

January 2014

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Recommended Citation

Oluwole, Jospeh O. and Green, Preston C. III (2014) "Harrowing through Narrow Tailoring: Voluntary Race-Conscious Student-Assignment Plans, Parents Involved and Fisher," *Wyoming Law Review*. Vol. 14: No. 2, Article 10.

Available at: <https://scholarship.law.uwyo.edu/wlr/vol14/iss2/10>

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WYOMING LAW REVIEW

VOLUME 14

2014

NUMBER 2

HARROWING THROUGH NARROW TAILORING: VOLUNTARY RACE-CONSCIOUS STUDENT-ASSIGNMENT PLANS, *PARENTS INVOLVED AND FISHER*

*Joseph O. Oluwole** and *Preston C. Green III***

INTRODUCTION

A *coup de grace* is in progress against voluntary race-conscious measures, despite the fact that these race-conscious measures—designed to realize and increase student body diversity—create many social and educational benefits. This *coup de grace* is stealthily executed through the narrow tailoring prong of strict scrutiny review. Research reveals the many benefits of diversity that would be at risk if voluntary race-conscious measures can no longer be implemented. For instance, a meta-analysis of 515 studies shows that interracial prejudice diminishes with intergroup racial contact.¹ Furthermore, 553 social scientists note that student learning in racially diverse classrooms decreases stereotyping and fosters critical thinking, as well as higher academic achievement.² Other benefits of a racially diverse education include less residential segregation, higher income for

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We would like to extend our deep appreciation to Michael J. Fitzgerald, Editor-in-Chief of the *Wyoming Law Review*, Article Editors Rebecca J. Zisch, Arah N. Shumway, and Katie J. Koski as well as Managing Editor Grant R. Smith for their invaluable help with this article. Our sincere thanks to each journal editor and staff who worked on this publication.

¹ Thomas F. Pettigrew & Linda R. Tropp, *A Meta-analytic Test of Intergroup Contact Theory*, 90 J. PERSONALITY & SOC. PSYCHOL., 751–83 (2005).

² Civil Rights Project, PICS: STATEMENT OF AMERICAN SOCIAL SCIENTISTS OF RESEARCH ON SCHOOL DESEGREGATION SUBMITTED TO US SUPREME COURT, Oct. 10, 2006: 5–8.

minorities, greater civic engagement, increased parental involvement, and better student preparation for a diverse workforce.³

Given the many benefits of cross-racial interactions, over the years, various schools have implemented race-conscious admissions plans.⁴ Nonetheless, schools' voluntary efforts ensuring racial diversity are under constitutional attack.⁵ These attacks—designed to end race-conscious measures—continue despite research showing that 74% of black students and 80% of Latino students nationwide attend schools where they have limited opportunities to interact with white students because minorities are the majority at their schools.⁶ Gary Orfield, John Kucsera, and Genevieve Siegel-Hawley of the UCLA Civil Rights Project, report that Latino students have increasingly less exposure to white students in all Western states.⁷ In California, for example, the “average Latino student had 54.5% white peers in 1970 but only 16.5% in 2009.”⁸ In the Northeast, the average black student attends school with only 25% white peers.⁹ In the South, “[f]or the last four decades, contact between black and white students has declined in virtually all Southern states.”¹⁰ Nationwide, the average white student attends school with 75% white peers.¹¹

The Civil Rights Project attributes these trends to the withdrawal of judicial support for using race in admissions decisions.¹² Since *Brown v. Board*

³ *Id.* at 5–10.

⁴ See, e.g., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No.1*, 551 U.S. 701 (2007); *Fisher v. Univ. of Tex. at Austin*, 645 F. Supp.2d 587 (W.D. Tex. 2009). See *Parents Involved*, 551 U.S. at 818 (observing that a federal district court found that Jefferson County Public Schools “treated the ideal of an integrated system as much more than a legal obligation—they consider it a positive, desirable policy and an essential element of any well-rounded public school education.”).

⁵ As used in this article, the term “diversity” encompasses the educational benefits of diversity. The educational benefits of diversity include decreased racial stereotyping, higher academic achievement, parental involvement, interracial contact, cross-racial understanding, enlightening class discussions, and better preparation to participate in an increasingly diverse work force.

⁶ Gary Orfield, John Kucsera & Genevieve Siegel-Hawley, *E Pluribus . . . Separation: Deepening Double Segregation for More Students*, CIVIL RIGHTS PROJECT AT UCLA (2012), available at http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/mlk-national/e-pluribus...separation-deepening-double-segregation-for-more-students/orfield_ePluribus_executive_2012.pdf.

⁷ *Id.* at 1010.

⁸ *Id.*

⁹ *Id.*

¹⁰ Genevieve Siegel-Hawley & Erica Frankenberg, *Southern Slippage: Growing School Segregation in the Most Desegregated Region of the Country*, CIVIL RIGHTS PROJECT AT UCLA, 4442 (2012), available at http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/mlk-national/southern-slippage-growing-school-segregation-in-the-most-desegregated-region-of-the-country/hawley_MLK_South_executive_2012.pdf.

¹¹ See Orfield, Kucsera & Siegel-Hawley, *supra* note 6, at 4.

¹² Orfield, Kucsera & Siegel-Hawley, *supra* note 6, at 1.

of *Education*, there has been a “roll back” of several educational racial diversity gains.¹³ Most troubling in this area is the United States Supreme Court’s *coup de grace* against voluntary race-conscious measures through the narrow tailoring prong of the Equal Protection Clause’s strict scrutiny standard.¹⁴ While the Court accepts diversity as a compelling interest ever since Justice Powell’s *Regents of the University of California v. Bakke*¹⁵ opinion, the Court’s recent race-conscious school-admissions cases quickly temper any excitement regarding diversity as a compelling interest given the harsh reality of the Court’s narrow tailoring hurdle.¹⁶ In other words, the Court is harrowing race-conscious measures through its narrow tailoring analysis. To explore this development, we examine the Supreme Court’s latest K–12 and higher education race-conscious student-admissions decisions in *Parents Involved in Community Schools v. Seattle School District No. 1*¹⁷ and *Fisher v. University of Texas at Austin*.¹⁸

First, this article outlines the strict scrutiny standard used in reviewing Equal Protection Clause racial classification cases.¹⁹ Second, the article presents an overview of three critical cases in the Supreme Court’s race-conscious student-assignment jurisprudence: *Regents of the University of California v. Bakke*,²⁰ *Grutter v. Bollinger*,²¹ and *Gratz v. Bollinger*.²² Finally, the article examines the most recent Supreme Court decisions withdrawing judicial support for race-conscious education measures: *Parents Involved* and *Fisher*.²³

¹³ 347 U.S. 483 (1954); Derek W. Black, *Education’s Elusive Future, Storied Past, And The Fundamental Inequities Between*, 46 GA. L. REV. 557, 563 (2012). Black discussed some of the educational diversity gains post-*Brown*:

When *Brown* was decided in 1954, less than 0.1% of African-American students attended integrated schools in the South. During the decade following *Brown*, very little changed, but during the 1980s, more than 40% of African-American students in the South attended integrated schools. More importantly, by breaking down racial barriers to opportunity and reducing poverty isolation, African-American graduation and college enrollment rates soared during this same period. The African-American high school dropout rate was cut in half, falling from almost 30% to less than 15%, and African-Americans’ college enrollment nearly doubled, rising from around 18% to 30%.

Id.

¹⁴ See, e.g., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No.1*, 551 U.S. 701 (2007); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013).

¹⁵ 438 U.S. 265, 269–324 (1978).

¹⁶ See, e.g., *Parents Involved*, 551 U.S. 701; *Fisher*, 133 S. Ct. 2411.

¹⁷ 551 U.S. 701.

¹⁸ 133 S. Ct. 2411.

¹⁹ See *infra* notes 24–49 and accompanying text.

²⁰ 438 U.S. 265, 269–324 (1978).

²¹ 539 U.S. 306 (2003).

²² 539 U.S. 244 (2003); see *infra* notes 55–208 and accompanying text.

²³ See *infra* notes 209–592 and accompanying text.

I. STRICT SCRUTINY STANDARD OF REVIEW

The United States Constitution's Equal Protection Clause provides that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws."²⁴ If a class is a suspect class under the Equal Protection Clause, courts apply strict scrutiny in review of the case.²⁵ A classification is suspect if the class is "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."²⁶ Courts apply strict scrutiny to the Equal Protection Clause racial discrimination claims because race is a suspect classification.²⁷ To survive strict scrutiny review, the government must show its classification is narrowly tailored to achieve a compelling interest.²⁸ In essence, "[s]trict scrutiny is, in simple terms, a bifurcated ends-means test. The government must pursue a compelling end, using only those means necessary to achieve that end."²⁹ Strict scrutiny presumes the government action is invalid, saddling the government with the burden of overcoming that presumption.³⁰

The Supreme Court identified two purposes for strict scrutiny. First, it is "a device to 'smoke out' illicit governmental motive . . . 'to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool."³¹ Furthermore, the test ensures

²⁴ U.S. CONST. amend. XIV, § 1.

²⁵ See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (discussing strict scrutiny review).

²⁶ *Id.* at 28; see also *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 290 (1978) (opinion of Powell, J.).

²⁷ *Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 457–58 (1988); George R. La Noue, *Western States' Light: Restructuring The Federal Transportation Disadvantaged Business Enterprise Program*, 22 GEO. MASON U. CIV. RTS. L.J. 1, 5–6 (2011).

²⁸ *Roe v. Wade*, 410 U.S. 113, 155–56 (1973); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227–28 (1995).

²⁹ Joshua P. Thompson & Adam R. Pomeroy, *Desperately Seeking Scrutiny: Why The Supreme Court Should Use Fisher v. University Of Texas To Restore Meaningful Review To Race-Based College Admission Programs*, 7 CHARLESTON L. REV. 139, 145 (2012). For a discussion of the history of the Equal Protection Clause jurisprudence, see JOSEPH OLUWOLE, *THE SUPREME COURT AND WHISTLEBLOWERS: TEACHERS AND OTHER PUBLIC EMPLOYEES* 135–50 (2008).

³⁰ HARVARD LAW REVIEW ASSOCIATION, Note, *The Benefits Of Unequal Protection*, 126 HARV. L. REV. 1348, 1359 (2013). See Stephen A. Siegel, *The Origin Of The Compelling State Interest Test And Strict Scrutiny*, 48 AM. J. LEGAL HIST. 355, 359–60 (2006) ("Strict scrutiny varies from ordinary scrutiny by imposing three hurdles on the government. It shifts the burden of proof to the government; requires the government to pursue a compelling state interest; and demands that the regulation promoting the compelling interest be narrowly tailored." (internal quotation marks omitted)).

³¹ Siegel, *supra* note 30, at 393 (quoting *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989)).

“the means chosen ‘fit’ this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.”³²

The second purpose of the strict scrutiny test is to provide a cost-benefit justification for governmental actions burdening “interests for which the Constitution demands unusually high protection.”³³ Whenever the government treats any person unequally because of their race, “that person has suffered an injury that falls squarely within the language and spirit of the Constitution’s guarantee of equal protection The application of strict scrutiny . . . determines whether a compelling governmental interest justifies the infliction of that injury.”³⁴

Making a cost-benefit determination effectively opens the door for courts to “second-guess” policy decisions of other government branches.³⁵ Scholars view “‘smoking out’ as strict scrutiny’s original purpose and the cost-benefit rationale as a recent shift in strict scrutiny’s underlying principle brought about by the Court’s *determination* to subject affirmative action legislation to the highest and most rigid level of review.”³⁶ The compelling-interest and narrow tailoring prongs of strict scrutiny are designed to further the cost-benefit and ‘smoking out’ rationales of strict scrutiny.

In line with the strict scrutiny rationales, the Supreme Court limited the ambit of compelling interest in racial classifications. For instance, the Court ruled that the government cannot claim a compelling interest in remedying general societal discrimination.³⁷ It, however, did recognize a compelling interest in using racial classifications if the government seeks to remedy vestiges of past intentional discrimination;³⁸ and the compelling interest has a “strong basis in evidence.”³⁹ Specifically, *before* embarking on an affirmative-action program, the government must have a strong basis in evidence determining it needs to take remedial action.⁴⁰ Additionally, the government must show the discrimination it seeks

³² Siegel, *supra* note 30, at 393 (quoting *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989)).

³³ Siegel, *supra* note 30, at 394.

³⁴ Siegel, *supra* note 30, at 394 (quoting *Adarand v. Peña*, 515 U.S. 200, 229 (1995)).

³⁵ Siegel, *supra* note 30, at 397.

³⁶ Siegel, *supra* note 30, at 394 (emphasis added). *See also* Siegel, *supra* note 30, at 397 (“Although many contemporary Justices forswear second-guessing legislatures, the high-protectionist Justices who . . . invented strict scrutiny, were comfortable with that activity. They thought it the essence of their role.”).

³⁷ *Shaw v. Hunt*, 517 U.S. 899, 909–10 (1996).

³⁸ *Freeman v. Pitts*, 503 U.S. 467, 494 (1992); *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 498–509 (1989).

³⁹ *Shaw*, 517 U.S. at 910.

⁴⁰ *Id.*

to remedy is “identified discrimination”⁴¹ rather than a “generalized assertion of past discrimination.”⁴² Apart from remedial use of race, the Supreme Court is reticent to expand compelling interests in racial classifications. For example, while the Court recognized diversity in higher education as a compelling interest,⁴³ it rejected racial proportionality and racial balancing as compelling interests.⁴⁴ On the other hand, the Court recognized diversity in higher education as a compelling interest.⁴⁵

For a race-conscious plan to pass narrow tailoring muster, the Supreme Court requires “the government to show it had exhausted facially neutral means of promoting minority participation before it employed racial classifications to achieve the same end.”⁴⁶ Indeed, the Court’s narrow-tailoring analysis “demands that the fit between the government’s action and its asserted purpose be as perfect as practicable.”⁴⁷ In other words, narrow tailoring requires a “tight means-end fit,”⁴⁸ and precise government action, not underinclusive or overinclusive actions.⁴⁹ When asserting a compelling interest in remedying past discrimination, “narrow tailoring, under current doctrine, requires evidence that the legislature observed and intended to remedy lingering discriminatory impacts within the particular institution affected by the remedial measure.”⁵⁰ In the next section, we examine

⁴¹ *Id.* at 909.

⁴² *Id.*

⁴³ *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003).

⁴⁴ *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No.1*, 551 U.S. 726–27 (2007) (plurality opinion); *Id.* at 783–87 (Kennedy, J. concurring). See also Brandon Paradise, *Racially Transcendent Diversity*, 50 U. LOUISVILLE L. REV. 415, 481 (2012) (“while a majority of the Court in *Parents Involved* believed that diversity could be a compelling interest in K–12 education, the Court’s plurality opinion refused to find diversity compelling in the K–12 context”).

⁴⁵ *Grutter*, 539 U.S. at 328.

⁴⁶ Reva B. Siegel, *From Colorblindness To Antibalkanization: An Emerging Ground Of Decision In Race Equality Cases*, 120 YALE L.J. 1278, 1293 (2011); Siegel, *supra* note 30, at 360 (citing John Ely, *The Wages of Crying Wolf*, 82 YALE L.J. 920, 933 n.85 (1983)). See Siegel, *supra* note 30, at 361 (characterizing strict scrutiny as the “oldest branch of strict scrutiny.”). See also John C. Philo, *Local Government Fiscal Emergencies And The Disenfranchisement Of Victims Of The Global Recession*, 13 J. L. SOC’Y 71, 93 (2011) (“Embedded with concepts of narrow tailoring is a requirement that the statute employ the least restrictive means available to advance the state’s compelling interest.”).

⁴⁷ Siegel, *supra* note 30, at 360 (internal quotation marks omitted).

⁴⁸ Elizabeth Price Foley, *Judicial Engagement, Written Constitutions, And The Value Of Preservation: The Case Of Individual Rights*, 19 GEO. MASON L. REV. 909, 920 (2012).

⁴⁹ Siegel, *supra* note 30, at 360–61.

⁵⁰ Garrick B. Pursley, *Dormancy*, 100 GEO. L.J. 497, 510 (2012). Pursley discusses over-enforcement as well as the strict scrutiny requirement of particularized discrimination:

A recognition that past racism has a lingering negative effect in society at large, or even in state institutions at large, will not suffice; thus, the state law likely would be invalidated. It would be invalidated even though an honest legislative intention to remedy the harms of past discrimination might be an adequate reason for enacting

the Supreme Court's use of the strict scrutiny standard in review of race-conscious measures in the educational context.

II. BAKKE, GRUTTER, AND GRATZ

Beginning in 1978, the United States Supreme Court decided three affirmative action education cases applying the strict scrutiny standard: *Regents of the University of California v. Bakke*,⁵¹ *Gratz v. Bollinger*,⁵² and *Grutter v. Bollinger*.⁵³ The following discussion of these cases provides context for the article's subsequent analysis of the judicial withdrawal of support for race-conscious measures in *Parents Involved* and *Fisher*.⁵⁴ The discussion reveals the Court's approach to analyzing race-conscious measures under the strict scrutiny standard, including its narrow tailoring jurisprudence, which endorses race as a plus factor in school admissions.⁵⁵

A. Regents of the University of California v. Bakke

Bakke was the first Supreme Court case to review voluntary race-conscious measures. Allan Bakke, a white male, challenged the University of California at Davis' Medical School (UC Davis) special admissions program after unsuccessfully applying for two consecutive years.⁵⁶ UC Davis implemented a special admissions program to increase ethnic minority representation once it realized its student body had no American Indian, Black, or Mexican-American students and only three Asians.⁵⁷ The special admissions program had its own admissions committee, distinct from the regular admissions committee, and was mostly comprised of ethnic minorities.⁵⁸ Applicants applied to UC Davis, which then made the decision, based on information in the application, on whether the special or regular committee would review the applicant.⁵⁹

a racial classification in law, on a straightforward understanding of "adequate." This is over-enforcement—the use of a constitutional decision rule that invalidates more laws than actually violate the operative proposition. Again, strict scrutiny is an extreme example; it predictably strikes down valid laws but upholds almost no violations.

Id. (internal quotation marks omitted).

⁵¹ 438 U.S. 265 (1978).

⁵² 539 U.S. 244 (2003).

⁵³ 539 U.S. 306 (2003).

⁵⁴ See *infra* notes 209–592 and accompanying text.

⁵⁵ See *infra* notes 56–208 and accompanying text.

⁵⁶ *Bakke*, 438 U.S. at 272, 276.

⁵⁷ *Id.*

⁵⁸ *Id.* at 274.

⁵⁹ *Id.* at 274–76.

The special admissions program began in 1973—the first year Allan Bakke applied to UC Davis. That year, the special committee reviewed candidates whose applications indicated that the applicant preferred to be reviewed as “economically and/or educationally disadvantaged.”⁶⁰ In 1974, UC Davis changed the categories from “economically and/or educationally disadvantaged” to the minority groups of Chicanos, Asians, Blacks, or American Indians.⁶¹ Although the special admissions committee generally reviewed this applicant pool of disadvantaged minorities using similar criteria as the regular admissions committee, it eliminated the 2.5 grade point average (GPA) cutoff applicable to regular applicants.⁶²

After interviews and benchmark scoring, the special committee recommended the top special applicants to the regular admissions committee.⁶³ The regular admissions committee did not evaluate special applicants against regular applicants.⁶⁴ Instead, the committee admitted special applicants until they filled the total number of seats designated for special applicants in the entering class.⁶⁵ No white applicant who applied to the special admissions program was offered admission through that process.⁶⁶

The regular admissions program denied Bakke admission and he was not considered under the special admissions program for minorities.⁶⁷ Bakke complained to the medical school that the special admissions program was a racial quota precluding his admission.⁶⁸ Indeed, in both years Bakke applied, special applicants with “significantly lower” MCAT scores, GPAs, and benchmark scores were admitted.⁶⁹ Consequently, Bakke pursued declaratory, mandatory,

⁶⁰ *Id.*

⁶¹ *Id.* Minorities who did not belong to these categories or those who chose not to be reviewed as minorities could apply to through the regular admissions process like every other non-minority applicant.

⁶² *Id.* at 275.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* In 1973, UC Davis set aside eight seats out of the overall class of fifty for special applicants. In 1974, sixteen of the overall class of 100 were set aside for special applicants. *See also id.* at 275–76 (“From the year of the increase in class size—1971—through 1974, the special program resulted in the admission of 21 black students, 30 Mexican-Americans, and 12 Asians, for a total of 63 minority students. Over the same period, the regular admissions program produced 1 black, 6 Mexican-Americans, and 37 Asians, for a total of 44 minority students.”).

⁶⁶ *Id.* at 276. *See id.* at 275 n.5 (“For the class entering in 1973, the total number of special applicants was 297, of whom 73 were white. In 1974, 628 persons applied to the special committee, of whom 172 were white.”).

⁶⁷ *Id.* at 276–77.

⁶⁸ *Id.* at 276.

⁶⁹ *Id.* at 277.

and injunctive remedies in court claiming that the special admissions program violated his right to Equal Protection.⁷⁰

In a divided 5–4 decision, the Supreme Court invalidated the special admissions program.⁷¹ Several Justices wrote or joined various opinions explaining their reasoning.⁷² Justice Powell authored the Court’s judgment, writing an opinion not joined by any other Justice.⁷³ However, as the Supreme Court subsequently noted, “[s]ince this Court’s splintered decision in *Bakke*, Justice Powell’s opinion announcing the judgment of the Court has served as the touchstone for constitutional analysis of race-conscious admissions policies.”⁷⁴ Given the pivotal role the Court accorded Justice Powell’s *Bakke* opinion, this section focuses on his opinion only.

Rejecting the argument that strict scrutiny does not protect white males,⁷⁵ Justice Powell stated that classifying people only on the basis of race is “odious to a free people whose institutions are founded upon the doctrine of equality.”⁷⁶ Consequently, Justice Powell declared that, regardless of race or ethnicity, whenever classifications “touch upon an individual’s race or ethnic background,

⁷⁰ *Id.* at 278.

⁷¹ *Id.* at 266–67.

⁷² Justice Powell announced the judgment of the Court and wrote an opinion not joined by any other Justice. *Id.* at 289–324. Justices Brennan, Blackmun, Marshall, and White wrote an opinion partly concurring in the judgment and dissenting. *Id.* at 324–79. Justice White wrote a separate opinion. *Id.* at 379–87. Justice Marshall wrote a separate opinion. *Id.* at 387–402. Justice Blackmun wrote a separate opinion. *Id.* at 402–08. Justices Stevens, Stewart, Rehnquist, and Chief Justice Burger wrote an opinion partly concurring in the judgment and dissenting in part. *Id.* at 408–21. *See also* Grutter v. Bollinger, 539 U.S. 306, 322 (2003) (providing an overview of the divided nature of the *Bakke* opinion).

⁷³ *Bakke*, 438 U.S. at 289–324.

⁷⁴ *Grutter*, 539 U.S. at 323. Further, the United States Court of Appeals for the Sixth Circuit stated that “Justice Powell’s opinion is binding on this court under *Marks v. United States*, 430 U.S. 188, 193 (1977).” *Grutter v. Bollinger*, 288 F.3d 732, 739 (6th Cir. 2008), *aff’d*, 539 U.S. 306.

⁷⁵ *See Bakke*, 438 U.S. at 289–90. *See also id.* at 305 (“When a classification denies an individual opportunities or benefits enjoyed by others solely because of his race or ethnic background, it must be regarded as suspect” (citing *McLaurin v. Oklahoma State Regents*, 339 U.S. 637, 641–42 (1950))).

⁷⁶ *Id.* at 290–91 (citing *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)). *See also id.* at 292–93 (“As the Nation filled with the stock of many lands, the reach of the [Equal Protection] Clause was gradually extended to all ethnic groups seeking protection from official discrimination. *See Strauder v. West Virginia*, 100 U.S. 303, 308, 25 L.Ed. 664 (1880) (Celtic Irishmen) (dictum); *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886) (Chinese); *Truax v. Raich*, 239 U.S. 33, 41, 36 S.Ct. 7, 10, 60 L.Ed. 131 (1915) (Austrian resident aliens); *Korematsu, Korematsu v. United States*, 323 U.S. 214 (1944) (Japanese); *Hernandez v. Texas*, 347 U.S. 475, 74 S.Ct. 667, 98 L.Ed. 866 (1954) (Mexican-Americans). The guarantees of equal protection, said the Court in *Yick Wo*, ‘are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws.’”).

he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest. The Constitution guarantees that right to every person regardless of his background.”⁷⁷

Justice Powell stated that if UC Davis designed its program to guarantee admission of a “specified percentage” of a particular race or ethnicity, the program would be unconstitutional.⁷⁸ While conceding that remedying “wrongs worked by specific instances of racial discrimination” is a compelling interest, Justice Powell stated that such remedial use of race must be preceded by legislative, administrative, or judicial findings of statutory or constitutional violations.⁷⁹ Educational institutions are unable to make such findings; accordingly, UC Davis failed to satisfy its burden of justifying the use of race for remedying past intentional discrimination.⁸⁰ Powell stated that using race to remedy the effects of societal discrimination was not a compelling interest because such an interest is “an amorphous concept of injury that may be ageless in its reach into the past.”⁸¹

Bakke marks the first time the Court’s Equal Protection jurisprudence recognized “attainment of a diverse student body” as a compelling interest.⁸² In fact, Justice Powell presented it as an indisputable interest.⁸³ Specifically, he stated that the attainment of diversity is “clearly” a compelling interest for institutions of higher education.⁸⁴ He reasoned that academic freedom, protected under the First Amendment, demands that universities be permitted to make educational judgments, including student selection, to ensure universities are institutions that expose students to a “robust exchange of ideas” attendant to a diverse student body.⁸⁵ Diversity protects our nation’s future, because the “nation’s future depends

⁷⁷ *Id.* at 299 (citing *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948)); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 351 (1938).

⁷⁸ *Bakke*, 438 U.S. at 307.

⁷⁹ *Id.* (citing *Teamsters v. United States*, 431 U.S. 324, 367–76 (1977); *U. Jewish Organizations v. Carey*, 430 U.S. 144, 155–56 (1977); *S. Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966)). *See also Bakke*, 438 U.S. at 302 (“But we have never approved preferential classifications in the absence of proved constitutional or statutory violations.”).

⁸⁰ *See Bakke*, 438 U.S. at 309 (“Petitioner does not purport to have made, and is in no position to make, such findings. Its broad mission is education, not the formulation of any legislative policy or the adjudication of particular claims of illegality. For reasons similar to those stated in Part III of this opinion, isolated segments of our vast governmental structures are not competent to make those decisions, at least in the absence of legislative mandates and legislatively determined criteria Lacking this capability, petitioner has not carried its burden of justification on this issue.”).

⁸¹ *Id.* at 307.

⁸² *Id.* at 311–12. Justice Powell concluded that this diversity interest applies at the undergraduate and graduate levels. *Id.* at 313–14.

⁸³ *Id.*

⁸⁴ *Id.* at 311–12.

⁸⁵ *Id.*

upon leaders trained through wide exposure to the ideas and mores of students as diverse as this Nation of many peoples.”⁸⁶

Justice Powell cautioned that, while schools must have latitude regarding admission, the Constitution’s limitations require that race be “only one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body.”⁸⁷ He explained that “[t]he diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.”⁸⁸ The UC Davis program did not promote “genuine diversity” because it focused only on racial diversity.⁸⁹ While racial quotas can be a means to achieve diversity, this is not the “only effective means.”⁹⁰ In fact, Justice Powell rejected any contrary contention as “seriously flawed.”⁹¹ Diversity passing constitutional muster is not “simple ethnic diversity,” such as racial set asides or quotas.⁹²

According to Justice Powell, constitutional use of narrowly tailored race measures involves using race as one of various plus factors:

In such an admissions program, race or ethnic background may be deemed a ‘plus’ in a particular applicant’s file, yet it does not insulate the individual from comparison with all other candidates for the available seats. The file of a particular black applicant may

⁸⁶ *Id.* at 313 (internal quotations omitted). In fact, Justice Powell characterized diversity as a paramount interest:

[I]n arguing that its universities must be accorded the right to select those students who will contribute the most to the ‘robust exchange of ideas,’ petitioner invokes a countervailing constitutional interest, that of the First Amendment. In this light, petitioner must be viewed as seeking to achieve a goal that is of *paramount* importance in the fulfillment of its mission.

Id. (emphasis added).

⁸⁷ *Id.* at 314.

⁸⁸ *Id.* at 315.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* (“It is not an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups, with the remaining percentage an undifferentiated aggregation of students.”). Justice clearly rejected a multitrack racial quota system as a constitutional alternative to a two-track system:

Nor would the state interest in genuine diversity be served by expanding petitioner’s two-track system into a multitrack program with a prescribed number of seats set aside for each identifiable category of applicants. Indeed, it is inconceivable that a university would thus pursue the logic of petitioner’s two-track program to the illogical end of insulating each category of applicants with certain desired qualifications from competition with all other applicants.

Id.

be examined for his potential contribution to diversity without the factor of race being decisive when compared, for example, with that of an applicant identified as an Italian-American if the latter is thought to exhibit qualities more likely to promote beneficial educational pluralism. Such qualities could include exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor, or other qualifications deemed important. In short, an admissions program operated in this way is flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight. Indeed, the weight attributed to a particular quality may vary from year to year depending upon the 'mix' both of the student body and the applicants for the incoming class.⁹³

Because other universities' admissions programs successfully used race as a plus factor rather than "simple ethnic diversity" to ensure educational diversity, Justice Powell opined that the UC Davis program failed the narrow tailoring requirement.⁹⁴ This reasoning crystalized the need for K-12 and higher education

⁹³ *Id.* at 317-18.

⁹⁴ *Id.* at 316-17, 320. One program Justice Powell cited is the Harvard College program which used race as one of many factors in admissions. Here is the description of the Harvard College program:

In recent years Harvard College has expanded the concept of diversity to include students from disadvantaged economic, racial and ethnic groups. Harvard College now recruits not only Californians or Louisianans but also blacks and Chicanos and other minority students. Contemporary conditions in the United States mean that if Harvard College is to continue to offer a first-rate education to its students, minority representation in the undergraduate body cannot be ignored by the Committee on Admissions.

In practice, this new definition of diversity has meant that race has been a factor in some admission decisions. When the Committee on Admissions reviews the large middle group of applicants who are 'admissible' and deemed capable of doing good work in their courses, the race of an applicant may tip the balance in his favor just as geographic origin or a life spent on a farm may tip the balance in other candidates' cases. A farm boy from Idaho can bring something to Harvard College that a Bostonian cannot offer. Similarly, a black student can usually bring something that a white person cannot offer. The quality of the educational experience of all the students in Harvard College depends in part on these differences in the background and outlook that students bring with them.

In Harvard College admissions the Committee has not set target-quotas for the number of blacks, or of musicians, football players, physicists or Californians to be admitted in a given year. At the same time the Committee is aware that if Harvard College is to provide a truly heterogen[e]ous environment that reflects the

schools to consistently study various race-conscious programs used around the country, ensuring the school is pursuing the least-restrictive program available.

Under a narrowly tailored program that passes muster under Justice Powell's view, each applicant is reviewed as an individual rather than solely typed by race.⁹⁵ Justice Powell foresaw a "race-as-a-plus-factor" system as one where applicants denied admission would be less likely to bring any challenges or successful challenges against race-conscious admissions programs:

This kind of program treats each applicant as an individual in the admissions process. The applicant who loses out on the last available seat to another candidate receiving a 'plus' on the basis of ethnic background will not have been foreclosed from all consideration for that seat simply because he was not the right color or had the wrong surname. It would mean only that his combined qualifications, which may have included similar nonobjective factors, did not outweigh those of the other applicant. His qualifications would have been weighed fairly and competitively, and he would have no basis to complain of unequal treatment under the Fourteenth Amendment.⁹⁶

However, as evident in *Gratz v. Bollinger*,⁹⁷ *Parents Involved in Community Schools v. Seattle School District No. 1*,⁹⁸ and other challenges to admissions plans using race as a plus factor, Justice Powell was ultimately wrong. Such programs are actually likely to face successful challenges.⁹⁹

rich diversity of the United States, it cannot be provided without some attention to numbers. It would not make sense, for example, to have 10 or 20 students out of 1,100 whose homes are west of the Mississippi. Comparably, 10 or 20 black students could not begin to bring to their classmates and to each other the variety of points of view, backgrounds and experiences of blacks in the United States. Their small numbers might also create a sense of isolation among the black students themselves and thus make it more difficult for them to develop and achieve their potential. Consequently, when making its decisions, the Committee on Admissions is aware that there is some relationship between numbers and achieving the benefits to be derived from a diverse student body, and between numbers and providing a reasonable environment for those students admitted. But that awareness does not mean that the Committee sets a minimum number of blacks or of people from west of the Mississippi who are to be admitted.

Id. at 322–24.

⁹⁵ *Id.* at 316–18.

⁹⁶ *Id.* at 318.

⁹⁷ 539 U.S. 244 (2003).

⁹⁸ 551 U.S. 701 (2007).

⁹⁹ For examples of successful challenges to race-conscious measures, see *Eisenberg v. Montgomery Cty. Pub. Sch.*, 197 F.3d 123 (4th Cir. 1999), cert. denied, 529 U.S. 1019 (2000); *Tuttle v. Arlington Cty. Sch. Bd.*, 195 F.3d 698 (4th Cir. 1999), cert. dismissed, 529 U.S. 1050

B. Gratz v. Bollinger

The next Supreme Court venture into affirmative action at the higher education level was the 2003 same-day decisions *Gratz v. Bollinger* and *Grutter v. Bollinger*.¹⁰⁰ This section examines the Court's analysis of the race-conscious undergraduate admissions policy in *Gratz*.¹⁰¹ Sub-section C discusses the *Grutter* case, which involved a graduate admissions policy.¹⁰²

In *Gratz*, the Supreme Court reviewed a challenge to the University of Michigan's (UM) undergraduate race-conscious admissions policy.¹⁰³ Two Caucasian applicants—Jennifer Gratz and Patrick Hamacher—applied to UM's College of Literature, Science, and the Arts for fall 1995 and 1997 respectively.¹⁰⁴ Both applicants were denied admission, prompting them to challenge the race-conscious program for undergraduate admissions as violating their Equal Protection Clause rights.¹⁰⁵ The case was a class-action suit covering those denied admission back to the year 1995.¹⁰⁶ The Court agreed with the plaintiffs that the race-conscious program was unconstitutional because it failed the strict scrutiny standard.¹⁰⁷

Under all pertinent periods of this case, UM's race-conscious program classified Hispanics, African-Americans, and Native Americans as "underrepresented minorities."¹⁰⁸ This classification helped UM enhance its minority representation because nearly every applicant who qualified for this classification and satisfied UM's race-conscious application-evaluation process was admitted.¹⁰⁹ UM's application-evaluation process in 1995 and 1996 combined an applicant's GPA, geographical residence, unusual circumstances, alumni relationships, and strength of high school curriculum to create a "GPA 2" score.¹¹⁰ The GPA 2 score was then considered along with race and the applicant's American College Test/Scholastic

(2000); Podberesky v. Kirwan, 38 F.3d 147, 151–52 (4th Cir. 1994); Wessmann v. Gittens, 160 F.3d 790 (1st Cir. 1998). For a great analysis of these cases and others, see Julie F. Mead, *Devilish Details: Exploring Features of Charter School Statutes That Blur the Public/Private Distinction*, 40 HARV. J. ON LEGIS. 349 (2003).

¹⁰⁰ 539 U.S. 306 (2003).

¹⁰¹ See *infra* notes 104–45 and accompanying text.

¹⁰² See *infra* notes 146–208 and accompanying text.

¹⁰³ *Gratz v. Bollinger*, 539 U.S. 244 (2003).

¹⁰⁴ *Id.* at 251.

¹⁰⁵ *Id.* at 252.

¹⁰⁶ *Id.* at 253.

¹⁰⁷ *Id.* at 249–51, 275.

¹⁰⁸ *Id.* at 254.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 254–55.

Aptitude Test (ACT/SAT) score.¹¹¹ “[A]pplicants with the same GPA 2 score and ACT/SAT score were subject to different admissions outcomes based upon their racial or ethnic status.”¹¹² A minority applicant with the same GPA 2 and ACT/SAT scores as Gratz qualified for admission whereas Gratz did not.¹¹³

In 1997, UM added extra points to the “unusual circumstances” factor in computing GPA 2 scores for applicants from socioeconomic disadvantage, underrepresented minority groups, or high schools primarily composed of underrepresented minorities.¹¹⁴ A minority applicant with the same GPA 2 and ACT/SAT scores as Hamacher qualified for admission whereas Hamacher did not.¹¹⁵

In 1998, UM replaced this system with a “selection index.”¹¹⁶ Points were awarded for GPA, high school quality, ACT/SAT scores, personal essay, in-state residency, personal leadership/accomplishment, alumni relationship, weakness/strength of high school curriculum, and a miscellaneous category.¹¹⁷ Race applied under the miscellaneous category: “an applicant was entitled to 20 points based upon his or her membership in an underrepresented racial or ethnic minority group.”¹¹⁸ Applicants could get up to 150 points under this new system.¹¹⁹ Admission decisions based on the index points were as follows: “100–150 (admit); 95–99 (admit or postpone); 90–94 (postpone or admit); 75–89 (delay or postpone); 74 and below (delay or reject).”¹²⁰

Under all of UM’s admission systems, UM’s guidelines stated that qualified minority candidates should be offered admission “as soon as possible” because the university believed that minorities were more likely to enroll if they received expeditious offers.¹²¹ UM made it a policy to reserve “protected seats” for underrepresented minority, international student, athlete, and Reserve Officer Training Corp (ROTC) applications received later in the application cycle.¹²²

¹¹¹ *Id.* at 254.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.* at 255. Beginning in 1997, the “unusual circumstances” factor also included extra points for persons seeking to pursue fields of study with an underrepresentation of a demographic. *Id.* This demographic was not limited to race. *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 255–56.

¹¹⁷ *Id.* at 255.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.* at 256.

¹²² *Id.*

While UM continued using the selection index in 1999, that year, it added an extra level of review for some applications through the creation of an Admissions Review Committee (ARC).¹²³ Admission counselors were authorized to consider race along with other factors in determining select applications to send to the ARC.¹²⁴ The ARC was empowered to disregard the selection-index points in making final admission decisions.¹²⁵ In analyzing UM's admissions program, the Supreme Court reiterated strict scrutiny's governance of all racial classifications.¹²⁶ The Court stated that—irrespective of the race of the person benefited or burdened by the classification—the classification must be strictly scrutinized because racial classifications, whether benign or invidious, are “simply too pernicious.”¹²⁷ Within this framework, and relying on Justice Powell's opinion in *Bakke*, UM contended that its race-conscious admissions program served a compelling interest in producing the educational benefits flowing from a racially diverse student population.¹²⁸ The Court agreed that diversity is a compelling interest,¹²⁹ rejecting Gratz and Hamacher's contrary argument that diversity was “too open-ended, ill-defined, and indefinite” to be compelling.¹³⁰ UM's race-conscious policy, however, failed narrowly tailored review by automatically assigning twenty points to every minority applicant.¹³¹ UM's policy failed Justice Powell's “race-as-a-plus-factor” policy from *Bakke* because UM's race-based automatic assignment of points made race the decisive predictor of each applicant's contribution to diversity.¹³² The Court decried the UM policy for not complying with Justice Powell's opinion that applicants must receive individualized consideration, with race being just one of several factors.¹³³ In essence, the Court endorsed Justice Powell's *Bakke* opinion as the touchstone for reviewing race-conscious student assignment plans.¹³⁴

¹²³ *Id.* at 256–57.

¹²⁴ *Id.*

¹²⁵ *Id.*; *see also id.* at 274 (“review committee can look at the applications individually and ignore the points”).

¹²⁶ *Id.* at 270.

¹²⁷ *Id.*

¹²⁸ *Id.* at 257.

¹²⁹ *Id.* at 268–70.

¹³⁰ *Id.* at 268.

¹³¹ *Id.* at 270 (“We find that the University's policy, which automatically distributes 20 points, or one-fifth of the points needed to guarantee admission, to every single ‘underrepresented minority’ applicant solely because of race, is not narrowly tailored to achieve the interest in educational diversity that respondents claim justifies their program.”). The Court contrasted the UM policy with the Harvard College admissions program (outlined in an earlier footnote herein) which Justice Powell upheld as a model of the “race-as-a-plus-factor” policy; and found the UM policy wanting because, unlike the Harvard program, UM's policy did not allow individualized evaluation of applicants. *Id.* at 273. *See also generally id.* at 272–73 (discussing the Harvard program and its contrast with the UM policy).

¹³² *Id.* at 270–72.

¹³³ *Id.* at 271.

¹³⁴ *Id.* at 270–76.

The Court stated that the automatic point assignment made race decisive for almost all “minimally qualified” minorities.¹³⁵ The Court faulted UM’s race-based automatic assignment of points as premised on the “presumption that persons think in a manner associated with their race.”¹³⁶ While the ARC could look at applications individually, that was of “little comfort under [a] strict scrutiny analysis” because such individualized consideration was undisputedly “the exception and not the rule” in the UM program.¹³⁷ Furthermore, the UM policy was found wanting because the record failed to show exactly how many applications underwent individualized ARC review.¹³⁸ Without an adequate record showing that a substantial number of applicants underwent individualized review, a school cannot make a successful argument that its race-conscious program is narrowly tailored. Additionally, the Court ruled that despite ARC’s existence, UM’s program still failed the narrow tailoring prong because it made race a decisive factor for virtually all minimally qualified minorities.¹³⁹ Indeed, ARC’s “individualized review is only provided *after* admissions counselors automatically distribute the University’s version of a ‘plus’ that makes race a decisive factor for virtually every minimally qualified underrepresented minority applicant.”¹⁴⁰

Finally, the Court ruled on whether administrative challenges can justify a school’s decision to use quotas instead of the “race-as-a-plus-factor” approach.¹⁴¹ UM contended that the volume of applications made it impractical to use Justice Powell’s “race-as-a-plus-factor” approach—the approach subsequently approved by the Court in *Grutter*.¹⁴² The Court rejected UM’s contention and warned schools that the bureaucratic challenges of implementing individualized review of applicants are not an excuse for an unconstitutional policy.¹⁴³

C. *Grutter v. Bollinger*

Similar to *Gratz*, *Grutter v. Bollinger*¹⁴⁴ is an affirmative action case involving higher education. In *Grutter*, Barbara Grutter, a Caucasian applicant with a 161 Law School Admission Test (LSAT) score and a 3.8 GPA, was denied admission

¹³⁵ *Id.* at 272. The Court revealed that UM conceded this as well. *See id.* at 273 (“the University has conceded, the effect of automatically awarding 20 points is that virtually every qualified underrepresented minority applicant is admitted”).

¹³⁶ *Id.* at 271 (internal quotation marks omitted) (citing *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 618 (1990) (O’Connor, J., dissenting)).

¹³⁷ *Id.* at 274.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 275.

¹⁴² *Id.* For the discussion of *Grutter* see *infra* notes 146–208 and accompanying text.

¹⁴³ *Id.* Here as well the Court relied on Justice Powell’s *Bakke* opinion. *Id.*

¹⁴⁴ 539 U.S. 306 (2003).

to the University of Michigan Law School (Law School).¹⁴⁵ She challenged the Law School's race-conscious admissions policy as a violation of the Equal Protection Clause.¹⁴⁶

The Law School relied on Justice Powell's *Bakke* opinion in designing its admissions policy¹⁴⁷—ensuring each applicant received individualized consideration of her entire application, including the applicant's essay discussing how she would contribute to the Law School's diversity.¹⁴⁸ As part of the application process, the Law School evaluated the applicant's LSAT score and GPA, as well as “soft variables” such as the enthusiasm in letters of recommendation, level of difficulty of applicant's undergraduate courses, quality of applicant's undergraduate institution, and personal statement.¹⁴⁹ The policy stated that GPA and test scores were not dispositive.¹⁵⁰ Justice O'Connor characterized the policy's “focus on academic ability coupled with a flexible assessment of applicants' talents, experiences, and potential to contribute to the learning of those around them” as the policy's “hallmark.”¹⁵¹ The Law School's race-conscious admissions policy¹⁵² ensured representation of students with strong capabilities from various experiences and backgrounds.¹⁵³

Under the policy, diversity could be given “substantial weight” in admissions decisions.¹⁵⁴ Diversity was not limited just to race, as there were “many possible bases for diversity admissions,”¹⁵⁵ including international background or experience, non-traditional student age, or an advanced degree.¹⁵⁶ The policy conveyed the Law School's “longstanding commitment” to racial diversity and its goal of enrolling a “critical mass” of minorities, ensuring the educational benefits

¹⁴⁵ *Id.* at 316–17.

¹⁴⁶ *Id.* at 311.

¹⁴⁷ *Id.* at 314.

¹⁴⁸ *Id.* at 315.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.* (internal quotation marks omitted).

¹⁵² *Id.* at 316.

¹⁵³ *Id.* at 312–15. *See also id.* at 315 (“The policy aspires to achieve that diversity which has the potential to enrich everyone's education and thus make a law school class stronger than the sum of its parts.” (internal quotation marks omitted)).

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 316 (“The policy does not define diversity solely in terms of racial and ethnic status.” (internal quotation marks omitted)).

¹⁵⁶ *See Grutter v. Bollinger*, 288 F.3d 732, 736 (6th Cir. 2002) (stating that the university considered as diversity “an Olympic gold medal, a Ph.D. in physics, the attainment of age 50 in a class that otherwise lacked anyone over 30, or the experience of having been a Vietnamese boat person” for example).

of diversity.¹⁵⁷ Specifically, the policy expressed the Law School's commitment to "racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against, like African-Americans, Hispanics and Native-Americans, who without this commitment might not be represented in our student body in meaningful numbers."¹⁵⁸

The Law School, described "critical mass" as "meaningful numbers or meaningful representation . . . a number that encourages underrepresented minority students to participate in the classroom and not feel isolated."¹⁵⁹ Despite this reference to numbers in defining critical mass, the Law School did not use racial quotas.¹⁶⁰ According to the Court, a quota refers to a "program in which a certain fixed number or proportion of opportunities are reserved exclusively for certain minority groups."¹⁶¹ The Law School did not use the "critical mass" concept in its policy "simply to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin."¹⁶² The Court stated that if the Law School intended "critical mass" to mean racial quotas, "critical mass" would constitute racial balancing which is "*patently* unconstitutional."¹⁶³ Instead, the Law School defined "critical mass" by linking it to the educational benefits of diversity.¹⁶⁴

The Court recognized the following educational diversity benefits: (i) cross-racial understanding; (ii) dismantling racial stereotypes; (iii) more animated, interesting, and enlightening class discussions; (iv) improved learning outcomes; (v) better preparation to participate in an increasingly diverse work force; and

¹⁵⁷ *Grutter*, 539 U.S. at 316, 318. The Law School stated that its policy was not designed to remedy past intentional discrimination. *Id.* at 319.

¹⁵⁸ *Id.* at 316. The Law School explained that Jews and Asians were not mentioned because the Law School had admitted them in significant numbers. *Id.* at 319.

¹⁵⁹ *Id.* at 318.

¹⁶⁰ *Id.* at 335–36; *see also id.* at 318 (order of quotes is not chronological) ("Munzel stated there is no number, percentage, or range of numbers or percentages that constitute critical mass;" "Dennis Shields, Director of Admissions when petitioner applied to the Law School, testified that he did not direct his staff to admit a particular percentage or number of minority students, but rather to consider an applicant's race along with all other factors."). *See id.* at 318–19 (stating that the law school dean testified as other witnesses that critical mass was not defined based on percentages or numbers). Even *Grutter's* expert witness acknowledged that race was not "the predominant factor" in admissions. *Id.* at 320 (internal quotation marks omitted).

¹⁶¹ *Id.* at 335 (internal quotation marks omitted) (citing *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 496 (1989) (plurality opinion)). *See also id.* ("Quotas impose a fixed number or percentage which must be attained, or which cannot be exceeded." (internal quotation marks omitted) (citing *Sheet Metal Workers v. EEOC*, 478 U.S. 421, 495 (1986) (O'Connor, J., concurring in part and dissenting in part)). *Id.* at 334 ("To be narrowly tailored, a race-conscious admissions program cannot use a quota system.").

¹⁶² *Id.* at 329.

¹⁶³ *Id.* at 330 (emphasis added); *id.* at 335–36.

¹⁶⁴ *Id.*

(vi) improved preparation of students as professionals.¹⁶⁵ The Court found the educational benefits of this race-conscious admissions policy significant despite Grutter's contention that the Law School had no compelling interest.¹⁶⁶ It further emphasized that these educational benefits of diversity are "not theoretical but real."¹⁶⁷ A colorblind approach to admissions would undermine these educational diversity benefits. The Law School argued that a colorblind admissions policy would produce a "very dramatic, negative effect" on minorities.¹⁶⁸ They further contended that "when a critical mass of underrepresented minority students is present, racial stereotypes lose their force because nonminority students learn there is no minority viewpoint but rather a variety of viewpoints among minority students."¹⁶⁹ In its compelling-interest analysis, the Supreme Court noted that, in *Bakke*, it found a compelling interest in the "competitive consideration of race and ethnic origin" in admissions decisions.¹⁷⁰ This interest can be served if the admissions program is "properly devised."¹⁷¹

In terms of a properly devised program's parameters, the *Grutter* Court confirmed Justice Powell's *Bakke* opinion as the constitutional touchstone.¹⁷² The Court expressly endorsed Justice Powell's opinion that diversity is a compelling interest and that admission programs can use race as a plus factor to promote diversity as long as the program meets the narrowly tailored prong.¹⁷³

The Court emphasized that strict scrutiny must be applied to all racial classifications, including remedial or benign classifications.¹⁷⁴ This rule is critical in "smok[ing] out" illegitimate racial classifications¹⁷⁵ and ensuring the

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 317.

¹⁶⁷ *Id.* Given these benefits, it is important to train a diverse student body in a diverse educational setting. *Id.* at 331.

¹⁶⁸ *Id.* at 320 (internal quotation marks omitted). According to the Law School, in 2000, 35 percent of underrepresented minority applicants were admitted. Dr. Raudenbush predicted that if race were not considered, only 10 percent of those applicants would have been admitted. Under this scenario, underrepresented minority students would have constituted 4 percent of the entering class in 2000 instead of the actual figure of 14.5 percent.

Id. at 320 (internal citations omitted).

¹⁶⁹ *Id.* at 319–20.

¹⁷⁰ *Id.* at 322–23. The Court rejected the contention that race-conscious policies can only be used to remedy past discrimination. *Id.* at 328.

¹⁷¹ *Id.* at 322–23. The Court rejected the contention that race-conscious policies can only be used to remedy past discrimination. *Id.* at 328.

¹⁷² *Id.* at 323–24.

¹⁷³ *Id.* at 325 ("[T]oday we endorse Justice Powell's view that student body diversity is a compelling state interest that can justify the use of race in university admissions.").

¹⁷⁴ *Id.* at 326.

¹⁷⁵ *Id.*

government's end for the racial classification is so vital that it justifies a "highly suspect tool" such as a race-conscious measure.¹⁷⁶ Although the Court affirmed the rule that all racial classifications must be strictly scrutinized, it required courts to consider context in their review.¹⁷⁷ In other words, the Constitution does not view every use of race as "equally objectionable."¹⁷⁸ Instead, courts must consider the following contextual factors: (i) the sincerity of the government's reasons for using race in that specific context;¹⁷⁹ and (ii) the importance of the government's reasons for using race in that specific context.¹⁸⁰

The Supreme Court found that the Law School had a compelling interest in a "diverse student body."¹⁸¹ The Court chose to defer to the "educational judgment" of the Law School that "such diversity is essential to its educational mission."¹⁸² As support, the Court pointed to the record which showed that the Law School would reap educational benefits from diversity.¹⁸³ The Court reasoned that deference was justified because the educational judgments of schools are "complex" and "primarily" the university's expertise.¹⁸⁴ Additionally, schools have leeway to make decisions because of the First Amendment right to academic freedom.¹⁸⁵ The Court stated that its decision recognizing the Law School's compelling interest in diversity was "*informed by*" the Court's view that student diversity is at the core of the "proper institutional mission."¹⁸⁶ In other words, schools can pursue student diversity as a "proper institutional mission."¹⁸⁷ Additionally, the Court presumed that, unless shown otherwise, universities exercise good faith in choosing diversity as a compelling interest to pursue.¹⁸⁸

The Court concluded that the Law School's use of race was narrowly tailored because it did not involve a racial quota.¹⁸⁹ The Court stated that a school's mere attention to numbers does not make the school's race-conscious admissions plan a

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 327 ("Context matters").

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 328.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* Justice Powell emphasized the latter in *Bakke*. See *id.* at 329 (emphasis added) (citing *Bakke*, 438 U.S. at 312) (internal quotation marks and citations omitted).

¹⁸⁶ *Id.* (emphasis added).

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 334, 343.

rigid quota.¹⁹⁰ Narrow tailoring only requires a “good faith effort” in race-conscious policies to “come within a [numerical or percentage] range demarcated by the goal [diversity] itself.”¹⁹¹ This reference to good faith implies a level of deference to schools in narrow tailoring analysis in that the Court is at least willing to credit good faith efforts of schools in its review of whether the school’s plan operates as a quota or as a demarcation of range.¹⁹²

The Court stated that race-conscious programs that “insulat[e] each category of applicants with certain desired qualifications from competition with all other applicants” are not narrowly tailored.¹⁹³ However, if race is merely a “plus” in an applicant’s file and the process requires all applicants to compete for seats, the program likely passes narrow tailoring muster.¹⁹⁴ Providing further guidance on narrow tailoring, the Court called for flexibility in race-conscious programs so they can account for all relevant forms of diversity.¹⁹⁵ In particular, such programs must be “flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight.”¹⁹⁶ In other words, while race is on the same footing as other elements of diversity, rather than being dispositive, race does not have to be weighted the same

¹⁹⁰ *Id.* at 336. The Court said this in response to the fact that the Law School daily tracked the racial composition of its entering class. *Id.* at 318, 336.

¹⁹¹ *Id.* at 335 (quoting *Sheet Metal Workers v. EEOC*, 478 U.S. 421, 495 (1986) (O’Connor, J., concurring in part and dissenting in part)).

¹⁹² Further evidence of deference in the Court’s narrow tailoring discussion is seen in the Court’s statement that “[w]e take the Law School at its word that it would like nothing better than to find a race-neutral admissions formula and will terminate its race-conscious admissions program as soon as practicable” *Id.* at 343 (internal quotation marks omitted).

¹⁹³ *Id.* at 334.

¹⁹⁴ *Id.* at 334–35.

¹⁹⁵ *See id.* at 334 (“As Justice Powell made clear in *Bakke*, truly individualized consideration demands that race be used in a flexible, nonmechanical way.”). The *Grutter* Court elaborated upon the required flexibility:

When using race as a ‘plus’ factor in university admissions, a university’s admissions program must remain flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant’s race or ethnicity the defining feature of his or her application. The importance of this individualized consideration in the context of a race-conscious admissions program is paramount.

Id. at 336–37. The relevant forms of diversity are “all [the] factors that may contribute to student body diversity” which must be “meaningfully considered alongside race in admissions decisions.” *Id.* at 337. These factors could include a unique educational background, international experience or background, fluency in foreign languages as well as remarkable talents or accomplishments.

¹⁹⁶ *Id.* at 334 (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 290 (1978) (opinion of Powell, J.)).

as other diversity elements in the plan.¹⁹⁷ Placing more weight on race compared to other elements is merely another way of stating that race can be one of the plus factors in reviewing applications.

The Court emphasized that narrowly tailored plans provide individualized consideration of applicants.¹⁹⁸ Under such plans, different races cannot be placed on “separate admission tracks.”¹⁹⁹ The Court stressed that, unlike the unconstitutional policy in *Gratz*, a narrowly tailored plan does not give “mechanical, predetermined diversity ‘bonuses’ based on race or ethnicity.”²⁰⁰ A narrowly tailored race-conscious plan does not provide for “de jure or de facto . . . automatic acceptance or rejection based on any single soft variable.”²⁰¹

The Court underscored the rule that schools do not have to exhaust “every conceivable race-neutral alternative” to satisfy narrow tailoring.²⁰² Instead, narrow tailoring merely requires “serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks.”²⁰³ The Court rejected the false choice between academic excellence of an institution and a diverse education; narrow tailoring does not require this choice nor does it create a Hobson’s choice.²⁰⁴ Further, narrowly tailored race-conscious plans do not create undue burdens for non-intended minority and non-minority beneficiaries.²⁰⁵

Finally, narrowly tailored plans must have a durational limit or logical stopping point.²⁰⁶ This durational limit is met by including “sunset provisions in race-

¹⁹⁷ *Id.* at 335 (“Justice Powell flatly rejected the argument that Harvard’s program was ‘the functional equivalent of a quota’ merely because it had some ‘plus’ for race, or gave greater ‘weight’ to race than to some other factors, in order to achieve student body diversity.” (emphasis added)).

¹⁹⁸ *Id.* at 334.

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 337.

²⁰¹ *Id.* (internal quotation marks and citations omitted). Test scores and grades are hard variables. Soft variables are those considered in admissions beyond the test scores and grades. They could include race, “the enthusiasm of recommenders, the quality of the undergraduate institution, the quality of the applicant’s essay, and the areas and difficulty of undergraduate course selection.” *Id.* at 315. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No.1.*, 551 U.S. 701, 843 (2007) (defining the difference between de facto and de jure segregation as follows: “the well-established conceptual difference between de jure segregation (‘segregation by state action’) and de facto segregation (‘racial imbalance caused by other factors’)”).

²⁰² *Grutter*, 539 U.S. at 339.

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 341.

²⁰⁶ *Id.* at 342. The Court reasoned that “racial classifications, however compelling their goals, are potentially so dangerous that they may be employed no more broadly than the interest demands. Enshrining a permanent justification for racial preferences would offend this fundamental equal protection principle.” *Id.*

conscious admissions policies and periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity.”²⁰⁷ Ultimately, the Court concluded by urging schools to learn from race-neutral programs used at other schools in the country to transition away from race-conscious programs.²⁰⁸

III. PARENTS INVOLVED IN COMMUNITY SCHOOLS V. SEATTLE SCHOOL DISTRICT NO. 1

The Supreme Court first considered voluntary race-conscious admissions policies in the K–12 education context in *Parents Involved in Community Schools v. Seattle School District No. 1*. In this case, the Court considered whether voluntary race-conscious plans in Seattle School District No. 1, Washington (Seattle) and Jefferson County Public Schools, Kentucky (JCPS) violated the Equal Protection Clause.²⁰⁹

Seattle implemented a series of tiebreakers for assigning students to oversubscribed high schools, one of which was race-conscious.²¹⁰ The district voluntarily implemented the racial tiebreaker even though it had neither been under a desegregation decree nor run segregated schools.²¹¹ It chose to use the racial tiebreaker to ameliorate the impact of racially segregated housing on schools’ racial composition.²¹²

Under the race-based tiebreaker, the district considered the individual student’s race along with the school’s racial demographics when assigning students.²¹³ Schools that the district deemed racially imbalanced were eligible for racial integration.²¹⁴ A school was deemed racially imbalanced if it had a racial composition that was not within 10% of the district’s overall white/nonwhite racial demographics.²¹⁵ This white/nonwhite composition was about 41% to 59% respectively.²¹⁶ The white/nonwhite racial categories were the only two used in the district’s plan.²¹⁷ Several parents challenged the racial tiebreaker’s constitutionality

²⁰⁷ *Id.* In essence, schools need to plan for and implement formative and summative assessments of their racial-conscious plans.

²⁰⁸ *Id.* at 342–43.

²⁰⁹ 551 U.S. 701, 709–18 (2007).

²¹⁰ *Id.* at 711–12.

²¹¹ *Id.* at 712.

²¹² *Id.* at 712–13.

²¹³ *Id.* at 712.

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.* at 712.

²¹⁷ *Id.* at 712–13, 723.

under the Equal Protection Clause.²¹⁸ The United States District Court for the District of Washington held that the racial tiebreaker was narrowly tailored to serve a compelling interest.²¹⁹

In Kentucky, within a year after the dissolution of Jefferson County Public Schools' desegregation decree, the district voluntarily implemented a race-conscious assignment plan to maintain its gains from desegregation²²⁰ and to ensure that black students in its non-magnet elementary schools constituted between 15% and 50% of enrollment at each school.²²¹ Under the plan, students were classified as either black or "other."²²² Black students constituted about 34% of the district's student population; most of the other 66% were Caucasian.²²³ If a student's choice of school led to racial imbalance, the district denied the student assignment to the school.²²⁴ Crystal Meredith brought an Equal Protection Clause challenge after her son was denied assignment to his choice of schools because of the race-conscious policy.²²⁵ The United States District Court for the Western District of Kentucky ultimately held that the race-conscious policy was narrowly tailored to serve a compelling interest, namely diversity.²²⁶

Following the review of the district courts' decisions, both the Ninth and Sixth Circuit Courts of Appeal affirmed the lower courts' decisions, finding the assignment plans constitutional under the Equal Protection Clause.²²⁷ The Supreme Court granted certiorari to decide whether a district that has never run segregated schools or one that has attained unitary status can use race-conscious student assignment plans.²²⁸

²¹⁸ *Id.* at 713–14.

²¹⁹ *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No.1*, 137 F. Supp. 2d 1224, 1240 (W.D. Wash. 2001).

²²⁰ *McFarland v. Jefferson Cty. Pub. Schs.*, 330 F. Supp. 2d 834, 841–48 (W.D. Ky. 2004).

²²¹ For more on the Jefferson County race-conscious plan, see *McFarland*, 330 F. Supp. 2d 834. To learn more about the desegregation cases involving Jefferson County Public Schools, see *Newburg Area Council, Inc. v. Bd. of Educ. of Jefferson Cty.*, 489 F.2d 925 (6th Cir. 1974), *vacated*, 418 U.S. 918, *modified*, 510 F.2d 1358 (6th Cir. 1974); *Hampton v. Jefferson Cty. Bd. of Educ.*, 72 F. Supp. 2d 753 (W.D. Ky. 1999); *Hampton v. Jefferson Cty. Bd. of Educ.*, 102 F. Supp. 2d 358 (W.D. Ky. 2000).

²²² *Parents Involved*, 551 U.S. at 723.

²²³ *Id.* at 716.

²²⁴ *Id.* at 716–17.

²²⁵ *Id.* at 717–18.

²²⁶ *McFarland*, 330 F. Supp. 2d at 837.

²²⁷ *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 426 F.3d 1162, 1192–93 (9th Cir. 2005) *rev'd*, 551 U.S. 701, *vacated*, 498 F.3d 1059 (9th Cir. 2007); *McFarland v. Jefferson Cty. Pub. Schs.*, 416 F.3d 513 (6th Cir. 2005), *rev'd*, *Parents Involved*, 551 U.S. 701.

²²⁸ *Parents Involved*, 551 U.S. at 711.

A. *The Voices Of The Majority And Plurality Justices*

Chief Justice Roberts wrote the majority opinion²²⁹ emphasizing strict scrutiny as the standard of review for all racial classifications that either distribute benefits or burden individuals.²³⁰ He was particularly concerned that, without strict judicial oversight, race could be potently damaging.²³¹ Citing *Gratz*, Roberts pointed out that all racial classifications are “simply too pernicious” not to face strict scrutiny.²³²

The Court’s opinion highlighted remedying past intentional discrimination²³³ and diversity in higher education—recognized in *Grutter*²³⁴—as two compelling interests for using racial classifications.²³⁵ The Court stated that a diversity interest is compelling only if race is merely a plus factor, as in *Grutter*.²³⁶ Once again, embracing Justice Powell’s *Bakke* opinion, the Court noted that compelling diversity is not “simple ethnic diversity” or racial quotas.²³⁷ A plurality of Justices (consisting of Chief Justice Roberts, Justices Alito, Scalia, and Thomas) who provided four of the votes for the Court opinion limited diversity as a compelling interest to the higher education context.²³⁸ The plurality described “sufficient

²²⁹ *Id.* at 708. Justices Alito, Scalia, Kennedy, Thomas and Chief Justice Roberts constituted the majority.

²³⁰ *Id.* at 720.

²³¹ *Id.*

²³² *Id.*

²³³ *Id.* (citing *Freeman v. Pitts*, 503 U.S. 467 (1992)).

²³⁴ *Id.* at 722.

²³⁵ The plurality—Justices Alito, Scalia, and Thomas and Chief Justice Roberts—stressed that remedy of past *societal* discrimination does not constitute a compelling interest. *Id.* at 731–32.

²³⁶ *Id.*

²³⁷ *Id.* (citing *Grutter v. Bollinger*, 539 U.S. 306, 324–25 (2003); *Regents of Univ. of Cali. v. Bakke*, 438 U.S. 265, 314–15 (1978)).

²³⁸ *Parents Involved*, 551 U.S. at 722, 724–25. The dissenting Justices—Ginsburg, Souter, Stevens, and Breyer—disagreed, stating that it was important to extend diversity as a compelling interest to K–12 education since that is where education and development of values begins. *Id.* at 842 (Breyer, J., dissenting). The dissenters explained:

In light of this Court’s conclusions in *Grutter*, the compelling nature of these interests in the context of primary and secondary public education follows here *a fortiori*. Primary and secondary schools are where the education of this Nation’s children begins, where each of us begins to absorb those values we carry with us to the end of our days. As Justice Marshall said, unless our children begin to learn together, there is little hope that our people will ever learn to live together. *Milliken v. Bradley*, 418 U.S. 717, 783 (1974) (dissenting opinion).

And it was *Brown*, after all, focusing upon primary and secondary schools, not *Sweatt v. Painter*, 339 U.S. 629 (1950), focusing on law schools, or *McLaurin v. Oklahoma State Regents for Higher Ed.*, 339 U.S. 637 (1950), focusing on graduate schools, that affected so deeply not only Americans but the world.

diversity” as diversity that helps “students see fellow students as individuals rather than solely as members of a racial group.”²³⁹ Justice Kennedy, providing the fifth vote, opined in the 5–4 Court decision that diversity could also be a compelling interest in K–12 education.²⁴⁰ Justice Kennedy agreed with the plurality that racial imbalance alone does not violate the Constitution.²⁴¹ The Court found that Seattle had no compelling interest in remedying past intentional discrimination, never having been segregated nor subjected to a court ordered desegregation decree.²⁴² JCPS had no compelling interest in remedying past intentional discrimination because it achieved unitary status.²⁴³

In its narrow tailoring review, the Court held that a narrowly tailored plan must allow for individualized consideration of applicants, with race merely constituting “part of a broader assessment of diversity” for each applicant.²⁴⁴ The Court explained that such consideration of applicants must be “highly individualized” and entail a “holistic review” of the applicant’s credentials with race being only a component of the review.²⁴⁵ The Court determined that the JCPS and Seattle plans were not narrowly tailored because race was dispositive rather than merely a plus factor.²⁴⁶

Furthermore, the Court ruled that narrowly tailored plans do not use a “limited notion of diversity” such as “viewing race exclusively in white/nonwhite terms in Seattle and black/‘other’ terms in Jefferson County.”²⁴⁷ The Court

Id. at 842 (internal quotation marks and citations omitted); *id.* at 865 (“Just as diversity in higher education was deemed compelling in *Grutter*, diversity in public primary and secondary schools—where there is even more to gain—must be, *a fortiori*, a compelling state interest.”). *See also id.* at 855 (poignantly stating that “I have explained why I do not believe the Constitution could possibly find ‘compelling’ the provision of a racially diverse education for a 23-year-old law student but not for a 13-year-old high school pupil.”).

²³⁹ *Id.* at 733.

²⁴⁰ *Id.* at 790–91, 787–88 (Kennedy, J., concurring). *See id.* at 788 (“In the administration of public schools by the state and local authorities it is permissible to consider the racial makeup of schools and to adopt general policies to encourage a diverse student body, one aspect of which is its racial composition.”). *See also id.* at 787–88 (“The plurality opinion is too dismissive of the legitimate interest government has in ensuring all people have equal opportunity regardless of their race.”); *id.* at 791 (“At the same time, these compelling interests, in my view, do help inform the present inquiry. And to the extent the plurality opinion can be interpreted to foreclose consideration of these interests, I disagree with that reasoning.”).

²⁴¹ *Id.* at 721.

²⁴² *Id.* at 720.

²⁴³ *Id.* at 721.

²⁴⁴ *Id.* at 722–23 (citing *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003)).

²⁴⁵ *Id.* at 723 (citing *Grutter*, 539 U.S. at 337).

²⁴⁶ *Id.* (“The districts argue that other factors, such as student preferences, affect assignment decisions under their plans, but under each plan when race comes into play, it is decisive by itself. It is not simply one factor weighed with others in reaching a decision, as in *Grutter*; it is *the* factor.”).

²⁴⁷ *Id.*

indicated that “[w]e are a Nation not of black and white alone, but one teeming with divergent communities knitted together by various traditions.”²⁴⁸ Thus, schools must broaden the racial categories used in their race-conscious plans to pass narrow tailoring scrutiny.²⁴⁹

The plurality opinion also sheds light on the Supreme Court Justices overall approach to narrow tailoring. The plurality opinion made clear that even if JCPS and Seattle had compelling interests, the plans would still fail narrow tailoring review.²⁵⁰ *Grutter’s* narrow tailoring analysis, while stringent, afforded some flexibility and discretion through its good faith reliance on educators’ expertise.²⁵¹ The plurality did not embrace the *Grutter* level of discretion and flexibility.²⁵² Indeed, the plurality characterized JCPS and Seattle’s race-conscious plans as “extreme,”²⁵³ revealing the plurality’s very unfavorable disposition toward race-conscious measures. The plurality’s opposition to deference for schools is evident in the following statement: “Justice Breyer repeatedly urges deference to local school boards on these issues. Such deference is *fundamentally* at odds with our equal protection jurisprudence.”²⁵⁴

²⁴⁸ *Id.* at 723–24 (citing *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 610 (1990) (O’Connor, J., dissenting)).

²⁴⁹ *Id.*

²⁵⁰ *Id.* at 726.

²⁵¹ *See Grutter v. Bollinger*, 539 U.S. 306, 335, 339 (2003).

²⁵² While the plurality did quote the *Grutter* Court’s language about “serious, good faith consideration of workable race-neutral alternatives,” as evident herein in the discussion of the plurality’s *Parents Involved* opinion, the plurality effectively paid lip service to the deference implied in good faith. *Parents Involved*, 551 U.S. at 735 (citing *Grutter*, 539 U.S. at 339). While the plurality required that schools must be able to present evidence that there was “serious, good faith consideration of workable race-neutral alternatives” prior to adopting a race-conscious plan, *id.* at 735, the dissenters saw no such documentation requirement in case law:

Seattle school officials concentrated on diminishing the racial component of their districts’ plan, but did not pursue eliminating that element entirely. For the Court now to insist as it does, ante, at 2760 – 2761, that these school districts ought to have said so officially is either to ask for the superfluous (if they need only make explicit what is implicit) or to demand the impossible (if they must somehow provide more proof that there is no hypothetical other plan that could work as well as theirs). I am not aware of any case in which this Court has read the “narrow tailoring” test to impose such a requirement. Cf. *People Who Care v. Rockford Bd. of Ed. School Dist. No. 205*, 961 F.2d 1335, 1338 (C.A.7 1992) (Easterbrook, J.) (“Would it be necessary to adjudicate the obvious before adopting (or permitting the parties to agree on) a remedy . . . ?”).

Parents Involved, 551 U.S. at 850 (Breyer, J., dissenting).

²⁵³ *Id.* at 728 (plurality opinion).

²⁵⁴ *Id.* at 744 (emphasis added) (internal quotation marks and citations omitted). According to Justice Breyer, on behalf of the dissenting Justices, the plurality was wrong. *See id.* at 834 (Stevens, J. dissenting) (“the plurality parts company from this Court’s prior cases, and it takes from local government the *longstanding* legal right to use race-conscious criteria for inclusive purposes in limited ways” (emphasis added)).

The plurality found neither the design nor the operation of JCPS and Seattle's plans narrowly tailored because they were tied to "specific racial demographics, rather than to any pedagogic concept of the level of diversity needed to obtain the asserted educational benefits."²⁵⁵ The Court disapproved of JCPS' plan seeking black enrollment between 15% and 50% of the school population, and Seattle's plan for a school racial composition within 10% of the district's overall white/nonwhite racial demographics.²⁵⁶ According to the plurality, the school or district's racial demographics should not "drive" the required diversity.²⁵⁷ Moreover, a school should not "count back from its applicant pool to arrive at the meaningful number" it deems necessary for student diversity.²⁵⁸

The plurality's strong characterization of any plan involving "working backward to achieve a particular type of racial balance"²⁵⁹ as a "*fatal flaw*"²⁶⁰ reveals the *coup de grace* against race-conscious plans face with the plurality. The plurality repeatedly clarified that plans involving racial balancing will fail the plurality's narrow tailoring review.²⁶¹ The plurality's extreme pessimism in racial balancing as a compelling interest infiltrating American society echoes a speculative fear, yet one strong enough to inspire the plurality's resistance to racial balancing.²⁶² This pessimism feeds into a fear of many in our nation that we would become a nation that operates on race consciousness rather than race neutrality. Indeed, the plurality appears to believe that plans using racial balancing will slow the

²⁵⁵ *Id.* at 726 (plurality opinion).

²⁵⁶ *Id.*

²⁵⁷ *Id.* at 726–27. If the school can document that "the level of racial diversity necessary to achieve the asserted educational benefits" just "happens to coincide" with racial demographics, this might help in a narrow tailoring argument to the plurality. *Id.* at 727.

²⁵⁸ *Id.* at 729.

²⁵⁹ *Id.*

²⁶⁰ *Id.* (emphasis added).

²⁶¹ *See, e.g., id.* at 729–30 ("We have *many times over reaffirmed* that [r]acial balance is not to be achieved for its own sake." (emphasis added) (internal quotation marks omitted) (citing *Freeman v. Pitts*, 503 U.S. 467, 494 (1992)); *Richard v. J.A. Croson Co.*, 488 U.S. 469, 507 (1989); *Regents of Univ. of Cali. v. Bakke*, 438 U.S. 265, 307 (1978) (opinion of Powell, J.)). *See also id.* at 730 ("outright racial balancing is patently unconstitutional." (internal quotation marks omitted) (citing *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003)); *id.* at 732 ("The principle that racial balancing is not permitted is one of substance, not semantics. Racial balancing is not transformed from *patently* unconstitutional to a compelling state interest simply by relabeling it racial diversity. While the school districts use various verbal formulations to describe the interest they seek to promote—racial diversity, avoidance of racial isolation, racial integration—they offer no definition of the interest that suggests it differs from racial balance.") (emphasis added) (internal quotation marks omitted)). Justice Kennedy evidently does not agree that avoidance of racial isolation is not a compelling interest in avoiding racial isolation. *See id.* at 798 (Kennedy, J., concurring) ("A compelling interest exists in avoiding racial isolation.").

²⁶² *Id.* at 730 (plurality opinion).

transition to a post-racial, colorblind America.²⁶³ This fear is heightened by the fact that “racial balancing has no logical stopping point.”²⁶⁴

The unconstitutionality of racial balancing and the constitutionality of individualized consideration of applicants are not the only significant principles the Court articulated. The Court also elaborated on the “minimal-effect” principle.²⁶⁵ Under this principle, race-conscious plans must have more than a “minimal effect” on student assignments for the plan to be narrowly tailored.²⁶⁶ A plan having only “minimal effect” on student assignments indicates that other more effective means are available for the school to achieve its diversity goal.²⁶⁷ Based on this “minimal-effect” principle, the Court explained that Seattle’s plan only moved a “small number of students between schools;”²⁶⁸ consequently, the plan was not narrowly tailored. As for JCPS, the district’s race-conscious plan only impacted 3% of student assignments, thereby having “only a minimal effect on the assignment of students.”²⁶⁹

The irony of this “minimal-effect” view of narrow tailoring is that the plurality opinion had expressed strong opposition to reliance on numbers.²⁷⁰ Yet, the “minimal-effect” analysis argues that race-conscious plans and numbers

²⁶³ See, e.g., *id.* at 730–31 (“Allowing racial balancing as a compelling end in itself would ‘effectively assur[e] that race will always be relevant in American life, and that the ‘ultimate goal’ of ‘eliminating entirely from governmental decision making such irrelevant factors as a human being’s race’ will never be achieved.” (citing *Croson*, 488 U.S. at 495 (plurality opinion of O’Connor, J.); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (Stevens, J., dissenting); *Fullilove v. Klutznick*, 448 U.S. 448, 547 (1980) (Stevens, J., dissenting)). See also *id.* at 731 (“An interest linked to nothing other than proportional representation of various races . . . would support indefinite use of racial classifications, employed first to obtain the appropriate mixture of racial views and then to ensure that the [program] continues to reflect that mixture.” (internal quotation marks omitted) (citing *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 614 (1990) (O’Connor, J., dissenting)). Cf. David Brown, *Adam Jones: Banana Thrown His Way At AT&T Park*, BIG LEAGUE STEW, Aug. 12, 2013 (characterizing post-racial America as “a fairytale until further notice.”).

²⁶⁴ *Id.* at 731 (internal cites omitted) (citing *Croson*, 488 U.S. at 498; *Wygant*, 476 U.S. at 275 (plurality opinion)). It also appears that the plurality views benign classifications as generational fads. *Id.* at 742. This attitude is another reason why the plurality’s resistance to race-conscious plans should not be surprising.

²⁶⁵ *Id.* at 733.

²⁶⁶ *Id.*; see also *id.* at 790 (Kennedy, J., concurring) (discussing Justice Kennedy’s agreement with this).

²⁶⁷ *Id.* at 733.

²⁶⁸ *Id.*

²⁶⁹ *Id.* at 734. The Court further relied on JCPS’ statement that “the racial guidelines have minimal impact in this process, because they mostly influence student assignment in subtle and indirect ways.” *Id.* (internal quotation marks omitted).

²⁷⁰ *Id.* at 726–28.

must play a greater role in student assignments.²⁷¹ This is very confusing for schools; however, obfuscation might be another way in which the Court seeks to undermine school's ability to satisfy the narrow tailoring requirement. After all, the four Justices in the plurality stated that “[i]f the need for the racial classifications embraced by the school districts is *unclear*, even on the districts’ own terms, the costs are undeniable.”²⁷² Further obfuscating the narrow tailoring riddle for schools, the Court declared: “While we do not suggest that *greater* use of race would be preferable, the minimal impact of the districts’ racial classifications on school enrollment casts doubt on the necessity of using racial classifications.”²⁷³

A final aspect of the plurality’s narrow tailoring approach involves evaluation of race-neutral plans. The plurality stressed that to pass narrow tailoring muster, schools must present evidence that they considered race-neutral plans before implementing race-conscious plans.²⁷⁴ The Court found that both JCPS and Seattle failed to present any evidence that they considered any race-neutral plans

²⁷¹ *Id.* at 733. *See also id.* at 790 (Kennedy, J., concurring).

²⁷² *Id.* at 745 (emphasis added).

²⁷³ *Id.* at 734. The plurality of Justices conflated invidious racial discrimination which existed before *Brown v. Board of Education*, 347 U.S. 483 (1954), with JCPS and Seattle’s benign use of race. *See id.* at 747–48 (plurality opinion) (“Before *Brown*, schoolchildren were told where they could and could not go to school based on the color of their skin. The school districts in these cases have not carried the heavy burden of demonstrating that we should allow *this once again*—even for very different reasons.” (emphasis added)). The word “this” as well as the phrase “once again” shows the conflation. Further, Chief Justice Roberts stated for the plurality, “The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.” *Id.* at 748. Justice Kennedy chided the plurality for this statement, noting that it was too simplistic a view of race-conscious measures and educational equality. *Id.* at 788. (Kennedy, J., concurring). He noted reality after 50 years of *Brown* affirms that this view was simplistic. *Id.* Justice Stevens wrote a dissenting opinion to express his dismay at statements like this from Chief Justice Roberts that essentially failed to acknowledge the distinction between benign and invidious discrimination. Justice Stevens responded:

The first sentence in the concluding paragraph of his opinion states: “Before *Brown*, schoolchildren were told where they could and could not go to school based on the color of their skin.” This sentence reminds me of Anatole France’s observation: “[T]he majestic equality of the la[w], . . . forbid[s] rich and poor alike to sleep under the bridges, to beg in the streets, and to steal their bread.” THE CHIEF JUSTICE fails to note that it was only black schoolchildren who were so ordered; indeed, the history books do not tell stories of white children struggling to attend black schools.

Id. at 799 (Stevens, J., dissenting) (internal quotation marks and citation omitted). Justice Stevens accused the Chief Justice of rewriting history. *Id.* He stated that inclusive uses of race is “fundamentally different” from inclusive uses of race. *Id.* at 799 & n.3. Justice Stevens warned that the Court’s rigidity “obscures *Brown’s* clear message.” *Id.* at 801. He stated that “[t]he Court’s misuse of the three-tiered approach to equal protection analysis merely reconfirms my own view that there is only one such Clause in the Constitution.” *Id.* at 800.

²⁷⁴ *Id.* at 735.

before they chose their race-conscious plans.²⁷⁵ Consequently, their plans were not narrowly tailored.²⁷⁶

Despite his vote with the Court and the plurality, Justice Thomas voiced stronger opposition to race-conscious measures than his colleagues. In his concurring opinion, Justice Thomas immediately evinced his attitude toward race-conscious measures, characterizing such measures as an “experiment.”²⁷⁷ He also referred to race-conscious plans as “coerced” and “forced racial mixing.”²⁷⁸ This is not surprising since Justice Thomas advocates a colorblind view of the Constitution.²⁷⁹ The colorblind view sees no color and consequently no premise for addressing issues on the basis of race.²⁸⁰ Instead people are simply individual humans in one human race.²⁸¹ Civil rights scholar Zoe Burkholder notes that, “[n]o matter how it is constructed, the colorblind ideal masks institutionalized racism in America.”²⁸²

Under this colorblind view, Justice Thomas regards benign uses of race as the moral equivalent of legal segregation before *Brown v. Board of Education*, calling both approaches “wrong.”²⁸³ Advancing this equivalency argument, he opined that “[w]hat was wrong in 1954 cannot be right today.”²⁸⁴ He declared that the

²⁷⁵ *Id.*

²⁷⁶ *Id.*

²⁷⁷ *Id.* at 748 (Thomas, J., concurring).

²⁷⁸ *Id.* at 761, 764.

²⁷⁹ *Id.* at 772, 780–81.

²⁸⁰ See generally Michael B. Rappaport, *Originalism And The Colorblind Constitution*, 89 NOTRE DAME L. REV. 71 (2013); Randall Kennedy, *Colorblind Constitutionalism*, 82 FORDHAM L. REV. 1 (2013); Osagie K. Obasogie, *Can The Blind Lead The Blind? Rethinking Equal Protection Jurisprudence Through An Empirical Examination Of Blind People's Understanding Of Race*, 15 U. PA. J. CONST. L. 705 (2013).

²⁸¹ See generally Michael B. Rappaport, *Originalism And The Colorblind Constitution*, 89 NOTRE DAME L. REV. 71 (2013); Randall Kennedy, *Colorblind Constitutionalism*, 82 FORDHAM L. REV. 1 (2013); Osagie K. Obasogie, *Can The Blind Lead The Blind? Rethinking Equal Protection Jurisprudence Through An Empirical Examination Of Blind People's Understanding Of Race*, 15 U. PA. J. CONST. L. 705 (2013).

²⁸² See ZOE BURKHOLDER, *COLOR IN THE CLASSROOM: HOW AMERICAN SCHOOLS TAUGHT RACE 1900–1954* 178 (2011).

²⁸³ *Parents Involved*, 551 U.S. at 748 (Thomas, J., concurring). The dissenting Justices—Souter, Stevens, Breyer, and Ginsburg—disagreed. *Id.* at 829–30. They explained that

[t]here is reason to believe that those who drafted an Amendment with this basic purpose in mind would have understood the legal and practical difference between the use of race-conscious criteria in defiance of that purpose, namely to keep the races apart, and the use of race-conscious criteria to further that purpose, namely to bring the races together.

Id. at 829 (Breyer, J., dissenting).

²⁸⁴ *Id.* at 778 (Thomas, J., concurring).

government's beneficial use of race, not unlike the invidious use of race, "demeans us all."²⁸⁵ According to Justice Thomas, benign use of race is "racial paternalism" and is "as poisonous and pernicious as any other form of discrimination."²⁸⁶

Justice Thomas continued his moral equivalency argument stating that "[t]he constitutional problems with government race-based decision making are *not diminished* in the *slightest* by the presence or absence of an intent to oppress any race or by the real or asserted well-meaning motives for the race-based decisionmaking."²⁸⁷ Race-conscious student assignment is "*precisely* the sort of government action that pits the races against one another, exacerbates racial tension, and provokes resentment among those who believe that they have been wronged by the government's use of race."²⁸⁸ Additionally, "benign race-based decisionmaking suffers *the same* constitutional infirmity as invidious race-based decisionmaking."²⁸⁹ Failure to acknowledge a moral distinction between the beneficial use of race and the invidious use of race seems troubling.

Justice Thomas continued his opposition to race-conscious measures by dismissing Justice Breyer's fears of school resegregation as a "mere incantation of terms"²⁹⁰ and a disguise to equate racial imbalance with segregation.²⁹¹ According to Justice Thomas, the term "segregation" should be reserved for the "deliberate operation of a school system to carry out a governmental policy to separate pupils in schools solely on the basis of race."²⁹² On the other hand, the term "racial imbalance" refers to the "failure of a school district's individual schools to match or approximate the demographic makeup of the student population at large."²⁹³ Justice Thomas appears to acquiesce with the government failing to address racial imbalance, even though he acknowledged the "danger of racial imbalance" in

²⁸⁵ *Id.* at 752.

²⁸⁶ *Id.* at 759.

²⁸⁷ *Id.* at 758 (emphasis added).

²⁸⁸ *Id.* at 759 (emphasis added) (internal citation omitted).

²⁸⁹ *Id.* at 758 (emphasis added). *See also id.* at 780 ("In place of the colorblind Constitution, the dissent would permit measures to keep the races together and proscribe measures to keep the races apart. Although *no such distinction* is apparent in the Fourteenth Amendment, the dissent would constitutionalize today's faddish social theories that embrace that distinction. The Constitution is not that malleable.") (emphasis added) (internal citation omitted)).

²⁹⁰ *Id.* at 749; *see also id.* at 750 ("To raise the specter of resegregation to defend these programs is to ignore the meaning of the word and the nature of the cases before us.").

²⁹¹ *Id.* at 749. He specifically stated that "[r]acial imbalance is not segregation." *Id.* at 750. He opined that "racial imbalance is not inevitably linked to unconstitutional segregation." *Id.*

²⁹² *Id.* at 749 (internal quotation marks omitted) (citing *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 6 (1971); *Monroe v. Bd. of Comm'rs of Jackson*, 391 U.S. 450, 452 (1968)).

²⁹³ *Id.* at 749 (Thomas, J., concurring).

JCPS and Seattle and “a national trend toward classroom racial imbalance.”²⁹⁴ In fact, he opposed remedying racial imbalance.²⁹⁵ He explained that racial imbalance has “no ultimate remedy” because “schools will fall in and out of balance in the natural course.”²⁹⁶ According to Justice Thomas, race-conscious measures will consequently continue on an “indefinite basis—a continuous process with no identifiable culpable party and no discernable end point.”²⁹⁷ Justice Thomas further evidenced his disapproval of race-conscious measures by opposing any deference to schools. He declared that race-conscious measures are not constitutionally permissible “simply because a school district . . . proceeds in good faith with arguably pure motives.”²⁹⁸

Justice Thomas appears willing to set up difficult and even fatal hurdles in the path of race-conscious measures. For instance, he stated that strict scrutiny “has proven *automatically fatal* in *most* cases.”²⁹⁹ Further, he opined that even with remedial uses of race, the government has a big hurdle to overcome.³⁰⁰ Additional hurdles he suggests include requiring the government present a “strong basis in evidence”³⁰¹ justifying remedial use of race, and not allowing the government to rely on “*inherently* unmeasurable claims of past wrongs.”³⁰²

Justice Thomas, in his concurrence, apparently encouraged or tacitly approved non-racially-integrated education.³⁰³ Such a posture is another hurdle to overcome because a mindset that sees benefits to non-racially-integrated education might be relatively intransigent on race-conscious efforts promoting integrated education. While declaring the social science on the benefits of racially-integrated education

²⁹⁴ *Id.* at 750. *See also id.* at 750–51 (“No one contends that Seattle has established or that Louisville has reestablished a dual school system that separates students on the basis of race. The statistics cited in Appendix A to the dissent are not to the contrary. At most, those statistics show *a national trend toward classroom racial imbalance*. However, racial imbalance without intentional state action to separate the races does not amount to segregation. To raise the specter of resegregation to defend these programs is to ignore the meaning of the word and the nature of the cases before us.”) (emphasis added) (internal citation omitted)).

²⁹⁵ *Id.* at 749–57.

²⁹⁶ *Id.* at 756.

²⁹⁷ *Id.* at 757, 760.

²⁹⁸ *Id.* at 751.

²⁹⁹ *Id.* at 752 (emphasis added) (internal quotation omitted); *id.* at 765.

³⁰⁰ *Id.* at 754–55.

³⁰¹ *Id.* He also called it “sheer speculation” to say that “decades-past” school segregation impacted employment, economic conditions, housing patterns, and social attitudes that some argued have furthered de facto school segregation. *Id.* at 760.

³⁰² *Id.* at 755 (emphasis added) (citation omitted). *See id.* (stating that claims of general societal discrimination “plainly” do not suffice). It is important to note that, like Justice Thomas and the plurality, see *id.* at 731, the dissenting Justices did not acknowledge a compelling interest in remedying general societal discrimination. *Id.* at 843 (Stevens, J., dissenting).

³⁰³ *Id.* at 761–70 (Thomas, J., concurring).

as disputed,³⁰⁴ Justice Thomas stated as “fact” the positive academic achievement of black students in “racially-isolated” schools.³⁰⁵ He held up, as examples, fifteen graduates of Dunbar High School who, over a five-year span, before the *Brown v. Board of Education* case received Ivy League degrees.³⁰⁶ Post-*Brown*, “[t]here is also evidence that black students attending historically black colleges achieve better academic results than those attending predominantly white colleges.”³⁰⁷ According to Justice Thomas, Seattle’s African American Academy exemplifies the benefits of education in a “highly segregated” school.³⁰⁸ The relationship between race-conscious plans and educational success for black students is “tenuous.”³⁰⁹ The negative impacts of racial imbalance are merely “perceived.”³¹⁰

The discussions above evince that Justice Thomas—a critical vote for the coalition that made *Parents Involved* a 5–4 decision—demands a heavy burden and high hurdles for all race-conscious plans.³¹¹ However, the magnitude of these hurdles is most vivid in his declaration that only race-conscious plans designed to serve as a “bulwark against anarchy” or for violence prevention should be constitutional.³¹² Overall, the tenor of Justice Thomas’ opinion clearly demonstrates that he is almost certainly never going to support race-conscious admissions plans.

B. *The Voice of the Fifth Vote*

As the fifth vote, and consequently positioning himself as the potential swing vote on race-conscious plans, Justice Kennedy’s concurring opinion might be the litmus test for future race-conscious measures. Kennedy’s narrow tailoring analysis is especially important as he devoted fifteen pages to discussing narrow tailoring, compared to only three pages analyzing compelling interest.³¹³

³⁰⁴ *Id.* In the dissenting Justices’ response to Justice Thomas, Justice Breyer stated: “If we are to insist upon unanimity in the social science literature before finding a compelling interest, we might never find one.” *Id.* at 845 (Breyer, J., dissenting).

³⁰⁵ *Id.* at 763 (Thomas, J., concurring).

³⁰⁶ *Id.* (stating that “Dunbar is by no means an isolated example.”).

³⁰⁷ *Id.* It is noteworthy that present tense and present continuous tense were used in this statement.

³⁰⁸ *Id.* at 764. *See also id.* at 766 & n.14 (“this Court does not sit to create a society that includes all Americans or to solve the problems of troubled inner-city schooling.” (internal quotation marks and citations omitted)).

³⁰⁹ *Id.* at 764.

³¹⁰ *Id.* at 766, 766 n.14. *See id.* at 770 (“Some studies have even found that a deterioration in racial attitudes seems to result from racial mixing in schools. Therefore, it is not nearly as apparent as the dissent suggests that increased interracial exposure automatically leads to improved racial attitudes or race relations.” (internal quotation marks omitted)).

³¹¹ *Id.* at 771.

³¹² *Id.*

³¹³ He discussed compelling interest on pages 782 to 783, 791 and 797. His narrow tailoring analysis runs from page 783 to 798.

Justice Kennedy stated that, while the colorblind view is great aspirationally, “[i]n the real world, it is regrettable to say, it cannot be a universal constitutional principle.”³¹⁴ While “[t]he enduring hope is that race should not matter; the reality is that too often it does.”³¹⁵ We must “recognize and confront the flaws and injustices that remain.”³¹⁶ To ensure that racial-inequality flaws and injustices are not perpetuated, we must apply strict scrutiny to race-conscious plans to determine whether the plan is remedial or benign.³¹⁷ Applying strict scrutiny helps ensure motivation for race-conscious plans is not “simple racial politics” or “illegitimate notions of racial inferiority.”³¹⁸ Justice Kennedy’s fear—which likely resonates with opponents of race-conscious measures—is that if anything less than traditional strict scrutiny is applied to racial classifications, “widespread governmental deployment of racial classifications” even outside the educational context could follow.³¹⁹

The burden of proof under the strict scrutiny standard for both the compelling interest and narrow tailoring prongs falls on school districts.³²⁰ The narrow tailoring burden requires schools to provide a detailed and precise description of how and when they use an individual student’s race in their decisions.³²¹ The districts must ensure their descriptions³²² contain no inconsistencies, discrepancies, or “competing propositions.”³²³ Justice Kennedy reasoned that “ambiguities become all the more problematic in light of the contradictions and confusions that result.”³²⁴ Besides, courts will not interpret ambiguities in the school’s favor.³²⁵ The description of race-conscious plans schools provide to

³¹⁴ *Id.* at 788 (Kennedy, J., concurring).

³¹⁵ *Id.* at 787.

³¹⁶ *Id.* Justice Kennedy chided the plurality for dismissing the government’s role in ensuring equal opportunity for all races. *Id.* at 787–88. *See also id.* at 788 (“The plurality opinion is at least open to the interpretation that the Constitution requires school districts to ignore the problem of de facto resegregation in schooling. I cannot endorse that conclusion. To the extent the plurality opinion suggests the Constitution mandates that state and local school authorities must accept the status quo of racial isolation in schools, it is, in my view, profoundly mistaken.”). The dissenting Justices agreed, noting that “[n]o case of this Court has ever relied upon the *de jure/de facto* distinction in order to limit what a school district is *voluntarily* allowed to do.”) (emphasis added).

³¹⁷ *Id.* at 783.

³¹⁸ *Id.*

³¹⁹ *Id.* at 791. The choice of the word “deployment” in conveying this fear appears quite interesting.

³²⁰ *Id.* at 784.

³²¹ *Id.* at 784–85. *See, e.g., id.* at 784 (“As part of that burden it must establish, in detail, how decisions based on an individual student’s race are made in a challenged governmental program.”).

³²² *Id.* at 784–86.

³²³ *Id.* at 786.

³²⁴ *Id.* at 785.

³²⁵ *Id.* at 786.

courts must clearly show race is not used in a “far-reaching, inconsistent, and ad hoc manner.”³²⁶

As part of narrow tailoring, race-conscious plans must clearly identify: (i) the person(s) responsible for making the race-conscious decisions; (ii) the oversight for decisions under the plan; and (iii) how the plan chooses between two similarly-situated applicants.³²⁷ Furthermore, where a school district is racially diverse, its race-conscious plan must not use “crude racial categories” such as white/non-white or black/“other.”³²⁸ If using crude racial categories, the district must fully justify why, despite the diversity of races in the district, its plan chose only a limited number of racial categories.³²⁹ For example, the district must “explain how, in the context of its diverse student population, a blunt distinction between ‘white’ and ‘non-white’” promotes the compelling interest(s) asserted by the district.³³⁰ Furthermore, the explanation must be “convincing.”³³¹ Ultimately, the district would be wise to use a variety of racial categories reflective of the diverse races in the district.³³²

To pass muster, narrowly tailored plans must address diversity without typing each student individually and systemically solely by race.³³³ Individual typing by

³²⁶ *Id.*

³²⁷ *Id.* at 785.

³²⁸ *Id.* at 786. Justice Kennedy, as well as the plurality, found problematic in Seattle’s crude categories the fact that “a school with 50 percent Asian–American students and 50 percent white students but no African–American, Native–American, or Latino students would qualify as balanced, while a school with 30 percent Asian–American, 25 percent African–American, 25 percent Latino, and 20 percent white students would not.” *Id.* at 724, 787. Justice Breyer, countered for the dissenting Justices by stating that the majority’s critique implied a greater, rather than lesser, use of race. *Id.* at 854 (Breyer, J., dissenting opinion). (“The majority suggests that Seattle’s classification system could permit a school to be labeled ‘diverse’ with a 50% Asian–American and 50% white student body, and no African–American students, Hispanic students, or students of other ethnicity Seattle has been able to achieve a desirable degree of diversity without the *greater* emphasis on race that drawing fine lines among minority groups would require.”) (internal citations omitted). *See id.* (“the plurality cannot object that the constitutional defect is the individualized use of race and simultaneously object that not enough account of individuals’ race has been taken.”).

³²⁹ *Id.* at 786 (Kennedy, J., concurring).

³³⁰ *Id.* at 787. In other words, it must be clear that the district’s classification system is not an “ill fit” for its compelling interest. *Id.*

³³¹ *Id.*

³³² *Id.* at 786–87.

³³³ *Id.* at 788–89. It is important to recognize that Justice Kennedy clearly stated that schools can address their concerns about their “student-body compositions.” *See id.* (“If school authorities are concerned that the *student-body compositions* of certain schools interfere with the objective of offering an equal educational opportunity to all of their students, they are *free* to devise *race-conscious measures* to address the problem in a general way and without treating each student in different fashion solely on the basis of a systematic, individual typing by race.”) (emphasis added).

race reduces “an individual to an assigned racial identity for differential treatment [and] is among the most pernicious actions our government can undertake.”³³⁴ Race-conscious measures typing individual students solely by race must be a “last resort” for pursuing a compelling interest.³³⁵ Justice Kennedy believed JCPS and Seattle’s plans individually typed students by race.³³⁶ Specifically, he characterized the plans as “explicit, sweeping, classwide racial classifications”³³⁷ and opined that the *Gratz* plan had “*much less* reliance on race” than JCPS and Seattle’s plans.³³⁸ And unlike *Grutter*, Seattle’s plan was based on a “mechanical formula” using “three *rigid* criteria”—race, sibling placement, and school distance.³³⁹

According to Justice Kennedy, plans typing individuals by race require a governmental definition of each individual’s race,³⁴⁰ consequently forcing the individual “to live under a state-mandated racial label.”³⁴¹ Such a label weakens the individual, undermining his or her dignity.³⁴² Plans individually typing by race result in “corrosive discourse” and make race a “bargaining chip in the political process.”³⁴³ Such plans are “crude” and “*threaten* to reduce children to racial chits valued and traded according to one school’s supply and another’s demand,”³⁴⁴ creating “*new* divisiveness.”³⁴⁵ Viewed in these terms, most people likely find it highly objectionable and degrading picturing their kids diminished to racial chits used in supply and demand transactions.

In his narrow tailoring analysis, Justice Kennedy embraced race-conscious measures in which race is merely a plus factor for admission; this is “a more nuanced, individual evaluation of school needs and student characteristics that

³³⁴ *Id.* at 795. He also pointed to the contentiousness and divisiveness of assigning benefits or burdens based on race. *Id.* at 795, 797. He conceded that “[n]otwithstanding these concerns,” the Court had indeed approved of race-based programs in the past that entailed individual typing by race. *Id.* at 795–96.

³³⁵ *Id.* at 790. *See also id.* at 798 (“measures other than differential treatment based on racial typing of individuals first must be exhausted”).

³³⁶ *Id.* at 790–98.

³³⁷ *Id.* at 790.

³³⁸ *Id.* at 791 (emphasis added). *See also id.* at 792 (“If *Gratz* is to be the measure, the racial classification systems here are *a fortiori* invalid . . . Under no fair reading, though, can the majority opinion in *Gratz* be cited as authority to sustain the racial classifications under consideration here.”).

³³⁹ *Id.* at 793 (emphasis added).

³⁴⁰ *Id.* at 793, 795, 797.

³⁴¹ *Id.* (emphasis added).

³⁴² *Id.*

³⁴³ *Id.*

³⁴⁴ *Id.* at 798 (emphasis added).

³⁴⁵ *Id.* at 797 (emphasis added). A new divisiveness implies there was an old divisiveness which could be a reference to the divisiveness that occurred in the time of de jure racial segregation in our nation. The mere fact that he suggests that there might be new divisiveness might be reminder of the old divisiveness which might distress and indeed panic a lot of people.

might include race as a component.”³⁴⁶ While *Grutter* informed schools to use a plus-factor approach in K–12, the other factors for consideration vary based on the students’ age, the role of the school, and the parents’ needs.³⁴⁷ Additionally, “other demographic factors, plus special talents and needs, should also be considered.”³⁴⁸

Justice Kennedy provided examples³⁴⁹ of race-conscious plans which might not merit strict scrutiny because they do not type individual students by race: (i) strategic choice of sites for construction of new schools;³⁵⁰ (ii) creating attendance zones while being generally conscious of neighborhood demographics;³⁵¹ (iii) resource allocation for special programs such as magnet schools;³⁵² (iv) targeted recruitment of faculty and students;³⁵³ and (v) tracking race-based statistics, including enrollment and performance numbers.³⁵⁴ These are examples of race-conscious measures that generally (as opposed to individually) type students by race and are thus considered narrowly tailored. Schools should be able to use “facially race-neutral”³⁵⁵ policies and procedures like these with “confidence” and “candor”³⁵⁶ as they do not present the pressing dangers of a race-conscious plan that individually types by race.³⁵⁷ Schools should consult experts, concerned citizens, parents, and administrators to find other narrowly tailored examples of implementing the compelling interest in diversity.³⁵⁸

Justice Kennedy stated that narrow tailoring forecloses blind judicial deference to school districts.³⁵⁹ Since Justice Kennedy appears unwilling to defer to district’s plans under narrow tailoring analysis, districts must be fully prepared to explain the means-end fit using Justice Kennedy’s identified narrow tailoring principles.

³⁴⁶ *Id.* at 788, 790. *See id.* at 793 (“If those students were considered for a whole range of their talents and school needs with race as just one consideration, *Grutter* would have some application.”).

³⁴⁷ *Id.* at 790.

³⁴⁸ *Id.* at 798.

³⁴⁹ Justice Kennedy characterizes these examples as facially race-neutral. *See id.* at 790 (“the facially race-neutral means set forth above.”). For an excellent critique of these examples, see Justice Breyer’s dissent. *Id.* at 852 (Breyer, J. dissenting).

³⁵⁰ *Id.* at 789 (Kennedy, J., concurring).

³⁵¹ *Id.*

³⁵² *Id.* *See id.* at 852 (identifying an example of these special programs as magnet schools).

³⁵³ *Id.* at 789.

³⁵⁴ *Id.*

³⁵⁵ *Id.* at 790.

³⁵⁶ *Id.* at 789.

³⁵⁷ *Id.* at 797.

³⁵⁸ *Id.* at 798.

³⁵⁹ *Id.* at 790 (“The history of racial classifications in this country suggests that blind judicial deference to legislative or executive pronouncements of necessity has no place in equal protection analysis.” (citing *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 501 (1989))). The critical word to look at here is the word “necessity” which is a reference to narrow tailoring.

Even with Justice Kennedy apparently endorsing diversity as a compelling K-12 interest, his narrow tailoring view disfavors race-conscious measures.³⁶⁰ Consequently, the school districts' enthusiasm about Justice Kennedy's support for diversity as a compelling interest must be quickly tempered by the reality that he encumbers race-conscious plans through stringent narrow tailoring requirements.

Justice Kennedy's unwillingness to defer to school districts, implies that he expects the judiciary to have a full understanding of the nuances of race-conscious plans that would enable the court to make the best decision for the district. However, one must question whether the court actually has the institutional capacity to make more competent decisions than the schools:

Justice Kennedy acknowledges that narrow tailoring analysis requires the Court to understand the scope and availability of less restrictive alternatives. Such an inquiry also requires in many cases a thorough understanding of how a plan works. According to Kennedy, the Jefferson County Board of Education failed to meet this mandate. One might question, however, whether the judiciary has the institutional capacity to thoroughly understand whether and how alternative policies might be used.³⁶¹

The plurality and Justice Kennedy's reasonings logically lead to the question: for the five Justices, what is the path moving forward for race-conscious measures? A majority of the Supreme Court requires schools first exhaust all workable race-neutral alternatives before considering race-conscious measures.³⁶² Justice Kennedy expressed optimism in schools achieving compelling interest in diversity or avoiding use of racial isolation through race-conscious measures that *generally* type

³⁶⁰ Justice Kennedy also emphasized that the distinction between de facto segregation which allows for limited remedies and de jure segregation which allows for broader remedies must not be minimized. *Id.* at 793-97. (Kennedy, J., concurring). He said this, despite acknowledging that:

From the standpoint of the victim, it is true, an injury stemming from racial prejudice can hurt as much when the demeaning treatment based on race identity stems from bias masked deep within the social order as when it is imposed by law. The distinction between government and private action, furthermore, can be amorphous both as a historical matter and as a matter of present-day finding of fact. Laws arise from a culture and vice versa. Neither can assign to the other all responsibility for persisting injustices.

Id. at 795.

According to the dissenting Justices—Breyer, Stevens, Ginsburg, and Souter—the distinction was “meaningless in the present context, thereby dooming the plurality's endeavor to find support for its views in that distinction.” *Id.* at 806 (Breyer, J., dissenting). For more of the dissenters' view on this distinction, see *id.* at 844 (“that distinction concerns what the Constitution requires school boards to do, not what it permits them to do”).

³⁶¹ Lia Epperson, *Equality Dissonance: Jurisprudential Limitations And Legislative Opportunities*, 7 STAN. J. CIV. RTS. & CIV. LIBERTIES 213, 227-28 (2011) (internal quotation marks omitted).

³⁶² See *supra* Part III.A.

students by race (i.e., plans using supposed proxies for race such as socioeconomic status).³⁶³ Such generalized typing plans are essentially furtive colorblindness. Justice Kennedy does not think such measures merit strict scrutiny; thus he might join a potential core of four dissenting Justices on the Court and uphold such measures.³⁶⁴ In fact, such measures could attract rational-basis review.³⁶⁵ However, the plans that are usually challenged individually typed by race, thus meriting strict scrutiny analysis according to at least five Justices.³⁶⁶ In other words, the fifth vote, Justice Kennedy's, is vitally important to determine what level of scrutiny will be applied, ultimately sealing the fate of school plans. Sadly, "[t]he blunt force of Kennedy's narrow tailoring analysis ultimately saturates his idealism"³⁶⁷ and portends a grim future for race-conscious plans.

The 2013 George Zimmerman trial reminds us that race is still a hot-button issue in America.³⁶⁸ Given the persistent anxieties and thorniness surrounding issues of race, any expectation of public outcry to relax the strictures of narrow tailoring in judicial review of race-conscious measures would be a pipedream. Even Justice Kennedy, who eagerly embraces diversity as a compelling interest, is not eager to ease narrow tailoring on race-conscious measures.³⁶⁹

³⁶³ *Parents Involved*, 551 U.S. at 788–91 (Kennedy, J., concurring).

³⁶⁴ For a great discussion of how Justices Sotomayor and Kagan might lean on race-conscious measures, see Brandon Paradise, *Racially Transcendent Diversity*, 50 U. LOUISVILLE L. REV. 415, 478–81 (2012). Professor Paradise suggests that both Justices Kagan and Sotomayor might be sympathetic to use of race-conscious measures. *Id.*

³⁶⁵ Since Justice Kennedy stated that they would not attract strict scrutiny, the next logical applicable standard of review is rational basis (since gender or illegitimacy is not involved, intermediate scrutiny is inapplicable).

³⁶⁶ These Justices are Justices Scalia, Thomas, Kennedy, Alito, and Kennedy. Recall, when individual typing is used, the Court also expects race-conscious plans to be a non-mechanical (i.e. flexible) plan in which race is merely a plus factor. See, e.g., *Parents Involved*, 551 U.S. at 793 (Kennedy, J., concurring); *Grutter v. Bollinger*, 539 U.S. 306, 334 (2003) (opinion of Powell, J.).

³⁶⁷ Epperson, *supra* note 361, at 227.

³⁶⁸ See, e.g., Paul Lewis, *George Zimmerman Acquittal Stirs Resentment And Renews Race Debate*, THE GUARDIAN (July 19, 2013), <http://www.guardian.co.uk/world/2013/jul/19/martin-luther-king-george-zimmerman-race> (discussing the acquittal of George Zimmerman of the charge of second-degree murder of Trayvon Martin and the attendant racial tensions); Megan Gannon, *Wide Racial Gap in Reaction to Zimmerman Verdict*, LIVE SCIENCE (July 19, 2013), <http://news.yahoo.com/wide-racial-gap-reaction-zimmerman-verdict-112952910.html> (discussing the large racial divide in the reaction to the Zimmerman acquittal).

³⁶⁹ Justice Kennedy did say that "[t]he decision today should not prevent school districts from continuing the important work of bringing together students of different racial, ethnic, and economic backgrounds." *Parents Involved*, 551 U.S. at 798 (Kennedy, J., concurring). And he did say that "[a] compelling interest exists in avoiding racial isolation, an interest that a school district, in its discretion and expertise, may choose to pursue." *Id.* at 797 (emphasis added). However, as evident above, his narrow tailoring analysis presents stringent hurdles for districts to overcome.

C. *We Dissent*

Justices Breyer, Ginsburg, Souter, and Stevens would have upheld JCPS and Seattle's voluntary race-conscious plans, given their fervent support for such plans.³⁷⁰ Indeed, the Justices stated that "the Constitution cannot plausibly be interpreted to rule out categorically all local efforts to use means that are conscious of the race of individuals."³⁷¹ The dissent compared JCPS and Seattle's plans to authorized racial-integration efforts and even went so far as to urge communities to undertake race-conscious measures.³⁷² The Justices stated that race-conscious measures are "efforts that this Court has repeatedly required, permitted, and encouraged local authorities to undertake [because] [t]his Court has recognized that the public interests at stake in such cases are compelling."³⁷³

The dissenting opinion described voluntary race-conscious measures as "measures that the Constitution *permitted*, but did not *require*."³⁷⁴ It noted that the Court has a history of deferring to schools' discretion on "how to achieve

³⁷⁰ *Id.* at 803–68, 837 (Breyer, J., dissenting opinion).

³⁷¹ *Id.* at 806 (internal quotation marks omitted).

³⁷² *Id.* at 803, 806. Additionally, the dissent stated that

[t]he plurality pays inadequate attention to this law, to past opinions' rationales, their language, and the contexts in which they arise. As a result, it reverses course and reaches the wrong conclusion. In doing so, it distorts precedent, it misapplies the relevant constitutional principles, it announces legal rules that will obstruct efforts by state and local governments to deal effectively with the growing resegregation of public schools.

Id. at 803.

³⁷³ *Id.* at 803 (internal quotation marks omitted).

³⁷⁴ *Id.* at 804, 824–30. *See id.* at 823 ("A longstanding and unbroken line of legal authority tells us that the Equal Protection Clause permits local school boards to use race-conscious criteria to achieve positive race-related goals, even when the Constitution does not compel it."). This permission granted to school districts includes broad discretionary authority to design race-conscious measures:

North Carolina Bd. of Ed. v. Swann, 402 U.S. 43, 45 (1971), this Court, citing *Swann*, restated the point. [S]chool authorities, the Court said, have wide discretion in formulating school policy, and . . . as a matter of educational policy school authorities may well conclude that some kind of racial balance in the schools is desirable quite apart from any constitutional requirements. Then—Justice Rehnquist echoed this view in *Bustop, Inc. v. Los Angeles Bd. of Ed.*, 439 U.S. 1380, 1383 (1978) (opinion in chambers), making clear that he too believed that *Swann's* statement reflected settled law: 'While I have the gravest doubts that [a state supreme court] was required by the United States Constitution to take the [desegregation] action that it has taken in this case, I have very little doubt that it was permitted by that Constitution to take such action.' These statements nowhere suggest that this freedom is limited to school districts where court-ordered desegregation measures are also in effect.

Id. at 823–24 (internal quotation marks and citations omitted).

integration.”³⁷⁵ Such discretion is critical because of the highly complex nature of decisions that school districts make.³⁷⁶ Therefore, it is important to give districts the opportunity to work with a “broad range of choices” of race-conscious “means.”³⁷⁷ Besides, increased discretion would not make districts unaccountable as they answer to the electorate.³⁷⁸ Even as Justice Breyer adjured his colleagues to defer to schools, with respect to narrow tailoring, he warned: “I shall not accept the school boards’ assurances on faith.”³⁷⁹ This seeming inconsistency is resolved by fact that, while Justice Breyer and the dissenters advocate deference, they still believe courts must apply strict scrutiny analysis when reviewing cases; however, they advocate a more lenient scrutiny.³⁸⁰ This scrutiny is still rigorous review,³⁸¹ just not as rigorous as traditional strict scrutiny. As Justice Breyer explained, “giving some degree of weight to a local school board’s knowledge, expertise, and concerns in these particular matters is not inconsistent with rigorous judicial scrutiny. It simply recognizes judges are not well suited to act as school administrators.”³⁸²

³⁷⁵ *Parents Involved*, 551 U.S. at 804 (Breyer, J., dissenting); *id.* at 863 (“Until today, this Court understood the Constitution as affording the people, acting through their elected representatives, freedom to select the use of ‘race-conscious’ criteria from among their available options. Today, however, the Court restricts (and some Members would eliminate) that leeway.” (internal citations omitted)).

³⁷⁶ *Id.* at 822.

³⁷⁷ *Id.* See *id.* at 845 (“the Constitution allows democratically elected school boards to make up their own minds as to *how best* to include people of all races in one America.” (emphasis added)).

³⁷⁸ *Id.* at 836. See also *id.* at 839 (“evidence supporting an educational interest in racially integrated schools is well established and strong enough to permit a democratically elected school board reasonably to determine that this interest is a compelling one”). The dissent’s push for deference to schools is further evident in the following:

The plurality, or at least those who follow Justice Thomas’ “color-blind” approach, may feel confident that, to end invidious discrimination, one must end *all* governmental use of race-conscious criteria including those with inclusive objectives. By way of contrast, I do not claim to know how best to stop harmful discrimination; how best to create a society that includes all Americans; how best to overcome our serious problems of increasing de facto segregation, troubled inner-city schooling, and poverty correlated with race. But, as a judge, I do know that the Constitution does not authorize judges to dictate solutions to these problems. Rather, the Constitution creates a democratic political system through which the people themselves must together find answers. And it is for them to debate how best to educate the Nation’s children and how best to administer America’s schools to achieve that aim. The Court should leave them to their work. And it is for them to decide, to quote the plurality’s slogan, whether the best way to stop discrimination on the basis of race is to stop discriminating on the basis of race. That is why the Equal Protection Clause outlaws invidious discrimination, but does not similarly forbid all use of race-conscious criteria.

Id. at 862–63 (internal quotation marks and citations omitted).

³⁷⁹ *Id.* at 846.

³⁸⁰ *Id.* at 832–34 (discussing needs for a more lenient strict-scrutiny review for inclusive uses of race).

³⁸¹ *Id.* at 848.

³⁸² *Id.* at 848–49 (Breyer, J., dissenting).

The Justices opined that the majority should have deferred to JCPS and Seattle's plans because those plans were not as race-conscious as other plans the Court previously approved as narrowly tailored.³⁸³ For instance, JCPS and Seattle's plans did not present the burdens accompanying mandatory busing in the school-busing era,³⁸⁴ and both plans relied on race in "limited and gradually diminishing ways."³⁸⁵ Indeed, the plans did "not impose burdens unfairly upon members of one race alone but instead [sought] benefits for members of all races alike."³⁸⁶

Continuing its theme of deference to schools, Justice Breyer opined that JCPS and Seattle's plans' compelling interests were narrowly tailored under "any reasonable definition of those terms."³⁸⁷ He observed that, in prior precedent, the Court empowered districts to make judgment calls about the need to have a "prescribed ratio" of white and black students "reflecting the proportion for the district as a whole."³⁸⁸ This racial balancing is "an educational policy . . . within the broad discretionary powers of school authorities."³⁸⁹

The dissenting Justices view racial diversity, racial balancing, racial integration, elimination/avoidance of racial isolation, and increasing racial mixtures of schools (and of each student's school experience) as synonymous concepts all falling under one, single compelling interest.³⁹⁰ This single compelling interest consists of three elements: (i) remedial; (ii) educational; and (iii) democratic.³⁹¹ The remedial element allows districts to remedy lingering effects of previous segregation and maintain "hard-won gains."³⁹² The educational element empowers districts to

³⁸³ *Id.* at 803, 857, 865.

³⁸⁴ The dissent identified the following as benefits of race-conscious plans such as JCPS and Seattle's plans, relative to prior desegregation plans: "district wide commitment to high quality public schools, increased pupil assignment to neighborhood schools, diminished use of busing, greater student choice, reduced risk of white flight, and so forth." *Id.* at 820. *See also id.* at 835 ("If one examines the context more specifically, one finds that the districts' plans reflect efforts to overcome a history of segregation, embody the results of broad experience and community consultation, seek to expand student choice while reducing the need for mandatory busing, and use race-conscious criteria in highly limited ways that diminish the use of race compared to preceding integration efforts.").

³⁸⁵ *Id.* at 820.

³⁸⁶ *Id.* at 835.

³⁸⁷ *Id.* at 806.

³⁸⁸ *Id.* at 804 (citing *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971)).

³⁸⁹ *Id.* at 805 (Breyer, J., dissenting) (citing *Swann*, 402 U.S. at 16).

³⁹⁰ *Id.* at 838 (Breyer, J., dissenting).

³⁹¹ *Id.* at 842. The dissent stated that even if there is contrary evidence about the impact of these elements, the evidence is strong enough in support of the elements that districts should be given the discretion to decide how to proceed. *Id.* at 839–41.

³⁹² *Id.* at 839.

rectify the negative educational impact of students attending heavily segregated schools by moving them to integrated schools.³⁹³ After all, research shows that when black students are moved from segregated schools to integrated schools, their academic achievement rises substantially.³⁹⁴ The democratic element allows districts to produce a school reflecting American pluralism where people play and work with various races.³⁹⁵ Research supports the importance of pluralism, showing that both white and black students thrive in interracial friendships, contact, and socialization when educated in integrated schools.³⁹⁶

Moving beyond its compelling interest discussion, the dissenters shed light on factors critical to their narrow tailoring analysis. For these Justices, a race-conscious plan is likely narrowly tailored if it is principally based on non-racial factors with race as merely one component of the plan.³⁹⁷ The dissenting Justices, unlike the plurality and Justice Kennedy, found JCPS and Seattle's plans used race only as a plus factor,³⁹⁸ as the principal factor in the plans was not race but rather "student choice."³⁹⁹

While the dissenters disapprove of strict quotas,⁴⁰⁰ they approve of tying student assignments to racial demographics.⁴⁰¹ Such an approach does not constitute a quota if it only triggers use of race at the "outer bounds of *broad* ranges."⁴⁰² Another way to describe the broad ranges is as "broad race-conscious

³⁹³ *Id.*

³⁹⁴ *Id.*

³⁹⁵ *Id.* at 840.

³⁹⁶ *Id.* at 841 (Breyer, J., dissenting). The dissent noted that these effects "foresee a time when there is less need to use race-conscious criteria." *Id.* See also *id.* ("this Court from *Swann* to *Grutter* has treated these civic effects as an important virtue of racially diverse education.").

³⁹⁷ *Id.* at 846. This is the "race-as-a-plus-factor" approach.

³⁹⁸ *Id.* at 846–47.

³⁹⁹ *Id.* See *id.* at 846 ("In fact, the defining feature of both plans is greater emphasis upon student choice. In Seattle, for example, in more than 80% of all cases, that choice *alone* determines which high schools Seattle's ninth graders will attend. After ninth grade, students can decide voluntarily to transfer to a preferred district high school (without any consideration of race-conscious criteria). Choice, therefore, is the 'predominant factor' in these plans. Race is not.") (emphasis added).

⁴⁰⁰ *Id.* See also *id.* (defining quota as "a program in which a certain fixed number or proportion of opportunities are 'reserved exclusively for certain minority groups.'" (quoting *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 496 (1989) (plurality opinion))).

⁴⁰¹ *Id.* at 846–47 (Breyer, J., dissenting). See also *id.* at 851 ("[T]his Court has in many cases explicitly permitted districts to use target ratios based upon the district's underlying population. The reason is obvious: In Seattle, where the overall student population is 41% white, permitting 85% white enrollment at a single school would make it much more likely that other schools would have very few white students, whereas in Jefferson County, with a 60% white enrollment, one school with 85% white students would be less likely to skew enrollments elsewhere.") (internal citations omitted).

⁴⁰² *Id.* at 846. See *id.* at 846–47 (citing cases allowing this pegging in support).

student population ranges.”⁴⁰³ JCPS’s plan, for instance, triggered race only at the outer bounds of broad ranges because the plan merely sought to increase the black student population of its nonmagnet elementary schools to within the 15 and 50 percent range of the school population.⁴⁰⁴ This acceptance of broad ranges is an element of the dissent’s “race-as-a-plus-factor” analysis,⁴⁰⁵ an element not embraced in the plurality’s “race-as-a-plus-factor” analysis.⁴⁰⁶ Under the dissent’s approach, race might sometimes only have a minimal effect “because the racial makeup of the school falls within the broad range.”⁴⁰⁷ Yet, the plan would be narrowly tailored.⁴⁰⁸ This is contrary to the majority’s “minimal-effect” analysis which ruled that plans which only have a minimal effect are not narrowly tailored.⁴⁰⁹

Broad ranges are merely “useful starting points.”⁴¹⁰ For example, in the case of JCPS and Seattle, the dissenters pointed out that research based evidence shows “that a ratio no greater than 50% minority—which is Louisville’s starting point, and as close as feasible to Seattle’s starting point—is helpful in limiting the risk of white flight.”⁴¹¹ Forcefully supporting the use of race-based ranges as starting points, while evidently frustrated with the majority’s failure to approve using racial demographics in assigning students, the dissenting Justices wrote:

What other numbers are the boards to use as a ‘starting point’? Are they to spend days, weeks, or months seeking independently to validate the use of ratios that this Court has repeatedly authorized in prior cases? Are they to draw numbers out of thin air? These districts have followed this Court’s holdings and

⁴⁰³ *Id.* at 862.

⁴⁰⁴ *McFarland v. Jefferson Cnty. Schools*, 330 F. Supp. 2d 834, 842 (2004) (“the 2001 Plan requires each school to seek a Black student enrollment of at least 15% and no more than 50%. This reflects a broad range equally above and below Black student enrollment systemwide”).

⁴⁰⁵ *Parents Involved*, 551 U.S. at 846–47 (Breyer, J., dissenting).

⁴⁰⁶ *See supra* Part III.A.

⁴⁰⁷ *Parents Involved*, 551 U.S. at 846–47 (Breyer, J., dissenting). For the dissenting Justices, other reasons that race might have a minimal effect include: “either because the particular school is not oversubscribed in the year in question . . . , or because the student is a transfer applicant or has a sibling at the school.” *Id.*

⁴⁰⁸ *Id.* at 846–47.

⁴⁰⁹ *See supra* Part III.A (discussing the majority’s “minimal-effect” principle). *See also Parents Involved*, 551 U.S. at 733.

⁴¹⁰ *Id.* at 847.

⁴¹¹ *Id.* at 851 (internal quotation marks omitted). *See also id.* (stating that “[f]ederal law also assumes that a similar target percentage will help avoid detrimental minority group isolation.” (internal quotation marks omitted)).

advice in ‘tailoring’ their plans. That, too, strongly supports the lawfulness of their methods.⁴¹²

Another key to narrow tailoring is a plan’s “manner” of development.⁴¹³ “Manner” means that the plan must: (i) be “devised to overcome a history of segregated public schools”;⁴¹⁴ (ii) embody consultations with the community as well as local experiences;⁴¹⁵ (iii) be the outcome of a process designed to increase student choice while reducing the necessity of such things as mandatory busing;⁴¹⁶ and (iv) use race “*diminish[ingly]*” compared to the use of race in preceding integration plans.⁴¹⁷ Furthermore, the district must have tried other plans first;⁴¹⁸ if there is a history of desegregation or use of race-conscious measures, they must look at whether that history reveals that a plan less reliant on race would be unsuccessful in achieving diversity.⁴¹⁹

Under the majority’s narrow tailoring standard, no plan could ever comply as the possible existence of such a plan is “purely imagined.”⁴²⁰ On behalf of the

⁴¹² *Id.* The dissenters also noted that plans with broad ranges like JCPS and Seattle’s are “less burdensome, and hence more narrowly tailored” than the plan approved in *Grutter*. *Id.* at 847; *id.* at 864 (“less burdensome, more egalitarian, and more effective than prior plans”).

⁴¹³ *Id.* at 848.

⁴¹⁴ *Id.*

⁴¹⁵ *Id.*

⁴¹⁶ *Id.*

⁴¹⁷ *Id.* (“experimentation with numerous other plans”).

⁴¹⁸ *Id.*

⁴¹⁹ *Id.* at 848 (“[I]ndeed, the 40–year history that Part I sets forth [about JCPS and Seattle’s history of desegregation and race-conscious plans], make clear that plans that are less explicitly race-based are unlikely to achieve the boards’ compelling objectives.”). The dissenting Justices explained this “history” factor as follows:

The history of each school system reveals highly segregated schools, followed by remedial plans that involved forced busing, followed by efforts to attract or retain students through the use of plans that abandoned busing and replaced it with greater student choice. Both cities once tried to achieve more integrated schools by relying solely upon measures such as redrawn district boundaries, new school building construction, and unrestricted voluntary transfers. In neither city did these prior attempts prove sufficient to achieve the city’s integration goals.

Id. at 848.

Beyond the history of JCPS and Seattle, the dissenting Justices also considered history in general:

Nor could the school districts have accomplished their desired aims (e.g., avoiding forced busing, countering white flight, maintaining racial diversity) by other means. Nothing in the extensive history of desegregation efforts over the past 50 years gives the districts, or this Court, any reason to believe that another method is possible to accomplish these goals.

Id. at 851–52.

⁴²⁰ *Id.* at 850. The dissenting Justices’ summarized the various factors critical to their narrowly tailoring analysis as follows:

dissenting Justices, Justice Breyer castigated the majority for its unrealistic and impractical narrow tailoring standard. He indicated that his review of various documents and court records spanning over fifty years of school desegregation jurisprudence revealed several examples of districts using “explicitly race-conscious methods” but not a single example that could satisfy the Court and plurality’s opinions.⁴²¹ In essence, Justice Breyer’s historical analysis revealed that the Court and plurality’s standards effected *coup de grace* for race-conscious measures.

Beyond the legal analysis, the dissenting Justices made moral arguments for favoring race-conscious measures. Appealing to the “moral vision”⁴²² of the Fourteenth Amendment, the Justices rejected the moral equivalency between use of race to include people and the use of race to exclude people.⁴²³ They reasoned that exclusionary segregation “perpetuated a caste system rooted in the institutions of slavery and 80 years of legalized subordination.”⁴²⁴ Clearly perturbed by the moral-equivalency arguments, Justice Breyer replied:

Indeed, it is a cruel distortion of history to compare Topeka, Kansas, in the 1950’s to Louisville and Seattle in the modern day—to equate the plight of Linda Brown (who was ordered to attend a Jim Crow school) to the circumstances of Joshua McDonald (whose request to transfer to a school closer to home was initially declined). This is not to deny that there is a cost in applying ‘a state-mandated racial label.’ But that cost does not approach, in degree or in kind, the terrible harms of slavery, the resulting caste system, and 80 years of legal racial segregation.⁴²⁵

Ultimately, the dissent concluded that the Court’s holding is a threat to “present calm,”⁴²⁶ fuel for a “disruptive round of race-related litigation,”⁴²⁷ and

The upshot is that these plans’ specific features—(1) their limited and historically diminishing use of race, (2) their strong reliance upon other non-race-conscious elements, (3) their history and the manner in which the districts developed and modified their approach, (4) the comparison with prior plans, and (5) the lack of reasonably evident alternatives—together show that the districts plans are narrowly tailored to achieve their compelling goals.

Id. at 855.

⁴²¹ *Id.* (emphasis added).

⁴²² *Id.* at 866.

⁴²³ *Id.* at 866–67.

⁴²⁴ *Id.* at 867.

⁴²⁵ *Id.* (internal citation omitted).

⁴²⁶ *Id.* at 803; *id.* at 866 (“today’s holding upsets settled expectations, creates legal uncertainty, and threatens to produce considerable further litigation, aggravating race-related conflict”).

⁴²⁷ *Id.* at 803. *See id.* at 861 (“At a minimum, the plurality’s views would *threaten a surge* of race-based litigation. Hundreds of state and federal statutes and regulations use racial classifications for educational or other purposes. In many such instances, the contentious force of legal challenges to these classifications, meritorious or not, would displace earlier calm.” (emphasis added) (internal citation omitted)).

a frustration to *Brown's* promise of racially-integrated education.⁴²⁸ The majority opinion makes race-conscious plans “often unlawful” while the plurality’s (and particularly Justice Thomas’s) colorblind approach makes them “always unlawful.”⁴²⁹ This gravely threatens the future of voluntary race-conscious measures. It also makes Justice Kennedy’s embrace of K–12 racial diversity as a compelling interest an illusory promise.

IV. FISHER V. UNIVERSITY OF TEXAS AT AUSTIN

After *Gratz*, *Grutter*, and *Parents Involved*, K–12 schools and institutions of higher education created race-conscious plans based on the confines established in these precedential cases. One of those plans, created by the University of Texas at Austin (UT), was challenged in *Fisher v. University of Texas at Austin*.⁴³⁰ *Fisher* was the Supreme Court’s first review of a university’s race-conscious plan after *Gratz* and *Grutter*.

Since the early 1990s, UT’s race-conscious admissions process has evolved through various permutations.⁴³¹ Until the United States Court of Appeals for the Fifth Circuit found UT’s use of race unconstitutional in 1996, UT considered race, along with the Academic Index (AI)—a numerical score representing an applicant’s standardized test scores and high school academic performance—in its admission decisions.⁴³² After the ruling, UT changed from the race-conscious policy to a race-neutral admissions policy which examined an applicant’s Personal Achievement Index (PAI) and the AI.⁴³³ The PAI involved a holistic evaluation of applicants’ potential contribution to the university based on the applicant’s background in areas such as leadership, extracurricular activities, work, socioeconomic status, and language spoken at home.⁴³⁴ The state legislature supported UT’s race-conscious efforts by enacting the Top Ten Percent Law, automatically entitling students in the top 10% of their high school class admission to a Texas higher education institute.⁴³⁵ The United States Supreme Court stated that these initiatives, part of an effort to increase minority student enrollment, lead to a more diverse student body at UT.⁴³⁶

⁴²⁸ *Id.* at 803. The dissent surmised that progress on racial-integration efforts have “stalled.” *Id.* at 805. See also *id.* at 863 (“I fear the consequences . . . for the law, for the schools, for the democratic process, and for America’s efforts to create, out of its diversity, one Nation.”).

⁴²⁹ *Id.* at 861.

⁴³⁰ 133 S. Ct. 2411 (2013).

⁴³¹ *Id.* at 2415; *Hopwood v. Tex.*, 78 F.3d 932, 935–37 (1996).

⁴³² *Fisher*, 133 S. Ct. at 2415 (citing *Hopwood*, 78 F.3d 932, 955 (1996)).

⁴³³ *Id.* at 2415–16.

⁴³⁴ *Id.* The PAI also considered whether the applicant was from a single-parent household; whether the applicant had lots of family responsibilities; participation in community service; and “other special circumstances that give insight into a student’s background.” *Id.*

⁴³⁵ TEX. EDUC. CODE ANN. § 51.803 (West 2009).

⁴³⁶ *Fisher*, 133 S. Ct. at 2416.

After the Court upheld a race-conscious policy in *Grutter* in 2003 and a study released in 2004 found that UT did not have a critical mass of minority students in its classes, UT crystallized its plans to return to a race-conscious policy.⁴³⁷ Under the new race-conscious policy, race was merely one plus-factor in a holistic admissions-review process⁴³⁸ as race was added as a component of the PAI evaluation without placing an explicit numerical value on it.⁴³⁹ Each college or major within the university plotted a matrix as a graph for each scored application⁴⁴⁰ with the PAI on the y-axis and the AI on the x-axis.⁴⁴¹ Only applicants above a cutoff line in the matrix were admitted.⁴⁴² Under the policy, applicants identified their race from five predetermined racial categories.⁴⁴³ While not dispositive, race was a meaningful factor in evaluations.⁴⁴⁴ Race itself, while not impacting the PAI score, helped provide context for the applicant's achievements and determine his or her "sense of cultural awareness."⁴⁴⁵ Abigail Fisher—a Caucasian applicant—challenged the policy after she was denied admission.⁴⁴⁶ The federal district court granted UT summary judgment and the Fifth Circuit affirmed.⁴⁴⁷ The Fifth Circuit reasoned that, under *Grutter*, courts had to grant substantial deference to a university under the compelling interest prong as well as the narrow tailoring prong of strict scrutiny.⁴⁴⁸ Abigail Fisher appealed to the Supreme Court.

Justice Kennedy wrote the 7–1 Supreme Court opinion.⁴⁴⁹ The fact that Justice Kennedy—the swing vote in *Parents Involved*—wrote the *Fisher* opinion after such a pivotal role in *Parents Involved* further amplifies his role in race-conscious cases moving forward. The lone dissenter Justice Ginsburg expressed strong support for race-conscious measures.⁴⁵⁰ Justice Kagan recused herself because, as solicitor general, she played a role in the United States' amicus brief

⁴³⁷ *Id.* at 2416.

⁴³⁸ *Id.* at 2415.

⁴³⁹ *Id.*; *Fisher v. Univ. of Tex. at Austin*, 645 F. Supp. 2d 587, 597 (W.D. Tex. 2009). The AI/PAI system applied to top 10% applicants denied admission to their school of choice, non-Texas residents (international and domestic) as well as non-top 10% Texas residents. *Fischer*, 645 F. Supp. 2d at 596.

⁴⁴⁰ *Fisher*, 133 S. Ct. at 2416–17; *Fisher*, 645 F. Supp. 2d at 598.

⁴⁴¹ *Fisher*, 133 S. Ct. at 2416; *Fisher*, 645 F. Supp. 2d at 598.

⁴⁴² *Fisher*, 133 S. Ct. at 2416; *Fisher*, 645 F. Supp. 2d at 598.

⁴⁴³ *Fisher*, 133 S. Ct. at 2416.

⁴⁴⁴ *Id.* at 2416; *Fisher*, 645 F. Supp. 2d at 597–98.

⁴⁴⁵ *Id.* at 597.

⁴⁴⁶ *Fisher*, 133 S. Ct. at 2415, 2417.

⁴⁴⁷ *Id.*

⁴⁴⁸ *Id.* at 2417; *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213, 231–34, 249–53, 256–57, 259 (5th Cir. 2011).

⁴⁴⁹ *Fisher*, 133 S. Ct. at 2414.

⁴⁵⁰ *Id.*

in the Fifth Circuit arguing for UT's race-conscious plan.⁴⁵¹ Justice Thomas wrote a concurring opinion—the longest opinion in the case—re-emphasizing his opposition to race-conscious measures.⁴⁵² Justice Scalia wrote a one-paragraph concurrence simply stating his belief that all racial discrimination is unconstitutional, and suggesting he would have voted to overrule *Grutter* if petitioner Abigail Fisher had asked the Court to do so.⁴⁵³ Scalia indicated he joined the majority opinion only because he was not in a position to overrule *Grutter*.⁴⁵⁴ The following sections discuss the majority opinion, Justice Thomas' concurrence, and Justice Ginsburg's dissent.⁴⁵⁵

A. Justice Kennedy—the Voice of the Seven

In the majority opinion, Justice Kennedy wrote that the Fifth Circuit Court of Appeals failed to require UT satisfy the “demanding burden” the Court imposed on strict scrutiny in *Grutter* and in Justice Powell's *Bakke* opinion.⁴⁵⁶ Under UT's first race-conscious policy, the university had 14.5% Hispanic and 4.1% African Americans in its entering class, whereas under the following race-neutral policy, UT's entering class was 16.9% Hispanic and 4.5% African American.⁴⁵⁷ Justice Kennedy subtlety (or not so subtlety) suggested that race-neutral alternatives to UT's goal of a diverse student body exist. He also subtly (or not so subtly) directed the lower court, on remand, that UT's policy is not narrowly tailored.

Justice Kennedy relied on precedent to support the belief that strict-scrutiny jurisprudence, particularly narrow tailoring, must be very tough on race-conscious measures. For example, relying on *Bakke*, Kennedy recounted Justice Powell's emphasis that all racial classifications are subject to strict scrutiny.⁴⁵⁸ He pointed out that Justice Powell, in fact, insisted that the benign nature of a race-based plan is “irrelevant” in a plan's strict-scrutiny review.⁴⁵⁹ Justice Powell, he

⁴⁵¹ See, e.g., Hans A. von Spakovsky, *Bench Memos: UT's Missing Brief and Justice Kagan's Recusal*, NATIONAL REVIEW ONLINE (Oct. 27, 2011), <http://nationalreview.com/bench-memos/281465/uts-missing-brief-and-justice-kagan-s-recusal-hans-von-spakovsky>.

⁴⁵² *Fisher*, 133 S. Ct. at 2422–32. Justice Thomas' longer opinion, running from page 2422 to 2432, is an indication of his passion against race-conscious measures. Justice Ginsburg's dissent ran from page 2432 to 2434. In comparison, Justice Scalia' concurrence was a paragraph on page 2422. The majority opinion ran from page 2415 to 2422.

⁴⁵³ *Id.* at 2422.

⁴⁵⁴ *Id.* at 2422–32.

⁴⁵⁵ See *infra* Part IV.A.

⁴⁵⁶ *Fisher*, 133 S. Ct. at 2415.

⁴⁵⁷ *Id.* at 2416.

⁴⁵⁸ *Id.* at 2417. Justice Kennedy stated that, in *Gratz* and *Grutter*, the Court endorsed Justice Powell's precepts as governing precedent. *Id.* at 2418.

⁴⁵⁹ *Id.* at 2417; see also *id.* at 2421 (stating that “the mere recitation of a ‘benign’ or legitimate purpose for a racial classification is entitled to little or no weight.” (internal quotation marks omitted) (citing *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989))).

observed, iterated that government policies touching upon individual's race must be subjected to strict scrutiny.⁴⁶⁰ It is surprising that Justice Breyer, who disagreed with applying strict scrutiny in the same way to benign and exclusionary uses of race in his vigorous 65-page dissenting opinion in *Parents Involved*, signed on to not only the opinion but this part of the opinion which contradicts his position in *Parents Involved*.⁴⁶¹

Justice Kennedy embraced Justice Powell's recognition of diversity as a compelling interest in *Bakke*.⁴⁶² Under this view, the interest in the educational benefits of diversity is compelling because diversity "serves values beyond race alone, including enhanced classroom dialogue and the lessening of racial isolation and stereotypes."⁴⁶³ This view treats racial quotas in admissions as constitutionally impermissible while plans that use race as a plus factor are permissible.⁴⁶⁴

Even though Justice Kennedy embraced Justice Powell's view on diversity as a compelling interest, he also took a stringent approach to strict scrutiny in *Fisher*. Signaling the stringency of his strict-scrutiny approach in *Fisher*, Justice Kennedy emphasized that *Gratz* and *Grutter* require a *precise* precondition for diversity to constitute a compelling interest—diversity cannot be a compelling interest unless the schools admissions process for diversity is "subject to judicial review."⁴⁶⁵ In such judicial review, the school has the burden of proof to show the race-conscious policy passes the compelling interest prong by specifying the reasons for the race-conscious plans and showing those reasons are undoubtedly legitimate.⁴⁶⁶

⁴⁶⁰ *Fisher*, 133 S. Ct. at 2417.

⁴⁶¹ See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 791, 803–868 (2007). In *Parents Involved*, Justice Breyer argued for a less stringent review for benign use of race; yet, he signed on to Justice Kennedy's opinion that the "analysis and level of scrutiny applied to determine the validity of [a racial] classification do not vary simply because the objective appears acceptable While the validity and importance of the objective may affect the outcome of the analysis, the analysis itself does not change." *Fisher*, 133 S. Ct. at 2421 (citing *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 & n.9 (1982)).

⁴⁶² *Fisher*, 133 S. Ct. at 2417–18. See also *id.* at 2418 (stating that "[n]othing in Justice Powell's opinion in *Bakke* signaled that a university may employ whatever means it desires to achieve the stated goal of diversity without regard to the limits imposed by *our* strict scrutiny analysis." (emphasis added) (citing *Gratz v. Bollinger*, 539 U.S. 224, 275 (2003))).

⁴⁶³ *Id.* at 2417–18. Additionally, Justice Kennedy referenced the fact that Justice Powell's support for diversity as a compelling interest was also grounded in academic freedom under the First Amendment. *Id.* at 2418.

⁴⁶⁴ *Id.* at 2418.

⁴⁶⁵ *Id.*

⁴⁶⁶ *Id.*

Justice Kennedy identified five keys to narrow tailoring for a race-conscious plan: the plan must (i) not be a quota;⁴⁶⁷ (ii) use race as merely a plus factor;⁴⁶⁸ (iii) be adequately flexible to allow for individualized holistic consideration;⁴⁶⁹ (iv) have a durational limit (i.e. a logical stopping point);⁴⁷⁰ and (v) be preceded by a “good faith consideration of workable race-neutral alternatives.”⁴⁷¹ Narrow tailoring requires the means chosen to be “specifically and narrowly framed” to achieve the compelling end.⁴⁷²

As in *Parents Involved*, Justice Kennedy ruled that racial quotas do not constitute diversity for purposes of the Equal Protection Clause, and that racial balancing is not a compelling interest.⁴⁷³ Justice Breyer, one of the seven in *Fisher*, clearly embraced racial balancing as a compelling interest in his dissenting opinion in *Parents Involved*.⁴⁷⁴ Nonetheless, he surprisingly signed on to Justice Kennedy’s opinion which condemned racial balancing. If Justice Breyer is backpedaling on his strong stance for race-conscious measures in *Parents Involved*, that should deeply trouble advocates of race-conscious measures as that would constitute the loss of a major Supreme Court voice for race-conscious measures. Justice Breyer might argue that *Parents Involved* dealt with K–12 education while *Fisher* involved higher education. However, asserting such a distinction to justify joining the majority opinion portions conflicting with his strong *Parents Involved* dissent disingenuously exalts form over substance.

With respect to narrow tailoring, Justice Kennedy stated that quotas are unacceptable.⁴⁷⁵ To be narrowly tailored, race-conscious plans must be flexible enough to ensure individualized consideration of applicants.⁴⁷⁶ Narrowly tailored plans do not make race the “defining feature” of applications.⁴⁷⁷ Narrow tailoring requires race to be shown as “necessary . . . to the accomplishment of its purpose.”⁴⁷⁸ To support the ruling that race-conscious policies must be subjected to the “most rigid”⁴⁷⁹ review, he cited precedents stating that classifications of people solely

⁴⁶⁷ *Id.* at 2420.

⁴⁶⁸ *Id.* at 2421.

⁴⁶⁹ *Id.* at 2420.

⁴⁷⁰ *Id.*

⁴⁷¹ *Id.*

⁴⁷² *Id.* at 2420.

⁴⁷³ *Id.* at 2419.

⁴⁷⁴ *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 838 (2007).

⁴⁷⁵ *Fisher*, 133 S. Ct. at 2418.

⁴⁷⁶ *Id.*

⁴⁷⁷ *Id.*

⁴⁷⁸ *Id.* (citing *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 305 (1978) (opinion of Powell, J.)).

⁴⁷⁹ *Id.* at 2419 (citing *Loving v. Virginia*, 388 U.S. 1, 11 (1967)).

based on race are “odious”⁴⁸⁰ and *rarely* constitute relevant grounds for disparate treatment.⁴⁸¹ Courts must instantly treat such policies as “inherently suspect”⁴⁸² and conduct a “searching” review of race-conscious policies.⁴⁸³ Justice Kennedy’s embrace of these strong words threatens the future of race-conscious measures as it prevents an unfavorable disposition towards such measures.

Deference is another area of narrow tailoring that Justice Kennedy addressed. In *Grutter*, the Court ruled that judges must defer to the educational judgments of universities that diversity is essential to their mission.⁴⁸⁴ In *Fisher*, however, even though Justice Kennedy acknowledged the need for deference, he interpreted the deference due as only “some” incomplete deference.⁴⁸⁵ It is unclear what makes the deference incomplete as he failed to provide a definition. He also failed to explain his reasoning for departing from *Grutter*’s call for more complete deference. The gray area that is incomplete deference only confuses school districts as they attempt to comply with the dictates of *Fisher*. This uncertainty could cause districts to refrain from pursuing any race-conscious measures rather than risk protracted litigation or ultimately having their plans found constitutionally inadequate.

Justice Kennedy emphasized that, while courts could factor in university expertise and experience, narrow tailoring decisions remain “at all times” exclusively the judiciary’s purview.⁴⁸⁶ The judiciary must examine race-conscious plans to ensure they are based on individualized evaluation of applicants rather than using race as a dispositive factor.⁴⁸⁷ The Court added that “[n]arrow tailoring also requires that the reviewing court verify that it is necessary for a university to use race to achieve the educational benefits of diversity.”⁴⁸⁸ This verification

⁴⁸⁰ *Id.* at 2419 (citing *Rice v. Cayetano*, 528 U.S. 495, 517 (2000) (internal quotation marks omitted)).

⁴⁸¹ *Id.* at 2419 (citing *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 505 (1989) (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 533–534 (1980) (Stevens, J., dissenting))).

⁴⁸² *Id.* at 2419. *See id.* (“judicial review must *begin from the position* that any official action that treats a person differently on account of his race or ethnic origin is inherently suspect” (internal quotation marks omitted) (citing *Fullilove*, 448 U.S. at 523 (Stewart, J., dissenting); *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964))).

⁴⁸³ *Id.* at 2419.

⁴⁸⁴ *See Grutter v. Bollinger*, 539 U.S. 306, 328–29 (2003). The *Grutter* Court reasoned that deference was important because of the expertise of the universities and the complexity of the plans, often beyond the knowledge purview of courts. *Id.*

⁴⁸⁵ *Fisher*, 133 S. Ct. at 2419. He acknowledged the disagreement in *Fisher* between Justice Scalia and Justice Ginsburg about *Grutter*’s consistency with Equal Protection Clause principles after its finding of diversity as a compelling interest. However, he pointed out that the *Fisher* Court had not been asked to re-examine the *Grutter*’s compelling-interest ruling. *Id.*

⁴⁸⁶ *Id.*

⁴⁸⁷ *Id.*

⁴⁸⁸ *Id.*

entails a “careful”⁴⁸⁹ review to determine if race-neutral alternatives can be used to achieve “sufficient diversity.”⁴⁹⁰ This statement is unsurprising, given that, earlier in the opinion, Justice Kennedy upheld UT’s race-neutral program as fostering greater diversity relative to UT’s first race-conscious policy:

The University’s revised admissions process, coupled with the operation of the Top Ten Percent Law, resulted in a more racially diverse environment at the University. Before the admissions program at issue in this case, in the last year under the post-Hopwood AI/PAI system that did not consider race, the entering class was 4.5% African–American and 16.9% Hispanic. This is in contrast with the 1996 pre-Hopwood and Top Ten Percent regime, when race was explicitly considered, and the University’s entering freshman class was 4.1% African–American and 14.5% Hispanic.⁴⁹¹

Despite recognizing that narrow tailoring precedents do not require schools to exhaust “every conceivable” race-neutral alternative,⁴⁹² the *Fisher* majority ruled that a “reviewing court must ultimately be satisfied that *no* workable race-neutral alternatives would produce the educational benefits of diversity.”⁴⁹³ The Court stated that if a race-neutral alternative could promote the compelling end “about as well and at tolerable administrative expense, then the university may *not* consider race.”⁴⁹⁴ The notions expressed in these two statements are contradictory, leaving schools with great uncertainty as to how to proceed. On one hand, schools have leeway not to exhaust race-neutral alternatives; on the other hand, schools cannot use race-conscious measures unless the court finds there is absolutely no workable race-neutral alternative that could achieve the educational benefits of diversity.⁴⁹⁵ Even if schools go to great lengths to exhaust race-neutral alternatives, an opponent of a race-conscious plan could find or create a race-neutral plan, leaving a reviewing court with no choice but to rule that the school’s race-conscious plan is not narrowly tailored. After all, all that is required to constitute “workable race-neutral alternative” is that the alternative have a “tolerable” administrative cost and that it work “about as well” as a race-conscious plan. This is a very minimal burden, if it even creates a burden in the first place.⁴⁹⁶

⁴⁸⁹ *Id.*

⁴⁹⁰ *Id.* at 2420.

⁴⁹¹ *Id.* at 2416.

⁴⁹² *Id.*

⁴⁹³ *Id.* at 2420 (emphasis added).

⁴⁹⁴ *Id.* (internal quotation marks and citations omitted).

⁴⁹⁵ See *id.* at 2419–20 (discussing the judicial reins over school leeway that could effectively undermine the school discretion to use race-conscious measures).

⁴⁹⁶ *Id.* at 2420.

Justice Kennedy highlighted the lack of judicial deference under narrow tailoring, noting that courts must “examine with care, *and not defer to*, a university’s serious, good faith consideration of workable race-neutral alternatives.”⁴⁹⁷ A school’s good faith consideration is necessary but not enough.⁴⁹⁸ In other words, schools must invest extensive time, expertise, and expense looking for race-neutral alternatives with “tolerable” administrative costs that can achieve the compelling end “about as well as” race-conscious plans if they intend to pass narrow tailoring analysis. After all, schools bear the “ultimate burden of demonstrating, before turning to racial classifications, that available, workable race-neutral alternatives do not suffice.”⁴⁹⁹ In essence, the good faith consideration is not what the school does in good faith but rather what the court thinks the school’s good faith should have been.⁵⁰⁰ This certainly creates a lot of anxiety for schools because it presents a losing gamble—the investment of extensive resources in search of race-neutral resources by the school only to be told by a court that it should have used a court identified race-neutral alternative. Effectively, a school’s good faith consideration is never immune from a successful constitutional challenge. For example, despite UT’s extensive efforts to create a constitutionally viable race-conscious plan that was based on past precedent, the Court rejected the Fifth Circuit’s deference to UT’s good faith consideration.⁵⁰¹ In the wake of this

⁴⁹⁷ *Id.* (emphasis added) (internal quotation marks omitted) (citing *Grutter v. Bollinger*, 539 U.S. 306, 339–340 (2003)). See also *id.* at 2421 (“Strict scrutiny does not permit a court to accept a school’s assertion that its admissions process uses race in a permissible way without a court giving close analysis to the evidence of how the process works in practice.”).

⁴⁹⁸ *Id.* at 2420.

⁴⁹⁹ *Id.*

⁵⁰⁰ See, e.g., *id.* at 2420–21 (“Rather than perform this searching examination, however, the Court of Appeals held petitioner could challenge only whether [the University’s] decision to reintroduce race as a factor in admissions was made in good faith. And in considering such a challenge, the court would presume the University acted in good faith and place on petitioner the burden of rebutting that presumption. The Court of Appeals held that to second-guess the merits of this aspect of the University’s decision was a task it was ill-equipped to perform and that it would attempt only to ensure that [the University’s] decision to adopt a race-conscious admissions policy followed from [a process of] good faith consideration. The Court of Appeals thus concluded that the narrow-tailoring inquiry—like the compelling-interest inquiry—is undertaken with a degree of deference to the Universit[y]. Because the efforts of the University have been studied, serious, and of high purpose, the Court of Appeals held that the use of race in the admissions program fell within “a constitutionally protected zone of discretion. These expressions of the controlling standard are at odds with *Grutter*’s command that all racial classifications imposed by government must be analyzed by a reviewing court under strict scrutiny *Grutter* did not hold that good faith would forgive an impermissible consideration of race Strict scrutiny does not permit a court to accept a school’s assertion that its admissions process uses race in a permissible way without a court giving close analysis to the evidence of how the process works in practice.” (internal quotation marks and citations omitted)).

⁵⁰¹ *Id.* at 2420–21. See also *id.* at 2421 (“The District Court and Court of Appeals confined the strict scrutiny inquiry in too narrow a way by deferring to the University’s good faith in its use of racial classifications and affirming the grant of summary judgment on that basis.”). Besides, the Court ruled that good faith does not “forgive an impermissible consideration of race.” *Id.* at 2421.

decision, schools will understandably shy away from implementing race-conscious plans given the uncertainty and risks. This may, in fact, be precisely what the *Fisher* majority indirectly aimed to achieve, given the contradictory statements we highlighted earlier.

Justice Breyer's withdrawal of support for deference to schools should be unsettling for supporters of race-conscious measures. After all, in *Parents Involved*, he strongly advocated for deference.⁵⁰² For instance, he stated:

I do not claim to know how best to stop harmful discrimination; how best to create a society that includes all Americans; how best to overcome our serious problems of increasing de facto segregation, troubled inner-city schooling, and poverty correlated with race. But, as a judge, I do know that the Constitution does not authorize judges to dictate solutions to these problems. Rather, the Constitution creates a democratic political system through which the people themselves must together find answers. And it is for them to debate how best to educate the Nation's children and how best to administer America's schools to achieve that aim. The Court should leave them to their work. And it is for them to decide, to quote the plurality's slogan, whether the best way to stop discrimination on the basis of race is to stop discriminating on the basis of race.⁵⁰³

Yet, just six years after this, he supported the *Fisher* majority opinion's withdrawal of deference to schools. Advocates of race-conscious measures must be very demoralized to see a Justice, who took great pains to pen a 65-page opinion in support of their views, sign on to the withdrawal of deference. Such a change in tone and position from a previous supporter makes the future grim for race-conscious measures.

⁵⁰² See generally *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 803–868 (2007) (Breyer, J., dissenting). For instance, in *Parents Involved*, Justice Breyer stated:

By way of contrast, I do not claim to know how best to stop harmful discrimination; how best to create a society that includes all Americans; how best to overcome our serious problems of increasing de facto segregation, troubled inner-city schooling, and poverty correlated with race. But, as a judge, I do know that the Constitution does not authorize judges to dictate solutions to these problems. Rather, the Constitution creates a democratic political system through which the people themselves must together find answers. And it is for them to debate how best to educate the Nation's children and how best to administer America's schools to achieve that aim. The Court should leave them to their work. And it is for them to decide, to quote the plurality's slogan, whether the best way to stop discrimination on the basis of race is to stop discriminating on the basis of race.

Id. at 862 (internal quotation marks omitted).

⁵⁰³ *Parents Involved*, 551 U.S. at 803–868 (Breyer, J., dissenting).

The *Fisher* majority's *coup de grace* against race-conscious measures is aptly captured in the court's conclusion that strict scrutiny must *not* be "strict in theory but feeble in fact."⁵⁰⁴ In other words, strict scrutiny should be potent and not feeble in its application. Essentially, the Court issued a nearly unanimous directive to the lower courts to stringently apply strict scrutiny when race-conscious measures are reviewed. It was for this same reason that the court remanded the *Fisher* case back to the lower court.⁵⁰⁵ Unfortunately in *Fisher*, there was no Justice Breyer to argue passionately for race-conscious measures. Instead, Justice Thomas—one of the seven Justices in the majority—made the passionate case, but it was against race-conscious measures, earning him our article's appellation "the forever lost vote."

B. Justice Thomas—the Forever Lost Vote

According to Scott Grinsell, former Law Clerk for the United States Court of Appeals for the Second Circuit, "[a]mong the current members of the Court, Justice Thomas is perhaps the strongest advocate of colorblindness."⁵⁰⁶ In fact, Justice Thomas believes his view of colorblindness inspired the *Brown v. Board of Education* litigation.⁵⁰⁷ Justice Thomas also believes that "advocates of desegregation then redeemed the colorblindness principle . . . and gave it expression in our law when the Court decided *Brown* and based the decision on a colorblind reading of the Fourteenth Amendment."⁵⁰⁸ Justice Thomas regularly opposes race-conscious measures, so *Fisher* was a logical platform to amplify those views.⁵⁰⁹ Justice Thomas wrote his concurrence to underscore his belief that race-conscious policies in higher education are "categorically prohibited by the Equal Protection Clause."⁵¹⁰ Besides his colorblind view, this categorical-prohibition approach is another reason Justice Thomas is clearly a lost vote for race-conscious measures.

Justice Thomas joined the majority opinion because the lower court did not apply strict scrutiny, or at least not strict enough scrutiny.⁵¹¹ Justice Thomas

⁵⁰⁴ *Id.* at 2421.

⁵⁰⁵ *Fisher*, 133 S. Ct. at 2421–22.

⁵⁰⁶ Scott Grinsell, "The Prejudice Of Caste": The Misreading Of Justice Harlan And The Ascendency Of Anticlassification, 15 MICH. J. RACE & L. 317, 331 (2010).

⁵⁰⁷ *Id.* at 331–37.

⁵⁰⁸ *Id.* at 337.

⁵⁰⁹ See generally Grinsell, *supra* note 506, at 331. For a great exposition on Justice Thomas' colorblind approach, see Jonathan L. Entin, *Justice Thomas, Race, And The Constitution Through The Lens Of Booker T. Washington And W.E.B. Du Bois*, 88 U. DET. MERCY L. REV. 755 (2011).

⁵¹⁰ *Fisher*, 133 S. Ct. at 2422.

⁵¹¹ *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 215, 231–32, 234 (5th Cir. 2011). See *id.* at 234 ("In short, the Court has not retreated from *Grutter's* mode of analysis, one tailored to holistic university admissions programs. Thus, we apply strict scrutiny to race-conscious admissions policies in higher education.").

wanted the “strictest” scrutiny, or the “most exacting,” standard of review.⁵¹² This is surprising, given his colorblind view and categorical-prohibition approach. Thomas reasoned that the most stringent scrutiny is necessary because the Equal Protection Clause sees people as individuals rather than members of racial groups.⁵¹³ Further, he portended that a “destructive impact on the individual and our society” arises when people are classified by race.⁵¹⁴ Race-conscious policies need to be reviewed under an interpretation of strict scrutiny that “has *proven automatically fatal in almost every case.*”⁵¹⁵

Racial classifications can only be used where there is “pressing public necessity.”⁵¹⁶ This is Justice Thomas’ alternate way of characterizing compelling interest.⁵¹⁷ Previously, Supreme Court precedents only found public necessity for racial classifications pressing when: (i) protecting national security,⁵¹⁸ described as the need to “provide a bulwark against anarchy, or to prevent violence,”⁵¹⁹ or at the state or local level, “only a social emergency rising to the level of imminent danger to life and limb;⁵²⁰ (ii) remedying past discrimination if there is “strong basis in evidence” that the remedy is necessary and if the government entity was responsible for the past discrimination;⁵²¹ and (iii) the *Grutter* decision. While acknowledging *Grutter* as a situation in which the Court found pressing public necessity, Thomas dismissed *Grutter* as a true “pressing public necessity” case by using the phrase “aside from *Grutter*,” and in stating that the Court acknowledged “only *two* instances” of pressing public necessity.⁵²² Additionally, Thomas called *Grutter* a “radical departure” from precedents.⁵²³ Furthermore, Thomas believes the first two interests listed above—interests he unequivocally supports as compelling—should only apply in a “narrow set of circumstances.”⁵²⁴ Justice Thomas criticized *Grutter* for recognizing the educational benefits flowing from diversity as a compelling interest because the case did not involve national security

⁵¹² *Fisher*, 133 S. Ct. at 2422. One also has to wonder if he implied in his opinion that race-conscious policies constitute “racial antagonism.” *Id.*

⁵¹³ *Id.*

⁵¹⁴ *Id.* (citation omitted).

⁵¹⁵ *Id.* (emphasis added) (internal quotation marks omitted).

⁵¹⁶ *Id.*

⁵¹⁷ *Id.* at 2423 & n.1.

⁵¹⁸ *Id.* at 2423 (citing *Korematsu v. United States*, 323 U.S. 214, 217–18 (1944)).

⁵¹⁹ *Id.* (citing *Grutter v. Bollinger*, 539 U.S. 306, 353 (2003) (Thomas, J., concurring in part and dissenting in part)).

⁵²⁰ *Id.* (citing *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 521 (1989) (Scalia, J., concurring)).

⁵²¹ *Id.* (citing *Croson*, 488 U.S. at 500, 504; *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1984) (plurality opinion)).

⁵²² *Id.*

⁵²³ *Id.*

⁵²⁴ *Id.*

or a remedy of past discrimination.⁵²⁵ In fact, he concluded that, “[a]s *should be obvious*, there is nothing ‘pressing’ or ‘necessary’ about obtaining whatever educational benefits flow from racial diversity.”⁵²⁶ While acknowledging that the *Grutter* Court deferred to the school in its compelling-interest analysis, Thomas labeled such deference “[c]ontrary to the very meaning of strict scrutiny.”⁵²⁷

In his compelling-interest analysis, Justice Thomas distinguished the “educational benefits derived from diversity” from diversity itself.⁵²⁸ Diversity as a compelling interest is a “nonstarter” equivalent to racial balancing.⁵²⁹ “[D]iversity can only be the *means* by which the University obtains educational benefits; it cannot be an end pursued for its own sake.”⁵³⁰ Per contra, educational benefits flowing from diversity are only “alleged”⁵³¹ and “putative.”⁵³² On one hand, educational benefits flowing from diversity must “rise to the level of a compelling state interest” to pass strict scrutiny muster.⁵³³ On the other hand, educational benefits flowing from diversity “hardly qualify” as compelling.⁵³⁴

Not only did Justice Thomas oppose recognizing educational benefits flowing from diversity as a compelling interest, he resisted expanding recognized compelling interests beyond national security and remedying past discrimination. Thomas reasoned that “the Court has frequently found other asserted interests insufficient.”⁵³⁵ For example, the Court rejected “best interests of a child,” “role models for minority students,” and remedying societal discrimination as compelling interests.⁵³⁶

⁵²⁵ *Id.* at 2423–24.

⁵²⁶ *Id.* at 2424.

⁵²⁷ *Id.*

⁵²⁸ *Id.* at 2423.

⁵²⁹ *Id.* at 2424.

⁵³⁰ *Id.* (emphasis added).

⁵³¹ *Id.* Also see the language “assuming they exist” in the following statement: “Unfortunately for the University, the educational benefits flowing from student body diversity—assuming they exist—hardly qualify as a compelling state interest.” *Id.*

⁵³² *Id.* at 2426.

⁵³³ *Id.* at 2424.

⁵³⁴ *Id.*

⁵³⁵ *Id.* at 2423.

⁵³⁶ *Id.* His words were actually that the Court had “flatly rejected” as compelling the “best interests of a child.” *Id.* He stated that the remedy of societal discrimination was not compelling because it had “no logical stopping point.” *Id.* (citing *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1984)). As for role-modeling, he reasoned that the argument for role models for minority students could result in the kind of segregation that existed before *Brown*: “the notion that black students are better off with black teachers could lead to the very system the Court rejected in *Brown v. Board of Education*.” *Id.* (citing *Wygant*, 476 U.S. at 276).

Justice Thomas carried forward his moral-equivalency view from *Parents Involved*, noting that “just as the alleged educational benefits of segregation were insufficient to justify racial discrimination then, the alleged educational benefits of diversity cannot justify racial discrimination today.”⁵³⁷ Even if UT successfully argued that it would be forced to close down due to a lack of diversity, the risk of closure or actual closure is insufficient to sustain the race-conscious policy.⁵³⁸ Thomas compared such a closure to Virginia’s Prince Edward County’s closure of public schools in resistance to desegregation after *Brown*.⁵³⁹ If closure of UT could not justify a race-conscious policy, neither could the educational benefits of diversity.⁵⁴⁰ Astonishingly, Thomas declared: “If the Court were actually applying strict scrutiny, it would require Texas either to close the University or to stop discriminating against applicants based on their race. The Court has put other schools to that choice, and there is no reason to treat the University differently.”⁵⁴¹ The “other schools” were segregated schools that resisted segregation with the threat or actual closure of their schools.⁵⁴²

Justice Thomas further expounded on his moral-equivalency view in responding to UT’s argument that diversity is critical to equipping students for leadership in a diverse society.⁵⁴³ First, he called the race-conscious policy “discriminatory,”⁵⁴⁴ and second, he noted that “segregationists *likewise* defended segregation on the ground that it provided more leadership opportunities for blacks.”⁵⁴⁵ In rejecting UT’s contention that diversity furthers interracial relations and diminishes stereotyping, Justice Thomas declared: “In this argument, too, the University repeats arguments once marshaled in support of segregation.”⁵⁴⁶ Additionally, Justice Thomas’ response to UT’s argument that the race-conscious policy was a “temporary necessity” to address an “enduring” racial problem reveals his failure to appreciate or at least acknowledge that segregation and race-conscious measures are not equivalent.⁵⁴⁷ Specifically, Thomas responded that, “[y]et again,

⁵³⁷ *Id.* at 2424–25 (internal citation omitted). *See also id.* at 2426 (“It is also noteworthy that, in our desegregation cases, we rejected arguments that are *virtually identical* to those advanced by the University today.” (emphasis added)).

⁵³⁸ *Id.*

⁵³⁹ *Id.*

⁵⁴⁰ *Id.*

⁵⁴¹ *See id.* (“If a State does not have a compelling interest in the *existence* of a university, it certainly cannot have a compelling interest in the supposed benefits that might accrue to that university from racial discrimination.”).

⁵⁴² *Id.* at 2425–26.

⁵⁴³ *Id.* at 2426.

⁵⁴⁴ *Id.*

⁵⁴⁵ *Id.* (emphasis added).

⁵⁴⁶ *Id.* at 2427.

⁵⁴⁷ *Id.*

the University echoes the hollow justifications advanced by the segregationists.”⁵⁴⁸ Interestingly, he claims moral authority for these views in *Brown*.⁵⁴⁹

Moreover, Justice Thomas opined:

While the arguments advanced by the University in defense of discrimination are the same as those advanced by the segregationists, one obvious difference is that the segregationists argued that it was *segregation* that was necessary to obtain the alleged benefits, whereas the University argues that *diversity* is the key. Today, the segregationists’ arguments would never be given serious consideration. We should be equally hostile to the University’s repackaged version of the same arguments in support of its favored form of racial discrimination.⁵⁵⁰

In essence, Justice Thomas suggested that advocates of race-conscious policies are neo-segregationists. Incredibly, he declared that “[t]here is no principled distinction between the University’s assertion that diversity yields educational benefits and the segregationists’ assertion that segregation yielded those same benefits.”⁵⁵¹ Justice Thomas revealed his disdain for race-conscious measures by characterizing them as “faddish theories.”⁵⁵²

Such disdain led Justice Thomas to question UT’s motives for their race-conscious policy.⁵⁵³ Justice Thomas believed UT’s “use of race ha[d] little to do with the alleged educational benefits of diversity.”⁵⁵⁴ He suggested UT’s policy was an example of the “worst forms of racial discrimination” always put forth to minorities with “straight-faced representations” about the benefits of “discrimination.”⁵⁵⁵ “The University’s professed good intentions cannot excuse

⁵⁴⁸ *Id.*

⁵⁴⁹ *Id.* at 2427–29.

⁵⁵⁰ *Id.* at 2428 n.3 (internal citations omitted).

⁵⁵¹ *Id.* at 2428. See also *id.* at 2429 (making the argument that the moral equivalency between diversity and segregation is “neither new nor difficult to understand.”). Confoundingly, he made an equivalency between *Grutter* and *Plessy v. Ferguson*, 163 U.S. 537 (1896)—the case that authorized separate but equal laws. See *Fisher*, 133 S. Ct. at 2429 (“This simple, yet fundamental, truth was lost on the Court in *Plessy* and *Grutter*.”).

⁵⁵² *Id.* at 2428. He emphasized that he would reverse *Grutter*. *Id.* at 2429. He criticized the *Grutter* Court for deferring to the Law School’s conclusion that diversity would produce educational benefits. *Id.* at 2428. In his view, such benefits are a “far cry” from what he considers to be “truly” compelling interests. *Id.* He stated that “no benefit in the eye of the beholder can justify racial discrimination.” *Id.* at 2429.

⁵⁵³ *Id.*

⁵⁵⁴ *Id.*

⁵⁵⁵ *Id.* at 2429–30.

its outright racial discrimination any more than such intentions justified the now denounced arguments of slaveholders and segregationists.”⁵⁵⁶ Justice Thomas opined that UT followed in the “inauspicious footsteps” of slaveholders and segregationists by arguing for using benign racial discrimination to help minorities.⁵⁵⁷ Further questioning UT’s motives, he declared that UT “would have us believe [as segregationists and slaveholders did] that its discrimination is likewise benign.”⁵⁵⁸ Thomas stated that using race is “never benign.”⁵⁵⁹

Justice Thomas also opposes race-conscious measures, believing they are harmful to minorities. To support his contention, Thomas stated that in almost all schools with race-conscious policies, “the majority of black students end up in the lower quarter of their class.”⁵⁶⁰ Thomas questioned whether Hispanic and black students admitted through the race-conscious policy could ever truly close the “substantial” college achievement gap between their Asian and white peers.⁵⁶¹ Without race-conscious policies, several non-competitive minorities would attend universities where they would be “more evenly matched.”⁵⁶² He argued that the use of race-conscious policies is a disservice to those non-competitive minorities in terms of their self-confidence and their learning as they are forced to attend schools where they are not evenly matched.⁵⁶³ He relied on evidence showing that students admitted under race-conscious policies are “more likely to abandon their initial aspirations to become scientists and engineers than are students with similar qualifications who attend less selective schools.”⁵⁶⁴ Thomas characterized race-conscious policies as a mechanism for government to put citizens on demeaning “race registers,” further diminishing the identity and self-confidence of minorities.⁵⁶⁵ He concluded that UT’s policy “stamps” Hispanic and black students with “a badge of inferiority” and “taints the accomplishments of all those who are the same race as those admitted as a result of racial discrimination.”⁵⁶⁶

Thomas’ disdain for race-conscious policies is unsurprising, given the strong non-interventionist perspective he expressed in *Grutter*:

⁵⁵⁶ *Id.* at 2430.

⁵⁵⁷ *Id.*

⁵⁵⁸ *Id.* at 2430.

⁵⁵⁹ *Id.* See also *id.* (stating that “it does not, for constitutional purposes, matter whether the University’s racial discrimination is benign.”).

⁵⁶⁰ *Id.* (citing STEPHEN COLE & ELINOR BARBER, INCREASING FACULTY DIVERSITY: THE OCCUPATIONAL CHOICES OF HIGH-ACHIEVING MINORITY STUDENTS 124 (2003)).

⁵⁶¹ *Id.* at 2431.

⁵⁶² *Id.*

⁵⁶³ *Id.*

⁵⁶⁴ *Id.* at 2432.

⁵⁶⁵ *Id.* at 2422.

⁵⁶⁶ *Id.* at 2432.

Frederick Douglass, speaking to a group of abolitionists almost 140 years ago, delivered a message lost on today's majority:

“In regard to the colored people, there is always more that is benevolent, I perceive, than just, manifested towards us. What I ask for the negro is not benevolence, not pity, not sympathy, but simply *justice*. The American people have always been anxious to know what they shall do with us . . . I have had but one answer from the beginning. Do nothing with us! Your doing with us has already played the mischief with us. Do nothing with us! If the apples will not remain on the tree of their own strength, if they are worm-eaten at the core, if they are early ripe and disposed to fall, let them fall! . . . And if the negro cannot stand on his own legs, let him fall also. All I ask is, give him a chance to stand on his own legs! Let him alone! . . . Your interference is doing him positive injury.”

Like Douglass, I believe blacks can achieve in every avenue of American life without the meddling of university administrators.⁵⁶⁷

Justice Thomas' non-interventionist perspective, moral-equivalency view, and disdain for race-conscious measures cast him as the “forever lost vote” for advocates of race-conscious measures.

C. Justice Ginsburg—I Stand Alone in Dissent

Justice Ginsburg bravely stood alone in the face of the coalition of seven Justices and despite the loss of Justice Breyer—her ally in *Parents Involved*. She opined that UT's policy was not a quota but instead followed the Court's decision in *Grutter* and the Harvard Plan that Justice Powell endorsed in *Bakke*.⁵⁶⁸ Further, Justice Ginsburg indicated that the Court must respect *Grutter* by deferring to a university's expertise and experience in its narrow tailoring analysis.⁵⁶⁹ Accordingly, she argued that, pursuant to *Grutter*, the Court should have deferred to UT's extensive review, which concluded that “supposedly race-neutral initiatives” could

⁵⁶⁷ *Grutter v. Bollinger*, 539 U.S. 306, 349–50 (2003) (Thomas, J., concurring in part and dissenting in part); *accord Fisher*, 133 S. Ct. at 2432 (averring that UT's “racial tinkering harms the very people it claims to be helping”) (internal citation omitted).

⁵⁶⁸ *Fisher*, 133 S. Ct. at 2432–33. She also made it clear that she would not overrule *Grutter* or Justice Powell's *Bakke* opinion. *Id.* See *supra* note 94 (describing the Harvard plan).

⁵⁶⁹ *Id.*

not achieve UT's diversity goals.⁵⁷⁰ After all, UT's policy "flexibly considers race only as a factor of a factor of a factor of a factor in the calculus"⁵⁷¹ and provides for regular reviews, ensuring the plan has a logical stopping point.⁵⁷² In fact, Ginsburg insisted that remand was unnecessary since the court of appeals correctly applied *Grutter* and *Bakke* in finding UT's plan narrowly tailored.⁵⁷³ She declared that the *Fisher* majority "rightly declines to cast off the equal protection framework settled in *Grutter*."⁵⁷⁴ However, she appears mistaken in this assessment since, as noted earlier,⁵⁷⁵ the *Fisher* majority did apparently jettison the deference in *Grutter's* framework.

Justice Ginsburg rejected Abigail Fisher's argument that UT effectively achieved its diversity goal through the Top Ten Percent Law and holistic colorblind review of applications.⁵⁷⁶ She reasoned that such measures are not truly "race unconscious."⁵⁷⁷ Instead, they are plagued by "deliberate obfuscation"⁵⁷⁸ such "that only an ostrich could regard the supposedly neutral alternatives as race unconscious."⁵⁷⁹ Ginsburg made a humorous but biting criticism of Abigail's argument using Professor Thomas Reed Powell's famous statement that "[i]f you think that you can think about a thing inextricably attached to something else without thinking of the thing which it is attached to, then you have a legal mind."⁵⁸⁰ Only such a legal mind "could conclude that an admissions plan specifically designed to produce racial diversity is not race conscious."⁵⁸¹

Indeed, in Justice Ginsburg's view, race-consciousness rather than colorblindness motivated the Top Ten Percent Law and holistic review of applications.⁵⁸² Justice Ginsburg's reasoning advances the argument that, if applicants like Abigail Fisher have no problem with the Top Ten Percent Law and holistic review of applications, they should similarly have no problem with *other*

⁵⁷⁰ *Id.* at 2434. She used the term "supposedly" because, as discussed below, she does not believe that there is no pure race-neutral alternative that can have as its goal racial diversity.

⁵⁷¹ *Id.* (internal quotation marks omitted) (citing *Fisher v. Univ. of Tex. at Austin*, 645 F. Supp. 2d 587, 608 (W.D. Tex. 2009)).

⁵⁷² *Id.* at 2434.

⁵⁷³ *Id.*

⁵⁷⁴ *Id.*

⁵⁷⁵ See *supra* Part IV.A.

⁵⁷⁶ *Fisher*, 133 S. Ct. at 2434.

⁵⁷⁷ *Id.* at 2433.

⁵⁷⁸ *Id.* (citing *Gratz v. Bollinger*, 539 U.S. 244, 297–98 (2003) (Souter, J., dissenting)).

⁵⁷⁹ *Id.* at 2433.

⁵⁸⁰ *Id.* at 2433 & n.2 (internal quotation marks and citations omitted).

⁵⁸¹ *Id.*

⁵⁸² *Id.* at 2433. See, e.g., *id.* at 2433 ("Texas' percentage plan was adopted with racially segregated neighborhoods and schools front and center stage.").

race-conscious measures.⁵⁸³ This reasoning invites attacks on the Top Ten Percent Law and holistic review of applications as unconstitutionally race-conscious.⁵⁸⁴ Alternatively, this reasoning could lead opponents of policies like UT's to argue that if the Top Ten Percent Law and holistic review of applications are race-conscious, then those measures should suffice without the need to adopt the kinds of race-conscious policies UT and the schools in *Parents Involved* implemented.⁵⁸⁵

Justice Ginsburg warned that, “[a]s for holistic review, if universities cannot explicitly include race as a factor, many may resort to camouflage to maintain their minority enrollment.”⁵⁸⁶ She admonished the Court, however, to support race-conscious measures encouraging schools to truthfully reveal their use of race, rather than supposedly race-neutral measures that allow, and in fact inspire, schools to use race stealthily.⁵⁸⁷ Ginsburg strongly believes schools should not have to act with colorblindness in dealing with the enduring impact and “legacy” of the nation’s discriminatory past.⁵⁸⁸

It appears that Justice Ginsburg is the lone voice on the Supreme Court willing to advocate for race-conscious measures and push back against the *coup de grace* infiltrating race-conscious cases. Since Justice Kagan did not participate in the case, we cannot definitively predict how she would have ruled on UT’s race-conscious policy.⁵⁸⁹ We do know that she recused herself because she was the solicitor general when the United States filed an amicus brief supporting UT’s policy.⁵⁹⁰ Therefore, if she had participated in the case, she likely would have provided a second vote to support Justice Ginsburg. A coalition of only two Justices, however, is insufficient to make a material difference in the outcome of cases. The fact that Justice Kagan’s presence would have made the *Fisher* case a 7-2 decision is no less comforting than a 7-1 decision. Advocates of race-conscious measures should be alarmed that what was a 5-4 opposition to race-conscious measures through narrow tailoring in *Parents Involved* has now morphed into a 7-1 or even 7-2 opposition.

⁵⁸³ *Id.*

⁵⁸⁴ *Id.*

⁵⁸⁵ *Id.*

⁵⁸⁶ *Id.* (internal quotation marks omitted) (citing *Gratz v. Bollinger*, 539 U.S. 244, 304 (2003) (Ginsburg, J., dissenting)).

⁵⁸⁷ *Id.* at 2433 (citing *Gratz*, 539 U.S. at 305 & n.11 (Ginsburg, J., dissenting)).

⁵⁸⁸ *Id.* at 2433 (citing *Gratz*, 539 U.S. at 298 (Ginsburg, J., dissenting); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 272–74 (1995) (Ginsburg, J., dissenting)).

⁵⁸⁹ See Spakovsky, *supra* note 451.

⁵⁹⁰ *Id.*

V. IMPLICATIONS

Even when the Court recognizes diversity as a compelling interest, several roadblocks within the narrow tailoring analysis make it less likely race-conscious plans will pass muster. A theme in various decisions discussed above is that the record presented in court regarding the mechanics of race-conscious programs must be clear. For example, the *Gratz* Court found the record inadequate and the UM policy wanting because the record failed to show exactly how many applications underwent ARC review.⁵⁹¹ In *Parents Involved*, Justice Kennedy's narrow tailoring analysis emphasized that schools must provide a *detailed* and precise, rather than broad, description of their plans without inconsistencies, discrepancies, or competing propositions.⁵⁹² Despite these calls for clarity and detail, schools are left wondering whether they can truly ever provide enough clarity and detail to pass narrow tailoring. After all, the Court's narrow tailoring jurisprudence allows judicial second-guessing of the school's expert determinations. Further, the Court's narrow tailoring jurisprudence is obfuscated by contradictory expectations for schools.⁵⁹³ Therefore, whether the Court will ever be satisfied with any level of detail or clarity for race-conscious measures remains unclear. Both *Fisher* and *Parents Involved* already bore this out as the Court used the narrow tailoring prong to reverse lower court decisions upholding schools' race-conscious policies. Associate Law Professor and SCOTUSblog guest contributor Melissa Hart recently explained the challenge schools now face as they strive to meet the stringency of narrow tailoring:

Selecting a large diverse class of students is not akin to casting individuals in specific roles in a play. Admissions officers face huge numbers of applicants and great uncertainty about acceptances, as a quick look at the UT numbers demonstrates. In 2008, UT received 29,501 applications. The University accepted 12,843 students, and only 6,715 of those admits actually enrolled. This enrollment reality—that you only net fifty percent of who you admit—creates difficulties for a university that must explain how its admissions policy, designed to achieve a wide range of goals with a large number of applicants, is narrowly tailored to those general goals.⁵⁹⁴

In other words, if a school admits 12,843 and only 6,715 accept their admission offers, how can that school claim your policy is narrowly tailored when you did not admit (because of race) people who would have attended? How can you

⁵⁹¹ See *supra* Part II.B.

⁵⁹² *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 784–85 (2007).

⁵⁹³ See *supra* Part III.A, IV.A.

⁵⁹⁴ Melissa Hart, *Fisher Commentary: Everyone Wins, Everyone Loses*, SCOTUSBLOG (June 25th, 2013), <http://www.scotusblog.com/2013/06/fisher-commentary-everyone-wins-everyone-loses/>.

claim your policy is narrowly tailored when half of those you admitted choose not to attend? The uncertainty about whether the narrow tailoring prong of strict scrutiny can truly be satisfied harrows race-conscious measures.

Amidst this legal uncertainty, “[m]any parents, white and black alike, want their children to attend schools with children of different races.”⁵⁹⁵ In fact, the “fate of race relations in this country depends upon unity among our children, for unless our children begin to *learn together*, there is little hope that our people will ever learn to live together.”⁵⁹⁶ Furthermore, “the very school districts that once spurned integration now strive for it.”⁵⁹⁷ Nonetheless, through narrow tailoring, the Court has chosen to hogtie parents and districts willing to work together toward racially-integrated educational settings.⁵⁹⁸ The ongoing narrow tailoring *coup de grace* “obscures *Brown’s* clear message”⁵⁹⁹ of working toward educational equity. Under the narrow tailoring prong, we might witness race-conscious plans created with the “laudable purpose of achieving equal educational opportunities” for minorities “founded on unsuspected shoals in the Fourteenth Amendment.”⁶⁰⁰

The hope of racially-integrated education that once fueled optimism is rapidly becoming lost in the forlorn of strict scrutiny. In 1978, Justice Blackmun declared: “I yield to no one in my earnest hope that the time will come when an ‘affirmative action’ program is unnecessary and is, in truth, only a relic of the past. I would hope that we could reach this stage within a decade at the most.”⁶⁰¹ Almost three decades later, as the statistics show,⁶⁰² affirmative action remains necessary as schools remain divided along racial lines. Indeed, even in 1978, Justice Blackmun had an ominous feeling that his “earnest hope” was mere idealism, noting his “hope is a slim one.”⁶⁰³

⁵⁹⁵ *Parents Involved*, 551 U.S. at 868 (Breyer, J., dissenting).

⁵⁹⁶ *Id.* at 864 (Breyer, J., dissenting) (emphasis added) (citing *Milliken v. Bradley*, 418 U.S. 717, 783 (Marshall, J., dissenting)).

⁵⁹⁷ *Id.* at 868 (Breyer, J., dissenting).

⁵⁹⁸ *See id.* at 868 (Breyer, J., dissenting) (“they have asked us not to take from their hands the instruments they have used to rid their schools of racial segregation, instruments that they believe are needed to overcome the problems of cities divided by race and poverty. The plurality would decline their *modest* request.” (emphasis added)).

⁵⁹⁹ *Id.* at 801 (Stevens, J., dissenting).

⁶⁰⁰ *Id.* at 801–02 (Stevens, J., dissenting) (citing *Sch. Comm. of Boston v. Bd. of Educ.*, 227 N.E.2d 729, 733 (1967)).

⁶⁰¹ *Regents of the Univ. of Cali. v. Bakke*, 438 U.S. 265, 403 (1978) (Blackmun, J., concurring in part and dissenting in part).

⁶⁰² *See supra* notes 1–23 and accompanying text.

⁶⁰³ *Bakke*, 438 U.S. at 403.

The reality of our history and heritage is that “a whole people were marked as inferior by the law. And that mark *has endured*. The dream of America as the great melting pot has not been realized for the Negro; because of his skin color he never even made it into the pot.”⁶⁰⁴ Quality higher education and K–12 education remain an elusive dream today for many minorities. The national reaction of minorities to the George Zimmerman verdict as a betrayal of the justice system and of America as the melting pot evidences the lingering feeling minorities hold that they have not really made it into the pot in various institutions of our society.⁶⁰⁵

The recent Supreme Court decisions on voluntary race-conscious measures could make the hopes of equitable minority integration into the educational melting pot a fantasy. In 2003, Justice O’Connor, writing for the *Grutter* Court, expressed optimism that racial educational equality would soon become entrenched in America and that race-conscious measures would be obsolete. She stated: “We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.”⁶⁰⁶ The time span between *Bakke* to *Gratz* and *Grutter* was twenty five years.⁶⁰⁷ Educational inequity has not substantially changed in twenty-five years.⁶⁰⁸ Despite Justice O’Connor’s optimism, the judicial withdrawal of support for race-conscious measures could actually make educational opportunities more inequitable for minorities over the twenty-five years post-*Grutter*. After all, as Justice Breyer stated, “[p]ast wrongs to the black race, wrongs committed by the State and in its name, are a stubborn fact of history. And stubborn facts of history linger and persist.”⁶⁰⁹ The various roadblocks of narrow tailoring in *Parents Involved* and *Fisher* render implementing race-conscious measures impossible. The narrow tailoring prong thus becomes the untimely *coup de grace* for dreams of race-conscious measures and genuine colorblindness. The very fact that, in an often-divided Court, seven Supreme Court Justices coalesced in *Fisher* to set very stringent narrow tailoring requirements is disconcerting, and should leave champions of race-conscious measures despondent and upset. Nevertheless, these emotions must be channeled to press on for the cause. The fight must continue for racial educational equity through legislative and grassroots community-based initiatives designed to rally

⁶⁰⁴ *Id.* at 400–01 (Marshall, J., concurring in part and dissenting in part).

⁶⁰⁵ Gannon, *supra* note 368 (discussing the large racial divide in the reaction to the Zimmerman acquittal and reporting that “reaction to the case looks far more lopsided when the survey participants’ race is considered. Blacks are dissatisfied with the verdict by a staggering 86-percent to 5-percent margin, the poll found, and 78 percent say the case raises important questions about race.”).

⁶⁰⁶ *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).

⁶⁰⁷ *Id.* at 322.

⁶⁰⁸ See *Integration and Diversity*, UCLA CIVIL RIGHTS PROJECT (Sept. 19, 2012), <http://civil-rightsproject.ucla.edu/research/k-12-education/integration-and-diversity>.

⁶⁰⁹ *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 844–45 (2007) (Breyer, J., dissenting).

public support. Until there is a different voice from the Supreme Court or a larger coalition, advocates must work within the stringent framework the Court has laid out. There is always the possibility a lower court might interpret the framework less stringently than the Supreme Court intended. Since the Supreme Court does not review education race-conscious cases on a perennial basis, race-conscious measures might be able to sustain viability through the lower courts; at least until the Supreme Court overturns the lower court. This is not the time to give up *Brown's* dream; this is not the time to abandon America's children.

CONCLUSION

Schools around the country have voluntarily implemented race-conscious measures in order to diversify their student bodies and provide the educational benefits of diversity for students of all races. While these measures are founded on noble intentions, they have been increasingly subjected to successful constitutional challenges, particularly in the United States Supreme Court. In this Article, we examined the strict scrutiny standard of review through the lenses of the United States Supreme Court's precedents on voluntary race-conscious measures at the K–12 and higher education levels. We examined the Supreme Court's analysis of voluntary race-conscious measures in all five precedents—*Regents of the University of California v. Bakke*,⁶¹⁰ *Grutter v. Bollinger*,⁶¹¹ *Gratz v. Bollinger*,⁶¹² *Parents Involved in Community Schools v. Seattle School District No. 1*,⁶¹³ and *Fisher v. University of Texas at Austin*.⁶¹⁴

Our review revealed that, while various Supreme Court Justices have been willing to embrace diversity as a compelling interest, they have made it burdensome for schools to actually pursue that interest. Specifically, the Justices have made it increasingly difficult to satisfy the narrow tailoring prong of the strict scrutiny test. This has created a *coup de grace* against voluntary race-conscious measures, putting the future of voluntary race-conscious measures at great risk. The future of those measures is also jeopardized because the coalition of Justices favoring voluntary race-conscious measures continues to decrease. We hope this Article would bring much needed attention to the stealth *coup de grace* that threatens the future of race-conscious measures. While we celebrate diversity as a compelling interest, we must keep perspective—narrow tailoring is quickly shutting the door on race-conscious measures.

⁶¹⁰ 438 U.S. 265, 269–324 (1978).

⁶¹¹ 539 U.S. 306 (2003).

⁶¹² 539 U.S. 244 (2003).

⁶¹³ 551 U.S. 701 (2007).

⁶¹⁴ 133 S. Ct. 2411 (2013).