AFFIRMATIVE ACTION AND JUDICIAL REVIEW

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INTRODUCTUON

The Equal Protection Clause of the U.S. Constitution, which is believed to have had a major influence on the drafting of Article 14 of the Japanese Constitution, was enacted to protect formerly enslaved blacks and their descendants after the American Civil War in 1861. However, the Equal Protection Clause has since been interpreted as a race-neutral provision, and the Supreme Court has a developed a theory of case law that interprets the Clause in a race-neutral manner. Under that interpretation of the Clause in question, there has been a conflict between the Supreme Court justices over the application of the standard of judicial review in cases where the constitutionality of Affirmative Action (hereafter abbreviated to AA), a system designed to redress the harmful effects of past racial discrimination, has been brought into question. This article therefore clarifies the conflicts among the Supreme Court justices over the application of the standard of judicial review, focusing on the Supreme Court cases involving violations of the Equal Protection Clause of the U.S. Constitution, and examines the judicial review that justifies AA.

I. ABOUT AFFIRMATIVE ACTION

A. Racism and Affirmative Action

In 1865, after the Civil War, Congress enacted the Thirteenth Amendment to

the U.S. Constitution, declaring the abolition of slavery in the United States, in order to change the legal status of the black population: from slaves to integrated citizens. Then, in 1868, the Fourteenth Amendment to the U.S. Constitution was enacted to provide that all persons born or naturalized in the United States shall be citizens of the United States and of the State wherein they reside, and that no State shall deny to any person within its jurisdiction the equal protection of the laws. In 1870, the Fifteenth Amendment to the U.S. Constitution was enacted to prohibit disenfranchisement based on race. In addition, Congress enacted the Civil Rights Act to implement these amendments to the U.S. Constitution. These amendments and civil rights laws gave politically powerless blacks the means to demand their freedom and also to seek protection against the unlawful use of public power. In addition, the power to defend civil rights was given to the federal government by Section 5 of the Fourteenth Amendment to the U.S. Constitution, which allowed Congress to use its legislative power over the states in order to protect constitutional rights.

Thus, the Civil War was followed by constitutional amendments and civil rights legislation; however, when Union troops withdrew in 1877, the movement to achieve racial equality in the Reconstruction era southern states waned. Furthermore, while a series of constitutional amendments allowed blacks freed from slavery to vote, their economic conditions were much the same has they had been prior to the emancipation. Not only was that the case but, also, even though the Fifteenth Amendment to the U.S. Constitution allowed black citizen the right to vote, it was only nominally, and, in fact, blacks were excluded from political activity by white violence, unfair means, and even "structural discrimination"(1). In other words, the Reconstruction era goal of creating an equal civil society free of racial discrimination was not achieved. The Southern states also enacted "Jim Crow Laws" aimed at making blacks an inferior racial class, which led to racial segregation in all forms of public transportation such as railroads and buses, public facilities, and even schools

and libraries. A succession of court decisions ruled such laws to be constitutional. Typical of this is the *Plessy v. Ferguson*(2) . The *Plessy* decision established the "Separate but Equal" theory. This "Separate but Equal" theory is the concept that even if whites and blacks are separated on the basis of race, they are not unequal as long as equal facilities are provided to each.

This systematic discrimination against blacks in the post-Reconstruction era is said to have created a classic form of "Disparate Impact," a core concept of AA. For example, in the Southern states, black citizens were provided with inadequate education, which resulted in very low literacy rates within that demographic, which in turn deprived them of employment opportunities and the right to vote. Furthermore, during the nineteenth century, blacks had difficulty fighting against systematic acts of discrimination by whites. Since the early twentieth century, however, the social situation of blacks has been transformed by the civil rights movement, which demanded that racial discrimination be abolished and that blacks be given the same guarantees of equal opportunity as whites. In this civil rights movement, the non-violent civil resistance movement advocated by Martin Luther King Jr. was actively engaged in. The civil resistance movement had its origins in the 1955 bus boycott in Montgomery, Alabama, but it culminated in the 1963 March on Washington. On the other hand, the civil rights movement also led to legal battles, which ultimately led to the *Brown v. Board of Education*(3) in 1954 that ruled racial segregation in public schools unconstitutional and overturned the "separate but equal" theory, at least in

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（1） SAMUEL LEITER & WILLIAM M. LEITER, AA IN ANTIDISCRIMINATION LAW AND POLICY 23-32, 39-40 (State University of New York Press 2002). For example, it discriminated against blacks by imposing a capitation tax, literacy tests as a voting eligibility requirement, and even gerrymandering, an unnatural practice of districting that ignored area and population in favor of one's own party.

（2） 163 U.S. 537 (1896).

（3） 347 U.S. 483. (1954).

education.

These civil rights movements culminated in the Civil Rights Act of 1964. This act comprehensively prohibited discrimination on the grounds of race, color, religion and national origin (a prohibition of discrimination on the basis of sex was added by a 1972 amendment to the same act). In addition, Title VII of the Civil Rights Act prohibited discrimination in employment on the basis of race and other grounds. However, as in Reconstruction era, simply prohibiting discrimination and guaranteeing equality of opportunity failed to bring about significant changes in the social and economic status of blacks. Therefore, in order to more substantially guarantee equality of opportunity for blacks and other minority groups who had suffered widespread racial discrimination in the past, the federal government began to make active efforts, particularly in the federal government, to remedy the harmful effects of past racial discrimination, rather than simply prohibiting discrimination(4). These proactive measures by the federal government are referred to as AA, and the term "AA" was coined by President Kennedy in 1961 when he issued Executive Order 10925, prohibiting racially discriminatory hiring practices by public works contractors. The first official use of the term was, therefore, in the United States(5). Typical of AA is purportedly based on President Johnson's Executive Order 11246 of

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（4） NISHIMURA HIROMI, *Sabetsu to Kyusai−Amerika Shiyakai To Byoudou−*[*Discrimination and Redress−American Society and Equality−*] in JINKEN NO SHIHOUTEKI KYUSAI [JUDICIAL REMEDIES FOR HUMAN RIGHTS] (Sakamoto Masanari and Murakami Takenori eds., Yushindo Kobunsha 1990), p. 28.

（5） Professor Nishimura Hiromi points out that presidential orders prohibiting discrimination in the employment of government procurement companies can be traced back to Order 8802 of 1941 by President Roosevelt. In addition, similar presidential orders were issued from 1940 to the 1950s, which were based on laws granting the president the authority to conduct the war, and their purpose was to secure the maximum amount of labor necessary for production related to national defense. See Nishimura Hiromi, *Affirmative Action Wo Meguru Gassyukoku Saikousai No Doukou* [*The Supreme Court on Affirmative Action*], Amerika Hou [1989-2] (1989), p. 238.

1965. Executive Order 11246 requires AA and prohibits federal contractors from discriminating on the basis of race, color, religion, sex, sexual orientation, gender identity, or national origin. Contractors also are prohibited from discriminating against applicants or employees because they inquire about, discuss, or disclose their compensation or that of others, subject to certain limitations. Furthermore, in 1967, President Johnson's Executive Order 11375 added sex discrimination to the list(6). These orders by President Johnson (Nos. 11266 and 11375), which added the prohibition of sex discrimination in employment to the language of President Kennedy's 1961 Executive Order 10925, are worthy of recognition in that they greatly expanded its scope. After 1967, AA applied to any employment action taken by a contractor, not just employment directly related to the performance of a government procurement contract.(7).

Furthermore, in addition to these presidential orders, there are four other types of AA, which can now be listed. First, AA taken pursuant to a court order; second, AA taken pursuant to a Consent Decree; third, AA taken pursuant to a specific law; and fourth, AA taken voluntarily and not pursuant to the provisions of a law(8). As can therefore be seen, the term “AA” denotes not one thing but various forms of action. For this reason, the term "AA" is generally used in a broad sense without a clear definition. However, if one were to venture a definition of AA, it could be as "the active relief of a discriminated group, typically on the basis of race (or gender), in order to remedy the existing harm of racial (or sexism) discrimination in the past”(9). On the other hand, as noted earlier, AA was initially justified as a remedy for past acts

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（6） Executive Order 11375.

（7） NISHIMURA HIROMI, AMERIKA NI OKERU AFFIRMATIVE ACTION WO MEGURU HOUTEKI SHYMONDAI [LEGAL ISSUES REGARDING AFFIRMATIVE ACTION IN THE UNITED STATES] (Osaka Furitsu Daigaku Keizaigaku Gyosho 66, 1987), p. 21-2.

（8） *Ibid.*

of racial and gender discrimination. However, after *Regents of the University of California v. Bakke*(10) , the Supreme Court came to approve AA to achieve diversity of student populations at universities.

B. Affirmative Action and the Two Conceptions of Equality

There have been many lawsuits filed in the United States over the constitutionality of AA. Although there has been some disagreement within the Supreme Court over the constitutionality of such AA cases, it is believed that this disagreement stems fundamentally from a difference in the views of equality assumed by conservative and liberal judges(11) .

The election of conservative justices to the Supreme Court is often considered to be premised on their holding an individualistic view of equality. This individualistic view of equality is one that states that equal opportunity and fair outcomes through free competition are guaranteed by forbidding any consideration of factors unrelated to individual ability, such as race and gender(12) . This individualistic conception of equality is one that must be “narrowly tailored” in relation to those who should be similarly situated for legislative purposes and those who are actually selected by the classifications adopted legislatively to achieve the legislative objectives(13) . Thus, under this individualistic conception of equality, "over-inclusive" legislation that targets those who should not be covered by the legislation in relation to its objectives, or "under-inclusive" legislation that does not target those who should

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（9） Nishimura Hiromi, *Affirmative Action No Nini No Jitsushi To Sabetsu No Ritshou Youken−Weber Hanketsu Igo No Tenkai−*[*Voluntary Impletenmention of Affirmative Action and The Requirement to Establish Discrimination−Developments Since The Weber Case−*], Osaka Furitsu Daigaku Keizaigaku Kenkyu 32, 1987), p. 209-10.

（10） 438 U.S. 265 (1978).

（11） Nishimura Hiromi, *supra* note 5, at 257.

（12） NISHIMURA HIROMI, *supra* note 7, at 24-6.

be covered in relation to the legislative objectives, is not recognized(14) . In other words, according to that conception of equality, the scope of relief under AA is limited to individual blacks who are the direct victims of past racial discrimination(15) .

The election of liberal justices to the Supreme Court is often considered to be premised on their holding a group-oriented view of equality(16) . This group-oriented view of equality is a concept that seeks to protect black groups and promote the interests of that entire race demographic by viewing those who have suffered the harmful effects of past racial discrimination as if they were a group rather than an individual(17) . Owen M. Fiss, a leading exponent of this group-oriented conception of equality, points out that protecting former slaves and their descendants from the most

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(13) Owen M. Fiss, *Group and the Equal Protection Clause*, 5 PHIL. & PUB. AFP. 108-11 (1976). Fiss also examines the "rationality" (meaning end rationality) between a group of persons who should be similarly situated for legislative purposes and a group of persons who are actually selected by the classifications adopted legislatively to effectuate the right legislative purpose. The "Formula of Tussman and tenBroek" (Tussman and tenBroek Formula) is given as a In the "Formula of Tussman and tenBroek," first, a group of persons who should be placed in a similar situation in terms of legislative purpose is designated A, and a group of persons who are actually selected according to the classifications adopted legislatively to realize the right legislative purpose is designated B. Then, if all A's are B's, but some of them are not A's, they are designated B's. If, then, all A's are B's, but some B's are not A's, this is defined to mean that the legislation is "over-inclusive" in that it targets those who, in relation to the legislative purpose, should not be covered by the legislation. On the other hand, if all B's are A's but some A's are not B's, it is defined to mean "under-inclusive" legislation that, in relation to the legislative purpose, does not target what it should target. See SAKAMOTO MASANARI, KENPO RIRON II [Constitutional Theory II] (Seibundou, 1997), p. 226, and TOMATUS HIDENORI, BYOUDOU GENSOKU TO SHIHOU SHINSA [THE PRINCIPLE OF EQUALITY AND JUDICIAL REVIEW] (Yuhikaku, 1990), p. 36-7.

(14) Owen M. Fiss, *supra* note 13, at 111, 130-1.

(15) *Id*. at 129.

(16) NISHIMURA HIROMI, *supra* note 7 at 33-7.

(17) *Ibid.*

offensive discrimination by the states was the original purpose of the Equal Protection Clause of the U.S. Constitution. Fiss then argues that the equal protection of the laws guaranteed that Clause is to protect blacks from the harms that threaten their status as citizens. Furthermore, Fiss explains that because the harms of racial discrimination extend to black groups as a whole, we should recognize the right to seek redress for those groups as well(18) .

As this conflict of equality is manifested in cases involving the constitutionality of AA, the next section examines the major Supreme Court cases in which the constitutionality of AA has been challenged.

II. AFFIRMATIVE ACTION AND THE JUDICIAL REVIEW

A. Conflict Between Judges Over the Application of the Standard of Judicial Review

In the Supreme Court decision in the 1990s that challenged the constitutionality of AA, conservative judges argued that standard of strict scrutiny should be applied to AA, while liberal judges argued that standard of intermediate scrutiny should be applied. Thus, there was a conflict between conservative and liberal judges over the application of the standard of judicial review. Therefore, I will examine the major cases in which the conflict between conservative and liberal judges over the application of the standard of judicial review became apparent.

Justice Powell, who wrote the relative majority opinion in the *Bakke* decision in which the constitutionality of an AA taken by the California State University, Davis School of Medicine was at issue, applied standard of strict scrutiny to the case. Judge Powell then stated that no past racial discrimination existed in this medical

(18) *Ibid.*

school and, furthermore, because the medical school did not have the authority to certify the harmful effects of past racial discrimination, the court held that the purpose of the special admissions system in this case – to redress social discrimination – could not be tolerated as a compelling state interest. On the other hand, Judge Powell held that the purpose of AA of diversity of student body at an institution is a compelling state interest because diversity of student body at an institution leads to diverse discussions in the classroom and helps students succeed in a racially diverse society. Moreover, in this case, Justice Powell made it clear that he would tolerate an admissions system that sought diversity in the student population, taking into account the broader qualities and characteristics of applicants, rather than a quota system in which race was the determining factor in admissions. On the other hand, in this *Bakke* decision, the group led by Justice Brennan held that an intermediate standard of review should be applied to the case for the purpose of seeing whether the AA imposes a stigma on a particular racial group. In other words, the group led by Justice Brenna assumed that the purpose of the AA was benign, and argued that the AA should be reviewed under a different standard of judicial review than other legislation that adopted racial discrimination.

In *City of Richmond v. J.A. Croson Co.*[19] , a Richmond city ordinance requiring public works contractors to reserve thirty percent of their contract value to subcontractors owned by racial minorities was challenged as violating the Equal Protection Clause of the U.S. Constitution.

Justice O'Connor authored the opinion of the Court in this case, in which she stated that she could not determine whether the government's use of racial classifications was for benign remedial purposes without applying the strict scrutiny.

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(19)　488 U.S. 469 (1989).

Judge O'Connor stated that under Section 5 of the Fourteenth Amendment to the U.S. Constitution, Federal Congress may implement race-conscious AA to remedy racial discrimination on the basis that it exists in society. Judge O'Connor also argued that because Section 1 of that same Amendment provides for restrictions on the powers of the states, the states and local governments are not permitted to exercise the same powers that Federal Congress has. Judge O'Connor then noted that state and local governments must show that no morally wrongful intent was at work in the AA in question, through proof that the harmful effects of past racial discrimination existed. However, the City of Richmond did not succeed in proving that. Next, Judge O'Connor pointed out that the City of Richmond's ordinance was allegedly based on overt racial political dynamics in that it also covered businesses owned by blacks, Hispanics, Orientals, Indians, Eskimos, and Aleuts. Justice O'Connor concluded ultimately that even if the City of Richmond were to successfully establish that there was past racial discrimination in the City's construction industry, it would not justify AA under the quota system set forth in the ordinance.

On the other hand, Justice Scalia, who wrote the concurring opinion in this judgment, stated that under the U.S. Constitution, the government's use of racial classifications is permissible only in the following two cases. First, when the government will end its own past and continuing racial discrimination; second, when the use of racial classification is absolutely necessary as the only available means to avoid an emergency so dramatic and imminent that even a gross injustice in violation of the Equal Protection Clause of the U.S. Constitution must be overlooked. Under Justice Scalia's view, AA would be permissible only in very exceptional cases(20) .

In *Metero Broadcasting, Inc. v. FCC*(21) , two broadcasting licenses that were

(20) RONALD DWORKIN, SOVREIGIN VIRTUE 416 (Harvard University Press 2002).

(21) 497 U.S. 547 (1990).

granted by the FCC (Federal Communications Commission) through AA regarding broadcasting licenses granted by the FCC were challenged as violating the equal protection requirements contained in the Due Process Clause of the Fifth Amendment to the U. S. Constitution. Justice Brennan authored the opinion of the Court in this case, in which they stated that the purpose of the AA in this case, which was to promote diversity in broadcast content, was an important government objective. In addition, Justice Brennan noted that Federal Congress and the FCC had recognized a correlation between the increase in the number of stations owned by racial minorities and the diversification of broadcast content, and that the AA in this case employed measures that were substantially related in relation to that objective.

On the other hand, Justice O'Connor, who wrote the dissenting opinion in the case, stated that the purpose of the AA in this case, was unacceptable because it was based on the assumption that race and ethnicity determine the content of actions and thoughts. Judge O'Connor also held that although the Court's opinion applied the intermediate scrutiny to the case, the AA in this case did not even meet the requirements of that. Furthermore, Judge O'Connor held that unless the FCC could establish that there was a narrow tailoring between the diversity of broadcast content and the race or ethnicity of the station's owners, the AA in this case would be unlawful stereotyping based on race.　As discussed above, in the early to midterm period of the Rehnquist Court, the Supreme Court justices disagreed on what standard of judicial review should be applied to AA using racial classifications.

AA in public works was also at issue in *Adarand Constructors, Inc. v. Pena*[(22)] . The Central Federal Lands Highway Division of the United States Department of Transportation entered into a contract with Mount Gravel for the construction of a

(22)　515 U.S. 200 (1995).

highway in Colorado. The contract provided that the prime contractor for the highway construction project could receive additional government subsidies if it chose a subcontractor owned by an individual who had been socially and economically discriminated against.

When Mountain Gravel submitted a bid for a guardrail subcontractor, Adarand, the plaintiff in this case, was defeated by Gonzales and failed to obtain the contract, despite the fact that Adarand's bid was lower than that of Gonzales, which was owned by racial minorities. Thereupon, Adarand filed suit, claiming that the terms of the contract between a division of the U. S. Department of Transportation and Mount Gravel violated the equal protection requirement contained in the Due Process Clause of the Fifth Amendment to the U. S. Constitution.

In this case, Justice O'Connor wrote the opinion of the Court, in which she stated that she could not determine whether the government's use of racial classifications was for benign remedial purposes without applying the strict scrutiny. In other words, in this decision, Judge O'Connor reversed the decision in *Metero Broadcasting, Inc*.. Justice O'Connor also stated that she wanted to dispel Gerald Gunther's theory that the strict scrutiny standard is "strict in theory but fatal in fact"[(23)]. What this meant was that Judge O'Connor explicitly rejected a method of applying the strict scrutiny that would immediately lead to an unconstitutional ruling. Judge O'Connor then argued that the standard for determining constitutionality under the Fifth Amendment as applied to federal law is the same as the standard for determining constitutionality under the Fourteenth Amendment as applied to state law. Judge O'Connor concluded, following the precedent of the *Croson* decision, that the case should be remanded to the lower courts to apply Strict Scrutiny to this case.

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(23) Gerald Gunther, *The Supreme Court 1971 Term-Foreword: In Search of Evolving Doctorine on Changing Court: A Model of for a Never Equal Protection*, 86 HARV. L. REV., 1, 8 (1972).

On the other hand, Justice Ginsburg, who wrote the dissenting opinion in the case, held that the application of the strict scrutiny adopted by Justice O'Connor was intended to "ferret out" the use of racial classifications that pretend to be benign when in fact they are malignant and then held that the intermediate scrutiny should be applied to any "suspicion" that would provide a basis for Justice O'Connor's application of the strict scrutiny.

Thus, since the *Croson* decision, Justice O'Connor has oriented judicial review to detect AA that pretend to be benign when in fact they are malignant. After Justice O'Connor explicitly declared that the strict scrutiny should be applied to the government's use of racial classifications in the *Adarand* decision, a number of liberal judges followed this precedent and applied the strict scrutiny to AA.

B. The Confliction of Judges' Approaches to the Application of Strict Scrutiny

In *Grutter v. Bollinger*(24) , the Michigan State University Law School's race-conscious admissions system was challenged on the grounds that it violated the Equal Protection Clause of the United States Constitution. In this case, Justice O'Connor wrote the opinion of the Court, in which she stated that she could not determine whether the government's use of racial classifications was for benign remedial purposes without applying the strict scrutiny. On the other hand, in this case, Judge O'Connor cited the Court's opinion in *Adarand*, which she authored, noting that the strict scrutiny is not a "strict in theory but fatal in fact" standard of judicial review, as Gunther pointed out, and she held that, although the strict scrutiny standard applies to legislation utilizing racial classifications, not all uses of racial classifications are rendered unconstitutional by the application of the strict scrutiny standard. In other words, Justice O'Connor made it clear that the application of the strict scrutiny

(24)　539 U.S. 306 (2003).

standard, which in this case, like the *Croson* and *Adarand* decisions, was thought to lead to a formal unconstitutional determination, could be applied flexibly, taking into account the individualized and specific context of the case(25) .

Applying strict scrutiny, Judge O'Connor noted, differently to the Fifth Circuit Court of Appeals in *Hopwood v. Texas*(26) , that the diversity of student body at educational institutions, including racial diversity, leads to diverse debates in the classroom and success in racially diverse communities. The Court held that the purpose of achieving diversity in the student body was a compelling state interest because it would help the law school to do what. Justice O'Connor also took the position that the AA was permissible if the law school established the following four points(27) . First, that the admissions system in question is not a quota system based on race, but rather is designed to reach a "critical mass" of racial minorities. Second, that it has given serious consideration to feasible race-neutral alternatives to reaching "critical mass"(28) in racial minority numbers. Third, the admissions system gives equal weight to race as well as various other factors that contribute to the diversity of the student body, such as foreign residency and proficiency in several languages. Fourth, the duration of the AA has been set and the AA will be terminated as soon as possible after the goals are met. In other words, Judge O'Connor may be considered to have shown a degree of deference to the law school's educational decisions by adopting a less formal application of the strict scrutiny.

On the other hand, Chief Justice Rehnquist, who wrote the dissenting opinion,

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(25) YOSHIDA HITOMI, BIYOUDOUKEN NO PARADOX [THE PARADOX OF EQUAL RIGHTS] (Nakanishiya Shupan, 2015), p. 111.

(26) 78 F.3d 932 (5th Cir. 1996).

(27) Jonathan W Rash, *Affirmative Action on Life Support: Fisher v. University of Texas at Austin and the End of Not-So-Strict Scrutiny*, 8 DUKE. J. CONST. L. & PUB. 25, 43 (2012).

(28) The number of racial minority students who can contribute to class discussions without feeling marginalized. See Grutter, 539 U.S. at 318.

criticized that the application of the strict scrutiny adopted by Justice O'Connor permits the government's use of racial classifications if they are based on "good motives". In addition, Chief Justice Rehnquist held that the admissions system in this case merely equates the racial composition of the applicant with the racial composition of the successful candidate.

In *Fisher v. University of Texas at Austin (Fisher I)* [29] , the race-conscious admissions system implemented by the University was challenged as violating the Equal Protection Clause of the U.S. Constitution. In this case, Justice Kennedy wrote the opinion of the Court, in which he stated that he could not determine whether the government's use of racial classifications was for benign remedial purposes without applying the strict scrutiny. Furthermore, Justice Kennedy stated that the strict scrutiny should not be a theoretically rigorous but virtually fatal standard of judicial review, and criticized the manner in which the strict scrutiny is formally applied, such that the application of the strict scrutiny immediately led to an unconstitutional ruling[30] . Thus, Justice Kennedy appears to favor the less formal application of the strict scrutiny employed by Justice O'Connor in the *Croson, Adarand*, and *Grutter* decisions.

In the case, Judge Kennedy followed the *Grutter* decision and held that the goal of achieving diversity in the student body of the admissions system in question was acceptable as a compelling government interest. On the other hand, Judge Kennedy found that the district court and the Fifth Circuit Court of Appeals had given deference to Texas State University at Austin in finding that the race-neutral

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(29)　570 U.S. _ (2013).

(30)　In *Croson*, Justice Kennedy had expressed an opinion in support of the approach to applying the standard of strict scrutiny adopted by Justice O'Connor in *Croson*. see Croson, 484 U.S. at 518-9.

alternative could not achieve a diverse student body that would produce educational benefits, and he criticized the trial court for granting summary judgment to allow the AA in this case. Judge Kennedy then sent the case back to the Fifth Circuit Court of Appeals. In other words, Judge Kennedy asked the Fifth Circuit Court of Appeals to rehear the case again on that point because there was insufficient proof on the part of Texas State University at Austin to justify a race-conscious admissions system.

Justice Kennedy's opinion of the Court in the *Fisher I* decision is reminiscent of his concurring opinion in the *Parents Involved in Community Schools v. Seattle School District No. 1*(31) decision (hereafter referred to as the *PICS* decision). In the *PICS* decision, Justice Kennedy recommended that school boards use race-neutral alternatives to remedy de facto racial segregation in public schools. And Judge Kennedy took the view that it was permissible to use racial classifications only if the school board established that they were ineffective and that racial classifications were the only available means of doing so. In other words, in this *PICS* decision, Justice Kennedy imposed a very strict burden of proof on the part of the school board to justify the use of racial classifications.

On the other hand, Justice Thomas, who wrote the concurring opinion in the *Fisher I*, argued that the consideration of race in the state university admissions system violated the Equal Protection Clause of the U.S. Constitution and should be prohibited.

Justice Ginsburg, who wrote the dissenting opinion in the case, also noted that the opinion of the Court abandoned the framework for judicial review of the constitutionality of AA in universities established in the *Grutter* decision. Judge Ginsburg also said that the Fifth Circuit Court of Appeals had already exhausted the

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（31） 551 U.S. 701 (2007). In the PICS decision, a student quota system using racial classifications in Seattle School District No. 1, Washington and Jefferson County, Colorado public schools was challenged as violating the Equal Protection Clause of the U.S. Constitution.

full hearing on the issues on which the court's opinion bases its remand to the lower court.

III. "OVERRIDING-NECESSITY VERSION" AND "REBUTTAL VERSION"

A. "Overriding-Necessity Version" and its problems

Writing the Court's opinion in the *Korematsu v. United States*(32) decision, in which the incarceration of Japanese Americans during World War II was at issue, Justice Black stated that any government statutory regulation targeting a particular racial group was immediately suspected to be unconstitutional. However, Justice Black pointed out that this does not mean that all of the statutory regulations at issue are unconstitutional, but rather that the Court must conduct judicial review of these regulations based on the most rigid scrutiny. As this shows, the strict scrutiny of review is understood in the first instance to be a balancing of interests approach that places a strict burden of proof on the side of the government(33) . During the Warren Court's time, however, there have been formal applications of the strict scrutiny of review that have resulted in immediate unconstitutional rulings. For example, Gerald Gunther, in a 1972 article, described the application of the strict scrutiny in the Warren Court in the 1960s as a "strict in theory but fatal in fact" review, and, when this strict scrutiny is applied, the legislation in question would, it was argued, be immediately declared unconstitutional(34) . This is because there was insufficient compelling public interest in Warren Court to justify imposing a disadvantage, such as a stigma, on the class covered by the "dubious classification"(35) . In this regard,

(32)　323 U.S. 214 (1944).

(33)　TOMATSU HIDENORI *supra* note 13 at 139, Richard H. Fallon, Jr., *Strict Judicial Scrutiny,* 54 UCLA. L. REV. 1267, 1306 (2007).

Paul Brest points out that the role of the strict scrutiny, which Gunther describes as "strict in theory but fatal in fact," is to protect classes covered by "suspect classification" from harms such as the imposition of race-based stigmas by allowing the government to use racial classification only in very exceptional cases(36) . First, the government would end its own past and continuing racial discrimination. Second, when it avoids an emergency so dramatic and urgent that even a gross injustice that violates the Equal Protection Clause of the U.S. Constitution must be overlooked. Ronald Dworkin refers to this method of applying the strict scrutiny as the "Overriding-Necessity Version"(37) . Paul Brest also pointed out in a 1976 article that the use of racial classifications by the government based on benign motivations, such as AA, has become increasingly important in recent years, and that harmonizing the strict scrutiny with AA would be a challenge in the future(38) .

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(34) Gerald Gunther, *The Supreme Court 1971 Term-Foreword: In Search of Evolving Doctrine on Changing Court: A Model of for a Never Equal Protection*, 86 HARV. L. REV. 1, 8 (1972). Professor Sakaguchi Shojiro elaborates on this Gunther article, arguing that although Gunther was a liberal, he did not affirm all of the Warren Court's positions. see SAKAGUCHI SHOJIRO, *Jinkenron II・Ikenshinsa No Futatsu No Kinou −Kenpo To Riyu−*[*Human Rights Theory II The Two Functions of Judicial Review−The Constitution and Reason−*] in KENPOURIRON NO SAISOUSEI [RECREATING CONSTITUTIONAL THEORY] (Tsujimura Miyoko and Hasebe Yasuo eds., Nihonhyoronsha, 2011), p. 148-50.

(35) RONALD DWORKIN, *supra* note 20, at 412, Adam Winkler, See *Fatal Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts,* 59 VAND. L. REV. 793, 805-8 (2006).

(36) Paul Brest, *The Supreme Court 1975 Term, Forward: in Defense of the Antidiscrimination Principle*, 90 HARV. L. REV, 1, 15 (1976).

(37) Dworkin notes that conservative judges on the Supreme Court prefer this theory of predominant necessity. see RONALD DWORKIN, *supra* note 20, at 417. Richard H. Fallon describes this formal application of the strict scrutiny as "Nearly Categorical Prohibition". see Richard H. Fallon, Jr. *supra* note 33, at 1303.

B. "Rebuttal Version" and its problems

As we move from the Warren Court era to the Burger Court era, a change in the way the strict scrutiny is applied is recognized. For example, in the 1978 *Bakke* decision, Justice Powell, writing the relative majority opinion, noted that the AA's purpose of creating diversity of the student body was recognized as a compelling state interest. As can be seen from the *Grutter* and *Fisher I* decisions discussed in Section 2, Justice Powell's relative majority opinion has been upheld by the Rehnquist and Roberts Courts since then.

It can also be noted that the method of applying the strict scrutiny standard of review adopted by Justice O'Connor in the *Croson, Adarand,* and *Grutter* decisions is aimed at exposing morally unjust legislative intent. That is, Judge O'Connor presumed that because race has been the basis for prejudice and sentiment, there is a real risk that a morally unacceptable intent may be at work in the government's use of racial classifications, but on the other hand she thought that if the government can provide justification of the use of racial classifications, then it is permissible for them to be used(39) . Dworkin called this method of applying the strict scrutiny the "Rebuttal Version" and praised it(40) . Ashutosh Bhagwat also points out that this method of applying the strict scrutiny examines the legitimacy of the hidden purpose behind the government's racial classification, which is ostensibly a benign purpose. Bhagwat also points out that the Supreme Court needed to create an "ad hoc" theory of precedent that would make constitutionally unacceptable governmental preferences more explicit in order to justify AA(41) .

However, it should be noted, as Bhagwat points out, that because the method

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(38) Paul Brest, *supra* note 36, at 16.

(39) RONALD DWORKIN, *supra* note 20, at 416.

(40) Richard H. Fallon describes this formal application of the strict scrutiny as the "Illicit Motive Test". see Richard H. Fallon, Jr. *supra* note 33, at 1308.

of applying such a strict scrutiny standard of review is an "ad hoc" case theory, different judges have different standards for finding the existence of "narrowly tailored" cases. For example, Jonathan W. Rash notes that Justice Kennedy would not permit a race-conscious admissions system at the level of proof made by the University of Michigan Law School in the *Grutter* decision(42) . In fact, as Rash points out, Justice Kennedy imposed a very strict burden of proof on the part of Texas State University at Austin on the justification of AA in his opinion for the court's *Fisher I* decision.

CONCLUSION

According to statistics from *The Shape of the River*, co-authored by William G. Bowen, former president of Princeton University, and Derek Bok, former president of Harvard University, AA has increased the college graduation rate for blacks, and there has also been an increase in the number of black leaders in community and regional services, and mutual understanding between different races has been promoted(43) . Thus, AA has been recognized as achieving a steady success. Thus, if the Supreme Court declares AA to be unconstitutional, black college graduation rates will begin to decline, as will the number of black leaders in industry, the professions, and community and local services. When that happens, mutual understanding between different races will be stifled and racial harmony will be undermined.

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(41) Ashutosh Bhagwat, P*urpose Scrutiny in Constitutional Analysis*, 85 CAL. L. REV. 297, 315-6 (1997).

(42) Jonathan W. Rash, *supra* note 27, at 25, 43.

(43) WILLIAM G. BOWEN AND DEREK BOK, THE SHAPE OF THE RIVER 1-3 (Princeton University Press 1998).

Moreover, in his book *Sovereign Virtue*, Dworkin develops a theory of "luck" in the context of equality. Dworkin distinguishes between two forms of luck: “option luck” and “brute luck”. Dworkin calls the “luck” that an individual can contrive, such as gambling, for example, “option luck”, while that which an individual cannot control, such as innate talent or congenital visual impairment, is referred to as “brute luck”. Dworkin argues that individuals must bear the consequences of their "option luck," but they should be absolved of responsibility for the consequences of their "brute luck," such as unfortunate circumstances. In addition, Dworkin argues that individuals have a right to seek redress for the unfortunate circumstances caused by their "brute luck[(44)] . Based on Dworkin’s theory of luck, I think that AA can be justified because the harms caused by racial discrimination in the past can be categorized as "brute luck".

On the other hand, from an individualistic view of equality, AA would be justified only in exceptional cases. Specifically, the scope of remedies envisioned by the individualistic conception of equality would seem to be limited to "remedies" in tort law, but such a narrow scope of remedies would not be appropriate. Given the historical fact that the evils of racial discrimination do not merely extend to individual blacks, but also to entire racial groups composed of blacks, and the historical fact that acts of systematic discrimination against racial groups composed of blacks have produced "discriminatory effects" from the Court should make a decision about the constitutionality of AA according to the “Rebuttal Version” standpoint of the group-oriented conception of equality.

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(44)　RONALD DWORKIN, *supra* note 20, at 287-8.