STIFLING THE POTENTIAL OF *GRUTTER V. BOLLINGER*: *PARENTS INVOLVED IN COMMUNITY SCHOOLS V. SEATTLE SCHOOL DISTRICT NO. 1*

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Justice Sandra Day O'Connor surprised many when she found compelling a vision of racial diversity if it is integrationist, forward-looking, optimistic, democracy-reinforcing, and non-remedial. Her opinion in Grutter v. Bollinger *had transformative potential both for affirmative action law and for society in general. In* Grutter*, Justice O'Connor applied a deferential form of strict scrutiny review to the government's use of racial preferences that further the "common good." This innovation immediately raised the following question: could the diversity rationale articulated in* Grutter *(and the concomitant relaxed application of strict scrutiny review) be applied to other contexts where the Court had traditionally been more skeptical of the use of racial*

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preferences? If so, Grutter *was, at the very least, in tension with two pillars of affirmative action doctrine:* Richmond v. J.A. Croson Co. *and* Adarand Constructors, Inc. v. Pena. *And some lower federal courts did interpret* Grutter *broadly, which allowed those courts to sustain the government's use of racial preferences where the application of a less deferential form of review would likely have led to their invalidation. This moment of expansive and unfettered possibility did not last.* Parents Involved in Community Schools v. Seattle School District No. 1 *stifled* Grutter*'s expansive potential.* Grutter*'s potential was not entirely destroyed, however, because Justice Kennedy's concurring opinion moderated* Parents Involved *in important respects. Because of Justice Kennedy,* Grutter*'s transformative potential – obscured but not extinguished – now waits for a more sympathetic Court to recognize it.*

INTRODUCTION

Grutter v. Bollinger[1] had the potential to dramatically transform affirmative action doctrine because of the nature of the compelling interest it recognized, and the deference with which the Court applied "strict scrutiny" review. In *Grutter*, the Supreme Court ruled that the University of Michigan Law School had a compelling interest in "attaining a diverse student body."[2] In actuality, however, the interest the *Grutter* Court found compelling was much broader than "student body diversity." At the core of the *Grutter* opinion, the interest the Court found compelling was the significant social benefits associated with racial diversity, which included: increased cross-racial understanding, better preparation for democratic citizenship, enhanced productivity of strategic sectors of the American economy and the military, and a more representative and legitimate democratic leadership class.[3]

While the *Grutter* Court articulated these social benefits in the context of higher education, they are not "educational" benefits per se. The benefits the court specified are largely consumed: 1) after the educational experience has ended, 2) in situations external to the educational context, and 3) by many others entirely outside of the educational experience. The educational experience, however, provides the means by which the benefits are dispersed. Thus, the compelling governmental interest animating *Grutter* is racial diversity when provided in an environment that enhances and disperses the social benefits that accompany it. In other words, the central feature of *Grutter*'s compelling governmental interest analysis is its recognition that racial diversity enhances the "common good" – that is, the "social systems, institutions, and environments on which we all depend . . . in a manner that

[1] 539 U.S. 306 (2003).

[2] *Id.* at 328.

[3] *Id.* (stating that expert reports show that diversity promotes learning and better prepares students for work and for society, and that the military and many businesses stress the importance of exposure to diversity).

benefits all people."[4]

At the same time, the *Grutter* Court applied a deferential brand of "strict scrutiny" review, deferring to the Law School both with respect to the importance of racial diversity to its educational mission and to the method the Law School used to achieve a more racially diverse class.[5] The *Grutter* Court's deferential application of strict scrutiny review clearly affected the outcome. The more deferential courts are in applying strict scrutiny, the greater the likelihood they will uphold the government's use of racial classifications. In contrast to *Grutter*, *Richmond v. J.A. Croson Co.*[6] and *Adarand Constructors, Inc. v. Pena*[7] counsel that, where government uses race to "remedy" intentional discrimination, courts should apply a robust form of strict scrutiny review.[8] This form of "strict" strict scrutiny usually results in the invalidation of the government's affirmative action program. The combination of the breadth of *Grutter*'s "common good" compelling interest analysis and the Court's deferential approach to the application of strict scrutiny review raised a startling possibility: courts might apply a deferential form of strict scrutiny review to any affirmative action program that provides the social benefits associated with racial diversity.

Prior to *Parents Involved in Community Schools v. Seattle School District No. 1*,[9] there was a strong argument that *Grutter*'s innovations could be extrapolated to the government's use of race in public primary and secondary education, public employment, and perhaps even public contracting. Indeed, several lower federal courts interpreted *Grutter* as permitting the government to use racial preferences where a less deferential form of review would likely have led to their invalidation.[10] For instance, in *Comfort v. Lynn School Committee*[11] the First Circuit explicitly relied on the analytic framework set forth in *Grutter* and *Gratz v. Bollinger*[12] to uphold a public school district's race-conscious voluntary desegregation plan. *Grutter* thus had the potential to change constitutional outcomes in affirmative action cases outside of the higher education context.

Unfortunately, *Grutter*'s moment of expansive and unfettered possibility did not last. In June 2006, the Supreme Court granted certiorari in *Parents Involved*,[13] the case raising virtually the same factual and constitutional

[4] Claire Andre & Manuel Velasquez, *The Common Good*, 5 ISSUES IN ETHICS 2, 2 (1992).

[5] *See infra* Part I.A.

[6] 488 U.S. 469 (1989).

[7] 515 U.S. 200 (1995).

[8] *See infra* Parts I.A-B.

[9] 127 S. Ct. 2738 (2007).

[10] *See infra* Parts II.A-C.

[11] 418 F.3d 1, 5-6 (1st Cir. 2005) (en banc), *cert. denied*, 546 U.S. 1061 (2005).

[12] 539 U.S. 244 (2003).

[13] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 547 U.S. 1177 (2006) (granting certiorari).

questions as *Comfort*, which had been denied certiorari just seven months prior.[14] In the interim, Justice O'Connor retired and was replaced by Samuel Alito.[15] *Grutter*'s author was gone, and her successor did not display enthusiasm for a broad reading of the *Grutter* precedent. The decision in *Parents Involved* reminds us that constitutional meaning is whatever five Justices on the Court say it is.

Parents Involved curtailed many of *Grutter*'s expansive possibilities. In *Parents Involved*, the Supreme Court ruled that two public school districts' race-based voluntary desegregation plans violated the Equal Protection Clause because they were insufficiently narrowly tailored to pass strict scrutiny review.[16] In reaching this conclusion, a majority of the Court ruled that the "present cases are not governed by *Grutter*"[17] even though the factual contexts – higher education and primary and secondary public education – were similar. The majority characterized *Grutter*'s compelling interest in the narrowest possible terms, emphasizing the importance of individualized determinations in the selection mechanism over any discussion of the importance of racial diversity to the educational process.[18] Moreover, the *Parents Involved* majority also applied a robust form of strict scrutiny review to the two school districts' student assignment plans, in contrast to *Grutter*'s deferential approach to the Law School's race-based admissions policy.[19] A plurality of the *Parents Involved* Court argued that it was inappropriate to take the government's purpose for the racial classification into consideration at all on the strict scrutiny analysis.[20] Yet, one interpretation of *Grutter* is that it privileged one particular governmental interest: racial diversity in settings likely to promote positive social externalities. The plurality rejected this "common good" interpretation of *Grutter* altogether. The majority and the plurality, taken together, left little room for an expansive interpretation of *Grutter*.

At the other end of the spectrum, Justice Breyer in dissent argued that racial classifications should be evaluated in the context in which the classification is used.[21] For Justice Breyer, *Grutter* was parallel to *Parents Involved* even though the contexts were different: "the existence of a compelling interest in these cases 'follows *a fortiori*' from *Grutter*."[22] Justice Breyer also recognized

[14] Comfort v. Lynn Sch. Comm., 546 U.S. 1061, 1061 (2005) (denying certiorari).

[15] Bill Mears, *Alito Sworn in as Nation's 110th Supreme Court Justice*, CNN.COM, Feb. 4, 2006, http://www.cnn.com/2006/POLITICS/01/31/alito/index.html.

[16] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2760 (2007).

[17] *Id.* at 2754.

[18] *See infra* Part III.A.

[19] *See infra* Part III.A.

[20] *Parents Involved*, 127 S. Ct. at 2764 (Roberts, C.J., plurality opinion).

[21] *Id.* at 2820 (Breyer, J., dissenting).

[22] *Id.* at 2763 (Roberts, C.J., plurality opinion) (describing Justice Breyer's dissenting

that *Grutter*'s key contribution was that it allowed courts to focus on the distinction between "exclusive and inclusive" uses of race when evaluating the constitutionality of affirmative action plans.[23] Applying *Grutter*, Justice Breyer opined that the school districts' use of racial classifications "do[es] not impose burdens unfairly upon members of one race alone but instead seek benefits for members of all races alike."[24] Consequently, Justice Breyer implicitly recognized *Grutter*'s "common good" approach. Justice Breyer's dissent suggests that *Grutter* could be applied outside of the higher education context.

Absent a dramatic turnover of members on the Court, any chance of an expansive interpretation of *Grutter* now lies with Justice Kennedy. However, there is reason to believe that Justice Kennedy will not interpret *Grutter* broadly. In *Parents Involved*, Justice Kennedy joined the majority's opinion and provided the critical fifth vote for the Court's holding that the voluntary desegregation plans were unconstitutional on narrow tailoring grounds.[25] Also, in his concurrence, Justice Kennedy disagreed sharply with Justice Breyer's dissent, which argued that *Grutter*'s key contribution was that it allowed courts to focus on the distinction between "exclusive and inclusive" uses of race in evaluating the constitutionality of an affirmative action plan.[26] Justice Kennedy explicitly took Justice Breyer to task for his interpretation of *Grutter* because it "would result in the broad acceptance of governmental racial classifications in areas far afield from schooling."[27] Thus, much of Justice Kennedy's concurrence appears to reject *Grutter*'s "common good" approach. Assuming the Court retains its current configuration, the broadest possible reading of *Grutter* is off the table; *Parents Involved* clearly stifles *Grutter*'s potential.

But it would be a mistake to read *Parents Involved* too broadly. While *Parents Involved* stifles *Grutter*'s potential, it does not destroy it – largely because of Justice Kennedy's concurrence. *Grutter* clearly played a role in Justice Kennedy's compelling interest analysis in that it "informed" his conclusion that diversity, "depending on its meaning and definition, is a compelling educational goal a school district may pursue."[28] Indeed, there are currently five votes on the Court for this proposition.[29] Consequently, Justice Kennedy rejected the view that *Grutter* has no relevance whatsoever outside

opinion).

[23] *Id.* at 2817 (Breyer, J., dissenting).

[24] *Id.* at 2818.

[25] *Id.* at 2753-54, 2760 (majority opinion).

[26] *See infra* Part III.C.

[27] *Parents Involved*, 127 S. Ct. at 2793 (Kennedy, J., concurring in part and concurring in the judgment).

[28] *Id.* at 2789.

[29] The three justices joining Justice Breyer's dissenting opinion clearly agreed with this statement. *Id.* at 2820-24 (Breyer, J., dissenting).

the higher education context. Because Justice Kennedy's concurrence is unclear as to exactly how much of a role *Grutter* played in his analysis, it is difficult to assess *Grutter*'s ongoing vitality. Nevertheless, *Grutter* was a factor in Justice Kennedy's analysis, a strong argument that *Grutter*'s expansive possibilities remain intact. Thanks to Justice Kennedy, *Parents Involved* neither overturned *Grutter* nor limited it to its facts. *Grutter*'s expansive possibilities – stifled but not destroyed by *Parents Involved* – now await a more sympathetic Court to rediscover them. This Article explores those obscured possibilities.

In Part I of this Article, I explain how *Grutter v. Bollinger* changed the landscape of affirmative action law. First, it clarified that the Court would accept a nonremedial justification for the use of racial classifications, creating greater constitutional leeway for affirmative action programs. Second, it applied a deferential brand of "strict scrutiny" review to the University of Michigan Law School's race-based admissions program. Finally, *Grutter* solidified and ultimately expanded the educational diversity rationale inherited from Justice Powell's opinion in *Regents of the University of California v. Bakke*.[30] The interest the *Grutter* Court found compelling was that racial diversity promotes the "common good." Other governmental actors are equally well-positioned to inculcate and disperse the social benefits associated with racial diversity. Consequently, after *Grutter*, there was a strong argument that courts could apply a deferential brand of strict scrutiny review to affirmative action programs outside of the higher education context.

In Part II, I explore the possibility of *Grutter*'s application outside of higher education in three contexts: voluntary public primary and secondary school desegregation programs, public employment, and finally, "minority set-asides" in government contracting programs. I show how courts in each of these contexts relied on *Grutter* to support their analyses that the government's use of racial preferences did not violate the Equal Protection Clause. In these cases, *Grutter* did real work in providing an additional compelling interest upon which the government could rely to justify its use of racial preferences; taking certain evidentiary issues off the table; allowing courts to defer to the government's educational choices; and allowing courts to rely on the government's "good faith" in assessing elements of the narrow tailoring analysis. These cases demonstrate that *Grutter* had the potential to change both constitutional analyses and constitutional outcomes outside of the higher education context.

Finally, in Part III I explain how *Parents Involved* stifles *Grutter v. Bollinger*'s expansive potential. I explain how the majority attempted to narrow *Grutter* to the higher education context alone, and how the plurality rejected the "common good" interpretation of *Grutter*. At the same time, I

[30] Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 311 (1978) (opinion of Powell, J.) (holding that the attainment of a diverse student body was the only interest asserted by the university that survived scrutiny).

demonstrate how Justice Kennedy's concurrence is critical to understanding both *Parents Involved* and *Grutter*. Justice Kennedy moderated the impact of the majority and the plurality's cramped interpretation of *Grutter*, saving *Grutter* from being overruled. But while it is true that Justice Kennedy's concurrence saves *Grutter* from irrelevance and keeps its expansive possibilities "in play," there is also a strong argument that it narrows rather than expands *Grutter*'s possibilities, at least in the short term. Justice Kennedy's concurrence applied a robust rather than a deferential style of strict scrutiny review to the school districts' voluntary desegregation plans and rejected much of Justice Breyer's dissent, which offered an expansive interpretation of *Grutter*. In addition, while Justice Kennedy described the school districts' compelling interest broadly, it is unclear whether Justice Kennedy's concurrence actually assists school districts in avoiding racial isolation.

Consequently, we are left with a confounding reality: *Parents Involved* stifles, but does not destroy, *Grutter*'s potential for future Courts, with any hope of an expansive interpretation of *Grutter* residing with Justice Kennedy. Justice Kennedy's *Parents Involved* concurrence demonstrates both an openness to racial diversity as an ideal and an abhorrence of "[g]overnmental classifications that command people to march in different directions based on racial typologies."[31] In order to reach Justice Kennedy, any argument that attempts to take *Grutter* beyond higher education would need to demonstrate the government's superior ability to inculcate and disperse the social benefits associated with racial diversity, but in a manner that does not classify individuals on the basis of race. The open question going forward is whether governmental entities, outside of colleges and universities, can effectively make this claim.

I. *GRUTTER V. BOLLINGER*: SOME ANSWERS AND SOME POSSIBILITIES

Grutter v. Bollinger altered the landscape of affirmative action law in at least three ways. First, *Grutter* showed that the Court would accept a nonremedial rationale for the use of racial classifications. Second, in upholding the constitutionality of the University of Michigan Law School's race-based admissions program, the *Grutter* Court applied a deferential brand of strict scrutiny review, deferring to the Law School on both prongs of the strict scrutiny analysis. This deferential brand of review is in stark contrast to the robust brand of strict scrutiny review the Court applies to the government's use of race to remedy intentional discrimination, suggesting a clear hierarchy between the two justifications for affirmative action plans. Finally, *Grutter* solidified and ultimately expanded the educational diversity rationale inherited from Justice Powell's opinion in *Regents of the University of California v.*

[31] *Parents Involved*, 127 S. Ct. at 2797 (Kennedy, J., concurring in part and concurring in the judgment).

Bakke.[32]

A. *The Triumph of the "Nonremedial" Justification and the Importance of Deference*

Under current equal protection doctrine, courts evaluate the government's use of racial classifications by applying "strict scrutiny."[33] The strict scrutiny standard is a two-pronged test, which evaluates both the nature of the interest put forward by the government, and the relationship between that rationale and the means used to achieve that interest. Under strict scrutiny, racial classifications must first be sufficiently "compelling" to withstand heightened judicial review.[34] Second, even where racial classifications are deemed sufficiently compelling, "the means chosen by the State to effectuate its purpose must be 'narrowly tailored to the achievement of that goal.'"[35]

Prior to *Grutter*, it was clear that in evaluating an affirmative action program, the Court accepted as "compelling" the government's interest in remedying the present effects of past (or present) intentional discrimination (hereinafter, the "remedial" rationale).[36] The Court accepted the remedial rationale in a wide variety of contexts including public employment,[37] public contracting,[38] and public education.[39] In *Bakke*, the Court also appeared to accept the government's interest in obtaining racial diversity in the context of higher education as sufficiently compelling to withstand strict scrutiny review.[40] Justice Powell's opinion in *Bakke*, which affirmed the importance of

[32] Justice O'Connor's compelling governmental interest analysis, with its varied focus on diversity's positive externalities wholly exogenous to the university setting, went far beyond Justice Powell's explication of "viewpoint diversity" in *Bakke*. *See* Grutter v. Bollinger, 539 U.S. 306, 330-31 (2003) (highlighting the societal and workplace benefits that accrue from educational diversity).

[33] Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995).

[34] *See, e.g.*, *Grutter*, 539 U.S. at 322.

[35] Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 274 (1986) (citing Fullilove v. Klutznick, 448 U.S. 448, 480 (1980)).

[36] *See, e.g.*, United States v. Paradise, 480 U.S. 149, 167 (1987).

[37] *Id.* at 185-86.

[38] *Fullilove*, 448 U.S. at 491-92.

[39] Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 271-72 (1978) (opinion of Powell, J.).

[40] The plurality opinion in *Bakke* is famously inscrutable. Four Justices held that the University of California at Davis Medical School's special admissions program did not violate equal protection because it met the requirements of intermediate scrutiny. *Id.* at 369 (Brennan, J., concurring in the judgment in part and dissenting in part). Four other Justices held that the Medical School's special admissions program violated Title VI, and thus did not reach the question of whether the program was also a violation of the Equal Protection Clause. *Id.* at 417-21 (Stevens, J., concurring in the judgment in part and dissenting in part). Justice Powell agreed that the special admissions program was illegal, supplying the fifth vote for that view. *Id.* at 320 (opinion of Powell, J.). However, Justice Powell also ruled

racial diversity in higher education, was broadly influential.[41] But in *Adarand v. Pena*,[42] the Court overturned *Metro Broadcasting, Inc. v. FCC*,[43] which had sustained a diversity-based affirmative action program for federal broadcast licenses.[44] *Adarand* suggested the Court would no longer accept the diversity rationale as a compelling government interest.[45] Thus, one view of *Adarand* was that the diversity rationale simply could not support an affirmative action plan at all.[46] Indeed, one question was whether a nonremedial rationale could *ever* justify the use of racial preferences.[47]

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that the goal of achieving a diverse student body is sufficiently compelling to justify the consideration of race in admissions, and that the decision below enjoining the Medical School "from according any consideration to race in its admissions process must be reversed." *Id.* at 272. Thus, there were five votes for the proposition that Alan Bakke must be admitted to the Medical School. There were also five votes for the proposition that race could play some role in the admissions process. However, no other Justice joined Justice Powell's opinion, which discussed the importance of diversity in higher education and elaborated upon what role race could play in the admissions process. *Id.* at 287-320.

[41] *See, e.g.*, Wessmann v. Gittens, 160 F.3d 790, 794-800 (1st Cir. 1998) (using Justice Powell's decision to frame the court's analysis in rejecting the constitutionality of the school's program); Hopwood v. Texas, 78 F.3d 932, 942 (5th Cir. 1996) ("Justice Powell's opinion has appeared to represent the 'swing vote,' and though, in significant part, it was joined by no other Justice, it has played a prominent role in subsequent debates concerning the impact of *Bakke*.").

[42] 515 U.S. 200, 202 (1995).

[43] 497 U.S. 547 (1990).

[44] *Id.* at 552.

[45] In *Adarand*, the central issue was what level of judicial scrutiny should apply to the use of racial preferences in federal contracting programs. *Adarand*, 515 U.S. at 224 (holding that any person, of whatever race, has the right to demand – subject to the most strict judicial scrutiny – that a governmental actor subject to the Constitution justify the racial classification subjecting that person to unequal treatment). In ruling that strict scrutiny ought to apply, the Court overturned *Metro Broadcasting* to the extent that it "adopt[ed] intermediate scrutiny as the standard of review for congressionally mandated 'benign' racial classifications . . . ." *Id.* at 226. *Adarand*'s holding cast doubt on the viability of a non-remedial rationale because *Metro Broadcasting* had applied intermediate scrutiny to uphold the use of race to ensure "programming diversity" among FCC broadcast licensees. *Metro Broad.*, 497 U.S. at 566. More specifically, *Metro Broadcasting* ruled that "the interest in enhancing broadcast diversity is, at the very least, an important governmental objective," similar to the "viewpoint diversity" concept the Court identified as central to Justice Powell's opinion in *Bakke*. *Id.* at 567-68. Given *Adarand*'s observation that *Metro Broadcasting* had taken a "surprising turn" in relation to the Court's previous equal protection doctrine, one possibility was that *Metro Broadcasting* had been overruled in all respects. *See Adarand*, 515 U.S. at 225.

[46] *See, e.g.*, Hopwood v. Texas, 236 F.3d 256, 274-75 (5th Cir. 2000).

[47] *See, e.g.*, Builders Ass'n of Greater Chicago v. County of Cook, 256 F.3d 642, 644 (7th Cir. 2001) ("Whether nonremedial justifications for 'reverse discrimination' by a public body are ever possible is unsettled."); Wittmer v. Peters, 87 F.3d 916, 918 (7th Cir. 1996) (stating that the question remains open in the Supreme Court as to whether any rationale

Grutter resolved that question definitively; after *Grutter* it was clear that a "nonremedial justification for 'reverse discrimination' by a public body [was] possible."[48] Moreover, in reaching its conclusion, the Court deferred to the University of Michigan Law School on both prongs of the strict scrutiny analysis. Indeed, the Court's deferential brand of strict scrutiny review suggested "a new willingness to rely upon good faith."[49] And the Court's relaxed brand of strict scrutiny contrasted sharply with its approach to the government's remedial use of racial preferences in an affirmative action plan.

Grutter concerned the University of Michigan Law School's admissions policy, which sought to enroll a "'critical mass' of underrepresented minority students."[50] The policy "consider[ed] race or ethnicity . . . flexibly as a 'plus' factor in the context of individualized consideration of each and every applicant."[51] The Court applied a relaxed form of strict scrutiny review to the Law School's race-based admissions policy. First, the Court deferred to the Law School's determination that the goal of "attaining a diverse student body" was central to its mission.[52] Thus, the Court held that there is a compelling interest in obtaining "the educational benefits that flow from a diverse student body."[53]

The *Grutter* Court placed no burden on the Law School to show precisely why "attaining a diverse student body is at the heart of [its] proper institutional mission."[54] Nor was the Law School required to demonstrate that the inclusion of underrepresented minorities would actually enhance that mission. In the context of higher education, deference rather than suspicion is the hallmark of strict scrutiny review. This approach is in stark contrast to the Court's skeptical approach to the remedial justification, where it vigilantly guards against unauthorized attempts to remedy societal discrimination.

In evaluating the government's remedial justification for the use of racial classifications, the Court applies an aggressive form of strict scrutiny review to

other than rectifying past discrimination is permissible). On the other hand, *Adarand* said nothing whatsoever about *Bakke*. *Adarand* clearly introduced a problem, however, and Justice Powell's opinion in *Bakke* did not command a majority of the Court. *See supra* note 40.

[48] Grutter v. Bollinger, 539 U.S. 306, 338-40 (2003).

[49] Concrete Works of Colo. v. City & County of Denver, 540 U.S. 1027, 1034-35 (2003) (Scalia, J., dissenting from denial of certiorari) (citing *Grutter*, 539 U.S. 306, 343) (arguing that racial classifications are inherently "suspect" and require more than good faith assurances).

[50] *Grutter*, 539 U.S. at 306.

[51] *Id.* at 334.

[52] *Id.* at 328 ("The Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer. The Law School's assessment that diversity will, in fact, yield educational benefits is substantiated by respondents and their *amici*.").

[53] *Id.* at 343.

[54] *Id.* at 329.

ensure that the government's use of racial preferences is directed at an appropriate remedial object. An appropriate remedial object is either the government's own discrimination or discrimination in the private market to which the government is a "passive participant."[55] An inappropriate remedial object is societal discrimination – discrimination which the government is not legally responsible for and therefore cannot remedy using race. Under this robust brand of strict scrutiny review, the Court requires the government to identify the specific harm it intends to ameliorate, explain how the beneficiaries of the program were harmed by particular discriminatory acts, and explain the government's role in either creating or perpetuating those discriminatory acts.[56] Thus, a government actor seeking to justify its use of racial preferences as a remedy for discrimination faces substantial obstacles. The application of this robust form of strict scrutiny often leads to pro-reverse discrimination plaintiff outcomes.[57] This aggressive form of strict scrutiny review reflects deep-seated judicial skepticism of affirmative action programs justified as remedies for intentional discrimination.

One argument is that the *Grutter* Court deferred to the Law School because of the need to respect the school's "academic autonomy."[58] Indeed, the Court stated, "[w]e have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition."[59] Consequently, one view is that the Court's deference to the Law School was mandated by special First Amendment concerns associated with universities.[60] To the extent that colleges and universities are unique "first amendment institutions,"[61] *Grutter*'s deferential brand of strict scrutiny review may not be transferrable to other settings.

However, even if we assume that "deference to the Law School's educational judgment performed real work in *Grutter*,"[62] it does not necessarily follow that public colleges and universities are the only government entities to which deferential strict scrutiny should be applied.

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[55] Richmond v. J.A. Croson Co., 488 U.S. 469, 492 (1989).

[56] *Id.* at 476-511.

[57] HAROLD LEWIS, JR. & ELIZABETH NORMAN, EMPLOYMENT DISCRIMINATION LAW AND PRACTICE 384 (2d ed. 2004) (explaining that under the *Croson* standard, most "equal protection challenges to current plans have succeeded").

[58] *See* Neal Kumar Katyal, *The Promise and Precondition of Educational Autonomy*, 31 HASTINGS CONST. L.Q. 557, 559 (2003) (defining academic autonomy as the ability of "the university itself, to make educational judgments for the sake of its students").

[59] *Grutter*, 539 U.S. at 329.

[60] *See, e.g.*, J. Peter Byrne, *The Threat to Constitutional Academic Freedom*, 31 J.C. & U.L. 79, 116-17 (2004) ("The logic of Justice O'Connor's opinion for the Court required that great weight be placed upon institutional academic freedom to make the case that student body racial diversity amounts to a compelling interest.").

[61] Paul Horwitz, Grutter*'s First Amendment*, 46 B.C. L. REV. 461, 567 (2005).

[62] *Id.* at 496.

First, to the extent that the Court grounded its compelling interest analysis in academic autonomy, this simply suggests that "universities often have superior competence at making tough admissions policy choices when compared to federal courts."[63] But other entities – public employers, public schools and more democratically accountable sectors of government – may be just as well situated to make determinations regarding affirmative action, which is fundamentally a public policy question.[64]

Second, as discussed below, the benefits the Court associated with racial diversity were not entirely educational in nature, undercutting the argument that deference can be accorded only to an institution of higher education. The Court's independent judgments with respect to the social goods associated with racial diversity undermine the argument that its compelling interest analysis hinged on an application of a brand of deference that is solely confined to higher education.[65] Finally, even granting special First Amendment status to colleges and universities, as Paul Horwitz has argued, "*Grutter* may counsel other institutions – religious institutions, media institutions, libraries, perhaps professionals, and even other institutions – to seek from the Court the same recognition that they have special roles to play in the social firmament and ought, perhaps, to be treated according to special rules."[66]

B. *Promoting the "Common Good": Racial Diversity as a Compelling Governmental Interest*

In *Grutter*, the Court ruled that the Law School has a "compelling interest in attaining a diverse student body."[67] In reaching this conclusion, the Court adopted an expansive vision of racial diversity through a "common good" approach in characterizing the social goods provided by racial diversity. "Common good" is defined as those benefits which promote the "social systems, institutions, and environments on which we all depend [and] work in a manner that benefits all people."[68] Along these lines, *Grutter* conceptualized

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[63] Katyal, *supra* note 58, at 571.

[64] *See* Luis Fuentes-Rohwer & Guy-Uriel E. Charles, *In Defense of Deference*, 21 CONST. COMMENT. 133, 136 (2004).

[65] As J. Peter Byrne suggests:

> The Court also apparently made an independent judgment that diversity in higher education was important. It embraced the views expressed in amicus curiae briefs by business leaders and military leaders that diversity is important in business and military command as well, and also stressed the general social benefits from the educational pathways to power and success being 'visibly open' to people of all races.

Byrne, *supra* note 60, at 117.

[66] Horwitz, *supra* note 61, at 569.

[67] Grutter v. Bollinger, 539 U.S. 306, 328 (2003).

[68] Andre & Velasquez, *supra* note 4, at 2. Of course, this definition may be overly facile; at least one scholar has suggested that the "common good is an attractive idea, but a notoriously difficult one." BILL JORDAN, THE COMMON GOOD: CITIZENSHIP, MORALITY AND SELF-INTEREST 1 (1989). This is particularly true given the concept's long and complicated

the benefits associated with diversity very broadly – as benefits accruing to all.

Rather than "smoking out" illicit motives, strict scrutiny presents the "sole question [of] whether the conceded race-based purpose is constitutionally legitimate."[69] And that question, the constitutional legitimacy of the racial preference, is determined using a balancing test.[70] *Grutter* balancing, however, is very nuanced. For instance, Justice O'Connor's compelling interest analysis did not suggest that the Law School's admissions process was a "zero-sum" game in which white applicants necessarily "lose" when an underrepresented minority is accepted. Instead, in conceptualizing the importance of the interest asserted by the Law School, the *Grutter* Court balanced *competing public benefits*. As Bruce Douglass argues:

> In most instances in which the public interest is perceived to conflict with the interests of particular individuals, it is not the case . . . that we believe the conflict is so deep that these individuals have *nothing* to gain from realization of the public interest. Rather, what is involved is a *balancing* of competing benefits, in which such individuals have more to gain, in the short term at least, from the realization of their special interest. In turn, should they lose, they are not complete losers. The point of characterizing a benefit as public is precisely that it does really pertain to everyone – if not actually, at least potentially.[71]

The public interest is not simply what the majority would prefer, but rather describes "benefits which apply, more or less equally, to all."[72] This is the "common good," and it is this vision of public benefits that informed Justice O'Connor's strict scrutiny analysis in *Grutter*.

As Justice O'Connor described the Law School's admissions policy, *everybody wins*, including the frustrated white applicants, as long as the harm to those applicants is minimized through appropriate attention to their interests throughout the admissions process. I will parse Justice O'Connor's opinion for the Court and show that there were three reasons why the Law School's use of race outweighed the countervailing interest of white applicants, one endogenous to the university setting and two exogenous to it: that diversity benefits the educational process; that diversity benefits society more generally; and that diversity ensures a more legitimate leadership class in our democratic system.

The first reason that the Law School's use of race was compelling – that

provenance, and because "any system of voluntary cooperation between self-interested individuals and the coordination of their individual interests for the common good is vulnerable to the charge of authoritarianism." Kevin P. Quinn, *Sandel's Communitarianism and Public Deliberations Over Health Care Policy*, 85 GEO. L.J. 2161, 2180 (1997).

[69] Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 437 (1997).

[70] *Id.* at 438. Rubenfeld refers to this test as the "cost-benefit justificatory test." *Id.*

[71] Bruce Douglass, *The Common Good and the Public Interest*, 8 POL. THEORY 103, 112 (1980).

[72] *Id.* at 110.

diversity benefits the educational process – was endogenous to the university setting and echoed the thrust of Justice Powell's opinion in *Bakke*. The Powell vision of educational diversity is synonymous with "viewpoint diversity." Thus, in *Bakke*, Justice Powell explained that the "robust exchange of ideas,"[73] in both the classroom setting and outside of it, was "essential to the quality of higher education."[74] In Justice Powell's words, "[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."[75] Echoing this theme, Justice O'Connor explained that diversity enhanced the educational experience for all because it promotes "cross-racial understanding,"[76] which "break[s] down racial stereotypes," and "enables students to better understand persons of different races."[77] For Justice O'Connor, racial diversity enhanced the understanding and appreciation of the differences of others, which, in turn, generated clear educational benefits for all students, such as more enlightened classroom discussions and a better learning experience.[78] Indeed, later in the opinion, Justice O'Connor explicitly endorsed the "viewpoint diversity" concept which had formed the basis of Justice Powell's opinion in *Bakke*.[79]

Second, the Court also ruled that the Law School's use of race was compelling because a racially diverse class benefited society more generally, independent of diversity's impact on the educational process. Justice O'Connor explained that racial and ethnic diversity in a university setting "better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals."[80] Indeed, Justice O'Connor was emphatic on this point, asserting that "[t]hese benefits are not theoretical but real,"[81] given evidence suggesting that "major American businesses"[82] and the United States military could not function without employees and soldiers trained "through exposure to widely diverse people, cultures, ideas and

[73] Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 313 (1978) (opinion of Powell, J.) (internal quotation marks omitted).

[74] *Id.* at 312.

[75] *Id.* at 316.

[76] Grutter v. Bollinger, 539 U.S. 306, 308 (2003).

[77] *Id.*

[78] *Id.* (asserting that "classroom discussion is livelier, more spirited, and simply more enlightening and interesting" when the students have "the greatest possible variety of backgrounds").

[79] *Id.* at 333 ("Just as growing up in a particular region or having particular professional experiences is likely to affect an individual's views, so too is one's own, unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters.").

[80] *Id.* at 330.

[81] *Id.*

[82] *Id.*

viewpoints."[83] Justice O'Connor did not, however, stop there. In accessing the downstream benefits created by "cross-racial understanding" within the education process, she also explored the relationship among education, work and citizenship. Justice O'Connor explained that because education was the "foundation of good citizenship,"[84] "the diffusion of knowledge and opportunity through public institutions of higher education must be *accessible* to all individuals regardless of race or ethnicity."[85]

There are two ways to read Justice O'Connor's emphasis on accessibility: remedial (focusing on minority beneficiaries of the Law School's policy) and external and wide-ranging (focusing on overall societal benefit generated by racial integration). With the remedial view, the Court's prime concern was that the minority beneficiaries of the admissions policy have access to the "knowledge and opportunity"[86] afforded by public educational institutions of the prestige and rank of the University of Michigan Law School. From this perspective, Justice O'Connor is explicitly recognizing that higher education generates status and opportunity, and that minority group members who have historically been excluded should now have access to it. After all, Justice O'Connor explicitly acknowledges that "race unfortunately still matters" in our society, suggesting that the Law School's affirmative action plan is necessary to redress the continuing harms associated with a segregated and unequal society.[87] The remedial interpretation would seem to conflict with *Croson*,

[83] *Id.*

[84] *Id.* at 331 (citing Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954)).

[85] *Id.* (emphasis added).

[86] *Id.*

[87] *Id.* at 333. The strongest argument in support of this proposition is the time limit she appears to place on affirmative action plans: "[w]e expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today." *Id.* at 343. The twenty-five-year sunset is consistent with a compensatory remedy; time limitations suggest a period after which the intended beneficiaries will no longer require the particular benefit. *See, e.g.*, Kevin R. Johnson, *The Last Twenty Five Years of Affirmative Action?*, 21 CONST. COMMENT. 171, 173 (2004) ("Remedial-based affirmative action, in contrast, would not be necessary after the impacts of an institution's discrimination had been remedied."). Justice O'Connor's time-limiting statement is admittedly paradoxical. *See* Christopher J. Schmidt, *Caught in a Paradox: Problems with* Grutter*'s Expectation That Race-Conscious Admissions Programs Will End in Twenty-Five Years*, 24 N. ILL. U. L. REV. 753, 755 (2004). But there are at least two responses to this line of argument, undercutting the remedial understanding. First, because the discussion of the time limitation is not necessary to the holding, it is dicta and therefore has "inspirational – but not precedential – effect." *See* Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953, 1093 (2005) (arguing "there is a strong argument that the no-later-than-2028 restriction is not based on the facts of the case and counts as dicta"). Thus, the statement should be viewed as a wish or exhortation, rather than as consistent with a compensatory or remedial analytical approach. Second, one might view the twenty-five-year "limitation" as completely consistent with a forward-looking, non-compensatory, integrationist interpretation of *Grutter*. Imagine, for instance, that two towns are attempting to merge into

which ruled that government may not use racial classifications to remedy societal discrimination.[88]

On the other hand, Justice O'Connor's recognition of the need for minorities to participate in and have access to public educational institutions can be seen as serving a more wide-ranging goal. On this view, the inclusion of minorities within the Law School was not necessary to compensate for any past race-based harm that prevented their matriculation in substantial numbers. Their inclusion serves instead to undercut the ugly message communicated about *our society generally* by their exclusion from prominent public institutions: that of a society still hopelessly rent by racial division, segregation and animosity. Justice O'Connor lionizes a particular normative vision of American society when she says "[e]ffective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized."[89] The appearance of inclusion in status-granting educational institutions matters because it is indicative of an open, democratic, and modern society.

The third reason why the Law School was justified in using racial preferences was also exogenous to the university setting: the "leadership" claim. This part of the Court's analysis also turned on the belief that a racially diverse class benefits society more generally, similarly independent of diversity's impact on the educational process. As in earlier parts of the compelling governmental interest analysis, Justice O'Connor recognized that higher education functions as a pathway, providing students with the necessary tools to participate in the larger society. Here, however, the focus was not on students' preparation for employment opportunities in a diverse society, but on higher education's role in creating an elite leadership class.[90] On this view, racial preferences are justified by the need to develop a multi-racial "leadership class." She recognized that many leaders of our society have benefited from a legal education and that lawyers are disproportionately represented in the halls

one large metropolitan area. Such a merger would require the restructuring of city government and elimination of duplicative functions. But at some point, a new, unified town would emerge. So, too, one might view the twenty-five-year period after which Justice O'Connor expects that racial preferences would no longer be necessary. On this view, the twenty-five-year period represents an (admittedly optimistic) estimation of the time it would take for at least certain sectors of our society to integrate successfully.

[88] Richmond v. J.A. Croson Co., 488 U.S. 469, 505-06 (1989). Indeed, at least one commentator argued that *Grutter* allowed governmental actors to remedy societal discrimination, essentially overturning the remedial line of affirmative action cases sub silentio. *See* Goodwin Liu, Brown, Bollinger, *and Beyond*, 47 HOW. L.J. 705, 759-63 (2004).

[89] *Grutter*, 539 U.S. at 332.

[90] *Id.* ("In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity.").

of power.[91]

But was the Law School permitted to use racial preferences because the benefits of elite education must now flow to members of a previously excluded group, or because a homogeneous leadership class cannot effectively lead a modern, multi-racial democracy? The latter demand appeared dominant. Justice O'Connor's analysis centered on universal needs and societal demands. Along these lines, she suggested that "[a]ll members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training."[92] In the end, the societal demand for leadership that would be viewed as legitimate precisely because of its multi-racial makeup seemed to trump the more remedial rationale for the use of racial preferences.

C. *Narrow Tailoring: Deference to the Manner and Mode*

The *Grutter* Court also displayed notable deference to the Law School on the "narrow tailoring" portion of the strict scrutiny test. This deference was displayed in the Court's evaluation of the mechanics of the Law School's admissions plan. For instance, the Court accepted the Law School's argument that its admissions plan contained no "quota" even though the proportion of minority students admitted during the relevant period remained within a narrow, predictable range.[93] The Court did not hold the Law School to any duty to exhaust all race-neutral means prior to resorting to race-conscious ones.[94] Typically, in enacting an affirmative action program the government must not just consider, but must also exhaust, all race-neutral means prior to instituting a race-conscious measure.[95] Stating that narrow tailoring requires only "good faith consideration" rather than "exhaustion of every conceivable race-neutral alternative," the Court ruled that the Law School would not be made to choose between diversity and excellence in an effort to come into compliance with the Equal Protection Clause.[96]

Moreover, the Court characterized the purpose of the narrow tailoring requirement as a form of protection for non-favored individuals from any

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[91] *Id.*

[92] *Id.*

[93] *Id.* at 383 (Rehnquist, J., dissenting) ("But the correlation between the percentage of the Law School's pool of applicants who are members of the three minority groups and the percentage of the admitted applicants who are members of these same groups is far too precise to be dismissed as merely the result of the school paying 'some attention to [the] numbers. . . .' [F]rom 1995 through 2000 the percentage of admitted applicants who were members of these minority groups closely tracked the percentage of individuals in the school's applicant pool who were from the same groups.").

[94] *Id.* at 339 (majority opinion).

[95] Ian Ayres & Sydney Foster, *Don't Tell, Don't Ask: Narrow Tailoring After* Grutter *and* Gratz, 85 TEX. L. REV. 517, 522 (2007).

[96] *Grutter*, 539 U.S. at 339.

"undue burden" imposed by the admissions plan.[97] But this suggested, in this context at least, that some burden would indeed be tolerated.[98] The Court suggested that individuals not favored under the Law School's admissions plan had not been "unduly burdened" because the plan provided for "individualized consideration" of each applicant.[99] For the Court, individualized consideration meant that the Law School did not maintain a quota system, and that race operated as a "plus" factor for each applicant such 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."[100]

But it is not clear that such individualized consideration was truly meaningful for all applicants. As Justice Kennedy suggested in his dissent:

> With respect to 15% to 20% of the seats, race is likely outcome determinative for many members of minority groups. That is where the competition becomes tight and where any given applicant's chance of admission is far smaller if he or she lacks minority status. At this point the numerical concept of critical mass has the real potential to compromise individual review.[101]

Indeed, it is likely that the Law School's provision of individualized consideration for each applicant in the admissions process actually served to obscure the magnitude of the preferences accorded to underrepresented minority group members.[102]

Gratz v. Bollinger,[103] of course, reached a different conclusion with respect to narrow tailoring. *Gratz* concerned the University of Michigan College of Literature, Science and the Arts' ("LSA") admissions policy, which assigned a certain number of points to various admissions factors including high school grades, test scores, high school quality and the applicant's racial and ethnic background.[104] Thus, the policy "automatically distributes 20 points, or one-fifth of the points needed to guarantee admission, to every single 'underrepresented minority' applicant solely because of race."[105] The Court struck down the LSA's policy because it was "not narrowly tailored to achieve the interest in educational diversity that respondents claim justifies their

[97] *Id.* at 341.

[98] *Id.*

[99] *Id.*

[100] *Id.* at 337.

[101] *Id.* at 389 (Kennedy, J., dissenting).

[102] Ayres & Foster, *supra* note 95, at 559, 582 (arguing that because the Law School's admissions plan featured individualized consideration, the Court simply did not probe the weight given to racial preferences in the admissions scheme, and that "the affirmative action program the Supreme Court upheld in *Grutter* appears to have granted larger racial preferences than the program the Court struck down in *Gratz*").

[103] 539 U.S. 244 (2003).

[104] *Id.* at 253-55.

[105] *Id.* at 270.

program."[106]

Notwithstanding this result, it was possible to read *Gratz* quite narrowly. First, *Gratz* was silent on educational diversity as a compelling interest, effectively leaving *Grutter*'s expansive assessment of that interest in place. Second, the LSA admissions program at issue in *Gratz* clearly quantified the scope and extent of the preference afforded to underrepresented minority students. But such an approach raised questions even under the then (apparently) prevailing *Bakke* standard.[107] Thus, it was possible given the level of deference afforded by the *Grutter* Court on both steps of strict scrutiny review to read *Gratz* as standing for the narrow proposition that governmental actors must not *quantify* the scope of the racial preference. From this perspective, narrow tailoring required individualized determinations where possible, that the preference be covert rather than overt, and that the preference not harm whites too much. As discussed below, this is almost certainly how several United States Courts of Appeals interpreted the two cases.

II. POST-*GRUTTER V. BOLLINGER*: A WINDOW ON THE POSSIBILITIES

A. *Primary and Secondary Public Education*

In late 2005, the United States Supreme Court denied certiorari in *Comfort v. Lynn School Committee*.[108] In *Comfort*, the First Circuit Court of Appeals upheld a voluntary desegregation plan intended to "achieve the educational benefits of racial diversity in the public schools."[109] The plan at issue took race into account when a student sought a transfer to a school outside of his or her neighborhood.[110] Thus, under the plan, students were not allowed to make "segregative transfers," transfers that would "exacerbate racial imbalance in the sending or receiving school."[111] Explicitly relying on the "analytic framework set forth in *Grutter* and *Gratz*,"[112] the First Circuit ruled that the plan did not violate the Equal Protection Clause.[113] At least at that moment, with Justice O'Connor still sitting on the Court, a case which explicitly applied *Grutter*'s analytical framework in a different context to uphold a voluntary desegregation plan did not seem to pique the Court's interest.

Even assuming the Court would eventually take such a case, it was hard to imagine that local school districts would receive less deference with respect to

[106] *Id.*

[107] Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 319 (1978) (opinion of Powell, J.).

[108] 546 U.S. 1061 (2005) (denying certiorari).

[109] Comfort v. Lynn Sch. Comm., 418 F.3d 1, 5 (1st Cir. 2005) (en banc), *cert. denied*, 546 U.S. 1061 (2005).

[110] *Id.* at 7.

[111] *Id.*

[112] *Id.* at 6.

[113] *Id.*

their use of race than colleges and universities, given the centrality of eradicating state mandated school segregation to the Civil Rights Movement and the importance of *Brown v. Board of Education* in the constitutional pantheon.[114] And even if the Court applied strict scrutiny to local public school districts' voluntary use of race to achieve desegregation – a scrutiny level civil rights advocates argued against[115] – surely the Court would apply the deferential rather than the robust version, as indicated by *Grutter*. That was the approach favored by the First Circuit in *Comfort*, and by the Sixth and Ninth Circuit Courts of Appeals in two voluntary desegregation cases that were overturned by the Supreme Court shortly after Justice Alito replaced Justice O'Connor: *Parents Involved in Community Schools v. Seattle School District, No. 1*[116] and *McFarland v. Jefferson County Public Schools*.[117]

Parents Involved concerned the Seattle School District's 2001-2002 "open choice" plan, which sought to maximize school choice and enhance racial diversity.[118] More specifically, the Seattle School District advanced two interests to support its "open choice" plan: the "affirmative educational and social benefits that flow from racial diversity" and avoidance of "the harms resulting from racially concentrated or isolated schools."[119] Under the plan, which applied to all of Seattle's public high schools, students were assigned to their first choice high school, except when a student selected a school that was "oversubscribed."[120] In the event of oversubscription, the school district assigned students based on a ranked series of tiebreakers.[121] The first tiebreaker gave a preference to students selecting a school where a sibling was already in attendance.[122] Race only became relevant at the second tiebreaker where an oversubscribed school was racially imbalanced.[123] Thus, at the second tiebreaker, the school district considered the student's race in making

[114] Brown v. Bd. of Educ., 347 U.S. 483 (1954); *see generally* RISA GOLUBOFF, THE LOST PROMISE OF CIVIL RIGHTS (2007) (discussing the civil rights movement's failure to address African-American workers' economic inequality).

[115] Brief for NAACP Legal Defense and Education Fund, Inc. as Amicus Curiae Supporting Respondents, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738 (2007) (Nos. 05-908 and 05-915).

[116] 426 F.3d 1162 (9th Cir. 2005), *rev'd*, 127 S. Ct. 2738 (2007).

[117] 330 F. Supp. 2d 834 (W.D. Ky. 2004), *aff'd*, 416 F.3d 513 (6th Cir. 2005), *rev'd*, 127 S. Ct. 2738 (2007). The Sixth Circuit's per curiam opinion adopted the district court's reasoning in its entirety. *McFarland*, 416 F.3d at 513. Consequently, I will refer to the *McFarland* court's reasoning as that of the Sixth Circuit.

[118] *Parents Involved*, 426 F.3d at 1168-69.

[119] *Id.* at 1174.

[120] *Id.* at 1169.

[121] *Id.*

[122] *Id.*

[123] *Id.* at 1169-70 (defining "racially imbalanced" as when "the racial make up of its student body differs by more than 15 percent from the racial make up of the students of the Seattle public schools as a whole").

school assignments in an effort to achieve a student body that more closely mirrored the racial make-up of the entire school district as a whole.[124] The race-based tiebreaker affected about 10% of all entering Seattle high school students.[125]

McFarland involved the Jefferson County Board of Education's 2001 student assignment plan.[126] In contrast to the Seattle School District,[127] a federal court in 1973 found that the Jefferson County Public Schools "maintained a segregated school system."[128] As a result, the Jefferson County Public Schools operated under a court-ordered desegregation decree until 2000.[129] After the decree was dissolved, "Jefferson County adopted [a] voluntary student assignment plan."[130] Jefferson County's plan was organized not only to maximize student choice and maintain neighborhood schools, but also to fulfill the Board's primary objective of maintaining "a fully integrated countywide system of schools."[131] The Jefferson County plan "require[d] each school [within the district] to seek a Black student enrollment of at least 15% and no more than 50%."[132] Prior to any consideration of race, administrators were to assign students to district schools based on a wide variety of factors.[133] But where a school's racial composition bordered either end of the 15-50% range, "the application of any student for open enrollment, transfer or even to a magnet program could be affected."[134] Thus, in some cases, a student's race

[124] *Id.* The racial breakdown of Seattle public school enrollment was approximately forty percent white and sixty percent nonwhite. *Id.* at 1166.

[125] *Id.* at 1170. During the 2001-2002 school year, the race-based tiebreaker operated at three out of the ten Seattle public high schools. *Id.* There were two other tiebreakers under the "open choice" plan. "In the third tiebreaker, students are admitted according to distance from the student's home to the high school." *Id.* at 1171. "In the fourth tiebreaker, a lottery is used to allocate the remaining seats." *Id.*

[126] McFarland v. Jefferson County Pub. Sch., 330 F. Supp. 2d 834, 841-42 (W.D. Ky. 2004), *aff'd*, 416 F.3d 513 (6th Cir. 2005), *rev'd*, 127 S. Ct. 2738 (2007). Jefferson County operates the "public school system in metropolitan Louisville, Kentucky." Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2749 (2007).

[127] Seattle never operated "legally separate schools for students of different races – nor has it ever been subject to court-ordered desegregation." *Parents Involved*, 127 S. Ct. at 2747. *But see id.* at 2810 (Breyer, J., dissenting) (describing the history of racial segregation in Seattle public schools dating back to the end of World War II and arguing that a "court finding of de jure segregation cannot be the crucial variable").

[128] *Id.* at 2749 (majority opinion).

[129] *Id.*

[130] *Id.*

[131] *McFarland*, 330 F. Supp. 2d at 842.

[132] *Id.*

[133] Those factors included residence, school capacity, popularity, random assignment and student choice. *Id.*

[134] *Id.*

could determine his or her school assignment.[135] Overall, the hallmark of the Jefferson County plan was discretion; the plan gave administrators broad authority to maintain schools within the prescribed range.[136]

Both *Parents Involved* and *McFarland* relied upon *Grutter* to support their holdings that the voluntary desegregation plans at issue did not violate the Equal Protection Clause. First, both courts referred to *Grutter* to buttress the assertion that the school districts had a compelling interest in using race voluntarily to promote integrated schools.[137] Second, both courts also cited *Grutter* for the proposition that the plans at issue were sufficiently narrowly tailored to withstand constitutional review.[138]

The courts' reliance on *Grutter* in the compelling interest portion of their analyses had a variety of benefits. First, it took some of the evidentiary issues off the table. There is powerful evidence to support the statement that "with few exceptions, separate schools are still unequal schools."[139] But the question of desegregation's impact on affected students, and more specifically whether K-12 desegregation results in enhanced learning, has been the subject of significant and extended debate.[140] In *Grutter*, the Court simply accepted that the benefits of racial diversity were "not theoretical but real."[141] To the extent that school districts could persuade lower courts that *Grutter* applied in the K-12 context, those courts could then simply accept the validity of racial diversity's (broadly defined) benefits. *Grutter*'s application in the K-12 context reduced the evidentiary burden on school boards. To be sure, the school boards still needed to present evidence of the benefits of racial diversity that are unique to the public school context,[142] but *Grutter*'s application

[135] *Id.*

[136] *Id.*

[137] *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 426 F.3d 1162, 1175 (9th Cir. 2005), *rev'd*, 127 S. Ct. 2738 (2007); *McFarland*, 330 F. Supp. 2d at 853.

[138] *See Parents Involved*, 426 F.3d at 1180; *McFarland*, 330 F. Supp. 2d at 856.

[139] *Parents Involved*, 426 F.3d at 1177 (citing ERICA FRANKENBERG ET AL., A MULTIRACIAL SOCIETY WITH SEGREGATED SCHOOLS: ARE WE LOSING THE DREAM? 11 (2003)).

[140] *See, e.g.*, *McFarland*, 330 F. Supp. 2d at 853 ("[O]ne of Defendant's experts testified that racial integration benefits Black students substantially in terms of academic achievement. The Court cannot be certain to what extent the policy of an integrated school system has contributed to these successes. Opinions surely vary on this issue.").

[141] Grutter v. Bollinger, 539 U.S. 306, 330 (2003).

[142] While the benefits of integration at various educational levels overlap, they are not identical. As James E. Ryan has suggested, "[c]olleges and graduate schools on the one hand, and public schools on the other, are not attempting to achieve exactly the same goals when using race in selecting students, and the correct application of strict scrutiny requires careful attention to these differences." James E. Ryan, *Voluntary Integration: Asking the Right Questions*, 67 OHIO ST. L.J. 327, 333 (2006). Indeed, both the *Parents Involved* court and the *McFarland* court emphasized that racial integration at the K-12 level had distinct benefits. Both *Parents Involved* and *McFarland* ruled that the school districts met the

relieved the school boards of the need to *independently establish* the validity of racial integration's benefits that are common to both contexts.

Both *Parents Involved* and *McFarland* reasoned by way of analogy. In *Parents Involved*, the Ninth Circuit ruled that the school district's interest in capturing the educational and social benefits that flow from diversity at the K-12 level were sufficiently analogous to the benefits of diversity identified in *Grutter* as to form a compelling governmental interest.[143] The Ninth Circuit's analysis tied the benefits of racial diversity at the secondary school level to both the endogenous and exogenous benefits of racial diversity recognized by *Grutter* in the context of higher education. For instance, the Ninth Circuit accepted evidence that racial diversity in secondary education enhanced both white and black students' critical thinking skills, "the ability to both understand and challenge views which are different from their own."[144] This finding mapped directly onto the *Grutter* Court's findings regarding the importance of racial diversity in promoting the "cross-racial understanding"[145] that breaks "down racial stereotypes" and enables students "to better understand persons of different races,"[146] enhancing the educational experience.

Second, the Ninth Circuit found that racial diversity improved race relations, reduced prejudicial attitudes, and created a more "inclusive experience for all citizens."[147] These benefits were not necessarily specific to the immediate educational experience, but instead were "long lasting" and embodied durable extra-educational social goals.[148] The Ninth Circuit concluded that these benefits encourage "students not only to think critically but also democratically."[149] These observations echoed the exogenous benefits of racial diversity recognized by the *Grutter* Court.[150] The Ninth Circuit also emphasized the role that public secondary education plays in a democracy, training students for their roles as workers and citizens. Here the court analogized to *Grutter*, and also emphasized the special role that secondary schools play in inculcating democratic values.[151] Consequently, the court ruled

compelling interest requirement both because of the *Grutter* analogy and because of the benefits of integrated schools that are unique to the K-12 setting. *Parents Involved*, 426 F.3d at 1177; *McFarland*, 330 F. Supp. 2d at 854.

[143] *Parents Involved*, 426 F.3d at 1173-77.

[144] *Id.* at 1174.

[145] *Grutter*, 539 U.S. at 330.

[146] *Id.*

[147] *Parents Involved*, 426 F.3d at 1175.

[148] *Id.*

[149] *Id.* The court also accepted evidence suggesting a desegregated education "opens opportunity networks" and is correlated with cross-racial friendships and students' propensity to live in integrated communities as adults. *Id.*

[150] *See supra* Part I.B.

[151] *Parents Involved*, 426 F.3d at 1175.

that the school district "has demonstrated that it has a compelling interest in the educational and social benefits of racial diversity similar to those articulated by the Supreme Court in *Grutter* as well as the additional compelling educational and social benefits of such diversity unique to the public secondary school context."[152]

The Sixth Circuit's approach in *McFarland* was similar. There, the court noted the importance of cross-racial understanding, racial tolerance, preparation for a diverse workforce and the leadership claim from *Grutter*'s analysis, and then analogized those benefits to the instant context: "[l]ike institutions of higher education, elementary and secondary schools are 'pivotal to sustaining our political and cultural heritage with a fundamental role in maintaining the fabric of society.'"[153] Consequently, the Sixth Circuit held the school board met the compelling governmental interest requirement because of the similarity between the benefits of racial diversity articulated by *Grutter* and those identified in the K-12 context by the school board.[154] The Ninth and Sixth Circuits' reliance on *Grutter* in the compelling interest portion of their analyses had another benefit: it assisted the courts in deferring to the local school districts' educational choices, since in *Grutter* the Court deferred to the Law School on both prongs of the strict scrutiny analysis.[155]

Of course, a preliminary question is why *Grutter* is needed to trigger judicial deference at all. Arguably, *Grutter*'s application is unnecessary to activate court deference to local school districts in evaluating their voluntary desegregation plans. After all, the Supreme Court repeatedly emphasized the importance of local control in public education.[156] The emphasis on local control, however, arose primarily in a line of doctrine that considered the scope of federal judicial supervision over public school districts that were found liable for intentional school segregation.[157] Let us call this type of deference "federalism-based" deference to distinguish it from "*Grutter*-style" deference. Prior to the Supreme Court's determination in *Parents Involved*, it was unclear whether the deference afforded local school districts in determining whether a federal desegregation order should be dissolved should be extended to local

[152] *Id.* at 1177.

[153] McFarland v. Jefferson County Pub. Sch., 330 F. Supp. 2d 834, 852-53 (W.D. Ky. 2004) (quoting Grutter v. Bollinger, 539 U.S. 306, 331 (2003)), *aff'd*, 416 F.3d 513 (6th Cir. 2005), *rev'd*, 127 S. Ct. 2738 (2007).

[154] *Id.* at 837 (holding the compelling interest requirement was met because of similarity to *Grutter* and because "the Board has described other compelling interests and benefits of integrated schools, such as improved student education and community support for public schools, that were not relevant in the law school context but are relevant to public elementary and secondary schools").

[155] *See* Grutter v. Bollinger, 539 U.S. 306, 328, 334 (2003).

[156] *McFarland*, 330 F. Supp. 2d at 850 n.30.

[157] *Id.* The Court has emphasized the importance of local control in other contexts as well. *See, e.g.*, Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 481-82 (1982); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 49-51 (1973).

school districts' *voluntary* desegregation efforts.[158]

Enter *Grutter*. If *Grutter* simply applied in the K-12 context, a court did not need to reach this question. Or, if a court rejected the wholesale application of *Grutter*-style deference because of the differences in the two contexts, a court could still point to *Grutter*'s embrace of deference in the higher education context to bolster its application of "federalism-based" deference in the voluntary desegregation context. Indeed, in *McFarland*, the Sixth Circuit pursued exactly this course.

The Sixth Circuit began by noting that the Supreme Court had long endorsed the importance of local control of school districts.[159] It then characterized that deference as an aspect of federalism and distinguished it from the type of deference the Court recognized in *Grutter*.[160] The court subsequently ruled that because of the difference in contexts, *Grutter*-style deference "is not relevant here."[161] But if *Grutter*-style deference was "not relevant," what was the purpose of drawing a distinction between it and the deference traditionally accorded local school districts? Or of discussing *Grutter*-style deference at all? The answer takes us back to the question posed above: it was not clear whether courts should apply federalism-based deference to local school districts' voluntary use of race to promote desegregation. But if the Supreme Court had accorded deference to colleges and universities in their use of race to achieve educational diversity, the rhetorical argument seemed to be: how could a court assessing a voluntary public school desegregation plan fail to follow suit? Thus, the *McFarland* court observed that it "would seem rather odd that the concepts of equal protection, local control and limited deference are now only one-way streets to a particular educational policy, virtually prohibiting the voluntary continuation of policies once required by law."[162]

In evaluating the narrow tailoring analysis in *McFarland* and *Parents Involved*, it is useful to note a fundamental principle that informed each court's analysis: *Grutter* and *Gratz*, rather than *Croson* and *Adarand*, controlled.[163] Both the Sixth and Ninth Circuits assumed that *Grutter* and *Gratz* framed the narrow tailoring analysis rather than the less deferential remedial cases because they concerned admissions policies which are more "like" the challenged student assignment policies than minority set-asides in public contracting.[164] Indeed, both courts performed the narrow tailoring analysis assuming not just

[158] *See* Bd. of Educ. v. Dowell, 498 U.S. 237, 248 (1991) (reversing dissolution order).

[159] *McFarland*, 330 F. Supp. 2d at 850.

[160] *Id.* ("The historical importance of the deference accorded to local school boards goes to the very heart of our democratic form of government.").

[161] *Id.* at 850 n.31.

[162] *Id.* at 851.

[163] *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 426 F.3d 1162, 1166 (9th Cir. 2005), *rev'd*, 127 S. Ct. 2738 (2007); *McFarland*, 330 F. Supp. 2d at 837.

[164] *See Parents Involved*, 426 F.3d at 1166; *McFarland*, 330 F. Supp. 2d at 837.

that *Grutter* and *Gratz* applied, but that aspects of that analysis could be modified to take account of contextual differences. This later assumption was made possible by *Grutter*'s emphasis on the context in which the racial classification is used.[165]

The Ninth Circuit's analysis in *Parents Involved* explicitly followed the lead of *Grutter* and *Gratz*.[166] From those cases, the court identified five markers of a narrowly tailored affirmative action plan: "(1) individualized consideration of applicants; (2) the absence of quotas; (3) serious, good-faith consideration of race-neutral alternatives to the affirmative action program; (4) that no member of any racial group was unduly harmed; and (5) that the program had a sunset provision or some other end point."[167] The court then applied these markers in a context-specific fashion, emphasizing some while deemphasizing others based upon their applicability to the K-12 context.

For instance, the Ninth Circuit dispensed with *Grutter*'s individualized consideration requirement, and held that this type of consideration was not necessary in the K-12 context.[168] In the court's view, individualized, holistic consideration at the university level was necessary to insure equal competition and reduce stigma in the context of a merit-based admissions determination.[169] But at the K-12 level, there was no merits determination; every student was guaranteed a spot in one of Seattle's public high schools.[170] Thus, the sole question was allocative rather than merit-based: to which public school would each student be assigned? At the same time, the Ninth Circuit noted no student possessed a "right" to attend any particular public school.[171] While recognizing particular students' school preferences might be frustrated, the

[165] Grutter v. Bollinger, 539 U.S. 306, 327 (2003) ("Context matters when reviewing race-based governmental action under the Equal Protection Clause. . . . Not every decision influenced by race is equally objectionable, and strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decisionmaker for the use of race in that particular context."). Justice Breyer's *Parents Involved* dissent makes this point emphatically. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2800 (2007) (Breyer, J., dissenting).

[166] *See Parents Involved*, 426 F.3d at 1180 ("Here, our analysis is framed by the Court's narrow tailoring analysis in *Grutter* and *Gratz*, which, though informed by considerations specific to the higher education context, substantially guides our inquiry."); *McFarland*, 330 F. Supp. 2d at 856 ("[T]he Court will evaluate whether the 2001 Plan is narrowly tailored . . . in light of the factual and analytical differences between this case and the admissions programs reviewed in *Grutter* and *Gratz*."). For the sake of brevity, my discussion of how *Grutter* and *Gratz* informed the courts' narrow tailoring analyses focuses primarily on the Ninth Circuit's decision.

[167] *Parents Involved*, 426 F.3d at 1180.

[168] *Id.* at 1180-81 ("This [holistic] focus on an applicant's qualifications . . . is not applicable when there is no competition or consideration of qualifications at issue.").

[169] *Id.*

[170] *Id.* at 1181.

[171] *Id.* at 1181 n.21.

Ninth Circuit ruled that because "no stigma results from any particular school assignment,"[172] individualized determinations were unnecessary.[173]

In *McFarland*, however, the Sixth Circuit ruled the student assignment plan did provide individualized review, asserting that "like the law school, the . . . assignment process focuses a great deal of attention upon the individual characteristics of a student's application, such as place of residence and student choice of school or program."[174] Yet the Sixth Circuit reached this conclusion by tailoring its analysis of the individualized review requirement to a "totally different context."[175] This contextual approach allowed the court to rule race was one factor among many in determining student assignment.[176] Thus, with respect to individualized determinations, both the Sixth and Ninth Circuits believed their analyses were consistent with the requirements of *Grutter* and *Gratz*. However, as discussed below, the Supreme Court rejected both approaches, signaling the newly enhanced importance of individualized determinations.[177]

Next, in *Parents Involved*, the Ninth Circuit ruled the voluntary desegregation plan did not contain an impermissible quota.[178] Characterizing the race-based tiebreaker as flexible in application, the court held there was no quota because the "race-based tiebreaker does not set aside a fixed number of slots for nonwhite or white students in any of the District's schools."[179] Instead, the Ninth Circuit noted the tiebreaker only came into play when a school was oversubscribed, and that the number of white and nonwhite students in the high schools varied from year-to-year.[180] Under Seattle's plan, the race-based tiebreaker was triggered only when the racial demographics at an oversubscribed school were within "plus or minus 15 percent of the District's demographics."[181] Analogizing to the *Grutter* Court's discussion of "critical mass," the Ninth Circuit reasoned that the District's 15% plus or minus variance was necessary to provide a "critical mass of students needed to

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[172] *Id.* at 1181.

[173] *Id.* at 1184. The court also justified its conclusion that no individualized determinations were necessary "[b]ecause race itself is the relevant consideration" when the school district attempts to redress de facto segregation. *Id.* at 1183.

[174] McFarland v. Jefferson County Pub. Sch., 330 F. Supp. 2d 834, 859 (W.D. Ky. 2004), *aff'd*, 416 F.3d 513 (6th Cir. 2005), *rev'd*, 127 S. Ct. 2738 (2007).

[175] *Id.*

[176] *Id.* ("Many factors determine student assignment, including address, student choice, lottery placement, and, at the margins, the racial guidelines. But, race is simply one possible factor among many, acting only occasionally as a permissible 'tipping' factor in most of the . . . assignment process.").

[177] *See infra* Part III.

[178] *Parents Involved*, 426 F.3d at 1184.

[179] *Id.*

[180] *Id.* at 1184-85.

[181] *Id.* at 1169.

'realize the educational benefits of a diverse student body.'"[182] Consequently, there was no quota.[183]

In ruling that the school district had considered race-neutral alternatives and found them ineffective, the Ninth Circuit applied *Grutter*-style deference.[184] Recall that one hallmark of *Grutter*'s narrow tailoring analysis was the Law School was not required to choose between its educational and diversity objectives.[185] Thus, the Court did not require the Law School to "lower admissions standards for all students" because such a "drastic remedy . . . would require the Law School to become a much different institution and sacrifice a vital component of its educational mission."[186] That is, *Grutter* ruled the Law School could use racial preferences *and* pursue other institutional objectives.

The Ninth Circuit followed this approach. The court neither required the school district to exhaust race-neutral alternatives, nor select less effective methods in order to pursue its goal.[187] The school district could, for instance, pursue its institutional goal of fostering parental and student choice while at the same time advancing racial diversity within the district.[188] Consequently, the Ninth Circuit deferred to the school district and found that a poverty classification, de-emphasis of the race-based tiebreaker, and a lottery system would all have been less effective in achieving the school district's varied goals.[189] Finally, the Ninth Circuit ruled the school district's plan minimized harm to whites and was appropriately time-limited because the plan contained a periodic review requirement.[190]

While the Sixth Circuit did not defer to Jefferson County on the narrow tailoring prong of the strict scrutiny analysis,[191] it concluded the school district met all of the narrow tailoring requirements. First, there was no quota because "one finds neither an automatic assignment nor a 'narrow band' of percentages of Black students among [Jefferson County Public] schools."[192] Second, for the reasons discussed above, the court ruled the individualized review

[182] *Id.* at 1185.

[183] *Id.* at 1186.

[184] *See id.* at 1188.

[185] Grutter v. Bollinger, 539 U.S. 306, 309 (2003).

[186] *Id.* at 340.

[187] *See Parents Involved*, 426 F.3d at 1191.

[188] *See id.*

[189] *Id.* at 1187-91 ("[W]hen a racially diverse school system is the goal (or racial concentration or isolation is the problem), there is no more effective means than a consideration of race to achieve the solution.").

[190] *Id.* at 1191-93 (explaining that the school district revisits the plan annually and is responsive to the parents' and students' choice patterns).

[191] McFarland v. Jefferson County Pub. Sch., 330 F. Supp. 2d 834, 856 (W.D. Ky. 2004), *aff'd*, 416 F.3d 513 (6th Cir. 2005), *rev'd*, 127 S. Ct. 2738 (2007).

[192] *Id.* at 856-58.

requirement was met. Third, the court ruled white students were not harmed by the student assignment plan because "no student is directly denied a benefit because of race so that another of a different race can receive that benefit."[193] Finally, the court ruled that the "Board not only considered, but actually implemented, a variety of race-neutral strategies to achieve its goals."[194]

In sum, both cases bore *Grutter*'s distinct imprint. As I argued above, it was quite possible to interpret *Grutter* as providing a "green light" to government to use racial preferences to pursue racial diversity where such diversity generated significant positive social externalities and whites were not unduly harmed. Because *Grutter* emphasized the importance of individualized determinations in a highly selective merits-based context, it was perfectly reasonable for the government to assume it was not required to perform individualized determinations in other contexts where it was inefficient or disruptive to do so. With this view of *Grutter*, individualized determinations were highly recommended but not absolutely mandatory. At the same time, it was perfectly reasonable for government to interpret *Gratz* narrowly; the scope and the nature of the racial preference must be covert rather than overt in order to reduce the politics of racial hostility. This is almost certainly how the Sixth and Ninth Circuit Courts of Appeals understood *Grutter* and *Gratz*. These assumptions, however, turned out to be incorrect in the eyes of the Supreme Court.

B. *Public Employment*

Public employers, like public universities, are institutions that are similarly situated in their ability to disperse the social benefits *Grutter* associated with racial diversity. In *Grutter*, the Court recognized that the university is a particularly effective vehicle for the provision and dispersal of the benefits associated with interracial interaction.[195] But colleges and universities are not necessarily the only institutional actors well-suited to this task. Cynthia Estlund argues that racial and ethnic integration within the workplace strengthens social bonds among individuals, which in turn, "produce more positive attitudes and relations across ethnic and racial lines."[196]

Indeed, Justice Scalia's *Grutter* dissent observed (with more than a hint of irony) that the compelling interest identified by the majority could not even be characterized as providing an "educational benefit."[197] After all, the benefits associated with cross-racial understanding were not "uniquely relevant to law school."[198] Instead, those benefits of racial diversity were "lesson[s] of life

[193] *Id.* at 861.

[194] *Id.*

[195] Grutter v. Bollinger, 539 U.S. 306, 330-31 (2003).

[196] *See* CYNTHIA L. ESTLUND, WORKING TOGETHER: HOW WORKPLACE BONDS STRENGTHEN A DIVERSE DEMOCRACY 11 (2003).

[197] *Grutter*, 539 U.S. at 347 (Scalia, J., dissenting).

[198] *Id.*

rather than law,"[199] which could (and perhaps should) be provided in contexts exogenous to the university setting. Justice Scalia argued, if it is appropriate for the University of Michigan to take account of race to provide these benefits, then "surely it is no less appropriate – indeed, *particularly* appropriate – for the civil service system of the State of Michigan to do so."[200]

A significant question after *Grutter* was whether public employers had a compelling interest in using racial preferences to obtain racial diversity when such diversity assists the public employer's "operational needs."[201] The operational needs argument connects the ability of the public employer to perform its public function directly to the presence of a racially diverse workforce. Thus, "[t]he argument is that for certain government agencies, such as local police departments, to be effective and have the cooperation and confidence of the communities they serve, the agencies must demonstrably represent all racial segments of the local community."[202]

This argument links to the relationship *Grutter* recognized between "cross-racial understanding" and the learning process.[203] Recall that in *Grutter*, the Court deferred to the Law School with respect to the relationship between the need for racial diversity and its educational mission.[204] The Court simply accepted that "such diversity is essential to [the Law School's] educational mission."[205] Deferring to the Law School, the Court held "cross-racial understanding" enhanced the educational experience because it "promotes learning outcomes."[206] The upshot is that without racial diversity, the government's ability to function as an effective educator is diminished. In this way, *Grutter* stands for the proposition that racial diversity is an "operational need" of government when it acts as educator. This makes sense when we reflect on *Grutter*'s simultaneous rejection of "outright racial balancing, which is patently unconstitutional."[207] *Grutter* does not simply accept a "diversity rationale"[208] as a compelling governmental interest, but instead accepts that rationale as constitutive of other important and widely-shared social goods: an enhanced educational experience, business competitiveness and military

[199] *Id.*

[200] *Id.* at 347-48.

[201] *See* Michael K. Fridkin, *The Permissibility of Non-Remedial Justifications for Racial Preferences in Public Contracting*, 24 N. ILL. U. L. REV. 509, 515 (2004) ("Besides diversity, a frequent candidate for consideration as a non-remedial justification for racial preferences is an agency's "operational needs.").

[202] *Id.*

[203] *Grutter*, 539 U.S. at 308.

[204] *Id.* at 328.

[205] *Id.*

[206] *Id.* at 330.

[207] *Id.*

[208] Lorin J. Lapidus, *Diversity's Divergence: A Post-*Grutter *Examination of Racial Preferences in Public Employment*, 28 W. NEW ENG. L. REV. 199, 248 (2006).

readiness, and effective leadership in a modern democracy.[209]

In 2005, the United States District Court for the District of New Jersey ruled the City of Newark had a compelling interest in eliminating de facto segregation in the city's firehouses, and the benefits of diversity "better prepare[] a firefighter to work effectively with his colleagues" which "can only improve their performance in their often dangerous work."[210] While the Third Circuit ultimately disagreed and overturned the district court's decision,[211] the Seventh Circuit explicitly adopted the "operational needs" approach in the law enforcement context. In *Petit v. City of Chicago*,[212] the Seventh Circuit found that racial diversity benefited individual police officers, the Chicago Police Department ("CPD") as an institution, and the community the department served.[213]

In *Petit*, white police officers challenged an examination that determined promotion to the rank of sergeant.[214] The test had an adverse impact on African-American and Hispanic officers; rank order promotion based on exam scores would have resulted in few promotions for members of those groups.[215] The City corrected for this result by "standardizing" the examination results based on race.[216] The white police officers argued that a "standardization"

[209] *Grutter*, 539 U.S. at 330-31.

[210] Lomack v. City of Newark, No. Civ.A.04-6085(JWB), 2005 WL 2077479, at *7 (D.N.J. Aug. 25, 2005), *rev'd*, 463 F.3d 303 (3d Cir. 2006).

[211] Lomack v. City of Newark, 463 F.3d 303, 305 (3d Cir. 2006) (holding that the City of Newark may not "employ a race-based transfer and assignment policy when any racial imbalance . . . is not the result of past intentional discrimination by the city"). Of particular concern to the Third Circuit was the breadth of the district court's interpretation of *Grutter*. *Id.* at 310 ("*Grutter* does not stand for the proposition that the . . . benefits of diversity are *always* a compelling interest, regardless of the context."). For the Third Circuit, *Grutter* "stands for the narrow premise that the educational benefits of diversity can be a compelling interest to an institution whose mission is to educate. The Fire Department's mission is not to educate." *Id.*

[212] 352 F.3d 1111 (7th Cir. 2003), *cert. denied*, 541 U.S. 1074 (2004).

[213] *Id.* at 1115 (holding that a diverse population would "set the proper tone in the department and . . . earn the trust of the community, which in turn [would increase] police effectiveness in protecting the city").

[214] *Id.* at 1112.

[215] *Id.* at 1116-17.

[216] *Id.* at 1117. At the time the challenged examination was given, the City of Chicago was under a federal court order "not to promote officers on rank-order examinations unless it could document the test's validity as a rank order promotional device." *Id.* at 1116. Validity meant the city had to show there was a relationship between the testing mechanism and job tasks in the new position. *Id.* Thus, validity turned on whether the city could demonstrate that an applicant's high score on the promotion test would "result in better performance as a sergeant." *Id.* In order to comply with the validity requirement, the city "standardized" the examination scores based on race, thereby "removing [the] differences between the scores" between white applicants and black and Hispanic applicants. *Id.* at 1117. These standardized scores were then used to determine promotion order. *Id.*

process that attempted "to produce results that reflected the score the candidate would have received if the test had not had an adverse impact" violated the Equal Protection Clause.[217] The Seventh Circuit did not uphold the CPD's affirmative action plan against constitutional challenge as an appropriate remedy for past intentional discrimination;[218] instead, the Seventh Circuit accepted the CPD's argument that the "affirmative action promotions"[219] did not violate the Equal Protection Clause because they promoted "diversity in a large metropolitan police force charged with protecting a racially and ethnically divided major American city."[220]

The Seventh Circuit began its analysis with an extended discussion of *Grutter*'s vision of diversity, noting that the *Grutter* Court "deferred to the law school's educational judgment that 'such diversity is essential to its educational mission.'"[221] From there, the court connected educational diversity to the operational needs of the police department and suggested that the need for diversity in this context might be "even more compelling" than in higher education.[222] When the government acts to protect public safety, racial diversity on the force and particularly in supervisory positions is essential to that mission.[223] The Seventh Circuit recognized that racial diversity has many benefits, including boosting the operational effectiveness of a force that must police a multi-racial rather than homogeneous community.[224] This is

[217] *Id.*

[218] *See id.* at 1114. The central rule for public entities seeking to justify the use of racial preferences as a remedy for intentional discrimination is the following: while "no formal, judicial determination of past discrimination by the governmental unit in question is necessary to show the requisite compelling governmental interest," "evidence of such discrimination must be 'strong' or 'convincing.'" LEWIS & NORMAN, *supra* note 57, at 386. Consequently, a public employer's voluntary affirmative action plan that seeks to remedy intentional discrimination will be evaluated using a more robust version of strict scrutiny review than the *Grutter* Court applied. Indeed, the district court below denied the city's motion for summary judgment on the issue of whether there was evidence of "past discrimination . . . adequate to establish a compelling interest to cure the effects of past discrimination." Petit v. City of Chicago, 239 F. Supp. 2d 761, 778-87 (N.D. Ill. 2002), *aff'd*, 352 F.3d 1111 (7th Cir. 2003), *cert. denied*, 541 U.S. 1074 (2004). At the same time, the district court granted the city's summary judgment motion on the issue of whether the operational need interest was compelling. *Id.* at 794. For reasons I will discuss, the Seventh Circuit affirmed that holding on appeal. *Petit*, 352 F.3d at 1111.

[219] *Id.* at 1114.

[220] *Id.*

[221] *Id.*

[222] *Id.*

[223] *Id.* (explaining that the Seventh Circuit had "left open a small window for forms of discrimination that are supported by compelling public safety concerns" (quoting Reynolds v. City of Chicago, 296 F.3d 524, 530 (7th Cir. 2002))).

[224] *Id.* at 1115 ("Effective police work, including the detection and apprehension of criminals, requires that the police have the trust of the community and they are more likely

consistent with *Grutter*'s approach, which recognized that while the educational experience itself was richer with the presence of a racially diverse class, there were also a variety of benefits that were temporally and spatially exogenous to the university experience.[225]

Next, the Seventh Circuit explicitly deferred to the CPD with regard to the relationship between racial diversity and its operational needs.[226] The court saw no need to limit judicial deference to the academic arena.[227] Thus, the Seventh Circuit applied *Grutter* "lock, stock, and barrel," first applying the diversity rationale to the public employment context and then deferring to the governmental actor that "affirmative action was warranted to enhance" its operations.[228]

Deferring to the "views of experts and Chicago police executives [on] affirmative action,"[229] the Seventh Circuit found that a large metropolitan police force must be racially diverse because it will enhance "the public's perception of the CPD, which in turn enhance[s] the department's ability to prevent and solve crime."[230] The CPD's enhanced institutional effectiveness simultaneously benefited the community.[231] Along these lines, the Seventh Circuit found additional minority sergeants were uniquely positioned to defuse "potentially explosive situations."[232] But beyond the effects a more racially diverse department had on the department's effectiveness and the community's well-being, the court also found such diversity benefited individual police officers by "changing [their] attitudes."[233] Consequently, the court ruled that the CPD had a compelling interest in "a diverse population at the rank of sergeant in order to set the proper tone in the department and to earn the trust of the community, which in turn increases police effectiveness in protecting the city."[234]

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to have it if they have 'ambassadors' to the community of the same [race or] ethnicity." (quoting *Reynolds*, 296 F.3d at 529)). The *Petit* court also recognized that diversity among police supervisors internally changed the "attitudes of officers." *See id.*

[225] Cynthia L. Estlund, *Putting* Grutter *to Work: Diversity, Integration, and Affirmative Action in the Workplace*, 26 BERKELEY J. EMP. & LAB. L. 1, 34 (2005) ("But *Grutter*, and its recognition that racially integrated institutions do great social good and advance the cause of equality . . . should allow public employers to recover their 'normal' entitlement to deference in the defense of employment decisions that help to advance that project of institutional integration.").

[226] *Petit*, 352 F.3d at 1114.

[227] *Id.* at 1115.

[228] *Id.* at 1114.

[229] *Id.*

[230] *Id.* at 1115.

[231] *Id.* at 1114-15 ("[W]hen police officers are routinely supervised by minorities, the fears that the police department is hostile to the minority community will naturally abate.").

[232] *Id.* at 1115.

[233] *Id.*

[234] *Id.*

The Seventh Circuit also applied the narrow tailoring test in a deferential fashion. The court ruled the standardization process was narrowly tailored essentially because the interests of the white candidates were not unduly burdened.[235] This outcome was completely consistent with *Grutter*-style narrow tailoring; the outcome on a more rigorous application of narrow tailoring would be more dubious. For instance, the Seventh Circuit noted that all of the promoted candidates were "uniformly qualified for promotion,"[236] suggesting that no unqualified candidate of color was promoted ahead of a qualified white candidate. Yet under a more stringent application of narrow tailoring review, that the favored candidates were also qualified would not necessarily allow the affirmative action program to withstand constitutional review.[237]

Next, the Seventh Circuit distinguished the standardization process used by the CPD from the fixed number of bonus points awarded to underrepresented minority candidates seeking admission to the LSA, which the Supreme Court struck down in *Gratz*.[238] In the court's view, the standardization process passed muster because it did not affect "every 'minimally qualified' candidate" as it did in *Gratz*.[239] However, it is not clear that *every* minimally qualified minority must receive a benefit in order for a racial preference scheme to flunk narrow tailoring. A stricter application of the narrow tailoring test would focus on barriers to competition created by the affirmative action program, an approach that is consistent with *Croson* and *Adarand*.[240] The Seventh Circuit read *Grutter* broadly (similar positive externalities, deference on both prongs of narrow tailoring)[241] and *Gratz* narrowly (every minority must benefit from the racial preference).[242] Until *Parents Involved*, such an approach was a perfectly logical reading of the two cases. Finally, the Seventh Circuit ruled that the standardization process was narrowly tailored because it functioned to "eliminat[e] an advantage the white officers had on the test."[243] But this rationale – affirmative action being necessary to offset whites' advantages –

[235] *Id.* at 1117 ("[S]tandardizing the scores can be seen not as an arbitrary advantage given to the minority officers, but rather as eliminating an advantage the white officers had on the test.").

[236] *Id.* (arguing that even the lowest scoring members of each racial group scored at least ten points above the passing score).

[237] *See, e.g.*, Gratz v. Bollinger, 539 U.S. 244, 251-55 (2003) (holding the school's plan unconstitutional because an applicant from an underrepresented minority could be granted admission when that applicant scored into the same range as a Caucasian applicant who was not admitted).

[238] *Petit*, 352 F.3d at 1117.

[239] *Id.*

[240] *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 238 (1995); Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989).

[241] *See Petit*, 352 F.3d at 1114.

[242] *See id.* at 1117.

[243] *Id.*

flies in the face of much affirmative action doctrine.[244]

The Seventh Circuit's approach to determining whether the affirmative action promotions survived constitutional review suggested that the court viewed *Grutter* as perfectly applicable to the public employment context. The Seventh Circuit's assumption was grounded in a particular view of *Grutter*: it is applicable to contexts where the governmental actor can show racial diversity within its particular hierarchy generates positive externalities similar to those recognized by *Grutter* in the higher education context. As discussed below, that interpretation of *Grutter* is more difficult to support after the decision in *Parents Involved*.

C. *Public Contracting*

My discussion of the compelling interest identified in *Grutter* largely centered on the underlying "public interest" the Court balanced against the interests of frustrated white applicants to the Law School. While I recharacterized that interest as the "common good," I defined the benefits associated with the use of racial preferences in higher education as essentially prospective rather than remedial, and available to a broader group instead of confined to a narrow sub-class.[245] One argument is that the government's use of racial preferences in public contracting can be justified on the basis that they contribute to the "common good" and generate a universal or nearly universal benefit that is widely shared. This line of argument raises a startling possibility: to the extent *Grutter* applies to *all* governmental uses of race, including public contracting, it overruled *Croson* and *Adarand* sub silentio. After all, if *Grutter* provides an additional rationale for the government's use of race in the public contracting context, then the government need not meet the much more onerous requirements of the remedial approach.

Indeed, while it is difficult to apply *Grutter* to the public contracting context, it is not impossible. Along these lines, one positive externality associated with minority set-asides in public contracting programs is the governmental unit's own "vital economic development."[246] In *Builders Association of Greater Chicago v. City of Chicago*,[247] Chicago attempted to justify its public works set-aside program by arguing that "there is an economic benefit which justifies the City's racial and gender preferences."[248] The city's position was that its own economic development was greatly

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[244] *Croson*, 488 U.S. at 486 (rejecting both the argument that legislatures are limited to remedial efforts to counteract prior discrimination and the argument that legislatures have broad power to "define and attack the effects of prior discrimination"); *see also Adarand*, 515 U.S. at 239 (Scalia, J., concurring in part and concurring in the judgment) ("[U]nder our Constitution there can be no such thing as either a creditor or a debtor race.").

[245] *See supra* Part I.B.

[246] Fridkin, *supra* note 201, at 522.

[247] No. 96C 1122, 2003 WL 1786489 (N.D. Ill. Apr. 2, 2003).

[248] *Id.* at *7.

enhanced by the presence of minority-owned firms, and therefore its interest in the set-aside program was compelling.[249] One commentator described the link between Chicago's economic benefit and its set-aside program as follows:

> Minority-owned firms locate themselves within the City's disadvantaged areas, and hire workers residing within those areas, at rates much greater than the nonminority firms. Therefore, racial contracting preferences result in the City retaining within its economic boundaries in general, and its disadvantaged areas in particular, tens of millions of its own public tax dollars. This retention has helped the City achieve vital economic stimulation: a rehabilitated property tax base, increased employment, raised wages and ignited business activity in disadvantaged areas and throughout the City.[250]

In a decision handed down shortly before *Grutter* was decided, the district court in *Builders Association* barred any evidence "offered to show that the city ordinance has a nonremedial justification."[251] Nevertheless, in light of *Grutter*, the city's economic development argument raised some interesting possibilities.

First, the district court dismissed any evidence the city offered to show that racial preferences provided an economic benefit to Chicago, because the "Supreme Court has not definitively addressed the issue of whether nonremedial benefits can justify racial and gender classifications."[252] *Grutter* undercut that holding, however – recall one of *Grutter*'s central innovations was its determination that a nonremedial justification *could* support the government's use of racial preferences.[253] After *Grutter*, the question was no longer whether the Court would accept a nonremedial justification for the government's use of racial preferences; a majority of the Court held that it would. Instead, the question was whether the Court would accept a nonremedial justification in contexts *outside* of higher education. Presumably, the positive externalities described above would accrue to all city residents rather than solely to the minority beneficiaries of such a program. The broad-based nature of the city's justification in *Builders Association* suggests at least some kinship with the extra-educational, "common good" orientation of the Court's compelling interest analysis in *Grutter*.

Of course, one problem is that the positive economic externalities associated with the use of the racial preferences described above seem unrelated to the kinds of benefits associated with racial diversity that are outlined in *Grutter*. Consequently, the next question is whether it is possible to argue that the use of racial preferences in the public contracting area generates positive

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[249] Fridkin, *supra* note 201 at 522.

[250] *Id.* at 522-23.

[251] *Builders Ass'n*, 2003 WL 1786489, at *7.

[252] *Id.* at *8.

[253] *See supra* Part I.A.

externalities similar to those observed in *Grutter*. The answer to this question is yes. To the extent the government's procurement policies distribute what is essentially a public benefit,[254] the distribution of that public benefit must at least appear to be fair or the government risks erosion of public confidence in the governmental contracting entity more generally.[255] Thus, if public contracting opportunities are devoid of minority participation, this sends the message that public programs are not open to all. From an institutional perspective, this undercuts the community's faith in, and belief in the fairness and legitimacy of, government as government.[256] This concern dovetails with the Court's emphasis in *Grutter* on institutional legitimacy such that "[a]ll members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training."[257]

Another concern is the arguable dissimilarity between the selection mechanisms employed by the government in the higher education and public contracting contexts. The selective admissions process as described by *Grutter* is multidimensional and multifaceted. Selective institutions want not just well-qualified students, but also a diverse class along a wide variety of dimensions: geographic, experiential, racial and ethnic. On the other hand, the selection process in the public contracting context is one-dimensional since the government's ultimate aim should be singular: awarding the contract to the lowest qualified bidder.[258] Thus, one argument is that the relaxed scrutiny associated with the government's use of racial preferences in the higher education context vis-à-vis *Grutter* is inapplicable to the government's use of racial preferences in the public contracting context.

One response to this line of reasoning is that the competitive bidding selection process is often more multifaceted than it first appears. For instance, many municipalities may only contract with the lowest "responsible" bidder, who is not necessarily the lowest cost provider.[259] Instead, where such a

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[254] *See* Thomas W. Merrill, *Public Contracts, Private Contracts, and the Transformation of the Constitutional Order*, 37 CASE W. RES. L. REV. 597, 626-27 (1987) (arguing in the context of the Contracts Clause that "public contracts, no less than welfare benefits or antidiscrimination laws, are viewed as public entitlements entitled to special judicial protection").

[255] Gene Ming Lee, Note, *A Case for Fairness in Public Works Contracting*, 65 FORDHAM L. REV. 1075, 1093 (1996) ("An important aim in the government's procurement of goods and services is the appearance of fairness.").

[256] As Fridkin aptly suggests, "[i]f the firms engaged in urban construction projects are principally white-owned, there may be similar risks to the perceived legitimacy of the public leaders selecting these firms if the firms are performing work in, and receiving taxpayer dollars from, communities of color." Fridkin, *supra* note 201, at 524.

[257] Grutter v. Bollinger, 539 U.S. 306, 332 (2003).

[258] *See* Steven R. Schooley & Michael W. Andrew, Jr., *The Devil in Devolution: State and Local Preference Programs*, CONSTRUCTRION LAW., Oct. 1996, at 18, 18.

[259] *See* John K. Gisleson, *Competitive Bidding of Municipal Contracts in Pennsylvania and the Litigation it Generates: Who is the Lowest Responsible Bidder?*, 41 DUQ. L. REV.

requirement applies, the municipality has discretion to select a higher bidder where the lower bidder is not sufficiently responsible.[260] The municipality may consider a number of factors in making this determination, including "financial responsibility, also integrity, efficiency, industry, experience, promptness, and ability to successfully carry out the particular undertaking."[261] The theory behind the responsible bidder requirement is that the expenditure of public money must be for the "public good."[262] Indeed, some scholars have suggested that the use of procurement policies to achieve social agendas restricts "logical market policy."[263] These observations suggest a more multidimensional public contracting process that conceivably could be analogized to the admissions process for selective colleges and universities.

Next, even if one rejects the argument that *Grutter* overturned *Croson* and *Adarand* sub silentio, there is still little question that *Grutter* was in tension with those cases. For example, consider the narrow tailoring requirement. Even if the government has to meet the more stringent remedial standard by demonstrating a compelling interest for its use of racial preferences in the public contracting context, *Grutter*'s relaxed approach could be applied to the narrow tailoring inquiry. This argument boils down to the question of whether *Grutter*'s emphasis on "good faith" rather than skepticism might define the narrow tailoring inquiry in the public contracting context. Prior to *Parents Involved*, some lower federal courts evaluating the constitutionality of racial preferences in the public contracting area cited *Grutter* either for the proposition that narrow tailoring factors associated with higher education apply outside of that context, or to highlight the importance of governmental "good faith."[264] While the application of some elements of *Grutter*'s deferential narrow tailoring approach did not necessarily change the outcome in those cases, *Grutter*'s more deferential approach clearly informed those courts' analyses.

For instance, two lower court cases applied *Grutter*'s approach to the consideration of race-neutral alternatives on the narrow tailoring inquiry. *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation* concerned a Department of Transportation Disadvantaged Business Enterprises ("DBE") program that provides "contracting advantages to small businesses owned and

513, 521 (2003).

[260] *Id.* at 529.

[261] *Id.*

[262] *Id.* at 530.

[263] Schooley & Andrew, *supra* note 258, at 18.

[264] *See* W. States Paving Co. v. Wash. State Dep't of Transp., 407 F.3d 983, 994 (9th Cir. 2005) (highlighting the importance of governmental good faith); Sherbrooke Turf, Inc. v. Minn. Dep't of Transp., 345 F.3d 964, 969 (8th Cir. 2003) (finding the government had a compelling interest in "not perpetuating the effects of racial discrimination in its own distribution of federal funds").

controlled by 'socially and economically disadvantaged individuals.'"[265] In order to determine contractor eligibility, states accepting funds under the program "must employ a rebuttable presumption that women and members of most racial minority groups are socially and economically disadvantaged."[266] Two non-minority contractors sued alleging that the program violated the equal protection component of the Fifth Amendment's Due Process Clause.[267] The Eighth Circuit ruled the government has a compelling interest in "not perpetuating the effects of racial discrimination in its own distribution of federal funds."[268]

The Eighth Circuit's narrow tailoring analysis reflected the impact of *Grutter*'s deferential approach to strict scrutiny review. On the one hand, the court cited *Adarand* for the proposition that the Department of Transportation ("DOT") regulations implementing the DBE program satisfied narrow tailoring because they strongly emphasized race-neutral means to enhance minority participation in government contracting.[269] But in the very next sentence, the court cited *Grutter* for the proposition that "'[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative,' but it does require 'serious, *good-faith* consideration of workable race-neutral alternatives.'"[270] Along these lines, consider as well *Western States Paving Co. v. Washington State Department of Transportation*,[271] in which the Ninth Circuit considered the constitutionality of the same DOT program that was at issue in *Sherbrooke Turf*. The court's discussion of race-neutral alternatives in *Western States* essentially tracks that of *Sherbrooke Turf*, citing the exact same *Grutter* "good faith" language the *Sherbrooke Turf* court had relied upon.[272]

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[265] *Sherbrooke Turf*, 345 F.3d at 968 (quoting the DBE program). The program was authorized under the Transportation Equity Act for the 21st Century, Pub. L. No. 105-178, § 1101(b)(1), 112 Stat. 107, 113 (1998). *Sherbrooke Turf*, 345 F.3d at 968-69.

[266] *Sherbrooke Turf*, 345 F.3d at 968.

[267] *Id.* at 967-69.

[268] *Id.* at 969.

[269] *Id.* at 972.

[270] *Id.* (emphasis added). According to the court, this requirement was met for three principal reasons. First, "[t]he state must meet the 'maximum feasible portion' of its overall goal through race-neutral means and must submit for approval a projection of the portion [of the overall DBE goal] it expects to meet through race-neutral means." *Id.* at 971. Second, under the program, while set-aside contracts are permitted, they are "limited to those instances 'when no other method could be reasonably expected to redress egregious instances of discrimination.'" *Id.* (citing 49 C.F.R. § 26.43(b) (2007)). Finally, if a state meets its overall DBE goal "for two consecutive years through race-neutral means, [the state] is not required to set an annual overall [DBE] goal until it does not meet its prior overall goal for a year." *Id.* at 972.

[271] 407 F.3d 983 (9th Cir. 2005).

[272] *Id.* at 993 (quoting Grutter v. Bollinger, 539 U.S. 306, 339 (2003)). *Accord* N. Contracting, Inc. v. Illinois, No. 00-4515, 2005 WL 2230195, at *24 (N.D. Ill. Sept. 8, 2005), *aff'd*, 473 F.3d 715 (7th Cir. 2007). *Western States* ruled the program was narrowly

The application of *Grutter* "good faith" in this context would seem to be in tension with the treatment of race-neutral alternatives in *Croson*. In *Croson*, the Court seemed to indicate that all feasible race-neutral alternatives must be considered and *rejected* prior to resorting to race-conscious means. The tenor of the *Croson* Court's discussion suggested that implementation of race-neutral means would have obviated the need for the set-aside program.[273] As Ian Ayres has observed, "*Croson* requires policymakers to find that race-neutral means could not achieve the government's compelling interest."[274] This approach to the narrow tailoring inquiry reflects a deep suspicion of race-conscious mechanisms such that race-neutral alternatives are entirely acceptable even if less effective at achieving the government's compelling interest.

Grutter suggested otherwise. In *Grutter*, the Court stated that, at least in higher education, "[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative."[275] Thus, narrow tailoring requires consideration rather than exhaustion of "workable race-neutral alternatives."[276] Consideration of race-neutral alternatives does not require universities to "choose between maintaining a reputation for excellence or fulfilling a commitment to provide educational opportunities to . . . all groups."[277] In the remedial context, on the other hand, courts "should give particularly intense scrutiny to whether a nonracial approach . . . could promote the substantial interest about as well and at tolerable administrative expense."[278] With *Grutter*'s view of narrow tailoring, the government's consideration of race-neutral alternatives to achieve its ends merely substantiates its good faith; exhaustion of such alternatives is not required because the government's good faith is presumed rather than doubted. The difference in treatment of the question of whether race-neutral alternatives must be exhausted rather than simply considered is yet another indication of the different brand of strict scrutiny review that the Court applied in *Grutter*.

That is not to suggest that reference to the *Grutter* approach to race-neutral alternatives was necessarily outcome determinative in those cases. There is evidence to suggest the DOT program at issue in *Sherbrooke Turf* and *Western*

tailored because, inter alia, the "regulations place a preference on the use of race-neutral means . . . to achieve a State's DBE utilization goal." *W. States*, 407 F.3d at 993 (citing *Sherbrooke Turf*, 345 F.3d at 972).

[273] Along these lines, the Court stated that "there does not appear to have been any consideration of the use of race-neutral means to increase minority business participation in city contracting." Richmond v. J.A. Croson Co., 488 U.S. 469, 507 (1989); *accord* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237-38 (1995).

[274] Ian Ayres, *Narrow Tailoring*, 43 UCLA L. REV. 1781, 1787 (1996).

[275] *Grutter*, 539 U.S. at 339.

[276] *Id.*

[277] *Id.*

[278] Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 280 n.6 (1986).

States could have met the requirements of narrow tailoring as articulated in *Croson* and *Adarand*.[279] Instead, the migration of *Grutter*'s approach to narrow tailoring in the contracting context demonstrates *Grutter*'s potential to unsettle the "remedial" category. In *Western States*, not only did the Ninth Circuit cite the same *Grutter* language as *Sherbrooke Turf* in the context of its discussion of race-neutral alternatives, but it also referenced *Grutter* in its discussion of the distinction between a quota and a goal.[280] Citing *Grutter* for the proposition that "a permissible goal . . . requires only a good-faith effort . . . to come within a range demarcated by the goal itself,"[281] the court went on to rule that the DOT program "provides for a flexible system of contracting goals that contrasts sharply with the rigid quotas invalidated in *Croson*."[282] The emphasis on good faith and flexibility suggests a more relaxed approach to the narrow tailoring analysis than *Croson* and *Adarand*.

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

In *Parents Involved in Community Schools v. Seattle School District No. 1*,[283] the Supreme Court ruled that both the Seattle School District and the

[279] In a case decided prior to *Grutter*, the Tenth Circuit Court of Appeals ruled the DOT program was narrowly tailored because, inter alia, it "emphasize[d] the continuing need to employ non-race-conscious methods even as the need for race-conscious remedies is recognized." Adarand Constructors, Inc. v. Slater, 228 F.3d 1147, 1179 (10th Cir. 2000), *cert. dismissed*, 534 U.S. 103 (2001). *Adarand* seems to suggest that the references to *Grutter* in *Sherbrooke Turf* and *Western States* were not necessary to the result. The Tenth Circuit opinion was not the end of the litigation, however. Adarand petitioned the United States Supreme Court for a writ of certiorari and that petition was subsequently granted. Adarand Constructors, Inc. v. Mineta, 532 U.S. 941 (2001) (granting certiorari). Petitioner's brief on the merits argued that the Tenth Circuit had misapplied the controlling standard: "a 'race conscious remedy will not be narrowly tailored until less sweeping alternatives – particularly race-neutral ones – have been considered *and tried*.'" Petition for Writ of Certorari, Adarand Constructors, Inc. v. Mineta, 534 U.S. 103 (2001) (No. 00-730) (quoting Walker v. City of Mesquite, 169 F.3d 973, 983 (5th Cir. 1999)). Petitioner argued that an "array" of race-neutral solutions were available but not tried. *Id.* For instance, petitioner asserted Congress did not attempt to waive a bonding requirement for inexperienced firms before requiring the DOT to presume that every single Sri Lankan permanently residing in America has tried to enter the American highway construction business. *Id.* Consequently, there is some dispute as to whether the DOT program would have survived constitutional review under an exhaustion-based standard. The Supreme Court did not reach the merits of the argument, and subsequently dismissed the writ as improvidently granted. *Adarand*, 534 U.S. at 103 (dismissing certiorari as improvidently granted).

[280] W. States Paving Co. v. Wash. State Dep't of Transp., 407 F.3d 983, 993-94 (9th Cir. 2005).

[281] *Id.* at 994 (citing *Grutter*, 539 U.S. at 335).

[282] *Id.*

[283] 127 S. Ct. 2738 (2007).

Jefferson County School District's voluntary desegregation plans violated the Equal Protection Clause of the Fourteenth Amendment.[284] Writing for the majority, Chief Justice Roberts ruled that neither the Seattle nor Jefferson County plans were narrowly tailored because "other means would be effective."[285] Therefore, the two plans flunked the strict scrutiny test. However, Chief Justice Roberts' opinion did not receive five votes across the board. Five Justices (Roberts, Scalia, Thomas, Alito, and Kennedy) joined both the reasoning and the result in Parts I-A, I-B, II, III-A and III-C of the Chief Justice's opinion for the Court.[286] Consequently, those portions of the Court's opinion have the force of a majority ruling (hereinafter "the majority").[287] Four Justices (Roberts, Scalia, Thomas, and Alito) joined the reasoning and the result in Parts III-B and IV of the Chief Justice's opinion, (hereinafter "the plurality").[288] Justice Kennedy wrote an opinion concurring in part and concurring in the judgment.[289] Finally, Justice Breyer wrote the main dissent, which three other Justices joined (Ginsberg, Souter, and Stevens).[290]

Justice Kennedy's concurring opinion adds an additional layer of complexity. His concurrence explains why he joined Parts III-A and III-C, which allowed the Court to strike down the voluntary desegregation plans.[291] But Justice Kennedy's concurrence also discussed his refusal to join the remainder of the Chief Justice's opinion: "parts of the opinion by the Chief Justice imply an all-too-unyielding insistence that race cannot be a factor in instances when, in my view, it may be taken into account."[292] And taken together with Justice Breyer's dissent, Justice Kennedy's concurrence establishes a five-vote majority for the proposition that school districts have a "compelling interest to achieve a diverse student population."[293] Thus, while Justice Kennedy's rationale for joining Parts III-A and III-C of the Court's opinion – which he signed in full – is technically dicta, a thorough analysis of

[284] *Id.* at 2746. The mechanics of each plan are discussed above in Part II.A.

[285] *Id.* at 2759 ("The minimal effect these classifications have on student assignments . . . suggests that other means would be effective.").

[286] *Id.* at 2746.

[287] In Part I-A, Chief Justice Roberts provided the general factual background and procedural history of the Seattle case. *Id.* at 2746-49. In Part I-B, Chief Justice Roberts provided the general factual background and procedural history of the Louisville case. *Id.* at 2749-50. In Part II, the Court ruled it had jurisdiction to decide the cases before it. *Id.* at 2750-51.

[288] *Id.* at 2755, 2761 (Roberts, C.J., plurality opinion).

[289] *Id.* at 2788 (Kennedy, J., concurring in part and concurring in the judgment).

[290] *Id.* at 2800 (Breyer, J., dissenting). Justice Thomas also wrote a concurring opinion, *id.* at 2768 (Thomas, J., concurring), and Justice Stevens filed a separate dissent, *id.* at 2797 (Stevens, J., dissenting).

[291] *Id.* at 2793 (Kennedy, J., concurring in part and concurring in the judgment).

[292] *Id.* at 2791.

[293] *Id.* at 2797.

his concurrence is crucial to any understanding of *Parents Involved*. Although Justice Kennedy spoke only for himself, his views must be given great weight.

A. *The Majority: Narrowing* Grutter *to the Higher Education Context*

In this Section, I explore Parts III-A and III-C of Chief Justice Roberts' *Parents Involved* opinion, each of which garnered five votes. The majority's holding can be stated with relative ease: the student assignment plans were unconstitutional because they were not narrowly tailored.[294] But to focus solely on the holding is to miss much of the majority opinion's import. While the majority never explicitly decided whether the student assignment plans lacked a compelling governmental interest, the Court's approach *implied* such a conclusion. And that implication – that the student assignment plans were not animated by a compelling interest – turned in large part on the majority's narrow interpretation of *Grutter*.

In Part III-A, the only relevant question was whether the voluntary desegregation plans fit within one of the two previously approved "compelling" interests: remedying the effects of past intentional discrimination, and "student body diversity 'in the context of higher education.'"[295] The Court held they did not. First, the majority ruled neither school district could rely on the remedial justification; Seattle had never been the subject of a "court-ordered desegregation decree," and a federal district court dissolved the Louisville desegregation order in 2000.[296]

Second, the majority ruled *Grutter* could not support the student assignment plans.[297] The *Parents Involved* majority narrowly defined the interest that *Grutter* found compelling as "student body diversity 'in the context of higher education.'"[298] This definition suggested that the "student body diversity" compelling governmental interest operated solely within the higher education context and no other; thus, the majority's holding that the "present cases are not governed by *Grutter*."[299] Indeed, the Court admonished several federal appellate courts for misinterpreting *Grutter* by relying on it to uphold student assignment plans in the primary and secondary school context. The Court explained that those federal courts misunderstood *Grutter* because they failed to appreciate that *Grutter* was decided in the unique context of higher education:

> Prior to *Grutter*, the courts of appeals rejected as unconstitutional

[294] *See id.* at 2760 (majority opinion).

[295] *Id.* at 2753 (quoting Grutter v Bollinger, 539 U.S. 306, 328 (2003)). The majority (as distinct from the plurality) never considered the additional interests that supported Louisville and Seattle's voluntary desegregation plans. *See id.* at 2760.

[296] *Id.* at 2752.

[297] *See id.* at 2753 (suggesting that because race is the decisive factor in the assignment plans, it is distinct from *Grutter* where race was one of many factors).

[298] *Id.* (quoting *Grutter*, 539 U.S. at 328).

[299] *Id.* at 2754.

> attempts to implement race-based assignment plans – such as the plans at issue here – in primary and secondary schools. After *Grutter*, however, the two Courts of Appeals in these cases, and one other, found that race-based assignments were permissible at the elementary and secondary level, largely in reliance on that case. In upholding the admissions plan in *Grutter*, though, this Court relied upon considerations unique to institutions of higher education . . . .[300]

That the majority so clearly situates *Grutter* within the higher education context suggests it is confining *Grutter* to that context alone. But this passage is illuminating for yet another reason. The Court's emphasis on the world before and after *Grutter* reflects a grudging recognition of just how much *Grutter did* change the legal landscape. Lower courts relied on *Grutter*'s more expansive vision of the governmental interest and its relaxed brand of narrow tailoring, and imported those innovations outside of the higher education context. The majority is deeply disapproving of that move. It is as if the Court is saying to government entities: you may not use *Grutter* to support your use of racial preferences, unless those preferences are employed in the higher education context. From this perspective, all governmental uses of race (outside the unique context of higher education) must be justified as a remedy for intentional discrimination.

The *Parents Involved* majority described the interest *Grutter* found compelling in narrow, cursory terms. Indeed, the majority's most expansive definition of *Grutter*'s "diversity interest" was that race should be "considered as part of a broader effort to achieve 'exposure to widely diverse people, cultures, ideas, and viewpoints.'"[301] The majority opined, "[t]he entire gist of the analysis in *Grutter* was that the admissions program at issue there focused on *each applicant as an individual*, and not simply as a member of a particular racial group."[302] Next, the Court characterized the selection mechanism approved in *Grutter* as flexible and multifaceted. The Court emphasized that *Grutter* upheld the Law School's admissions policy because race was just one factor among many determining admission.[303] In contrast, the Court characterized the student assignment plans at issue as monolithic: "under each plan when race comes into play, it is decisive by itself."[304] The majority's difficulty with the student assignment plans was that they improperly emphasized race at the expense of individual students' unique characteristics.

The problem with the majority's approach in Part III-A was that it lacked any discussion of why *Grutter* ruled that racial diversity was so important in the higher education setting or any explanation of the exogenous benefits *Grutter* associated with racial diversity. To be sure, an important part of

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[300] *Id.*

[301] *Id.* at 2753 (quoting *Grutter*, 539 U.S. at 330).

[302] *Id.* (emphasis added).

[303] *Id.* at 2753-54.

[304] *Id.* at 2753.

Grutter's analysis was the Court's discussion of the necessity of treating applicants as individuals. But that discussion was a key portion of the Court's narrow tailoring analysis. The entirety of *Grutter* cannot be reduced to the focus on "each applicant as an individual," because doing so ignores *Grutter*'s discussion of the Law School's compelling interest. It ignores the myriad reasons why the *Grutter* Court believed it was important for the Law School to have a racially diverse class in the first place. Moreover, in Part III-A, it is difficult to tell the difference between the majority's discussion of *Grutter*'s compelling governmental interest and narrow tailoring analyses; the Court conflates the two.[305] But perhaps that is the majority's point: in confining *Grutter* to higher education, and only then to situations where colleges and universities treat each applicant for admission as an individual, the Court reduces *Grutter* to a mere restatement of the holding in *Gratz*.

Finally, consider Part III-C of the majority's opinion, which explicitly concerned narrow tailoring. Part III-C departs from *Grutter*'s deferential approach to the government's use of racial classifications. *Grutter* was unusual in that it required only that the government consider – rather than exhaust – race-neutral measures prior to instituting a race-conscious admissions policy.[306] While it is true the Court cites *Grutter* to that effect,[307] it also cites Justice Kennedy's concurring opinion in *Croson* for the proposition that "racial classifications [are] permitted only 'as a last resort.'"[308] Indeed, the majority's approach to narrow tailoring is more consistent with Justice Kennedy in *Croson* than Justice O'Connor in *Grutter*.

In Part III-C, the Court ruled the school districts' student assignment plans were not narrowly tailored because the districts failed to show they "considered methods other than explicit racial classifications to achieve their stated goals."[309] The majority's position regarding the districts' use of race in the student assignment plans was simply that "other means would be effective."[310] But both the Sixth and Ninth Circuits ruled (with one small exception) that the Jefferson County and Seattle School Districts had considered alternative race-neutral measures in good faith and found them ineffective.[311] The majority simply disagreed with the lower courts, expressing

[305] *See id.* at 2753-54.

[306] *See supra* Part I.C.

[307] *Parents Involved*, 127 S. Ct. at 2760 (citing Grutter v. Bollinger, 539 U.S. 306, 339 (2003)).

[308] *Id.* at 2760-61 (citing Richmond v. J. A. Croson Co., 488 U.S. 469, 519 (1989) (Kennedy, J., concurring in part and concurring in the judgment).

[309] *Id.* at 2760.

[310] *Id.* at 2759.

[311] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 426 F.3d 1162, 1191 (9th Cir. 2005) ("[T]he District made a good faith effort to consider feasible race-neutral alternatives and permissibly rejected them in favor of a system involving a sibling preference, a race-based tiebreaker and a proximity preference."), *rev'd* 127 S. Ct. 2738

skepticism rather than deference towards the school districts' good faith.[312] Indeed, the entire thrust of Part III-C is that the student assignment plans were not really necessary because they had only a "minimal effect on the assignment of students."[313] This approach also suggested the school districts needed to exhaust rather than simply consider race-neutral alternatives. But in *Grutter*, the Court deferred to the Law School *both* with respect to the importance of racial diversity to its mission and the means it could use to achieve that interest.[314] The *Parents Involved* majority rejects this deferential approach.

In sum, a majority of the Court in *Parents Involved* ruled that neither *Grutter* nor doctrine recognizing a compelling interest in remedying the effects of past intentional discrimination supported the school districts' interest in promoting integration. In addition, the majority also ruled that the student assignment plans were not sufficiently narrowly tailored to survive strict scrutiny review. I have argued that one clear implication of the majority's approach is to limit *Grutter* to the context of higher education.

B. *The Plurality: Rejecting the "Common Good" Approach*

In this Section, I explore the *Parents Involved* plurality, Parts III-B and IV of Chief Justice Roberts' opinion.[315] Part III-B expresses real skepticism about the value of the benefits associated with racial diversity. And in Part IV, the plurality decisively rejected a "common good" interpretation of *Grutter*.

In Part III-B, the plurality ruled the plans at issue were "not narrowly tailored to the goal of achieving the educational and social benefits asserted to flow from racial diversity."[316] At first blush, Part III-B simply appears to anticipate the majority's holding in Part III-C, that the plans at issue were not narrowly tailored and therefore flunked strict scrutiny review.[317] Along these lines, the plurality ruled the school districts' plans failed the narrow tailoring test because they were "tied to each district's specific racial demographics, rather than to any pedagogic concept of the level of diversity needed to obtain

(2007); McFarland v. Jefferson County Pub. Sch., 330 F. Supp. 2d 834, 861 (W.D. Ky. 2004) ("The Court concludes that, throughout most of the assignment process [excluding the traditional school assignment process which accounted for a small portion of the assignment plan], the Board sufficiently considered and used alternatives, which either were race-neutral or made minimal use of race, to meet narrow tailoring requirements."), *aff'd*, 416 F.3d 513 (6th Cir. 2005), *rev'd*, 127 S. Ct. 2738 (2007).

[312] *Parents Involved*, 127 S. Ct. at 2760 ("[I]n Seattle several alternative assignment plans – many of which would not have used express racial classifications – were rejected with little or no consideration. Jefferson County has failed to present any evidence that it considered alternatives . . . .").

[313] *Id.*

[314] *See supra* Part I.A.

[315] *See supra* note 288 and accompanying text.

[316] *Parents Involved*, 127 S. Ct at 2755 (Roberts, C.J., plurality opinion).

[317] *Id.* at 2755-59.

the asserted educational benefits,"[318] and because the schools would have been substantially diverse even without the use of race in school assignments.[319]

In reaching this conclusion, the plurality engaged in a lengthy exegesis into the relationship between each school district's racial demographics and the educational benefits purported to flow from such diversity. The plurality stated flatly that the "districts offer no evidence that the level of racial diversity necessary to achieve the asserted educational benefits happens to coincide with the racial demographics of the respective school districts."[320] This discussion implied that the school districts' desire for racial diversity was "an end in itself."[321] Indeed, much of Part III-B is concerned with rehashing the harms associated with racial balancing, and with explaining how attempts to re-label "racial balancing" as "racial diversity" or "racial integration" are unavailing under strict scrutiny review.[322]

Thus, the thrust of Part III-B is that the "real motivation" behind the voluntary desegregation plans at issue was racial balance rather than the school districts' good faith desire to achieve the benefits associated with racial diversity. But what was the point of establishing the school districts' "real motivation"? First, this approach displayed the plurality's lack of deference to the school districts' objectives and the means used to achieve them, in sharp contrast to *Grutter*-style deference. Second, conflating the educational and broader social benefits associated with racial diversity with "racial balancing" discredits the entire enterprise. After all, if "racial balancing," "racial diversity," and "racial integration" are essentially synonymous then they are all invalid.

This interpretation of Part III-B makes sense when one considers the plurality's interpretation of *Grutter* in Part IV. Part IV is an explicit rebuke to Justice Breyer's dissent, and in particular to Justice Breyer's interpretation of *Grutter*. The plurality took issue with Justice Breyer's assertion that "the existence of a compelling interest in these cases 'follows *a fortiori*' from *Grutter*."[323] Justice Breyer argued the school districts' interest must be compelling because *Grutter* had already recognized the "civic effects" of a racially diverse education – enhanced cross-racial understanding, reduction in stereotypes, and increased ability for individuals to function in a global

[318] *Id.* at 2755.

[319] *Id.* at 2756-57.

[320] *Id.* at 2756.

[321] *Id.* It is certainly true that "racial balance is not to be achieved for its own sake." *Id.* at 2757. But the plurality's narrow tailoring analysis went beyond what would have been necessary to invalidate the plans. For instance, the plurality could simply have ruled that the plans failed the narrow tailoring test because there were other less restrictive, race-neutral alternatives that would have achieved the school districts' ends.

[322] *See id.* at 2758-59.

[323] *Id.* at 2763.

marketplace – as compelling.[324] Justice Breyer noted these civic effects of racial diversity applied even more forcefully to primary and secondary education "where each of us begins to absorb those values we carry with us to the end of our days . . . . '[U]nless our children begin to learn together, there is little hope that our people will ever learn to live together.'"[325] Indeed, in describing the racial classifications at issue Justice Breyer opined: "*They do not impose burdens unfairly upon members of one race alone but instead seek benefits for members of all races alike*."[326] In this manner, Justice Breyer was speaking of racial diversity from the perspective of the benefits that accrue to all – that is, racial diversity as a "common good."

Now note the plurality's response. The plurality accused Justice Breyer of overreading *Grutter* by "suggesting that it renders pure racial balancing a constitutionally compelling interest."[327] But what is the basis for this assertion? In Part III-B, the plurality argued that "reliance on *Grutter* cannot sustain [the school districts'] plans,"[328] and held that the plans' "design and operation" demonstrated they are "directed only to racial balance, pure and simple."[329] From this perspective, it is possible to understand why the plurality accuses Justice Breyer of "overreading *Grutter*" – because his interpretation suggests that an institution that can deliver and inculcate the same types of social benefits associated with racial diversity that *Grutter* recognized has a compelling interest in using race to pursue those ends. In stark contrast, the plurality argued that any interpretation of *Grutter* that would allow courts to take the government's purpose for the racial classification into consideration on the strict scrutiny analysis is incorrect: "[o]ur cases clearly reject the argument that motives affect the strict scrutiny analysis."[330] Yet, as discussed above, one interpretation of *Grutter* is that it privileged one particular governmental interest: racial diversity in settings likely to promote positive social externalities. The plurality decisively rejected this interpretation.

Parents Involved stifled *Grutter*'s expansive potential. The majority was explicit in its attempt to cabin *Grutter* and confine it to the higher education context alone. In a complementary move, the plurality attacked *Grutter* head on, explicitly rejecting Justice Breyer's expansive interpretation of the case. For the plurality, the government's ends are immaterial: "different rules should [not] govern racial classifications designed to include rather than exclude."[331]

[324] *Id.* at 2822 (Breyer, J., dissenting).

[325] *Id.* (citations omitted).

[326] *Id.* at 2818 (emphasis added).

[327] *Id.* at 2763 (Roberts, C.J., plurality opinion).

[328] *Id.* at 2755.

[329] *Id.*

[330] *Id.* at 2764.

[331] *Id.*

C. *Justice Kennedy Pushes Back*

While *Parents Involved* stifles *Grutter*'s potential, it does not destroy it, largely because Justice Kennedy's concurrence moderated the impact of the majority and the plurality's cramped interpretation of *Grutter*. Justice Kennedy rejected the view that *Grutter* has no relevance whatsoever outside of the higher education context. Thus, Justice Kennedy's concurring opinion departed from the plurality to the extent the plurality failed to "acknowledge that the school districts have identified a compelling interest here."[332] And, Justice Kennedy's concurrence backtracked from the majority's holding that the "present cases are not governed by *Grutter*."[333] Instead, Justice Kennedy allowed the compelling interest the Court recognized in *Grutter* along with the government's interest in remedying the effects of past intentional discrimination to "inform the present inquiry."[334] Consequently, Justice Kennedy relied on *Grutter* to reach the conclusion that the public school districts had a compelling interest in obtaining racial diversity.[335]

One question is whether the distinction between "inform" and "govern" matters. One response is that the difference is immaterial, particularly if one recalls that Justice Kennedy dissented in *Grutter*.[336] Perhaps Justice Kennedy did not wish to accord the *Grutter* majority an undue amount of influence given his dissent in that case. From this perspective, there is little meaningful distinction between "inform" and "govern." After all, Justice Kennedy ultimately concluded that "[d]iversity, depending on its meaning and definition, is a compelling educational goal a school district may pursue."[337] Indeed, there are five votes (inclusive of Justice Breyer and the other three dissenters) for this proposition.[338] This holding is extremely important. *Parents Involved* is the first time that five members of the Court recognized that public school districts have a compelling interest in pursing racial diversity in the absence of a finding of de jure segregation.

Because *Grutter* was a factor in Justice Kennedy's analysis, there is a strong argument that *Grutter*'s expansive possibilities remain intact. *Parents Involved* neither overturned *Grutter* nor (thanks to Justice Kennedy) limited it to its facts. Moreover, Justice Kennedy described the school districts' interest in pursuing racial diversity broadly. School districts have an interest in "avoiding racial isolation" so that our nation can meet its "moral and ethical obligation to fulfill its historic commitment to creating an integrated

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[332] *Id.* at 2789 (Kennedy, J., concurring in part and concurring in the judgment).

[333] *See id.* at 2754 (majority opinion).

[334] *Id.* at 2793 (Kennedy, J., concurring in part and concurring in the judgment).

[335] *See id.* at 2792.

[336] Grutter v. Bollinger, 539 U.S. 306, 387 (2003) (Kennedy, J., dissenting).

[337] *Parents Involved*, 127 S. Ct. at 2789 (Kennedy, J, concurring in part and concurring in the judgment).

[338] *Id.* at 2800 (Breyer, J., dissenting).

society."[339] At other points in his concurrence, Justice Kennedy suggests there is an inexorable link between *Brown*'s promise of equal educational opportunity and racial diversity.[340]

On the other hand, while it is true Justice Kennedy's concurrence saves *Grutter* from irrelevance and keeps its expansive possibilities intact, there is also a good argument that it narrows rather than expands *Grutter*'s possibilities, at least in the short term. Recall Justice Kennedy's seemingly expansive statement that the compelling interest recognized in *Grutter* helps to "inform the present inquiry."[341] This statement is in tension with Part III-A of the majority opinion, which Justice Kennedy signed in full. In that part, the Court ruled that the "present cases are not governed by *Grutter*."[342] The majority's holding suggested the higher education context is somehow unique. Indeed, imagine a counterfactual situation: the Court had ruled *Grutter* "governed" in *Parents Involved*. Such a holding would suggest *Grutter* had broad applicability outside of the higher education context including public employment and, potentially, public contracting. But *Parents Involved* did not so hold. On this view, *Grutter* does not govern in *Parents Involved* because the case concerns the government's use of racial classifications in a different context: primary and secondary schools. Indeed, Justice Kennedy's concurrence reaffirmed that holding. Emphasizing his agreement with Part III-A, Justice Kennedy stated, "the compelling interests implicated in the cases before us are distinct from the interests the Court has recognized in remedying the effects of past intentional discrimination and in increasing diversity in higher education."[343]

Moreover, it is unclear from Justice Kennedy's concurrence exactly how *Grutter* informed his conclusion that diversity is a compelling interest in the public school context. His concurrence provides no guidance to the government or to the courts as to how in the future *Grutter* might apply outside of the higher education context. The concurrence raises more questions than it answers. Why, exactly, does *Grutter* "inform the present inquiry"? Is it because the government's need for racial diversity is similar in both contexts? Is it because the positive social externalities generated by racial diversity in the two contexts are similar? Is it because both cases concern educational institutions? Or is it because public primary and secondary education is itself unique, providing government in that context alone a justification to use race to achieve diversity? Ultimately, Justice Kennedy did not answer these questions.

There are hints in the concurrence that Justice Kennedy is deferring to the school districts on the issue of the importance of racial diversity to primary and

[339] *Id.* at 2797 (Kennedy, J., concurring in part and concurring in the judgment).

[340] *Id.* at 2791.

[341] *Id.* at 2793.

[342] *Id.* at 2754 (majority opinion).

[343] *Id.* at 2793 (Kennedy, J., concurring in part and concurring in the judgment).

secondary education. Such deference is consistent with the Court's approach in *Grutter*. But the argument that Justice Kennedy is applying *Grutter*-style deference in a factually analogous situation is problematic. One possibility is that Justice Kennedy viewed the local public school context as unique, based upon the combination of the Court's prior recognition of diversity as a compelling interest in *Grutter* and "*Brown*'s objective of equal educational opportunity."[344] On this view, it was the uniqueness of the public school context which animated Justice Kennedy's compelling interest analysis. It may well be that, given our history, public education is unique. But even where the argument for deference is perhaps stronger than in any other context, Justice Kennedy would require more of public school districts on the strict scrutiny analysis than the *Grutter* Court required of colleges and universities seeking the same goal.

Along these lines, the *Grutter* Court applied a highly deferential form of "strict scrutiny" to the law school's admissions program.[345] The Court also accepted perhaps the broadest possible justification for the Law School's use of race in the admissions program: racial integration that promotes the common good.[346] And finally, the Court also dispensed with any requirement that the Law School exhaust race-neutral measures prior to using race-conscious means.[347] But in his *Parents Involved* concurrence, Justice Kennedy does not defer to the school districts. In fact, he is clear in stating that the school districts may not use the most efficient means to achieve racial integration.[348] Moreover, school districts must exhaust race-neutral measures before resorting to a selection system that "classif[ies] every student on the basis of race and . . . assign[s] each of them to schools based on that classification."[349] These requirements are not the hallmarks of deference.

Moreover, Justice Kennedy's discussion of how *Grutter* affects his analysis is internally contradictory. Late in the concurrence, Justice Kennedy states, inconsistently with earlier statements, that *Grutter* has no application to the instant case because of the difference in the student selection mechanisms exhibited in the two different contexts: "[i]f [primary and secondary school] students were considered for a whole range of their talents and school needs with race as just one consideration, *Grutter* would have some application. That, though, is not the case."[350] Given this statement, it is again worth asking

[344] *Id.* at 2791.

[345] *See supra* Part I.A.

[346] *See supra* Part I.B.

[347] *See supra* Part I.C.

[348] *See Parents Involved*, 127 S. Ct. at 2796 (Kennedy, J., concurring in part and concurring in the judgment).

[349] *Id.* at 2797. While Justice Kennedy would accept the type of "race as factor" selection mechanism approved in *Grutter*, the fact that such a system may not be feasible in the public school context is immaterial. *See id.*

[350] *Id.* at 2794.

just how *Grutter* "inform[s] the present inquiry."

Initially, Justice Kennedy indicated that *Grutter* "informed" at the compelling interest step of strict scrutiny review: "these compelling interests, [diversity in higher education and remedying past intentional discrimination,] in my view, do help to inform the present inquiry."[351] But perhaps *Grutter* "informs" in yet another way. That is, *Grutter* "informs the present inquiry" such that when government promotes diversity, it must do so *in just the right way*. That is, race must be just one factor in the overall selection mechanism which respects the individual as unique throughout the process. This interpretation of Justice Kennedy's approach is consistent with Part III-C of the Court's opinion, and other portions of his concurrence that emphasize public school districts may use a variety of facially race-neutral means to achieve racial diversity (a race-conscious end) without triggering strict scrutiny review. Justice Kennedy opined:

> School boards may pursue the goal of bringing together students of diverse backgrounds and races through other means, including strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race. These mechanisms are race conscious but do not lead to different treatment based on a classification that tells each student he or she is to be defined by race, so it is unlikely any of them would demand strict scrutiny to be found permissible.[352]

The difficulty is that it is unclear to what extent Justice Kennedy's approach will actually assist school districts in "the important work of bringing together students of different racial, ethnic, and economic backgrounds."[353] The trouble with Justice Kennedy's list of facially race-neutral, yet race-consciously motivated mechanisms is that there are serious questions as to their effectiveness. As Justice Breyer argued in dissent, "[n]othing 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."[354]

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[351] *Id.* at 2793.

[352] *Id.* at 2792.

[353] *Id.* at 2797.

[354] *Id.* at 2828 (Breyer, J., dissenting). Justice Breyer argued that each of Justice Kennedy's suggested race-neutral mechanisms was ineffective:

> But, as to "strategic site selection," Seattle has built one new high school in the last 44 years (and that specialized school serves only 300 students). In fact, six of the Seattle high schools involved in this case were built by the 1920's; the other four were open by the early 1960's. As to "drawing" neighborhood "attendance zones" on a racial basis, Louisville tried it, and it worked only when forced busing was also part of the plan. As to "allocating resources for special programs," Seattle and Louisville have both experimented with this; indeed, these programs are often referred to as "magnet

In addition, Justice Kennedy may overstate the claim that these facially-neutral, yet racially-motivated mechanisms are constitutionally unproblematic. After all, if the government takes these steps "because of race," and they have a disproportionate impact on students in some racial groups, then school districts that adopt Justice Kennedy's suggestions are still potentially open to constitutional challenge.[355] Finally, under Justice Kennedy's approach, school districts are prohibited from classifying individual students on the basis of race unless race is just one factor and "other demographic factors, plus special talents and needs, [are] also . . . considered."[356] But this is a difficult proposition in the primary and secondary school context, where students are not competing against each other for admission based upon unique talents and gifts.

Finally, Justice Kennedy also explicitly departed from Justice Breyer's dissent that offered an expansive vision of *Grutter*. For Justice Kennedy, Justice Breyer's reading of precedent (which centered on *Grutter*) had two major problems: it would allow the government to use racial classifications outside the school context and it authorized "permissive strict scrutiny (which bears more than a passing resemblance to rational-basis review)."[357] Not only would Justice Breyer's interpretation of *Grutter* have supported the school districts' use of race in the student assignment plans challenged in *Parents Involved*, but it arguably would also support governmental use of race in other contexts such as public employment and perhaps even public contracting. Under this view of *Grutter*, the fact that the government is using racial preferences in a way that benefits society more generally rather than just a narrow sub-class of minority beneficiaries is a mitigating factor. One possibility is that Justice Kennedy rejects the "common good" view of *Grutter* altogether; on the other hand, there is the specter of *Grutter* clearly "inform[ing]" Justice Kennedy's analysis.

> schools," but the limited desegregation effect of these efforts extends at most to those few schools to which additional resources are granted. In addition, there is no evidence from the experience of these school districts that it will make any meaningful impact. As to "recruiting faculty" on the basis of race, both cities have tried, but only as one part of a broader program. As to "tracking enrollments, performance and other statistics by race," tracking *reveals* the problem; it does not cure it.

Id. (citations omitted).

[355] *See* Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 272 (1979) (finding that if the statute is a pretext for gender discrimination then it would be a violation of the Equal Protection Clause); Washington v. Davis, 426 U.S. 229, 240 (1976) (holding that a race-neutral law could violate the Equal Protection Clause if its impact could be traced to a purpose of discriminating on the basis of race).

[356] *Parents Involved*, 127 S. Ct. at 2797 (Kennedy, J., concurring in part and concurring in the judgment).

[357] *Id.* at 2793.

CONCLUSION

Grutter was a remarkable moment for affirmative action jurisprudence as the Court truly recognized the importance of diversity to American society. Because *Grutter* concerned higher education, it was relatively easy – although no less remarkable – for the Court to make the link between the importance of diversity to the educational experience and the benefits of diversity to society more generally. *Grutter* left open a potentially transformative question: whether *Grutter*'s rationale could apply in contexts beyond higher education. If so, there were exciting possibilities for proponents of affirmative action. Post-*Grutter*, lower courts began to explore these tantalizing possibilities. In contexts such as education, public employment, and public contracting, there were suddenly possibilities available to government actors trying to justify voluntary affirmative action programs. Then, in *Parents Involved*, the Supreme Court stifled these possibilities. *Grutter*'s potential was not entirely destroyed, however, because Justice Kennedy's concurring opinion moderated the majority and plurality opinions. Because of Justice Kennedy, *Grutter*'s transformative potential has been maintained, and now waits for the day that a more sympathetic Court might recognize it.

Moreover, it is also important not to give up on Justice Kennedy in the short term. Justice Kennedy might be receptive to an argument that takes *Grutter* beyond higher education, at least with respect to the compelling interest analysis. After all, Justice Kennedy's compelling interest analysis was rooted both in his recognition of the public schools' ability "to teach that our strength comes from people of different races, creeds, and cultures uniting in commitment to the freedom of all,"[358] and the Court's prior affirmation in *Grutter* that diversity in higher education is a compelling interest. Both the public schools and colleges and universities share a strong ability to instill and disperse the social benefits of racial diversity. Assuming public schools are not sui generis, Justice Kennedy might be persuaded to extend *Grutter*'s compelling interest analysis to a similarly-situated public entity, such as the U.S. military, that is uniquely well-positioned to provide, disperse, and inculcate the social democracy-enhancing benefits of diversity in the widest possible manner. But Justice Kennedy's openness is likely to extend only so far; such an entity's use of race would also have to meet significant narrow tailoring constraints such as the requirement of individualized determinations.

[358] *Id.* at 2788.