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From *Bakke* to *Grutter* and *Gratz*: The Supreme Court as a Policymaking Institution

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Abstract

Finding the best means for ensuring equal opportunities for women and minorities has long been controversial and initial efforts to do so were addressed by executive orders, and later the historic Civil Rights Act of 1964. However, this paper argues, since its initial Bakke decision in 1978, it is the Supreme Court that has set policy in this area. In the twenty-five years between that decision and the recent Gratz and Grutter decisions, the court has shifted in its stance, in many cases declaring unconstitutional what it once sanctioned. That shift has not resulted from changes in laws or new amendments to the Constitution, nor can it be seen as reflecting public opinion, as that is not clear-cut. Rather, affirmative action policy has reflected the ideological stances of the justices sitting at the time a decision was rendered. The paper concludes with an assessment as to what this means for a democracy.

The candid citizen must confess that if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court . . . he people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal.

Abraham Lincoln, First Inaugural Address

In June of 2003, the Supreme Court handed down two landmark decisions defining the acceptable parameters of the use of affirmative action in university admissions decisions (*Grutter v. Bollinger* and *Gratz v. Bollinger*). The importance of these cases was reflected in many ways, from the dozens of organizations and individuals who hoped to influence the outcome through amicus briefs to the extensive news coverage the cases received. Commentators were quick to express their support or opposition to the verdict, but what was left unquestioned was whether it should be the Supreme Court, the unelected branch of government, who sets policy in this area. The purpose of this paper is to examine the court's policymaking role through the lens of affirmative action.

The extent to which the Supreme Court should and does engage in policymaking has long been controversial. The justices do not do so directly, of course, but rather through the power of judicial review; that is, in declaring policies to be in violation of law or the Constitution. It is clear from Federalist 78 that Alexander Hamilton (1961) saw this power as necessary to protect "the minority party in the community" from "serious oppression" that may occur if the majority has a mind to enact legislation counter to the will of the people as represented in the Constitution. From another point of view, this creates what Alexander Bickel (1962) called the "countermajoritarian difficulty." He wrote: "when the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it" (Bickel, 1962, pp. 16–17).

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The court, like other institutions in our democracy, must balance three, sometimes competing values—individual liberty, political equality, and the collective good. The extent to which the court successfully balances these rival values can be seen when it is called argue that the collective good is achieved by restoring upon to consider a controversial policy such as affirmative action, because the debate about affirmative action falls along the lines of these competing values. Affirmative action proponents political equality to minorities. Opponents argue that affirmative action undermines the collective good by robbing nonminorities of political equality and liberty. Proponents argue that affirmative action protects the minority against the tyranny of the majority while opponents contend that it unjustly places the interests of a minority above the equally important interests of the majority.

A literature rife with efforts to assess empirically the extent to which the court decisions reflect public opinion joins a growing body of scholarship debating other factors that influence judicial decision making (see, for example, Epstein & Knight, 1998, Mishler & Sheehan, 1993, 1994, Segal, 1997, Gillman & Clayton, 1999). The purpose of this paper is not to engage in that debate, nor to attempt a rigorous empirical examination of cause and effect. Rather, it asks

- To what extent, and on what grounds, has the Supreme Court shaped affirmative action policy and how, if at all, have the "elected" branches of government responded to the courts?
- Do the court's positions reflect the will of the majority, as one might expect from a democratic institution, or do they protect the "minority party in the community" as Hamilton suggested?

Affirmative Action: The Birth of a Controversy

The roots and development of affirmative action programs,[1] which, until the late 1970s took place in the executive and legislative branches, has been well documented in other sources (see, for example, Brody, 1996, Burstein, 1998, Graham, 1990, Elliott & Ewoh, 2000, Moreno, 1997). Table 1 provides a brief chronology of key executive orders and statutes.

The Supreme Court had its opportunity to weigh in on the notion as to how far the government could go in ending discrimination in the landmark case, *Griggs v. Duke Power* (1971). In that case, the court adopted, without dissent, a "disparate impact" analysis for demonstrating discrimination. Under this standard, if an employer engages in practices that disproportionately and adversely affect a protected class, whether intentional or not, it may be a violation of Title VII of the Civil Rights Act. In this situation, the burden of proof is on the employer to show that there was a justifiable, nondiscriminatory purpose for the practice. The importance of this case for affirmative action was that it recognized that discrimination could occur, even if unintentionally, and gave employers an incentive to hire underrepresented minorities so as to avoid a potential charge of disparate impact.

By the early 1970s, then, all three branches of the federal government had recognized that simply prohibiting discrimination, or even giving aggrieved individ-

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Table 1. Key Developments in Affirmative Action Policy Executive and Legislative Branches pre *Bakke*

Executive Branch Action	Legislative Branch Action
1941 Executive Order 8802 (F. Roosevelt,) required nondiscrimination in defense industries	1864 Freeman's Bureau Bill provides assistance to newly freed slaves
1953 Executive Order 10479 (Eisenhower) declared nondiscrimination to be national policy	1964 Civil Rights Act. Title VI forbade discrimination by any activity receiving federal funds, Title VII made discrimination in employment unlawful. Created EEOC
1961 Executive Order 10925 (Kennedy) called for government contractors to "take affirmative action" to ensure nondiscrimination.	1972 Equal Employment Opportunity Act expanded coverage of Civil Rights Act and adopted notion of discrimination to encompass that adopted by Court in *Griggs*
1965 Executive Order 11246 reinforced and strengthened EO 10925 anc alled on federal contractors to take "affirmative action" in employment of minorities.	1977 Public Works Employment Act required government contractors to set aside 10% of funds for minority contractors
1971 (Nixon) Philadelphia Plan required contractors to set "goals and timetables"	

uals a right to file a complaint, was not enough to ensure equal opportunity. Rather, seemingly neutral policies or long-established recruitment and selection practices could also deny opportunities to minorities and women even without overt discrimination (Brody, 1996). Proactive efforts, such as affirmative action, were needed to overcome these disadvantages.

Since the late 1970s, it is largely the courts that have defined the permissible scope of affirmative action programs. They do so under the Civil Rights Act of 1964, as amended, and two Constitutional amendments that come into play whenever a government entity makes distinctions based on race or gender. The Equal Protection Clause of the Fourteenth Amendment prohibits state (and, by extension, local) governments from denying anyone "equal protection of the law." Some people believe a policy that grants preference based on race or gender may constitute a denial of equal protection. That amendment speaks only to state and local governments, however, and so it has been the Due Process Clause of the Fifth Amendment that courts have relied on to judge the constitutionality of federal government programs. The Supreme Court views that provision as also requiring equal protection of the law (Kellough, 1991).

This paper reviews the major affirmative action cases decided by the Supreme Court over the past twenty-five years, from *Bakke* decision in 1978, to the 2003 *Gratz* and *Grutter* decisions. Specifically, it assesses the positions taken by the justices, and the grounds on which they supported their positions. It will be clear that while the court may only have judgment, as Hamilton suggested, justices do more than follow the lead of other branches, and adjudicate disputes. Since the mid-1970s it has been the court that has set policy with respect to affirmative action. In the development of that policy, it has mattered quite a bit as to which justices were on the court. As the members of the court have changed, so has the court's position.

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The Court Defines (and Largely Accepts) Affirmative Action

The first time the high court addressed the issue of affirmative action was in *Regents of the University of California v. Bakke* in 1978.[2] In that case, a white male applicant to the U.C. Davis medical school argued that he was passed over for admission in favor of less qualified minority applicants, in violation of Title VI of the Civil Rights Act of 1964 and the Equal Protection Clause of the Fourteenth Amendment. The medical school did have, in fact, a system that set aside sixteen seats out of one hundred for minority applicants.

The *Bakke* decision remains notorious because there was very little on which a majority of justices agreed. The four more liberal justices ruled that the plan was valid, neither violating the Fourteenth Amendment nor Title VI, arguing that, "Government may take race into account when it acts not to demean or insult any racial group, but to remedy disadvantages cast on minorities by past racial prejudice." The four more conservative justices opined that it was unnecessary to rule on the constitutionality of the admissions system because it clearly violated Title VI (see Table 2). It was left to Justice Powell to straddle these two positions and "announce" the court's judgment. He sided with the conservatives in ruling that the medical school's system of setting aside seats for minorities was unconstitutional, but also sided with the liberals, saying that the use of race as one factor in an admissions process did meet constitutional muster. According to Powell, "The atmosphere of 'speculation, experiment and creation'—so essential to the quality of higher education—is widely believed to be promoted by a diverse student body."

One of the main lines of division among members of the court that appeared in this case was the standard that an affirmative action program should meet in order to be considered constitutional. By this time, the court had ruled that when the government restricts "fundamental rights" or contains "suspect classifications" (of which race is one), it must be subject to the standard of "strict scrutiny." This means that the program in question must serve a *compelling* government purpose, and be narrowly tailored to achieve that purpose. The court had applied this standard, for example, when evaluating whether it was constitutional to incarcerate Japanese Americans during the war (*Korematsu v. United States*).

Justice Powell asserted that this was the standard that should be used in the *Bakke* case, while also holding that the value of diversity in an educational institution does comprise a compelling interest. Other justices, including Justice Brennan, argued that whites do not comprise a "suspect" class because whites are "not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." Therefore, Brennan argued, programs designed to benefit rather than harm minorities ought to be held to a lesser "intermediate" standard of "meeting *important* governmental objectives, where the racial classification is substantially related to meeting those objectives." The four more conservative justices declined to address this issue, arguing that the case could and should be decided on statutory, rather than constitutional grounds.

Over the next several years, the court continued to interpret the Civil Rights Act and the Constitution in evaluating affirmative action programs. Although many issues were addressed in each case, the following summary seeks to highlight only

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Table 2. The Supreme Court and Affirmative Action: Key Decisions

Case	Statute/Constitutional Ruling	Decision	Pro/Anti Affirmative Action	**Majority**/Dissent [Changes to the Court]
Griggs v. Duke Power (1971)	Permitted by Title VII of Civil Rights Act (CRA)	Civil Rights Act requires elimination of barriers that operate to discriminate on basis of race when they are not related to job performance.	Pro	**Unanimous** (Note: Brennan did not participate)
Regents of UC v. Bakke (1978)	Violation of Title VI of CRA (For Powell—also violated 14th Amendment)	An admission program that denies applicants admission on the basis of race is unlawful. . . .	Anti	**Powell, Rehnquist, Stevens, Stewart, Burger** Blackmun, Brennan, Marshall, White
	Permitted by 14th Amendment	. . . But race may be considered as one factor in admission	Pro	**Powell, Blackmun, Brennan, Marshall, White** Stevens, Stewart, Rehnquist, Burger
United Steelworkers v. Weber (1979)	Permitted by Title VII of CRA	Upheld voluntary affirmative action plan giving preference for admission to a training programs to African Americans	Pro	**Brennan, Stewart, White, Marshall, Blackmun** Burger, Rehnquist (Note: Stevens and Powell did not participate)
Fullilove v. Klutznick (1980)	Permitted by Title VI of CRA and 5th Amendment	Upheld a minority set-aside program created by Congress	Pro	**Burger, White, Powell, Marshall, Blackmun, Brennan** Stewart, Rehnquist, Stevens
Firefighters v. Stotts (1984)	Violation of Title VII	Invalidated a layoff plan designed to protect African American workers who would have been disadvantaged by a seniority-based layoff program.	Anti	**White, Burger, Powell, Rehnquist, O'Connor, Stevens** Blackman, Brennan, Marshall [O'Connor replaces Stewart]

Table 2. *Continued*

Case	Statute/Constitutional Ruling	Decision	Pro/Anti Affirmative Action	**Majority**/Dissent [Changes to the Court]
Wygant v. Jackson Board of Education (1986)	Violation of 14th amendment	Invalidated a layoff plan designed to retain a specific proportion of minority teachers	Anti	**Powell, Burger, Rehnquist, O'Connor, White** Marshall, Brennan, Blackmun, Stevens
Sheet Metal Workers v. EEOC (1986)	Permitted by Title VII and the 5th amendment	Upheld court-imposed hiring plan	Pro	**Brennan, Marshall, Blackmun, Stevens, O'Connor, Powell** White, Rehnquist, Burger
U.S. v. Paradise (1987)	Permitted by 14th Amendment	Upheld specific, court imposed hiring plan	Pro	**Brennan, Marshall, Blackmun, Powell, Stevens** White, O'Connor, Rehnquist, Scalia [Scalia replaces Burger, Rehnquist elevated to Chief Justice]
Johnson v. Santa Clara County (1987)	Permitted by Title VII (plaintiff did not raise 14th amendment issue)	Upheld voluntary affirmative action plan for promotions	Pro	**Brennan, Marshall, Blackmun, Powell, Stevens, O'Connor** White, Scalia, Rehnquist
Richmond v. Croson (1989)	Violation of 14th amendment	Invalidated minority set aside provision in City contracting process	Anti	**O'Connor, Rehnquist, White, Kennedy, Stevens, Scalia** Marshall, Brennan, Blackmun [Kennedy replaces Powell]
Wards Cove v. Atonio (1989)	Violation of Title VII	Overturned Griggs, and required plaintiffs to show intentional discrimination	Anti	**White, Rehnquist, O'Connor, Scalia, Kennedy** Stevens, Blackmun, Brennan, Marshall

Metro Broadcasting v. FCC (1990)	Permitted by 5th amendment	Allowed program favoring minority ownership of broadcast licenses	Pro	**Brennan, Stevens, White, Blackmun, Marshall** O'Connor, Rehnquist, Scalia, Kennedy
Adarand v. Pena (1995)	Violation of 5th amendment	Disallowed federal minority-set aside contracting program	Anti	**O'Connor, Scalia, Kennedy, Rehnquist, Thomas** Stevens, Ginsburg, Souter, Breyer [Souter, Thomas, Ginsburg, and Breyer replace Brennan, White, Blackmun and Marshall]
Gratz v. Bollinger (2003)	Violation of 14th amendment and Title VI	Disallowed the awarding of a specific number of points to underrepresented minorities	Anti	**Rehnquist, Kennedy Thomas, Scalia, Breyer, O'Connor** Ginsberg, Souter, Stevens
Grutter v. Bollinger (2003)	Permitted by the 14th amendment and Title VI	Allowed an admissions program that evaluates each candidate "holistically," including race as one factor	Pro	**O'Connor, Ginsberg, Souter, Stevens, Breyer** Kennedy, Rehnquist, Thomas, Scalia

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those that are most relevant to this paper: the extent to which the court deferred to Congress to set affirmative action policy; how specific the discrimination against minorities had to be to warrant race-conscious policies; what procedures were "fair" as opposed to putting an undue burden on whites, and the standard that should be used to determine whether an affirmative action policy is constitutional (i.e., whether it must meet the standard of "strict scrutiny," advocated by Powell in *Bakke*, or the intermediate standard promoted by Brennan in that case). In their opinions in these cases, the ideological stances of the justices became clear.

In *United Steelworkers of America v. Weber* (1979), the court upheld a voluntary affirmative action plan that granted preference to African American employees over more senior white employees for admission into a training program. Since the employer was a private company, rather than a government entity, the Fourteenth Amendment was not germane. The only issue, according to Justice Brennan who wrote for the five-justice majority, was whether Title VII forbids private employers from adopting voluntary affirmative action plans. Brennan contended that the legislative history made clear that while the law did not *require* affirmative action, neither was it Congress's intention to *prohibit* it. Justice Burger, in his dissent, argued that the court was engaging in "statutory 'construction" and rewriting Title VII "to achieve what it regards as the desirable result."

A year later Congress and its intentions were again the focus of the court when it examined an affirmative action plan specifically mandated by Congress. In its 1980 decision, *Fullilove v. Klutznick*, six justices upheld a minority set aside provision in the Public Works Employment Act, ruling that it did not violate the Equal Protection Clause of the Fifth Amendment or Title VI of the Civil Rights Act. Importantly, in writing for the court, Chief Justice Burger specifically recognized Congress as a "co-equal branch charged by the Constitution with the power to 'provide for the . . . general welfare of the United States' and 'to enforce, by appropriate legislation, the equal protection guarantees of the 14th Amendment." "Congress," he wrote, "perceived a pressing need to move forward with new approaches in the continuing effort to achieve the goal of equality of opportunity . . . Congress has the necessary latitude to try new techniques such as the limited use of racial and ethnic criteria to accomplish remedial objectives." Two justices (Rehnquist and Stewart) dissented, stating that the minority set-aside provision represented a denial of equal protection, while Justice Stevens's dissent argued that Congress had violated its duty, under the Fifth Amendment, to govern impartially.

Fullilove is significant because it seemed to resolve certain matters. Seven justices sanctioned the use of race-conscious remedies for past discrimination. Six justices also agreed that affirmative action could be used to correct the effects of societal discrimination in general rather than only in response to specific, identifiable discrimination. The decision also made it clear that Congress had authority under the Fourteenth Amendment to mandate affirmative action programs, an authority that did not belong to the states (Spann, 2000a).

Four years later, in *Firefighters v. Stotts* (1984), the court addressed another set of issues with respect to Title VII. One was whether a court could modify a seniority-based layoff procedure that threatened to undue the effects of the minority hiring program agreed to in a consent decree (since the minorities were last hired,

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they would be the first to be laid off). The Supreme Court, in an opinion written by Justice White (who had previously voted in favor of affirmative action programs) interpreted Title VII as not allowing the court to modify a consent decree to supersede the white employees' seniority rights. He also objected to the use of affirmative action to take away something from innocent white employees (i.e., their jobs) as opposed to simply denying them a job, promotion or access to training, as was the case in *Weber*. More importantly, Justice White ruled that to receive a race-conscious remedy under Title VII, one must be an actual victim of discrimination, rather than simply a member of the class that had been subject to discrimination. In his dissent, Justice Blackmun argued that the majority misinterpreted Congress's intention in passing the Civil Rights Act, but that in any case the EEO Act of 1972 clearly authorized broader race conscious relief for discrimination. This controversy as to how specific the discrimination had to be in order to justify affirmative action benefiting minorities in general would continue to surface in subsequent cases. Notably, in this case, as in *Weber*, while the majority and dissent disagreed in their interpretation, they both sought to base their decisions on what Congress intended in civil rights legislation. Later, the justices would seemingly abandon their concern for Congress's intentions in favor of evaluating affirmative action programs on Constitutional grounds, simply stating that the statutes are irrelevant if the program is unconstitutional.

A court-imposed affirmative action plan was upheld by a six-justice majority in *Sheet Metal Workers v. EEOC* (1986). A key difference, in this case, was that it involved hiring goals rather than a layoff, which was enough to satisfy Justice Powell that it could be distinguished from the *Firefighters* decision. The justices again disagreed as to whether Title VII permits race-conscious remedies that were designed to benefit those who were not themselves victims of discrimination. Also at issue in this case was whether the court-imposed plan was permitted by the Fourteenth Amendment. Brennan, writing for the court, was satisfied that both Title VII and the Fourteenth Amendment permitted this plan. He reminded the court that it had yet to agree on the proper standard for evaluating such programs (strict or intermediate scrutiny), but that this program would meet the test of strict scrutiny nonetheless. In light of the union's "egregious violations of Title VII," he found there was a compelling governmental interest sufficient to justify the racial classification, and that the remedy was narrowly tailored. Again, Justice Powell, in his concurring opinion, reiterated the need for strict scrutiny, but opined that the district court-imposed remedy met that standard in part because of the history of particularly virulent discrimination in this case that led to the consent degree. Four justices—O'Connor, White, Rehnquist and Burger declined to address the constitutionality of the program, voting instead that the plan was not permitted under Title VII.

In a 1986 decision, *Wygant v. Jackson Board of Education*, the court also struck down a layoff plan that was voluntarily agreed to by the school board and the teachers union. In this case a collective bargaining agreement attempted to protect the representation of minority teachers from the effects of a seniority-based layoff provision. The board had actively sought to increase the representation of minorities, in part, to provide role models for its minority students; a goal it thought important enough to justify a layoff provision not solely based on seniority.

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This time the court ruled on constitutional grounds, with Justice Powell, joined by three other justices, ruling that the policy failed to meet the required standard of strict scrutiny. Again, the court held that a policy based on remedying the effects of societal discrimination was not justified; rather the governmental unit had to demonstrate that *it* had engaged in discrimination. The "role model theory," in Powell's view, "allows the Board to engage in discriminatory hiring and layoff." He also reiterated the concern, expressed in *Firefighters*, that a preferential layoff policy imposes too great a burden on innocent parties.

The dissent, signed by Justices Marshall, Brennan, and Blackmun reiterated their *Bakke* contention that when the goal of a policy is to eliminate the "pernicious vestiges of past discrimination," a lesser standard than strict scrutiny should be applied, particularly since "whites have none of the immutable characteristics of a suspect class." Nevertheless, they also believed that the layoff provision in question could meet the standard of strict scrutiny because of the urgent need to preserve the hiring policy that sought to achieve diversity and stability in the schools.

In her concurring opinion, Justice O'Connor sought to find a middle ground between these two sides. She wrote that a "remedial purpose need not be accompanied by contemporaneous findings of actual discrimination." Moreover, presaging her majority opinion in *Grutter v. Bollinger* (2003), she suggested a state interest in promoting racial diversity in education could be presumed to meet the "compelling interest" prong of the strict scrutiny standard. However, she agreed with the plurality that the layoff provision was not narrowly tailored, and so failed to meet the second prong of the strict scrutiny standard.

In the same year, the court upheld another, even more specific promotion plan imposed by a district court in *U.S. v. Paradise*. The court had found that the Alabama Department of Public Safety had engaged in a pattern of discrimination and so ordered it to hire one black trooper for each white trooper until blacks constituted 25% of the trooper force. Later, the court also ordered that 50% of promotions go to blacks. Brennan again took the opportunity to remind the court that it had "yet to reach a consensus on the appropriate constitutional analysis"; Nevertheless, he was satisfied the relief met the standard of strict scrutiny. Justice O'Connor, who had joined the majority in the *Sheet Metal Workers* case, dissented in this one because she found the one-for-one promotion quota too "extreme."

The court upheld a voluntary affirmative action plan adopted by a local government in *Paul E. Johnson v. Transportation Agency, Santa Clara County* (1989). Four justices held that this plan met the conditions articulated in the *Weber* case—that an employer need not show that it has engaged in discrimination to adopt an affirmative action plan. A "conspicuous imbalance in traditionally segregated job categories" warranted such a plan if it did not "unnecessarily trammel the rights of male employees or create an absolute bar to their advancement." The most recent appointee to the court, Antonin Scalia, wrote the dissent in this case, stating, "The Court today completes the process of converting [Title VII of the Civil Rights Act] from a guarantee that race or sex will *not* be the basis for employment determinations, to a guarantee that it often *will*." Johnson had relied on Title VII in arguing his case and did not raise the possibility that the Equal Protection Clause might be violated by the Santa Clara plan, even though the employer in the case was a local government. Scalia suggested in his dissent that the Fourteenth Amendment did

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apply and that "it would be strange to construe Title VII to permit discrimination by public actors that the Constitution forbids." Therefore, in his opinion, the court should have used this case to overrule the *Weber* decision.

Thus, in the period between the *Bakke* decision in 1978, and the *Johnson* decision in 1987, the court had largely upheld, albeit with narrow majorities, affirmative action plans under a variety of circumstances. A liberal group of justices, Brennan, Blackmun, and Marshall, consistently ruled in favor of these plans while a conservative group, Rehnquist, Stewart, Burger,[3] and later Scalia consistently ruled against them. Justice Stevens tended to join the liberals when the benefit of the racial classification and the procedures from which it transpired were clear to him (Spann, 2000a). The only cases in which the liberals were not able to generate enough support from the "swing" voters (e.g., Powell, O'Connor, White) to form a majority were those were those that involved taking away employment from (that is, laying off) white employees in order to retain minorities (see Table 2).

1989: The Court Changes Course

Beginning in 1989, proponents of affirmative action met significant defeats in the Supreme Court. The most startling departure from previous rulings occurred in *Wards Cove v. Antonio* (1989). This case did not address affirmative action directly, but, in the words of John D. Skretny, the court "did an about-face on the race-conscious adverse or disparate impact theory that had been the legacy of Griggs" (1996, p. 226). This time, the court held that a racial imbalance is *not* sufficient to establish a prima facie case of discrimination. Moreover, it is the plaintiff, not the employer, who bears the burden of identifying the employment practice that is allegedly having the disparate impact. Once the plaintiff establishes the prima facie disparate impact case, the employer must provide evidence of a business necessity for the practice, but the burden of proof lies with the plaintiff to show the cause-and-effect relationship. This would be the case, argued the dissent, "even where such proof would be impossible."

Blackmun, joined by Brennan and Marshall wrote that "today, a bare majority took three major strides backwards in the battle against racial discrimination by "upsetting the longstanding distribution of burdens of proof in Title VII disparate-impact cases." "Sadly," he added, "this comes as no surprise. One wonders whether the majority still believes that race discrimination—or, more accurately, race discrimination against nonwhites—is a problem in our society, or even remembers that it ever was."

And indeed the court had changed since 1971 when it unanimously banned employment practices that had discriminatory effects (see Table 2). Three new justices had joined the court, all appointed by President Ronald Reagan. Justice O'Connor, who proved to be a swing vote in these cases, replaced another swing voter, Justice Stewart. The conservative Justice Scalia replaced the conservative Justice Berger. But Anthony Kennedy, who allied himself with the conservatives on these cases, replaced the fifth member of the court that the liberals had relied on to vote with them at least some of the time, Justice Powell.

In *City of Richmond v. Croson* (1989), affirmative action advocates were dealt another blow. For the first time a majority (rather than plurality) of justices ruled

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on the constitutionality of a local government affirmative action program. Six justices ruled that a minority set-aside provision that the city of Richmond, Virginia, required of its prime contractors violated the Equal Protection Clause of the Fourteenth Amendment. The court ruled that the city failed to demonstrate a compelling interest because there was no evidence of discrimination by the city's construction industry, and the program was not narrowly tailored. In this case three justices made the distinction between the acceptability of *Congress* identifying and redressing discrimination (as it did in *Fullilove*) and of *states and localities* doing so. In her opinion, O'Connor emphasized that Congress has the authority to determine what situations may threaten principles of equality and "to adopt prophylactic rules to deal with those situations." This may include mandating that states and localities that choose to receive funding under the public works projects it authorizes set aside a specific proportion of the grants for minority business enterprises. The Fourteenth Amendment, however, was, in her view, designed to "place clear limits on the States' use of race as a criterion for legislative action," and so a city government did not have the authority to devise a race-conscious program.

Justice Stevens, who in other cases had sided with the more liberal wing, concurred with the majority, but wrote separately to say that in public contracting (unlike, for example, educational institutions) there is not a basis for arguing that the race of a subcontractor has relevance to the market. He further suggested that it should be the courts, rather than legislative bodies, that identify and fashion remedies for past discrimination. And he reiterated the concern he expressed in his dissent in *Fullilove* that too often "habitual attitudes toward classes of persons, rather than analysis of relevant characteristics of the class serve as a basis for legislative classification."

The dissent, written by Justice Marshall reaffirmed his view that race conscious classifications need only further important (rather than compelling) governmental objectives and be substantially related to the achievement of those objectives. Using this standard, Marshall found the Richmond program to be "plainly constitutional."

All was not lost yet, however, for supporters of affirmative action. In *Metro Broadcasting v. FCC* (1990), the court reaffirmed its position that it should defer to Congress as a co-equal branch entitled to legislate affirmative action in order to achieve an important governmental objective. *Metro Broadcasting* challenged an Federal Communications Commission (FCC) program that permitted a limited category of radio and television stations to be transferred only to minority-controlled firms. In writing for the court, Justice Brennan agreed with the FCC that "unless minorities are encouraged to enter the mainstream of the commercial broadcasting business, a substantial portion of the citizenry will remain underserved and the larger, non-minority audience will be deprived of the views of minorities." Brennan emphasized that "It is of overriding significance in these cases that the FCC's minority ownership programs have been specifically approved—indeed, mandated—by Congress," who has power to provide for the general welfare of the US and to enforce the equal protection guarantees of the Fourteenth Amendment. He distinguished this case from *City of Richmond v. Croson* by highlighting the notion that race-conscious classifications adopted by Congress to address discrimination are subject to different standards than those prescribed by state and local governments.

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Justice O'Connor, in her dissent joined by Rehnquist, Scalia, and Kennedy, argued that racial classifications are only permissible if they are narrowly tailored and meet a compelling interest. "The Constitution's guarantee of equal protection," she wrote, "binds the Federal Government as it does the States and no lower level of scrutiny applies to the Federal Government's use of racial classifications." Moreover, assuming citizens think in ways associated with their race violates the constitutional right that people have to be treated as individuals rather than as members of groups.

Justice Kennedy wrote a separate dissent (joined by Scalia) likening the court's justification that the FCC program would achieve "broadcast diversity" to the court's reasoning in *Plessy v. Ferguson* (1896) that separate accommodations for black and white railroad passengers were reasonable because they would increase the riding pleasure of their passengers. In his view, neither increasing rider pleasure through segregation nor listener pleasure through broadcast diversity is sufficiently compelling a reason for Congress to be permitted to use racial classifications. He, too, argued that the FCC policy was a form of discrimination and that such racial classifications must meet the standard of strict scrutiny.

Kennedy's dissent notwithstanding, until 1995 the court held that Congress should be permitted greater deference in sanctioning race conscious programs than state and local governments because the national government was specifically charged with enforcing the Fourteenth Amendment and other relevant provisions of the Constitution. This distinction between the standards of review met its demise in 1995 with *Adarand Constructors v. Pena*.

By this time, a conservative majority had firmly taken hold of the high court (see Table 2). Between 1990 and 1995 four new justices were appointed to the court: Souter, Thomas, Ginsburg, and Breyer. Thomas (appointed by Bush) joined the conservative faction while Ginsburg and Breyer (appointed by Clinton) joined the liberals. Souter would prove to be a swing vote. But the three most stalwart liberal justices, Blackmun, Marshall, and Brennan were gone. White, who had been a swing vote in affirmative action cases, had also retired. While two of the swing votes joined the pro-affirmative action justices in the *Adarand* vote (Souter and Stevens) their alliance was not enough to outvote the conservatives, now joined by Thomas, and O'Connor who had only occasionally allied herself with the liberals in the past.

Not surprisingly, O'Connor wrote the *Adarand* the decision, making the same arguments she did in her dissent in *Metro Broadcasting*. At issue was a federal department of transportation program that gave contractors on government projects a financial incentive to hire subcontractors run by "socially and economically disadvantaged individuals." The law further stated that certain minority group members would be presumed to be disadvantaged. When Adarand lost the contract despite having the low bid, he challenged the policy under the Fifth Amendment. In her opinion, O'Connor went noted that the court had still not produced a majority opinion on the proper analysis for government race-based action; that is, whether a standard of strict scrutiny or an intermediate standard should be employed. That had been achieved in *Croson*, she noted, where the court agreed that the Fourteenth Amendment required strict scrutiny for race-based action by state and local governments. But just a year later, O'Connor observed, "the Court took a surpris-

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ing turn" in *Metro Broadcasting*. The due process clause of the Fifth Amendment, she wrote, applies the same equal protection requirement to the federal government as the Fourteenth Amendment does to state governments. To the extent that *Metro Broadcasting* was inconsistent with that notion, it was overturned. O'Connor went on to leave one small ray of hope open to proponents of affirmative action. She wrote:

> Finally, we wish to dispel the notion that strict scrutiny is "strict in theory, but fatal in fact." . . . The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it. . . . As recently as 1987, for example, every Justice of this Court agreed [in U.S. v. Paradise] "pervasive, systematic, and obstinate discriminatory conduct' justified a narrowly tailored race-based remedy. . . . When race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the "narrow tailoring" test this Court has set out in previous cases" (63 LW 4533).

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While assuring us that strict scrutiny need not be "fatal in fact" it is nevertheless the case that the Supreme Court has not found any racial classification to meet this requirement since its decision in *Korematsu v United States* (Spann, 2000a). In *Adarand*, the court reversed its position in *Fullilove* and *Metro Broadcasting*, that affirmative action programs legislated by Congress should be held to a lower standard of intermediate scrutiny. In his dissent, Justice Stevens wrote at length about the importance of allowing Congress to exercise its power under the Commerce Clause, the Spending Clause and the Civil War amendments, particularly since "federal affirmative-action programs represent the will of our entire Nation's elected representatives."

In this decision Justices Thomas and Scalia also made their positions clear: under *no* circumstances does the Constitution permit race to be used as a criterion for distributing a burden or benefit, no matter how benign or remedial the purpose. Scalia wrote, "under our Constitution there can be no such thing as either a creditor or debtor race. That concept is alien to the Constitution's focus on the individual . . . In the eyes of government, we are just one race here. It is American." To this Thomas added, "In my mind, government-sponsored racial discrimination based on benign prejudice is just as noxious as discrimination inspired by malicious principle. In each instance, it is racial discrimination, plain and simple." Justice Stevens, in his dissent, strongly objected to this reasoning, accusing the court of disregarding "the difference between a 'No Trespassing' sign and a welcome mat."

The decision dealt a significant blow to affirmative action by declaring that all government affirmative action programs must meet the standard of strict scrutiny to be considered constitutional. (Indeed, Thomas and Scalia's view, even meeting a standard of strict scrutiny would not render an affirmative action program constitutionally permissible). No longer would the court defer to Congress as a coequal branch that should be given the latitude to remediate the effects of past discrimination. This change in stance clearly reflected the altered composition of the court and the "particular political philosophy" of its members (Brody, 1996; Mishler & Sheehan, 1993). It has also been suggested that the decision reflected a loss of trust in Congress with respect to the issue of race (Mishkin, 1996). But, arguably, neither

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ideology nor trust matter if the court, as a countermajoritarian institution, was protecting the minority from an oppressive majority, or at least reflecting the will of the people. The extent to which this is the case will be addressed later in this paper. First, it is important to review the court's most recent affirmative action jurisprudence, two cases involving the University of Michigan.

Gratz and Grutter: Revisiting Affirmative Action in Higher Education

While by this time it seemed the court would oppose most affirmative action programs, because the standard of strict scrutiny would be nearly impossible to meet, it had not, until the 2002–2003 term, addressed a key principle of the *Bakke* decision. That was whether the achievement of a diverse student body meets the "compelling interest" prong of the strict scrutiny standard, as Justice Powell suggested in that decision. The issue presented by a case addressing affirmative action in admissions, then, was *not* whether affirmative action was justified as a reactive measure to counter the effects of past discrimination. By this time the court had made its position on that subject clear—there must be specific findings of past discrimination on the part of the entity employing the affirmative action program. Rather, in the educational context, the issue was whether a race-conscious process could be used proactively to achieve the educational benefit attained by a diverse student body. While lower courts had addressed this question, and reached differing conclusions, it was not until the 2002–03 term that the Supreme Court agreed to review this issue raised in *Bakke*.

On June 23, 2003, the court handed down two rulings; one addressing University of Michigan's undergraduate admissions process (*Gratz v. Bollinger*) and the other the procedure used by its law school (*Grutter v. Bollinger*). In one case, the majority upheld the affirmative action program, and in the other rejected it, but, notably, in both cases the justices reaffirmed the *Bakke* decision as the controlling precedent, rather than overturn it as critics of affirmative action had hoped. This case elicited dozens of briefs on both sides; notable were those filed by academic, military and business interests in support of the continuation of affirmative action in higher education.

The law school's admissions process considered all applicants individually to ascertain whether they would contribute to the diversity of the student body, as well as their academic qualifications. While race was only one among many factors considered, the law school sought to enroll a "critical mass" of minority students. In her majority opinion, Justice O'Connor carefully distinguished this case from the previous line of cases that appeared to invalidate the consideration of race, except where there were clear and specific findings of past discrimination. In this case, she opined, the court would defer to "The Law School's educational judgment that such diversity is essential to its educational mission." The court has long recognized, she wrote, that "given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition." She also found acceptable the law school's practice of seeking to admit a "critical mass" of underrepresented students. However, for the first time in an affirmative action case, she gave the program an expiration date: "The Court expects that 25 years

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from now, the use of racial preferences will no longer be necessary to further the interest approved today."

Several dissenting opinions were filed, but the one written by Chief Justice Rehnquist was joined by the other three dissenting justices. Justice Rehnquist primarily took aim at the notion that seeking a critical mass of underrepresented students could meet the test of strict scrutiny. "Although the Court recites the language of our strict scrutiny analysis," he wrote, "its application of that review is unprecedented in its deference." Justice Scalia was less restrained, calling the law school admission process "a sham to cover a scheme of racially proportionate admissions." He further protested that rather than providing clarity as to whether race-conscious admissions policies were constitutional or not, "today's *Grutter-Gratz* split double header seems perversely designed to prolong the controversy and the litigation." Needless to say, in those future cases, he would continue to rule against race-conscious policies.

Gratz v. Bollinger challenged a process for evaluating applicants for undergraduate admission wherein the university awarded a specific number of points to applicants who were members of underrepresented groups. In that decision, the five justices who voted against affirmative action in previous cases, not surprisingly also voted against it in this case. However, in his opinion for the court, Rehnquist specifically rejected the argument that diversity fails to constitute a compelling interest, referring to the *Grutter* decision reasoning, and rather struck down the program on the grounds that it was not narrowly tailored.

What was surprising is that the majority in this case was joined by Justice Breyer, who has been considered an ally of the liberal justices on the bench. While he concurred with the court in judgment, however, he did not sign on to its opinion. Instead, he joined part of the dissent written by Justice Ginsberg in which she emphasized the difference between using race as a reason to deny someone benefits and using it to remedy the effects of past discrimination: "Our jurisprudence ranks race a suspect category, not because [race] is inevitably an impermissible classification, but because it is one which usually, to our national shame, has been drawn for the purpose of maintaining racial inequality. But where race is considered for the purpose of achieving equality, no automatic proscription is in order." The dissent in this case argued that the program was, in fact, narrowly tailored because unlike the UC Medical School admissions system at issue in *Bakke*, it did not set aside a specific number of seats for which nonminorities could not compete.

Thus, these opinions suggest that the court is more willing than the other recent cases would suggest to accept a limited application of affirmative action. However, three points are clear. One is that while the majority accepts that diversity can represent a compelling interest, that acceptance appears to be limited to higher education. Moreover, the means by which this is achieved is limited to consideration of each applicant individually and "not in a way that makes an applicant's race or ethnicity the defining feature of his or her application." Such individual consideration places a heavy burden on universities who must screen thousands of applications each year. The second point is that Justice O'Connor, as the swing vote in this decision, as in *Adarand*, was unwilling to slam the door completely on affirmative action. Should she be replaced by a more conservative justice in the future,

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the parameters under which the court may find race-conscious affirmative action in admissions will likely contract further. Finally, future challenges to affirmative action will likely also point to Justice O'Connor's expectation that racial preferences should not be necessary twenty-fvie years from now. Opponents will likely use this as a reason to demand that the affirmative action program in question provide evidence that there has been success in narrowing the test score gap that disadvantages minorities in the admissions process. But the reasons for this gap are complex and controversial, and closing it will be costly, financially as well as politically (Jencks & Phillips, 1998).

Is the Court Thwarting the will of the People?

The overall question this paper seeks to address is whether the court, in its affirmative action jurisprudence, is acting consistent with or opposed to, the will of the people, and, if the latter, whether in doing so it is protecting the minority in the community from oppression. The answer to that question must account for change in the court's position over time. Mishler and Sheehan (1993) concluded "the decisions of the Court during the Reagan years were significantly countermajoritarian in direction;" suggesting that the court grew increasingly conservative while the public mood was more liberal. But a simple question as to where the public stands on affirmative action is not easy to answer. Opinion polls have shown very different results over the years, based to a significant extent on how the question is worded[4] (Fine, 1992; Lipset & Schneider, 1978; Sigelman & Welch, 1991; Steeh & Krysan, 1996; Harris, 1996; Biskupic, 1991a; "Conflicted Views," 2003). For this reason, both critics and supporters of affirmative action have been able to show public opinion data that supports their position. Moreover, a recent Pew Research Center concluded that the affirmative action debate is "still below the radar" for the vast majority of Americans, citing a recent poll that found that "despite the flurry of press attention to the University of Michigan case," relatively few people had heard much about it ("Conflicted Views," 2003).[5]

Another way to answer the question as to whether the court has carried out the will of the people is by examining whether those peoples' elected representatives in Congress have tried to reverse the court. Congress had an opportunity to ban affirmative action when it passed the Equal Opportunity Act of 1972, and did not do so. An anti-affirmative action amendment introduced by Senator Ervin was voted down (Skretny, 1996). Justice Brennan noted specifically in the *Johnson* decision that Congress had not amended Title VII following the court's determination in *Weber* that the statute did not prohibit affirmative action, and therefore the court's interpretation could be assumed to be correct.

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Congress has acted to overturn civil rights decisions, including several important ones related to employment discrimination. One of the most important pieces of legislation in this regard was the 1991 Civil Rights Act. The law was sufficiently ambiguous to leave the extent to which Congress addressed affirmative action unclear (Lund, 1997). However, it did overturn the conservative opinion in *Wards Cove* and reinstated the *Griggs* standard that hiring practices must be job related and consistent with "business necessity," although the definition of "business necessity" remained ambiguous (Biskupic, 1991b). Elliott and Ewoh (2000, p. 226)

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conclude from their analysis of Congressional action that passage of further major civil rights legislation in today's environment is "highly unlikely."

Since that time, proposals to restrict federal affirmative action (even after the *Adarand* decision) have been introduced in the House and Senate, including the "Equal Opportunity Act of 1995" sponsored by Senator Robert Dole and Representative David Canady. Despite the fact that Republicans dominated Congress at this time, none of these bills reached the floor. Republicans were successful in eliminating a seldom-used tax break that promoted sales of radios and television stations to minorities ("Affirmative Action," 1997).

What about the president, who is also elected to carry out the will of the people? Presidents elected since the first affirmative action case was decided in 1978 have a mixed record, not clearly signaling unwavering support for or opposition to affirmative action. Clearly the president most notable for his opposition to race-conscious policies was Ronald Reagan, who took some actions to curtail affirmative action within the executive branch. For example, the department of labor reduced the threat of sanctions against contractors that failed to comply with E.O. 11246 (Leonard, 1994) and his appointed head of the EEOC, Clarence Thomas apparently informally told federal agency general counsels not to approve affirmative action plans that specified goals and timetables (Skrentny, 1996). But Reagan left affirmative action policies alone, even failing to rescind the provision codified in the Code of Federal Regulations (CFR) 60-2.10 that requires government contractors to set goals and timetables. This apparently was due to opposition of his labor secretary William Brock and 59 senators (among them Majority Leader Robert Dole) and 175 House members who asked Reagan to leave the order alone (Cohodas, 1985).

The Reagan administration did engage the courts by, for example, submitting briefs in some of the affirmative action cases. A notable example was *Wygant*, which the administration used to press its contention that affirmative action violates the Fourteenth Amendment (Witt, 1986). Although the affirmative action plan was struck down in that decision, O'Connor, one of the justices in the 5 to 4 majority, made it clear that the ruling should not be interpreted as an endorsement of the administration's position (Witt, 1986). Later that year (in *Sheet Metal Workers v. EEOC*), the administration lost its case when the court rejected the EEOC's argument that under Title VII, the courts could only mandate race conscious relief for identified victims of intentional discrimination (Brody, 1996).

Linda Fay Williams (1996, p. 253) concluded her assessment of the Reagan administration's response to affirmative action this way: "From the perspective of the late 1980s, the change in rhetoric was considerably larger than the change in programs" (see also Urofsky, 1997; Skrentny, 1996). Nevertheless he did leave his mark on affirmative action in one important way, albeit one that would not be realized until after he left office, and that was in his appointments to the high court. These were Antonin Scalia and Anthony Kennedy who have consistently opposed affirmative action. He also appointed Sandra Day O'Connor who, with the exception of *Grutter*, has voted against affirmative action in every important decision since 1989. He also elevated the conservative Justice Rehnquist to Chief Justice.

George Bush continued Reagan's opposition to affirmative action, making, "quotas the 'hot button' word on civil rights in the early 1990s" (Shull, 1993,

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p. 31). He vetoed the Civil Rights Act that Congress passed in 1990, calling it a "quota bill." A year later, he signed a slightly amended version. This change of heart has been attributed to criticism following the confirmation hearings for Justice Clarence Thomas who was accused of sexual harassment, and to a desire to distance himself from the successful primary election of former KKK member David Duke for governor of Louisiana (Biskupic, 1991b). Bush also left his stamp on the court, however, by appointing Clarence Thomas, an arch opponent of affirmative action. Little was known about his other appointee, David Souter, before his confirmation, and he has proven to be more liberal than many other Republican appointees.

Bill Clinton took a "low-key" position vis-à-vis civil rights (Skrentny, 1996). He commissioned a review of federal affirmative action programs and then advocated a position of "mend it, don't end it" in which he reaffirmed the need for affirmative action, but suggested that where in practice it has gone afoul, it should be fixed. He further heightened attention paid to civil rights by appointing an advisory panel on race. He appointed two relatively liberal members to the high court, Ruth Bader Ginsberg and Steven Breyer. However, the president declined to challenge the Supreme Court's notion, in *Adarand*, that race-conscious policies do not meet Constitutional muster (Spann, 2000b). Moreover, he could have chosen to apply the *Adarand* ruling solely to federal contracting but instead issued guidance instructing federal agencies to apply it to employment as well (Naylor & Rosenbloom, 2002).

George W. Bush's record has also been mixed. His administration declined to support a second challenge to the federal government's contracting program (*Adarand v Mineta*, 2001), invoking some criticism on the part of conservatives (Cokorinos, 2003). The administration's briefs in the *Grutter* and *Gratz* cases opposed the use of "race-based admissions criteria," calling the programs unconstitutional, but, acknowledging that diversity is important in higher education, proposing "race-neutral" alternatives to achieve that goal. This moderate position has been attributed to pressure by Condoleezza Rice, Colin Powell and other administration officials who support affirmative action. On the heals of the *Grutter* and *Gratz* decisions, George W. Bush issued a statement, "applaud[ing] the Supreme Court" whose decisions, he said, "seek a careful balance between the goal of campus diversity and the fundamental principle of equal treatment under the law" (Office of the Press Secretary, 2003).

Thus, an examination of Congressional and Presidential actions since the Supreme Court began to rule on affirmative action programs in the late 1970s suggests that it was the court that set the agenda and formulated the policy, with Congress and the president doing little more than sniping from the sidelines (see also Elliott & Ewoh, 2000). Indeed, in *Adarand*, the court specifically declined to defer to Congress's efforts to take proactive action with respect to ameliorating discrimination (Perry, 1999). For its part, Congress has failed to reverse any of the Supreme Court's affirmative action jurisprudence. Bill Clinton and George W. Bush clearly accepted the Supreme Court's lead, as Clinton moved to broadly apply *Adarand* and Bush praised Grutter and Gratz. Presidents, it seems, have elected to follow the court's lead, rather than the reverse. The final question to be addressed is what does this mean for a democracy?

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The Supreme Court in a Democracy: The Case of Affirmative Action

Now that the court has come full circle, returning to the issues addressed in its first affirmative action case, it is a good time to ask, then, whether the Supreme Court has carried out a democratic role reflecting the will of the people, or whether it has served the role envisioned by Hamilton "protect[ing] the minority party in the community" from "serious oppression." That depends, in part, on who one considers to be the "minority" to be protected. If one considers the minority to be members of minority groups in the US, the court largely protected their rights until 1989. It did so in a democratic way—by deferring to Congress when it established programs designed to remediate the effects of past discrimination, even if it was unwilling to accord states and localities the same deference. Arguably, this is what was intended in Section 5 of the Fourteenth Amendment, for example, which provides Congress the power to enforce that amendment through legislation (Mishkin, 1996).

By the 1990s, the court reversed course, no longer to deferring to Congress, but rather directly applying its own interpretation of the Constitution. Despite no significant changes in law or constitutional amendments, the court was proscribing affirmative action plans it once sanctioned. It was no longer on the side of minorities, instead declaring that the Fifth and Fourteenth Amendments guarantees of equal protection applied to the majority (whites) as much as they do to minorities. The one exception was the recent *Grutter* decision in which it narrowly sanctioned the law school admission program. This decision could hardly be said to have invalidated its decisions opposing the consideration of race in employment and contracting and certainly doesn't return the authority to Congress that *Adarand* withdrew.

The court is now routinely involved in the formulation of social policy (Spann, 2000a). In the case of affirmative action, it is not, as Alexander Hamilton promised, the least dangerous branch that would have to take "all possible care . . . to enable it to defend itself against their attacks" (Hamilton, 1961, p. 466). In recent years, it has defined the scope of lawful affirmative action policies, and has done so based on the ideology of the majority of justices. As noted by Spann (2000a, p. 192), "But these days, no one really believes the Court is simply 'reading the Constitution.' The policy-making discretion of the Court is both too vast and too obvious to permit any indulgence in that view."

Moreover, affirmative action jurisprudence highlights the importance of any *one* justice's political views. Because the decisions have reflected plurality or bare majorities, even one replacement on the court could swing its position. As long as Justices Marshall, Brennan, and Blackmun were on the court, affirmative action was ensured three votes and in many cases, the votes of Powell and Stevens, too. But the replacement of Powell by Kennedy resulted in significant defeats in two 1989 cases. By the time the significant *Adarand* case was heard, Clarence Thomas had replaced Thurgood Marshall, and the decision raised the bar for permissible use of affirmative action in Congressionally mandated programs. The timing of Sandra Day O'Connor's retirement will also be noteworthy. While she authored the key *Croson* and *Adarand* cases that definitively required strict scrutiny for state and federal programs, she was willing to compromise and permit the consideration of

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race, albeit in a very limited way, in admissions to institutions of higher education. Her replacement by a conservative justice could result in the court's revisiting this decision and shutting that door as well. Such is the vital role played by even individual justices.

What is largely at issue is the often stark difference in the way these justices interpret the same language of the Constitution and Civil Rights Act. Does the Fourteenth Amendment's requirement for equal protection preclude the consideration of race in hiring, admissions or contracting, or does it permit (perhaps even encourage) the consideration of race to remedy the historical disadvantages faced by minorities? Does the justification for a remedy in the form of affirmative action have to be based on specific, identifiable discrimination or is the recognition of the lasting impact of societal discrimination enough? Does Congress have the authority to create programs that consider race if it deems these are necessary to realize the Fourteenth Amendment equal protection guarantees, or does it not? Is the proper role of the court to protect minorities from the majoritarian political process, as Brennan argued, or in upholding affirmative action would the court be infringing on the rights of the (innocent) majority? Should the court defer to Congress as a coequal branch of government or decide for itself how the Constitution and statutes should be interpreted and whether they are valid.

One's answers to these questions reflect one's political views. To the extent that political ideology reflects the wishes of the people as conveyed through the president and Congress whom they elect, and who appoint and confirm the justices, that can be seen as a victory for democracy. But it is a thin victory, indeed.

Notes

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1 Affirmative action is not represented by a single law or policy statement, but rather is a concept developed over many years and applied in many circumstances. This paper will adapt a definition that Curry (1996, p. xiv) attributes to the Civil Rights Commission: Affirmative action policies and programs permit the consideration of race, ethnicity, national origin, or sex in the awarding of contracts, employment or university admissions in order to provide opportunities to a class of qualified people who have been historically or actually denied those opportunities, and to prevent further discrimination in the future.

2 The Court had been presented with another affirmative action case in 1974, *DeFunis v. Odegaard*, but sidestepped the issue by declaring it moot. Some commentators do find it significant that four justices dissented from the decision, arguing the Court should address affirmative action. Justice Douglas was the only one who addressed the merits of the case, writing that even the "benign" racial classification used by the university in its admissions program should be subject to strict scrutiny (Spann, 2000a).

3 An exception was Burger's vote in favor of affirmative action in the *Fullilove* decision.

4 For example, the Pew Research Center has found the following in its polls. When asked to agree or disagree with the statement "We should make every possible effort to improve the position of black and other minorities, even if it means giving them preferential treatment, only 24% of respondents agreed." When asked, "In order to overcome past discrimination, do you favor or oppose affirmative action programs designed to help blacks, women, and other minorities get better jobs and education," 63% responded in favor of those efforts ("Conflicted Views," 2003).

5 In a 2000 issue of *Policy Studies Review*, Euel Elliott and Andrew I.E. Ewoh looked at the congruence between public opinion and civil rights issues such as affirmative action. In a recent case *Lawrence v. Texas* (2003), the Court ruled that gays were entitled to respect for their private lives, reflecting American society's increase in tolerance for gays, and providing further support for Elliott and Euel's thesis. However, this paper disagrees that the Court has been congruent with public opinion on the issue

of affirmative action because, as noted in the paper, the public's position on that issue is not clear (see also note 5).

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