fullilove*, the Court held that the spending power granted to the U.S. Congress under Article I, Section 8, of the U.S. Constitution enabled Congress to establish set-aside programs *without* submitting them to a strict scrutiny analysis. The Court stated that

because the consideration of race is relevant to remedying the continuing effects of past racial discrimination, and because governmental programs employing racial classifications for remedial purposes can be crafted to avoid stigmatization, we [conclude] that such programs should not be subjected to conventional “strict scrutiny.” (*Fullilove*, 1980, p. 519)

In upholding the set-aside program under the equal protection principles embodied in the Due Process Clause of the Fifth Amendment, the Court instead applied a form of intermediate scrutiny because the program had been adopted or sanctioned by the U.S. Congress. The *Fullilove* Court did not insist on concrete proof of past discrimination against people of color, and as noted, it explicitly acknowledged the power of Congress to adopt affirmative action programs. The Court in *Fullilove* went on to say that it granted great “deference to the Congress, *a coequal branch* [emphasis added] charged by the Constitution with the power to ‘provide for the . . . general Welfare of the United States’” (1980, p. 472).

In applying an intermediate scrutiny analysis, the *Fullilove* Court began to more clearly articulate the parameters of strict scrutiny. It reinforced the requirement that a compelling government interest be demonstrated, but it went further to explicitly state that remedying past discrimination or the present effects of past discrimination would fulfill this provision of the strict scrutiny test (see *Fullilove*, 1980, p. 480). The Court then went on to say that “under strict scrutiny, the means chosen to accomplish the State’s asserted purpose must be specifically and narrowly framed to accomplish that purpose” (*Fullilove*, 1980, p. 480). The Court thus commenced to establish the second prong of the strict scrutiny test.

In 1986, the U.S. Supreme Court in *Wygant v. Jackson Board of Education* more precisely defined strict scrutiny and applied it to a layoff provision designed to maintain diversity in an academic setting. The Court stated that

there are two prongs to this examination. First, any racial classification “must be justified by a compelling governmental interest.” Second, the means chosen by the State to effectuate its purpose must be “narrowly tailored to the achievement of that goal.” (*Wygant*, 1986, p. 274)

The *Wygant* case involved a provision in a collective bargaining agreement between a teachers union and the Jackson, Michigan, Board of Education, which sought to protect faculty of color if layoffs were to occur. Specifically, it provided that, if it became necessary to layoff teachers, those with the most seniority would be retained unless it threatened to disrupt the racial balance of the faculty. Layoff decisions based on seniority tend to adversely affect women and people of color, as they are systematically the last to enter the workforce (see, e.g., Cayer, 2004). The use of affirmative action in layoffs is highly controversial because, as the *Wygant* Court argued, it places the responsibility for achieving racial equality or balance on a *specific* individual.

The school board in *Wygant* sought to justify the collectively bargained race-based layoff policy on the grounds that its goal was “to remedy societal discrimination by providing ‘role models’ for minority schoolchildren” (*Wygant*, 1986, p. 267). In applying the strict scrutiny test, the Supreme Court rejected this argument, stating that the Equal Protection Clause required, first, a showing of prior discrimination by the school board and, second, evidence that the program was narrowly tailored. The Court ruled that

societal discrimination alone is insufficient to justify a racial classification. Rather, there must be convincing evidence of prior discrimination by the governmental unit involved before allowing limited use of racial classifications to remedy such discrimination. The “role model” theory employed by the District Court would allow the Board to engage in discriminatory hiring and layoff practices long past the point required by any legitimate remedial purpose. . . . Societal discrimination, without more, is too amorphous a basis for finding race-conscious state action and for imposing a racially classified remedy. (*Wygant*, 1986, pp. 267-268)

The Court then addressed whether the layoff provision was narrowly tailored and, in so doing, added a new dimension or prong to the strict scrutiny test. Here, the Court asked whether there were alternative methods of maintaining a diverse workforce. It determined that affirmative action programs in hiring are a more effective, less intrusive means for the school board to accomplish its goal. It stated that

while hiring goals impose a diffuse burden, often foreclosing only one of several opportunities, layoffs impose the entire burden of achieving racial equality on particular individuals, often resulting in serious disruption of their lives. That burden is too intrusive. We therefore hold that, as a means of accomplishing purposes that otherwise may be legitimate, the Board’s layoff plan is not sufficiently narrowly tailored. Other less intrusive means of accomplishing similar purposes—such as the adoption of hiring goals—are available. (*Wygant*, 1986, pp. 283-284)

In sum, the *Wygant* Court provided more precise contours of strict scrutiny, which it would apply in subsequent cases. However, it would do so in an ad hoc, unsystematic manner, as it did, for example, a year later in its *United States v. Paradise* (1987) ruling. This case involved the constitutionality of a consent decree between a federal district court and the Alabama Department of Public Safety to promote African Americans to higher ranks on the state police force. The program specifically involved numerical goals of promoting one African American for every White. The Court loosely applied the two-pronged strict scrutiny test, and despite its ruling in *Bakke* on the use of a numerical rating system, the *Paradise*

Court upheld the affirmative action program under the Equal Protection Clause of the Fourteenth Amendment.

Interestingly, despite its previous rulings involving the application of strict scrutiny, the Court first argued that although a rigorous judicial review of race-conscious programs is necessary to pass constitutional muster, it has not yet reached full agreement on what level of review is necessary. It stated that “although this Court has consistently held that some elevated level of scrutiny is required when a racial or ethnic distinction is made for remedial purposes, it has yet to reach consensus on the appropriate constitutional analysis” (*Paradise*, 1987, p. 166). It then went on to say that “we need not do so in this case . . . because we conclude that the relief ordered survives even strict scrutiny analysis: it is ‘narrowly tailored’ to serve a ‘compelling [governmental] purpose’” (*Paradise*, 1987, pp. 166-167).

Yet the Court then went on to apply the strict scrutiny test. It found that “the Government unquestionably has a compelling interest in remedying past and present discrimination by a state actor,” and because the lower courts found systematic discrimination against African Americans in the public safety department for almost four decades, the program in question was justifiable (*Paradise*, 1987, p. 167). Importantly, however, the petitioner in this case, the U.S. government, which did not support the use of affirmative action, argued that, in light of *Wygant* (1986), promotion relief in the public safety department was unjustified because the department had been found to have committed discrimination in *hiring* only (see *Paradise*, 1987, p. 150).

In rejecting the petitioner’s claim, the Court ruled that the department’s

intentional hiring discrimination had a profound effect on the force’s upper ranks by precluding blacks from competing for promotions. Moreover, the record amply demonstrates that the Department’s promotional procedure is itself discriminatory, resulting in an upper rank structure that totally excludes blacks. (see *Paradise*, 1987, p. 150)

Thus, the Court made exceptions to its application of the first prong of the strict scrutiny test by *inferring* discrimination in promotions; actual evidence had not been demonstrated. The Court then relied on this disemboweled rendering of the first prong in applying the second prong of the strict scrutiny test. It ruled that the numerical, “one-black-for-one-white promotion requirement . . . is narrowly tailored to serve its purposes . . . [of] eliminate[ing] the effects of the Department’s long-term, open, and pervasive discrimination, including the absolute exclusion of blacks in the upper ranks” (see *Paradise*, 1987, p. 150).

In short, the *Paradise* Court expressed the importance of applying a strict scrutiny analysis, but it did not systematically apply it, thus leaving open a number of salient questions. For example, does the governmental unit that has developed an affirmative action program need to explicitly demonstrate prior discrimination? Or could it be inferred by the Court? If so, under what circumstances? Would numerical ranking or rating systems now be easier to justify? When is strict scrutiny relevant? The *Paradise* Court effectively created the opportunity for the ad hoc application of something called strict scrutiny: It would now be applied on a case-by-case basis.

Two years after *Paradise*, the Court again invoked strict scrutiny in its *City of Richmond v. Croson* (1989) decision. This case involved the constitutionality of a set-aside program. Based on its previous rulings, in particular in *Fullilove* (1980), it was anticipated that the program

in question would pass constitutional muster without submission to the strict scrutiny analysis. In *Croson*, a White-owned contracting firm challenged the constitutionality of the local government's set-aside program, which required city contractors to subcontract at least 30% of the dollar amount of their contracts to MBEs. The *Croson* Court determined that because the set-aside program in question was established by a *local* legislative body, and not the U.S. Congress, it *would* be subjected to the strict scrutiny analysis. The Court first stated that

the principal opinion in *Fullilove* . . . did not employ "strict scrutiny" or any other traditional standard of equal protection review. The Chief Justice noted at the outset that, although racial classifications call for close examination, the Court was at the same time, bound to approach [its] task with . . . deference to the Congress. (*Croson*, 1989, p. 487)

The Court rejected Richmond's rationale that "a city council, like Congress, need not make specific findings of discrimination to engage in race-conscious relief" and that it "would be a perversion of federalism to hold that the federal government has a compelling interest in remedying the effects of racial discrimination in its own public works program, but a city government does not" (*Croson*, 1989, p. 489). The Court reasoned that

what appellant ignores is that 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. (*Croson*, 1989, p. 490)

State and local governments, then, according to the Court, must justify their set-aside programs under a two-pronged strict scrutiny analysis. The Court first ruled that to justify a compelling government interest for a program that relies on racial classification, there must be a specific showing of past discrimination. Whereas the U.S. Congress can justify race-based remedial programs that seek to rectify past *societal* discrimination, the *Croson* Court stated that state and local governments did not have the constitutional authority to rely on the rationale of societal discrimination but instead must show prior discrimination by the government unit involved. The Court found that Richmond had "revealed no record of prior discrimination by the city in awarding public contracts" and thus ruled that the first prong of the strict scrutiny test had not been met (*Croson*, 1989, p. 485).

The *Croson* Court then proceeded to determine whether the set-aside program was sufficiently narrowly tailored to accomplish its remedial purpose. The Court ruled that the 30% set-aside was arrived at arbitrarily; it argued that the set-aside program, which was intended to compensate African American contractors for past discrimination, was overly and "haphazardly" inclusive of other racial groups. In an astonishing judgment, the Court ruled that

If a 30% set-aside was "narrowly tailored" to compensate black contractors for past discrimination, one may legitimately ask why they are forced to share this "remedial relief" with an Aleut citizen who moves to Richmond tomorrow? The gross overinclusiveness of Richmond's racial preference strongly impugns the city's claim of remedial motivation. (*Croson*, 1989, p. 506)

The *Croson* Court concluded that Richmond's plan did not satisfy the criteria of the strict scrutiny test, thus finding it unconstitutional under the Fourteenth Amendment's

Equal Protection Clause. The decision suggested that a very stringent set of criteria would now be applied in judging the constitutionality of set-asides at the state and local levels of government.

A year after *Croson*, the Court reiterated its position on the power of the U.S. Congress to adopt affirmative action programs in *Metro Broadcasting v. F.C.C.* (1990). This case involved a constitutional challenge to the policies of the Federal Communications Commission (FCC) in awarding licenses for new radio or television broadcast stations; because people of color were underrepresented, thereby leading to “insufficient broadcast diversity,” race was taken into account. In this case, the Court upheld a federal set-aside program seeking to increase the number of broadcast licenses awarded to people of color without, as in *Fullilove* (1980), applying the strict scrutiny test. In upholding the constitutionality of the FCC program under the equal protection provision of the Fifth Amendment, the Court (*Metro Broadcasting*, 1990, p. 548) ruled that it “need not apply strict scrutiny analysis [because] . . . FCC policies . . . bear the *imprimatur* of longstanding congressional support and direction” and the U.S. Congress approves and mandates such programs. The Court went on to say that “deference [is] appropriate in light of Congress’ *institutional competence* [italics added] as the national legislature” (*Metro Broadcasting*, 1990, p. 563).

In light of the *Fullilove* and *Metro Broadcasting* decisions, then, it seemed clear that the strict scrutiny test *would not be* applied to federal set-aside programs but that it would be applied, pursuant to *Croson*, to set-aside programs developed by state and local governments. The Court’s rationale was that the U.S. Congress had the constitutional authority to establish set-asides without submitting them to the same type of litmus test that governs state and local legislative bodies.

In a dramatic reversal of opinion, however, the Court shifted its position on the application of strict scrutiny to federal set-asides in 1995 with its *Adarand Constructors v. Peña, U.S. Secretary of Transportation* ruling. The *Adarand* decision insisted that federal set-asides be subjected to strict scrutiny and, in effect, overturned the *Fullilove* and *Metro Broadcasting* decisions.

In *Adarand* (1995), a White contractor challenged the constitutionality of a federal set-aside program when he lost his bid to a Latino-owned company for a subcontract to build guardrails on a federal highway in Colorado. The program provided primary contractors with bonuses if they subcontracted some of the work to MBEs. The White contractor, whose bid was lower than that of the Latino-owned firm, claimed that the program amounted to “reverse discrimination.”

The Court majority in *Adarand* issued a ruling that did not directly find the program to be unconstitutional but, rather, invoked the strict scrutiny criteria set forth in the *Croson* decision and applied them to the federal set-aside program in question. The plurality opinion in *Adarand*, which was written by Justice O’Connor and joined by Chief Justice Rehnquist and Justices Kennedy, Scalia, and Thomas, said that federal affirmative action programs, like state and local programs, are presumed unconstitutional, unless they can meet the standards of strict scrutiny. Quoting from its ruling in *Croson*, the Court said that

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. (*Adarand*, 1995, p. 2112)

It went on to say that “more than good motives should be required when government seeks to allocate its resources by way of an explicit racial classification system” (*Adarand*, 1995, p. 2112).

The *Adarand* decision overturned *Fullilove* and *Metro Broadcasting* by changing the standards for evaluating federal affirmative action programs under strict scrutiny. Presumably, then, with the *Adarand* ruling, the High Court no longer believes that the U.S. Congress is “a co-equal branch of the federal government” or that it has the “institutional competence” to enact affirmative action programs.

The *Grutter* and *Gratz* Rulings

In 2003, the U.S. Supreme Court issued two rulings on affirmative action programs at the University of Michigan. Strict scrutiny was applied in both cases; in one case, involving the Law School (*Grutter*), the Court upheld the use of affirmative action, but in the other case, which involved undergraduate admissions at the College of Literature, Sciences, and Art (*Gratz v. Bollinger*), the Court struck it down.

In *Grutter* (2003), the Court applied the strict scrutiny test in a way that was somewhat different from the way it had in its previous incarnations. For example, the Court was now willing to allow “diversity” to serve as a compelling government interest.¹¹ As will be discussed later, this is a critical part of ongoing affirmative action efforts not only at universities but in the workplace as well.

Interestingly enough, however, the Court did not make an actual determination as to whether diversity met the first prong of the strict scrutiny test; it rather deferred to the Law School’s “educational judgment.” The Court stated that it

defers to the Law School’s educational judgment that diversity is essential to its educational mission. The Court’s scrutiny of that interest is no less strict for taking into account complex educational judgments in an area that lies primarily within the university’s expertise. . . . Attaining a diverse student body is at the heart of the Law School’s proper institutional mission, and its “good faith” is “presumed” absent “a showing to the contrary.” (*Grutter*, 2003, p. 308)

The Court then went on to rule that the program was narrowly tailored. Here the Court stated that “the program is flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes race or ethnicity the defining feature of the application” (*Grutter*, 2003, p. 309). It also argued that the program considered all “pertinent elements” of an applicant and placed “them on the same footing for consideration, although not necessarily according them the same weight” (*Grutter*, 2003, p. 309). The Court appeared to apply the same logic to *Gratz v. Bollinger* (2003), yet it struck down the affirmative action program in undergraduate admissions.

The *Gratz* Court first ruled that diversity represents a compelling government interest, thus fulfilling the first prong of the strict scrutiny test. However, in applying the second prong of the strict scrutiny test, the Court found that the rating system employed, which granted points for a number of factors including “underrepresented” racial and ethnic status, was unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. Yet

similar to the Law School's program, the undergraduate admission program did not make race or ethnicity the "defining feature of the application," in that several other elements were considered, including residency in Michigan; residency in an underrepresented Michigan county; residency in an underrepresented state (with no states enumerated in this category); legacy; provost's discretion; socioeconomic disadvantage; male nursing applicants; and other elements unrelated to race or ethnicity. Moreover, much like the affirmative action program at the Law School, the undergraduate admission program considered various pertinent elements but did not "accord them the same weight," or in the case of *Gratz*. Notwithstanding, the Court ruled that the use of a numerical rating system would not pass constitutional muster under the second prong of the strict scrutiny test.

The point here is that strict scrutiny is again applied in a random, extemporized fashion. The Court continues to extol the virtues of strict scrutiny, yet it is ambivalent and capricious about its actual meaning and when it should be applied.

Jettisoning Strict Scrutiny

Perhaps one of the strongest arguments for abandoning the use of strict scrutiny comes from Justice Scalia in his dissenting opinion in the VMI case discussed earlier. In *United States v. Virginia* (1996), Justice Scalia supported VMI's policy of barring women from admission. His opinion ironically makes the case for developing alternative standards for judging the constitutionality of affirmative action. Scalia writes,

Our current equal-protection jurisprudence . . . regards this Court as free to evaluate everything under the sun by applying one of three tests: "rational basis" scrutiny, intermediate scrutiny, or strict scrutiny. These tests are no more scientific than their names suggest, and a further element of randomness is added by the fact that it is largely up to us which test will be applied in each case. . . . Strict scrutiny, we have said, is reserved for state "classifications based on race or national origin and classifications affecting fundamental rights." . . . It is my position that the term "fundamental rights" should be limited to "interests traditionally protected by our society," but the Court has not accepted that view, so that strict scrutiny will be applied to the deprivation of whatever sort of right we consider "fundamental." We have no established criterion for "intermediate scrutiny" either, but essentially apply it when it seems like a good idea to load the dice. . . . I have no problem with a system of abstract tests such as rational-basis, intermediate, and strict scrutiny (though I think we can do better than applying strict scrutiny and intermediate scrutiny whenever we feel like it). (*Virginia*, 1996, pp. 567-568)

Justice Ruth Bader Ginsburg, writing a dissenting opinion in *Gratz* (2003), in which she supported the numerically based affirmative action program, also called for an elimination of strict scrutiny. She argued that the Court applied strict scrutiny to all racial classifications, classifications that both exclude, as well as those that *include* people (see Aka, 2006). She stated that the Court's insistence on one uniform standard of review for all classifications

would have been fitting were our Nation free of the vestiges of rank discrimination long reinforced by law. . . . But we are not far distant from an overtly discriminatory past, and the effects of centuries of law-sanctioned inequality remain painfully evident in our communities and schools. (*Gratz*, 2003, p. 298)

Strict scrutiny is no more scrutable today than it was in 1944 when the U.S. Supreme Court laid out its seminal concerns for judging the legality of race-based classifications. A more cogent, systematic way of evaluating affirmative action programs can be seen in the High Court rulings on affirmative action under statutory law, namely, Title VII of the Civil Rights Act of 1964.¹²

Statutory Law and Classifications by Race, Ethnicity, and Gender

In 1979, a year after the *Bakke* ruling, the U.S. Supreme Court surprised policymakers and legal scholars when it upheld a voluntarily developed affirmative action program much like that of UC Davis' Medical School. In *United Steelworkers v. Weber* (1979), the Court was asked to review the legality of a collectively negotiated affirmative action plan under Title VII that prohibits discrimination on the basis of race, color, gender, religion, and national origin in employment. The program, designed to eliminate racial imbalances in the Kaiser Aluminum Chemical Corporation, reserved for African American employees 50% of the openings in in-house craft training programs until the percentage of African American craft workers in any given plant was commensurate with the percentage of African Americans in the local labor force where the plant was located. At the time, only 1.83% of the skilled craft workers at the Kaiser plant in Gramercy, Louisiana, were African American, even though the local workforce was comprised of approximately 39% African Americans.

During the plan's first year of operation, seven African American and six White craft trainees were selected from the production workforce, with the most senior African American trainee having less seniority than several White production workers whose bids for admission were rejected. Brian Weber, one of those rejected, filed a class-action suit, alleging that the affirmative action program discriminated against White employees in violation of Title VII. Without a good deal of fanfare, the U.S. Supreme Court ruled that "Title VII's prohibition . . . against racial discrimination does not condemn all private, voluntary, race-conscious affirmative action plans" (*Weber*, 1979, p. 194). Strict scrutiny was never invoked or mentioned in the case.

The Court's 5-2 decision seemed to turn on two interrelated factors: One, that a *private* not public sector employer was involved, and two, that the case was brought under Title VII, not the U.S. Constitution, which does not regulate private employment. The *Weber* Court opined that private employers are expected to develop affirmative action programs to rectify the egregious patterns of racial discrimination they engaged in historically. The Court reasoned that because private employers did not have legal mechanisms before 1964 to prohibit discrimination, private employers in the absence of legislation to the contrary are not prohibited from "supplying relief" through voluntarily developed affirmative action programs (*Weber*, 1979, p. 214). The inference, perverse as it may seem, is that public sector employers, because of various legal mechanisms (e.g., the Equal Protection Clause), did not historically engage in egregious patterns of discrimination.

Title VII, then, at least for private sector employers beginning in 1979 with *Weber*, permitted the use of voluntarily developed affirmative action programs to rectify past discrimination. Moreover, the Court did not insist on an actual showing of past discrimination;

instead, evidence of a racial imbalance was deemed sufficient in this case. The same standards of law would presumably apply to *private* institutions of higher education, because Title VI of the Civil Rights Act as amended covers public and private educational programs.

The Court's reasoning in *Weber* is notably paradoxical: First, as Rosenbloom (1979) argued long ago,

How can a government pursuing equal opportunity allow more forceful action in the private sector than it may take in its own employment practices? Indeed, throughout the history of equal employment opportunity programs the need for the government to set an example for the rest of the society has been evident. (p. 396)

Second, the Civil Rights Act of 1964 that was amended in 1972 to cover public employers is an extension of Reconstruction-era civil rights laws, namely, the Civil Rights Acts of 1886 and 1871. These laws were designed to enact the spirit of the constitutional mandate of equal treatment and equal protection. In addition, the laws, just as with the Thirteenth, Fourteenth, and Fifteenth Amendments, were explicitly intended to provide *not Whites* but African Americans with equal protection. In other words, as it has long been argued, the Constitution, as with civil rights laws, is not color-blind. The U.S. Supreme Court recognized this in a number of its decisions, including *Bakke*. Justice Blackmun argued that to treat people equally, the Court is sometimes compelled, legitimately, to treat persons differently. He wrote,

In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently. We cannot—we dare not—let the Equal Protection Clause perpetuate racial supremacy. (*Bakke*, 1978, p. 407)

More recently, Justice Ginsburg, dissenting with the majority in *Gratz* (2003), wrote that

the Constitution is both color blind and color conscious. To avoid conflict with the equal protection clause, a classification that denies a benefit, causes harm, or imposes a burden must not be based on race. In that sense, the Constitution is color blind. But the Constitution is color conscious to prevent discrimination being perpetuated and to undo the effects of past discrimination. . . . Contemporary human rights documents draw just this line; they distinguish between policies of oppression and measures designed to accelerate *de facto* equality. (*Gratz*, 2003, p. 302)

Furthermore, it should be noted that government laws and programs have historically gone beyond a strict interpretation of the Equal Protection Clause. As Aka (2006) points out, the U.S. government has always sponsored “color-conscious” relief programs for underrepresented groups, including, following the Civil War, the Freedmen’s Bureau, which provided education for newly freed slaves. Aka also points to the initiatives by various U.S. presidents beginning with Franklin D. Roosevelt, which built on the Unemployment Relief Act of 1933—“some of these relief initiatives, without question, served as an important prelude to present policies [such as] affirmative action” (Aka, 2006, p. 8).

Finally, the Court’s justification for private sector versus public sector relief in the form of affirmative action under Title VII was eviscerated by its 1987 decision *Johnson v. Santa Clara County Transportation Agency*, in which it upheld the use of a voluntarily developed

affirmative action program by a *public* sector employer; strict scrutiny was not applied, because the case turned on statutory, not constitutional, law. In *Johnson*, the county voluntarily developed an affirmative action plan for hiring and promoting women and people of color in traditionally segregated job classifications. The goal was to achieve statistical balance in these jobs. In particular, women had been significantly underrepresented in road dispatcher jobs, and so the county considered gender as one factor among others of qualified applicants.

In upholding the affirmative action plan, the Court ruled that

an employer seeking to justify the adoption of an affirmative action plan need not point to its own prior discriminatory practices, but need point only to a *conspicuous imbalance* [emphasis added] in traditionally segregated job categories. Voluntary employer action can play a crucial role in furthering Title VII's purpose of eliminating the effects of discrimination in the workplace, and Title VII should not be read to thwart such efforts. (*Johnson*, 1987, p. 617)

The *Johnson* Court concluded that "consideration of the sex of applicants for skilled craft jobs was justified by the existence of a 'manifest imbalance' that reflected underrepresentation of women in 'traditionally segregated job categories'" (*Johnson*, 1987, p. 617).

Thus, civil rights laws embody the spirit of constitutional mandates that seek to provide relief to persons who are victims of discrimination. Moreover, neither civil rights statutes nor the Constitution are color-blind. Both were intended to ensure that women and people of color would not only be free from discriminatory practices, but would also be represented throughout the workplace and institutions of higher education. As Justice Brennan wrote for the majority in *Bakke*, the Court cannot turn the "Equal Protection Clause . . . against those whom it was intended to set free, condemning them to a 'separate but equal status before the law, a status always separate but seldom equal'" (*Bakke*, 1978, pp. 326-327).

The *Johnson* Court readily legitimized the use of affirmative action in the public sector without submitting the program to a strict scrutiny analysis. Thus, the standards of law under Title VII, which are equally compelling, could be easily applied to cases brought under the Equal Protection Clause. Based on the analysis here, these standards would consider whether the affirmative action program was intended to

- a. rectify past or present discrimination (once the first prong of strict scrutiny);
- b. correct racial and/or gender imbalances (sometimes the first prong of strict scrutiny); or
- c. promote diversity (now the first prong of strict scrutiny).

Implications for Public Management and Policy

Changes to the political, social, and economic landscapes in the United States have called for the need to increase cultural diversity in the workplace as well as educational institutions. The demographic shifts in the population have been a major impetus for the push toward cultural diversity but more than demography, a plethora of studies and surveys point to the benefits of culturally diverse environments in the workforce and university settings. For example, the extensive body of literature on representative bureaucracy illustrates the importance of gender, racial, and ethnic diversity in government workforces (see Hindera, 1993; Keiser, Wilkins, Meier, & Holland, 2002; Meier, 1993; Meier & Bohte, 2001; Meier & Nigro, 1976;

Ricucci & Meyers, 2004; Ricucci & Saidel, 1997; Wilkins & Keiser, 2006). This literature shows that women and people of color in public bureaucracies push for public policies and programs on behalf of their counterparts outside as well as within the bureaucracy. As Keiser and colleagues (2002, p. 553) point out, a good deal of research “shows that minority bureaucrats frequently implement policies or use their discretion to reduce the disparate treatment minority clients have received historically from various public bureaucracies.” Similarly, in the policy arena of child support enforcement, Wilkins and Kaiser (2006) found that women bureaucrats can make a difference for public policies that favor women. Their research found “that increases in the number of female supervisors lead to greater child support enforcement in Missouri counties” (2006, p. 98).

In addition, a good deal of research points to the importance of diversity in educational institutions (see Astin, 1993; Gurin, Dey, Hurtado, & Gurin, 2002; Hurtado, Milem, Clayton-Pedersen, & Allen, 1998; Meier & Stewart, 1991, 1992). Chang and Astin (1997), for example, show that a diverse student body has a positive influence on institutional climate in terms of the following: overall college satisfaction; intellectual self-confidence; social self-confidence; student retention, commitment to multiculturalism, a greater emphasis by faculty on racial and gender issues in their research and in the classroom; and higher student enrollment in ethnic studies courses.

The U.S. Supreme Court majority also pointed to the benefits of diversity in its *Grutter* (2003) decision. The Court (2003, p. 308) emphasized the “substantial, important, and laudable educational benefits that diversity is designed to produce, including cross-racial understanding and the breaking down of racial stereotypes.” It went on to say that

diversity promotes learning outcomes and better prepares students for an increasingly diverse workforce, for society, and for the legal profession. Major American businesses have made clear that the skills needed in today’s increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints. High-ranking retired officers and civilian military leaders assert that a highly qualified, racially diverse officer corps is essential to national security. Moreover, because universities, and in particular, law schools, represent the training ground for a large number of the Nation’s leaders . . . the path to leadership must be visibly open to talented and qualified individuals of every race and ethnicity. (*Grutter*, 2003, p. 308)

To be sure, there continues to be some resistance around the use of affirmative action programs and policies in the workplace as well as public universities.¹³ However, it is exceedingly difficult to argue against the importance and value of cultural diversity; moreover, public and private employers and universities will continue to strive toward diversifying their environments. Reliance by the courts on strict scrutiny creates greater hurdles for public employers as well as public universities in implementing their affirmative action programs or policies that are aimed at *promoting diversity*. The question becomes, how can policymakers in educational or employment settings develop affirmative action policies that will meet the legal standards of strict scrutiny, when those standards are erratic and unreliable? As argued here, it is more logical and feasible to hold public employers and universities to the legal standards under Title VII, which have long been applied to the private sector. In so doing, diversity programs in *public* institutions would not be held hostage to or impeded by incoherent, unintelligible criteria such as strict scrutiny. If cultural diversity is indeed a

laudable goal for governments and public universities, then Title VII is the more viable instrument for assessing the legality of affirmative action programs.

The most effective way of moving away from a strict scrutiny standard toward a civil rights interpretation of affirmative action is to change the composition of the U.S. Supreme Court. This, of course is improbable; even if a Democrat wins the presidency in the 2008 elections, the retirement of any of the conservative justices is doubtful. If the lower courts begin to loosen the standards around the legal review of affirmative action under the Constitution, it is likely that some change can occur, provided the cases are not appealed to the Supreme Court. Given its current composition, the High Court is unlikely to sidestep strict scrutiny. This may be a viable strategy in that the Court has limited the overall number of cases it is willing to review each year (Schauer, 2006), and the Court issued two significant decisions around affirmative action in 2003. It is not implausible, then, that the High Court will not grant certiorari to appellate court decisions addressing affirmative action.

Perhaps there is an interim measure: To the extent that governments and public universities develop and implement “diversity” programs, the courts may begin to move away from the application of strict scrutiny. Affirmative action is and will always remain an important legal tool for redressing past discrimination and achieving gender and racial balance in the workplace and educational institutions. Emphasis on the broader concept of diversity or diversity management, however, is more behavioral, where the goal is to build specific skills in *all* workers and to create productive work environments with a diverse, rich mix of human resources. The approach is also aimed at changing organizational culture to accommodate diverse groups and foster the development of new ways of working together in a pluralistic environment (Gardenswartz & Rowe, 1993; Henderson, 1994; Riccucci, 2002).

In developing diversity programs, organizations can set goals, as they do with any other organizational function or policy, for achieving diversity. But they may need to avoid assigning points on the basis of such factors as race in accordance with the majority decision in *Gratz* (2003). Parenthetically, at least two justices writing for the minority in *Gratz*—Souter and Ginsberg—found the point system acceptable. In effect, commitment to the *goal* of affirmative action—diversity—remains in tact. The focus on cultural diversity as opposed to affirmative action, as noted earlier, is less contentious and, thus, more apt to limit resistance.

Conclusions

The constitutional litmus test for judging affirmative action is a failure—it gets an unequivocal “F.” It lacks reliability, validity, and hence legitimacy, characteristics that even the most basic civil service tests are required to demonstrate. Moreover, it becomes almost impossible for policymakers in educational or employment settings to develop affirmative action policies that will meet some rule of law, when those rules are hollow and inconstant. It must be questioned at this point in the history of affirmative action: why does the Court continue to wrestle with appropriate standards of review, when it will ultimately disregard those standards on a whim or apply them in an erratic, illogical manner? Perhaps strict scrutiny is simply one area where the Court will expressly continue to “legislate from the bench.”

As argued here, the framework advanced under Title VII is much less cryptic, arcane, and mercurial, and therefore, could be applied more broadly to all questions of law concerning affirmative action programs and policies. This will greatly facilitate the work of managers

and policymakers who are striving to create culturally diverse environments for public employees and students in public universities. As the composition of the Supreme Court has changed since the 2003 *Grutter* ruling, it becomes imperative for public administrators and policymakers to engage in a dialogue around the *irrelevance* of strict scrutiny.

Notes

1. According to the courts, a classification is considered suspect if it is based on a group's race, ethnicity, or religion; it has been referred to as the "discrete and insular minorities" standard, first addressed by the U.S. Supreme Court in *United States v. Carolene Products* (1938). In *Carolene Products*, the Court stated that

prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied on to protect minorities, and which may call for a correspondingly more searching judicial inquiry. (*United States v. Carolene Products* [1938], p. 155)

Carolene Products is generally taken as the inception of a theory of strict scrutiny as it applies to social groups.

2. Rational basis scrutiny applies to equal protection challenges to, for example, mandatory age-retirement statutes. In *Gregory v. Ashcroft* (1991), the plaintiffs—state judges—challenged the Missouri Constitution's mandatory retirement provision for judges at age 70. The U.S. Supreme Court applied rational basis scrutiny and found that the Missouri Constitution did not violate the Equal Protection Clause. The Supreme Court applied rational basis scrutiny because, according to the Court, age is not a suspect classification under the Equal Protection Clause and because candidacy for judicial office does not implicate any fundamental right.

3. It should be noted that in *San Antonio Independent School District v. Rodriguez* (1973), the school district challenged Texas' funding scheme for public elementary and secondary schools on the grounds that it violated the Fourteenth Amendment's Equal Protection Clause by failing to distribute funding equally among its school districts. The school district claimed that the financing scheme provided funding to the more affluent at the expense of the "poor." The federal district court applied the strict scrutiny test and struck down the funding scheme. The U.S. Supreme Court disagreed and refused to examine the system with strict scrutiny, because according to the Court, there is no fundamental right to education in the Constitution and the system did not systematically discriminate against all poor people in Texas. The Court ruled that the

Texas system does not disadvantage any suspect class. It has not been shown to discriminate against any definable class of "poor" people or to occasion discriminations depending on the relative wealth of the families in any district. And, insofar as the financing system disadvantages those who, disregarding their individual income characteristics, reside in comparatively poor school districts, the resulting class cannot be said to be suspect. (*Rodriguez*, 1973, p. 2)

4. Some have argued, including U.S. Supreme Court Justice Ruth Bader Ginsburg, that gender should be considered a suspect classification. Ginsburg, then an attorney, argued in *Craig v. Boren* (1976) that gender warranted a higher standard of review than rational basis and convinced the Supreme Court to move the level of scrutiny for gender classification to intermediate scrutiny. By 2003, as Supreme Court Justice, she supported eliminating strict scrutiny altogether in *Gratz*, as will be discussed later in the text. Also see "The ERA Campaigner," Issue 10, September 7, 2002, <http://eracampaignweb.kis-hosting.com/newsletter10.html>, date accessed September 25, 2006.

5. For example, in *Levy v. Louisiana* (1968), the U.S. Supreme Court held that a state statute that did not permit illegitimate children to sue for wrongful death was invidiously discriminatory because there was no link between the children's illegitimacy and the alleged wrong to their mother. In *Graham v. Richardson* (1971), the Court struck down state statutes denying welfare benefits to resident aliens and to aliens who had not resided in the state for 15 years (see *Report Under the International Covenant on Civil and Political Rights*, 1994).

6. Also see *Hirabayashi v. United States* (1943), which involved an executive order issued by President Franklin D. Roosevelt designating certain parts of the country "military areas" and excluded certain persons (namely, Japanese) from them. A second executive order established the War Relocation Authority that had the

power to remove, maintain, and supervise persons who were excluded from the military areas. Gordon Kiyoshi Hirabayashi, a student at the University of Washington, was convicted of violating a curfew and relocation order. The U.S. Supreme Court upheld the constitutionality of the executive orders under the Fifth Amendment to the U.S. Constitution. The High Court stated that

distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. For that reason, legislative classification or discrimination based on race alone has often been held to be a denial of equal protection. . . . We may assume that these considerations would be controlling here were it not for the fact that the danger of espionage and sabotage, in time of war and of threatened invasion, calls upon the military authorities to scrutinize every relevant fact bearing on the loyalty of populations in the danger areas. (*Hirabayashi*, 1943, p. 100)

7. The U.S. Supreme Court addressed affirmative action in its *DeFunis v. Odegaard* (1974) decision, but it did not issue a substantive ruling. Also see *Morton v. Mancari* (1974), which involved the constitutionality of a system of “Indian preference” in the Bureau of Indian Affairs. The Court justified the program on the grounds that the circumstances of American Indians are unique, given that they belong to “quasi-sovereign tribal entities.”

8. Although the *Bakke* case was decided in favor of Alan Bakke in a close 5-4 decision, there was no agreement by a majority of the Justices on such matters as whether the use of numerical set-asides—erroneously referred to as quotas—based on race violated the Constitution.

9. Although the *Bakke* case also involved a challenge under Title VI of the Civil Rights Act of 1964, the decision turned on the constitutionality of the affirmative action program under the Fourteenth Amendment to the U.S. Constitution.

10. Quoting *Craig v. Boren* (1976, p. 197, n. 35). Also see, *Califano v. Webster* (1977, p. 317).

11. But see *Bakke* (1978, p. 267).

12. Title VI of the Civil Rights Act, which covers educational programs, is also implied in this analysis. It should be noted that even though earlier decisions involving affirmative action in university admissions were generally filed under both the Equal Protection Clause and Title VI, the U.S. Supreme Court either judged the constitutionality of affirmative action exclusively under the Equal Protection Clause (e.g., *Bakke*), or it did not examine the legality of the programs under Title VI once it determined they passed the strict scrutiny test (e.g., See *Gruiter* [2003]: “Because the Law School’s use of race in admissions decisions is not prohibited by Equal Protection Clause, petitioner’s statutory claims based on Title VI and §1981 also fail,” p. 310).

13. One indication can be seen in the three states—California, Washington, and most recently Michigan—which have had successful voter initiatives to ban the use of affirmative action in public employment, public universities, and contracting.

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