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Strict in Theory, But Accommodating in Fact?

Ozan O. Varol*

ABSTRACT

As law students quickly learn, the strict-scrutiny test governs challenges under the Equal Protection Clause to the government's use of suspect classifications and infringement on certain fundamental rights. To survive strict scrutiny, the government bears the heavy burden of showing a compelling interest in drawing a suspect classification or infringing on a fundamental right and narrowly tailored means to achieve that interest. Over the years, strict scrutiny has expanded to serve as a bulwark against government intrusions on many fundamental rights and liberties in the United States Constitution – including the right to vote, marry, access the courts, and freedom of speech and association. At times, the United States Supreme Court was so demanding of the government in its application of strict scrutiny that no government action seemed capable of meeting its demands. This prompted the Supreme Court justices to counter, in at least eleven individual and majority opinions, that strict scrutiny was not “strict in theory, but fatal in fact.” So long as the government met its burden – albeit a highly demanding one – the Court would uphold the government action as constitutional.

But times have changed. Strict scrutiny is strict no more. In its attempt to remedy the perceived rigidity of strict scrutiny, the Supreme Court overcorrected. The pendulum has now swung in the opposite direction. In a recent line of Supreme Court decisions, justices in majority and dissenting opinions have diluted the strict-scrutiny test with a strong dose of deference to the government. Out of these decisions emerges a test that is strict in theory, but accommodating in fact.

This Article is an analysis and critique of deferential strict scrutiny. The Article reveals inconsistencies in the Court's use of run-of-the-mill strict scrutiny and deferential strict scrutiny, which have left government actors uncertain about the constitutionality of their conduct and the lower courts in a quandary as to which version of strict scrutiny to apply and when. The

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Article argues that, if unconstrained, this newly minted version of strict scrutiny – which allows the government to avoid an exacting constitutional inquiry – puts at risk the very liberties that strict scrutiny was designed to protect.

I. INTRODUCTION

The origins of the strict-scrutiny test have been the subject of much academic debate.¹ According to some accounts, the roots of the test can be traced to the Supreme Court's decision in *Korematsu v. United States*, a widely criticized opinion that upheld the internment of Japanese Americans during World War II.² In that case, the Court held that "the most rigid scrutiny" would govern all challenges under the Equal Protection Clause³ to the government's classification of individuals according to their race.⁴ Analyzing the equal-protection challenge in a highly deferential manner to the government,⁵ the Court held that the government's interest in preventing espionage and sabotage by the Japanese justified its internment of Japanese Americans dur-

1. See, e.g., Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1275 (2007) ("[T]he modern [strict-scrutiny] formula evolved simultaneously in a number of doctrinal areas . . ."); Peter J. Rubin, *Reconnecting Doctrine and Purpose: A Comprehensive Approach to Strict Scrutiny After Adarand and Shaw*, 149 U. PA. L. REV. 1, 3 n.1 (2000) ("[T]he formal concept of strict scrutiny developed in the area of equal protection . . ."); Stephen A. Siegel, *The Origin of the Compelling State Interest Test and Strict Scrutiny*, 48 AM. J. LEGAL HIST. 355, 357 (2006) (arguing that the strict-scrutiny test first appeared in the Supreme Court's First Amendment jurisprudence); Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 798 (2006) ("[T]he strict scrutiny standard was first suggested by implication in the famous footnote four of *United States v. Carolene Products*.").

2. 323 U.S. 214, 216, 219 (1944); see also *Grutter v. Bollinger*, 539 U.S. 306, 351 (2003) (Thomas, J., concurring in part and dissenting in part) (noting that the strict-scrutiny test "was first enunciated in *Korematsu*"); Fallon, *supra* note 1, at 1276 (stating that *Korematsu* "included language that can be seen as anticipating what we would now call strict scrutiny").

3. U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

4. *Korematsu*, 323 U.S. at 216 ("[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny."). The *Korematsu* Court's formulation of the "most rigid scrutiny" test did not include the compelling-interest and narrowly-tailored-means elements that comprise the current strict-scrutiny test. See Fallon, *supra* note 1, at 1274. The Court developed the modern formulation of the test in the 1960s. *Id.* at 1283.

5. See Siegel, *supra* note 1, at 382 ("Although [the *Korematsu* Court] intimated a heightened state interest requirement for racial classifications, [the Court] entirely deferred to the government's assertion that it was met.").

ing wartime.⁶ Justice Murphy vehemently dissented from the Court's "legalization of racism" under the auspices of heightened scrutiny.⁷

Since *Korematsu*, the Court expanded the use of strict scrutiny from its application in the context of racial classifications. In the Equal Protection Clause context, strict scrutiny now also governs classifications on the basis of national origin⁸ and state classifications on the basis of alienage.⁹ In addition, strict scrutiny applies to infringements on certain fundamental rights¹⁰ under the Due Process and Equal Protection Clauses – including the right to marry,¹¹ to control the upbringing of one's children,¹² to vote,¹³ to access the courts,¹⁴ and to travel within the United States.¹⁵ Governmental infringements on the First Amendment rights to freedom of speech and freedom of association also are subject to strict scrutiny.¹⁶

To survive strict scrutiny, the government bears the heavy burden of satisfying two elements: one relating to the government's ends and the other to its means.¹⁷ As to its ends, the government must show a compelling interest in drawing a suspect classification or infringing on a fundamental right.¹⁸ As to its means, the government must prove that it adopted narrowly tailored

6. *Korematsu*, 323 U.S. at 217-18.

7. *Id.* at 242 (Murphy, J., dissenting).

8. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985).

9. *Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 602 (1976). There are some exceptions to the application of strict scrutiny to alienage classifications, such as state classifications related to self-government and the democratic process and congressionally approved alienage classifications. ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 743-46 (2d ed. 2002) (citing *Foley v. Connelie*, 435 U.S. 291, 296 (1978) (self-government and democratic process); *Mathews v. Diaz*, 426 U.S. 67 (1976) (congressionally approved classifications)).

10. Adam Winkler has shown that, contrary to conventional wisdom, infringements on only some – not all – fundamental rights are subject to strict scrutiny. See generally Adam Winkler, *Fundamentally Wrong About Fundamental Rights*, 23 *CONST. COMMENT.* 227 (2006).

11. See generally *Zablocki v. Redhail*, 434 U.S. 374 (1978).

12. See generally *Troxel v. Granville*, 530 U.S. 57 (2000).

13. See generally *Harper v. Va. State Bd. of Elections*, 383 U.S. 663 (1966).

14. See *Bounds v. Smith*, 430 U.S. 817, 828 (1977).

15. See *United States v. Guest*, 383 U.S. 745, 757 (1966).

16. See generally *Grayned v. City of Rockford*, 408 U.S. 104, 116-17 (1972) (freedom of speech); *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (freedom of association).

17. *Johnson v. California*, 543 U.S. 499, 505, 506 n.1 (2005) ("We put the burden on state actors to demonstrate that their race-based policies are justified.")

18. *Id.* at 505.

means to achieve that compelling interest.¹⁹ A government action subject to strict scrutiny is unconstitutional if it fails either element of this test.²⁰

Strict scrutiny, by definition, is strict – and for good reason. For example, for racial classifications, the test is intended “to ‘smoke out’ illegitimate uses of race” by the government.²¹ The test presumes that whenever the government classifies persons according to their race, its decisions are inherently suspect.²² To serve its inquisitorial function, the test cannot accept blank assertions by the government for why it needs to use race in its decision-making. Rather, through the strict-scrutiny test, the courts ensure that “the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool.”²³ The reason for this searching inquiry, no doubt, is the wound that government-sanctioned racial discrimination has inflicted on this nation throughout its history.²⁴ When our government classifies us by race,

19. *Id.*

20. *Id.* Most government actions are not subject to strict scrutiny. For example, the intermediate-scrutiny test governs government classifications on the basis of gender and government discriminations against children born out of wedlock. *See* *United States v. Virginia*, 518 U.S. 515, 532-33 (1996) (gender); *Caban v. Mohammed*, 441 U.S. 380, 388 (1979) (children born out of wedlock). That test requires the government to show an “important” government interest and means “substantially related” to the achievement of that interest. *Virginia*, 518 U.S. at 533 (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)) (internal quotation marks omitted). All other classifications under the Equal Protection Clause are subject to rational-basis review. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440-42 (1985). Under the deferential rational-basis test, “legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.” *Id.* at 440.

21. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 226 (1995) (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989)).

22. *Id.*; *Johnson v. California*, 543 U.S. 499, 505 (2005) (“The reasons for strict scrutiny are familiar. Racial classifications raise special fears that they are motivated by an invidious purpose.”).

23. *Adarand Constructors, Inc.*, 515 U.S. at 226 (quoting *J.A. Croson Co.*, 488 U.S. at 493); *see* Cass R. Sunstein, *The Supreme Court, 1995 Term—Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 78 (1996) (arguing that the strict-scrutiny test “ensure[s] that courts are most skeptical in cases in which it is highly predictable that illegitimate motives are at work”).

24. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., No. 1*, 426 F.3d 1162, 1196 n.2 (9th Cir. 2005) (en banc) (Bea, J., dissenting) (“Because of our country’s struggle with racial division and the injustices of compelled government *de jure* segregation, we must be especially suspicious of any compulsive government program based upon race, even when such a program is supposedly beneficial.”), *rev’d*, 551 U.S. 701 (2007).

courts ordinarily assume foul play is at work and put the government to its burden to show why its action must be upheld.²⁵

At times, the Supreme Court has been so demanding in its application of the strict-scrutiny test that commentators questioned if any government action could survive the test.²⁶ This prompted the Supreme Court justices to counter – in at least eleven individual and majority opinions – that strict scrutiny is not “‘strict in theory, but fatal in fact.’”²⁷ So long as the government satisfied its burden under strict scrutiny – albeit a highly demanding one – the Court would uphold the government action as constitutional.

But times have changed. At least in certain contexts, strict scrutiny is strict no more. In its attempt to remedy the perceived rigidity of the strict-scrutiny test,²⁸ the Supreme Court overcorrected. The pendulum has now swung in the opposite direction. In majority and dissenting opinions in *Grutter v. Bollinger*,²⁹ *Johnson v. California*,³⁰ and *Parents Involved in Community Schools v. Seattle School District No. 1*,³¹ the Supreme Court diluted the strict-scrutiny test with a strong dose of deference³² to the government, creat-

25. See *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 511 (2006) (Roberts, C.J., concurring in part, concurring in the judgment in part, and dissenting in part) (“It is a sordid business, this divvying us up by race.”).

26. Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (arguing that the Court’s use of strict scrutiny in some cases was “‘strict’ in theory and fatal in fact”).

27. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 833 (2007) (Breyer, J., dissenting); *Johnson v. California*, 543 U.S. 499, 514 (2005); *Concrete Works of Colo., Inc. v. City and County of Denver*, 540 U.S. 1027, 1031 (2003) (mem.) (Scalia, J., dissenting from the denial of certiorari); *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003); *Adarand Constructors, Inc.*, 515 U.S. at 237; *Missouri v. Jenkins*, 515 U.S. 70, 112 (1995) (O’Connor, J., concurring); *J.A. Croson Co.*, 488 U.S. at 552 (Marshall, J., dissenting); *United States v. Paradise*, 480 U.S. 149, 166 n.17 (1987); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 285 (1986) (O’Connor, J., concurring in part and concurring in the judgment); *Fullilove v. Klutznick*, 448 U.S. 448, 507 (1980) (Powell, J., concurring); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 362 (1978) (Brennan, J., concurring in part and dissenting in part).

28. The rigidity of the strict-scrutiny test was “perceived,” because, according to an empirical study by Adam Winkler, the test never was as fatal as scholars thought. See generally Winkler, *supra* note 1. Professor Winkler’s study of federal-court decisions between 1990 and 2003 shows that the challenged laws survived strict scrutiny 30 percent of the time – a percentage “high enough to conclude that in the aggregate strict scrutiny is not inevitably, or even in the overwhelming number of cases, fatal in fact.” *Id.* at 812-13.

29. 539 U.S. 306 (2003).

30. 543 U.S. 499 (2005).

31. 551 U.S. 701 (2007).

32. In this Article, I employ Robert Schapiro’s definition of judicial deference: “Judicial deference acknowledges that, based on the interpretation of another branch of government, a court might arrive at a conclusion different from one it would oth-

ing a deferential version of strict scrutiny that bears no resemblance to its original form. Out of these decisions emerges a test that is strict in theory, but accommodating in fact.

This Article is an analysis and critique of deferential strict scrutiny. The Article reveals inconsistencies in the Court's use of run-of-the-mill strict scrutiny and deferential strict scrutiny, which have left government actors uncertain about the constitutionality of their conduct and the lower courts in a quandary as to which version of strict scrutiny to apply and when. The Article argues that, if unconstrained, this newly minted version of strict scrutiny – which allows the government to avoid an exacting constitutional inquiry – puts at risk the very liberties that strict scrutiny was designed to protect.

In Part II, the Article discusses the Supreme Court's decision in *Grutter v. Bollinger*.³³ *Grutter* concerned an Equal Protection Clause challenge to the University of Michigan Law School's use of race in its admissions decisions.³⁴ The Court upheld the law school's admissions criteria and, in so doing, deferred to the law school on the questions of whether its stated interest in achieving diversity was compelling and whether its admissions criteria was narrowly tailored.³⁵ Part III argues that *Grutter's* reasoning was faulty and that its deference to the law school cannot be justified under any of the rationales asserted by the majority. It explores the bounds of *Grutter's* deference, concluding that *Grutter* may have created a dangerous precedent of deferential strict scrutiny that may extend far beyond the confines of higher education.

The remaining sections of the Article contrast *Grutter's* deferential analysis to other cases from the Supreme Court's equal-protection jurisprudence. Part IV discusses the Supreme Court's non-deferential analysis in *United States v. Virginia*, which addressed an equal-protection challenge to the male-only admissions policy of the Virginia Military Institute, another higher-education institution.³⁶ Part V contrasts *Grutter* to *Johnson v. California*, where the Court refused to defer to prison officials in an equal-protection challenge to a prison policy requiring the segregation of inmates according to their race to prevent violence.³⁷ Part VI analyzes *Parents Involved in Community Schools v. Seattle School District No. 1*, where the Court struck down two school districts' student-assignment plans that relied on race to determine which public schools the students could attend.³⁸ Al-

erwise reach." Robert A. Schapiro, *Judicial Deference and Interpretive Coordinacy in State and Federal Constitutional Law*, 85 CORNELL L. REV. 656, 665 (2000). For a thorough analysis of the use of deference in constitutional law, see generally Paul Horwitz, *Three Faces of Deference*, 83 NOTRE DAME L. REV. 1061 (2008).

33. *Grutter*, 539 U.S. 306.

34. *Id.* at 316-17.

35. *Id.* at 328-29.

36. 518 U.S. 515, 520-21, 523 (1996).

37. 543 U.S. 499, 515 (2005).

38. See generally 551 U.S. 701 (2007).

though the four-justice plurality in *Parents Involved* attempted to confine *Grutter*'s deference to the context of higher-education institutions, five justices extended at least part of *Grutter*'s holding to K-12 schools.³⁹ With this extension, Part VI argues, deferential strict scrutiny has gained momentum and will be invoked in future Supreme Court opinions.

II. *GRUTTER V. BOLLINGER* AND DEFERENTIAL STRICT SCRUTINY

Grutter v. Bollinger was a class-action case against the University of Michigan Law School challenging the law school's use of race in its admissions criteria.⁴⁰ The plaintiffs asserted that race was the predominant factor in the law school's admissions policy, which put non-minority applicants at a significant disadvantage in the application process.⁴¹ This, the plaintiffs contended, constituted state-sanctioned racial discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment.⁴² The law school countered that it used race as one of many factors in its decision-making process, which it asserted was narrowly tailored to achieve its compelling interest in recruiting a "critical mass" of minority students to construct a diverse student body.⁴³

The district court applied strict scrutiny and held that the law school's race-based admissions criterion was unconstitutional.⁴⁴ The court reasoned that the attainment of a racially diverse student body was not a compelling state interest and, even if such interest were compelling, the law school had not used narrowly tailored means to achieve that interest.⁴⁵

The Sixth Circuit reversed the district court.⁴⁶ The Sixth Circuit held that achieving a diverse student body was a compelling interest under binding Supreme Court precedent and that the law school's use of race as a "potential plus factor" in its admissions criteria was narrowly tailored to serve that interest.⁴⁷

In a 5-4 decision, the United States Supreme Court affirmed the Sixth Circuit.⁴⁸ The Court purported to apply strict scrutiny to the law school's use of race in its admissions decisions, noting that the policy would survive the constitutional challenge only if the race-based classification was "narrowly tailored to further compelling governmental interests."⁴⁹ In describing the

39. See *infra* Part VI (discussing *Parents Involved*).

40. *Grutter*, 539 U.S. at 317.

41. *Id.*

42. *Id.*

43. *Id.* at 316.

44. *Id.* at 321.

45. *Id.*

46. *Id.*

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

48. *Id.* at 343-44.

49. *Id.* at 326.

strict-scrutiny test, the Court emphasized that the test is intended to “smoke out illegitimate uses of race”⁵⁰ and that the determination of the admissions policy’s constitutionality is “the job of the court,” not of the law school.⁵¹ But the Court failed to note, perhaps deliberately, that the law school would bear the burden of satisfying the requirements of strict scrutiny.

The Court first discussed whether the law school’s stated interest in the educational benefits that flow from diversity was a compelling state interest.⁵² On this point, the Court held that “[t]he Law School’s educational judgment that such diversity is essential to its educational mission is one to which we defer.”⁵³ Despite this deference, the Court reassured its skeptics that its scrutiny would be “no less strict.”⁵⁴

The Court explained that it would defer to the law school because “context matters” in the Court’s equal-protection analysis.⁵⁵ In other words, although all race-based classifications are suspect under the Equal Protection Clause, some racial classifications, depending on their context, are more suspect than others. Race-based classifications in the higher-education context, according to the Court, are less suspect than in other contexts because “universities occupy a special niche in our constitutional tradition.”⁵⁶ Citing Justice Powell’s opinion in *Regents of the University of California v. Bakke*, the Court noted that universities enjoy educational autonomy under the First Amendment.⁵⁷ The decision of whom to admit to a university requires “complex educational judgments . . . primarily within the expertise of the university,” warranting deference by the courts.⁵⁸

Despite this broad rhetoric about deference to the law school, the Court also examined the amicus briefs and expert studies in the record, concluding that the record supported the law school’s educational judgment about the benefits of diversity.⁵⁹ According to the Court, the record demonstrated that

50. *Id.* (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989)).

51. *Id.* at 327 (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 230 (1995)).

52. *Id.* at 327-33.

53. *Id.* at 328.

54. *Id.*

55. *Id.* at 327.

56. *Id.* at 329 (citing *Wieman v. Updegraff*, 344 U.S. 183, 195 (1952) (Frankfurter, J., concurring); *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957); *Shelton v. Tucker*, 364 U.S. 479, 487 (1960); *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967)).

57. *Id.* (“The freedom of a university to make its own judgments as to education includes the selection of its student body.” (quoting *Regents of the Univ. of Calif. v. Bakke*, 438 U.S. 265, 312 (1978))).

58. *Id.* at 328.

59. *Id.* at 330. The existence of evidence supporting the importance of diversity in law schools makes the Court’s deference to the law school all the more unjustified.

diversity “promotes ‘cross-racial understanding,’ helps to break down racial stereotypes,” enables livelier classroom discussion, and exposes students to a broad array of viewpoints.⁶⁰ These theoretical benefits of diversity had practical support from amicus briefs filed in support of the law school by major American businesses, high-ranking retired military officers and civilian leaders, and the Reserve Officer Training Corps (“ROTC”), all of whom asserted that student body diversity leads to many benefits in the work force.⁶¹ Because universities – and especially law schools – were training arenas for the nation’s future leaders, diversity in legal education contributed to the creation of leaders from diverse backgrounds.⁶²

Next, the Court analyzed whether the means that the law school adopted were narrowly tailored to achieve its compelling interest in diversity.⁶³ The Court began its narrow-tailoring analysis by reiterating – reminiscent of the Queen’s “The lady protests too much, methinks” remark from *Hamlet*⁶⁴ – that it was not “‘abandon[ing] strict scrutiny.’”⁶⁵ The Court went on to hold that the law school’s admissions policy bore “the hallmarks of a narrowly tailored plan.”⁶⁶ Instead of using a quota system that reserved a certain number of seats for minority students, which would have been clearly unconstitutional,⁶⁷ the law school engaged in an individualized consideration of all candidates, with race or ethnicity playing a role only as a potential plus factor.⁶⁸ The law school also gave “substantial weight” to non-racial factors, such as “‘employment experience, nonacademic performance, or personal background,’”

ble. If such evidence existed in the record, the Court could have reached the same conclusion through its independent analysis, not via deference to the law school.

60. *Id.* (quoting *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 850 (E.D. Mich. 2001)).

61. *Id.* at 330-31; *see, e.g.*, Brief for 3M et. al as Amici Curiae in Support of Defendants-Appellants Seeking Reversal at *5, *Grutter*, 539 U.S. 306 (No. 02-241), 2001 WL 34624918; Brief of General Motors Corporation as Amicus Curiae in Support of Respondents at *3-4, *Grutter*, 539 U.S. 306 (Nos. 02-241, 02-516), 2003 WL 399096.

62. *Grutter*, 539 U.S. at 332.

63. *Id.* at 333.

64. WILLIAM SHAKESPEARE, *HAMLET* 254 (Horace Howard Furness ed., J.B. Lippincott Co. 1905) (1877).

65. *Grutter*, 539 U.S. at 334 (quoting Justice Kennedy’s dissenting opinion).

66. *Id.*

67. *See generally* *Gratz v. Bollinger*, 539 U.S. 244 (2003) (holding unconstitutional the admissions policy of the University of Michigan’s College of Literature, Science, and the Arts because the College assigned a fixed number of points on the basis of the minority status of an applicant and did not provide sufficient individual consideration).

68. *Grutter*, 539 U.S. at 334.

which the law school believed contributed to the diversity of its student body.⁶⁹

The Court rejected the dissent's assertion that the law school's daily consultation of its minority admission statistics suggested that the law school maintained a quota system.⁷⁰ Rather, the Court accepted, with no scrutiny, the school officials' testimony that they did not give race more or less weight because of their constant reference to these statistics.⁷¹ The Court also cursorily dismissed the dissent's examination of the law school's minority admission statistics over a period of five years. This data, according to the dissent, showed a close correlation between the percentage of minority applicants from a particular minority group and the percentage of admitted applicants from that group – suggestive of a quota system.⁷²

Even though the narrowly tailored means prong of strict scrutiny ordinarily requires the state to show that it employed the least restrictive means to achieve its compelling interest,⁷³ the law school was required to consider – but not required to exhaust – every race-neutral formula for attaining a diverse student body.⁷⁴ If the race-neutral alternatives sacrificed the law school's elite status or the level of diversity it sought to attain, the law school could constitutionally use race as a factor in its admissions decisions.⁷⁵ As part of its narrow-tailoring analysis, the Court took the law school "at its word" that it would end its race-conscious admissions policy as soon as it found a race-neutral alternative to its liking.⁷⁶ Deference to the law school's "word" thus allowed the Court to uphold the law school's admissions policy as constitutional under strict scrutiny.

III. *GRUTTER'S ERRORS*

A. Grutter's Deference Is Inconsistent with Strict Scrutiny

By definition, the strict-scrutiny test puts the heavy burden on the government to prove the two prongs of the test. For this reason, the Supreme Court has held: "[B]ind judicial deference to legislative or executive pronouncements of necessity has no place in equal protection analysis."⁷⁷ Even Justice O'Connor, the author of *Grutter*, writing for the Court in a later case, stated: "[D]eference is fundamentally at odds with our equal protection juri-

69. *Id.* at 338 (quoting Brief for Respondents at *4, *Grutter*, 539 U.S. 306 (No. 02-241), 2003 WL 402236).

70. *Id.* at 335.

71. *Id.* at 335, 338.

72. *Id.* at 383-85 (Rehnquist, C.J., dissenting).

73. See *Sable Comms. of Cal., Inc. v. F.C.C.*, 492 U.S. 115, 126 (1989).

74. *Grutter*, 539 U.S. at 339.

75. *Id.* at 340.

76. *Id.* at 343.

77. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 501 (1989).

sprudence. We put the burden on state actors to demonstrate that their race-based policies are justified.”⁷⁸ Most recently, in *Christian Legal Society v. Martinez*, the Court reaffirmed: “This Court is the final arbiter of the question whether a public university has exceeded constitutional constraints, and we owe no deference to universities when we consider that question.”⁷⁹

But the *Grutter* Court was not faithful to the tenets of the traditional strict-scrutiny test. The Court failed to place the burden on the law school, deferred to the law school on both prongs of the strict-scrutiny test, and presumed “‘good faith’ on the part of [the law school] . . . absent ‘a showing to the contrary.’”⁸⁰ Justice O’Connor applied this good-faith presumption in *Grutter* even though in an earlier case, where the Court struck down a city plan that required a 30% set aside for minority contractors, she wrote for a majority of the Court: “Racial classifications are suspect, and that means that simple legislative assurances of good intentions cannot suffice.”⁸¹ The *Grutter* Court’s presumption of good faith effectively switched the burden from the law school to the litigants challenging the law school’s race-conscious admissions policy to prove the absence of a compelling state interest and the absence of narrowly tailored means. This switch all but guaranteed that the law school’s admissions policy would satisfy both prongs of the strict-scrutiny test.

78. *Johnson v. California*, 543 U.S. 499, 506 n.1 (2005). Justice O’Connor’s criticism of deference in *Johnson* was directed at Justice Thomas, who, in his dissent, asserted that a “compelling showing [is] needed to overcome the deference we owe to prison administrators.” *Id.* at 543 (Thomas, J., dissenting). See *infra* Part V for an in-depth discussion of *Johnson v. California*.

79. *Christian Legal Soc’y v. Martinez*, 130 S. Ct. 2971, 2988 (2010). In *Christian Legal Society*, the Court held that a policy of the Hastings College of Law requiring registered student organizations to accept all students as members did not violate the First Amendment rights of the Christian Legal Society. *Id.* at 2978. Despite the Court’s purported rejection of deference, the dissent accused the majority of “[d]eferring broadly to the law school’s judgment about the permissible limits of student debate.” *Id.* at 3000 (Alito, J., dissenting).

80. *Grutter*, 539 U.S. at 329 (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 318-19 (1978)); see also *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist.*, No. 1, 426 F.3d 1162, 1188 (9th Cir. 2005) (en banc) (“Implicit in the [*Grutter*] Court’s [narrow-tailoring] analysis was a measure of deference toward the university”), *rev’d*, 551 U.S. 701 (2007).

81. *J.A. Croson Co.*, 488 U.S. at 500. Likewise, Cass Sunstein has noted that the strict-scrutiny test is based on a “presumption of distrust” and not a “presumption of good faith,” which is ordinarily reserved for rational-basis review. See Sunstein, *supra* note 23, at 78.

1. Compelling-Interest Prong

On the compelling-interest prong, the Court failed to examine whether diversity was the actual purpose of the law school's race-conscious admissions program and not a post-hoc rationalization for a different, and perhaps unconstitutional, purpose. Although the Court discussed the benefits that result from a diverse student body,⁸² it failed to inquire whether diversity was a mere pretext for the law school's use of race in its admissions decisions. If, for example, the law school had implemented its race-conscious admissions policy to remedy past societal discrimination against minorities – not to further the diversity of its student body – that policy would have been unconstitutional under well-established precedent.⁸³

Even in the intermediate-scrutiny context, where the government's burden is easier to meet,⁸⁴ the Court examines whether the government's justification for drawing a classification states "actual [government] purposes, not rationalizations for actions in fact differently grounded."⁸⁵ But the *Grutter* Court took the law school "at its word" that attainment of diversity was its actual purpose.⁸⁶ If the function of strict scrutiny, as the *Grutter* Court held, is to "smoke out" unconstitutional uses of race and to "carefully examin[e] . . . the sincerity of the reasons advanced by the governmental decisionmaker for the use of race,"⁸⁷ the Court cannot perform that function by taking the government "at its word" as to its actual motives.

A recent Supreme Court opinion, *Ricci v. DeStefano*, exemplifies the *Grutter* Court's errors on this front.⁸⁸ In *Ricci*, white and Hispanic firefighters sued the City of New Haven, Connecticut, for racial discrimination, alleging violations of the Equal Protection Clause and Title VII of the Civil Rights Act, which "prohibits employment discrimination on the basis of race, color, religion, sex, and national origin."⁸⁹ The firefighters asserted that the city had intentionally discriminated against them by discarding the results of a promotional examination, which they had successfully passed, on the basis that

82. *Grutter*, 539 U.S. at 328-33.

83. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 220 (1995) ("[S]ocietal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy." (quoting *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267, 276 (1986))).

84. Intermediate scrutiny applies to quasi-suspect classifications such as gender. *United States v. Virginia*, 518 U.S. 515, 533 (1996). To meet its burden under intermediate scrutiny, the government must show an "important" government interest and means "substantially related" to the achievement of that interest. *Id.*

85. *Id.* at 535-36.

86. *Grutter*, 539 U.S. at 343.

87. *Id.* at 326-27.

88. 129 S. Ct. 2658 (2009).

89. *Id.* at 2664, 2672; see also 42 U.S.C. § 2000e-2 (2006).

white candidates had substantially outperformed minority candidates.⁹⁰ The city countered that it had discarded the examination, not to discriminate against the plaintiffs, but to avoid liability under Title VII for implementing a policy that had a disparate impact on minority firefighters.⁹¹

The Supreme Court, in a 5-4 decision, held that the city's action constituted intentional discrimination in violation of Title VII and granted summary judgment to the firefighters.⁹² As relevant here, Justice Alito examined in a separate concurrence whether the city's asserted reason for discarding the test results – concern for disparate-impact liability – was a mere pretext for an ulterior motive.⁹³ In his analysis, Justice Alito went through the district court record in painstaking detail – to an extent rarely seen in a Supreme Court case.⁹⁴ He concluded that a reasonable jury could find that the city's actual reason for discarding the tests was not potential Title VII disparate-impact liability but “a simple desire to please a politically important racial constituency” motivated by the lobbying efforts of a community leader.⁹⁵

Justice Alito's detailed pretext analysis stands in stark contrast to the *Grutter* majority's nonexistent one. Instead of taking the City of New Haven “at its word” that it discarded the test results to avoid disparate-impact liability, Justice Alito properly put the city to its burden. In stark contrast, the *Grutter* Court failed to require the law school to meet its full burden. Deferential strict scrutiny in *Grutter* lifted the law school's burden on the pretext question, converting what might have been an unconstitutional program into a constitutional one.

2. Narrowly Tailored Means Prong

On the narrowly tailored means prong, the *Grutter* Court failed to thoroughly inquire whether the law school's stated use of race as a plus factor in its admissions decisions was, in effect, an unconstitutional quota system. This too resulted from the Court's deference to and presumption of good faith on the part of the law school.⁹⁶ In dissent, Chief Justice Rehnquist criticized

90. *Ricci*, 129 S. Ct. at 2664.

91. *Id.*

92. *Id.* at 2664-65, 2681.

93. *Id.* at 2683-84 (Alito, J., concurring).

94. *See id.* at 2684-88.

95. *Id.* at 2687-88.

96. The presumption of good faith accorded to higher-education institutions in *Grutter* is reminiscent of the deferential analysis professional associations enjoy under antitrust laws. *See Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 773 n.10 (1999) (“The fact that a restraint operates upon a profession as distinguished from a business is, of course, relevant in determining whether that particular restraint violates the Sherman Act. . . . The public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation

the Court's failure to engage in a thorough narrow-tailoring analysis, asserting that the close correlation between the percentage of minority applicants and the percentage of admitted minority students raised the inference of an unconstitutional quota system.⁹⁷ Without deference, the burden would have been on the law school to prove the *nonexistence* of an unconstitutional quota system, even absent evidence suggestive of a quota system.⁹⁸

The *Grutter* Court also failed to inquire thoroughly as to whether the law school had considered race-neutral alternatives to its race-conscious admissions policy. The Court did not cite any evidence in the record, whether in the form of testimony by an admissions officer or minutes from a board meeting, that the law school had considered and rejected race-neutral alternatives, as it was required to do to satisfy strict scrutiny.⁹⁹ Instead, the Court dismissed the race-neutral alternatives proposed by the district court and the United States as unworkable because they *might* potentially compromise the educational mission of the law school.¹⁰⁰ Even if these race-neutral alternatives may have turned out to be impracticable, the Constitution required – as the Court itself acknowledged – that the law school give “serious, good faith consideration” to such alternatives.¹⁰¹ Despite the Court's repeated protests to the contrary, the narrow-tailoring analysis it employed under the guise of strict scrutiny was effectively an application of intermediate scrutiny, which demands means that are only “substantially related” to the achievement of the governmental objective and not means that require the exhaustion of less restrictive alternatives.

For these reasons, the dissenting justices criticized the majority's mix of strict scrutiny and deference. Justice Thomas asserted that “the Constitution

of the Sherman Act in another context, be treated differently.” (quoting *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 788 (1975)).

97. *Grutter v. Bollinger*, 539 U.S. 306, 383-86 (2003) (Rehnquist, C.J., dissenting) (“For example, in 1995, when 9.7% of the applicant pool was African-American, 9.4% of the admitted class was African-American. By 2000, only 7.5% of the applicant pool was African-American, and 7.3% of the admitted class was African-American. This correlation is striking.”).

98. *See id.* at 390-91.

99. *Id.* at 339-40 (majority opinion) (“Narrow tailoring does, however, require serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks.”). A “distinguished committee of legal scholars” developed the admissions policy that was at issue in *Grutter*. Brief for Respondents, *supra* note 69, at *3. Presumably, these scholars would have created a record delineating the purposes behind the race-conscious policy and whether or not they had considered race-neutral alternatives.

100. *Grutter*, 539 U.S. at 340.

101. *Id.* at 339; *see also* Calvin Massey, *The New Formalism: Requiem for Tiered Scrutiny?*, 6 U. PA. J. CONST. L. 945, 978 (2004) (“[I]f [*Grutter*] means that a government need only consider (but not necessarily adopt) workable, race-neutral alternatives, the standard articulated for narrow tailoring has assumed a surprisingly deferential posture toward government decision makers.”).

[does not] countenance the unprecedented deference the Court gives to the Law School, an approach inconsistent with the very concept of ‘strict scrutiny.’”¹⁰² Likewise, Justice Kennedy noted, “[d]eference is antithetical to strict scrutiny, not consistent with it.”¹⁰³

This does not mean, however, that strict scrutiny should be so exacting as to be “strict in theory, but fatal in fact.”¹⁰⁴ What the *Grutter* Court should have done, but did not do, was: (1) examine whether diversity was the actual purpose of the law school’s race-conscious admissions policy; (2) engage in the kind of analysis that Chief Justice Rehnquist employed in his dissent to determine whether the law school’s admissions policy constituted an unconstitutional quota system; and (3) determine whether the law school had seriously considered and rejected race-neutral admissions criteria.

Under this analysis, the law school could have met its burden on all three issues by presenting evidence in the form of minutes from a board meeting or testimony from school authorities that: (1) the achievement of diversity, and not an unconstitutional purpose such as remedying past societal discrimination against minorities, was the actual purpose of its admissions policy; (2) the statistics that the dissent cited were not sufficient to establish the existence of a quota system; and (3) the law school had adequately researched, seriously considered, and rejected – for constitutionally proper reasons – race-neutral alternatives for constitutionally valid purposes.

This is the type of analysis that strict scrutiny – which should be strict in theory *and* strict in fact – required from the *Grutter* Court.¹⁰⁵ The Court should have drawn its independent conclusions from the evidence, rather than deferring to the law school’s blanket statements. In the end, the Court’s independent conclusions may have been the same as the law school’s, but the Court had the constitutional duty to reach them on its own.¹⁰⁶

102. *Grutter*, 539 U.S. at 350 (Thomas, J., concurring in part and dissenting in part).

103. *Id.* at 394 (Kennedy, J., dissenting); see also Winkler, *supra* note 1, at 820 (noting that *Grutter* was an example of “strict scrutiny schizophrenia” because the *Grutter* Court “pledge[d] adherence to both deference and skeptical scrutiny”).

104. See cases cited *supra* note 27; see also Winkler, *supra* note 1, at 805 (“A strict scrutiny that is always fatal cannot serve to smoke out illegitimate motives; such a rule effectively sets fire to the laws themselves, invalidating them regardless of motive.”).

105. Indeed, Adam Winkler’s empirical study of federal-court decisions between 1990 and 2003 shattered the familiar adage that strict scrutiny is fatal in fact. See Winkler, *supra* note 1; see also *supra* note 28 (discussing Professor Winkler’s study). Strict scrutiny, before *Grutter* was decided in 2003, had been strict in theory, but “survivable in fact.” See Winkler, *supra* note 1, at 796.

106. See *Marbury v. Madison*, 5 U.S. 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”).

B. Grutter Erroneously Deferred to the Judgment of the Law School on a Legal Question

What made the *Grutter* Court's deference all the more unjustifiable was its deference to the law school on a *legal* question.¹⁰⁷ Assume, as the Court did, that complex educational judgments lie beyond the purview of the judiciary, necessitating deference to universities' educational policies. In that case, deference would be proper to specific educational policies implemented using constitutional means to meet constitutional ends. For example, were the law school to implement a minimum GPA or LSAT score requirement for admissions and were this requirement challenged as discriminatory under the Equal Protection Clause, deference to the law school's educational judgment would be proper. Minimum GPA and LSAT score requirements, unlike race, are not suspect classifications under the Equal Protection Clause.¹⁰⁸ The Court need not second-guess a particular educational policy or substitute its judgment for that of university officials, so long as the university acts within the bounds of the Constitution.

Described in this way, deference to a university's educational judgment is similar to deference to a board of directors' business judgment in the corporate-law context. When a stockholder challenges a board of directors' business decision, a presumption applies – dubbed the business-judgment rule – that the directors made a fair and impartial decision in the best interests of the corporation.¹⁰⁹ In other words, courts defer to the board of directors on

107. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist.*, No. 1, 426 F.3d 1162, 1173 (9th Cir. 2005) (en banc) (“The [*Grutter*] Court largely deferred to the law school’s educational judgment not only in determining that diversity would produce these benefits, but also in determining that these benefits were critical to the school’s educational mission.”), *rev’d*, 551 U.S. 701 (2007); see *id.* at 1173 n.13 (“The [*Grutter*] Court also heeded the judgment of amici curiae – including educators, business leaders and the military – that the educational benefits that flow from diversity constitute a compelling interest.”); Paul J. Beard II, *The Legacy of Grutter: How the Meredith and Pics Courts Wrongly Extended the “Educational Benefits” Exception to the Equal Protection Clause in Public Higher Education*, 11 TEX. REV. L. & POL. 1, 9 (2006) (“For the Court, obtaining the educational benefits flowing from a racially diverse student body was compelling because the University of Michigan Law School said so.”); Wendy Parker, *Connecting the Dots: Grutter, School Desegregation, and Federalism*, 45 WM. & MARY L. REV. 1691, 1700 (2004) (“Justice O’Connor’s analysis [in *Grutter*] is clearly one of deferring to the defendants on a legal question.”).

108. A claim that a minimum GPA or LSAT score requirement imposes a disparate impact on minorities would not, in and of itself, suffice to hold the requirement unconstitutional. Under well-established Supreme Court precedent, a showing of discriminatory purpose also would be required. See *Washington v. Davis*, 426 U.S. 229, 240 (1976).

109. *Omnicare, Inc. v. NCS Healthcare, Inc.*, 818 A.2d 914, 927-28 (Del. 2003). The Delaware Supreme Court explained the business-judgment rule as follows:

any business decision they make, absent evidence of conflict of interest or bad faith, because the board of directors knows how to manage a corporation better than a court.¹¹⁰ While courts defer to the board of directors on the question whether its business decisions are in the best interests of the corporation, they do not defer to corporations on the question whether those decisions are lawful.¹¹¹ A decision by the board of directors to discriminate on the basis of race in hiring, for example, would violate Title VII of the Civil Rights Act. A court would not defer to the board of directors' "business judgment" that such policy is lawful under Title VII.

And so was the case in *Ricci*. There, the city refused to certify the results of its firefighter promotion examination, believing that certification would expose it to Title VII liability for disparate impact.¹¹² But the Supreme Court refused to defer to the city's legal determination on this question. Far from showing any deference to the city, the Court held that the city "must have a *strong basis in evidence* to believe it will be subject to disparate-impact liability if it fails to take the race-conscious, discriminatory action."¹¹³

But the *Grutter* Court did precisely what the *Ricci* Court declined to do. *Grutter* did not merely defer to *which* constitutional course of conduct the law school chose to achieve a constitutional objective. Instead, the Court deferred to the law school on the questions *whether* the law school's objective was constitutional and *whether* the means the law school adopted to achieve that objective were constitutional.¹¹⁴ These are both legal questions.¹¹⁵ Deference

The business judgment rule is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company. An application of the traditional business judgment rule places the burden on the party challenging the [board's] decision to establish facts rebutting the presumption.

Id. (internal quotation marks omitted) (footnote omitted).

110. *In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 52 (Del. 2006); *Omnicare*, 818 A.2d at 928 ("The business judgment rule embodies the deference that is accorded to managerial decisions of a board of directors. Under normal circumstances, neither the courts nor the stockholders should interfere with the managerial decision of the directors." (internal quotation marks omitted)).

111. *See, e.g., W. Air Lines, Inc. v. Criswell*, 472 U.S. 400, 423 (1985) ("Even in cases involving public safety, the [Age Discrimination in Employment Act] plainly does not permit the trier of fact to give complete deference to the employer's decision.").

112. *Ricci v. DeStefano*, 129 S. Ct. 2658, 2664 (2009).

113. *Id.* at 2677 (emphasis added).

114. As Pamela Karlan explains:

Nowhere in its [decisions before *Grutter*] had the Court delegated responsibility for deciding the weight of a governmental interest to some other governmental entity. . . . What is striking [in *Grutter*] is not that the Court thinks racial diversity within the student body of a selective public educational institution can be a compelling governmental purpose, but rather

to the law school on these questions is no different from deference to a board of directors' statement that its policy of hiring employees of only a particular race is lawful under Title VII. That policy would violate Title VII regardless of the board's belief as to its legality and regardless of the reasons for the policy's adoption. For example, in *Ricci*, the Court held that the City of New Haven's decision to scrap its firefighter promotion exams violated Title VII even though the city believed – incorrectly – that the certification of its promotion exams would violate Title VII.¹¹⁶ The *Ricci* Court refused to defer to the city on the legality of its policy.¹¹⁷

In addition, in a recent case that implicated national security and foreign affairs, the Supreme Court refused to defer to the government's interpretation

that it declares that racial diversity is compelling because a school thinks it is.

Pamela S. Karlan, *Compelling Interests/Compelling Institutions: Law Schools as Constitutional Litigants*, 54 UCLA L. REV. 1613, 1622 (2007); see also Michelle Adams, *Stifling the Potential of Grutter v. Bollinger: Parents Involved in Community Schools v. Seattle School District No. 1*, 88 B.U. L. REV. 937, 943 (2008) (“[T]he *Grutter* Court applied a deferential brand of strict scrutiny review, deferring to the Law School on both prongs of the strict scrutiny analysis.”). But see F. Andrew Hessick, *Rethinking the Presumption of Constitutionality*, 85 NOTRE DAME L. REV. 1447, 1449 (2010) (arguing that federal courts “have largely refused to defer [to the legislature] on questions of constitutional interpretation”).

115. The *Grutter* Court's deference to the law school seems, on its surface, similar to judicial deference to administrative agencies' interpretations of statutes under the *Chevron* doctrine. See *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). After all, both the interpretation of the Constitution and the interpretation of a statute are legal questions. But there are two important differences between the two contexts that justify the use of *Chevron* deference, but the rejection of *Grutter* deference. First, the *Chevron* doctrine is based primarily upon Congress's delegation of lawmaking authority to administrative agencies. See *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001) (holding that the *Chevron* doctrine applies “when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority”); Horwitz, *supra* note 32, at 1080 (citing *Chevron*, 467 U.S. at 843-44). In other words, courts defer to agency interpretations of statutes mainly because agencies are charged with implementing those same statutes. In contrast, law schools are not charged with implementing or administering the Constitution. Neither has the Supreme Court delegated to law schools its authority of constitutional interpretation. Second, deference under *Chevron* is relatively limited; courts may defer to agency interpretations of statutes only where (1) the statute is ambiguous and (2) the agency interpretation is reasonable. See *Chevron*, 467 U.S. at 843-44. And the court – not the agency – makes both of these determinations. See *id.* Further, “in reviewing agency policy determinations, courts have continued to apply a ‘hard look’ doctrine that involves close judicial scrutiny.” Schapiro, *supra* note 32, at 682. The courts' active scrutiny of agency decisions stands in stark contrast to the expansive deference that the *Grutter* Court afforded to the law school.

116. *Ricci*, 129 S. Ct. at 2681.

117. *Id.*

of the constitutional provision at issue. In *Holder v. Humanitarian Law Project*, the Supreme Court considered a First Amendment challenge to a federal statute prohibiting “the provision of ‘material support or resources’ to certain foreign organizations that engage in terrorist activity.”¹¹⁸ In upholding the constitutionality of the statute, the Court expressly denounced any deference to Congress’s interpretation of the First Amendment: “Our precedents, old and new, make clear that concerns of national security and foreign relations do not warrant abdication of the judicial role. We do not defer to the Government’s reading of the First Amendment, even when such interests are at stake.”¹¹⁹ Where other public entities are bound by the Constitution, public universities should not be awarded a get-out-of-jail-free card via deference.¹²⁰

This does not mean, however, that deference to public universities should be banished from constitutional analysis. As explained above, the law school’s educational judgment would have deserved deference had the law school, for example, implemented minimum GPA or LSAT score requirements or picked one particular race-neutral admissions policy over another to further its interest in diversity. In those cases, the university is exercising its judgment as to what constitutes appropriate educational policy while remaining within the bounds of the Constitution. But when the issue concerns the constitutionality of a suspect classification (e.g., race) that appears on the face of an admissions policy, deference to a non-judicial body likely biased toward the legality of its own actions is improper – especially under strict scrutiny.¹²¹

The *Grutter* Court’s deference did not end there. Not only did the Court defer to the law school on the legal question whether diversity is a compelling interest, the Court also deferred, *sub silentio*, to the law school’s interest in maintaining its elite status.¹²² The law school contended that adopting race-

118. *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2712 (2010) (quoting 18 U.S.C. § 2339B(a)(1)).

119. *Id.* at 2727.

120. *Cf. Christian Legal Soc’y v. Martinez*, 130 S. Ct. 2971, 3008 (2010) (Alito, J., dissenting) (“[W]hen it comes to the interpretation and application of the right to free speech, we exercise our own independent judgment. We do not defer to Congress on such matters . . . and there is no reason why we should bow to university administrators.” (citation omitted)).

121. *See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 765 (2007) (Thomas, J., concurring) (“It is not up to the school boards – the very government entities whose race-based practices we must strictly scrutinize – to determine what interests qualify as compelling under the Fourteenth Amendment to the United States Constitution. Rather, this Court must assess independently the nature of the interest asserted and the evidence to support it in order to determine whether it qualifies as compelling under our precedents.”).

122. *See Grutter v. Bollinger*, 539 U.S. 306, 356 (2003) (Thomas, J., concurring in part and dissenting in part) (“The proffered interest that the majority vindicates today, then, is not simply ‘diversity.’ Instead the Court upholds the use of racial discrimination as a tool to advance the Law School’s interest in offering a marginally superior education while maintaining an elite institution.”). Had the Court not recognized a

neutral admissions policies – such as using a lottery system or decreasing its emphasis on LSAT scores or GPA – would undermine its high national ranking.¹²³ The Court accepted this contention on its face, did not examine whether it had any merit, and neglected the fact that other public law schools such as Boalt Hall had maintained their elite status while adopting race-neutral admissions policies.¹²⁴ In effect, the Court recognized a compelling state interest in maintaining an elite status by allowing the law school to reject race-neutral alternatives because of the law school’s desire to maintain its prestigious spot in the U.S. News & World Report rankings.¹²⁵

Grutter’s deference to the law school largely was welcomed by the academia. For example, one commentator praised *Grutter*’s deference to the law school’s legal judgment for creating “mini-Supreme Courts out of higher education institutions,” “shift[ing] the primary policing duties from the courts to the admissions offices,” and “reorganiz[ing] the division of labor between educational officials and the Court.”¹²⁶

compelling interest in elite status, the law school would have been required to adopt race-neutral criteria (e.g., decreasing its emphasis on undergraduate GPA and LSAT scores) that would have sacrificed the law school’s high admissions standards and eventually its elite status. *See id.* at 340 (majority opinion) (noting that the race-neutral alternatives of “decreasing the emphasis . . . on undergraduate GPA and LSAT scores” or a “lottery system” “would require a dramatic sacrifice of diversity, the academic quality of all admitted students, or both” (internal quotation marks omitted)).

123. *Id.* at 340 (majority opinion).

124. *See id.*; *id.* at 366-67 (Thomas, J., concurring in part and dissenting in part).

125. *See id.* at 361 (Thomas, J., concurring in part and dissenting in part) (“Therefore, the Law School should be forced to choose between its classroom aesthetic and its exclusionary admissions system – it cannot have it both ways.”).

126. Annalisa Jabaily, *Color Me Colorblind: Deference, Discretion, and Voice in Higher Education After Grutter*, 17 CORNELL J.L. & PUB. POL’Y 515, 526-27 (2008); *see* Paul Horwitz, *Universities as First Amendment Institutions: Some Easy Answers and Hard Questions*, 54 UCLA L. REV. 1497, 1520 (2007) (noting that under a “strong-form” of deference, “universities would enjoy near-absolute discretion to self-regulate across a range of academic activities, from hiring and firing, to the selection of campus speech codes or the restriction of religious speech, to the composition of the student body based explicitly on considerations of race or gender”); *id.* at 1542 (“[C]ourts should grant universities substantial autonomy to engage in educational decisions; and they should defer, too, in determining what constitutes an academic decision.”); Edward N. Stoner II & J. Michael Showalter, *Judicial Deference to Educational Judgment: Justice O’Connor’s Opinion in Grutter Reapplies Longstanding Principles, As Shown by Rulings Involving College Students in the Eighteen Months Before Grutter*, 30 J.C. & U.L. 583, 617 (“It is an honor for college administrators that the Supreme Court has selected higher education as the one unique community in our society eligible for such judicial deference.”); *see also* Hessick, *supra* note 114, at 1451 (“When the legislature has offered an interpretation of the Constitution, courts should afford some level of deference to that interpretation.”).

I do not view this as an improvement. The “labor” involved in *Grutter* was not the making of academic decisions better suited for admissions offices. It was the interpretation of the United States Constitution – which, ever since *Marbury v. Madison*, has been “emphatically the province and duty of the judicial department.”¹²⁷ If the Court has jealously guarded its responsibility to interpret the Constitution¹²⁸ and refused to shift it to any other branch of government, why should universities be granted an exception? The U.S. Constitution is built on a distrust of all government actors, including public university officials. This distrust exists especially in the constitutional provisions protecting individual rights (including the Equal Protection Clause), which place certain subjects beyond the reach of government actors who may be guided by their own biases or political motives – and not by a desire to protect constitutional norms.¹²⁹ Thus, allowing universities to play a role in policing the constitutionality of their own actions while the courts take a back seat amounts to constitutional abdication – not constitutional improvement.¹³⁰

Taken to its logical extreme, this position could have devastating consequences. After all, it was the Court’s “exceedingly deferential” approach to the military authorities in *Korematsu* that justified the internment of Japanese Americans during World War II.¹³¹ But even within the context of higher education, a similar danger exists. Once in place, a rule of deference to higher-education institutions would apply across the board. The Court would

127. *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

128. See *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11 (2004) (noting the Court’s “command to guard jealously and exercise rarely [its] power to make constitutional pronouncements”).

129. See *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943) (“The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.”); Hessick, *supra* note 114, at 1478 (“[A] legislator may view the Constitution as a tool for accomplishing desired results – a tool to be negotiated, stretched, or even disregarded, when necessary. Judges do not face equivalent pressures.” (footnote omitted)); Sunstein, *supra* note 23, at 78 (“‘Strict scrutiny’ is based on a presumption of distrust, to be rebutted only in the extreme cases.”); Winkler, *supra* note 1, at 802 (“With laws encroaching upon [fundamental] rights, the ‘ordinary political processes’ could not be trusted to reach constitutionally legitimate results.” (quoting *United States v. Carolene Prods.*, 304 U.S. 144, 153 n.4 (1938))).

130. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 766 (2007) (Thomas, J., concurring) (“To adopt the dissent’s deferential approach would be to abdicate our constitutional responsibilities.”); Scott A. Moss, *Against “Academic Deference”: How Recent Developments in Employment Discrimination Law Undercut an Already Dubious Doctrine*, 27 *BERKELEY J. EMP. & LAB. L.* 1, 5 (2006) (arguing that deference to educational institutions “threatens to leave academia in an island of civil rights lawlessness”).

131. See Siegel, *supra* note 1, at 382; Massey, *supra* note 101, at 973-74 (arguing that the *Korematsu* Court “employed much of the same method as the *Grutter* majority”). See generally *Korematsu v. United States*, 323 U.S. 214 (1944).

defer to all academic decisions by such institutions, regardless whether their motives are good or bad and whether the consequences of their decisions are beneficial or harmful. Higher-education institutions easily may abuse the deference granted to them to define the legality of their own conduct. However well intentioned the law school's race-conscious admissions policy may have been, the same benign intentions do not motivate all educational policies.

Paul Horwitz argues that deference to higher-education institutions on legal questions is proper in part because “[m]ost academics . . . would resist any move by a university to engage in flagrant discrimination.”¹³² He further notes that “[a]n effort by a university to engage in open discrimination . . . would run into [numerous] barriers,” including objections from faculty members, students, and alumni.¹³³ Racial prejudice, according to Professors Horwitz and Byrne, is “not an academic value.”¹³⁴

History begs to differ. In the law-school context, consider the Supreme Court's 1950 decision in *Sweatt v. Painter*.¹³⁵ In that case, Heman Sweatt was denied admission to the University of Texas Law School solely because of his African American race.¹³⁶ Instead of offering integrated legal education, the state of Texas offered a separate law school for African Americans.¹³⁷ But that law school had nowhere near the same stature as the University of Texas Law School in terms of “reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige.”¹³⁸ Under these circumstances, the Supreme Court concluded that the state of Texas violated the Equal Protection Clause and required that Sweatt be admitted to the University of Texas Law School.¹³⁹

Although *Sweatt* was decided sixty years ago, racial prejudice in higher-education institutions is not a relic of the past. Until 2000, Bob Jones University in South Carolina prohibited interracial dating among its students and denied admission to applicants who engaged in interracial marriage or dat-

132. Horwitz, *supra* note 126, at 1543.

133. *Id.*

134. *Id.* (quoting J. Peter Byrne, *Constitutional Academic Freedom After Grutter: Getting Real About the “Four Freedoms” of a University*, 77 U. COLO. L. REV. 929, 941 (2006)).

135. 339 U.S. 629 (1950).

136. *Id.* at 631.

137. *Id.* at 633.

138. *Id.* at 634.

139. *Id.* at 635-36.

ing.¹⁴⁰ Academic institutions, as these cases show, are no more immune to prejudice than other government actors.¹⁴¹

Consider also *Brown v. Board of Education (Brown I)*.¹⁴² In *Brown I*, the Supreme Court held that segregation of students according to their race violates the Equal Protection Clause of the Fourteenth Amendment.¹⁴³ *Brown I* rightfully refused to defer to educational institutions and local governments that had segregated students on the basis of race and held that “[s]eparate educational facilities are inherently unequal.”¹⁴⁴ The segregationists in that case had advanced many of the same arguments that the supporters of *Grutter*’s deference now advance.¹⁴⁵ They argued for deference to the local authorities’ judgments about how best to educate their students.¹⁴⁶ They purported to “advocate only a concept of constitutional law that permits determinations of state and local policy to be made on state and local levels.”¹⁴⁷ What would have happened if the *Brown* Court countenanced deference to the local authorities? What if the segregationists in *Brown* were allowed to sit as “mini-Supreme Courts,”¹⁴⁸ sharing the labor of interpreting the Equal Protection Clause with the United States Supreme Court? The Supreme Court in *Plessy v. Ferguson* did just that in upholding the constitutionality of segregated railway cars and holding that “separate but equal” was sufficient to satisfy the Equal Protection Clause.¹⁴⁹ In so holding, *Plessy* accorded “a large discretion” to the state legislatures.¹⁵⁰

140. *Bob Jones Univ. v. United States*, 461 U.S. 574, 580-81 (1983); *Bob Jones University Ends Ban on Interracial Dating*, CNN.COM, Mar. 4, 2000, <http://archives.cnn.com/2000/US/03/04/bob.jones/>.

141. See also *Kunda v. Muhlenberg Coll.*, 621 F.2d 532, 550 (3d Cir. 1980) (“Discrimination against minorities and women in the field of education is as pervasive as discrimination in any other area of employment.”); Michelle Chase, *Gender Discrimination, Higher Education, and the Seventh Circuit: Balancing Academic Freedom with Protections Under Title VII*, Case Note: *Farrell v. Butler University*, 22 WIS. WOMEN’S L.J. 153, 160 (2007) (noting the misperception “held by judges and juries that university administrators and faculty, some of America’s most educated citizens, are above sexism or racism”); Moss, *supra* note 130, at 14-15 (noting the persistence of gender segregation and inequality in academic institutions).

142. *Brown v. Bd. of Educ. (Brown I)*, 347 U.S. 483 (1954).

143. *Id.* at 495.

144. *Id.*

145. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 774-75 (2007) (Thomas, J., concurring).

146. *Id.* (citing Brief for the State of Kansas on Reargument at *14, *Brown I*, 347 U.S. 483 (No. 1), 1953 WL 48689).

147. *Id.* at 775 (quoting Brief for the State of Kansas on Reargument, *supra* note 146).

148. See Jabaily, *supra* note 126, at 527.

149. 163 U.S. 537, 548-49 (1896), *overruled by Brown I*, 347 U.S. 483.

150. *Id.* at 550.

Brown I expressly overruled *Plessy* and did not heed the segregationists' pleas for deference – and for good reason. But when it came to the implementation of *Brown I*, the Court regrettably added deference to the mix. As a general matter, when a court finds a government action unconstitutional, that action is unconstitutional immediately. The government must implement an immediate remedy to correct its constitutional wrong. But in *Brown II*, rather than demanding that states desegregate their schools immediately, the Supreme Court allowed them to desegregate only “with all deliberate speed.”¹⁵¹ The school authorities could take their time, deliberate, and devise a remedy to their liking for their very own constitutional wrongs. The Court justified this departure from constitutional norms by deferring to school authorities who had “the primary responsibility for elucidating, assessing, and solving these [school-segregation] problems.”¹⁵²

Brown II's deference undermined the historic holding of *Brown I* and significantly delayed the desegregation of schools.¹⁵³ Segregationists welcomed *Brown II* as a sign of relief following *Brown I*'s broad constitutional holding, which recognized the rights of African Americans to attend the schools of their choice.¹⁵⁴ While deference may seem harmless to some in the context of race-conscious admissions criteria in higher-education institutions, there is no legal basis on which to distinguish the benign deference accorded to the law school in *Grutter* and the disastrous deference to the local authorities in *Brown II*.

The world of *Sweatt* and *Brown* is different from the one in which we live today. Professor Horwitz may well be right that most of today's universities, even if granted deference on legal questions, “would still observe most of the civic norms . . . that are usually enforced through the law.”¹⁵⁵ But why leave that to chance? Why undermine the courts' role in our delicate constitutional balance and leave university officials to judge their own actions? Why take the often-neglected risk of history repeating itself?¹⁵⁶ Whatever the benefits of according deference to educational institutions, they are vastly outweighed by the potential risk of serious abuse. As Justice Thomas put it in a later decision:

Can we really be sure that the racial theories that motivated *Dred Scott* and *Plessy* are a relic of the past or that future theories will be

151. *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 301 (1955).

152. *Id.* at 299.

153. For a discussion of the immediate aftermath of *Brown I* and *Brown II*, see generally Robert B. McKay, “*With All Deliberate Speed: A Study of School Desegregation*,” 31 N.Y.U. L. REV. 991 (1956).

154. Parker, *supra* note 107, at 1707-08 & n.89.

155. Horwitz, *supra* note 126, at 1543.

156. See *supra* notes 135-41 and accompanying text (discussing the history of racial discrimination in higher-education institutions).

nothing but beneficent and progressive? That is a gamble I am unwilling to take and it is one the Constitution does not allow.¹⁵⁷

C. Grutter's Deference Cannot Be Justified on First Amendment Grounds

The *Grutter* Court found a home in the First Amendment for its deference to the law school on its race-conscious admissions policy.¹⁵⁸ The Court noted 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.”¹⁵⁹ This First Amendment interest, in turn, required the Court to defer to a higher-education institution’s admissions policies, including the use of race to promote diversity.

What in the First Amendment’s text or the Court’s First Amendment jurisprudence accords a special constitutional status to higher-education institutions? What in the First Amendment protects a university’s decision of whom to admit to its student body? Scholars have debated these questions at length,¹⁶⁰ so this section provides only a brief overview. This section then poses a question that the *Grutter* Court failed to confront: Even assuming that a school’s admissions policy enjoys First Amendment protection, can that First Amendment interest trump an individual’s right under the Fourteenth Amendment not to be subject to racial discrimination?

The recognition of educational autonomy under the First Amendment can be traced to the Supreme Court’s decision in *Sweezy v. New Hampshire*.¹⁶¹ In that case, the Court invalidated the conviction of Paul Sweezy,

157. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 781-82 (2007) (Thomas, J., concurring).

158. *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003) (noting that universities enjoy “educational autonomy” that is “grounded in the First Amendment”).

159. *Id.*

160. For a thorough analysis of the origins of academic freedom under the First Amendment, see Paul Horwitz, *Grutter's First Amendment*, 46 B.C. L. REV. 461, 481-502 (2005). For a criticism of a First Amendment right to academic freedom, see William G. Buss, *Academic Freedom and Freedom of Speech: Communicating the Curriculum*, 2 J. GENDER RACE & JUST. 213, 220-24, 230-33 (1999) (asserting that “the impressive rhetoric about academic freedom” in Supreme Court opinions “was sweepingly proclaimed rather than carefully delineated”); Robert A. Caplen, *The “Fifth” Freedom: Freedom from Impermissible Expansion of Academic Freedom to University Admissions*, 36 SW. U. L. REV. 1 (2007); Richard H. Hiers, *Institutional Academic Freedom or Autonomy Grounded upon the First Amendment: A Jurisprudential Mirage*, 30 HAMLINE L. REV. 1, 4 (2007) (“[T]he Supreme Court has never actually held that academic institutions are entitled to either academic freedom or autonomy under the First Amendment.”).

161. 354 U.S. 234, 249-50 (1957) (plurality opinion); Horwitz, *supra* note 160, at 482.

who was convicted on the basis of several Marxist lectures he gave at the University of New Hampshire.¹⁶² In dictum, the Court recognized a First Amendment interest against the restriction of speech in an academic context.¹⁶³ Of course, this interest is not limited to higher-education institutions or to academic speech.¹⁶⁴ Any person – whether on or off campus – enjoys a First Amendment right, subject to certain exceptions, to engage in speech activities, join organizations, or deliver lectures, and do so without the fear of criminal liability.

Over time, this tenuously grounded First Amendment interest in academic speech expanded further than its roots. In *Keyishian v. Board of Regents of the University of the State of New York*, the Supreme Court struck down a New York law making membership in the Communist Party prima facie evidence of disqualification for employment in the public school system.¹⁶⁵ The Court held that the law was overbroad under the First Amendment because the law denied employment even to those persons who joined the Communist Party with no intent to further that party's unlawful aims.¹⁶⁶ In what was otherwise a narrow holding based on overbreadth,¹⁶⁷ the Court broadly declared that a classroom serves as a “marketplace of ideas” and that the nation's future leaders are “trained through wide exposure to that robust exchange . . . which discovers truth ‘out of a multitude of tongues’”¹⁶⁸ *Keyishian's* focus on universities' role in the development of future leaders signaled a shift towards deference to a university's institutional policies, including the selection of its student body, even though *Keyishian* itself had nothing to do with admissions policies.

Justice Powell recognized this extension in his opinion in *Regents of the University of California v. Bakke*: “The freedom of a university to make its own judgments as to education includes the selection of its student body.”¹⁶⁹ But why does a university's admissions policy constitute academic speech protected under the First Amendment? Does a university engage in protected speech when it decides whom to admit? Perhaps, as the *Keyishian* Court

162. *Sweezy*, 354 U.S. at 244-46.

163. *Id.* at 250 (noting in dictum that the First Amendment protects academic speech because “[s]cholarship cannot flourish in an atmosphere of suspicion and distrust”).

164. According to William Buss, the Supreme Court's rhetoric about freedom of academic speech is based – not on the freedom to teach – but on “the extramural freedom to participate as citizens in the political process by joining organizations or engaging in speech activities outside the classroom.” Buss, *supra* note 160, at 222-23.

165. 385 U.S. 589, 605-11 (1967).

166. *Id.* at 609-11.

167. See Buss, *supra* note 160, at 223 (noting that *Keyishian's* “narrow holding . . . was based on vagueness and overbreadth”).

168. *Keyishian*, 385 U.S. at 603 (quoting *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)); Horwitz, *supra* note 160, at 488.

169. 438 U.S. 265, 312 (1978).

noted, the university facilitates the creation of a “marketplace of ideas” in the classroom by admitting a diverse student body.¹⁷⁰ That admissions decision, in turn, may be protected by the First Amendment.

Assume, for the sake of argument, that the First Amendment protects a university’s admissions decisions. There is another hurdle that Justice Powell in *Bakke* had acknowledged, but that the *Grutter* Court failed to overcome. Justice Powell, in recognizing a First Amendment interest in a university’s selection of its student body, noted that a university’s educational decisions are subject to “constitutional limitations protecting individual rights.”¹⁷¹ Surely, the right to be free from racial discrimination under the Equal Protection Clause is an individual right that should trump any institutional autonomy or educational freedom that the First Amendment protects.

Contrast *Grutter* to other cases where individual constitutional rights trumped a higher-education institution’s educational autonomy. For example, in *Saxe v. State College Area School District*, the Third Circuit – in an opinion authored by then-Judge Alito – struck down a university’s anti-harassment policy as unconstitutionally overbroad under the First Amendment.¹⁷² The Third Circuit’s opinion did not even hint at deference to the university’s educational judgment under the First Amendment, even though the university’s policy, much like the law school’s policy in *Grutter*, was adopted to preserve order and provide a “nurturing school environment.”¹⁷³ The students’ First Amendment rights to free speech trumped whatever institutional autonomy that the university enjoyed.

Likewise, in *Doe v. University of Michigan*, the district court struck down under the First Amendment an anti-harassment policy that the University of Michigan adopted in response to rising incidents of racism.¹⁷⁴ The court did not defer to the University of Michigan’s educational judgment in adopting this policy, even though the very same university’s law school was granted the educational autonomy to use race in its admissions decisions in *Grutter*.¹⁷⁵ If the First Amendment rights of students trump a university’s educational autonomy, so must the Fourteenth Amendment rights of students to be free from discrimination because of their race.

170. *Keyishian*, 385 U.S. at 603.

171. *Bakke*, 438 U.S. at 314.

172. 240 F.3d 200, 214 (3d Cir. 2001); see Rachel F. Moran, *Let Freedom Ring: Making Grutter Matter in School Desegregation Cases*, 63 U. MIAMI L. REV. 475, 496 & n.127 (2009).

173. *Saxe*, 240 F.3d at 202.

174. 721 F. Supp. 852, 853-54 (E.D. Mich. 1989); see Moran, *supra* note 172, at 496 & n.127.

175. See Moran, *supra* note 172, at 496 (“Judges generally have rejected ‘hate speech’ codes adopted to protect students from ‘words that wound’ because these measures chill the legitimate discussion of racial difference and curtail individual rights of expression.”).

There is yet another reason why a First Amendment interest in educational freedom has to give way to liberties protected by the Fourteenth Amendment. The Fourteenth Amendment was ratified after the First Amendment. The First Amendment could not have created an educational-autonomy exception in a constitutional provision that did not exist at the time of its adoption. Where there is a conflict between two constitutional provisions, the one enacted later in time controls.¹⁷⁶ If the First Amendment recognizes an interest in educational freedom, that interest therefore is subject to any limitations the Fourteenth Amendment subsequently imposed. For that reason, what several commentators have labeled as the First Amendment “educational benefits” exception to the Fourteenth Amendment is a misnomer.¹⁷⁷ If anything, the Fourteenth Amendment creates an exception to the institutional autonomy of universities under the First Amendment. This exception prevents higher-education institutions from using their autonomy to discriminate on the basis of race. Because the Fourteenth Amendment, through the Equal Protection Clause, protects the right to be free from racial discrimination, deference to the law school’s use of race in its admissions decisions in *Grutter* cannot be justified under the First Amendment.

D. *Grutter’s Deference Lacks Support from Precedent*

In support of its deference to the law school, the *Grutter* Court relied on three prior Supreme Court cases: *Regents of the University of Michigan v. Ewing*,¹⁷⁸ a footnote from Justice Powell’s concurrence in *Board of Curators of the University of Missouri v. Horowitz*,¹⁷⁹ and a footnote from Justice Powell’s opinion in *Bakke*.¹⁸⁰ The first two cases, *Ewing* and *Horowitz*, are distinguishable from *Grutter* because they accorded deference to university officials under rational-basis review, not strict scrutiny. Under the deferential rational-basis test, “legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.”¹⁸¹

176. See *Friery v. L.A. Unified Sch. Dist.*, 300 F.3d 1120, 1124 (9th Cir. 2002) (“[I]t is a firmly established rule of constitutional jurisprudence that where two constitutional provisions conflict, the one that was enacted later in time controls.” (citation omitted)); *Premier Pabst Sales Corp. v. Grosscup*, 12 F. Supp. 970, 972 (E.D. Pa. 1935) (“[Constitutional] provisions, if conflicting, are subject to the rule applied to conflicting statutes. The latest controls.”).

177. See Beard, *supra* note 107, at 4-5 (noting that *Grutter* created an “educational benefits” exception “to the guarantee of racial equality under the Fourteenth Amendment”).

178. 474 U.S. 214 (1985).

179. 435 U.S. 78, 96 n.6 (1978) (Powell, J., concurring).

180. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 319 n.53 (1978).

181. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985).

In *Ewing*, a University of Michigan student claimed that the university violated his due-process rights by dismissing him for poor academic performance.¹⁸² The Court rejected this claim and concluded, in part by deferring to university officials, that the dismissal was not arbitrary or capricious.¹⁸³ Because there was no suspect classification at issue, rational-basis review, not strict scrutiny, applied. Importantly, the Court's deference was to the educational judgment of the university officials on "the substance of a genuinely academic decision"¹⁸⁴ – i.e., the "academic performance of students and their entitlement to promotion or graduation."¹⁸⁵ Despite deferring to the university, the Court also examined the record, noting that the district court had found that the university "had good reason to dismiss Ewing from the program," namely, his poor academic performance.¹⁸⁶ Even though one might argue that the law school's implementation of an admissions policy is no different than the university's decision to dismiss Ewing, the crucial difference between the two cases is the application of strict scrutiny in *Grutter* and rational basis in *Ewing*.¹⁸⁷ While deference is permissible under the latter, it is inconsistent with the former.

Similarly, in *Horowitz*, the Court, applying rational-basis review, rejected the due-process claims of a medical student dismissed for poor academic performance.¹⁸⁸ The Court applied the balancing test from *Mathews v. Eldridge*¹⁸⁹ and concluded that the procedures used in dismissing Horowitz were sufficient to satisfy the Due Process Clause.¹⁹⁰ Although the majority noted that public education is committed to state and local authorities and judicial intervention in public education requires "care and restraint," it never expressly mentioned deference to the educational institution.¹⁹¹

Indeed, the *Grutter* Court cited, not the majority opinion in *Horowitz*, but a footnote from Justice Powell's concurrence to support its deference to

182. *Ewing*, 474 U.S. at 222-23.

183. *Id.*

184. *Id.* at 225.

185. *Id.* at 225 n.11 (quoting Bd. of Curators of the Univ. of Mo. v. Horowitz, 435 U.S. 78, 96 n.6 (Powell, J., concurring)). Decisions about the "academic performance of students and their entitlement to promotion or graduation," *Horowitz*, 435 U.S. at 96 n.6, are inherently educational judgments, similar to the business decisions that a board of directors makes in managing a corporation. See *supra* text accompanying notes 109-11 (discussing the business-judgment rule).

186. *Ewing*, 474 U.S. at 227 (quoting the district-court decision).

187. See Buss, *supra* note 160, at 232 (characterizing *Ewing* as "a garden-variety deference of the judiciary to an institutional decision to dismiss a student for failing to meet academic standards").

188. *Horowitz*, 435 U.S. at 80-81, 91-92.

189. 424 U.S. 319, 334-35 (1976).

190. *Horowitz*, 435 U.S. at 85.

191. *Id.* at 91 (quoting Epperson v. Arkansas, 393 U.S. 97, 104 (1968)).

the law school.¹⁹² The footnote addressed the discretion given to university officials in decisions concerning the “academic performance of students and their entitlement to promotion or graduation,”¹⁹³ which was the same type of deference at issue in *Ewing* under rational-basis review (not strict scrutiny). And even in *Ewing* and *Horowitz*, where a deferential standard applied, the deference accorded to the educational institution was not tantamount to a *carte blanche* to violate the Constitution. Had the educational institution provided no meaningful process to the student (e.g., dismissed the student after flipping a coin), the Court in both cases would have found a due-process violation.

As the final support for its deference to the law school, the *Grutter* Court cited a footnote from Justice Powell’s opinion in *Bakke*.¹⁹⁴ That footnote stated:

Universities . . . may make individualized decisions, in which ethnic background plays a part, under a presumption of legality and legitimate educational purpose. So long as the university proceeds on an individualized, case-by-case basis, there is no warrant for judicial interference in the academic process.¹⁹⁵

Even though this footnote certainly provides support for the *Grutter* majority, it was anything but clear before *Grutter* that Justice Powell’s statement on this point was controlling. *Bakke* was a badly fractured decision and left lower courts confused as to whether a majority of the Justices had signed on to any portion of the opinion.¹⁹⁶ It was not until *Grutter* that the Supreme Court cited Justice Powell’s opinion as controlling.¹⁹⁷ As a result, this footnote provided little, if any, precedential support to the *Grutter* Court’s conclusions.

192. *Grutter v. Bollinger*, 539 U.S. 306, 328-29 (2003) (citing *Horowitz*, 435 U.S. at 96 n.6 (Powell, J., concurring)).

193. *Horowitz*, 435 U.S. at 96 n.6 (Powell, J., concurring).

194. *Grutter*, 539 U.S. at 328 (citing *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 319 n.53 (1978)).

195. *Bakke*, 438 U.S. at 319 n.53.

196. See *United States v. Miami*, 614 F.2d 1322, 1337 (5th Cir. 1980) (“[T]he Justices [in *Bakke*] have told us mainly that they have agreed to disagree.”), *aff’d in part, vacated in part on reh’g*, 664 F.2d 435 (5th Cir. 1981).

197. *Grutter*, 539 U.S. at 328 (citing *Bakke*, 438 U.S. at 319 n.53).

E. *What Are the Limits to Grutter's Deference?*

The *Grutter* Court stated at least three limitations to its deferential analysis. First, the Court limited its deference to institutions of higher education, which “occupy a special niche” under the First Amendment.¹⁹⁸ Second, the Court’s deference would be to an institution’s “educational judgment.”¹⁹⁹ If the constitutional challenge is to a policy unrelated to the educational purposes of the institution, then deference presumably would be improper. Third, the Court noted that the law school’s admissions criteria did not constitute a quota system, reiterating Justice Powell’s holding in *Bakke* that racial quotas are unconstitutional.²⁰⁰

This narrow set of limitations leaves the door wide open to extend *Grutter*’s holding beyond its facts. Remaining within the bounds of higher education, consider whether the Court would apply deference in the following hypothetical. A traditionally African American university decides to diversify its student body. The vast majority of its applicants are African American. To achieve its compelling interest in diversity, it seeks to admit a “critical mass” of Caucasian students, thereby precluding admission to some African American applicants whom it would have admitted under its race-neutral admissions policy. African American students who were denied admission file suit, challenging the school’s policy under the Equal Protection Clause. What result? If the same strict-scrutiny test applies to classifications that seek to include or exclude members of a particular race, as the Supreme Court has repeatedly held,²⁰¹ this hypothetical admissions policy would be just as deserving of deference as was the law school’s policy in *Grutter*.

198. *Id.* at 329.

199. *Id.* at 328.

200. *Id.* at 335.

201. *See Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 224, 229-30 (1995) (“[W]henver the government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution’s guarantee of equal protection.”); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 494 (1989) (“[T]he standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification.”); *Bakke*, 438 U.S. at 289-91 (Powell, J., concurring) (“The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color.”); *see also Ricci v. DeStefano*, 129 S. Ct. 2658, 2674 (2009) (“Whatever the City’s ultimate aim – however well intentioned or benevolent it might have seemed – the City made its employment decision because of race.”). As the Court later explained in *Parents Involved*:

The reasons for rejecting a motives test for racial classifications are clear enough. “The Court’s emphasis on ‘benign racial classifications’ suggests confidence in its ability to distinguish good from harmful governmental uses of racial criteria. History should teach greater humility ‘[B]enign’ carries with it no independent meaning, but reflects only ac-

Even though the *Grutter* Court limited its holding to higher-education institutions, was there a sound legal basis for doing so? This limitation was based in part on the Court's assertion that universities are training grounds for the nation's future leaders. This would limit the Court's deference to those institutions that similarly train leaders. But it is not only higher-education institutions that educate and produce leaders for the nation's future. Suppose the U.S. Department of Justice forms a new division, which promises incomparable opportunities to bright law-school graduates, in part to prepare these young lawyers for lucrative leadership positions in government. Would deference be proper to the Department of Justice's decision to facilitate diversity in its new division by using race as a "plus" factor in making employment offers? Ultimately, if the Court's basis for deference to the law school was the facilitation of a marketplace of ideas in an institution that develops leaders, the new division of the Department of Justice would be just as deserving of deference.

In addition to deferring to universities because they are training grounds for future leaders, the Court also reasoned that higher-education institutions make "complex educational judgments" that lie beyond the competence of the judiciary.²⁰² This argument would be equally applicable to many institutions outside the higher-education context.²⁰³ The Department of Justice in the above hypothetical and the City of New Haven Fire Department in *Ricci* also make complex decisions related to that institution that are just as much, if not more, beyond the competence of the judiciary as the educational judgments of a university.²⁰⁴ After all, five justices on the current Court (Justices Scalia, Kennedy, Ginsburg, Breyer, and Kagan) are former academics;²⁰⁵ the Court

ceptance of the current generation's conclusion that a politically acceptable burden, imposed on particular citizens on the basis of race, is reasonable."

Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 742 (2007) (quoting *Metro Broad., Inc. v. F.C.C.*, 497 U.S. 547, 609-10 (1990) (O'Connor, J., dissenting)).

202. *Grutter*, 539 U.S. at 328.

203. See Moss, *supra* note 130, at 6 (arguing that the reasons behind the academic-deference doctrine would require courts to "defer to employers in a wide swath of labor markets, whenever judges feel insecure about their knowledge of the field").

204. See Horwitz, *supra* note 32, at 1090 ("[T]he federal courts regularly, and without any hint of deference, review and resolve problems of the most exquisite complexity."); *id.* at 1092 (noting, for example, that courts do not "show any special degree of deference to decisions made by the aeronautics industry" even though courts are unlikely to be familiar with that industry); Adam Winkler, *The Federal Government as a Constitutional Niche in Affirmative Action Cases*, 54 UCLA L. REV. 1931, 1958 (2007) ("Does [*Grutter*] mean that every governmental institution with a mission and expertise is a special constitutional niche? If so, what remains of skeptical judicial review, and to exactly which governmental entities does it apply?").

205. Biographies of Current Justices of the Supreme Court, <http://www.supremecourt.gov/about/biographies.aspx> (last visited Sept. 28, 2010).

undoubtedly knows more about running a higher-education institution than a fire department or the Department of Justice. If such an entity decides to use race as a factor in hiring decisions, what would justify distinguishing it from a higher-education institution?²⁰⁶

These hypothetical slippery-slope scenarios have practical grounding. At least one federal circuit court took *Grutter*'s deference out of the campus grounds and applied it to the employment context. In *Petit v. City of Chicago*, the U.S. Court of Appeals for the Seventh Circuit upheld a policy of the Chicago Police Department that standardized the applicants' raw scores in promotion examinations in a way that advantaged minorities.²⁰⁷ The purpose of the policy was to create and maintain a diverse police department.²⁰⁸ In support of its holding that the Chicago Police Department had a compelling interest in diversity, the court expressly relied on *Grutter* and deferred to "the views of experts and Chicago police executives that affirmative action was warranted to enhance the operations" of the Department.²⁰⁹

Employers are not the only institutions that might benefit from *Grutter*'s deference. Scholars have argued for the extension of *Grutter*'s deference to a plethora of other organizations, including libraries, news organizations, churches, and corporations.²¹⁰ Given the lack of coherent boundaries to *Grut-*

206. See *Grutter*, 539 U.S. at 347-48 (Scalia, J., concurring in part and dissenting in part) ("If it is appropriate for the University of Michigan Law School to use racial discrimination for the purpose of putting together a 'critical mass' that will convey generic lessons in socialization and good citizenship, surely it is no less appropriate – indeed, *particularly* appropriate – for the civil service system of the State of Michigan to do so.").

207. 352 F.3d 1111, 1118 (7th Cir. 2003). According to Cynthia Estlund, the *Grutter* Court endorsed the "business case for diversity":

The proponents of workforce diversity will rightly take comfort in the majority's affirmation that student body diversity "better prepares students for an increasingly diverse workforce and society," and in its reliance on corporate amici's contention that "the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints."

Cynthia L. Estlund, *Putting Grutter to Work: Diversity, Integration, and Affirmative Action in the Workplace*, 26 BERKELEY J. EMP. & LAB. L. 1, 20 (2005) (internal quotation marks omitted).

208. *Petit*, 352 F.3d at 1114.

209. *Id.*; see also *Lomack v. City of Newark*, No. Civ. A. 04-6085 (JWB), 2005 WL 2077479, at *6-7 (D. N.J. Aug. 25, 2005) (applying *Grutter* to uphold the City of Newark's race-conscious policy to diversify its firehouses), *rev'd*, 463 F.3d 303 (3d Cir. 2006); Adams, *supra* note 114, at 980 ("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.").

210. Elizabeth Dale, *Death or Transformation? Educational Autonomy in the Roberts Court*, 43 TULSA L. REV. 725, 728 (2008); Horwitz, *supra* note 126, at 1502 ("[A] number of other institutions – the press, religious associations, libraries, and others . . . should enjoy substantial deference from courts . . ."). In addition, a stu-

ter's reasoning, the deference applied in that case is unlikely to remain within the higher-education context.²¹¹

But at least one can take comfort in the certainty of one proposition for which *Grutter* stands: Deferential review applies to equal-protection challenges to a higher-education institution's admissions policy. If context indeed matters under the Equal Protection Clause, one would at least expect the Court to apply the same deferential analysis in the same context. Think again.

IV. *UNITED STATES V. VIRGINIA*: NO DEFERENCE TO ANOTHER HIGHER-EDUCATION INSTITUTION

A. Background

United States v. Virginia concerned an equal-protection challenge by the United States to the male-only admissions policy of the Virginia Military Institute ("VMI").²¹² VMI, a public higher-education institution, provided "incomparable" education to men and trained them to be "citizen-soldiers."²¹³ VMI used the "adversative method" of teaching, characteristic of traditional military instruction, seeking to instill in students a strong moral code via "[p]hysical rigor, mental stress, absolute equality of treatment, absence of privacy, minute regulation of behavior, and indoctrination in desirable values."²¹⁴ VMI's unique educational method had proved to be rather fruitful; members of Congress, military generals, and business executives were among its impressive list of alumni.²¹⁵

The district court applied intermediate scrutiny to VMI's single-sex policy and rejected the United States' equal-protection challenge.²¹⁶ The court found that the admission of women would necessitate fundamental changes in VMI's distinct adversative method, which provided a "sufficient constitutional justification" for upholding its admissions policy.²¹⁷

dent commentator has argued for the application of *Grutter*'s deferential strict scrutiny to infringements on the Second Amendment right to keep and bear arms. See Andrew R. Gould, Comment, *The Hidden Second Amendment Framework Within District of Columbia v. Heller*, 62 VAND. L. REV. 1535, 1570-73 (2009).

211. See Massey, *supra* note 101, at 970 (arguing that *Grutter* "distorted and weakened the force of strict scrutiny in equal protection, and by implication, in other areas of constitutional law in which strict scrutiny is applicable").

212. 518 U.S. 515, 519 (1996).

213. *Id.* at 519, 557.

214. *Id.* at 520, 522 (quoting the district court's decision).

215. *Id.* at 520.

216. *Id.* at 523-24.

217. *Id.* at 524.

The U.S. Court of Appeals for the Fourth Circuit reversed.²¹⁸ The professed purpose of VMI's policy – the promotion of “autonomy and diversity” – could not survive constitutional scrutiny because the policy favored one gender while disadvantaging the other.²¹⁹ But the Fourth Circuit agreed with the district court that the admission of women would materially affect VMI's training program and thus provided three options to the Commonwealth of Virginia to remedy its constitutional violation: (1) establish a parallel institution for women; (2) allow the admission of women to VMI; or (3) withdraw state support from VMI.²²⁰

The Commonwealth opted for the first option, proposing the Virginia Women's Institute for Leadership (“VWIL”).²²¹ Yet VWIL was fundamentally different from VMI because it lacked VMI's military model of education, which the task force in charge of designing VWIL found to be unsuitable for most women.²²² Instead, VWIL implemented “a cooperative method [that] reinforces self-esteem.”²²³ The district court held that the establishment of VWIL satisfied the Commonwealth's obligations under the Equal Protection Clause because VMI and VWIL would “achieve substantially similar outcomes.”²²⁴ The Fourth Circuit later affirmed the district court's decision, applying what the majority of the Supreme Court described as a deferential analysis to the Commonwealth.²²⁵

The Supreme Court, in a 7-1 decision, reversed the Fourth Circuit.²²⁶ The Court applied intermediate scrutiny, which governs classifications on the basis of gender, and required the state to show: (1) an “exceedingly persuasive justification” for the single-sex policy and (2) the use of means “substantially related to the achievement” of that purpose.²²⁷ Under intermediate

218. *Id.*

219. *Id.* at 525 (internal quotation marks omitted).

220. *Id.* at 525-26.

221. *Id.* at 526.

222. *Id.* at 526-27.

223. *Id.* at 527 (quoting the district court's decision).

224. *Id.* at 527-28 (quoting the district court's decision).

225. *Id.* at 528.

226. *Id.* at 518, 534. Justice Thomas recused himself from participation in this case. *Id.* at 558.

227. *Id.* at 531, 533 (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)). The Court interchangeably referred to the requirement under the first prong of this test as “important governmental objectives” and “exceedingly persuasive justification.” See, e.g., *id.* at 533. Justice Scalia, dissenting, criticized the latter characterization of the first prong, arguing that it amounted to strict scrutiny in disguise. *Id.* at 571-74 (Scalia, J., dissenting); see also *id.* at 559 (Rehnquist, C.J., concurring) (“While terms like ‘important governmental objective’ and ‘substantially related’ are hardly models of precision, they have more content and specificity than does the phrase ‘exceedingly persuasive justification.’ That phrase is best confined, as it was first used, as an observation on the difficulty of meeting the applicable test, not as a formulation of the test itself.”).

scrutiny, the state's proffered purpose had to be "genuine, not hypothesized or invented *post hoc* in response to litigation," and the state could not "rely on overbroad generalizations about the different talents, capacities, or preferences of males and females."²²⁸ The burden of meeting these requirements was "demanding" and rested "entirely on the State."²²⁹

In applying intermediate scrutiny, the Court first analyzed Virginia's purported purposes for drawing a gender-based classification: (1) the provision of important educational benefits that inhere to single-sex education, including the contribution of single-sex education to "diversity in educational approaches" across the Commonwealth of Virginia and (2) the preservation of VMI's adversative method, which VMI would have to modify if it admitted women.²³⁰ Responding to these purposes, the Court refused to defer to VMI's first asserted interest in diversity, holding that VMI failed to establish that the exclusion of women diversified educational opportunities in Virginia.²³¹ The Court emphasized that VMI's justification would "not be accepted automatically" and engaged in an exacting inquiry into whether VMI's proffered interest in diversity had any substance.²³² Examining in detail the history of VMI, its internal reports, the history of other higher-education institutions in Virginia, and the testimony from the record, the Court found "no persuasive evidence . . . that VMI's male-only admission policy is in furtherance of a stated policy of diversity."²³³

Next, the Supreme Court analyzed VMI's second assertion that the admission of women would "destroy" its unique educational method.²³⁴ The district court had found that "coeducation would materially affect 'at least these three aspects of VMI's program – physical training, the absence of privacy, and the adversative approach.'"²³⁵ The Supreme Court refused to defer to VMI's proffered interest in maintaining its unique training method and also rejected the district court's findings of fact. It held that these findings amounted to unacceptable, overbroad generalizations and "fixed notions concerning the roles and abilities of males and females."²³⁶ Citing historical evidence such as the successful admission of women into the military, the Court noted that "Virginia's fears for the future of VMI may not be solidly grounded."²³⁷ The Court therefore concluded that Virginia failed to establish

228. *Id.* at 533 (majority opinion).

229. *Id.*

230. *Id.* at 534-35 (internal quotation marks omitted).

231. *Id.* at 535.

232. *Id.* at 535-36 (citing *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 (1975); *Califano v. Goldfarb*, 430 U.S. 199, 212-13 (1977)).

233. *Id.* at 535-39 (internal quotation marks omitted).

234. *Id.* at 540.

235. *Id.* at 540-41 (quoting the district court's opinion).

236. *Id.* at 541 (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982)).

237. *Id.* at 544-45.

an “exceedingly persuasive justification” for VMI’s male-only admissions policy.²³⁸

Finally, the Court examined VWIL, Virginia’s proposed women-only counterpart to VMI. The Court held that “VWIL [did] not qualify as VMI’s equal” because “VWIL’s student body, faculty, course offerings, and facilities” did not match VMI’s.²³⁹ Moreover, VWIL graduates could not “anticipate the benefits associated with VMI’s 157-year history, the school’s prestige, and its influential alumni network.”²⁴⁰ The Court went on to criticize the Fourth Circuit’s deferential review to Virginia’s proposal of VWIL, noting that deference is “inconsistent with the more exacting standard our precedent requires.”²⁴¹ The Court stated that the Fourth Circuit’s deferential approach yielded “little or no scrutiny of the effect of a classification directed at [single-gender education].”²⁴² Giving no deference to Virginia, the Court held that VMI’s male-only admissions policy failed intermediate scrutiny and thus violated the Equal Protection Clause of the Fourteenth Amendment.²⁴³

B. *Similarities Between Grutter and Virginia*

The similarities between *Grutter* and *Virginia* are striking. First, both cases concerned admission to elite institutions of higher learning. The University of Michigan Law School was “among the Nation’s top law schools,”²⁴⁴ and VMI was an “incomparable military college” with overwhelming alumni support and success at producing leaders.²⁴⁵

Second, the challenges in both cases concerned the institutions’ “educational judgment,” which, under *Grutter*’s reasoning, would deserve deference under the First Amendment. Specifically, the educational judgment at issue in both cases was the adoption of an admissions policy. As Justice Powell noted in his opinion in *Bakke* – which the *Grutter* Court accepted as controlling – a university must be allowed “to make its own judgments as to education[,] includ[ing] the selection of its student body.”²⁴⁶

Third, both the law school and VMI offered the same objective for drawing protected classifications in their admissions policies: the achievement of diversity. VMI argued that diversity is an important governmental objective and that single-sex schools can contribute to the attainment of diversity by “dissipat[ing], rather than perpetuat[ing], traditional gender classi-

238. *Id.* at 546 (internal quotation marks omitted).

239. *Id.* at 551.

240. *Id.*

241. *Id.* at 555.

242. *Id.* (alteration in original) (internal quotation marks omitted).

243. *Id.* at 519.

244. *Grutter v. Bollinger*, 539 U.S. 306, 312 (2003).

245. *Virginia*, 518 U.S. at 519.

246. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978).

fications.”²⁴⁷ Likewise, the law school offered, and the *Grutter* Court accepted via deference, a compelling interest in the achievement of diversity through the enrollment of a critical mass of minority students.²⁴⁸ If diversity is a *compelling* interest under strict scrutiny, it follows, *a fortiori*, that it is an *important* interest under the less exacting intermediate-scrutiny test.²⁴⁹

But rather than deferring to VMI’s assertion that its interest in diversity was an important state interest – as did the *Grutter* Court – the *Virginia* Court held, after a meticulous analysis, that VMI’s male-only admissions policy did not further its asserted diversity interest.²⁵⁰ In contrast, the *Grutter* Court failed to scrutinize whether the law school’s stated interest in diversity was the actual purpose behind its race-conscious admissions policy.²⁵¹ Even though strict scrutiny is a more exacting test than intermediate scrutiny, the *Virginia* Court engaged in a more exacting analysis under intermediate scrutiny than did the *Grutter* Court under strict scrutiny.

Fourth, both VMI and the law school asserted that interference by the Court with their admissions policies would sacrifice the educational benefits provided by each institution. VMI asserted that the admission of women would require a dramatic sacrifice of the adversative method and the academic experience of its students.²⁵² Indeed, the district court in VMI made a fact finding that, were women admitted, “some aspects of [VMI’s] distinctive method would be altered”²⁵³ and VMI “would eventually find it necessary to drop the adversative system altogether.”²⁵⁴ But the Court refused to defer to VMI’s educational judgment and held that VMI could alter its educational policy to allow the admission of women without foregoing its adversative education method.²⁵⁵

Like VMI, the law school maintained that a race-neutral admissions policy would “reduce ‘academic selectivity’” and turn the law school into “a very different institution” by forcing it “to sacrifice a core part of its educa-

247. *Virginia*, 518 U.S. at 533 n.7 (quoting Brief of Twenty-Six Private Women’s Colleges as Amici Curiae in Support of Petitioner at *5, *Virginia*, 518 U.S. 515 (Nos. 94-1941, 94-2107), 1995 WL 702837).

248. *Grutter*, 539 U.S. at 325.

249. Even though both VMI and the law school asserted that “diversity” was the purpose of their admissions policies, the diversity each sought to achieve was different in kind. See *infra* Part IV.C.

250. *Virginia*, 518 U.S. at 539-40.

251. See *supra* Part III.A.1.

252. *Virginia*, 518 U.S. at 524.

253. *Id.* (quoting the district-court opinion). That only *some* aspects of VMI’s distinctive training method would be altered does not distinguish that case from *Grutter*. Adoption of race-neutral criteria likewise would have affected only *some* aspects of the law school’s educational policy – namely, the retention of its elite status.

254. *Id.* at 578 (Scalia, J., dissenting) (quoting the district-court opinion).

255. *Id.* at 551 n.19 (majority opinion).

tional mission.”²⁵⁶ The *Grutter* majority concluded, by deferring to the law school, that a race-neutral admissions policy would necessitate a “dramatic sacrifice of diversity, the academic quality of all admitted students, or both.”²⁵⁷ The Court did not cite any evidence in the record for this proposition and dismissed in one paragraph the race-neutral methods that the district court had found the law school failed to consider.²⁵⁸ Rather, the *Grutter* Court took the law school “at its word” that it would implement a race-neutral policy as soon as it found one that would not require fundamental changes in the school’s prestigious status.²⁵⁹

C. *Can the Different Outcomes in Grutter and Virginia Be Justified?*

Given the similarities between *Grutter* and *Virginia*, what justified the use of deference in *Grutter* but its rejection in *Virginia*? There are three potentially material differences between the two cases. First, the gender-based discrimination in *Virginia* excluded women, but the race-conscious admissions policy in *Grutter* included a critical mass of minority students. Perhaps the Court in both cases was attempting to facilitate the admission of underrepresented students to elite educational institutions and ensure their inclusion among the leaders that both institutions produce. But the Court has consistently held that heightened scrutiny applies to *all* protected classifications, whether they seek to include or exclude a protected class.²⁶⁰ Under this precedent, the same test would apply regardless whether the law school in *Grutter* sought to include or exclude minority students and regardless whether VMI sought to include or exclude women.

Second, the difference in the applicable test of constitutionality also does not explain the difference between the cases. The *Virginia* Court applied intermediate scrutiny, requiring the state to show an “‘important’” or “‘exceedingly persuasive’” objective and means substantially related to the achievement of that objective.²⁶¹ In contrast, the *Grutter* Court applied strict scrutiny, requiring the state to show a “compelling interest” and narrowly tailored means to achieve that interest.²⁶² Because strict scrutiny imposes a burden more difficult to meet than intermediate scrutiny, the non-deferential

256. *Grutter v. Bollinger*, 539 U.S. 306, 355 (2003) (Thomas, J., concurring in part and dissenting in part) (quoting Brief for Respondents, *supra* note 69, at *33-36).

257. *Id.* at 340 (majority opinion).

258. *Id.*

259. *Id.* at 343. Deference to the law school on this point was critical to the Court’s decision because, according to the Court, “race-conscious admissions policies must be limited in time” to be constitutional. *Id.* at 342.

260. See *supra* note 201 and authorities cited therein.

261. *United States v. Virginia*, 518 U.S. 515, 533 (1996) (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1993)).

262. *Grutter*, 539 U.S. at 326-28.

approach in *Virginia* cannot be reconciled on this basis with the *Grutter* Court's deferential analysis.

Third, even though both VMI and the University of Michigan Law School asserted an interest in diversity, the diversity each sought to achieve was different in kind. The law school sought to include "a critical mass" of minority students within its own student body.²⁶³ In contrast, VMI did not seek to diversify its own student body. Rather, its interest was in offering single-sex education as an alternative to the co-educational institutions in Virginia, thereby contributing to the diversity of the schools in the entire state.²⁶⁴ Even though universities enjoy educational autonomy under the First Amendment, that autonomy applies to decisions universities make with respect to their own policies. A broader diversity interest among all educational institutions in Virginia may not fall within the ambit of the autonomy accorded to higher-education institutions.

Even assuming that the disparity between the diversity interests in *Virginia* and *Grutter* was material, VMI's second proffered interest – the preservation of its unique adversative educational method²⁶⁵ – related directly to its own institutional autonomy. This asserted interest has no meaningful legal difference from the law school's proffered interest in the diversity of its student body. But the *Virginia* Court never mentioned the educational autonomy that a higher-education institution enjoys under the First Amendment; indeed, the First Amendment is mentioned nowhere in the opinion.

The diversity interests in *Virginia* and *Grutter* were different in another respect. VMI's interest in educational diversity benefited only males because no women-only public institution of VMI's caliber existed in Virginia.²⁶⁶ In contrast, the diversity interest of the law school in *Grutter* may have benefited all students, not just racial minorities. Racial minorities benefited from the law school's admissions criteria because, with race considered as a plus factor, they had a better chance of admission to the law school. In addition, the rest of the student body also may have benefited from the law school's admissions policy because they were exposed to different viewpoints and better trained for a diverse society and workforce than they may have been if the law school employed a race-neutral admissions policy.²⁶⁷ But the law school's policy harmed those applicants who would have been admitted to the law school had a race-neutral admissions policy been in place. Thus, even though the law school's policy may have benefited all *enrolled* minority and non-minority students, it still harmed – similar to VMI's policy – a class of *applicants* solely because of their race.

Ultimately, there is no meaningful way to reconcile the Court's decisions in *Grutter* and *Virginia*. The only substantive difference between the

263. *Id.* at 316.

264. *Virginia*, 518 U.S. at 534-35.

265. *Id.* at 540.

266. *Id.* at 562 (Rehnquist, C.J., concurring).

267. *See Grutter*, 539 U.S. at 330-33.

two cases seems to be that the classification in *Grutter* was “benign,”²⁶⁸ whereas the classification in *Virginia* was “discriminatory.”²⁶⁹ As stated above, however, such distinction lacks any constitutional significance under current Supreme Court case law because the same heightened scrutiny applies to both classifications. Thus, had *Grutter* been decided before *Virginia*, and had the *Virginia* Court been faithful to *Grutter*’s reasoning, VMI would still be refusing admission to qualified women.

Although *Virginia* and *Grutter* concerned higher-education institutions, in cases decided thereafter, the Supreme Court considered the application of deferential scrutiny in two other contexts: prisons and K-12 schools. As the next two sections analyze these cases and dig deeper into the Court’s equal-protection jurisprudence, even more inconsistencies are unraveled in the Court’s evolving application of deferential scrutiny.

V. *JOHNSON V. CALIFORNIA*: NO DEFERENCE TO PRISON ADMINISTRATORS

In *Grutter*, the Supreme Court held that it would defer to a higher-education institution in its decision to use race as a factor in making admissions decisions.²⁷⁰ What if the institution were a prison facility instead of a law school? If the prison segregated inmates according to their race to prevent violence, would the Court accord to prison administrators the same deference that it gave to law-school admissions officials in *Grutter*? Two years after *Grutter*, the Court answered this question in *Johnson v. California*.²⁷¹

A. *The Majority’s Non-Deferential Analysis*

Johnson v. California concerned an equal-protection challenge to the California Department of Corrections’ (“CDC”) policy of racially segregating prisoners for up to sixty days upon admittance to a correctional facility.²⁷² While other factors played a role in the cell-assignment process, race was the predominant factor.²⁷³ Numerous incidents of race-based violence among prisoners, most of whom belonged to violent gangs, required this policy.²⁷⁴ California prison officials testified that racial conflict and violence were cer-

268. *Id.* at 326.

269. *Virginia*, 518 U.S. at 548-49.

270. *Grutter*, 539 U.S. at 328.

271. 543 U.S. 499 (2005).

272. *Id.* at 502.

273. *Id.* In addition to race, the prison officials also considered “geographic and national origin . . . age, mental health, medical needs, criminal history, and gang affiliation.” *Id.* at 527 (Thomas, J., dissenting).

274. *Id.* at 502-03 (majority opinion); *see also id.* at 526-27 (Thomas, J., dissenting).

tain to result if prisoners were not segregated according to their race.²⁷⁵ Segregation was limited to the cells in the initial reception areas, and the rest of the prison facilities remained fully integrated.²⁷⁶

In an opinion by Justice O'Connor – the author of *Grutter* – the Supreme Court applied strict scrutiny to the prison policy.²⁷⁷ Justice O'Connor reaffirmed that strict scrutiny governed all racial classifications, whether benign or discriminatory²⁷⁸ and whether or not they ““may be said to burden or benefit the races equally.””²⁷⁹ The Court reasoned that a ““searching judicial inquiry”” was necessary to determine ““what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics.””²⁸⁰ Previously, the Court had applied a deferential standard of review to prison officials in *Turner v. Safley*, which challenged a prison regulation that restricted the inmates' right to marry and correspond with other inmates.²⁸¹ Under *Turner*, a prison policy that burdened the inmates' constitutional rights would be upheld if the policy was ““reasonably related' to 'legitimate penological interests’” – similar to rational-basis review.²⁸² But the Court concluded that *Turner's* deferential standard of review did not apply to this case because a suspect classification, race, was at issue.²⁸³

The prison officials asked the Court to defer to them on the legality of their segregation policy.²⁸⁴ After all, these officials had special expertise in managing prison operations, just as the university officials in *Grutter* had special expertise in managing law schools. The Court declined.²⁸⁵ With no mention of *Grutter*, Justice O'Connor noted that the Court had ““refused to defer to state officials' judgments on race in other areas where those officials traditionally exercise substantial discretion.””²⁸⁶ According to the Court, deference to the state prison officials would reduce constitutional protections to a nullity.²⁸⁷

275. *Id.* at 502-03 (majority opinion).

276. *Id.* at 503.

277. *Id.* at 505-06.

278. *Id.* at 505.

279. *Id.* at 506 (quoting *Shaw v. Reno*, 509 U.S. 630, 651 (1993)).

280. *Id.* at 505-06 (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion)).

281. *Id.* at 509-10 (discussing *Turner v. Safley*, 482 U.S. 78, 89 (1987)).

282. *Id.* (quoting *Turner*, 482 U.S. at 89).

283. *Id.* at 510.

284. *Id.* at 509.

285. *Id.*

286. *Id.* at 512 (citing *Batson v. Kentucky*, 476 U.S. 79, 89-96 (1986); *Shaw v. Reno*, 509 U.S. 630 (1993)).

287. *See id.* at 511 (citing *Spain v. Procunier*, 600 F.2d 189, 193-94 (9th Cir. 1979)).

In dissent, Justice Thomas argued for deference to state prison officials.²⁸⁸ But Justice O'Connor rejected that approach. She asserted that a "hands-off approach to racial classifications" is "fundamentally at odds with [the Court's] equal protection jurisprudence."²⁸⁹ Under the Court's jurisprudence, the burden was on the "state actors to demonstrate that their race-based policies [were] justified,"²⁹⁰ and the deferential *Turner* standard would be "too lenient . . . to ferret out invidious uses of race."²⁹¹ According to Justice O'Connor, *Turner* would allow prisons to draw racial classifications even when race-neutral methods existed to accomplish the same purpose.²⁹² Under *Turner's* deferential review, the Court would have to defer to simple assertions by prison officials that racial segregation was necessary to prison management.²⁹³ This the Court would not do.

Justice O'Connor's rejection of deference in *Johnson* was unequivocal. Deference, according to Justice O'Connor, was "fundamentally at odds" with the Court's equal-protection jurisprudence and strict scrutiny would apply in every context.²⁹⁴ Justice O'Connor's absolute and categorical rejection of deference was out of step with her acceptance of deference in the higher-education context just two terms earlier in *Grutter*.²⁹⁵ With this unyielding language, Justice O'Connor seemed to be backpedaling from her contextual approach to strict scrutiny to a categorical one. Was she trying to send a signal? Had her broad rhetoric about deference in *Grutter* been taken too far?

B. *The Dissent's Deferential Analysis*

Justice Thomas, joined by Justice Scalia, dissented and contended that the deferential standard from *Turner* should apply.²⁹⁶ Reminiscent of the *Grutter* majority's deference to the law school on its race-conscious admissions policy, Justice Thomas argued that judgments about race-based prison policies "are better left in the first instance to the officials who run our Nation's prisons, not to the judges who run its courts."²⁹⁷

Justice Thomas provided three reasons in support of his deferential approach. First, federal courts had traditionally deferred to prison officials on matters concerning the administration of state prisons.²⁹⁸ Second, incarce-

288. *Id.* at 524 (Thomas, J., dissenting); see also *infra* Part V.B (discussing the dissent's deferential analysis).

289. *Johnson*, 543 U.S. at 506 n.1.

290. *Id.*

291. *Id.* at 513.

292. *Id.*

293. *Id.* at 514.

294. *Id.* at 505, 506 & n.1.

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

296. *Johnson*, 543 U.S. at 524 (Thomas, J., dissenting).

297. *Id.* at 542.

298. *Id.* at 528.

rated persons did not enjoy the full panoply of constitutional rights as other persons.²⁹⁹ And third, federal courts were ill-equipped “to supervise the daily operations of prisons.”³⁰⁰ The challengers therefore had to make a “compelling showing . . . to overcome the deference” given to prison officials.³⁰¹ Justice Thomas applied a deferential analysis in the prison context even though, in a concurrence two years later in *Parents Involved*, he would state that “as a general rule, all race-based government decisionmaking – regardless of context – is unconstitutional.”³⁰²

Turning to the merits, the dissent would uphold the policy under *Turner*’s deferential standard.³⁰³ The record supported the prison officials’ belief that racial integration in the reception centers would lead to “serious violence.”³⁰⁴ This interest in protecting inmates from gang violence, according to the dissent, constituted a “legitimate penological interest.”³⁰⁵ Further, California’s racial-segregation policy bore a rational relationship to this penological interest, because the use of race was inevitable in a prison system where most prisoners were members of gangs that divided themselves along racial lines.³⁰⁶ The challengers had not shown any “obvious, easy alternatives” to the racial-segregation policy.³⁰⁷ Finally, the segregation policy applied only at reception centers, and the rest of the prison areas were fully integrated.³⁰⁸ Thus, according to the dissent, the policy survived the deferential *Turner* standard.

C. The Majority’s Non-Deferential Analysis Is Inconsistent with *Grutter*

The majority in *Johnson* was correct to apply strict scrutiny. At issue was a racial classification on the face of a government-sponsored policy. But the Court’s deference to the law school in *Grutter* cannot be reconciled with its refusal to defer to the prison officials in *Johnson*. The *Johnson* Court’s analysis proceeded on the assumption that the applicable test was either strict

299. *Id.* Some exceptions to this rule include the right to due process and the right to free exercise of religion. *Id.* at 528-29.

300. *Id.* at 529-30.

301. *Id.* at 543.

302. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 752 (2007) (Thomas, J., concurring) (emphasis added).

303. *Johnson*, 543 U.S. at 534 (Thomas, J., dissenting).

304. *Id.* at 532-34, 537.

305. *Id.* at 534-35.

306. *Id.* at 535.

307. *Id.* at 537 (quoting *Turner v. Safley*, 482 U.S. 78, 90 (1987)).

308. *Id.* at 536.

scrutiny or the deferential *Turner* standard.³⁰⁹ The Court did not consider that it had endorsed the possibility of combining deference with strict scrutiny in *Grutter*. The Court could have held that strict scrutiny was the correct standard and could have deferred, as in *Grutter*, to the judgment of the prison authorities on whether preventing prison violence was a compelling interest and whether segregating inmates according to their race at the reception centers was narrowly tailored to achieving that interest.

The *Johnson* majority did not explain why *Grutter* was distinguishable.³¹⁰ Both cases addressed an equal-protection challenge to a policy that drew a racial classification on its face. Both cases also involved institutions that make complex judgments in which federal courts are ostensibly ill-advised to intervene.³¹¹ What justified, then, the Court's deference to the law school in *Grutter* but the application of non-deferential strict scrutiny in *Johnson*? If, as the *Johnson* Court noted, "deference is fundamentally at odds with [the Court's] equal-protection jurisprudence,"³¹² why was deference acceptable two terms before in *Grutter*? Why would the use of race undermine "public respect for our system of [criminal] justice"³¹³ but not public respect for our education system? The *Johnson* majority held that the deferential *Turner* standard was inapplicable, carving an exception to the applicability of that standard to prison policies that draw racial classifications.³¹⁴ If deference should not be accorded to prison authorities on policies that draw classifications based on race, why must the Court defer to higher-education institutions on *all* educational policies – even when they draw racial classifications?

One factor could potentially distinguish *Grutter* from *Johnson*. In *Grutter*, race was considered a "plus factor" among other factors in deciding whom to admit to the law school.³¹⁵ In contrast, race was the predominant factor in segregating inmates in *Johnson*. But this difference between *Grutter* and *Johnson* is likely to be material only when the Court reaches the narrow-tailoring analysis on the merits of the case. That is, the use of race as the predominant factor (as opposed to one factor among many) is less likely to be

309. *Id.* at 509 (majority opinion) ("The CDC invites us to make an exception to the rule that strict scrutiny applies to all racial classifications, and *instead* to apply the deferential standard of review articulated in *Turner* . . ." (emphasis added)).

310. *See id.* at 543 (Thomas, J., dissenting) ("Deference would seem all the more warranted in the prison context, for whatever the Court knows of administering educational institutions, it knows much less about administering penal ones.").

311. *See Grutter v. Bollinger*, 539 U.S. 306, 328 (2003) (holding that the decision of whom to admit to a university requires "complex educational judgments . . . primarily within the expertise of the university"); *see also Turner v. Safley*, 482 U.S. 78, 89 (1987) (establishing a rule of deference to prison administrators).

312. *Johnson*, 543 U.S. at 506 n.1.

313. *Id.* at 511.

314. *Id.* at 509-13.

315. *Grutter*, 539 U.S. at 334.

narrowly tailored to achieving a compelling interest and thus more likely to be unconstitutional. This difference is not relevant, however, to determine what *test* to apply to the policy – a question that the Court must decide before it proceeds to the merits of the case.

The *Johnson* Court's non-deferential analysis cannot be reconciled with *Grutter*'s deferential analysis. The Court's decisions in *Johnson* and *Grutter* seem to recognize two different types of strict scrutiny: deferential strict scrutiny (*Grutter*), and non-deferential or run-of-the-mill strict scrutiny (*Johnson*). Which type of strict scrutiny would apply to a school district's use of race to facilitate diversity among students in K-12 schools? Before the Supreme Court's 2007 decision in *Parents Involved*, the answer to this question was anybody's guess.

VI. PARENTS INVOLVED IN COMMUNITY SCHOOLS V. SEATTLE SCHOOL DISTRICT NO. 1: DEFERENCE TO K-12 SCHOOLS?

Two school districts – one in Seattle, Washington and the other in Jefferson County, Kentucky – voluntarily adopted student-assignment plans that relied on racial categories, such as “black,” “white,” and “nonwhite,” to determine which public schools students may attend.³¹⁶ The *Parents Involved* case concerned a challenge under the Equal Protection Clause to these race-based assignment plans.³¹⁷

The Ninth Circuit, which considered the Seattle plan, applied deferential strict scrutiny and upheld the plan as constitutional.³¹⁸ Relying primarily on *Grutter*, the Ninth Circuit reasoned that Seattle has a compelling interest in attaining the educational and social benefits of racial diversity and in preventing racial isolation and concentration in its schools.³¹⁹ The Ninth Circuit further concluded that Seattle's assignment plan was narrowly tailored to serve its compelling interest in diversity.³²⁰ In its analysis, the Ninth Circuit deferred to the Seattle school district under *Grutter*, reasoning that secondary schools, like higher-education institutions, “occupy a unique position in our constitutional tradition.”³²¹ Evidencing the confusion that *Grutter* generated in the lower courts,³²² the majority, concurring, and dissenting opinions applied three different tests of constitutional review: deferential strict scrutiny

316. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 709-10 (2007).

317. *Id.* at 710-11.

318. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist.*, No. 1, 426 F.3d 1162, 1166, 1180 (9th Cir. 2005) (en banc), *rev'd*, 551 U.S. 701 (2007).

319. *Id.*

320. *Id.* at 1180.

321. *Id.* at 1188 n.33.

322. *See also* Fallon, *supra* note 1, at 1304 (“[U]ncertainty and confusion have arisen about which version [of strict scrutiny] the Court will apply in cases in which differences among the tests would result in different outcomes.”).

(majority);³²³ “robust and realistic rational basis” (concurrency);³²⁴ and traditional strict scrutiny (dissent).³²⁵

Like the Ninth Circuit, the Sixth Circuit, which considered the Jefferson County plan, upheld that plan as constitutional in a short per curiam opinion that affirmed the district court’s reasoning.³²⁶ Relying on *Grutter*, the district court held that Jefferson County had a compelling interest in maintaining integrated schools and that its race-based assignment plan was narrowly tailored to achieving that interest.³²⁷ The court underscored the “historical importance of the deference accorded to local school boards” and noted that such deference “goes to the very heart of our democratic form of government.”³²⁸

These cases eventually made their way to the Supreme Court.³²⁹ In a four-Justice plurality opinion authored by Chief Justice Roberts and joined by Justices Scalia, Thomas, and Alito, the Court reversed the Sixth and Ninth Circuits, holding that the school districts’ race-based assignment plans violated the Equal Protection Clause.³³⁰ Because the plans classified students according to their race, the Court applied strict scrutiny.³³¹ Under long-standing precedent, the Court held that strict scrutiny was the controlling test regardless whether the government’s motives in drawing racial classifications were benign or malicious.³³² The Court would strike down the assignment plans if they did not further a compelling interest or did not employ narrowly tailored means to achieve that compelling interest.³³³

On the compelling-interest prong, the plurality noted that, in the school context, two interests had qualified as compelling in previous decisions: (1) remedying the effects of past intentional discrimination and (2) attaining

323. See *Parents Involved*, 426 F.3d at 1188 n.33.

324. *Id.* at 1194 (Kozinski, J., concurring) (noting that “robust and realistic rational basis review” requires the courts to consider “the actual reasons for the plan in light of the real-world circumstances that gave rise to it”).

325. *Id.* at 1199 (Bea, J., dissenting) (“[T]he majority conceives of strict scrutiny as some type of relaxed, deferential standard of review. I view it differently.”).

326. *McFarland v. Jefferson County Pub. Sch.*, 330 F. Supp. 2d 834, 837 (W.D. Ky. 2004), *aff’d*, 416 F.3d 513 (6th Cir. 2005), *rev’d sub nom. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

327. *Id.* at 850, 861-62.

328. *Id.* at 850.

329. *Parents Involved*, 551 U.S. 701.

330. *Id.* at 708, 710-11.

331. *Id.* at 720.

332. *Id.* at 741-42 (citing *Johnson v. California*, 543 U.S. 499, 505 (2005) (“We have insisted on strict scrutiny in every context, even for so-called ‘benign’ racial classifications.”); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989) (“Racial classifications are suspect, and that means that simple legislative assurances of good intention cannot suffice.”)).

333. *Id.* at 720.

diversity in higher-education institutions (which was recognized in *Grutter*).³³⁴ The first interest was not at issue in either the Seattle or the Jefferson County case. Seattle public schools never had been segregated by law.³³⁵ Although Jefferson County schools were once segregated by law and subject to a desegregation decree, the decree had been dissolved in 2000 after the district court found that Jefferson County had eliminated the vestiges associated with its former segregation policy.³³⁶

As to the second government interest in diversity recognized in *Grutter*, the plurality in *Parents Involved* concluded that this diversity interest did not apply to elementary and secondary schools.³³⁷ The plurality noted that, in upholding diversity as a compelling interest, *Grutter* had relied upon considerations unique to higher-education institutions – such as “the expansive freedoms of speech and thought associated with the university environment” and the “special niche” universities occupied “in our constitutional tradition.”³³⁸ These considerations, according to the plurality, were absent from K-12 schools.³³⁹

But the plurality was unsuccessful in its attempt to nail the coffin shut on *Grutter* and confine that case to higher-education institutions. Justice Kennedy concurred separately to note his disagreement with the plurality’s analysis on this point.³⁴⁰ Consistent with the views of the four dissenting Justices,³⁴¹ Justice Kennedy concluded that the diversity interest recognized in *Grutter* may be, “depending on its meaning and definition,” a compelling interest for primary and secondary schools.³⁴²

334. *Id.* at 720-22.

335. *Id.* at 720.

336. *Id.* at 720-21.

337. *Id.* at 724-25.

338. *Id.* at 724.

339. *Id.* at 724-25.

340. *See id.* at 783, 787-88, 797-98 (Kennedy, J., concurring).

341. The dissenting Justices (Justice Breyer, joined by Justices Stevens, Ginsburg, and Souter) would extend *Grutter* to primary and secondary education:

In light of this Court’s conclusions in *Grutter*, the “compelling” nature of these interests in the context of primary and secondary public education follows here *a fortiori*. Primary and secondary schools are where the education of this Nation’s children begins, where each of us begins to absorb those values we carry with us to the end of our days.

Id. at 842 (Breyer, J., dissenting).

342. *Id.* at 783 (Kennedy, J., concurring) (“The plurality, by contrast, does not acknowledge that the school districts have identified a compelling interest here.”); *see also id.* at 797-98 (Kennedy, J., concurring) (“[A] district may consider it a compelling interest to achieve a diverse student population.”); *id.* at 788 (“To the extent the plurality opinion suggests the Constitution mandates that state and local school authorities must accept the status quo of racial isolation in schools, it is, in my view, profoundly mistaken.”). Justice Kennedy cautioned, however, that although race may be one component of this diversity interest, “other demographic factors, plus special

On the narrowly tailored means prong, the plurality, joined by Justice Kennedy, held that the race-based assignment plans were not narrowly tailored to achieve the school districts' stated interests.³⁴³ The race-based classifications shifted only a small number of students between schools and therefore had minimal effect on student assignments – suggesting that other means would be just as, if not more, effective in achieving diversity.³⁴⁴ Further, the school districts had failed to show that they had seriously considered race-neutral alternatives to achieve their stated goals.³⁴⁵ Unlike the *Grutter* Court, which allowed the law school to reject race-neutral alternatives that might sacrifice its elite status, the *Parents Involved* Court required the school districts to give such alternatives serious consideration regardless of any undesirable consequences.

In a portion of the opinion that Justice Kennedy did not join, the plurality rejected the dissent's pleas for deference to the school districts.³⁴⁶ According to the plurality, the "good faith" of the school districts did not suffice to uphold their race-based assignment plans.³⁴⁷ In contrast to the plurality's statement in *Parents Involved*, the majority in *Grutter* had expressly presumed "good faith" on the part of the law school "absent 'a showing to the contrary.'"³⁴⁸

The dissent, authored by Justice Breyer and joined by Justices Stevens, Ginsburg, and Souter, rejected the majority's application of strict scrutiny.³⁴⁹ Justice Breyer argued that a different standard of review should apply where, as here, the government used race for beneficial rather than malignant purposes.³⁵⁰ According to Justice Breyer, the plans should be evaluated under a "standard of review that is not 'strict' in the traditional sense of that word."³⁵¹ Under this diluted version of strict scrutiny, the government's race-conscious actions would be upheld if the action "is proportionate to the important ends it serves."³⁵² Justice Breyer's version of strict scrutiny seems to lie somewhere between the rational-basis test, which requires means rationally related

talents and needs, should also be considered." *Id.* at 798. A majority of lower court opinions rendered during the three years following *Parents Involved* have treated Justice Kennedy's concurrence on the diversity interest as binding precedent. See generally Mary Kathryn Nagle, *Parents Involved and the Myth of the Colorblind Constitution*, 26 HARV. J. RACIAL & ETHNIC JUST. 211 (2010).

343. *Parents Involved*, 551 U.S. at 726, 733 (plurality opinion).

344. *Id.* at 733.

345. *Id.* at 735.

346. *Id.* at 744.

347. *Id.*

348. *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003) (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 318-19 (1978)).

349. *Parents Involved*, 551 U.S. at 833-34 (Breyer, J., dissenting).

350. *Id.*

351. *Id.* at 837.

352. *Id.*

to legitimate ends,³⁵³ and intermediate scrutiny, which requires means substantially related to the achievement of important ends.³⁵⁴ The dissent's deferential strict-scrutiny test incorporates the means part of the rational-basis test – “proportionate” or “rationally related” – and the ends part of the intermediate-scrutiny test – “important” interests. Justice Kennedy described the dissent's standard of review as “permissive strict scrutiny,” which he cautioned “could invite widespread governmental deployment of racial classifications.”³⁵⁵

What was implicit in the *Grutter* majority thus became explicit in the *Parents Involved* dissent. Although the *Grutter* Court repeatedly insisted that its deferential analysis did not abandon strict scrutiny,³⁵⁶ the *Parents Involved* dissent pulled the last plug on strict scrutiny and confirmed what was apparent from *Grutter* all along: Strict scrutiny, at least in some contexts, is strict in theory, but accommodating in fact.

According to the *Parents Involved* dissent, deferential strict scrutiny was the proper standard of review because “[c]ontext matters.”³⁵⁷ This does not answer the question, but begs it. Why does context matter? Why is the government's use of race more legitimate in certain contexts than others? As the dissent noted, the use of race-based criteria may arise in numerous contexts:

[C]ensus forms, research expenditures for diseases, assignments of police officers patrolling predominantly minority-race neighborhoods, efforts to desegregate racially segregated schools, policies that favor minorities when distributing goods or services in short supply, actions that create majority-minority electoral districts, [and] peremptory strikes that remove potential jurors on the basis of race.³⁵⁸

In which of these contexts does diluted strict scrutiny apply? When must lower courts apply run-of-the-mill strict scrutiny? Even within each context, must the lower courts apply the same version of strict scrutiny – given that the *Grutter* Court deferred to a higher-education institution but the *Virginia* Court did not? What about the Court's holding in *Johnson v. California* just two terms earlier that the Court has “insisted on strict scrutiny in every context”?³⁵⁹ Or the Court's holding in *Adarand Constructors, Inc. v. Peña* that strict scrutiny applies to “all racial classifications” and by “any

353. *Nguyen v. I.N.S.*, 533 U.S. 53, 77 (2001) (Scalia, J., concurring).

354. *United States v. Virginia*, 518 U.S. 515, 533 (1996).

355. *Parents Involved*, 551 U.S. at 791 (Kennedy, J., concurring).

356. *See Grutter v. Bollinger*, 539 U.S. 306, 326-27 (2003).

357. *Parents Involved*, 551 U.S. at 833 (Breyer, J., dissenting) (quoting *Grutter*, 539 U.S. at 326-27).

358. *Id.* at 834.

359. 543 U.S. 499, 505 (2005) (emphasis added).

governmental actor subject to the Constitution”?³⁶⁰ Given the inconsistencies in its application, has strict scrutiny become an “I know it when I see it” test,³⁶¹ which allows the Supreme Court to uphold those government actions that the Court believes are beneficial and strike down those that the Court believes are ill-advised?³⁶² Are the Supreme Court justices calling balls and strikes³⁶³ with no indication to the pitcher of where the equal-protection strike zone lies? These questions, and many others, abound.

A final important question remains. Does Justice Kennedy’s acceptance of diversity as a compelling interest for primary and secondary schools also imply an agreement with the dissent’s deferential strict-scrutiny test? Justice Breyer certainly thinks so: “Apparently Justice Kennedy also agrees that [traditional] strict scrutiny would not apply in respect to certain ‘race-conscious’ school board policies.”³⁶⁴ Further, Justice Kennedy refused to join the section of the plurality opinion that criticized the dissent’s deferential approach.³⁶⁵ This suggests that he disagreed with the plurality and agreed with the dissent on the application of deferential strict scrutiny. Supporting this view, Justice Kennedy’s concurrence noted that “a school district, in its discretion and expertise, may choose to pursue” “a compelling interest . . . in avoiding racial isolation.”³⁶⁶ Heeding a school district’s “discretion and expertise” sounds remarkably like deferring to it.³⁶⁷

But in another part of his concurrence, Justice Kennedy criticized the dissent’s deferential strict-scrutiny test, noting that “[t]he dissent’s permissive strict scrutiny (which bears more than a passing resemblance to rational-basis

360. 515 U.S. 200, 224 (1995) (emphasis added).

361. See *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

362. Cass Sunstein has noted the dangers involved in abandoning the current three-tier approach to constitutionality review under the Equal Protection Clause and instead applying an ad hoc balancing test:

Without tiers, it would be difficult to predict judicial judgments under the Equal Protection Clause, and judges would make decisions based on ad hoc assessments of the equities. The Chancellor’s foot is not a promising basis for antidiscrimination law. . . . If the Court simply were to balance all relevant factors in all equal protection cases, the rule of law would be at excessive risk.

Sunstein, *supra* note 23, at 77-78.

363. See *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005) (statement of John G. Roberts, Jr., nominee to be Chief Justice of the United States).

364. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 837 (2007) (Breyer, J., dissenting).

365. *Id.* at 783, 788, 797-98 (Kennedy, J., concurring).

366. *Id.* at 797.

367. See Adams, *supra* note 114, at 986-87 (“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 secondary education.”).

review) could invite widespread governmental deployment of racial classifications.”³⁶⁸ This view is similar to his dissent in *Grutter*, where he broadly proclaimed that “[d]eference is antithetical to strict scrutiny, not consistent with it.”³⁶⁹ But Justices do change their minds, and as Heather Gerken has noted, Justice Kennedy significantly “softened his stance on race in *Parents Involved*.”³⁷⁰ Given the mixed signals in Justice Kennedy’s concurrence and Justice Breyer’s reading of it, the possibility remains that deferential strict scrutiny garnered five votes in *Parents Involved*.

The fractured opinion in *Parents Involved* further muddied the waters in the Court’s application of strict scrutiny. Lower courts and school officials alike are struggling to decipher the Court’s split opinion and determine the precedential value to accord to the plurality opinion and Justice Kennedy’s concurrence.³⁷¹ But one thing is clear: Deferential strict scrutiny is alive and well. It will be invoked again in future opinions and dissents in the Supreme Court and in lower courts. What remains unclear is whether the deferential strict-scrutiny test will assume a permanent spot among the tests that the Supreme Court uses to evaluate the constitutionality of government conduct.

VII. CONCLUSION

“Liberty finds no refuge in a jurisprudence of doubt.”³⁷² With this remarkable language, the Supreme Court ardently cautioned against the creation of uncertainty in the realm of fundamental rights and liberties. But uncertainty now dominates the Supreme Court’s application of the strict-scrutiny test – a test that protects against governmental infringements on a range of rights and liberties under the Constitution, including the right to vote, the right to marry, the right to access the courts, freedom of speech, and freedom of association.

368. *Parents Involved*, 551 U.S. at 791 (Kennedy, J., concurring).

369. *Grutter v. Bollinger*, 539 U.S. 306, 394 (2003) (Kennedy, J., dissenting).

370. Heather K. Gerken, *Justice Kennedy and the Domains of Equal Protection*, 121 HARV. L. REV. 104, 104 (2007).

371. See Robert Barnes, *Three Years After Landmark Court Decision, Louisville Still Struggles with School Desegregation*, WASH. POST, Sept. 20, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/09/19/AR2010091904973.html?sid=ST2010091904357> (“Because [*Parents Involved*] is a 4-4-1 decision, we sit on a pinnacle, a question mark.” (quoting Sheldon Berman, school Superintendent)); Nagle, *supra* note 342 (noting the disagreement among the lower courts on whether the *Parents Involved* plurality’s opinion or Justice Kennedy’s concurrence is binding precedent); see also Mark Bartholomew, *Judicial Deference and Sexual Discrimination in the University*, 8 BUFF. WOMEN’S L.J. 56, 78 (2000) (“Besides eroding public faith in the judicial process, the inconsistent application of the deference doctrine also leaves administrators and faculty unclear on what speech and conduct is legally permitted.”).

372. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 843 (1992) (O’Connor, Kennedy, and Souter, JJ.).

The cases discussed in this Article might be a strong signal that the pendulum of strict scrutiny is swinging from “fatal in fact” to “accommodating in fact.” Each move of that pendulum to the accommodating side of the line threatens the protections that strict scrutiny was designed to afford. Each inconsistent application of deferential and traditional strict scrutiny leaves government actors uncertain about the constitutionality of their conduct and lower courts asking themselves the nearly impossible question: “To defer or not to defer?” By deferring on legal questions to the assertions of state actors under the guise of strict scrutiny, the Court is handing its keys to the Constitution to biased parties that appear before the Court. Our fundamental rights and liberties will find no shelter within the inconsistent mix of deference and strict scrutiny that the Court is slowly, but surely, endorsing.

