

# **Balancing Competing Priorities: Affirmative Action in the United States and Canada**

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## I. INTRODUCTION

This Article presents a detailed analysis of equality rights in the United States and Canada and their relationship to race-based government affirmative action programs<sup>1</sup> as practiced in those two countries. At the outset, the term “equality rights” requires a definition, for although the term appears extensively in Canadian legal scholarship, that precise term is used less frequently, if at all, in the United States.<sup>2</sup> At its most basic level, the term “equality rights” expresses the idea that a government must not discriminate against its citizens by treating some of them differently from others.<sup>3</sup> Given this general definition of equality rights, the question becomes how to reconcile this concept with that of race-based affirmative action programs. After all, the goal of race-based affirmative action programs is to ameliorate the past effects of discrimination on formerly disenfranchised minority groups by affirmatively assisting those groups in competing with the majority for opportunities within society.

This Article demonstrates, via a survey of the radically opposed American and Canadian national approaches, that the promotion of equality rights is inconsistent with using ameliorative race-based government affirmative action programs to support formerly disenfranchised minority groups. The American and Canadian approaches to equality rights exist at opposite ends of the spectrum. The American definition of equality rights has become highly formalistic and requires that the government not discriminate against select citizens, by—save for the most narrow of circumstances—attempting to treat all equally under the law. In taking the equal treatment for all citizens as its point of departure, U.S. equality-rights jurisprudence has resulted in a piecemeal approach to affirmative action programs.

In contrast, the Canadian approach starts with the idea of ameliorating past discrimination rather than subscribing to a formalistic definition of equality rights as equal treatment under the law. This results in a much more favorable judicially constructed framework for government affirmative

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<sup>1</sup> Race-based affirmative action programs seek to eliminate existing and continuing discrimination, to remedy lingering effects of past discrimination, and to create systems and procedures to prevent future discrimination. BLACK'S LAW DICTIONARY 60 (7th ed. 1999).

<sup>2</sup> In the United States, this same idea has often been referred to as “equal protection.”

<sup>3</sup> See generally PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA § 55.1 (5th ed. 2007).

action programs. The Canadian approach refines the definition of equality rights to a highly substantive one, holding that the government must not discriminate against select citizens through redefining the very meaning of what discrimination entails. Unequal treatment at the hands of the law alone does not constitute discrimination; rather, discrimination is a violation of “human dignity” by excluding a group solely for the purpose of exclusion. Under this definition, exclusion of majority groups for the sake of ameliorating past discrimination—as opposed to excluding just for the sake of excluding—is no longer discrimination. Just as with the American approach, however, there is a tradeoff: the Canadian approach is much less inclined to take seriously dissenting arguments that such programs force the state, in looking to assist formerly disenfranchised minorities, to treat its citizens unequally.

Part II of this Article will present and explain the American approach toward equality rights. Part III of this Article will present and explain the Canadian approach toward equality rights. Part IV of this Article will explore the divergence of views and convergence of methods between the two national approaches.

## II. THE AMERICAN APPROACH: EQUAL TREATMENT OVER DIVERSITY

### A. Introduction

Both the Fifth Amendment<sup>4</sup> and Fourteenth Amendment<sup>5</sup> to the U.S. Constitution guarantee equality rights in the United States. The guarantees enshrined in the two Amendments are known collectively as the equal protection guarantee.<sup>6</sup> By its language, the equal protection guarantee of the Fourteenth Amendment applies only to the state governments. Judicial interpretation of the Fifth Amendment Due Process Clause has extended this guarantee to the federal government.<sup>7</sup>

The equal protection guarantee defines equality as constituting equal protection before the law. The standards of review used to determine whether the government has violated the equal protection guarantee are the same for both federal and state laws.<sup>8</sup> Unlike in Canada, the debate over the effect of

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<sup>4</sup> U.S. CONST. amend. V. The relevant portion of the Fifth Amendment reads as follows: “No person shall be . . . deprived of life, liberty, or property, without due process of law . . .” *Id.*

<sup>5</sup> U.S. CONST. amend. XIV, § 1. The relevant portion of the Fourteenth Amendment reads as follows: “No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” *Id.*

<sup>6</sup> RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 18.1 (4th ed. 2007).

<sup>7</sup> *Bolling v. Sharp*, 347 U.S. 497, 499 (1954).

<sup>8</sup> ROTUNDA & NOWAK, *supra* note 6, § 18.1; *See also* *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995).

equality rights in the United States does not rest upon the question of how the equal protection guarantee defines equality; rather, the debate has centered upon the proper judicial standard of review required to give effect to these rights.

### B. *Standards of Review*

U.S. courts utilize three different standards of review in determining whether the equal protection guarantee has been violated. Which standard of review applies depends on what the legislation seeks to regulate.

#### 1. Rational Relationship Test

The majority of legislation that treats people differently, including most economic legislation,<sup>9</sup> is generally reviewed under the rational relationship test.<sup>10</sup> Under this test, the court asks only whether the challenged law bears a rational relationship to a legitimate, i.e., constitutional, government interest.<sup>11</sup> The legislative history of the challenged law does not have to articulate a legitimate government interest. As long as there is some conceivable government purpose in the enactment of the legislation, the court considers it "irrelevant whether . . . [such] reasoning in fact underlay the legislative decision."<sup>12</sup> If a court finds a rational relationship, which it nearly always does, it upholds the classification in the challenged law as valid and not violative of the equal protection guarantee. Clearly, when employing the rational relationship test, American courts are extremely deferential to the actions of the legislative branch.

#### 2. The Intermediate Scrutiny Test

Courts review legislation that classifies people on the basis of gender or illegitimacy for the purposes of treating them differently under the intermediate scrutiny test.<sup>13</sup> Under the intermediate scrutiny test, the government must show that the challenged law has a substantial relationship to an important government interest.<sup>14</sup> Intermediate scrutiny

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<sup>9</sup> See *e.g.*, *Ry. Express Agency v. New York*, 336 U.S. 106 (1949) (upholding a city ordinance banning certain people from advertising on their vehicles but permitting others to do so); *City of New Orleans v. Duke*, 427 U.S. 297 (1976) (upholding a city ordinance banning pushcart dealers generally but providing certain vendors with exceptions); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981) (upholding a state ordinance banning the use of nonreturnable milk cartons but allowing milk to be sold in other nonreturnable containers).

<sup>10</sup> ROTUNDA & NOWAK, *supra* note 6, § 18.3.

<sup>11</sup> See, *e.g.*, *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78–79 (1911).

<sup>12</sup> *Flemming v. Nestor*, 363 U.S. 604, 612 (1960).

<sup>13</sup> ROTUNDA & NOWAK, *supra* note 6, § 18.3(a)(iv).

<sup>14</sup> *Craig v. Boren*, 429 U.S. 190, 197 (1976).

review can be thought of as a middle ground<sup>15</sup> between the extreme deference of rational basis review and the extreme rigor of strict scrutiny review.<sup>16</sup>

### 3. Strict Scrutiny Test

Courts generally review legislation that classifies people on the basis of race or national origin<sup>17</sup> under the strict scrutiny test.<sup>18</sup> It does not matter if enactment of the legislation was for a remedial or “benign” purpose, as in affirmative action programs; regardless of the purported purpose, American courts will apply the strict scrutiny test.<sup>19</sup> Under the strict scrutiny test, the government must establish clearly a compelling state interest that justifies and necessitates the challenged law.<sup>20</sup> The government can establish a compelling state interest only if that interest overrides the interests of the individuals against whom the law discriminates.<sup>21</sup> Even if the government proves that a compelling state interest exists, the court will not uphold the challenged law unless it independently determines that the classification(s) employed by the law are narrowly tailored to promote the compelling government interest.<sup>22</sup>

Regarding race-based government affirmative action programs, the U.S. Supreme Court has held that the only government interests suitably compelling to justify the use of racial classifications are programs designed to remedy specific instances of past discrimination<sup>23</sup> or encourage racial diversity in higher education.<sup>24</sup> American courts employing the strict scrutiny test generally remain very wary of the stated government motivations behind

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<sup>15</sup> ROTUNDA & NOWAK, *supra* note 6, § 18.3(a)(iv).

<sup>16</sup> See *Orr v. Orr*, 440 U.S. 268 (1979) (striking down an Alabama statute allowing alimony awards only from husbands to wives and not from wives to husbands); *United States v. Virginia*, 518 U.S. 515 (1996) (striking down a state university admissions policy that excluded women); *Michael M. v. Super. Ct. of Sonoma County*, 450 U.S. 464 (1981) (upholding a California statute that imposed penalties for statutory rape upon males only).

<sup>17</sup> Such classifications are labeled “suspect classifications” in American constitutional law jurisprudence. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (noting prejudice against “discrete and insular minorities” may call for a “more searching judicial inquiry”).

<sup>18</sup> *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989).

<sup>19</sup> *Adarand*, 515 U.S. at 200.

<sup>20</sup> *McLaughlin v. Florida*, 379 U.S. 184, 196 (1964) (noting such laws will be upheld “only if necessary”). For cases using the “compelling state interest” terminology for strict scrutiny review, see also *Bernal v. Fainter*, 467 U.S. 216, 219 (1984); *Texas v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985).

<sup>21</sup> *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 680 (1994) (O’Connor, J., concurring in part and dissenting in part).

<sup>22</sup> *Adarand*, 515 U.S. at 227.

<sup>23</sup> *Richmond*, 488 U.S. at 498–508.

<sup>24</sup> *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003).

the challenged law, and generally strike down legislation reviewed under this standard.<sup>25</sup>

C. *Can Affirmative Action Programs Survive Strict Scrutiny Review?*

1. *Adarand Constructors, Inc. v. Pena*

In the landmark decision of *Adarand Constructors, Inc. v. Pena*,<sup>26</sup> the U.S. Supreme Court ruled on two issues important to the discussion of race-based affirmative action programs. First, it overturned a ruling it had made only five years earlier<sup>27</sup> and held that the standards of review used to determine whether a law violated the equal protection guarantee were the same under both federal law, through the Fifth Amendment Due Process Clause, and state law, through the Fourteenth Amendment Equal Protection Clause.<sup>28</sup> Second, the Court held that race-based government affirmative action programs (i.e., “benign” racial classifications) should be reviewed under the strict scrutiny test.<sup>29</sup>

In *Adarand*, the appellant challenged a federal program giving financial incentives to hire subcontractors certified as owned by “socially and economically disadvantaged individuals.”<sup>30</sup> The appellant, an uncertified subcontractor, submitted a low bid on a federal highway construction project, but his bid was rejected in favor of a higher bid made by a certified subcontractor. The appellant sued the U.S. government, claiming that the federal program violated his equality rights guaranteed by the Fifth Amendment, as it constituted a race-based affirmative action program that excluded him from its benefits based on his race.<sup>31</sup>

The majority decision in *Adarand*, written by Justice O’Connor and joined by Justices Rehnquist, Kennedy, Scalia, and Thomas, held that the proper standard of review for government affirmative action programs was the strict scrutiny test.<sup>32</sup> The majority, however, divided on the question of whether a government affirmative action program could ever pass this heightened standard of review.

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<sup>25</sup> ROTUNDA & NOWAK, *supra* note 6, § 18.8(d)(ii)(6).

<sup>26</sup> *Adarand*, 515 U.S. at 200.

<sup>27</sup> The decision that the court overturned was *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990).

<sup>28</sup> *Adarand*, 515 U.S. at 227.

<sup>29</sup> *Id.* at 227–36.

<sup>30</sup> *Id.* at 205 (quoting the Small Business Act, 15 U.S.C. §§ 631, 637, 644).

<sup>31</sup> *Id.* at 205–06 (reciting facts of the case).

<sup>32</sup> *Id.* at 226.

a) *Affirmative Action Programs Can Survive Strict Scrutiny Review, per Justice O'Connor in Adarand*

Justice O'Connor felt that a government affirmative action program could indeed pass the strict scrutiny test. She disagreed with the notion that legislation reviewed under the strict scrutiny test, especially race-based government affirmative action programs, was almost never upheld:

[W]e 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.<sup>33</sup>

Justice O'Connor went on to cite the Court's decision in *U.S. v. Paradise*<sup>34</sup> as proof that a government affirmative action program that employs "pervasive, systematic, and obstinate discriminatory conduct" could pass the strict scrutiny test.<sup>35</sup>

Two points should be noted regarding Justice O'Connor's invocation of *Paradise*. First, it cannot escape notice that Justice O'Connor can cite *Paradise* as the single instance at the Supreme Court level where a race-based government affirmative action program survived the strict scrutiny test. Second, despite Justice O'Connor's claims to the contrary, *Paradise* itself did not answer conclusively the question of whether a race-based government affirmative action program could ever pass strict scrutiny review.

At issue in *Paradise* was a district court order that required the Alabama Department of Public Safety, the state police force, to promote a numerical quota of black applicants to the middle-upper officer ranks.<sup>36</sup> Although five justices had agreed in *Paradise* to uphold the original district court order, there was no majority opinion. The Court had produced only a four judge plurality opinion, written by Justice Brennan and joined by Justices Marshall, Blackmun, and Powell. Although the plurality opinion held that the district court order could survive strict scrutiny review,<sup>37</sup> it never

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<sup>33</sup> *Adarand*, 515 U.S. at 237 (quoting in part *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980)). For an opposing view, see Gerald Gunther, *Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

<sup>34</sup> *United States v. Paradise*, 480 U.S. 149, 166–67 (1987).

<sup>35</sup> *Adarand*, 515 U.S. at 237 (quoting in part *Paradise*, 480 U.S. at 167). See also Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 796 (2006). Winkler conducted an empirical analysis of all the cases decided by U.S. federal courts under strict scrutiny review between 1990 and 2003 and found that the challenged legislation and/or government programs survived strict scrutiny review 30 percent of the time. However, it should be noted that 30 percent is a relatively low number.

<sup>36</sup> *Paradise*, 480 U.S. at 154–55.

<sup>37</sup> *Id.* at 167.

conclusively answered whether a formal race-based government affirmative action program, as opposed to a court order, could survive strict scrutiny. Indeed, as the *Paradise* plurality opinion noted, the very question of whether strict scrutiny review itself was the proper standard remained in doubt,<sup>38</sup> as this case was decided two years before *Richmond v. J.A. Croson Co.*<sup>39</sup> was handed down, definitively setting strict scrutiny as the proper level of review. In her dissent in *Paradise*, which was joined by Chief Justice Rehnquist and Justice Scalia, Justice O'Connor had chastised the plurality opinion for engaging in a strict scrutiny analysis of the district court order that was in fact far "less stringent than that required by strict scrutiny."<sup>40</sup>

b) *Affirmative Action Programs Cannot Survive Strict Scrutiny Review, per Justices Scalia and Thomas in Adarand*

In *Adarand*, Justices Scalia and Thomas concurred in part with O'Connor's reasoning and concurred in the judgment, but felt that it would be extremely difficult, if not impossible, for race-based government affirmative action programs to pass the strict scrutiny test.<sup>41</sup> Justice Scalia stated that nowhere did the U.S. Constitution mention "either a creditor or a debtor race," and as such, to pursue "the concept of racial entitlement," even for "admirable" or "benign" purposes, completely contradicted the Constitution.<sup>42</sup> Therefore, Justice Scalia concluded that the "government can never have a compelling interest in discriminating on the basis of race in order to make up for past racial discrimination in the opposite direction."<sup>43</sup>

Justice Thomas, while agreeing with Justice Scalia in part, went even further by disparaging the "benign" nature of race-based affirmative action programs, calling such programs pure racial discrimination:

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<sup>38</sup> *Id.* at 166–67.

<sup>39</sup> *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

<sup>40</sup> *Paradise*, 480 U.S. at 196–97.

<sup>41</sup> Despite the seeming certainty of Justices Scalia and Thomas in *Adarand*, the question of whether race-based affirmative action programs could pass the strict scrutiny test at the U.S. Supreme Court level had yet to be answered concretely. Race-based affirmative action programs had survived strict scrutiny review in the lower federal courts when the U.S. Supreme Court decided *Adarand*. See *Stuart v. Roach*, 951 F.2d 446, 455 (1st Cir. 1991) (upholding under strict scrutiny review a race-based officer promotion plan for minorities undertaken by the Boston Police Department); *Vogel v. Cincinnati*, 959 F.2d 594, 596 (6th Cir. 1992) (upholding under strict scrutiny review the race-based hiring policy of the Cincinnati Police Department); *Officers for Justice v. Civil Serv. Comm'n*, 979 F.2d 721, 726–28 (9th Cir. 1992) (upholding under strict scrutiny review a race-tilted officer promotion plan for minorities undertaken by the San Francisco Police Department); *Peightal v. Metro. Dade County*, 26 F.3d 1545, 1548 (11th Cir. 1994) (upholding under strict scrutiny review the race-based hiring policy of the Miami Dade County Fire Department).

<sup>42</sup> *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 239 (1995).

<sup>43</sup> *Id.* (emphasis omitted).

That these programs may have been motivated, in part, by good intentions cannot provide refuge from the principle that under our Constitution, the government may not make distinctions on the basis of race. As far as the Constitution is concerned, it is irrelevant whether a government's racial classifications are drawn by those who wish to oppress a race or by those who have a sincere desire to help those thought to be disadvantaged.<sup>44</sup>

## 2. Debate Resolved: *Grutter v. Bollinger*

In *Grutter v. Bollinger*, the U.S. Supreme Court answered the question of whether a race-based government affirmative action program could ever pass the strict scrutiny test.<sup>45</sup> At issue in *Grutter* was the admissions scheme employed by the University of Michigan Law School, where one of its many stated admissions goals was a commitment to “racial and ethnic” diversity.<sup>46</sup> The appellant in *Grutter*, a white applicant to the University's Law School who had been rejected, sued the University claiming that by using race as a factor in its admissions policy, the University had violated her equality rights as guaranteed in the Equal Protection Clause of the Fourteenth Amendment.<sup>47</sup>

The majority decision in *Grutter*, written by Justice O'Connor and joined by Justices Stevens, Souter, Ginsburg, and Breyer, held that the University of Michigan Law School's admissions program, with its emphasis on racial and ethnic diversity, indeed qualified for heightened strict scrutiny review.<sup>48</sup> In applying the strict scrutiny test, the majority found that, first, encouraging racial diversity in higher education constituted a suitably compelling government interest to justify the use of racial classifications;<sup>49</sup> and second, that the admissions program employed by the University of Michigan's Law School was in fact narrowly tailored to the government interest of promoting diversity in higher education.<sup>50</sup> The majority held that the program was narrowly tailored because it did not employ a quota system,<sup>51</sup> but instead considered each applicant for admission on an

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<sup>44</sup> *Id.* at 240.

<sup>45</sup> See *Grutter v. Bollinger*, 539 U.S. 306 (2003).

<sup>46</sup> *Id.* at 316. The Court had visited the issue of race-based university admissions policies once before, in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), but had left some issues unresolved in that opinion—most notably which standard of review should be utilized in such cases.

<sup>47</sup> *Id.* at 314–17 (reciting the facts of the case).

<sup>48</sup> *Id.* at 326–27.

<sup>49</sup> *Id.* at 325.

<sup>50</sup> *Grutter*, 539 U.S. at 341.

<sup>51</sup> *Id.* at 336–37.

individual basis, and therefore survived strict scrutiny review.<sup>52</sup> While the majority felt that the University had not explored every single race-neutral alternative to the admissions scheme they had devised, it also found that “narrow tailoring d[id] not require [the] exhaustion of every conceivable race-neutral alternative.”<sup>53</sup>

### III. THE CANADIAN APPROACH: DIVERSITY OVER EQUAL TREATMENT

#### A. Introduction

Equality rights are guaranteed in Canada by s. 15(1)<sup>54</sup> and s. 15(2)<sup>55</sup> of the Canadian Charter of Rights and Freedoms. Sections 15(1) and 15(2) of the Charter apply to both the federal and provincial levels of government. The equality rights guaranteed in ss. 15(1) and 15(2) define equality as protection against discrimination<sup>56</sup> through the amelioration of its past effects,<sup>57</sup> rather than simply a formalistic definition of equality before the law, as in the United States.

#### B. The Equality Standard

##### 1. *Lovelace v. Ontario*

In *Lovelace v. Ontario*,<sup>58</sup> the Supreme Court of Canada established the precise legal effects of ss. 15(1) and 15(2) upon race-based affirmative action programs.<sup>59</sup> The government program challenged in *Lovelace* was a provincial plan negotiated in 1993 between First Nations<sup>60</sup> tribes and the provincial government of Ontario. The plan permitted First Nations tribes to set up a casino on tribal land, the proceeds of which would go into a specially

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<sup>52</sup> *Id.* at 337.

<sup>53</sup> *Id.* at 339.

<sup>54</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 15(1). Section 15(1) reads as follows: “Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.” *Id.*

<sup>55</sup> *Id.* s. 15(2). Section 15(2) reads as follows: “Subsection (1) does not preclude any law, program or activity that has as its objective the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.” *Id.*

<sup>56</sup> *Harrison v. Univ. of British Columbia*, [1990] 3 S.C.R. 451, 475 (Can.).

<sup>57</sup> *Lovelace v. Ontario*, [2000] 1 S.C.R. 950, 987 (Can.).

<sup>58</sup> *Lovelace*, [2000] 1 S.C.R. at 950.

<sup>59</sup> But see also *infra* note 70.

<sup>60</sup> In Canada, Indians or Native Canadians are known as First Nations.

established fund (known as the First Nations Fund), with the monies eventually distributed among the various Ontario First Nations tribes.<sup>61</sup> In 1996, the provincial government of Ontario amended the plan,<sup>62</sup> so that monies from the fund would only be distributed to First Nations tribes registered as such under the federally enacted Indian Act.<sup>63</sup> The appellants, all undisputed First Nation tribes, had refused to register as tribes under the Indian Act and therefore were informed that they were ineligible to receive monies from the First Nations Fund. The appellants sued the provincial government of Ontario, claiming that the newly amended provincial plan violated their equality rights as guaranteed in s. 15(1). The provincial plan, in essence, was acting as a race-based affirmative action program that excluded the appellants from the First Nations Fund benefits on account of their race (as determined by the Indian Act). In a unanimous decision, the Supreme Court of Canada rejected the appellants' claim.

The unanimous opinion in *Lovelace*, written by Justice Iacobucci, decided two very important issues. First, the Court set the criterion for the promotion of equality in Canada by providing a precise mechanism for promulgating the equality rights enshrined in ss. 15(1) and 15(2). Second, the Court determined whether s. 15(2) was an exception to s. 15(1) or rather a clarification of it.

## 2. The *Lovelace* Mechanism for Promoting Equality Rights

Justice Iacobucci categorized race-based government affirmative action programs as being, first and foremost, about “an expression of equality, rather than an exception to it.”<sup>64</sup> Justice Iacobucci further stated that programs that ameliorate the “conditions of disadvantaged individuals or groups” ought to be understood as “what equality is all about.”<sup>65</sup> This conclusion was based on the results of such programs, rather than on the fact that they utilized a racial classification alone. Justice Iacobucci described the advantage of this analysis in the following terms:

Taking such an approach ensures that the analysis remains focused on whether the exclusion conflicts with the purpose of s. 15(1), and directs us away from reducing the equality analysis to a simplistic measuring or balancing of relative disadvantage. Here, the focus of analysis is not the fact that the appellant and respondent groups are equally disadvantaged, but that the program in question was targeted

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<sup>61</sup> *Lovelace*, [2000] 1 S.C.R. at 959–960.

<sup>62</sup> *Id.*

<sup>63</sup> Indian Act, R.S.C., ch. I-5 (1985).

<sup>64</sup> *Lovelace*, [2000] 1 S.C.R. at 1008 (quoting in part COLLEEN SHEPPARD, ONTARIO LAW REFORM COMM'N, LITIGATING THE RELATIONSHIP BETWEEN EQUITY AND EQUALITY 2 (1993)).

<sup>65</sup> *Id.*

at ameliorating the conditions of a specific disadvantaged group[.]<sup>66</sup>

In Justice Iacobucci's view, in determining the equality, or lack thereof, of race-based government affirmative action programs, the courts should not reduce themselves to balancing competing interests, but rather should focus on what the program is, or is not, achieving. The test of whether the government has met the equality burden then lies in the corrective result of the program, not on the effects its ameliorative goal may mete out in the form of unequal treatment.

Justice Iacobucci defined the prime motivation behind s. 15(1) as "protect[ing] against the violation of essential human dignity."<sup>67</sup> Equality rights were not defined as equal protection under the law, but rather as the possession of self-respect and self-worth. The precise relationship between dignity and equality was described by Justice Iacobucci in the following terms:

Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society. Human dignity within the meaning of the equality guarantee does not relate to the status or position of an individual in society per se, but rather concerns the manner in which a person legitimately feels when confronted with a particular law.<sup>68</sup>

This view defines equality in substantive rather than formal terms, focusing on the self-worth that the protected racial group possesses. Under Justice Iacobucci's analysis, the question is not whether the program treats racial groups differently or whether the program achieves a compelling state interest, as it would in a formalistic approach. Rather, the question is whether the program takes away from the human dignity of the party challenging it. The analysis focuses on whether the program singles out the "personal traits" of the challenging party, "marginalizing" and "devaluing" it, thereby violating s. 15(1), or whether the program ignores the "personal

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<sup>66</sup> *Id.* at 1000.

<sup>67</sup> *Id.* at 984.

<sup>68</sup> *Id.* (quoting *Law v. Canada (Minister of Emp. and Immigr.)*, [1999] 1 S.C.R. 497, 530 (Can.)).

traits” of the challenging party and instead simply seeks to ameliorate past unequal treatment of a disadvantaged group, thereby not violating s. 15(1). Justice Iacobucci conceded that a race-based government affirmative action program that simply sought to ameliorate past unequal treatment of disadvantaged groups could, in some cases, result in discrimination against advantaged groups at the expense of disadvantaged groups; however, the Court held that such discrimination did not violate s. 15(1) because the advantaged group was not targeted for specific discrimination and thus was not robbed of its human dignity.<sup>69</sup>

### 3. The Relationship Between Section 15(1) and Section 15(2) in *Lovelace*

Delving into the drafting history of the Charter, Justice Iacobucci found that s. 15(2) acted as a clarification of s. 15(1) rather than an exception to s. 15(1).<sup>70</sup> The substance of this view is found in Justice Iacobucci’s analysis of equality rights, described above.<sup>71</sup> Justice Iacobucci does not hold race-based government affirmative action programs as per se violations of s. 15(1) that are then saved by s. 15(2). Instead, such programs are upheld under s. 15(1) via Justice Iacobucci’s substantive definition of equality.

Given this understanding, the question becomes what purpose s. 15(2) serves. Peter W. Hogg, former Dean of the Osgoode Hall Law School of York University, Toronto, offers the following explanation:

[Section] 15(2) has no independent work to do, but is not redundant. It is there out of an abundance of caution in order to clarify that the purpose of s. 15(1) is to promote equality in a substantive and not merely a formal sense.<sup>72</sup>

Justice Iacobucci reads s. 15(2) as a clarification of s. 15(1) rather than as an exception to it. If race-based government affirmative action programs were per se violative of s. 15(1), then the burden of proving whether such a program was saved under s. 15(2) would rest with the government rather than with the challenging party.<sup>73</sup> To that end, the standard of review is also of consequence. In Canadian constitutional jurisprudence, courts must construe narrowly the government’s defenses to an otherwise prohibited Charter standard, with the government facing

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<sup>69</sup> *Lovelace*, [2000] 1 S.C.R. at 998–99.

<sup>70</sup> *Id.* at 1009–10. However, as this Article was going to press, the Supreme Court of Canada held that s. 15 (1) analysis is made unnecessary by s. 15(2) if a government program is found to be prima facie discriminatory, so long as it is discriminatory in favor of a disadvantaged group. *R. v. Kapp*, [2008] 2 S.C.R. 483, paras. 34–42 (2009).

<sup>71</sup> See *supra* Part II.B.2.

<sup>72</sup> HOGG, *supra* note 3, § 55.13.

<sup>73</sup> Edward M. Iacobucci, *Antidiscrimination and Affirmative Action Policies: Economic Efficiency and the Constitution*, 36 OSGOOD HALL L.J. 293, 322 (1998).

a high burden in defending its infringement.<sup>74</sup> However, if race-based government affirmative action programs are not per se violative of s. 15(1), as is the case, then the burden of proving that such a program violates s. 15(1) rests with the challenging party. This gives the government greater latitude in enacting such programs.<sup>75</sup> The standard of review in such an instance is “a generous rather than a legalistic one,” that seeks the “full benefit” of the Charter’s protections for individuals.<sup>76</sup>

#### IV. DIVERGENT VIEWS BETWEEN THE TWO NATIONAL APPROACHES

##### A. *Substantive Equality vs. Formalistic Equality*

As discussed above, Justice Iacobucci consciously rejects the balancing test throughout the *Lovelace* opinion. That Justice Iacobucci can do this so casually suggests that under his substantive definition of equality, equal treatment is not a natural extension of equality rights, but rather an outdated, formalistic characterization. Express discrimination is not identified as unequal treatment by the law, but rather as the violation of “human dignity” when a law or program excludes a group of people solely for the sake of exclusion.

Justices Scalia and Thomas, on the other hand, in their concurring opinions in *Adarand*, find that any exclusion, for whatever reason it is undertaken, is per se incompatible with their more formalistic characterization of equality rights as constituting equal treatment under the law. Equality is just that;<sup>77</sup> no distinctions ought to be allowed. This view colors the analysis of programs offered with the “good intentions”<sup>78</sup> of ameliorating past discrimination of minority groups when those programs also result in unequal treatment at the hands of the government. Such an interpretation of equality rights does not differ that greatly from those expressed in Justice O’Connor’s majority opinion in *Grutter*. Indeed, the factor that saved the University of Michigan Law School’s admission program under strict scrutiny review was that it did not employ a quota system and considered each applicant for admission on an individual basis. The benefits of diversity in a university environment aside, the Court upheld the University of Michigan Law School’s admission program in *Grutter* with a formalistic analysis that focused on the fact that the program still allowed for consideration of each individual applicant, minority and non-minority alike, rather than classifying them strictly on race alone.

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<sup>74</sup> See *R. v. Oakes*, [1986] 1 S.C.R. 103, 138–39 (Can.) (outlining the standard).

<sup>75</sup> Iacobucci, *supra* note 73, at 322.

<sup>76</sup> *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, 344 (Can.).

<sup>77</sup> *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 239–40 (1995).

<sup>78</sup> *Id.* at 240.

Compare this reasoning to that undertaken by Justice Iacobucci, who argues that government has a role to play in the promotion of formerly disenfranchised minority groups. In fact, according to the *Lovelace* approach, a race-based government affirmative action program can violate the ss. 15(1) and 15(2) guarantees if it does not go far enough to promote diversity<sup>79</sup> and remains underinclusive of disadvantaged groups. Justice Thomas, conversely, feels that government has no role to play in the promotion of formerly disenfranchised minority groups. “Government cannot make us equal,” Justice Thomas states; rather, “it can only recognize, respect, and protect us as equal before the law.”<sup>80</sup>

Both the Canadian and American approaches recognize that promoting equal treatment under the law remains incompatible with a specific government aim to promote formerly disenfranchised minority groups. This realization is reflected in the divergent legal assertions both sides make. The U.S. Supreme Court consistently focuses on questions regarding the proper judicial standard of review required to give effect to the equal protection guarantee. In doing so, the Court looks for a convenient method to tailor such programs to the narrowest purpose possible so as to promote the compelling interest of equal treatment under the law over that of promoting formerly disenfranchised minority groups.

*B. Standards of Review: Balancing Test as a Shield vs. Balancing Test as a Sword*

1. Balancing Test as a Shield in the United States

Under the American approach, the strict scrutiny test requires the government to establish that it has a compelling interest that justifies and necessitates the race-based affirmative action program in question. Upon review, the courts balance the government’s interest in the challenged law against the constitutional right of individuals to be free of the law, and then determine if the law is narrowly tailored to the compelling government interests of remedying past discrimination or encouraging racial diversity in higher education. As this Article notes, American courts rarely uphold legislation scrutinized under the strict scrutiny test. Therefore, the balancing test employed by American courts can be seen to act as a shield protecting equal protection guarantees against the unequal effect of race-based government affirmative action programs.

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<sup>79</sup> *Lovelace v. Ontario*, [2000] 1 S.C.R. 950, 987 (Can.).

<sup>80</sup> *Adarand*, 515 U.S. at 240.

## 2. Balancing Test as a Sword in Canada

All of the rights and freedoms guaranteed by the Charter are subject to override by s. 1 of the Charter.<sup>81</sup> An s. 1 override works in a two-step process. Step one involves a determination of whether the challenged law infringes upon one of the protected rights in the Charter, i.e., whether the challenged law is unconstitutional.<sup>82</sup> If the answer is affirmative, step two of the analysis then asks whether the limitation is reasonable.<sup>83</sup> As such, none of the rights protected in the Charter is absolute, but rather each is subject to an internal test of reasonability. The s. 1 override can be thought of as the Canadian answer to the strict scrutiny test employed by American courts, but with the very important caveat that it works in reverse. Usually, American courts employ the balancing approach of the strict scrutiny test to invalidate a law passed by the government. In Canada, however, the government uses the s. 1 override to attempt to save a law that it has enacted—to, in effect, “override” the initial judicially determined unconstitutionality of the challenged law. Thus, in the near future, if there is any movement in the Canadian courts toward interpreting equality rights on a more formalistic basis, similar to the United States, the s. 1 override could be available as a safeguard.

The actual judicially crafted test used to determine whether the per-se unconstitutionality of a law can be “overridden” via s. 1 of the Charter was described by the Supreme Court of Canada in *R. v. Oakes*.<sup>84</sup> The *Oakes* test requires a two-part analysis. Part one involves determining whether the challenged law is of such “pressing and substantial” concern as to warrant an s. 1 override (this proviso sounds strikingly similar to the compelling state interest test in American strict scrutiny analysis).<sup>85</sup> Part two requires the government to demonstrate that the means chosen are proportional to their objective.<sup>86</sup> The government can demonstrate proportionality by showing a rational connection between the methods of the challenged law and its objectives (which sounds similar to the rational relationship test).<sup>87</sup> The Canadian courts then apply a balancing test between the objectives of the challenged law and the effects of its measures that limit Charter rights and freedoms (which sounds strikingly similar to the strict scrutiny test

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<sup>81</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 1. Section 1 reads as follows: “The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” *Id.*

<sup>82</sup> HOGG, *supra* note 3, § 38.8(b).

<sup>83</sup> *Id.*

<sup>84</sup> *R. v. Oakes*, [1986] 1 S.C.R. 103, 135–43 (Can.).

<sup>85</sup> *Id.* at 137–39.

<sup>86</sup> *Id.* at 139.

<sup>87</sup> *Id.*

requirement that the stated government objective be narrowly tailored to promote the compelling government interest).<sup>88</sup> A challenged law will be upheld only if it limits Charter rights and freedoms as little as possible.<sup>89</sup>

## V. CONCLUSION

As the comparative analysis makes clear, the stark differences between the two national approaches to equality rights are not due to the internal mechanics of different judicially imposed tests. In fact, the judicially imposed tests are quite similar. Rather, the difference of approach is due to the external constitutional mechanics of the American system, which views equal protection under the law as an absolute right and freedom, and the Canadian system, which views the amelioration of past discrimination of minority groups as a compelling enough goal to allow for the potential limitation of other rights and freedoms.

The objective for any enlightened society in the new century can be either a commitment to pure equality in the treatment of its citizenry, or a dedication to the amelioration of past discrimination of minority groups via concerted government/state action. It cannot be both at the same time. The one interest naturally and inevitably snuffs out the other—they are very much polar opposites. As they ready themselves for further rounds of endless debate, both the opponents and proponents of race-based government affirmative action programs would do well to observe the dual paradoxes of the American and Canadian approaches to the issue. Each national approach, in trying to reconcile the idea of equality rights with the need to address past racial discrimination, ends up trading one objective for the other in an imperfect attempt to balance what, in the end, cannot be balanced. The imperfect result is, on the one hand, an American approach too concerned with a formalistic definition of equality as equal treatment under the law; and on the other hand a Canadian approach too concerned with a substantive definition of equality, which ignores the very real effects that affirmative action programs can have in creating an environment that allows the state to treat its citizens differently from one another.

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<sup>88</sup> *Id.*

<sup>89</sup> *R. v. Oakes*, [1986] 1 S.C.R. 103, 139–40 (Can.).