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The Many Faces of Strict Scrutiny: How the Supreme Court Changes the Rules in Race Cases

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ARTICLES

THE MANY FACES OF STRICT SCRUTINY: HOW THE SUPREME COURT CHANGES THE RULES IN RACE CASES

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ABSTRACT

In this paper, we argue that there is no single test called strict scrutiny when the Court considers claims of racial discrimination. In fact, the Court changes the rules depending on why and how the government is using race. By examining racial redistricting, remedial affirmative action, and diversity-based affirmative action cases, we show how the Court uses at least three very different versions of strict scrutiny. The costs of maintaining the fiction of unitary strict scrutiny is high. In the area of racial profiling, for example, courts refuse to apply strict scrutiny for fear that it will either overly hamper police or will weaken strict scrutiny in other areas of racial discrimination. An open acknowledgment that the Court is already using different standards of analysis for different types of racial discrimination would allow courts to craft appropriate standards without fear of diminishing protections in other areas.

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INTRODUCTION

All students of American constitutional law learn of the three-tiered tests for alleged violations of the equal protection clause. Rational basis, heightened scrutiny, and strict scrutiny are embedded deeply in our understanding of how equal protection operates. For a law to pass the rational basis test, there must be a reasonable relationship between the law and a legitimate government purpose.[1] Heightened scrutiny, sometimes called "intermediate scrutiny," requires that a law demonstrate a substantial relationship to an important governmental purpose.[2] Strict scrutiny, the highest level of review, requires that a law be narrowly tailored to meet a compelling governmental interest.[3] When rational basis is applied, the law is almost certain to survive, while strict scrutiny is "strict in theory, fatal in fact."[4] These descriptions are nearly truisms in the field of constitutional law—most teachers can recite these principles in their sleep.

Most also recognize, however, that such descriptions greatly oversimplify what the Court actually does in equal protection cases. Cases such as *Romer v. Evans* and *Cleburne v. Cleburne Living Center*[5] appear on their face to apply rational basis, but offer a significantly more stringent test than typical rational basis analysis.[6] Heightened scrutiny was arguably revised by Justice Ginsburg in *United States v. Virginia*, to add the "exceedingly persuasive justification" language.[7] The notion that strict scrutiny is strict in theory, but fatal in fact was addressed by Justice O'Connor in *Adarand v. Pena*, where she indicated that strict scrutiny did not necessarily need to be fatal.[8] Consistent with this, Adam Winkler has conducted empirical research

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1. *See*, for example, Romer v. Evans, 517 U.S. 620 (1996).
2. *See*, for example, Craig v. Boren, 429 U.S. 190 (1976).
3. *See*, for example, Regents of the University of California v. Bakke, 438 U.S. 265 (1978).
4. This phrase originated in Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).
5. 473 U.S. 432 (1985).
6. William D. Araiza, *The Section 5 Power and the Rational Basis Standard of Equal Protection*, 79 TUL. L. REV. 519, 554 (2005) ("These problems suggest the difficulty the Court has had explaining its 'rational basis plus' cases. Indeed, Justice O'Connor was recently moved to acknowledge that cases such as *Cleburne* and *Romer* involved something more than traditional rational basis review, a suggestion the rest of the Court has not been willing to embrace, at least officially.").
7. 518 U.S. 515, 524 (1996).
8. 515 U.S. 200, 237 (1995).

demonstrating that in its application in federal courts, strict scrutiny is in fact, not so fatal.[9]

In this paper, we argue that in light of these claims, legal scholars need to fundamentally revisit the notion that strict scrutiny is an accurate description for what courts do when faced with racial discrimination by the government. In practice, the process is rarely as simple as looking for a compelling interest and then evaluating whether the law is narrowly tailored. While the language is the same, the meaning of strict scrutiny varies tremendously from subject area to subject area within equal protection jurisprudence. Strict scrutiny in the area of remedial affirmative action is not the same as strict scrutiny in diversity-based affirmative action. Likewise, strict scrutiny in racial redistricting differs from strict scrutiny in either type of affirmative action. Applying the same term to these disparate tests is misleading and prevents a clearer understanding of how courts treat equal protection claims. Further, we will show that it inhibits the courts from developing a coherent response to issues such as racial profiling by the government.

A simple example from another area of constitutional law should help clarify our point. The Supreme Court has often stated that violations of the First Amendment trigger strict scrutiny.[10] In the field of First Amendment litigation, restrictions on freedom of speech are not resolved by applying one test to all types of cases. The Court applies one test for advocacy of illegal action and another test for obscenity. While each test shares some similarities, the tests are conceptually and practically different. For example, "offensiveness" is a key component of the *Miller* test for obscenity, while the *Brandenberg* test for advocacy of illegal action self-consciously excludes any consideration of offensiveness: the Ku Klux Klan and Martin Luther King are treated the same.[11] We argue that an understanding of strict scrutiny in equal protection ought to be more similar to that in First Amendment analysis than is presently the case.

To develop our argument, we look at three different areas of equal protection law and explore how the Court actually scrutinizes race-conscious decision making in each area. Racial redistricting, remedial affirmative action, and diversity-based affirmative action cases have dominated the Court's

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9. Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793 (2006).

10. *See* Vieth v. Jubelirer, 541 U.S. 267, 294 (2004) (plurality opinion); Republican Party of Minn. v. White, 536 U.S. 765, 774 (2002); Turner Broad. Sys. v. FCC, 512 U.S. 622, 641–42 (1994).

11. Miller v. California, 413 U.S. 15, 24 (1973); Brandenburg v. Ohio, 395 U.S. 444 (1969).

jurisprudence on equal protection over the last two decades and provide a useful set of case law from which to examine strict scrutiny.[12] What we find is that while the language of "compelling governmental interest" and "narrowly tailored" is dutifully used in each case, the meaning and use of those terms varies enormously. The various equal protection tests labeled as strict scrutiny are as different from one another as the *Miller* test is from the *Brandenberg* test.

Our argument significantly furthers other recent research on equal protection. In the wake of the Court's reaffirmation that strict scrutiny is not necessarily fatal in *Grutter v. Bollinger*,[13] other scholars have identified what they term "contextual strict scrutiny."[14] This approach suggests that the strict scrutiny test is more than simply "compelling government interest" and "narrowly tailored." Contextual strict scrutiny means that the Court takes the context of the challenge into consideration in determining whether or not strict scrutiny is met. The authors of one article on contextual strict scrutiny identify four analytical inquiries in which the Court engages when applying strict scrutiny—(1) racial group history and current racial conditions; (2) the distinction between exclusionary and inclusionary policies; (3) whether the policy is motivated by prejudice or harmful group stereotypes; and (4) whether the range of realistic alternatives was considered.[15] While a useful beginning to understanding how strict scrutiny actually operates, this approach works overly hard to retain the notion that strict scrutiny is one uniform test. The sooner this notion is dispelled, the better. That is our goal.

Beginning with racial redistricting and then moving on to the two types of affirmative action, we will examine the case law for each subject area, focusing on three critical areas. The first is how the Court determines whether to apply strict scrutiny. The second is how the Court has interpreted the term "compelling governmental interest" in the context of that area of law. Finally, we will look at how "narrowly tailored" has been interpreted and applied. Through this careful review, we aim to demonstrate that strict scrutiny has many faces—the Supreme Court applies different rules depending on the circumstances in which race is used.

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12. While other issues, such as mandatory busing of students to achieve racial integration, were once major issues for the courts, they no longer represent a significant number of cases where the courts apply strict scrutiny. Winkler, *supra* note 9, at 833–34.

13. 539 U.S. 306 (2003).

14. Angelo N. Ancheta, *Contextual Strict Scrutiny and Race-Conscious Policy Making*, 36 LOY. U. CHI. L.J. 21 (2004); Eric K. Yamamoto, Carly Minner & Karen Winter, *Contextual Strict Scrutiny*, 49 HOW. L.J. 241 (2006).

15. Yamamoto et al., *supra* note 14, at 244.

I. RACIAL REDISTRICTING

The process of redistricting is a tremendously complex one, with various cross-cutting demands and goals. Maintaining roughly equal populations in districts and keeping political subdivisions together sit alongside the goals of incumbency protection and partisan electoral gain. Given the inherently political and partisan nature of the exercise of redistricting, federal courts long avoided addressing inequities and problems in its practice. By the 1960s, however, the Court ruled that such a position had become untenable and moved redistricting out of the nonjusticiable category of political questions.[16] *Reynolds v. Sims*, for example, required that each person's vote be counted roughly equal.[17] However, redistricting is an area where the Court has struggled in developing consistent standards. Issues such as the justiciability of partisan gerrymandering continue to divide the justices.[18]

Race, too, has a place in the calculations of State legislators when redistricting. The critical question is how much of a role it can legitimately play. That is the issue that has troubled the Court. As far back as *Gomillion v. Lightfoot*,[19] the Court has recognized that redistricting can be done in ways that harm racial minorities and violate the Constitution. The Court in *Gomillion* ruled that Tuskegee, Alabama could not redraw its city boundaries to exclude all of the African-American neighborhoods. Such explicit examples of racial segregation are, in a sense, the easy cases. Moving beyond clear attempts at exclusion, the picture becomes much murkier.

Legal challenges to race-based redistricting are comprised of a complex mixture of Fourteenth Amendment, Fifteenth Amendment, and Voting Rights Act (VRA) claims. *Gomillion* was a straightforward Fifteenth Amendment case. Cases such as *Johnson v. Grandy*[20] and *Holder v. Hall*[21] rely exclusively upon Section 2 of the VRA. Most of the Supreme Court's racial redistricting cases, however, have involved some combination of the Fourteenth Amendment and the VRA. In each case, the Court has considered whether strict scrutiny should apply, looked for a compelling government interest, and

16. Baker v. Carr, 369 U.S. 186, 208–36 (1962).

17. 377 U.S. 533, 564–68 (1964).

18. *See* Vieth v. Jubelirer, 541 U.S. 267 (2004); League of United Latin Am. Citizens v. Perry, 548 U.S. 399 (2006).

19. 365 U.S. 339 (1960).

20. 512 U.S. 997 (1994).

21. 512 U.S. 874 (1994).

then determined whether the law is narrowly tailored to meet those interests. While the language and process is consistent, our interest is in the meaning that the Court gives to each of those terms. In order to determine that, we will follow the flow of decision making through the different cases.

A. Should Strict Scrutiny Apply?

The first step for the Court, when faced with an equal protection challenge, is to determine what level of review should apply. Where there is a suspect classification, usually involving race, strict scrutiny is the appropriate test. In summarizing the case law in 1993, the Court stated that, "we have held that the Fourteenth Amendment requires State legislation that expressly distinguishes among citizens because of their race to be narrowly tailored to further a compelling governmental interest."[22] But does the Court actually apply strict scrutiny whenever race is a relevant criterion in government decision making? A close reading of the redistricting cases shows that the trigger for strict scrutiny is not so straightforward. If a legislature is "aware" of race in developing a redistricting plan, that alone is not suspect even though it involves a suspect classification.[23] In 1977, seven justices rejected appellants' contention that race could never legitimately be taken into account in redistricting and a majority held that even racial quotas in redistricting was acceptable. As Justice White wrote in his opinion for *United Jewish Organizations of Williamsburg v. Carey*,

> there is no doubt that in preparing the 1974 legislation, the State deliberately used race in a purposeful manner. But its plan represented no racial slur or stigma with respect to whites or any other race, and we discern no discrimination violative of the Fourteenth Amendment nor any abridgment of the right to vote on account of race within the meaning of the Fifteenth Amendment.[24]

A claim cannot exist except where a racial group's voting strength has been "invidiously minimized."[25] By 1977, the Court made it clear that redistricting laws involving race do not necessarily trigger strict scrutiny. It is not just that compliance with the VRA could satisfy strict scrutiny, but that strict scrutiny

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22. Shaw v. Reno, 509 U.S. 630, 643 (1993) [hereinafter *Shaw I*].

23. *See*, for example, Miller v. Johnson, 515 U.S. 900, 916 (1995) ("Redistricting legislatures will, for example, almost always be aware of racial demographics; but it does not follow that race predominates in the redistricting process.").

24. 430 U.S. 144, 165 (1977).

25. *Id.* at 167 (quoting Gaffney v. Cummings, 412 U.S. 735, 752 (1973)).

itself is not an appropriate standard in these cases. The scope of *United Jewish Organization*'s decision has been significantly narrowed in the intervening years, but as will be seen, the core holding that consideration of race does not automatically trigger strict scrutiny has been reaffirmed repeatedly by subsequent courts.

Major change in the Court's redistricting jurisprudence began with *Shaw I*, in 1993. In that case, the Court considered whether a North Carolina redistricting plan that established two majority-minority districts violated the Fourteenth Amendment. The Court acknowledged once again that "race-conscious redistricting is not always unconstitutional."[26] While deciding to apply strict scrutiny in the case, the Court held that such a test is appropriate when redistricting legislation "is so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting, *without regard for traditional districting principles* and without sufficiently compelling justification."[27] The italicized part of this passage is critical. Strict scrutiny is appropriate in racial redistricting cases not simply when race is expressly a factor in the decision making of legislators, but when they have *also* ignored traditional districting principles. In *Shaw I*, the Court placed great emphasis on the "bizarre" shape of the challenged districts as a reason for examining them more closely.[28]

The Court further emphasized the importance of the element of determining whether strict scrutiny should apply two years later in *Miller v. Johnson*.[29] Though accepting that strict scrutiny could apply to race-based redistricting, the Court qualified that ruling by noting "the distinction between being aware of racial considerations and being motivated by them."[30] Legislators can be "aware" of racial considerations and that would not trigger strict scrutiny. It is only when plaintiffs can show "that race was the *predominant* factor motivating the legislature's decision to place a significant number of voters within or without a particular district," that strict scrutiny applies.[31] The *Miller* Court continued,

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26. *Shaw I*, 509 U.S. at 642.
27. *Id.* (emphasis added).
28. *Id.* at 655–56.
29. 515 U.S. 900 (1995).
30. *Id.* at 916.
31. *Id.* (emphasis added). The Court's preference for this standard was reiterated in *Shaw v. Hunt*, 517 U.S. 899, 905 (1996) [hereinafter *Shaw II*]:

> While it would have been preferable for the court to have analyzed the case in terms of the standard laid down in *Miller*, that was not possible [because *Miller* was not decided yet when the District Court heard the case]. This circumstance has no consequence here because we think

> Race was, as the District Court found, the predominant, overriding factor explaining the General Assembly's decision to attach to the Eleventh District various appendages containing dense majority-black populations. *As a result*, Georgia's congressional redistricting plan cannot be upheld unless it satisfies strict scrutiny, our most rigorous and exacting standard of constitutional review.[32]

The Court acknowledges that race is almost always a factor in legislative redistricting—it simply cannot be the predominant factor. If it is, then strict scrutiny applies. As with *Shaw I*, considering race in redistricting is a necessary, but not sufficient factor to trigger strict scrutiny. There must also be either direct evidence of legislative discriminatory intent or a failure to follow traditional districting principles.[33] The Court reiterated this construction in two cases the following year. In *Shaw v. Hunt* (*Shaw II*), Chief Justice Rehnquist wrote that "the constitutional wrong occurs when race becomes the 'dominant and controlling' consideration"[34] and reemphasized the *Miller* holding that "strict scrutiny applies when race is the 'predominant' consideration in drawing the district lines such that 'the legislature subordinate[s] traditional race-neutral districting principles . . . to racial considerations.'"[35]

In summing up the recent case law in *Bush v. Vera*, the plurality opinion made it clear that "strict scrutiny does not apply merely because redistricting is performed with consciousness of race. Nor does it apply to all cases of intentional creation of majority-minority districts."[36] Later in the same opinion, the Court acknowledged that where "race was not the only factor . . . we must scrutinize each challenged district to determine whether the district court's conclusion that race predominated over legitimate districting considerations, including incumbency, can be sustained."[37] Justice O'Connor was even more explicit in her concurring opinion, stating that "so long as they do not subordinate traditional districting criteria to the use of race for its own sake or as a proxy, States may intentionally create majority-minority districts,

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that the District Court's findings, read in the light of the evidence that it had before it, comport with the *Miller* standard.

32. *Miller*, 515 U.S. at 920 (emphasis added) (citation omitted).

33. *Id.* at 916.

34. *Shaw II*, 517 U.S. at 905 (citing *Miller*, 515 U.S. at 911).

35. *Shaw II*, 517 U.S. at 907 (citing *Miller*, 515 U.S. at 916).

36. 517 U.S. 952, 958 (1996) (citation omitted). Justices Thomas and Scalia argued in a concurring opinion that strict scrutiny should apply whenever race is a consideration, but the combination of the plurality and the dissenting justices means that a strong majority of the Court do not accept that approach.

37. *Id.* at 965.

and may otherwise take race into consideration, without coming under strict scrutiny."[38]

One objection to this analysis that could be raised, is that the Court is simply engaging in semantic games, but in practice it overturns any redistricting where race is a consideration. The twin cases of *Hunt v. Cromartie* and *Easley v. Cromartie* serve to dispel this particular objection.[39] In 1999, a majority of Justices voted to overturn a summary judgment for the plaintiffs at the district court level over the same North Carolina redistricting at issue in *Shaw I* and *Shaw II*. A 1997 redistricting plan led plaintiffs to claim that the plan unconstitutionally considered race. The district court agreed and granted summary judgment to the plaintiffs. On appeal, all nine justices voted to reverse, holding that, while race may have been a consideration, there was not sufficient evidence in the record yet to conclude that it was the predominant consideration. Political considerations such as incumbent protection, partisan reliability, and the similarity of concerns between different urban areas were all alternative explanations. The opinion, consistent with the cases that came before, noted that "in this context, strict scrutiny applies if race was the 'predominant factor' motivating the legislature's districting decision."[40] By 2001, the case was back before the Supreme Court.[41] The district court had proceeded with trial and again concluded that the redistricting was unconstitutional. On review, a five-justice majority ruled that the plaintiffs were not successful in proving race was a predominant consideration rather than merely one consideration among many others. "The critical district court determination—the matter for which we remanded this litigation—consists of the finding that race *rather than* politics *predominantly* explains District 12's 1997 boundaries."[42] In this sequence of cases, the Court put into practice its language about the predominance standard and upheld a redistricting plan without applying strict scrutiny despite the role that race unquestionably played. An accurate description of the standard for strict scrutiny in racial redistricting cases, then, is that it is triggered where plaintiffs can prove that race was the predominant factor in legislative decision making. That stands in contrast to the notion in other areas of equal protection law that

38. *Id.* at 993.

39. 526 U.S. 541 (1999) [hereinafter *Cromartie I*]; 532 U.S. 234 (2001) [hereinafter *Cromartie II*].

40. *Cromartie I*, 526 U.S. at 547.

41. This was the fourth time North Carolina's redistricting plan was considered by the Supreme Court.

42. *Cromartie II*, 532 U.S. at 243.

strict scrutiny applies wherever there are laws that explicitly take race into account, even if done so in conjunction with other factors.[43]

B. Compelling Governmental Interest

Once strict scrutiny is triggered in racial redistricting cases, what constitutes a compelling governmental interest? The Court has hinted at what would satisfy that requirement, although it has hardly offered conclusive answers. In the racial redistricting cases from *Shaw I* on, the Court has identified three possible compelling governmental interests. The most commonly claimed governmental interest is compliance with Section 2 of the VRA. The Court has never clearly answered the question of whether compliance with Section 2 alone would be sufficient, despite hearing several cases directly on point. In *Miller v. Johnson*, the Court appeared to be skeptical, but then switched to statutory interpretation of the VRA, stating "compliance with federal antidiscrimination laws cannot justify race-based districting where the challenged district was not reasonably necessary under a constitutional reading and application of those laws."[44] In *Shaw II*, the Court again avoided addressing the issue by assuming *arguendo* that compliance was a compelling interest, then striking the redistricting plan down on the grounds that it was not narrowly tailored. One element of this claim that the Court does make clear, however, is that an order from the Justice Department to comply with Section 2 is not sufficient. In *Miller*, the majority ruled that "were we to accept the Justice Department's objection itself as a compelling interest adequate to insulate racial districting from constitutional review, we would be surrendering to the Executive Branch our role in enforcing the constitutional limits on race-based official action."[45] The Court reserves the right to interpret Section 2 definitively for itself.

The Court has acknowledged that undoing past discrimination can be a compelling interest.[46] However, it has established two caveats to this doctrine. First, "while the States and their subdivisions may take remedial action when they possess evidence of past or present discrimination, they must identify that discrimination, public or private, with some specificity before they may use

43. In *League of United Latin American Citizens*, 548 U.S. at 517, Justice Scalia sums up the Court's jurisprudence on this point: "[R]ace may be a motivation in redistricting as long as it is not the predominant one."

44. *Miller*, 515 U.S. at 921.

45. *Id.* at 922.

46. *See Shaw I*, 509 U.S. at 655.

race-conscious relief."[47] This means that efforts to resolve broad societal discrimination are not sufficient—there must be a specific cause. And secondly, "the institution that makes the racial distinction must have had a 'strong basis in evidence' to conclude that remedial action was necessary, '*before* it embarks on an affirmative-action program.'"[48] Even where discrimination can be identified, there must be separate evidence that such remedial action is not only desirable, but necessary. None of the racial redistricting cases have been found to meet these criteria, despite evidence of widespread racial discrimination in voting in the past. In fact, each case has come out of a State covered by the VRA and requiring preclearance from the Department of Justice. Nonetheless, that fact alone is not sufficient to establish a compelling governmental interest for the Court.

The final compelling governmental interest, claimed by States, is avoidance of retrogression in minority voting power under Section 5 of the VRA. Section 5 requires that there be no "retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise."[49] The Court has accepted that this is a compelling interest, but it again takes a narrow view of what constitutes retrogression. In *Shaw I*, the Court ruled that "[a] reapportionment plan would not be narrowly tailored to the goal of avoiding retrogression if the State went beyond what was reasonably necessary to avoid retrogression."[50] In *Bush v. Vera*, the Court clarified this position, noting that "nonretrogression is not a license for the State to do whatever it deems necessary to ensure continued electoral *success*; it merely mandates that the minority's *opportunity* to elect representatives of its choice not be diminished, directly or indirectly, by the State's actions."[51] In the fractured opinions of *League of United Latin American Citizens v. Perry*, seven justices did accept Texas' nonretrogression claim in defense of one of the districts that was created.[52] The majority opinion did not address the question because of the ruling on a Section 2 violation in another district,

47. *Shaw II*, 517 U.S. at 909 (quoting Richmond v. J.A. Croson Co., 488 U.S. 469, 504 (1989)).

48. *Id.* at 910 (quoting Wygant v. Jackson Board of Education, 476 U.S. 267, 277 (1986)).

49. *Miller*, 515 U.S. at 926 (quoting Beer v. United States, 425 U.S. 130, 141 (1976)).

50. *Shaw I*, 509 U.S. at 655.

51. 517 U.S. 952, 983 (1996).

52. 548 U.S. at 518 (Scalia, J., concurring and dissenting); 548 U.S. at 485 n.2 (Souter, J., concurring and dissenting). Justice Scalia, writing for Justices Thomas and Alito and Chief Justice Roberts, states: "We have in the past left undecided whether compliance with federal antidiscrimination laws can be a compelling State interest. I would hold that compliance with § 5 of the Voting Rights Act can be such an interest." Justice Souter, writing for Justice Ginsburg, notes: "Like Justice Stevens, I agree with Justice Scalia that compliance with § 5 is a compelling state interest."

which precluded directly addressing the retrogression issue.[53] Two concurring and one dissenting opinion, however, explicitly made the point. In all of the cases since *Shaw I*, this is the only one where a majority of Justices made it clear that a State met the compelling governmental interest standard.

C. Narrowly Tailored

The final inquiry in applying strict scrutiny is to determine whether the law is narrowly tailored to meet the compelling governmental interest identified. As the Court has acknowledged, it has been less than precise in explaining what "narrowly tailored" actually means.[54] In the area of redistricting, the Court provides the following guidance: "we have always expected that the legislative action would substantially address, if not achieve, the avowed purpose."[55] Such a standard could reasonably be assumed to apply to any equal protection challenge. In redistricting, however, the test is given a little more specificity. In *Shaw II*, the State alleged that the redistricting plan was narrowly tailored to meet the goal of avoiding Section 2 liability. After passage of the plan, the State was clearly not liable for violating Section 2.[56] For the majority, such an interpretation of the connection required was not sufficiently narrow. The district as drawn, could not remedy any potential Section 2 violation because "a plaintiff must show that the minority group is 'geographically compact' to establish Section 2 liability. No one looking at District 12 could reasonably suggest that the district contained a 'geographically compact' population of any race."[57]

In *Bush v. Vera*, however, the Court backed off from the strictest interpretation of its holding. The district court had required that in order for the law to be narrowly tailored, it "must have the least possible amount of irregularity in shape, making allowances for traditional districting criteria."[58] The majority rejected that standard and held instead that "[a] § 2 district that is *reasonably* compact and regular, taking into account traditional districting principles such as maintaining communities of interest and traditional boundaries, may pass strict scrutiny without having to defeat rival compact

53. *Id.* at 442.
54. *See Shaw II*, 517 U.S. at 915.
55. *Id.*
56. *See id.* at 946–47 (Stevens, J., dissenting).
57. *Id.* at 916.
58. Bush v. Vera, 517 U.S. at 977 (citation omitted).

districts designed by plaintiffs' experts in endless 'beauty contests.'"[59] However, the Court did not abandon its emphasis on geographical compactness. The Court reiterated its position that a redistricting plan is narrowly tailored only when a *reasonably compact* majority-minority district is created. "If, because of the dispersion of the minority population, a reasonably compact majority-minority district cannot be created, § 2 does not require a majority-minority district; if a reasonably compact district can be created, nothing in § 2 requires the race-based creation of a district that is far from compact."[60]

In his concurring in part and dissenting in part opinion in *League of United Latin American Citizens v. Perry* in 2006, Justice Scalia suggests a possible test for narrow tailoring in compliance with the VRA. In his interpretation, "a State cannot use racial considerations to achieve results beyond those that are required to comply with the statute."[61] Justice Scalia was joined by three other Justices, but a majority has not yet adopted this approach.[62] That leaves the requirements of narrow tailoring in redistricting still somewhat vague, but it is clear that geographic compactness of the minority population and resulting district is very important to pass strict scrutiny review.

D. Strict Scrutiny and Redistricting

Where does strict scrutiny stand in the area of redistricting? As detailed above, in order to trigger strict scrutiny, race must be the predominant factor in drawing district lines. Once strict scrutiny is identified as the appropriate test, the Court must determine whether there is a compelling governmental interest. Three possible interests have been identified, with varying success. Compliance with Section 2 of the VRA is possibly compelling on its own, but only within the narrow interpretation of the statute provided by the Court. Remedying past discrimination is a compelling governmental interest, but there must be an identification of specific discrimination in the past that the

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59. *Id.* at 977.

60. *Id.* at 979.

61. *League of United Latin American Citizens*, 548 U.S. at 519 (Scalia, J., concurring and dissenting). Justice Scalia's reasoning for adopting this particular language is surprisingly thin, though. The only citation is to a passage in *Miller* in which the Justice Department's demands of compliance with § 5 are deemed to not constitute a compelling interest because the demands exceed the requirements of the VRA. The passage does not involve the question of narrow tailoring at all.

62. As discussed above, the majority did not consider the equal protection claims against District 25 because it ordered District 23 to be redrawn, which would inevitably change District 25.

law is addressing and the remedy must be shown to be necessary. Finally, compliance with Section 5 of the VRA is a compelling governmental interest, but that compliance is only compelling when avoiding retrogression, not when trying to increase minority voting power. It is worth noting, however, that a finding of retrogression can rest solely on the effect of the redistricting rather than any evidence of discriminatory intent by the legislature.[63] The final step is to consider whether the redistricting plan is narrowly tailored. The only guidance the Court has provided in this regard is that a redistricting plan must be reasonably compact in order to qualify as narrowly tailored. In moving on to the affirmative action decisions, we will see that these tests are distinct from other meanings given to strict scrutiny and ought to be recognized as such.

II. REMEDIAL VS. DIVERSITY-BASED AFFIRMATIVE ACTION

Affirmative action is the most heavily litigated issue involving race and the Constitution. It has been the issue in the overwhelming majority of cases where federal courts have applied strict scrutiny to race-conscious action by the government, with race-conscious redistricting representing almost all the rest of such cases.[64]

Ostensibly, the courts subject affirmative action programs to the same constitutional test as racial redistricting: strict scrutiny. As we will see though, the constitutional test applied to affirmative action programs has little in common with the constitutional test applied to racial redistricting. We will also see that it is actually misleading to speak about the scrutiny applied to affirmative action as a single constitutional test. There are in fact, two kinds of affirmative action programs. What this article refers to as "remedial"

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63. § 5 of the Voting Rights Act of 1965 requires that covered States receive preclearance by establishing that a redistricting plan "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color . . . ." 42 U.S.C. § 1973c. In interpreting § 5, the Court has consistently looked to the effect of redistricting even in the absence of an inquiry into intent. *See, e.g.*, Beer v. United States, 425 U.S. 130, 141 (1976) ("In other words the purpose of § 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise."); Georgia v. Ashcroft, 539 U.S. 461, 471–72 (2003) (case that involved a redistricting plan supported by ten of eleven African-American state senators and thirty-three of thirty-four African-American state representatives. "Georgia, which bears the burden of proof in this action, attempted to prove that its Senate plan was not retrogressive either in intent *or* in effect." italics added); *League of United Latin American Citizens*, 126 S. Ct. at 2644 (affirmatively citing the interpretation of *Beer* and *Georgia*); and Riley v. Kennedy, 553 U.S. 406, 128 S. Ct. 1970, 1977 (2008) (affirmatively citing the standard from *Beer*).

64. Winkler, *supra* note 9, at 833–34.

affirmative action programs are designed to compensate for direct or indirect governmental discrimination, while "diversity-based" affirmative action programs are designed to promote a diverse dialogue, usually in educational institutions.[65] The constitutional tests applied to these two separate types of affirmative action programs are very different from one another and both tests are quite different from the test applied to racial redistricting. In sum, rather than there being a unitary strict scrutiny test applied to racial classifications, there are several distinct tests with more differences than commonalities.

The next section will lay out strict scrutiny as applied to remedial affirmative action and contrast it with the form of strict scrutiny used in racial redistricting. The section after that will lay out strict scrutiny as applied to diversity-based affirmative action and contrast it with the other two types of strict scrutiny.

III. REMEDIAL AFFIRMATIVE ACTION

The Supreme Court first upheld a remedial action plan in a 1986 decision, *Local 28 of the Sheet Metal Workers' International Association v. EEOC*,[66] and again in 1987 in *United States v. Paradise*.[67] Both cases involved egregious, long term job discrimination against African Americans and in both cases the petitioners repeatedly resisted court orders designed to remedy the discrimination. For example, in *Local 28* the union suspended court ordered job searches, made only "token efforts" to hire minorities, and disregarded selection tests in which minorities did well based upon their assertion that the minority candidates received "unfair tutoring."[68] In *Paradise*, the Court found "unexplained and unexplainable" the fact that the Alabama Department of Public Safety had failed to hire even a single African-American trooper in its thirty-seven year history.[69]

Federal courts responded by imposing stringent affirmative action requirements on both Local 28 and the Alabama Department of Public Safety. In *Local 28*, the district court upheld a 29% nonwhite membership goal, and other measures such as maintaining separate detailed membership records for

65. *See*, respectively, City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); Regents of the University of California v. Bakke, 438 U.S. 265 (1978).

66. 478 U.S. 421 (1986).

67. 480 U.S. 149 (1987).

68. 478 U.S. at 428.

69. 480 U.S. at 154.

blacks and whites, as well as engaging in extensive recruitment of minorities.[70] The goal was later made even more precise when the order was modified to require a goal of 29.23% non-white membership.[71] In the *Paradise* case, the district court "issued an order (1972 order) enjoining the Department to hire one black trooper for each white trooper hired until blacks constituted approximately 25% of the state trooper force."[72]

Applying strict scrutiny, the Supreme Court upheld both of these orders. However, while doing so, it laid out a form of scrutiny that is, by far, the most genuinely strict of any such test. As we will see in the next section, the standards set out by the Court are so strict that if they were applied to diversity-based affirmative action, such as the University of Michigan Law School plan upheld by the Court in *Grutter v. Bollinger*,[73] this form of scrutiny would indeed be "strict in theory and fatal in fact."

The Supreme Court has consistently held that the "Government unquestionably has a compelling interest in remedying past and present discrimination" that is practiced directly by the government.[74] This compelling interest also extends to rectifying indirect discrimination by the government. An example is where the government has become a "passive participant" in racial exclusion by granting contracts to general contractors who use that money to discriminate against minority subcontractors.[75] As we will see though, the Court not only requires a convincing showing that such discrimination has occurred, but it also demands clear evidence that the discrimination was purposeful and that a race-conscious remedy is needed to correct it.

The greater rigor of the strict scrutiny test in this area is manifest in every aspect. The Court is quicker to apply strict scrutiny to affirmative action than it is to racial redistricting and it requires stronger evidence that a compelling interest exists for race-conscious remedies. The greater strictness is also evident when the Court explains how it determines whether an affirmative action plan is narrowly tailored:

> In determining whether race-conscious remedies are appropriate, we look to several factors, including the necessity for the relief and the efficacy of alternative remedies; the flexibility and duration of the relief, including the availability of waiver

70. 478 U.S. at 432.
71. *Id.* at 421.
72. 480 U.S. at 154–55.
73. 539 U.S. 306 (2003).
74. *Paradise*, 480 U.S. at 167.
75. *Croson*, 488 U.S. at 492–93.

> provisions; the relationship of the numerical goals to the relevant labor market; and the impact of the relief on the rights of third parties.[76]

As will be explained below, the Court strictly enforces all of these elements.

The affirmative action plans in *Local 28* and *Paradise* survived strict scrutiny due in large part, to the longstanding and egregious conduct of the petitioners in those cases, and also due to the very limited duration and limited burden on third parties of the race-conscious measures. However, subsequent cases have demonstrated just how high a bar the Court has set for remedial affirmative action programs and how different the strict scrutiny in these cases is from the scrutiny applied in racial redistricting cases.

A. Should Strict Scrutiny Apply?

The Supreme Court is much quicker to apply strict scrutiny to affirmative action cases than it is to racial redistricting cases. Recall that in the districting cases, the Court repeatedly held that since some use of race is inevitable it will only apply strict scrutiny when race is the *predominant* factor in district line drawing. By contrast, in remedial affirmative action cases, the Court has held that it will apply strict scrutiny to *all* cases where *any* racial classification is used by the government. In the 1989 case *City of Richmond v. Croson*, the Court reviewed a remedial affirmative action program that "required prime contractors to whom the city awarded construction contracts to subcontract at least 30% of the dollar amount of the contract to one or more Minority Business Enterprises (MBE's)."[77] In applying strict scrutiny, the Court made clear that the issue was not whether the use of race was predominant. As the Court later described the case; "[w]ith *Croson* the Court finally agreed that the Fourteenth Amendment requires strict scrutiny of *all* race-based action by state and local governments."[78] The only caveat was that there was still a question about whether federal, affirmative action programs, as opposed to State and local programs, were subject to the same stringent rule. This question was answered six years later, in *Adarand Constructors v. Pena*.[79] In reviewing a federal remedial affirmative action program, the Court held that "any person, of whatever race, has the right to demand that *any* government actor subject to the Constitution justify *any* racial classification subjecting that

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76. *Paradise*, 480 U.S. at 171 (citing *Local 28*, 478 U.S. at 481).
77. 488 U.S. at 477.
78. *Adarand Constructors*, 515 U.S. at 222 (emphasis added).
79. *Id.* at 200.

person to unequal treatment under the strictest judicial scrutiny."[80] Thus, in contrast to the redistricting cases, the Court has never declined to apply strict scrutiny on the basis that the use of race in a remedial affirmative action plan was not "predominant."

B. Compelling Governmental Interest

Not only is the Court quicker to apply strict scrutiny to remedial affirmative action cases, but it also much stricter in determining whether there is a compelling government interest. Recall that in racial districting cases, there are three possible compelling interests: compliance with Section 2 of the VRA, remedying intentional discrimination, and avoiding retrogression of minority voting power. While the Court's treatment of intentional discrimination is the same in both redistricting and remedial affirmative action cases, there is a major difference overall. Completely apart from remedying intentional discrimination, in the redistricting cases, the Court has held that there is a compelling government interest in avoiding minority retrogression, especially if such retrogression would run afoul of the Voting Rights Act. Proving that a particular redistricting plan would weaken existing minority voting power, i.e., produce fewer districts with a majority of minority voters, is relatively simple because there is no requirement that the retrogression be intentional. For example, race-conscious districting is permissible, in fact it may be required under Section 5 of the Voting Rights Act, if an annexation by a city reduces the proportion of majority minority districts, even if that outcome is unintentional.[81] Since it is far easier to prove objective impact than it is to prove subjective intent, it is not surprising that seven justices were willing to acknowledge avoiding retrogression as a compelling government interest.[82]

In contrast, the Court is adamant that there is no compelling interest in having a remedial affirmative action plan without proof of intentional discrimination by the government or by general contractors using government

80. *Id.* at 224 (emphasis added).

81. *See* United Jewish Org. v. Carey, 430 U.S. 144, 160 (1977) (citing Richmond v. United States, 422 U.S. 358, 370–71 (1975)) ("The Court has taken a similar approach in applying § 5 to the extension of city boundaries through annexation. Where the annexation has the effect of reducing the percentage of blacks in the city, the proscribed 'effect' on voting rights can be avoided by a post-annexation districting plan which 'fairly reflects the strength of the Negro community as it exists after the annexation' and which 'would afford [it] representation reasonably equivalent to [its] political strength in the enlarged community.'").

82. *League of United Latin Am. Citizens*, 548 U.S. at 485 n.2, 517.

money. In this area, there is no such thing as a compelling governmental interest based solely upon adverse impact on racial minorities. In *Croson*, defenders of the remedial action plan had strong evidence that minorities were vastly underrepresented in terms of receiving government construction contracts. As the *Croson* Court noted,

> Proponents of the set-aside provision relied on a study which indicated that, while the general population of Richmond was 50% black, only 0.67% of the city's prime construction contracts had been awarded to minority businesses in the 5-year period from 1978 to 1983. It was also established that a variety of contractors' associations, whose representatives appeared in opposition to the ordinance, had virtually no minority businesses within their membership.[83]

This was not sufficient to establish a compelling governmental interest in creating the affirmative action program because the exclusion of minorities was not proven to be intentional. The Court found that, "[t]here was no direct evidence of race discrimination on the part of the city in letting contracts or any evidence that the city's prime contractors had discriminated against minority-owned subcontractors."[84]

The difference between these two approaches, as to whether an adverse impact on minorities must be intentional, is extremely significant. While impact is relatively simple to demonstrate, proving a subjective desire to discriminate is usually very difficult.[85] Since the Court has held that preventing retrogression of minority voting power is a compelling interest in racial districting cases, regardless of whether the retrogression is intentional, the scrutiny in remedial affirmative action cases can be understood as clearly more demanding in this regard than in the racial redistricting cases. For example, if a town implemented a new rule that government contracts would only be awarded to locally owned businesses, even if that had a significant but unintended negative impact on minority participation, there is nothing in the Court's jurisprudence to indicate that avoiding such an impact would be a compelling governmental interest. In contrast, as noted earlier, if a town annexed a new property, avoiding any inadvertent retrogression of minority voting power would indeed be a compelling interest.

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83. 488 U.S. at 479–80.

84. *Id.* at 480.

85. *See generally* DANIEL A. FARBER & PHILLIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION 89–95 (1991) (explaining the difficulty of proving the subjective intention of any legislative body).

C. Narrowly Tailored?

Another important difference between these two types of strict scrutiny is the level of evidence the Court requires to justify race-based action in the particular case before it. In a remedial affirmative action case, even if there is a credible allegation of intentional discrimination, the Court demands that the government prove that a race-based plan is necessary to address the effects of that discrimination. In *Croson*, not only had the City found that African Americans were underrepresented in the local construction industry, but also, that "Congress made a determination that the effects of past discrimination had stifled minority participation in the construction industry nationally."[86] Nonetheless, the Court held that: "None of these 'findings,' singly or together, provide the city of Richmond with a 'strong basis in evidence for its conclusion that remedial action was necessary' . . . . Racial classifications are suspect, and that means that simple legislative assurances of good intention cannot suffice."[87] The Court specifically pointed out that, "[t]here does not appear to have been any consideration of the use of race-neutral means to increase minority participation in City contracting." Similarly, in the 1986 case, *Wygant v. Jackson Board of Education*, the Supreme Court struck down a remedial affirmative action plan, holding that the government had not shown that a race-based plan was necessary:

> Evidentiary support for the conclusion that remedial action is warranted becomes crucial when the remedial program is challenged in court by non-minority employees . . . unless such a determination is made, an appellate court reviewing a challenge by nonminority employees to remedial action cannot determine whether the race-based action is justified as a remedy for prior discrimination.[88]

In contrast, there is no requirement that the State consider race-neutral approaches to avoiding retrogression of minority voting power. As shown above, if race-blind line drawing would weaken minority voting power by reducing the number of minority-majority districts, then the Court assumes that race-conscious line drawing is constitutional as long as the plan is narrowly tailored to avoid retrogression of minority voting power. There are of course other measures, such as using cumulative voting and single transferable vote systems, which are race-neutral and are believed by many

86. 488 U.S. at 499.
87. *Id.* at 500 (quoting Wygant v. Jackson Board of Education, 476 U.S. 267, 277 (1986)).
88. 476 U.S. at 277–78.

political scientists to prevent minority vote dilution.[89] In sharp contrast though, strict scrutiny in districting cases does not require a "strong basis in evidence" that a race-conscious remedy is a necessity to avoid retrogression.

Another stark difference between the two strict scrutiny tests is their approach to durational limits. When the Court has looked at whether race-conscious remedial affirmative action programs are "narrowly tailored," it has repeatedly emphasized that such programs must be as temporary as possible. There is no equivalent requirement in the redistricting version of strict scrutiny.

Even in cases where the government's racial discrimination has been severe and direct, the Court has emphasized the requirement that remedial affirmative action plans be temporary. In *Paradise*, the Supreme Court upheld the lower court's remedial order, stating:

> Finally, the Department was ordered to submit within 30 days a schedule for the development of promotion procedures for all ranks above the entry level. The schedule was to be "based upon realistic expectations" as the court intended that "the use of the quotas . . . be a one-time occurrence." The District Court reasoned that, under the order it had entered, the Department had "the prerogative to end the promotional quotas at any time, simply by developing acceptable promotion procedures."[90]

Similarly, in *Local 28*, another case with proven, egregious governmental discrimination, the Court emphasized that race-based programs, even goals, as opposed to quotas, are to be temporary: "Finally, a district court may find it necessary to order interim hiring or promotional goals pending the development of nondiscriminatory hiring or promotion procedures."[91] In other cases, the Supreme Court has rejected affirmative action programs that were justified as promoting a diverse set of role models because such reasoning "could be used to 'justify' race-based decision making essentially limitless in

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89. *See, e.g.*, George H. Hallett, Jr., *Proportional Representation with the Single Transferable Vote: A Basic Requirement for Legislative Elections*, *in* CHOOSING AN ELECTORAL SYSTEM: ISSUES AND ALTERNATIVES 113, 117–24 (Arend Lijphart & Bernard Grofman eds., 1984); Richard L. Engstrom et al., *Cumulative Voting as a Remedy for Minority Vote Dilution: The Case of Alamogordo, New Mexico*, 5 J.L. & POL. 469, 477 (1989); Richard L. Engstrom, *The Single Transferable Vote: An Alternative Remedy for Minority Vote Dilution*, 27 U.S.F. L. REV. 779, 807 (1993) ("[Single transferable voting] will not only provide an electorally cohesive minority with opportunities to elect candidates of its choice comparable to [cumulative and limited voting] systems, it will also accommodate electoral competition within the minority.").

90. United States v. Paradise, 480 U.S. 149, 164 (1987).

91. Local 28 of the Sheet Metal Workers Int'l Ass'n v. EEOC, 478 U.S. 421, 450 (1986).

scope and [the] duration" would be "timeless in their ability to affect the future."[92]

This concern, that race-conscious remedies be temporary, is utterly lacking from the racial redistricting cases. There is no hint that a policy of race-conscious line drawing must be limited in duration in order to be narrowly tailored. It is true that States redistrict every ten years, but there is no requirement, for example, that during redistricting, the government review whether there is still sufficiently prevalent racial bloc voting to make race-conscious line drawing still necessary.

Finally, the two forms of strict scrutiny are quite different in terms of how they balance burdens on minorities and non-minorities. As noted earlier, when the Court determines if a remedial affirmative action plan is narrowly tailored, it explicitly takes into account "the impact of the relief on the rights of third parties."[93] This balancing of interests was a crucial factor in *Wygant*, where the Court struck down a remedial affirmative action plan that would have resulted in the school board laying off senior non-minority teachers while retaining less senior minority teachers. The decision relied largely upon the fact that layoffs imposed too great a burden upon the non-minority teachers:

> 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. For these reasons, the Board's selection of layoffs as the means to accomplish even a valid purpose cannot satisfy the demands of the Equal Protection Clause.[94]

Crucially, the Court made clear that it was weighing the burden on the individual non-minority teachers, not the burden on whites as a group. The Board of Education had argued that since the predominantly white union had approved the plan, the laid off teachers had effectively waived their right to argue that race-conscious layoffs violated their right to equal protection. The Court rejected this argument, emphasizing that the issue is not how a plan affects whites, or any other race as a group, but how it affects the particular individuals in question:

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92. Respectively, *Croson*, 488 U.S. at 498; *Wygant*, 476 U.S. at 276.
93. *Paradise*, 480 U.S. at 171.
94. *Wygant*, 476 U.S. at 283–84.

> Of course, when a State implements a race-based plan that requires such a sharing of the burden, it cannot justify the discriminatory effect on some individuals because other individuals had approved the plan. Any "waiver" of the right not to be dealt with by the government on the basis of one's race must be made by those affected. Yet Justice Marshall repeatedly contends that the fact that Article XII was approved by a majority vote of the Union somehow validates this plan. He sees this case not in terms of individual constitutional rights, but as an allocation of burdens "between two racial groups." *Post*, at 309. Thus, Article XII becomes a political compromise that "avoided placing the entire burden of layoffs on either the white teachers as a group or the minority teachers as a group." *Post*, at 299. But the petitioners before us today are not "the white teachers as a group." They are Wendy Wygant and other individuals who claim that they were fired from their jobs because of their race.[95]

Thus, there is a significant difference between these two types of strict scrutiny when it comes to evaluating the burden on non-minority plaintiffs. For racial redistricting, the Court focuses on the burden on whites as a whole, and looks for evidence of group harm. For remedial affirmative action, the Court focuses on the burden of the individual plaintiffs. For whites who see themselves as marginalized by other whites as a result of such factors as a lack of seniority or membership in a minority religion, this is a major difference.

To be sure, none of this means that scrutiny in racial redistricting cases is always less strict than scrutiny in remedial affirmative action cases. The "narrow tailoring" element can be quite strict in redistricting cases. As noted earlier, the Court has repeatedly rejected redistricting plans because they violated tradition districting principles and/or were not reasonably compact or regular. However, once again we see how different these two forms of strict scrutiny are. The narrow tailoring elements of redistricting—compactness, regularity, and traditional districting principles—are completely irrelevant to remedial affirmative action programs. Thus, the two tests for "narrow tailoring" have little overlap or commonality.

D. Remedial Affirmative Action and Strict Scrutiny

In sum, these two "strict scrutiny" tests applied by the Court, while sharing a few common features, have far more differences than similarities. The only way to say that the constitutional tests in both racial redistricting and remedial affirmative action are the same would be to describe the tests at the most general and abstract level. In both types of cases the Court has to decide if it is going to apply a more rigorous test to a challenged government action;

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95. *Id.* at 281 n.8.

in both cases, the Court identifies something that it calls a compelling governmental interest; in both types of cases, the Court uses a set of factors that ostensibly test whether the program is narrowly tailored.

However, once we look at the substance of the two types of strict scrutiny, it is evident that they are not the same test at all, and in fact, differ in most major respects. As we have seen:

—any use of race in a remedial affirmative action program triggers an enhanced form of scrutiny, while only the *predominant* use of race in redistricting triggers an enhanced form of scrutiny;

—in remedial affirmative action, the harm to minorities must be intentional in order to be compelling, while, in redistricting cases, avoiding retrogression of minority voting power is solely a matter of impact;

—remedial affirmative action plans must have strict durational limits to pass muster, while race-conscious districting plans need not have any such limits;

—remedial affirmative action plans are unconstitutional unless there is a strong basis in evidence that a race-conscious plan is necessary and the government must explicitly consider race-neutral alternatives, while this is not true of racial redistricting plans; and,

—for racial redistricting plans the Court looks at burdens only at a racial group level, while the Court looks at the burdens on the individual plaintiffs in remedial affirmative action cases.

In fact, the *Wygant* case shows how irrelevant abstract constructs such as "narrow tailoring" are to how the Supreme Court actually decides racial cases.[96] Recall that the *Wygant* Court struck down a race based layoff plan because it believed that it is a greater burden to be laid off from a job you already have than it is to be denied a job that you are merely applying for.[97] This may be so, but it has nothing to do with whether the plan was narrowly tailored to reversing the effects of the alleged discrimination. Just the opposite, a race based layoff plan is *more* narrowly tailored than a race based hiring plan such as the one approved in *Paradise*.[98] After all, there are always possible alternatives to race-based hiring as a way to increase the number of minority employees. However, in *Wygant*, since the minority teachers were almost all among the less senior teachers, sparing minority teachers from

96. Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986).
97. *Id.*
98. United States v. Paradise, 480 U.S. 149 (1987).

layoffs was the only possible way for the school board to accomplish its goal.[99] This is not to say that the Court was wrong to take the burden on the white teachers into account, but it has nothing to do with whether the plan was narrowly tailored to reversing the effects of alleged discrimination.

Thus, it can be seen that the two strict scrutiny tests have little substance in common and share only some vague and not particularly descriptive adjectives. This is most likely a result of the fact that they were developed to address two very different policy issues. Perhaps even more surprising is that the strict scrutiny test for remedial affirmative action programs also has very little in common with the strict scrutiny test the Court applies to diversity-based affirmative action plans. While the former test is extremely strict, the latter is much less so. Indeed, with two important exceptions, so-called strict scrutiny of diversity-based affirmative action programs is so comparatively permissive that it is best described as less strict than what the Court calls "intermediate scrutiny" and, for the most part, is hardly any stricter than the highly deferential "rational basis" test. This is taken up in the next section.

IV. DIVERSITY-BASED AFFIRMATIVE ACTION

While remedial affirmative action is intended to remedy past and present wrongs, diversity-based affirmative action is oriented towards the future. It is intended to help future graduates develop a broader understanding of the diverse world in which they live. The Court first held that student body diversity is a compelling governmental interest for public universities in *Regents of the University of California v. Bakke*,[100] in 1978. The University of California Davis Medical School had set aside 16 of 100 seats for "Black," "Chicano," "Asian," and "American Indian" applicants. It was sued by a rejected white applicant, Allan Bakke, who had far higher grades and tests scores than the averages for the students who were admitted under the set-aside program.[101]

The Court was deeply fractured but issued what appeared to be a majority ruling written by Justice Louis Powell. It was joined in some parts by four justices, and in other parts, by the four other justices. The opinion set out three key rulings. First, it held that strict scrutiny applies to affirmative action

99. Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986).

100. 438 U.S. 265 (1978).

101. For example, Bakke's Quantitative MCAT score was in the 94th percentile, compared to an average score in the 24th percentile for the students admitted under the special program. His GPA was 3.44 compared to an average GPA of 2.62 for the students admitted under the special program. *Id.* at 277 n.7.

programs, just as it applies to laws that discriminate against racial minorities.[102] Second, it rejected many of the government interests put forward for the program, such as compensating for historic discrimination, but it held that achieving student diversity is a compelling governmental interest with important first amendment implications.[103] Finally, the Court held that an affirmative action program is narrowly tailored to achieve diversity if the program allows for individual consideration of each applicant, with race or ethnicity serving as a "plus" factor. Said the Court, "race or ethnic background may be deemed a 'plus' in a particular applicant's file, yet it [should] not insulate the individual from comparison with all other candidates for the available seats."[104]

Owing to the fractured nature of the opinion, there was some question about its status as binding precedent.[105] Until it decided a pair of cases in 2003, the Supreme Court had not provided further guidance on the issue of diversity-based affirmative action for 25 years. In *Gratz v. Bollinger* and *Grutter v. Bollinger*, the Court heard challenges to the affirmative action programs of, respectively, the University of Michigan's College of Literature, Science, and the Arts (LSA) and The University of Michigan Law School.[106]

In these cases, the Court affirmed that Justice Powell's opinion in *Bakke*, despite its fractured nature, was controlling precedent. In *Gratz*, the Court struck down the LSA's program, which evaluated students on a point system and admitted all students with 100 or more points.[107] Pursuant to the LSA's affirmative action program, the school automatically awarded 20 points to any applicant who was a member of "an underrepresented minority group." The Court held that the advantage conferred by the extra points was so great that "the LSA's automatic distribution of 20 points has the effect of making 'the factor of race . . . decisive' for virtually every minimally qualified underrepresented minority."[108]

As will be discussed below, it was not simply the size of the racial/ethnic "plus" that ran afoul of the Court's analysis. Of at least equal importance, was the fact that the LSA's program capped the number of points awarded for having various talents well below the number of points awarded for being an

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102. *Id.* at 294–97.

103. *Id.* at 308–13.

104. *Id.* at 317.

105. *See*, for example, Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996), *overruled by* Grutter v. Bollinger, 539 U.S. 306 (2003).

106. Respectively, *Gratz*, 539 U.S. 244 (2003); *Grutter*, 539 U.S. 306 (2003).

107. *Gratz*, 539 U.S. 244 (2003).

108. *Id.* at 272.

underrepresented minority. "Even if [a student's] 'extraordinary artistic talent' rivaled that of Monet or Picasso, the applicant would receive, at most, five points under the LSA system."[109]

However, in the *Grutter* case, the Court upheld the law school's affirmative action program. Since the *Bakke* and *Gratz* decisions struck down the programs under review, *Grutter* remains the leading Supreme Court decision clarifying what sort of diversity-based affirmative action program is constitutionally acceptable under the strict scrutiny standard.

Unlike the LSA program, the law school program did not use a point system. It "require[d] admissions officials to evaluate each applicant based on all the information available in the file . . . ."[110] The admissions director frequently reviewed the "daily reports," which tracked the racial and ethnic composition of the class. The stated goal of the law school was to ensure that members of certain minority groups—African Americans, Chicana/os and Native Americans—were admitted in sufficient numbers as to constitute a "critical mass," i.e. a group large enough that the law school could "realize the educational benefits of a diverse student body."[111]

A crucial factor for the *Grutter* Court was that the goal of a "critical mass," although inherently imprecise, is directly tied to the government's compelling interest in diversity. Since that interest is rooted in the First Amendment value of truly diverse class room discussion, the idea that groups must be present in a critical mass to effectively participate in that discussion forms a meaningful nexus between the law school's affirmative action program and the First Amendment. Said the majority, "The Law School's interest is not simply 'to assure within its student body some specified percentage of a particular group . . . . Rather, the Law School's concept of a critical mass is defined by reference to the educational benefits that diversity is designed to produce."[112]

The student challenging the affirmative action plan, Barbara Grutter, argued that achieving a critical mass of certain minorities required the law school to give those minorities a very large advantage in gaining admission. Her expert testified that "membership in certain minority groups 'is an extremely strong factor in the decision for acceptance.'"[113] The law school did not dispute this. In fact, the law school's expert testified that "a race-blind

109. *Id.* at 273.
110. *Grutter*, 539 U.S. at 312.
111. *Id.* at 318.
112. *Id.* at 329–30.
113. *Id.* at 320.

admissions system would have a 'very dramatic' negative effect on underrepresented minority admissions."[114] However, the *Grutter* Court upheld the admissions plan, focusing not on how strong a factor race or ethnicity is, but rather on whether every applicant, minority or non-minority, got an individualized review that took into account his or her own merits:

> Here, the Law School engages in a highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment. The Law School affords this individualized consideration to applicants of all races. There is no policy, either *de jure* or *de facto*, of automatic acceptance or rejection based on any single "soft" variable. Unlike the program at issue in *Gratz v. Bollinger*, *ante*, p. 244, the Law School awards no mechanical, predetermined diversity "bonuses" based on race or ethnicity.[115]

In fact, we will see below that it is only a slight exaggeration to say that the factor of "individualized consideration," along with connecting the admissions goals to the First Amendment benefits that diversity is supposed to promote, are really the *only* issues of importance in diversity-based affirmative action cases. While the *Grutter* Court mentioned the various factors it applied in remedial affirmative action cases, and repeatedly cited those cases, it was so deferential in how it scrutinized these factors that the level of review it applied was far closer to rational basis review than it was to strict scrutiny. The following sections compare the strict scrutiny tests in remedial and diversity-based affirmative action cases.

A. Should Strict Scrutiny Apply?

Despite huge differences, there are of course some similarities between how the Court applies strict scrutiny in the two types of affirmative action cases. This analysis begins with the most significant similarity. In both areas, the Court subjects government affirmative action policies to a test labeled as strict scrutiny regardless of whether the use of race is "predominant." For example, in the seminal case of *Grutter v. Bollinger*, the plaintiff's own expert witness conceded "that race is not the predominant factor in the Law School's admissions calculus."[116] Nonetheless, the Court applied strict scrutiny, stating "when governmental decisions 'touch upon an individual's race or ethnic

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114. *Id.*
115. *Id.* at 337.
116. *Id.* at 306, 320.

background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest.'"[117]

Thus, in contrast to case law in the racial redistricting cases, the Court applies strict scrutiny to both remedial and diversity-based affirmative action programs even when the use of race is not predominant. As we will see in the next two sections, this is where the similarities, for the most part, end.

B. Compelling Governmental Interest

To begin with a brief statement of the obvious, the compelling governmental interests in the two types of affirmative action are different. The interest in remedial affirmative action is rectifying specific governmental discrimination. In diversity-based affirmative action, the compelling interest is in diversity regardless of any intentional discrimination.

This is a straightforward result of the different contexts that give rise to these cases. However, there is a less overt, far more significant difference in these two forms of strict scrutiny that goes to the very heart of what strict scrutiny is supposed to accomplish. In both remedial and diversity-based affirmative action cases, the Court has repeatedly stated that the *reason d'etre* of strict scrutiny is to "'smoke out' illegitimate uses of race."[118] "Absent searching judicial inquiry into the justification for such race-based measures we have no way to determine what classifications are 'benign' or 'remedial' and what 'classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics.'"[119]

In the remedial affirmative action cases, this attempt to smoke out illegitimate uses of race is a genuinely central focus of strict scrutiny review. For example in *Croson*, in which the City of Richmond required 30% of subcontracting dollars to go to "Minority Business Enterprises," the district court had found that the city's purpose was indeed to rectify past and present discrimination. The district court based this on five findings of fact:

> 1) the ordinance declares itself to be remedial; (2) several proponents of the measure stated their views that there had been past discrimination in the construction industry; (3) minority businesses received 0.67% of prime contracts from the city while minorities constituted 50% of the city's population; (4) there were very few minority contractors in local and state contractors' associations; and (5) in 1977,

117. *Id.* at 323 (quoting *Bakke*, 438 U.S. at 299).
118. *Gruttner*, 539 U.S. at 326 (quoting *Croson*, 488 U.S. at 493).
119. *Id.*

> Congress made a determination that the effects of past discrimination had stifled minority participation in the construction industry nationally.[120]

Despite these lower court findings, the Supreme Court refused to defer to Richmond's explanation of the program's purpose or to the district court's conclusions that Richmond's intent was benign and remedial. Instead, the Justices took their own independent and exacting examination of Richmond's purported reasons for the program. The majority noted that "the city has not ascertained how many minority enterprises are present in the local construction market, nor the level of their participation in city construction projects."[121] The Justices added that "[t]he city points to no evidence that qualified minority contractors have been passed over for city contracts or subcontracts . . . ."[122]

As a result, the Court held that it was at least possible that the affirmative action program was really a result of illegitimate motives, whether conscious or subconscious: "Absent such findings, there is a danger that a racial classification is merely the product of unthinking stereotypes or a form of racial politics."[123]

Finally, the Court took a hard look at what racial groups were and were not included in the program:

> The foregoing analysis applies only to the inclusion of blacks within the Richmond set-aside program. There is *absolutely no evidence* of past discrimination against Spanish-speaking, Oriental, Indian, Eskimo, or Aleut persons in any aspect of the Richmond construction industry. . . . 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.[124]

Thus, in the remedial context, the Court uses strict scrutiny as tool to verify that the purpose of the government program is genuinely benign and to smoke out unthinking stereotypes or racial politics. This examination includes a judicial inquiry into the question of what racial groups are included in the program.

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120. *Croson*, 488 U.S. at 499.
121. *Id.* at 510.
122. *Id.*
123. *Id.*
124. *Id.* at 506.

The contrast with diversity-based affirmative action could not be greater. In *Grutter*, the Court granted virtually complete deference to The University of Michigan Law School's claim that its sole purpose was to ensure that a "critical mass" of underrepresented minorities was enrolled in each entering class. Rather than scrutinizing this crucial claim, the Court held that as an institution of higher learning, the law school was entitled to deference: "The Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer. . . . Our holding today is in keeping with our tradition of giving a degree of deference to a university's academic decisions, within constitutionally prescribed limits."[125] The presumption of a university's good faith was also central to the Court's holding in *Bakke*:

> a court would not assume that a university, professing to employ a facially nondiscriminatory admissions policy, would operate it as a cover for the functional equivalent of a quota system. In short, good faith would be presumed in the absence of a showing to the contrary in the manner permitted by our cases.[126]

In fact, the *Grutter* Court went well beyond granting "a degree of deference." In sharp contrast to *Croson*, the Court held that it would simply assume that the law school was giving a truthful account of the affirmative action program's purpose:

> Our conclusion that the Law School has a compelling interest in a diverse student body is informed by our view that attaining a diverse student body is at the heart of the Law School's proper institutional mission, and that "good faith" on the part of a university is "presumed" absent a "showing to the contrary."[127]

The magnitude of the Court's deference becomes even more apparent when one considers the fact that there were reasonable bases for fearing that "unthinking stereotypes" and/or "racial politics" could indeed have been at least part of the law school's motivation in designing the affirmative action program. One red flag is the complete exclusion of Asian Americans from the program, including those from under-represented ethnicities.

The stated purpose of the law school's program was to increase enrollment of students "from groups which have been historically

125. *Grutter*, 539 U.S. at 328.
126. *Bakke*, 438 U.S. at 318–19.
127. *Grutter*, 539 U.S. at 329 (quoting *Bakke*, 438 U.S. at 318–19).

discriminated against."[128] The law school conceded that Asian Americans were a group that had been historically discriminated against but averred that Asian Americans were left out of the program anyway because they "were already being admitted to the Law School in significant numbers."[129] As a result, Asian Americans face a much higher hurdle for admission than do African Americans or Latino/a applicants.[130]

The Court let the issue of excluding Asian Americans pass without further examination, but had it applied anything like the level of scrutiny it applied in *Croson*, the law school would have had great difficulty defending this exclusion. While there is a tendency to speak of Asian Americans monolithically as a highly successful "model minority," there are many different ethnicities of Asian Americans, quite a few of whom suffer from great disadvantages and are unlikely to be admitted to the law school in significant numbers.[131] While some ethnicities, such as Chinese and Japanese Americans, have impressive rates of educational achievement, other ethnicities, such as Cambodian, Hmong, and Laotian Americans, are severely underrepresented in higher education. For example only 0.4% of Cambodian, Hmong, and Laotian Americans hold advanced degrees, which is only one-third the percentage of African Americans with such degrees and only one-quarter the percentage of Latina/os with such degrees.[132]

Therefore, the *Grutter* Court certainly had reason to fear that "unthinking stereotypes" or "racial politics" was at play in the law school's blanket exclusion of Asian Americans from the affirmative action program. A possible stereotype would be to view Asian Americans monolithically and see no need for the voices of underrepresented Asian ethnicities when there are ample numbers of Chinese and Japanese American students already being admitted. The possibility of "racial politics" is even more disturbing. Many Asian Americans fear, often with reason, that they might be affirmatively

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128. *Id.* at 316.

129. *Id.* at 319.

130. Petition for Writ of Certiorari at 7, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241) (including a breakdown of the law school's 1995 admissions statistics. For students with a GPA between 3.5 and 3.74 and an LSAT score between 159-160, African Americans and Mexican Americans had an 80% chance of admittance while Asian Americans had only a 5% chance. For applicants with a GPA between 3.25 and 3.49 and an LSAT score between 156-158, the law school admitted 15 out of 18 African-American and Latino applicants, but none of the 14 Asian-American applicants).

131. *See generally* Deana K. Chuang, *Power, Merit, and the Limitations of the Black and White Binary in the Affirmative Action Debate: The Case of Asian Americans at Whitney High School*, 8 ASIAN L.J. 31 (2001).

132. Asian-Nation Asian American History, Demographics, & Issues, http://www.asian-nation.org/demographics.shtml (last visited May 1, 2010).

unwelcome at elite educational institutions, at least in large numbers. For example, as this article was being written, the United States Department of Education was "tak[ing] a broad look at Princeton's admission policies to determine whether discrimination against Asians was involved."[133] Further, there is a long history of educational discrimination against Asian Americans.[134]

This is not to assert that the law school was actually motivated by either unthinking stereotypes or racial politics. What we see, though, is that in diversity-based affirmative action cases, the level of scrutiny is far lower than in remedial affirmative action cases due to the deep deference the Court grants in the diversity cases. If it were indeed true that anti-Asian stereotypes or animus were at play in the law school's policies, there is nothing in the *Grutter* Court's analysis that would have smoked this out, even though smoking out these sorts of invidious factors is supposed to be the very reason for applying strict scrutiny in the first place.

One measure of the deferential scrutiny applied by the Grutter Court is how it compares to the scrutiny employed by the Court in a gender discrimination case, *United States v. Virginia*.[135] In that case, the Virginia Military Institute (VMI), a public university, had a male-only admission policy. It proffered two reasons for the policy. It claimed that single-sex education was essential to its particular method of education and it also argued that since all other Virginia public universities were coed, it was enhancing the State's educational diversity by offering a single sex option.[136]

Since the issue in the case was gender discrimination, it is hornbook law that the Court must apply "intermediate" or "heightened" scrutiny, which is intended to be less rigorous than strict scrutiny.[137] Therefore, one would expect that the Court would grant at least as much deference to VMI as it did to the University of Michigan Law School and would presume VMI's good faith as it did in *Grutter*. To the contrary, the Court flatly stated that it would not presume VMI's good faith and that it would look at the historical record not only of VMI, but of elite universities generally. The Court rejected VMI's proffered explanations:

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133. *Admission to College Isn't Just About Test Scores*, USA TODAY, July 7, 2008, at A10.

134. *See* Chuang, *supra* note 131 (providing a broader discussion of "fearing the model minority" of Asian Americans).

135. 518 U.S. 515 (1996).

136. *Id.* at 525.

137. Craig v. Boren, 429 U.S. 190 (1976).

> Single-sex education affords pedagogical benefits to at least some students, Virginia emphasizes, and that reality is uncontested in this litigation. Similarly, it is not disputed that diversity among public educational institutions can serve the public good. But Virginia has not shown that VMI was established, or has been maintained, with a view to diversifying, by its categorical exclusion of women, educational opportunities within the Commonwealth. In cases of this genre, our precedent instructs that "benign" justifications proffered in defense of categorical exclusions will not be accepted automatically; a tenable justification must describe actual state purposes, not rationalizations for actions in fact differently grounded. . . . Neither recent nor distant history bears out Virginia's alleged pursuit of diversity through single-sex educational options. In 1839, when the Commonwealth established VMI, a range of educational opportunities for men and women was scarcely contemplated. Higher education at the time was considered dangerous for women; reflecting widely held views about women's proper place, the Nation's first universities and colleges—for example, Harvard in Massachusetts, William and Mary in Virginia—admitted only men.[138]

Based upon its rejection of Virginia's proffered intentions, the Court held that VMI lacked an "'exceedingly persuasive justification'" for its male-only policy.[139] In fact, the Court was so nondeferential to VMI that some prominent constitutional law scholars argued that the case represented a toughening of the intermediate scrutiny standard.[140]

It is startling to juxtapose this skeptical treatment of Virginia's proffered interests with the highly deferential treatment accorded to Michigan's law school. While it is certainly true that elite schools had a history of discrimination against women, it is equally true that many of these same schools also have a history of discrimination against Asian-American applicants.[141] While the *Grutter* Court was applying what is supposed to be the strictest form of scrutiny, and the *Virginia* Court was applying what is supposed to be a more lenient form of scrutiny, we can see that the opposite is true. Not only is the level of scrutiny applied in *Grutter* less strict than it was in any of the Court's remedial affirmative action cases, it is actually less strict than so-called "intermediate scrutiny." Indeed, it will be argued below that the most important distinction in diversity cases is not race versus gender, but rather "individual consideration" versus "categorical exclusion." Because VMI completely excluded women, this triggered a very high level of scrutiny;

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138. *Virginia*, 518 U.S. at 535–37 (citations omitted).

139. *Id.* at 531.

140. Cass R. Sunstein, *Leaving Things Undecided*, 110 HARV. L. REV. 4, 75 (1996).

141. Chuang, *supra* note 131, at 41 ("The threatening success of Asian Americans in the educational sphere led fearful admissions offices to limit Asian American enrollment through deliberate policies of exclusion. In the 1980's, highly selective schools such as Harvard, Yale, Stanford, Princeton, Brown, U.C. Berkeley, and UCLA, faced charges of bias against Asian American applicants.").

because the University of Michigan Law School gave individual consideration to every candidate, this triggered a far more deferential level of scrutiny. This will be discussed at the end of the next section.

In sum, the "compelling interest" prong of the strict scrutiny test is applied very differently in the two types of affirmative action cases. In remedial affirmative action cases, the Court undertakes an independent, searching examination of whether the stated interest is the genuine motivation for the policy. In racial diversity affirmative action cases, the Court grants virtually complete deference. These two approaches are so different that it is not accurate to state that the Court is applying the same level of scrutiny in both cases.

C. Narrowly Tailored?

As previously discussed, an important part of the narrow tailoring requirement of strict scrutiny in remedial affirmative action cases is that there must be clear durational limits. Ostensibly, diversity-based affirmative action plans should also have a durational limit. The *Grutter* Court held that "race-conscious admissions policies must be limited in time."[142] As with the compelling interest prong of strict scrutiny, the level of judicial deference regarding this requirement is so great as to be more in line with the Court's lowest level of scrutiny, rational basis.

The *Grutter* Court stated, "[i]n the context of higher education, the durational requirements can be met by sunset provisions in race-conscious admissions policies and periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity."[143] Nonetheless, the Court did not require that the law school's race-conscious policies actually have sunset provisions, nor did it even require "periodic reviews" to determine whether such policies are still necessary. Instead, the Court flatly stated that it would not scrutinize the duration of the policy at all, much less do so strictly: "We take the Law School at its word that it would 'like nothing better than to find a race-neutral admissions formula' and will terminate its race-conscious admissions program as soon as practicable."[144] The Court added, "[w]e expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved

142. Grutter v. Bollinger, 539 U.S. 306, 342 (2003).

143. *Id.*

144. *Id.* at 343 (citing Brief for Respondent Bolinger et al. at 34, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241), 2003 WL 402236).

today."[145] However, even this quarter century long time line was phrased as an aspiration rather than a requirement.

Similarly, the Court accords a very high degree of deference in scrutinizing whether an educational institution has considered race-neutral alternatives. This is, once again, in sharp contrast to the level of scrutiny employed by the Court in remedial affirmative action cases. In *United States v. Paradise*, the Court held that, "[i]n determining whether race-conscious remedies are appropriate, we look to several factors, including the efficacy of alternative remedies."[146] In *Croson*, one of the reasons the Court struck down the City of Richmond's remedial affirmative action plan was that "there does not appear to have been any consideration of the use of race-neutral means to increase minority business participation in city contracting."[147]

In *Grutter*, the Court was, once again, far more deferential. While the Court did say "[n]arrow tailoring does, however, require serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks,"[148] it required little or no evidence from the law school that it actually considered race-neutral alternatives.[149] The law school never produced a witness at trial or during pre-trial proceedings who purported to describe any actual consideration of race-neutral alternatives. Nonetheless, the Court of Appeals rejected the district's court's finding that the law school failed to consider race-neutral alternatives. Citing the expertise of the law school, and the court's own lack of expertise, the Court of Appeals held that the law school was entitled to virtually complete deference on this matter and that the law school should simply be presumed to have considered race-neutral alternatives in good faith:

> [I]n applying strict scrutiny we cannot ignore the educational judgment and expertise of the Law School's faculty and admissions personnel regarding the efficacy of race-neutral alternatives. We are ill-equipped to ascertain which race-neutral alternatives merit which degree of consideration or which alternatives will allow an institution such as the Law School to assemble both a highly qualified and richly diverse academic class. . . . Mindful of both our constitutional obligations and our practical limitations, we also assume—along the lines suggested by Justice Powell—that the Law School acts in good faith in exercising its educational judgment and expertise.[150]

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145. *Id.*

146. United States v. Paradise, 480 U.S. 149, 171 (1986).

147. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 507 (1988).

148. 539 U.S. at 339.

149. Brief for Petitioner at 48, Grutter v. Bollinger, 529 U.S. 306 (2003) (No. 02-241).

150. Grutter v. Bollinger, 288 F.3d 732, 750–51 (6th Cir. 2002), *aff'd*, Grutter v. Bollinger, 539 U.S. 306 (2003).

The Supreme Court upheld the Court of Appeals stating, as quoted above, that "[w]e take the Law School at its word that it would 'like nothing better than to find a race-neutral admissions formula' . . . ."[151] The Court made no mention of the law school's lack of evidence that it actually considered race-neutral alternatives. The Court discussed the lack of feasibility of the law school's achieving diversity by lowering admissions standards or by using a "percentage plan" that was designed for colleges, not graduate programs. However, it made no inquiry into whether the law school had actually considered such commonly mentioned race-neutral alternatives as economic or class-based affirmative action.[152] In contrast, the *Croson* Court took the City of Richmond to task for not having considered whether increased economic aid might be a race-neutral way to increase minority participation: "If [Minority Business Enterprises] disproportionately lack capital or cannot meet bonding requirements, a race-neutral program of city financing for small firms would, *a fortiori*, lead to greater minority participation."[153] The *Grutter* Court made no equivalent suggestion, such as the law school considering increased financial aid to diversify its student body. The deference of the Court is particularly striking given the fact that various other elite law schools have had success diversifying their classes utilizing race-neutral programs such as UCLA's "Critical Race Studies" program that is open to all students regardless of race.[154]

D. Diversity-Based Affirmative Action and Strict Scrutiny

In sum, the scrutiny the Court applies to diversity-based affirmative action programs is quite different from the scrutiny it applies to remedial affirmative action programs. The Court's scrutiny of remedial affirmative

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151. 539 U.S. at 343 (citing Brief for Respondent Bolinger et al. at 34, Grutter v. Bollinger, 529 U.S. 306 (No. 02-241)).

152. *See, e.g.*, Richard H. Sander, *Experimenting with Class-Based Affirmative Action*, 47 J. LEGAL EDUC. 472 (1997); Deborah C. Malamud, *Affirmative Action, Diversity, and the Middle Class*, 68 U. COLO. L. REV. 939 (1997); Richard H. Fallon, Jr., *Affirmative Action Based on Economic Disadvantage*, 43 UCLA L. REV. 1913, 1947–52 (1996) (discussing limits of effectiveness of economically-based programs and reporting on studies at California schools); Kimberly Paap Taylor, Note, *Affirmative Action for the Poor: A Proposal for Affirmative Action in Higher Education Based on Economics, Not Race*, 20 HASTINGS CONST. L.Q. 805 (1993).

153. 488 U.S. at 507.

154. Daniel Golden, *Schools Find Ways to Achieve Diversity Without Key Tool*, WALL ST. J. On-Line, June 20, 2003, http://online.wsj.com/public/resources/documents/golden5.htm.

action plans is actually quite strict regarding the issues of whether there is a compelling governmental interest for such a program, whether the program has durational limits, and whether there was genuine consideration of race-neutral alternatives. For diversity-based affirmative action, the Court's highly deferential approach is so different as to make it clear that these are not the same tests at all.

For diversity cases, the only two factors that are actually subjected to serious scrutiny are: whether the racial and ethnic goals of the educational institution are based upon the First Amendment benefits of diversity and whether every student receives individual consideration. The Court has particularly emphasized this second factor and repeated it over and over again in *Gratz* and *Grutter*. In a two page stretch, the *Gratz* opinion uses some variant of the word "automatic" or notes the lack of individual consideration nine different times.[155] Similarly, in a single page, the Grutter opinion states that:

> The importance of individualized consideration . . . is paramount"; "the Law School engages in a highly individualized, holistic review of each applicant's file . . ."; "the Law School awards no predetermined, mechanical diversity 'bonuses' based on race or ethnicity"; "the Law School's admissions policy 'is flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant' . . ."; and "the Law School's race-conscious admissions program adequately ensures that all factors that may contribute to student body diversity are meaningfully considered alongside race in admissions decisions.[156]

Thus, to the degree that the Court's scrutiny of such programs can be labeled as strict, that strictness is based upon two criteria: 1) there must be a nexus between the racial/ethnic goals and their First Amendment benefit; 2) there must be individual consideration of every application. This two part test has almost nothing in common with the Court's test in remedial affirmative action cases.

In fact, in many ways, the two tests are polar opposites. While remedial affirmative action cases are far stricter in all the ways discussed above, their level of scrutiny is actually quite lenient in terms of requiring individual consideration. If the Court is satisfied that all of its conditions are met—a strong basis in evidence that governmental discrimination has occurred, durational limits, etc.—the Court tolerates just the sort of automatic preferences that it rejects in diversity cases. Recall that in *Local 28*, the Court

155. Gratz v. Bollinger, 539 U.S. 244, 273–74 (2003).

156. *Grutter*, 539 U.S. at 337.

upheld a 29% nonwhite membership goal and in *Paradise*, the Court upheld a lower court order enjoining the Alabama Department of Public Safety to hire one African-American trooper for each white trooper hired until African Americans constituted approximately 25% of the State trooper force.[157] So in *Paradise*, for example, if the State were hiring 10 new troopers and had already hired five white applicants, even a highly qualified white applicant would be rejected purely on the basis of his or her race as long as there were five qualified African-American applicants.[158] Such a result would be anathema under the version of strict scrutiny applied in *Bakke* and *Grutter*.

So far, the Court has only decided one remedial affirmative action case since *Croson*: the *Adarand* case in 1995. In that case, the Court clarified that the *Croson* standards applied to the federal government as well as State governments and remanded the case to the district court with explicit instructions to apply those standards.[159] The Supreme Court directed the lower Court to determine "whether there was 'any consideration of the use of race-neutral means to increase minority participation' in government contracting . . . or whether the program was appropriately limited such that it 'will not last longer than the discriminatory effects it is designed to eliminate.'"[160] The Supreme Court also ordered a more stringent review of "which socially disadvantaged individuals qualify as economically disadvantaged . . . ."[161] Therefore, it certainly appears that *Croson* is the leading case on remedial affirmative action.

Croson's role, as the controlling standard, was reemphasized by the Court in 2009, although not in an equal protection case. The Court not only cited *Croson* favorably in its decision on racial disparate impact in *Ricci v. Destafano*, but it actually borrowed the "strong basis in evidence" language from *Croson* (as well as from *Wygant*) and used it to resolve a dispute arising under Title VII.[162] In that case, a group of mostly white firefighters sued the city of New Haven for setting aside the results of a promotion exam on which African-American firefighters performed poorly. The Supreme Court declined to rule on the Equal Protection claims but borrowed from its remedial

157. *See* United States v. Paradise, 480 U.S. 149 (1987); Local 28 of Sheet Metal Workers' Int'l. Ass'n v. EEOC., 478 U.S. 421 (1986).

158. *Cf.* Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) (noting that while the *Wygant* decision looked at the burden on whites, it explicitly based its analysis on the fact that it involved layoffs, as opposed to hiring).

159. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995).

160. *Adarand*, 515 U.S. at 237–38.

161. *Id.* at 238.

162. Ricci v. DeStefano, 129 S. Ct. 2658, 2675 (2009).

affirmative action jurisprudence to resolve the case. The Court noted that the standards for race-conscious action under Title VII were not necessarily the same as the constitutional standard. Nonetheless, it applied the rule from *Croson* that race-based affirmative action is constitutional only if there is a strong basis of evidence that it is necessary to rectify past or present discrimination. Based upon this standard, the Court held that New Haven was not allowed to set the test results aside unless it had a strong basis in evidence that such a remedial action was necessary to avoid liability under Title VII.

Similarly, the one diversity-based affirmative action case decided by the Court since *Gratz* and *Grutter*, is a remarkably straightforward application of those cases. *Parents Involved in Community Schools v. Seattle School District No. 1*,[163] involved a challenge to the Seattle School and Jefferson County School Districts' plans to maintain diversity in their schools. The Seattle plan allowed students to rank order their preference for high schools in the district. If a school was oversubscribed and its racial makeup was not within 10 percentage points of the district's overall white/non-white balance, the available slots would go to students whose race would bring the school closer to that balance. The district was 41% white, so the goal was for each school to be no less than 31% white and no greater than 51% white. The Jefferson County plan required all non-magnet schools to maintain an African-American enrollment of between 15% and 50%.

The Court struck down both plans, provoking a number of major journalists to claim that the Court was changing the rules for evaluating diversity-based affirmative action plans. For example, *The New Yorker* charged that "the Court issued a decision, written by Chief Justice John Roberts that signaled a complete departure from more than half a century of jurisprudence on race."[164] The *New York Times*' eminent Supreme Court reporter Linda Greenhouse argued that the decision was a reversal of the Court's approach in *Grutter*.[165] Interestingly, the Court itself averred that "[t]he present cases are not governed by *Grutter*" because they involved K-12 schools rather than institutions of higher learning.

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163. 551 U.S. 701 (2007).

164. Nicholas Lemann, *Reversals*, 83 THE NEW YORKER, July 30, 2007, *available at* http://www.newyorker.com/talk/comment/2007/07/30/070730taco_talk_lemann.

165. Linda Greenhouse, *In Steps Big and Small, Supreme Court Moved Right*, N.Y. TIMES, July 1, 2007, at 18.

All this reveals the very high level of confusion, including the Court's own, about how the Court really applies strict scrutiny to student diversity cases. Whatever *Parents Involved*'s other complexities may be, it is a straightforward application of the *Bakke/Grutter* version of the strict scrutiny test.

The Court noted that because Seattle had never been under a desegregation order and, because Jefferson County's desegregation order had been dissolved, the only compelling interest the districts could rely upon was student diversity.[166] As we have now seen, strict scrutiny in diversity cases amounts to a two prong test. First, is there a nexus between the racial/ethnic goals and the educational/First Amendment interest in a diverse dialogue and educational experience? Second, does every student get individual consideration? The school districts' plans failed both prongs. Regarding the first prong, the Court stated: "The plans are tied to each district's specific racial demographics, rather than to any pedagogic concept of the level of diversity needed to obtain the asserted educational benefits."[167] This flaw would be fatal under the diversity version of the strict scrutiny test because the goals must be tailored to the educational/First Amendment benefits sought. The Court continued:

> The districts offer no evidence that the level of racial diversity necessary to achieve the asserted educational benefits happens to coincide with the racial demographics of the respective school districts—or rather the white/nonwhite or black/"other" balance of the districts, since that is the only diversity addressed by the plans.[168]

The districts' plans failed the second prong as well, which requires that every student have an opportunity to be evaluated on his or her own merits. The fate of the Seattle plan was sealed when the Court described the operation of the plan with the following example:

166. 551 U.S. at 702–03.
167. *Id.* at 727.
168. *Id.*

> Petitioner Parents Involved in Community Schools (Parents Involved) is a nonprofit corporation comprising the parents of children who have been or may be denied assignment to their chosen high school in the district because of their race. The concerns of Parents Involved are illustrated by Jill Kurfirst, who sought to enroll her ninth-grade son, Andy Meeks, in Ballard High School's special Biotechnology Career Academy. Andy suffered from attention deficit hyperactivity disorder and dyslexia, but had made good progress with hands-on instruction, and his mother and middle school teachers thought that the smaller biotechnology program held the most promise for his continued success. Andy was accepted into this selective program but, because of the racial tiebreaker, was denied assignment to Ballard High School.[169]

Since Andy Meeks had no opportunity to have his case individually reviewed and was denied access to the program solely because of his race, this is clear violation of the second prong of the Court's strict scrutiny test. The Court used a similar example to explain the workings of the Jefferson County plan:

> When petitioner Crystal Meredith moved into the school district in August 2002, she sought to enroll her son, Joshua McDonald, in kindergarten for the 2002-2003 school year. His resides school was only a mile from his new home, but it had no available space—assignments had been made in May, and the class was full. Jefferson County assigned Joshua to another elementary school in his cluster, Young Elementary. This school was 10 miles from home, and Meredith sought to transfer Joshua to a school in a different cluster, Bloom Elementary, which—like his resides school—was only a mile from home. See Tr. in *McFarland I*, pp. 1–49 through 1–54 (Dec. 8, 2003). Space was available at Bloom, and intercluster transfers are allowed, but Joshua's transfer was nonetheless denied because, in the words of Jefferson County, "[t]he transfer would have an adverse effect on desegregation compliance" of Young.[170]

As with Andy Meeks in Seattle, Joshua McDonald had no opportunity for individual review. He was denied admittance to the closer school solely because of his race. Therefore, both plans clearly violated the second prong of diversity strict scrutiny as well as the first prong. Whatever the policy merits of the plans were, both plans were unconstitutional under both prongs of the actual strict scrutiny test that has emerged from *Bakke*, *Gratz*, and *Grutter*.

Understanding the two prong test also makes it easier to understand the Court's striking down of the Virginia Military Institute's (VMI) male-only

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169. *Id.* at 713–14.
170. *Id.* at 717.

admission policy in the *Virginia* case. As discussed above, despite the ostensible rule that gender discrimination is subject to a lower form of scrutiny than is race discrimination, the Court subjected VMI's professed reasons for its admissions policies to significantly stricter scrutiny than it did to the University of Michigan Law School's reasons. While a full exploration is beyond the scope of this article, these two cases suggest that the conventional view that race is subject to strict scrutiny while gender is subject to intermediate scrutiny might be at least partially outdated. These two cases are best explained by the fact that the law school gave every applicant an individual review while VMI did not. The race/gender dichotomy, at least in the context of diversity cases, may no longer be as relevant as it once was.

V. SAME NAME, DIFFERENT TESTS

Contrary to the conventional wisdom, there is no unitary strict scrutiny test for racial equal protection any more than there is a unitary First Amendment test. Just as the Court applies different tests to obscenity, libel, fighting words and other free speech cases, it applies different tests to racial redistricting, remedial affirmative action, and diversity-based affirmative action cases. To summarize, these tests are as follows:

	Racial Redistricting	Remedial Affirmative Action	Diversity-Based Affirmative Action
Apply Strict Scrutiny?	Only if race is predominant	Any use of race	Any use of race
Compelling Interest	For minority retrogression, avoiding adverse impact is compelling regardless of whether there is intentional discrimination.	Only combating firmly proven, intentional discrimination is compelling.	The issue of discrimination is irrelevant. The issue is the educational benefit of diversity.

	Racial Redistricting	Remedial Affirmative Action	Diversity-Based Affirmative Action
Narrow Tailoring	Race must not be predominant—Court looks to compactness and respect for traditional apportionment criteria. Issues of duration, consideration of race-neutral alternatives are not relevant. Burden on non-minorities is measured at the group level.	There must be strict durational limits. There must be genuine consideration of race-neutral alternatives and a showing that a race-conscious remedy is necessary to rectify the discrimination. Benefits of the race-conscious program must be measured against the burden on individual non-minorities. Burden is measured by impact; there is no need to prove or allege stigma or animus against non-minorities. The Court scrutinizes which racial/ethnic groups benefit from the race-conscious policies.	There must be a clear nexus between the race-conscious goals and the educational benefits of diversity. Every applicant must receive genuinely individual consideration with no seats or spaces excluded. The Court applies rational basis level deference on other questions.

VI. IMPLICATIONS

What is the significance of our findings? In what ways does the myth of a unitary strict scrutiny test impact the outcome of cases and fields of law? As

we will show, confusion over how the Court actually applies strict scrutiny undermines the efficacy of the courts in addressing contemporary issues of equal protection. For example, one area where the Court has greatly struggled is equal rights for gay men and lesbians. The Court has been unwilling to apply strict scrutiny to discrimination against homosexuals for fear that applying strict scrutiny to any one area of constitutional rights for lesbians and gay men would force the Court to also apply strict scrutiny to other areas such as same-sex marriage. Because the Court is apparently not ready to do that, it has gone to great lengths to avoid applying strict scrutiny to gay men and lesbians even when its own jurisprudence would seem to require application.[171] The next section will address another important area where the myth of a unitary strict scrutiny test has prevented the Court from adequately developing equal protection doctrine—that of racial profiling by the government.

A. Racial Profiling

One consequence of the confusion over strict scrutiny is that it has completely impeded the courts from applying the equal protection doctrine to the important issue of racial profiling. It is difficult to precisely measure how prevalent racial profiling is in the United States,[172] but there is no question that Americans, especially minority Americans, perceive the practice as common place. According to a Gallup poll of over 2000 people, including 1001 African Americans:

> A majority of Americans, regardless of race, believe that racial profiling—the practice of police stopping people, often ethnic or racial minorities, who fit a profile of a certain type of offender—is widespread in this country . . . . More than four out of 10 Blacks of all ages and both genders said they believe they've been stopped because of their race.[173]

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171. *See generally* EVAN GERSTMANN, THE CONSTITUTIONAL UNDERCLASS (University of Chicago Press 1999) (providing a more extensive argument on this issue).

172. *See, e.g.*, Bernard E. Harcourt, *Rethinking Racial Profiling: A Critique of the Economics, Civil Liberties, and Constitutional Literature, and of Criminal Profiling More Generally*, 71 U. CHI. L. REV. 1275, 1314 n.80 (2004) ("While virtually every extant study of such data indicates that racial profiling *may* be occurring, it is important to stress that these studies do not provide *proof* that biased policing exists. Without appropriate 'denominator' data keyed to specific racial and ethnic populations, and without the addition of appropriate contextual information concerning traffic stops to multivariate analyses, it is not possible to distinguish biased policing from entirely appropriate, but demographically disproportionate, enforcement outcomes with respect to racial and ethnic characteristics.").

173. *Annual Poll Shows that Most People Believe Racial Profiling by Cops is Common*, JET, Jan. 1, 2001, at 6.

These concerns have been stoked by the courts' anemic response to this issue. In one highly publicized case, *Brown v. City of Oneonta*,[174] a 77-year-old home burglary victim in Oneonta, New York, told police that she had only seen the hands and arms of the perpetrator. The victim told the police that the burglar was young and black and had a cut on his hand. The Oneonta police responded by randomly stopping and questioning over 200 young black men—virtually every young black man they could find in town. Black male students at the local university and others who had been stopped and questioned sued the Oneonta police for civil rights violations.

What is remarkable about this case is not merely that the plaintiffs lost, but how little protection they received from the equal protection clause. The Second Circuit held that because the police were "not alleged to have investigated 'based solely upon . . . race, without more,'" there was no "actionable claim under the Equal Protection Clause."[175] In short, because the police used "not only race, but also gender and age, as well as the possibility of a cut on the hand," this was not a racial classification at all, and therefore, it did not create an equal protection claim.[176]

The *Oneonta* decision follows the lead of the Sixth Circuit Court of Appeals, which has also held that strict scrutiny, indeed any equal protection scrutiny, is only triggered when the government stops and questions a person *solely* on the basis of their race. In *United States v. Travis*,[177] the defendant claimed that her rights were violated when detectives allegedly questioned her and searched her bags based upon her race. The Sixth Circuit held that there is an equal protection claim only when the defendant can "demonstrate by a 'preponderance of the evidence' that a police officer decided to approach him or her solely because of his or her race."[178]

The United States Supreme Court had a major opportunity to weigh in on this issue but declined to do so. In *United States. v. Martinez-Fuerte*,[179] the Court upheld the practice of the United States Border Patrol, which relied heavily, but not solely, on apparent Latino ethnicity in determining whom to send to a secondary inspection area. The Court did not apply the Equal

174. 221 F.3d 329 (2d Cir. 2000), *cert. denied*, 534 U.S. 816 (2001).
175. *Id.* at 338.
176. *Id.* at 337.
177. 62 F.3d 170 (6th Cir. 1995).
178. *Id.* at 174.
179. 428 U.S. 543 (1976).

Protection Clause at all to this practice, and instead upheld it under a Fourth Amendment balancing test.

Given the significance of the issue of racial profiling, this is not much protection. As the constitutional law scholar Albert W. Alschuler has pointed out, even lynch mobs and other ardent racists did not rely *solely* on race:

> Even in our nation's shameful old days, only a small minority of blacks were lynched, and blacks were not alone in being lynched. Lynch mobs considered not only race but also gender, religion, attitude, and allegations of criminal conduct. These mobs, however, employed racial classifications. Even old-style racists often have reasons in addition to race for hating people; we call someone a racist because race provides one of his reasons for judging other people, not because it provides the only one.[180]

The Court's insistence that there is no equal protection issue unless police or border profiling is based solely on race makes this area an extreme outlier in the field of equal protection. As discussed above, affirmative action policies, be they remedial or diversity-based, trigger strict scrutiny so long as race is *any* factor in government-decision making. Additionally, we have seen that districting triggers strict scrutiny if race is the predominant factor; there is no requirement that it be the only factor. Given that factors such as incumbency protection and partisan advantage are important factors in any redistricting plan, such a requirement would virtually eliminate equal protection review from the area of redistricting.

Indeed, the Court will apply strict scrutiny even when there is no explicit use of race at all by the government if the Court believes that race was one factor in the government's decision making process. In *Arlington Heights v. Metropolitan Housing Development Corp.*,[181] the plaintiffs argued that the city's refusal to allow development of multiple housing units that would be affordable to minorities was racially motivated. In response, the Court explicitly clarified that the Equal Protection Clause "does not require a plaintiff to prove that the challenged action rested solely on racially discriminatory purposes. . . . When there is a proof that a discriminatory purpose has been a motivating factor in the decision," strict scrutiny is required.[182]

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180. Albert W. Alschuler, *Racial Profiling and the Constitution*, 2002 U. CHI. LEGAL F.163, 179 (2002).

181. 429 U.S. 252 (1977), *superseded by statute*, 42 U.S.C. § 1973, *as recognized in* Chapman v. Nicholson, 579 F. Supp. 1504 (N.D. Ala. 1984).

182. *Id.* at 265–66.

Why then have the courts taken so stingy an approach to applying equal protection to such a crucial issue as racial profiling? While judicial mind-reading is always a tricky task, the judges in the *Oneonta* case offered some revealing insights into the dynamics of how judges view equal protection and racial profiling. Police often rely on race in questioning suspects, for example, either because a victim describes the race of the assailant or because a crime was committed by a gang with a particular racial makeup. If the courts applied strict scrutiny to this practice, the fear is that the courts would either straitjacket the police or, by allowing the practice, dilute strict scrutiny protection against other forms of discrimination. As Judge Calabresi wrote in his dissenting opinion in the *Oneonta* case:

> If an action is deemed a racial classification, it is very difficult, under the Supreme Court precedents, ever to justify it. And, were such justification made easier in cases of police following a victim's description, the spillover to other racial classification contexts would be highly undesirable. In other words, were the requirements of strict scrutiny to be relaxed in the police/victim's description area, it would be hard indeed to keep them from also being weakened in other areas in which racial classifications ought virtually never to be countenanced.[183]

In his concurring opinion Chief Judge Walker, made a similar point:

> For better or worse, it is a fact of life in our diverse culture that race is used on a daily basis as a short hand for physical appearance. This is as true in police work as anywhere else. The theories suggested by the dissenters would require a police officer, before acting on a physical description that contains a racial element, to balance myriad competing considerations, one of which would be the risk of being subject to strict scrutiny in an equal protection lawsuit . . . . In addition to potentially chilling police protection, and tying up officers in added court proceedings, these new rules would be implicated in many ordinary police investigations. As a result, these rules would likely undermine the strict scrutiny standard itself, because apprehending dangerous criminals in almost all instances would constitute a compelling state interest. Frequent satisfaction of strict scrutiny as police go about their daily work of investigating crime would likely have spillover effects into other areas of equal protection law, diluting the standard's efficacy where we would want it to retain its power.[184]

This line of reasoning, although well-intentioned, is a perfect example of the costs of the myth that there is single strict scrutiny test. If there is only one strict scrutiny test and it does not fit neatly in the world of police officers' use

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183. 235 F.3d 769, at 786 (2000) (Calabresi, J., dissenting).
184. *Id.* at 771–72 (Walker, J., concurring).

of race, then the best choice is to avoid strict scrutiny all together, just as the courts have done.

It would be far easier for the courts to formulate an appropriate equal protection analysis of racial profiling if they were clearer about the fact that the Supreme Court already applies a number of different strict scrutiny tests to different areas of race discrimination based upon the particulars of each area. Just as the courts do not have to apply the same form of strict scrutiny to obscenity as they do to libel or advocacy of illegal action under the First Amendment, the courts do not have to apply the same strict scrutiny test to racial profiling that they do to affirmative action or race-based redistricting.

Once the myth of a unitary strict scrutiny test is set aside, the courts can engage in the crucial project of developing a form of strict scrutiny that is appropriate for the issue of racial profiling. Such a test could take account of the legitimate use of race by the police without diluting equal protection in other areas because it would be a test designed specifically to deal with this issue.

Just what such a test would look like is beyond the scope of this article and beyond the expertise of the authors. A form of strict scrutiny to be applied to racial profiling might distinguish between reliance upon witness descriptions of specific suspects that include the suspect's race and reliance upon statistics about which races most often commit certain crimes. It might distinguish between racial profiling in specific, highly regulated areas such as airports or border crossings and racial profiling on ordinary streets and highways. It might distinguish between profiling based on race and profiling based upon apparent nationality.

Formulating the best strict scrutiny test for racial profiling will be a challenging enterprise, but taking on this challenge is far better than continuing the Courts' current abdication of responsibility by pretending that the equal protection clause is irrelevant to racial profiling. The first step is recognizing the nature of the project: developing a form of strict scrutiny that can take into account the legitimate needs of the police as well as the high costs of racial profiling and the wide spread perception among minority communities that they are being unfairly targeted on the basis of their race or ethnicity. As long as the myth of unitary strict scrutiny maintains its stranglehold on legal discourse, this project will not happen.

CONCLUSION: THE MANY FACES OF STRICT SCRUTINY

There is no single, unitary "strict scrutiny" test that the Supreme Court applies to all government decision making based on race. Redistricting

decisions, different forms of affirmative action and racial profiling all involve race, but they are very different legal areas, each with its own highly individual histories, contexts, and competing sets of values. The myth of unitary strict scrutiny has caused a great deal of unnecessary confusion. As noted above, once we recognize that the forms of strict scrutiny in *Croson* (involving remedial affirmative action) and *Grutter* (involving diversity-based affirmative action) are very different, a case such as *Parents Involved in Community Schools* becomes far easier to predict and explain.

This raises the question of why the Court has continued to insist that it is applying a single test called strict scrutiny to race cases, when it is so clearly applying a multiplicity of tests instead. While explaining judicial behavior is outside of the scope of this article, we do want to briefly offer one speculative explanation for judges' insistence that there is only one strict scrutiny test. The idea that federal judges, who are not democratically elected, defer to the democratic process in most cases, but heighten scrutiny of laws that affect minorities, has played a crucial role in the argument over judicial legitimacy. The idea that the courts have a special obligation to protect minorities precisely because courts are not subject to untrammeled majoritarianism has been the central defense of the courts against charges of judicial meddling with democratic decision making.[185] Thus, the simple two-tier system in which the courts normally defer to the legislature but sharpen their scrutiny of race-based laws is a concept that judges are likely to reflexively embrace. The idea that the courts have devised different tests to fit various policy areas might strike a judicial nerve about acting as unelected policy makers. The notion that judges are merely sharpening their scrutiny of race-based decision making, rather than making substantive decisions about what, for example, affirmative action programs and congressional districts should actually look like, is probably quite appealing to judges even if it does not accurately describe what the courts are doing.

The myth of a "one size fits all" form of strict scrutiny, though, has hampered the Court's ability to respond to the claims of gays and lesbians who allege various forms of discrimination and of racial and ethnic minorities who allege that they are victims of racial profiling. The Court can do better than this. Once strict scrutiny is seen for what it really is—a flexible tool that has different meanings in different legal areas—the courts will be better able to respond to contemporary equal protection cases that are currently outside of the courts' comfort zone. Further, with greater awareness of the different tests,

185. GERSTMANN, *supra* note 171, at 25–29.

schools can have a better understanding of how they can constitutionally strive to achieve diversity and government entities will better understand how they can seek to remedy past and present discrimination. None of this will be easy of course, but a clearer understanding of the multiplicity of strict scrutiny tests that the Supreme Court already uses would be an important first step in the right direction.