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I. INTRODUCTION

Our nation was founded on the premise that the door will be equally open to all.[1] Yet, for much of the nation's history, children of color were

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not allowed to attend school with white children, and were instead required to attend separate, often ill-equipped schools.[2] The passage of the Fourteenth Amendment and its explicit mandate that no state shall deny to any person the equal protection of the laws[3] began a commitment to color-blindness by the Court.[4] With this commitment, the Court abandoned the notion that separate could be "equal" in education.[5]

It is against this background that former Supreme Court Justice Sandra Day O'Connor's impact on the Court's race and education jurisprudence is noteworthy. During her tenure, Justice O'Connor maintained a firm commitment to both equality and the ability of students to receive an excellent and diverse education.[6] While this commitment is significant, it is Justice O'Connor's embrace of strict scrutiny judicial review in all cases of race-based decision-making by state actors, first as a dissenting member of the Court and finally as a leader of the majority of the Court,[7] that is Justice O'Connor's greatest contribution to the Court's race and education jurisprudence.[8]

This paper explores the impact of Justice O'Connor on the Court's race and education jurisprudence, both in the context of primary through secondary school education and in public universities. Section II outlines Justice O'Connor's biography and explores several external influences on the Justice. Section III reviews the Court's race and education jurisprudence prior to Justice O'Connor's appointment to the Court. Section IV exposes the Court's jurisprudence in this area during Justice O'Connor's time on the Court, with an emphasis on those opinions authored by Justice O'Connor. Section V offers an analysis of the aftermath of Justice O'Connor's race and education jurisprudence, beginning with Section V(A) addressing the state of the law after Justice O'Connor's majority

University of Houston Law Center, who teaches an annual seminar on the contributions of Justice Sandra Day O'Connor, for his inspiration and assistance in writing this paper, the editors of this Law Review for their careful editing of this paper, and finally, Ben Williams, for his encouragement and support.

1. *See* THE FEDERALIST NO. 36, at 259 (Benjamin Fletcher Wright ed., 1961) (stating "the door ought to be equally open to all").

2. *See infra* notes 48–64 and accompanying text (describing cases that allowed for separate education).

3. U.S. CONST. amend. XIV, § 1.

4. *See* Kristina M. Campbell, Note, *Will Equal Again Mean Equal?: Understanding* Ricci v. DeStefano, 14 TEX. REV. L. & POL. 385, 387 & nn.6–7 (2010) (noting the Court's response to the 14th Amendment).

5. *See infra* notes 65–69 and accompanying text (discussing the Court's holding in *Brown v. Board of Education*).

6. *See infra* Section IV (examining Justice O'Connor's jurisprudence on the Court).

7. *See infra* Section IV (tracing this evolution of the Court's jurisprudence).

8. *See* Roberto L. Corrada, Ricci*'s Dicta: Signaling a New Standard for Affirmative Action under Title VII?*, 46 WAKE FOREST L. REV. 241, 245-46 (2011) ("The key jurist on affirmative action has been Justice Sandra Day O'Connor.").

opinion in *Grutter v. Bollinger*. Section V(B) discusses the Court's race and education jurisprudence following Justice O'Connor's tenure, primarily through an analysis of *Parents Involved in Community Schools*. Finally, Section V(C) hypothesizes the future of race-conscious decision-making in education and Justice O'Connor's legacy through the lens of *Fisher v. University of Texas at Austin*. Section VI concludes this paper.

II. ABOUT JUSTICE SANDRA DAY O'CONNOR

Sandra Day O'Connor was born in March 1930 and grew up on a cattle ranch on the Arizona-New Mexico border, known as "Lazy B."[9] She attended the private Radford School for Girls in El Paso, Texas, beginning at age six, and she spent the academic semesters living with her grandmother in El Paso.[10] During her vacations from school, Sandra returned to Lazy B and worked alongside the rest of the family.[11] After she graduated from high school, she attended Stanford University in California.[12] Sandra then attended law school at Stanford, where she was an outstanding student and member of the Law Review.[13] She met her husband, John O'Connor, during law school.[14] After law school, Sandra practiced law in both the public and private sectors, and in many ways, she settled for whatever work she could secure as a female lawyer.[15] She became involved in politics in the 1960s, first in the local Republican Party, and eventually as an Arizona Senator.[16] In 1975, Sandra was elected to a state trial judgeship in Arizona, and in 1979, she joined the Arizona Court of Appeals.[17] In 1981, she was nominated to the United States Supreme Court by President Reagan, and she was confirmed as the first female Justice on the Court that same year.[18] In 2006, Justice O'Connor retired from the Court.[19]

9. JOAN BISKUPIC, SANDRA DAY O'CONNOR: HOW THE FIRST WOMAN ON THE SUPREME COURT BECAME ITS MOST INFLUENTIAL JUSTICE 11 (2006).

10. BISKUPIC, *supra* note 9, at 16. Sandra attended a local public school in New Mexico, twenty miles from Lazy B, for her eighth grade year. However, she returned to Radford for the rest of her secondary education. *Id.* at 19.

11. *Id.* at 19–20.

12. *Id* at 22.

13. *Id.*at 25–26.

14. *Id.*at 26–27.

15. BISKUPIC, *supra* note 9, at 28–30.

16. *See id.* at 31 (noting her involvement in the local Republican Party), 35 (noting her experience in the Arizona Senate).

17. *See id.* at 65–66 (noting her state trial judgeship), at 68 (noting her appointment to the state Court of Appeals).

18. *Id.* at 98.

19. Craig Joyce, *A Tribute to Justice Sandra Day O'Connor*, 119 HARV. L. REV. 1257, 1271 (2006).

Before delving into the opinions Justice O'Connor authored during her time on the Court, it is first useful to examine her writings, both reflective and analytical, to gain insight into her judicial philosophy. First, Justice O'Connor's writings evidence her strong belief in the importance of education, not only for the individual, but also for the American democracy.[20] Of note, she attended school in El Paso, not in Arizona where her immediate family lived, as a result of the poor primary and secondary education available in rural Arizona at the time.[21] Her family encouraged her to pursue higher education, including law school, a not entirely common experience for a woman at the time.[22] These experiences provided her with the educational background necessary to succeed, first as a lawyer and later as a Supreme Court Justice. Consequently, Justice O'Connor not only appreciated education, but greatly benefited from it.

Justice O'Connor's writings also evidence a unique understanding of the impact of race in the United States.[23] In a 1992 article published in the Stanford Law Review, entitled "*Thurgood Marshall: The Influence of a Raconteur*," Justice O'Connor wrote of when Thurgood Marshall changed the nation through *Brown v. Board of Education*.[24] O'Connor reflects that she had not been personally exposed to racial tensions before *Brown*, as Arizona did not have a large African American population during her childhood, and further, unlike many southern states, Arizona had never adopted a *de jure* system of segregation.[25] Even though O'Connor spent her eighth-grade year in a predominantly Latino public school in New Mexico, she has written that she never had a personal sense of being a minority in a culture that cared much more for the majority.[26] Additionally, during her childhood, Justice O'Connor's father employed a Mexican American cowboy, "Rastus," on the family ranch.[27] Justice O'Connor speaks highly of Rastus in her writings, noting that he became part of the family, and admiring the high standards he set for himself and those

20. *See* SANDRA DAY O'CONNOR, THE MAJESTY OF THE LAW 274 (Craig Joyce ed., 2004) (noting the effects of an educated society).

21. *See* BISKUPIC, *supra* note 9, at 16 (noting the limited educational opportunities available near Lazy B).

22. *See id.* at 22 (discussing her attendance at Stanford).

23. *See infra* notes 24–30, 38–41 and accompanying text (discussing Justice O'Connor's comments).

24. *See* Sandra Day O'Connor, *Thurgood Marshall: The Influence of a Raconteur*, 44 STAN. L. REV. 1217, 1217 (1992) ("It was through *Brown v. Board of Education* that [Justice Marshall] compelled us, as a nation, to come to grips with some of the contradictions within ourselves.").

25. *Id.*

26. *Id.*

27. SANDRA DAY O'CONNOR & H. ALAN DAY, LAZY B: GROWING UP ON A CATTLE RANCH IN THE AMERICAN SOUTHWEST 53 (2003).

around him, both professionally and personally.[28] Despite the roadblocks Rastus faced—"being small, crippled, fatherless, a minority race in his birthland"—Justice O'Connor has reflected that Rastus "played the hand he was dealt like a master" and found respect.[29] Despite not being personally exposed to the type of discrimination the children in *Brown* experienced in segregated schools, Justice O'Connor was shaped by the personal experiences of Justice Marshall and others as they shared their own trials with her.[30]

While Justice O'Connor did not experience discrimination based on her race in educational or career opportunities, she did experience discrimination as a result of her gender.[31] When she was on Lazy B with her family, young Sandra Day was expected to, and did, contribute to the same degree as the men in her family, even participating in roundups.[32] Further, when she attended Stanford University in the late 1940s, she joined some two thousand female students, which constituted nearly a quarter of enrolled undergraduates.[33] Her husband appreciated her independence and ambition, a rarity in the 1950s.[34] However, she had significant difficulties securing her first job after law school, as firms would only hire women as legal secretaries, instead of as practicing lawyers.[35] Justice O'Connor's experiences led her to champion better job opportunities for women and equal pay for equal work as a state senator.[36] As a Justice on the Supreme Court, she noted that what was important about her appointment was "not that [she would] decide cases as a woman, but that she [is] a woman who will get to decide cases."[37]

Justice O'Connor's writings evidence a deep understanding of the discrimination many have felt in pursuing opportunities, particularly resulting from race and gender discrimination.[38] Further, her writings evidence a strong belief that the framers drafted a Constitution that held the promise

28. O'CONNOR, *supra* note 27, at 58–59.

29. *Id.*

30. O'Connor, *supra* note 25, at 1217; *see also* O'CONNOR, *supra* note 20, at 135–36 (recounting Justice Marshall's stories).

31. O'Connor, *supra* note 25, at 1219.

32. *See, e.g.*, O'CONNOR, *supra* note 27, at 96 (noting Justice O'Connor's participation in the previously all-male roundups).

33. BISKUPIC, *supra* note 9, at 22.

34. *See id.*at 28 ("But she must have known the deeper commitment she was winning from a 1950s husband: an appreciation of her independence and ambition and a willingness to sacrifice some of his own drive for hers.").

35. *See supra* note 31 and accompanying text (noting Justice O'Connor's experiences with gender discrimination).

36. BISKUPIC, *supra* note 9, at 52.

37. *Id.*at 103.

38. *See generally* O'Connor, *supra* note 25 (Justice O'Connor discussing her own experiences and the stories Justice Marshall shared with her).

of equality.[39] This awareness is joined by an assumption of responsibility for narrowing the gap between "the ideal of equal justice and the reality of social inequality."[40] In her writings, Justice O'Connor has expressed a great respect for the dedication and commitment to the Constitution of the many judges that shaped the struggle for civil rights, particularly in the battle over the desegregation of schools.[41]

Justice O'Connor's story is impressive, as she rose from humble beginnings on a cattle ranch to the first woman appointed to the United States Supreme Court.[42] Her writings and jurisprudence evidence a deep commitment to equality and education and a profound respect for the role of the Court.[43] A searching review of her biography and the opinions she authored suggest that her jurisprudence is perhaps no accident; rather, her experiences shaped her rulings as a member of the Court.[44] The following sections will note these correlations in the larger context of an exploration and analysis of Justice O'Connor's race and education jurisprudence.[45]

III. RACE AND EDUCATION JURISPRUDENCE BEFORE JUSTICE O'CONNOR'S APPOINTMENT

> *We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.*[46]

Before exploring Justice O'Connor's impact on the Court's race and education jurisprudence, it is first useful to explore the Court's jurisprudence in this area prior to Justice O'Connor's appointment to the Court. As such, this section will trace the Court's race and education jurisprudence, both in higher education and in the K-12 context, from the ratification of the Constitution to Justice O'Connor's appointment in 1981.[47]

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39. *See* O'CONNOR, *supra* note 20, at 268 (noting the "Framers' promises of equality").
40. O'Connor, *supra* note 25, at 1218.
41. Sandra Day O'Connor, *The Judiciary Act of 1789 and the American Judicial Tradition*, 59 U. CIN. L. REV. 1, 11–12 (1990); *see also* O'CONNOR, *supra* note 20, at 246 (noting that the Court took "a leading role in the issue of race relations in the United States").
42. *See supra* notes 9–19 and accompanying text (outlining Justice O'Connor's background and experiences).
43. *See supra* notes 20–41 and accompanying text (exploring various writings by Justice O'Connor).
44. *See generally* Joyce, *supra* note 19 (suggesting such a connection).
45. *Infra* Section V.
46. Brown v. Bd. of Educ., 347 U.S. 483, 492–93 (1954).
47. *Infra* Section III.

Education has historically been a matter belonging to the states, and absent "clear and unmistakable disregard of rights secured by the supreme law of the land," the early Court was especially reluctant to interfere.[48] In this deferential spirit, the early 20th century Court upheld state laws[49] that authorized maintenance of separate schools for children of the white and colored races[50] and made teaching children of all races together illegal, in both public and private schools.[51]

Despite this deferential approach, the Court began to place some limit on the states' ability to discriminate under the Fourteenth Amendment in the late 1930s.[52] In *Missouri v. Canada*,[53] the Court noted that the constitutional permissibility of laws separating the races in the enjoyment of state privileges was dependent upon equal privileges being given to the separated groups in the state.[54] Resort to opportunities elsewhere was not enough to mitigate a state's discrimination; rather, the Court required that the State itself provide equal, even if separate, opportunities.[55] Because Missouri provided a law school only for its white citizens, the Court found that its actions violated the Equal Protection Clause of the Fourteenth Amendment.[56]

In the 1950s, the Court began to define this notion of equal opportunity in the education context.[57] In *Sweatt v. Painter*,[58] the Court held that the state providing one law school for whites and one law school for colored students was not enough; rather, there must be "substantial equality" in the educational opportunities.[59] The Court looked to the number and reputation of faculty, experience of the administration, variety of courses, size of the student body, scope of the library, availability of student activities, and

48. *See* Cumming v. Cnty, Bd. of Educ., 175 U.S. 528, 545 (1899) ("the education of the people in schools maintained by state taxation is a matter belonging to the respective states").

49. While the Court most often reviewed cases wherein a state law explicitly authorized separation of the races, the Court treated cases where such a policy was intended similarly. *See, e.g.*, Missouri v. Canada, 305 U.S. 337, 344 (1938) (noting the intended policy "to separate the white and negro races").

50. Lum v. Rice, 275 U.S. 78, 82, 87 (1927). "Colored races" has been used to refer not only to children of African American dissent, but also of the "brown, yellow, and black races"—essentially, to all non-Caucasian races. *Id.* at 82.

51. Brea Coll. v. Kentucky, 211 U.S. 45, 58 (1908).

52. *Infra* notes 53–56 and accompanying text.

53. 305 U.S. 337 (1938).

54. *Id.* at 349.

55. *See id.* at 350 ("Manifestly, the obligation of the State to give the protection of equal laws can be performed only where its laws operates.").

56. *Id.* at 352; *see also* Sipuel v. Bd. of Regents of Univ. of Okla., 332 U.S. 631, 633 (1948) (holding that the State must provide a legal education for colored students if it provides such an education for white students).

57. *Infra* notes 58–64 and accompanying text.

58. 339 U.S. 629 (1950).

59. *Id.* at 633–34.

standing in the community to measure equality.[60] Finding significant discrepancies in the two law schools, the Court held that the Equal Protection Clause required that the colored law student petitioner be admitted to the state's white law school.[61] That same year in *McLaurin v. Oklahoma State Regents for Higher Education*,[62] the Court held that once a student was admitted to a state-supported graduate school, even if he was of a different race than the majority of other students, the state must afford the student the same treatment as students of other races.[63] As a result, it became clear by the early 1950s that outer appearance of equality was not enough; rather, the Constitution required the states to provide truly equal opportunities to its students.[64]

By the mid-1950s, the Court's growing insistence on actual, substantive equality set the stage for its landmark decision in *Brown v. Board of Education*.[65] Because all tangible measures before the Court indicated that the primary and secondary schools that white and colored children attended in Kansas were equal, with respect to buildings, curricula, qualifications and salaries of teachers, and other factors, the Court was squarely faced with the question of whether segregation solely on the basis of race deprives children of the minority group of equal educational opportunities, even if tangible factors are equal.[66] The Court found that it did and that in the field of public education, "the doctrine of separate but equal has no place."[67] *Brown* clarified the meaning of the Fourteenth Amendment—that no state can "deny to any person within its jurisdiction the equal protection of the laws."[68] In subsequent cases, the Court reinforced this holding, noting that state governments and school boards alike were bound by *Brown*.[69]

After *Brown*, the nationwide system of segregated schools and an entire set of practices that denied citizens rights on account of their race conflicted with the Court's command of equality.[70] The Court had many opportunities to clarify the implications of its holding that, legally, separate was no longer equal as plaintiffs challenged the policies of their state gov-

60. *Id.*
61. *Id.* at 636.
62. 339 U.S. 637 (1950).
63. *Id.* at 642.
64. *Supra* notes 59 and 63 and accompanying text (noting the Court's requirement that the plaintiffs receive truly equal educational opportunities).
65. 347 U.S. 483 (1954).
66. *Id.* at 492–93.
67. *Id.* at 495.
68. O'Connor, *supra* note 41, at 11.
69. *See, e.g.*, Cooper v. Aaron, 358 U.S. 1, 4 (1958) (citing Brown v. Bd. of Educ., 347 U.S. 483 (1954)).
70. O'Connor, *supra* note 41, at 11.

ernments and local school boards.[71] The Court struck down school board policies that allowed students, upon request, to transfer to another school solely on the basis of its racial composition[72] and held that counties could not close all public schools when the result would be unequal education opportunities at private schools.[73]

By the mid-1960s, the Court noted that the time for mere deliberate speed in desegregation had run out[74] and remnants of unequal education must be remedied immediately.[75] Where plaintiffs could prove that a current condition of segregated schooling existed and was compelled or authorized by state action, the Court imposed on states the "affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch."[76] Even if the segregation resulted from free transfer policies[77] or statutes forbidding educational decisions based on race,[78] rather than through designated separate schools, the Court found that, in each case, the state's complacent actions violated the Equal Protection Clause.[79] The Court sanctioned district court orders requiring certain numbers of minority teachers and staff members per school,[80] the drawing of geographic attendance zones to achieve greater racial balance,[81] and the use of mathematical ratios of white to black students[82] as reasonable steps toward eliminating discrimination. Finally, the Court held that schools could not deny admission to prospective students because they were not white.[83]

However, by the mid-1970s, the Court began to limit the duty of states to address racial discrepancies in education, noting that federal remedial

71. *See, e.g.*, *infra* notes 72–73 and accompanying text (highlighting such cases).

72. Goss v. Bd. of Educ., 373 U.S. 683, 688 (1963) ("The recognition of race as an absolute criterion for granting transfers which operate only in the direction of schools in which the transferee's race is in the majority is no less unconstitutional than its use for original admission or subsequent assignment to public schools.").

73. Griffin v. Cnty. Sch. Bd., 377 U.S. 218, 231 (1964).

74. *Id.* at 234.

75. Rogers v. Paul, 382 U.S. 198, 199 (1965).

76. Monroe v. Bd. of Comm'rs, 391 U.S. 450, 458 (1968) (citing Green v. Cnty. Sch. Bd., 391 U.S. 430, 437–38 (1968)).

77. *See, e.g.*, *Green*, 391 U.S. at 440; Monroe v. Bd. of Comm'rs, 391 U.S. 450, 459 (1968).

78. N.C. State Bd. of Educ. v. Swann, 402 U.S. 43, 45–46 (1971). The Court noted: "To forbid, at this stage, all assignments made on the basis of race would deprive school authorities of the one tool absolutely essential to fulfillment of their constitutional obligation to eliminate existing dual school systems." *Id.* at 46.

79. *Id.*; *Green*, 391 U.S. at 440; *Monroe*, 391 U.S. at 459 (1968).

80. United States v. Montgomery Cnty. Bd. of Educ., 395 U.S. 225, 236 (1969).

81. McDaniel v. Barresi, 402 U.S. 39, 41 (1971).

82. *See* Swann v. Charlotte-Mechlenburg Bd. of Educ., 402 U.S. 1, 25 (1971) (approving such ratios as "starting point[s]").

83. *See* Runyon v. McCrary, 427 U.S. 160, 172 (1976) ("It is apparent that the racial exclusion practiced by the Fairfax-Brewster School and Bobbe's Private School amounts to a classic violation of [28 U.S.C.] 1981.").

power may be exercised only on the basis of a constitutional violation, and as with any equity case, the nature of the violation would determine the scope of the remedy.[84] In *Milliken v. Bradley*,[85] the Court held that before imposing cross-district school remedies, the plaintiff must first show that there has been a constitutional violation within one district that has produced a significant segregative effect in another district.[86] Remedies must be designed to restore the victims of discrimination, not as a justification to consider race in the placement of students.[87] Finally, in *Regents of the University of California v. Bakke*,[88] a plurality of the Court found that the University's Medical School admissions process, which reserved 16 out of the available 100 positions in the class for minority applicants, was impermissible.[89] Amongst several splintered opinions, four different members of the Court joined Justice Powell in finding that the State could consider race in admissions, provided that such consideration is devised to achieve a diverse student body within the University.[90] *Bakke* has been said to mark the Court's "retreat from race," as the Court began to substantially limit states' efforts to address racial discrepancies in schools.[91]

By 1980, the Court firmly established that separate was no longer equal in the context of education and that remedying past discrimination was a compelling government interest.[92] The Court heard several cases in which school districts had refused to undo years of segregation, but the Court was just beginning to establish the boundaries for the ability of states to consider race in the context of education.[93] It is against this background

84. Milliken v. Bradley, 418 U.S. 717, 738 (1974) (citing *Swann*, 402 U.S. at 300).

85. *Milliken*, 418 U.S. at 717.

86. *Id.* at 744–45; *see also* Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 455, 467 (1979) (allowing for system-wide remedy because the school board's segregative actions impacted the entire system); Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 417 (1977) (finding that the system-wide remedy fashioned by the district court went beyond the scope of the "three instances of segregative action").

87. *See Milliken*, 418 U.S. at 746 ("[T]he remedy is necessarily designed . . . to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct.").

88. 438 U.S. 265 (1978).

89. *See id.* at 271 (affirming the California court's holding that the University's special admissions program was unlawful). Justices Stewart, Rehnquist, and Stevens concurred in this part of Justice Powell's opinion. *Id.*

90. Justice Powell was joined in this part of his opinion by justices Brennan, White, Marshall, and Blackmun. *Id.* at 272. Justice Powell argued that race or ethnic background could be used as "simply one element—to be weighed fairly against other elements—in the selection process," but no other members of the Court joined that part of his opinion. *Id.* at 318. Justice Powell urged for the application of "the most exacting scrutiny" to this type of case, and four members of the Court chose to apply "strict scrutiny." *Compare id.* at 291 (Powell, J.) *with id.* at 328 (Brennan, White, Marshall, and Blackmun, J.).

91. Mario L. Barnes et al., *A Post-Race Equal Protection*, 98 GEO. L.J. 967, 971 (2010).

92. *See supra* Section III (tracing the Court's jurisprudence before Justice O'Connor's appointment to the Court).

93. *See supra* note 70–91 and accompanying text (exploring the Court's jurisprudence after *Brown*).

that Justice O'Connor was appointed to the Court and grappled with leaving her mark on the Court's race and education jurisprudence.[94]

IV. THE COURT'S JURISPRUDENCE DURING JUSTICE O'CONNOR'S TENURE

When Justice O'Connor joined the Court in 1981, the Court no longer subscribed to the notion that separate is equal.[95] Yet, the Court had not yet formalized this commitment to equality by applying the strictest level of judicial review to each instance of discrimination.[96] By the end of Justice O'Connor's tenure, however, the Court firmly adopted strict judicial review in all claims of race-conscious decision making by state actors.[97] This section will trace this evolution of the Court's race and education jurisprudence during Justice O'Connor's time on the Court.[98]

A. *Early Cases*

During the earliest years of Justice O'Connor's time on the Court, the Court was frequently faced with the difficult question of how far a state could—or should—go in remedying discrepancies between the races in public schools.[99] In *Crawford v. Board of Education of the City of Los Angeles*,[100] Justice O'Connor joined the majority in holding that the State could amend its Constitution to provide no further remedies than those required by the Fourteenth Amendment, and further, that the State was not required to provide pupil-school assignment or pupil transportation where segregation that violates the Equal Protection Clause did not exist.[101] However, unlike in *Crawford*, a majority of the Court in *Washington v. Seattle School District No. 1*[102] invalidated a facially neutral state statute that prohibited school assignment on the basis of race, on the grounds that

94. *See infra* Section IV (discussing significant cases in this area during Justice O'Connor's time on the Court).

95. *Supra* note 67 and accompanying text.

96. *See supra* Section III (discussing the Court's race and education holdings prior to Justice O'Connor's appointment).

97. *Infra* notes 123–162 and accompanying text (noting the Court's continued application of strict scrutiny).

98. *Infra* Section IV.

99. *See generally, e.g.*, Crawford v. Bd. of Educ., 458 U.S. 527 (1982).

100. *Id.*

101. *Id.* at 542, 545.

102. 458 U.S. 457 (1982).

it violated the Equal Protection Clause.[103] Four members of the Court dissented in *Washington*, including Justice O'Connor, arguing that the school districts had no federal constitutional obligation to adopt mandatory busing programs, and as such, could enact legislation that did not allow students to be assigned on the basis of race.[104]

Although Justice O'Connor's votes in *Crawford* and *Washington* evidence a view that a states' responsibility to combat racial discrepancies in public schools is limited to remedying violations of the Equal Protection Clause,[105] there is no doubt that she believed that children's inability to receive an education in a racially integrated school was "one of the most serious injuries recognized in our legal system."[106] In *Wygant v. Jackson Board of Education*,[107] a plurality of the Court applied strict scrutiny review to the school board's actions and held that the school board's policy of extending preferential protection against layoffs to some employees because of their race violated the Fourteenth Amendment.[108] Justice O'Connor wrote separately concurring in part and concurring in the judgment, embracing strict scrutiny review of any type of racial classification but applying the narrowly tailored component of the analysis differently than the rest of the plurality.[109] Justice O'Connor subscribed to Justice Powell's formulation of strict scrutiny in his plurality opinion—that racial classification must be justified by a compelling government interest and the means chosen by the state to effectuate its purpose must be narrowly tailored.[110] Foreshadowing later opinions, Justice O'Connor embraced two state interests as compelling in *Wygant*: remedying past or present discrimination by a state actor, and promoting racial diversity in higher education.[111] Justice O'Connor wrote similarly in her dissent in *United States v. Paradise*,[112] calling for strict scrutiny review.[113] In 1989, Justice O'Connor garnered four votes, but still no majority of the court, to apply strict scrutiny to the city's racial classifications in awarding construction contracts in

103. *Compare Crawford*, 458 U.S. at 545 (finding no discriminatory purpose and therefore no Equal Protection Clause violation) *with* Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 486–87 (1982) (finding undue burden on racial minorities and therefore an Equal Protection Clause violation).
104. *Washington*, 458 U.S. at 491–92 (Powell, J., dissenting).
105. *See supra* notes 100–104 and accompanying text (discussing Justice O'Connor's opinions in these cases).
106. Allen v. Wright, 468 U.S. 737, 756 (1984).
107. 476 U.S. 267 (1986).
108. *Id.* at 283–84.
109. *Id.* at 285 (O'Connor, J., concurring).
110. *Id.*
111. *Id.* at 286.
112. 480 U.S. 149 (1987).
113. *Id.* at 196 (O'Connor, J., dissenting).

City of Richmond v. J.A. Croson Company.[114] Again in 1990, in *Metro Broadcasting, Inc. v. FCC*, Justice O'Connor pressed for strict scrutiny review of all racial classifications—even those that benefit minorities—and was joined in her dissent by three other members of the Court.[115] A majority of the Court chose instead to apply intermediate scrutiny to the federal regulations at issue, on the basis that these regulations benefited, instead of burdened minorities.[116]

In 1991, Justice O'Connor joined a majority of the Court to place a further limit on public school desegregation plans in *Board of Education of Oklahoma City Public Schools v. Dowell*.[117] The Court emphasized the intended transitory nature of desegregation decrees—that federal supervision of local school systems was intended as only a temporary measure to remedy past discrimination.[118] As a result, the Court found that where local authorities had acted in compliance with a desegregation decree and no evidence of de jure segregation remained, the decree should be dissolved.[119]

However, in 1992, a majority of the Court, including Justice O'Connor, made clear in *United States v. Fordice* that it had not abandoned its central holding in *Brown*.[120] The *Fordice* Court noted that a state does not discharge its constitutional obligation until it eradicates policies and practices traceable to its prior system that continue to foster segregation, and that the adoption and implementation of race-neutral policies alone does not suffice to demonstrate that the prior segregated system has completely been abandoned.[121] Justice O'Connor concurred in the judg-

114. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (plurality opinion).

115. 497 U.S. 547, 602–03 (1990) (O'Connor, J., dissenting) *overruled by* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995). Justice O'Connor was joined by Justices Rehnquist, Scalia, and Kennedy. *Id.* at 602.

116. *Id.* at 563. Some commentators have noted the Court's oscillation between applying strict scrutiny and intermediate scrutiny review to racial classifications that benefit minorities during that time, from *Croson* to *Metro Broadcasting* to *Adarand*. *See generally* Matthew Scutari, *"The Great Equalizer": Making Sense of the Supreme Court's Equal Protection Jurisprudence*, 97 GEO. L.J. 917, 933 (2009); Dianne Marie Amann, *John Paul Stevens and Equally Impartial Government*, 43 U.C. DAVIS L. REV. 885, 908 (2010). Eventually, the Court settled on applying strict scrutiny review to all race-based classifications, whether intended to be discriminatory or benign. *Infra* note 123 and accompanying text (noting Justice O'Connor's success in leading the Court to apply strict scrutiny review to all racial classifications).

117. 498 U.S. 237 (1991). *See infra* note 119 and accompanying text (stating the Court's holding).

118. *Dowell*, 498 U.S. at 247–48.

119. *Id.* In 1992, a majority of the Court took *Dowell* one step further, finding that a district court may relinquish supervision and control over a school district in incremental stages before full compliance has been achieved in every area of operations. Freeman v. Pitts, 503 U.S. 467, 489 (1992).

120. United States v. Fordice, 505 U.S. 717, 727–28 (1992).

121. *Id.*

ment, noting that it was the State's burden to prove that it has undone its prior segregation, which should, "by now, be only a distant memory."[122]

In 1993, Justice O'Connor finally had a majority of votes from the Court in *Shaw v. Reno* to impose strict scrutiny review on racial classifications.[123] In *Shaw*, Justice O'Connor labeled the State's reapportionment plan, which placed into one district all individuals who belonged to the same race but had little in common besides the color of their skin, as "political apartheid," and she noted that the Court had rejected such perceptions elsewhere as impermissible racial stereotypes.[124] Justice O'Connor again garnered support from a majority of the Court to impose strict scrutiny review on all racial classifications, regardless of whom they benefited, in *Adarand Constructors, Inc. v. Pena*.[125] The *Adarand* Court not only overruled *Metro Broadcasting*, but also erased any doubt that strict scrutiny review would be applied when the government considers race.[126] At the same time, O'Connor's majority opinion in *Adarand* sought to "dispel the notion that strict scrutiny is strict in theory, but fatal in fact," noting that the government is not disqualified from acting in response to racial discrimination and leaving open the possibility that some race-based actions could later be found permissible.[127]

By the end of the 20th century, Justice O'Connor had firmly established strict scrutiny review as the Court's standard of review for race-conscious decision-making by state actors.[128] By the time the University of Michigan cases, *Grutter v. Bollinger*[129] and *Gratz v. Bollinger*,[130] reached the Court, Justice O'Connor and a majority of the Court were poised to strike down race-conscious acts of state officials that were not narrowly tailored to achieve a compelling government interest, whether in the context of employment or education.[131]

122. *Id.* at 744–45 (O'Connor, J., concurring).
123. 509 U.S. 630, 643 (1993).
124. *Id.* at 647. Justice O'Connor again applied strict scrutiny to racial classifications in the public education context in her concurrence in *Missouri v. Jenkins*. 515 U.S. 70, 112 (1995).
125. 515 U.S. 200, 227 (1995).
126. *Id.*
127. *Id.* at 237.
128. *See supra* notes 123–127 and accompanying text (discussing Justice O'Connor's majority opinions in *Shaw* and *Adarand*).
129. 539 U.S. 306 (2003).
130. 539 U.S. 244 (2003).
131. *See supra* notes 1284–128 and accompanying text (noting the Court's adoption of strict scrutiny review).

1. *The University of Michigan Admissions Cases*

In 2003, the Court reviewed two university admissions policies from the University of Michigan—those of the Office of Undergraduate Admissions and of the Law School.[132] In these two cases, the Court applied strict scrutiny review for the first time to race-based actions of university actors and issued separate but closely related opinions.[133]

In *Gratz*, the Court considered the University of Michigan's Office of Undergraduate Admissions process, which utilized a selection index in which an applicant could score up to 150 points.[134] Each applicant received points based on high school grades and the quality of the applicant's high school, standardized test scores, in-state residency, alumni relationships, personal essay, personal achievement or leadership, and notably, applicants from underrepresented minority or racial groups automatically received twenty points.[135] Writing for a majority of the Court, which included Justice O'Connor, Justice Rehnquist applied strict scrutiny to the University's admissions procedures and required that the University demonstrate that their use of race was "narrowly tailored [to] further compelling government interests."[136] Justice Rehnquist recognized that diversity was a compelling interest for the University, pursuant to the Court's opinion in *Grutter*, which was decided on the same day.[137] However, the Court held that the University's use of race in its freshman admissions policy was not narrowly tailored to achieve the asserted compelling interest in diversity.[138] Justice O'Connor wrote separately in *Gratz* to note that the weakness of the University's admissions process was that it "did not provide for a meaningful individualized review of applicants."[139]

The Court considered the University of Michigan's Law School admissions process in *Grutter*.[140] The Law School looked for individuals with "substantial promise for success in law school" and a "strong likelihood of succeeding in the practice of law and contributing in diverse ways," and they aspired to "achieve that diversity which has the potential to enrich everyone's education."[141] Rather than assigning points to various applicant

132. *See Gratz*, 539 U.S. at 244 (reviewing the admissions policy of the Office of Undergraduate Admissions); *Grutter*, 539 U.S. at 306 (reviewing the law school admissions policy).
133. *See infra* notes 134–156 and accompanying text (exploring the Court's *Grutter* and *Gratz* opinions).
134. *Gratz*, 539 U.S. at 255.
135. *Id.*
136. *Id.* at 270.
137. *Id.* at 268.
138. *Id.* at 275.
139. *Id.* at 276 (O'Connor, J., concurring).
140. 539 U.S. 306 (2003).
141. *Id.* at 314–15.

characteristics, as the Office of Undergraduate Admissions did in *Gratz*, the Law School admissions policy stated that admissions officials should "look beyond grades and test scores" to "soft variables," such as the enthusiasm of recommenders and the diversity of the applicant.[142] Utilizing this admissions process, the Law School sought to enroll a "critical mass of underrepresented minority students," although it did not define the term "critical mass" by a specific number, percentage, or range of numbers or percentages.[143]

Writing for the majority, Justice O'Connor first noted that the Court had last addressed the use of race in public higher education over twenty-five years before in *Bakke*, and that the only holding by a majority of the *Bakke* Court was that states have a substantial interest that may be served by a properly devised admissions program that involved the consideration of race.[144] In *Grutter*, Justice O'Connor adopted Justice Powell's view in *Bakke* that student body diversity is a compelling state interest that may justify the use of race in university admissions.[145] Recognition of this compelling interest was not enough; Justice O'Connor then proceeded to subject the Law School's admissions process to strict scrutiny review.[146] As a foundation for her review, Justice O'Connor asserted that "not every decision influenced by race is equally objectionable."[147] Here, because the Law School's interest was not simply to assure a percentage of a particular group within its student body merely because it its race, but to achieve the "critical mass" necessary to provide educational benefits from diversity,[148] Justice O'Connor found the Law School's interest compelling.[149] Justice O'Connor next looked to the means chosen to accomplish the Law School's interest to determine whether they were specifically and narrowly framed to accomplish that purpose such that there was little possibility that the motive for the classification was illegitimate racial prejudice or stereotype.[150] Further, again citing Justice Powell's decision in *Bakke*, Justice O'Connor found that for a race-conscious admissions program to be nar-

142. *Id.* at 306.
143. *Id.* at 318.
144. *Id.* at 322–23.
145. *Id.* at 325.
146. *Grutter*, 539 U.S. at 326.
147. *Id.* at 327. This statement is noteworthy given that Justice O'Connor's majority opinion in *Adarand* suggested that all racial classifications would be subject to the most exacting judicial scrutiny by the Court. *See* Joshua P. Thompson & Damien M. Schiff, *Divisive Diversity at the University of Texas: An Opportunity for the Supreme Court to Overturn Its Flawed Decision in* Grutter, 15 TEX. REV. L. & POL. 437, 453 (2011).
148. Justice O'Connor outlined the benefits of diversity touted by the University of Michigan in her opinion. *Grutter*, 539 U.S. at 330–32.
149. *Id.* at 325.
150. *Id.* at 333.

rowly tailored, it could not use a quota system or insulate each category of applicants with certain qualifications from competition with all other applicants, and instead, the program must be flexible enough to consider all elements of diversity in light of the qualifications of each applicant.[151] Justice O'Connor found that the Law School's admissions program was this type of narrowly tailored plan because it did not operate as a quota system; rather, each applicant was evaluated individually without giving any race more or less weight based on their race.[152] As a result, Justice O'Connor and a majority of the Court found the Law School's admissions policy permissible under the Equal Protection Clause of the Fourteenth Amendment.[153]

Despite upholding the Law School's admissions process in *Grutter*, Justice O'Connor noted that race-conscious admissions policies must be limited in time, as the primary purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race.[154] O'Connor suggested that this durational requirement may be met in the context of higher education by sunset provisions in race-conscious admissions processes and periodic reviews to determine whether racial preferences are still necessary to achieve diversity, and further, she noted that universities should draw on the most promising aspects of race-neutral alternatives as they develop.[155] Finally, Justice O'Connor and the majority of the Court noted their expectation that twenty-five years from the date of their opinion—by 2028—"the use of racial preferences will no longer be necessary to further the interest [in diversity]."[156]

Together, *Grutter* and *Gratz* made clear that the Court had joined Justice O'Connor's commitment to both remedying past government discrimination on the basis of race and in ensuring that any current race-based decision-making by state actors must survive strict review.[157] Consequently, by the beginning of the twenty-first century, the Court's jurisprudence seemed to embrace only a very small number of government uses of race.[158]

151. *Id.* at 334.
152. *Id.* at 335–36.
153. *Id.* at 343.
154. *Grutter*, 539 U.S. at 342–43.
155. *Id.* at 342.
156. *Id.* at 343; *see also* Gerald Torres, *We Are on the Move*, 14 LEWIS & CLARK L. REV. 355, 361 (2010).
157. *See supra* notes 134–156 and accompanying text (exploring *Grutter* and *Gratz*).
158. *See supra* Section III–IV(B) (tracing the Court's race and education jurisprudence).

2. *After Grutter v. Bollinger*

In 2005, the Court again reaffirmed the application of strict scrutiny review to race-conscious state actions in *Johnson v. California*.[159] Writing for the majority, Justice O'Connor applied strict scrutiny review to a prison's policy of placing new or transferred inmates with cellmates of the same race.[160] Instead of quickly resolving *Johnson* on the historical deference given to the needs of prison administrators, as urged by the dissent, Justice O'Connor reaffirmed the Court's prior holdings that all racial classifications must be analyzed by a reviewing court under strict scrutiny, regardless of the motive behind the classification,[161] and remanded the case to the district court to apply strict scrutiny review.[162]

By the time Justice O'Connor retired from the Court in 2005, the Court's application of strict scrutiny review to all race-conscious decision-making by state actors was clear.[163] In the context of education, it was evident that the government might successfully offer two different compelling interests to withstand this scrutiny—remedying past discrimination and achieving diversity of a critical mass through university admissions.[164] However, government's actions to achieve these compelling interests must be narrowly tailored, and only few race-conscious actions would withstand this degree of heightened scrutiny by the Court.[165]

V. ANALYSIS

Justice O'Connor served on the Court during a fundamentally transformative time in the nation's history, as the Court struggled to define the tangible meaning of the Equal Protection Clause in the context of education.[166] At a superficial review, it is clear that Justice O'Connor shepherded strict scrutiny judicial review of race-conscious decision-making by government actors from a minority view to the view of a majority of the Court.[167] However, Justice O'Connor's influence on the Court's race and

159. 543 U.S. 499 (2005).
160. *Id.* at 502, 509.
161. *Compare id.* at 524 (Thomas, J., dissenting) *with id.* at 509 (O'Connor, J.).
162. *Johnson*, 543 U.S. at 515.
163. *See supra* Section IV (noting the consistent application of strict scrutiny by the Court).
164. *See supra* notes 111 and 145 and accompanying text (noting the Court's embrace of these compelling interests).
165. *See supra* Section IV (making note of the Court's application of strict scrutiny review).
166. *See supra* Section IV (highlighting the Court's race and education jurisprudence during Justice O'Connor's tenure).
167. *See supra* Section IV (highlighting the Court's race and education jurisprudence during Justice O'Connor's tenure).

education jurisprudence stretches much further, as this section will illustrate.[168] This section will address: (A) the state of the law after *Grutter*, (B) the Court's jurisprudence after Justice O'Connor's tenure, and (C) the future of race-conscious decision-making in education and Justice O'Connor's legacy in this area.

A. *State of the Law after* Grutter

Justice O'Connor's majority opinion in *Grutter* was the culmination of many years of addressing race in the context of education during her tenure on the Court.[169] As such, it should serve as the basis for review of Justice O'Connor's impact on this area of the Court's jurisprudence. As will be discussed in this section, Justice O'Connor's opinion in *Grutter* established three principles: (1) diversity in education is a compelling government interest; (2) although university admissions policies must be narrowly tailored to survive judicial review, universities have a significant degree of autonomy to adopt standards consistent with their educational mission; and (3) *Grutter*'s holding will expire in twenty-five years from its issuance.

1. *Diversity as a Compelling Interest*

The Court's clear embrace in *Grutter* of diversity as a compelling interest for purposes of Equal Protection analysis in higher education cases was built on a growing notion in the Court's jurisprudence that education must prepare students for the diverse world they were certain to encounter as an adult.[170] Justice O'Connor garnered five votes for this diversity rationale in *Grutter*, a significant change from support of this rationale by only Justice Powell in *Bakke*.[171] Instead of aiming merely to eliminate racial discrimination through conscious placement of students, an interest in diversity aims to achieve a student body of varied ethnicities for the purpose of educating all students so that they each may be better prepared for the world.[172] Justice O'Connor's opinion in *Grutter* includes several assertions to this effect as proof of the compelling nature of universities achieving diversity,[173] and it is not difficult to imagine that Justice

168. *See infra* Section V(A) (analyzing Justice O'Connor's opinion in *Grutter* and other cases).

169. *See supra* Section IV (tracing the Court's race and education jurisprudence during Justice O'Connor's tenure through her opinions).

170. *Grutter*, 539 U.S. at 324, 330–31.

171. Kimberly West-Faulcon, *The River Runs Dry: When Title VI Trumps State Anti-Affirmative Action Laws*, 157 U. PA. L. REV. 1075, 1147 (2009).

172. *See Grutter*, 539 U.S. at 331–32 (discussing the benefits of achieving diversity in higher education).

173. *Supra* note 148.

O'Connor understood and appreciated diversity from her own experiences as well. Justice O'Connor's exposure to individuals of different races as a child at Lazy B and her experiences at Stanford as one of only a small percentage of female law students perhaps led her to not only appreciate learning from diverse individuals, but to view the experiences of individuals with different backgrounds as necessary to a good education.[174]

Some legal scholars have praised *Grutter*'s embrace of diversity as a compelling interest as a "win-win for universities," as universities relying on diversity are not forced to show evidence of their own past racial discrimination and rarely must state the characteristics that qualify or disqualify applicants.[175] Further, while traditional affirmative action programs appear more exclusive, seeming to demand that people acknowledge and assume responsibility for a history of racial oppression, diversity initiatives seem to lack a remedial component and suggest a more forward-looking orientation.[176] As a result, the word diversity appears more inclusive, and a wider range of society can envision themselves as beneficiaries of programs aimed at achieving diversity.[177]

Although Justice O'Connor clearly embraced diversity as a compelling interest, her majority opinion in *Grutter* left murky the distinction between remedial measures and diversity measures.[178] Her opinion generally avoided traditional remediation rhetoric and instead touted the benefits of diversity, but at the same time spoke of time limits for universities' abilities to utilize race-conscious admissions programs, suggesting that the State's interest was remedial.[179] In particular, Justice O'Connor's statement that the university's diversity plan would no longer be justified twenty-five years after the Court's opinion suggests that the Court upheld the admissions plan as a remedial measure, instead of as a means to ensure the student body diversity necessary to provide a sound university education.[180] As a result, while *Grutter* clearly embraced diversity as a compelling interest in higher education, it is not clear whether the Court truly relied on this interest to uphold the University's admissions process, and as such, whether an interest in diversity alone can justify future race-

174. *See supra* Section II (discussing Justice O'Connor's childhood experiences and education).
175. West-Faulcon, *supra* note 171, at 1147–48.
176. Barnes, *supra* note 91, at 1001–02.
177. *See* Barnes, *supra* note 91, at 1002 (describing diversity as "a source of relief for racial inequality").
178. *Compare supra* note 145 and accompanying text (noting that the *Grutter* Court embraced diversity as a compelling interest) *with* Ronald J. Krotoszynski, Jr., *The Argot of Equality: On the Importance of Disentangling "Diversity" and "Remediation" as Justifications for Race-Conscious Government Action*, 87 WASH. U. L. REV. 907, 918 (2010) (asserting that *Grutter* was based on both diversity and remediation interests).
179. Krotoszynski, *supra* note 178, at 918.
180. *Id.*at 935–36.

conscious decision-making in higher education.[181] Finally, to further weaken diversity as a reliable compelling interest for race-based measures, today *Grutter* remains the lone Court decision to which proponents of diversity can cite.[182]

2. *Narrowly Tailored, but not Fatal in Fact*

By the time *Grutter* and *Gratz* reached the Court, it was clear that strict scrutiny review would be applied to all racial classifications by state actors and would require that the state's actions be narrowly tailored to achieve a compelling government interest.[183] Justice O'Connor garnered a majority of votes from the Court to apply strict scrutiny in *Shaw v. Reno*,[184] and the Court had applied strict scrutiny in each subsequent encounter of racial classifications.[185] Consequently, it is not surprising that in *Grutter*, the Court required that the University of Michigan's admissions policy be narrowly tailored to its interest in achieving student body diversity.

Justice O'Connor utilized the opportunity that *Grutter* offered to clarify what narrowly tailored entails in the Court's strict scrutiny analysis.[186] Justice O'Connor defined the Court's narrowly tailored test as requiring that "[t]he means chosen to accomplish the government's asserted purpose must be specifically and narrowly framed to accomplish that purpose" and that "the means chosen [must] fit . . . so closely that there is little or no possibility that the motive for the classification was illegitimate."[187] This elaboration on the Court's narrowly tailored review suggested that few, if any, governmental actions that employ racial classifications will fit closely enough with the state's compelling interest to pass constitutional muster. However, other parts of Justice O'Connor's opinion indicated that the narrowly tailored requirement of strict scrutiny is not intended to make judicial review "fatal in fact"[188] and that "[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative."[189] This suggests

181. *Supra* notes 178–180 and accompanying text.
182. Thompson, *supra* note 147, at 475.
183. *See supra* Section IV (exploring the evolution of the Court's race jurisprudence and adoption of strict scrutiny review).
184. *Supra* note 123 and accompanying text.
185. *Supra* notes 124–162 and accompanying text.
186. *Infra* notes 187–189 and accompanying text. The Court did not expound upon the "narrowly tailored" requirement in *Shaw* and *Adarand*; instead, the Court remanded both cases to the lower courts to apply the strict scrutiny analysis. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 238–39 (1995); Shaw v. Reno, 509 U.S. 630, 658 (1993).
187. *Grutter*, 539 U.S. at 333.
188. *Id.* at 326.
189. *Id.* at 339.

that state actors have a significant degree of latitude for race-based decision-making in education.

Because the education context influenced the Court in articulating the constitutionally required fit necessary in *Grutter*, the special characteristics of education identified by Justice O'Connor are worth noting.[190] For Justice O'Connor in *Grutter*, academic freedom had been historically viewed as a special concern of the First Amendment,[191] and there was a tradition of giving deference to a university's academic decisions.[192] In fact, while the Court noted that deference would only be given within the bounds of constitutional limits, it openly deferred to the Law School's "educational judgment that such diversity is essential to its educational mission."[193] Because the Law School's admissions policy was not an outright quota system of the type rejected in *Bakke* and because the Law School claimed that its admissions process left ample opportunity for individualized review, the *Grutter* Court found that it was narrowly tailored to the Law School's interest in diversity in education.[194] As Chief Justice Rehnquist argued in dissent, the Law School presented little concrete evidence to demonstrate exactly how race factored into both individual admissions and the Law School admissions as a whole.[195] Such deference to the Law School suggests that the Court's strict scrutiny review in race-based decision-making is perhaps much less rigorous in education contexts than strict scrutiny, as defined, might suggest.[196] As a result, it is questionable whether Justice O'Connor in fact left the Court with strict scrutiny—requiring ends narrowly tailored to achieve a compelling interest—firmly intact as the proper standard of review in all racial classifications by state actors.

3. *A Twenty-Five Year Expiration for* Grutter

Justice O'Connor's opinion in *Grutter* is frequently cited for her declaration that "25 years from now, the use of racial preferences will no longer be necessary to further the interest approved [in *Grutter*]."[197] Her assertion

190. *Infra* notes 191–193 and accompanying text.
191. *Grutter*, 539 U.S. at 324.
192. *Id.* at 328; *see also generally* Erica Goldberg & Kelly Sarabyn, *Measuring a "Degree of Deference": Institutional Academic Freedom in a Post-*Grutter *World*, 51 SANTA CLARA L. REV. 217 (2011) (discussing *Grutter*'s impact on deference to university officials).
193. *Grutter*, 539 U.S. at 328.
194. *Id.* at 334–39.
195. *Id.* at 379–87.
196. Mark S. Kende, *Reviving Pragmatism in Constitutional Law: U.S. Opportunities and South African Examples*, 36 OHIO N.U. L. REV. 679, 695 (2010).
197. *See, e.g.*, Alison L. LaCroix, *Temporal Imperialism*, 158 U. PA. L. REV. 1329, 1369 (2010); Torres, *supra* note 156, at 361.

was based on the premise that race-conscious programs require a termination point in order to assure that differing from the norm of equal treatment is only a temporary practice,[198] and arguably, is based on an underlying commitment to equality unhampered by race that is greater than an appreciation for diversity. This underlying value judgment is expected to the extent that Justice O'Connor's majority opinion in *Grutter* was shaped by her own experiences.[199] While Justice O'Connor benefited and learned from exposure to workers of differing backgrounds during her time at Lazy B, her ability to receive a legal education equal to that of her male peers and her own struggle with obtaining an equal employment opportunity after graduation from law school likely had a greater impact on her life. As such, it would not be surprising if she intended *Grutter* to embrace ultimate equality as a greater concern than achieving diversity.

As evidenced by the several references to Justice O'Connor's statement by the rest of the Court, it is unclear whether this termination point was intended as an expectation, a limitation, or a mere hopeful projection.[200] Regardless of the intent behind this statement, the Court is sure to be faced with a strong argument in 2028, twenty-five years after *Grutter*, that race-conscious programs can no longer be upheld.[201]

B. *Supreme Court Jurisprudence After Justice O'Connor's Tenure*

In 2007, following Justice O'Connor's retirement, the Court reviewed the proper role for race in the education context in *Parents Involved in Community Schools v. Seattle School District No. 1*.[202] Consequently, *Parents Involved* offers the best foundation for determining the holding power of Justice O'Connor's contributions to race and education jurisprudence. This section will address: (1) the Court's opinion in *Parents Involved* and (2) how *Parents Involved* changed the Court's race and education jurisprudence.

1. Parents Involved in Community Schools

In *Parents Involved*, the Court faced the question of whether a public school that had not operated segregated schools or found to be unitary may

198. LaCroix, *supra* note 197, at 1369.

199. *See* Joyce, *supra* note 19 (suggesting such a connection); *see also* Christopher E. Smith, *Justice John Paul Stevens: Staunch Defender of Miranda Rights*, 60 DEPAUL L. REV. 99, 106 (2010) (quoting Justice O'Connor) ("We bring whatever we are as people to a job like the Supreme Court.").

200. LaCroix, *supra* note 197, at 1370–71.

201. *Id.* at 1371 ("[W]ith the tolling of the twenty-five year period . . . the era of race-conscious admissions policies in higher education will come to an end.").

202. 551 U.S. 701 (2007).

choose to classify students by race and rely upon that classification in making school assignments.[203]

The *Parents Involved* Court based their analysis on the "well established" proposition that when the government distributes burdens or benefits on the basis of individual racial classifications, that action will be reviewed under strict scrutiny.[204] In order to satisfy this standard of review, the Court noted that the school districts must demonstrate that the use of individual racial classifications is narrowly tailored to achieve a compelling government interest.[205] In *Parents Involved*, the Court took these principles as firmly established truths of constitutional law, citing to Justice O'Connor's opinion in *Grutter* and other cases.[206] Before analyzing the school district plans, the Court also noted that they had only recognized two interests as compelling to justify race-based decision-making.[207] First, the Court identified remedying the effects of past intentional discrimination as a compelling interest, but only where the harm being remedied by a mandatory desegregation plan is the harm traceable to segregation, not mere racial imbalance.[208] Second, the Court pointed again to Justice O'Connor's opinion in *Grutter* and noted a very specific interest in student body diversity in the context of higher education, focused not on race alone, but encompassing all factors that may contribute to student body diversity.[209] Finally, in *Parents Involved*, the Court made clear that racial balancing can never be a compelling state interest.[210]

In *Parents Involved*, the Court applied strict scrutiny to the school district's racial classifications, first determining whether the state had a compelling interest in this case.[211] The Court rejected diversity as an interest in the case before it because the school district had not considered race as part of a broader effort to achieve "exposure to widely diverse people, cultures, ideas, and viewpoints," as the University of Michigan Law School had in *Grutter*.[212] Instead, for some students, race alone was determinative.[213]

203. *Id.* at 711.
204. *Id.* at 720 (citing, *e.g.*, *Grutter*, 539 U.S. at 326).
205. *Id.* (citing Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995)).
206. *Id.* at 720.
207. *Id.* at 720–22.
208. *Parents Involved*, 551 U.S. at 720–21 (citing Freeman v. Pitts, 503 U.S 467, 494 (1992); Milliken v. Bradley, 433 U.S. 267, 280 (1977)).
209. *Id.* at 722. The Court noted that "[t]he entire gist of the analysis in *Grutter* was that the admissions program at issue there focused on each applicant as an individual, and not simply as a member of a particular racial group." *Id.*
210. *Id.* at 730–31 (citing *Grutter* for the proposition that outright racial balancing is "patently unconstitutional").
211. *Id.* at 720.
212. *Id.* at 723.
213. *Id.* The Court found the Seattle School District's plan more akin to the admissions program struck down in *Gratz*, instead of the meaningful, individualized review upheld in *Grutter*. *Id.*

Further, the considerations unique to higher education outlined by the Court in *Grutter* were not present here.[214] As a result, in *Parents Involved*, the Court found that the present case was not governed by *Grutter*, and diversity did not lie as a valid compelling interest for the state.[215] Out of the several offered interests, the Court found that only the school district's interest in remedying past discrimination was compelling.[216]

The Court then subjected the school district's actions to strict scrutiny, noting that the school district seeking a "worthy" goal did not mean that their racial classifications would be subject to less exacting scrutiny.[217] The Court found that the school district's actions were not narrowly tailored to achieving its interest, as the "minimal effect" of student assignments suggested that other means would be effective and the district failed to show "serious, good faith consideration of workable race-neutral alternatives."[218] The Court not only based both of these considerations on Justice O'Connor's opinion in *Grutter*, but also compared the facts before them to those found to support the constitutionality of the University of Michigan Law School's admissions process.[219] Finally, the Court ended its opinion with the strong assertion that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[220]

2. *How* Parents Involved *Changed Race and Education Jurisprudence*

The Court reaffirmed the central holdings of *Grutter* in *Parents Involved*, as the Court held that strict scrutiny was the proper standard of review to apply to the plaintiff's claims of state classifications based on race, and that only two state interests could be compelling: remedying the effects of past intentional discrimination and ensuring diversity, but only in higher education.[221]

However, the Court's opinion in *Parents Involved* seemed to limit the availability of diversity as a compelling interest, repeatedly noting that *Grutter* embraced diversity only in the context of higher education, and declining to allow diversity as a compelling interest in secondary education

214. *Parents Involved*, 551 U.S. at 724–26.
215. *Id.* at 725.
216. *Id.* at 720–21, 731–32. It should be noted that the Court found that only the Jefferson City school district's interest in remedying past discrimination was compelling, as there was no evidence of past intentional discrimination in the Seattle school district. *Id.*
217. *Id.* at 743.
218. *Id.* at 734–36.
219. *Id.*
220. *Parents Involved*, 551 U.S. at 748.
221. Michael P. Pohorylo, Note, *The Role of Parents Involved in the College Admissions Process*, 42 CONN. L. REV. 693, 714 (2009).

cases.[222] At the same time, *Parents Involved* did little to address the constitutional line between remedial efforts and proactive measures to achieve diversity, leaving diversity as a nebulous but possibly legitimate state interest.[223]

The Court emphasized two reasons why the secondary school assignment plans were not narrowly tailored, and as such, not constitutional: the two reassignment plans only had a marginal impact in achieving diverse student bodies, and the school district showed no evidence of consideration of alternatives that were not based on race.[224]

Because courts often find holdings involving K-12 education instructive in cases where one party is a university or college, and give similar treatment in the reverse, *Parents Involved* can be viewed together with *Grutter* to determine the Court's current race and education jurisprudence.[225] To the extent that *Grutter* and *Parents Involved* may be viewed together, the Court has added additional requirements to racial classifications that wish to pass constitutional muster. First, racial classifications must show significant measurable success.[226] Minor gains in creating a diverse student body will not survive strict scrutiny.[227] Second, if favorable race-neutral alternatives exist, then a plan that employs the use of race is not narrowly tailored.[228] State actors must clearly prove their consideration of such alternatives as well as provide evidence to the court that race-neutral alternatives are not favorable.[229] These requirements arguably signal that the current Court has grown increasingly reluctant to continue its typical deference to affirmative action in higher education.[230]

The number of cases filed by plaintiffs alleging racial discrimination against students has been limited since *Parents Involved* was decided in 2007, and lower courts facing such claims have ruled consistent with the

222. Ellison S. Ward, *Toward Constitutional Minority Recruitment and Retention Programs: A Narrowly Tailored Approach*, 84 N.Y.U. L. REV. 609, 628 (2009).

223. Krotoszynski, *supra* note 179, at 918.

224. Pohorylo, *supra* note 222, at 714-15.

225. *Id.* at 715–16. *But see* Coal. for Equity & Excellence in Maryland Higher Educ., Inc. v. Md. Higher Educ. Comm'n, CIV.A. CCB-06-2773, 2011 WL 2217481 (D. Md. June 6, 2011)) (analyzing plaintiff's claim of Title VII violations in higher education under *United States v. Fordice* and *Grutter*, without mention of *Parents Involved*); Pohorylo, *supra* note 222, at 716 ("*Grutter* is still good law and the holding of *Parents Involved* has not been incorporated into higher education and will not be a part of higher education law until a case is before the courts which warrants its application.").

226. Pohorylo, *supra* note 222, at 716–17.

227. *Id.*

228. *Id.* at 717–18.

229. *Id.* at 718.

230. Kimberly A. Pacelli, Fisher v. University of Texas at Austin: *Navigating the Narrows between* Grutter *and* Parents Involved, 63 ME. L. REV. 569, 570 (2011).

Court's jurisprudence.[231] For instance, in 2009, the Sixth Circuit noted that the Court has held that the "transition to a unitary, nonracial system of public education was and is the ultimate end" of its desegregation jurisprudence, and that once the effects of prior discrimination have been cured, race-conscious federal judicial supervision of the school district ends.[232] The Sixth Circuit overwhelmingly echoed the sentiment of the *Parents Involved* Court in its opinion.[233] Similarly, in 2010, the United States District Court for the Eastern District of Pennsylvania applied strict scrutiny to the plaintiffs' allegation that they were unable to choose between two high schools as a result of their race.[234] The district court echoed the Court's jurisprudence that disparate impact alone is not enough to show violation of the Equal Protection Clause, and the existence of one primarily black high school may be acceptable if it results from the desire to meet race-neutral, compelling interests.[235] As a result, *Parents Involved* remains the final word in the Court's race and education jurisprudence.[236]

The *Parents Involved* Court based much of its opinion on Justice O'Connor's majority opinion in *Grutter* and similar prior holdings of the Court that embraced strict scrutiny judicial review.[237] At the same time, *Parents Involved* constrained the central holding of *Grutter* to a very narrow context, as the Court found that diversity could be compelling only in the context of higher education.[238] As a result, Justice O'Connor's contribution to the Court's race and education jurisprudence remained strong, but narrowed, after the Court's opinion in *Parents Involved.*

231. *See infra* notes 232–132 (discussing various post-*Parents Involved* cases); Pohorylo, *supra* note 222, at 722–23

232. Robinson v. Shelby Cnty. Bd. of Educ., 566 F.3d 642, 650–51 (6th Cir. 2009); *see also* Fell v. Jefferson County Bd. of Educ., 2010-CA-001830-MR, 2011 WL 4502673 at *1-2, 8 (Ky. Ct. App. Sept. 30, 2011) (noting that federal supervision ends when the effects of prior discrimination have been cured). *Cf.* Fisher v. Tucson Unified Sch. Dist., 652 F.3d 1131, 1143-44 (9th Cir. 2011) (finding that the district court could not abdicate its responsibility to retain jurisdiction until the school district both demonstrated good faith and eliminated the vestiges of past discrimination to the extent practicable).

233. *Robinson*, 566 F.3d at 656.

234. Student Doe 1 v. Lower Merion Sch. Dist., No. 09-2095, 2010 WL 2595278, at *1, *3 (E.D. Pa. June 24, 2010).

235. *Id.* at *2–3; *see also* Everett v. Juvenile Female 1, 6:69-CV-702-H, 2011 WL 3606539, at *2 (E.D.N.C. Aug. 16, 2011) ("The fact that the plan results in schools that do not reflect the racial composition of the school system as a whole does not mean that the plan is unconstitutional.").

236. *See* Jacob E. Meusch, Note, *Equal Education Opportunity and the Pursuit of "Just Schools": The Des Moines Independent Community School District Rethinks Diversity and the Meaning of "Minority Student,"* 95 IOWA L. REV. 1341, 1350 (2010) ("*Parents Involved* represents the most recent major decision regarding the issue of school desegregation").

237. *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 720 (2007) (*citing* Grutter v. Bollinger, 539 U.S. 306, 326 (2003)).

238. *Id.* at 724-25.

C. *The Future of Race-Conscious Decision-Making in Education*

Equality has been a shifting concept throughout the history of the United States.[239] The Court's jurisprudence has consistently evolved over time to address shifting notions of equality, sharpening the promise of the Equal Protection Clause,[240] particularly in the area of race and education.[241] As such, Justice O'Connor's impact on the Court's race and education jurisprudence cannot only be measured through *Parents Involved*; rather, we must consider her legacy in the context of both cases currently pending and the perception of race in our society today.

1. Fisher v. University of Texas at Austin

The Fifth Circuit ruled on the University of Texas' race-conscious admissions policy in early 2011 in *Fisher v. University of Texas at Austin*,[242] attracting nationwide attention once again to the use of race in university admissions.[243] Petition for certiorari was granted by the Court on February 21, 2012, and the Court will hear oral arguments in the fall of 2012 after briefs are filed during the summer of 2012.[244] Commentators have noted that *Fisher* provides the Court with the opportunity to revisit *Grutter* and will be the next "big" case in the Court's race and education jurisprudence.[245]

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239. Barnes, *supra* note 92, at 968.

240. Nicholas F. Brescia, *Modernizing State Voting Laws that Disenfranchise the Mentally Disabled with the Aid of Past Suffrage Movements*, 54 ST. LOUIS U. L.J. 943, 948–49 (2010) (citing the Court's use in Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 669-70 (1966) of the strict scrutiny test for laws limiting an individual's right to vote).

241. *Cf.* Pacelli, *supra* note 231, at 570 (describing jurisprudence regarding the use of race in college admissions as having a "long and complex history").

242. 631 F.3d 213, 216–17 (5th Cir. 2011), *cert. granted*, 11-345, 2012 WL 538328 (U.S. Feb. 21, 2012).

243. *See, e.g.*, Nathan Koppel, *Fifth Circuit Approves Race-Based Admissions at Univ. of Texas*, WALL ST. J. (Jan. 19, 2011, 1:15 PM), http://blogs.wsj.com/law/2011/01/19/fifth-circuit-approves-race-based-admissions-at-univ-of-texas/. The United States and twenty-eight other organizations participated as amicus curiae before the Fifth Circuit, and many are expected to similarly participate before the Court. *See* Petition for Writ of Certiorari, Fisher v. University of Texas, No. 11-345, 2011 WL 4352286, at *4 (U.S. Sept. 15, 2011).

244. *See* Supreme Court of the United States, Docket File for Fisher v. University of Texas, http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/11-345.htm (noting that Petition was granted on February 21, 2012, the time to file petitioner's brief on the merits is extended to and includes May 21, 2012, and the time to file respondents' brief on the merits is extended to and includes August 6, 2012); Lyle Denniston, *Affirmative Action Review Due Next Term*, SCOTUSBLOG (Feb. 21, 2012, 4:38 PM), http://www.scotusblog.com/?p=139196 (noting that *Fisher* "will go over for argument in the next Term, starting October 1").

245. *See, e.g.*, Thompson, *supra* note 147, at 440; Mike Sacks, *Is the End Near for Affirmative Action?*, FIRST ONE @ ONE FIRST (Jan. 18, 2011), https://f11f.wordpress.com/2011/01/18/is-the-end-near-for-affirmative-action/. Some have noted that *Fisher* provides the first opportunity since *Parents*

In 1997, the Texas legislature enacted a diversity initiative that guarantees admission to public Texas universities and colleges to Texas students graduating in the top ten percent of their high school class (the "Top Ten Percent Law").[246] Those students who are not given automatic admission under the Top Ten Percent Law compete for admission to the University of Texas based on their Academic and Personal Achievement Indices, which not only makes note of the applicant's race,[247] but also considers it as a factor for admission.[248] The University of Texas admissions plan went considerably further than merely seeking diversity across the entering class of students; the plan also sought to achieve diversity among major fields of study and at the classroom level.[249] Abigail Fisher and Rachel Micalewicz, both Texas residents, were denied undergraduate admission to the University of Texas at Austin for the class entering in fall 2008.[250] Fisher and Micalewicz filed suit alleging that the admissions policies of the University of Texas discriminated against them on the basis of race in violation of their right to equal protection under the Fourteenth Amendment.[251] The district court granted summary judgment to the University.[252]

Echoing much of the Court's opinion in *Grutter*, the Fifth Circuit held in *Fisher* that the University's admissions policy was narrowly tailored to achieve a compelling interest in achieving diversity in a critical mass, rather than outright racial balancing.[253] Notably, the Fifth Circuit read the Court's jurisprudence to require scrutiny of the University's decision making process only "to ensure that its decision to adopt a race-conscious admissions policy followed from the good faith consideration *Grutter* requires," rather than "second-guess[ing] the merits of the University's decision."[254] Applying this deference, the Fifth Circuit found no indication that the university did not act in good faith by designing an admissions policy

Involved "to explore what that case might mean for university admissions." Pacelli, *supra* note 231, at 571.

246. *Fisher*, 631 F.3d at 216-17, 224.

247. *Id.*at 227–28.

248. *Id.* at 226. An applicant's "Personal Achievement" score considers their "special circumstances," such as leadership qualities, socioeconomic status, and their race. *Id.* at 228. The amount of points that an applicant may earn based on their race is not specified; rather, the applicant's file is viewed "holistically." *Id.*

249. Denniston, *supra* note 245.

250. *Fisher*, 631 F.3d at 217.

251. *Id.*

252. *Id.*

253. *Id.* at 247. The Fifth Circuit discussed at length the Court's findings in *Grutter* both that diversity in higher constitutes a compelling interest and that consideration of race must be individualized and flexible. *Id.* at 220–21.

254. *Id.* at 231.

modeled after that in *Grutter*, and as such, it passed constitutional muster.[255]

However, Fifth Circuit Justice Emilio Garza noted in his *Fisher* concurrence that the deference the Fifth Circuit gave to the University of Texas in following *Grutter* did not follow the Court's traditional application of strict scrutiny to race-conscious decision-making.[256] In Judge Garza's view, the use of phrases like "individualized consideration" and "holistic review" merely cloud the reality that race is used in essentially the same way as it is in rigid quota systems.[257] As a result, "race now matters in university admissions, where, if strict judicial scrutiny were properly applied, it should not."[258]

As noted, the Court granted certiorari in *Fisher* on February 21, 2012,[259] and certified the following question: whether this Court's decisions interpreting the Equal Protection Clause of the Fourteenth Amendment, including *Grutter*, permit the University of Texas at Austin's use of race in undergraduate admissions decisions.[260] While the stated issue before the Court is whether the University of Texas may continue to use its current admissions policy, *Grutter*'s validity is in danger as well.[261] Scholars have aptly noted that the facts of *Fisher* expose the contradictory holdings of *Grutter* and *Parents Involved*: whereas *Grutter* holds that universities "need not exhaust" race-neutral alternatives before using racial classifications, *Parents Involved* requires that racial classifications only be used as a "last resort."[262] As such, the Court is faced with reconciling *Grutter*'s embrace of a deferential review of race-conscious university admissions programs that is justified by an interest in diversity with the Court's otherwise strong embrace of strict scrutiny in all race based state actions.[263] In

255. *Id.* at 247.

256. *Fisher*, 631 F.3d at 247 (Garza, J., concurring).

257. *Id.* at 252.

258. *Id.* at 247.

259. *Supra* note 244 and accompanying text.

260. *See* Docket File for Fisher v. University of Texas, Supreme Court of the United States, http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/11-345.htm.

261. Amy Howe, *This Week's Grants: In Plain English*, SCOTUSBLOG (Feb. 23, 2012, 11:39 AM), http://www.scotusblog.com/2012/02/this-week's-grants-in-plain-english/; see Jeffrey Toobin, *The Other Big Supreme Court Case*, THE NEW YORKER BLOG (May 1, 2012), http://www.newyorker.com/online/blogs/comment/2012/05/the-other-big-supreme-court-case.html (stating that "[t]he case amounts to a direct challenge to [*Grutter*]"). Some scholars have alternatively argued that the Court is not necessarily faced with overruling *Grutter* in *Fisher*, but instead, *Fisher* provides the Court with the opportunity to strike down the University of Texas' admissions policy as a "runaway expansion" of *Grutter* while reaffirming the central holding of *Grutter*. *See* Brief of Amici Curiae California Association of Scholars and Center for Constitutional Jurisprudence, in Support of Petitioner, Fisher v. University of Texas, No. 11-345, 2011 WL 4352286 (U.S. Oct. 19, 2011), 2011 WL 5007902.

262. Pacelli, *supra* note 231, at 589.

263. *Compare* Petition for Writ of Certiorari, Fisher v. University of Texas, No. 11-345, 2011 WL 4352286, at *24 (U.S. Sept. 15, 2011) (noting the Court's history of holding that "governmental racial

addition, the composition of the Court deciding *Fisher* is markedly different than the Court that ruled on *Grutter*. Three of the Justices who dissented in *Grutter*—Justices Kennedy,[264] Scalia and Thomas—continue to be firmly opposed to affirmative action, as does Justice Roberts, who succeeded the fourth dissenter in *Grutter*, Justice Rehnquist.[265] In addition, the author of the Court's opinion in *Grutter*, Justice O'Connor, has been replaced by Justice Alito, who is more likely to find the University of Texas' policy unconstitutional than his predecessor.[266] Finally, Justice Kagan has recused herself from *Fisher*,[267] leaving Justices Sotomayor, Breyer and Ginsburg as the only members of the Court who are consistent supporters of affirmative action and can be counted on to uphold *Grutter*'s legacy.[268] As such, Justice O'Connor's legacy in this area will surely be tested in *Fisher*.[269]

b. *Race in America Today*

Beginning with *Grutter*, the Court limited the consideration of race in university admissions and secondary school integration plans.[270] As a result, legal scholars have argued that these and subsequent cases signal a return to post-racial ideology and analysis, where race-based decision-making is no longer warranted because racial discrimination no longer exists.[271] Justice O'Connor's statement in *Grutter* that race-conscious so-

classifications demand the most exacting judicial examination") (internal citations omitted) *with infra* Section IV(A)(a) and accompanying text (discussing *Grutter*).

264. Justice Kennedy dissented from Justice O'Connor's *Grutter* opinion, and again in *Parents Involved*, expressing negative sentiments about the very concept of remedial racial preferences. *See* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 798 (2007) (Kennedy, J., concurring) ("[M]easures other than differential treatment based on racial typing of individuals first must be exhausted."); Scott A. Moss, *The Courts Under President Obama*, 86 DENV. U. L. REV. 727, 734 (2009); Pacelli, *supra* note 231, at 577 (noting that Justice Kennedy's vote will be crucial in future cases); *see also* Corrada, *supra* note 8, at 242 (noting that Justice Kennedy "has adopted key elements of Justice O'Connor's position on affirmative action: hostile and restrictive, yes, but not entirely opposed to it as are the more conservative members of the Court.").

265. Howe, *supra* note 262.

266. *Id.* Justice Alito signaled opposition to any consideration of race in *Parents Involved*. Moss, *supra* note 265, at 734.

267. Lyle Denniston, *Affirmative Action Review Due Next Term*, SCOTUSBLOG (Feb. 21, 2012, 4:38 PM), http://www.scotusblog.com/?p=139196.

268. *See* Toobin, *supra* note 262 (stating "[t]hat leaves only three Democratic appointees—Ruth Bader Ginsburg, Stephen Breyer, and Sonia Sotomayor—as likely votes in favor of affirmative action").

269. *Fisher*, 631 F.3d at 264 (Garza, J., concurring); *see* Toobin, *supra* note 262 (stating that *Grutter* was the "most famous decision authored by Sandra Day O'Connor").

270. *See* Barnes, *supra* note 92, at 972 (noting the post-racial ideology of the Court after *Grutter*).

271. Barnes, *supra* note 92, at 972. Barnes points to *Parents Involved* as a judicial assertion that the Equal Protection Clause requires colorblindness and bars any effort at race-based remedies for discrimination and segregation. *Id.* at 974.

lutions should end twenty-five years after that decision embraces this post-racial ideology,[272] as does Justice Garza's concurrence in *Fisher*. Proponents of affirmative action argue that the Court's growing tendency to accept post-racial ideology ignore the ways in which racism has been ingrained, and continues to produce effects, in systems and structures of the United States.[273] They note that while post-racialism emphasizes stories of individual success, it does not adequately account for the disparate conditions under which minorities struggle that cause minorities to compare unfavorably to whites among almost all measures of economic and social success.[274] Consequently, proponents of affirmative action argue that the Court's growing adoption of post-racialism "ignores how race operates" and does not go far enough to achieve equality.[275] While Justice O'Connor's opinion in *Grutter* suggests that diversity will remain a compelling state interest in higher education and that programs that consider applicants' diversity as one factor in making admissions decisions will remain valid for another twenty years, the adoption of post-racialism by several sitting Justices suggests that the Court will soon, perhaps as early as within the next year through *Fisher*, reject race-based remedies in all but the most egregious intentional discrimination cases.[276]

Not only is the present Court poised to strike down any use of affirmative action measures in university admissions, but opponents of affirmative action are waging an increasingly vocal national battle over race-conscious admissions, not only in the courts, but also through state ballot initiatives.[277] To comply with these initiatives, many public universities have eliminated affirmative action policies, which has resulted in a negative impact on admissions rates for minorities.[278] However, these actions may

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272. Barnes, *supra* note 92, at 975.

273. *Id.* at 979; *see also* Destiny Perry, *The Colorblind Ideal in a Race-Conscious Reality: The Case for a New Legal Ideal for Race Relations*, 6 NW. J.L. & SOC. POL'Y 473 (2011) (arguing that "race consciousness in the law is necessary to ensure equal treatment of racial groups in regulated domains such as . . . education").

274. Barnes, *supra* note 92, at 983. Barnes notes discrepancies in the poverty rate, income and wealth, homeownership, employment, education, and criminal justice statistics. *Id.* at 984–992.

275. Barnes, *supra* note 92, at 995. *But see* Krotoszynski, *supra* note 179, at 925 (acknowledging the pre-university experiences of minorities).

276. Barnes, *supra* note 92, at 996–97.

277. West-Faulcon, *supra* note 172, at 1078. These include California's Proposition 209, Washington's Initiative 200, Michigan's Proposal 2, and Nebraska's Initiative 424. *Id.* After initiatives were passed in these states, the states passed laws that prohibit public universities from discriminating or giving preference on the basis of race. *Id.* at 1086. The Sixth Circuit heard an Equal Protection challenge to Michigan's Proposal 2 in 2011. Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. by any Means Necessary (BAMN) v. Regents of Univ. of Michigan, 652 F.3d 607, 610 (6th Cir. 2011), reh'g en banc granted, opinion vacated (Sept. 9, 2011).

278. Ward, *supra* note 223, at 631; West-Faulcon, *supra* note 172, at 1078. For example, UC Berkley admitted fewer than half the number of African American and Latino students during the first

constitute violations of Title VI of the Civil Rights Act of 1964, which prohibits universities from using admissions criteria that result in discrimination against applicants on the basis of race.[279] Further, declining levels of minorities admitted arguably constitutes proof that the seemingly race-blind university admissions process actually discriminates against minorities.[280] In addition, many universities that have removed race as a factor in admissions decisions have created programs designed to increase racial diversity through recruiting and retaining minority students.[281] Proponents of these programs argue that they are both necessary to ensure minority representation within their universities and are narrowly tailored to achieve the state's compelling interest in diversity.[282] However, there is a strong argument that not only do these types of minority recruitment and retention programs cause a detriment to non-minority students, as they utilize university resources that might be used in ways not based on race and provide unfair advantages to minority students,[283] but also that they do more harm than good.[284] As a result, the Court is not only poised to strike down the use of race in university admissions, but the climate is ripe for the right case to come before the Court for such an outcome that diminishes Justice O'Connor's legacy in this area.[285]

VI. CONCLUSION

The Court's race and education jurisprudence has come a long way from its embrace of the "separate but equal" doctrine in education before

admissions cycle without use of affirmative action than the university had admitted the prior year. *Id.* at 1094.

279. West-Faulcon, *supra* note 172, at 1078. For discussion supporting the idea that such initiatives are unconstitutional, *see* Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. by any Means Necessary (BAMN), 652 F.3d at 610.

280. West-Faulcon, *supra* note 172, at 1078–79. For such a claim to succeed, the plaintiff would not only need to show decreased admissions, but that the selection process is discriminatory, whether in fact or in impact. *Id.* at 1095.

281. Ward, *supra* note 223, at 611. *But see id.* at 622 (noting that *Grutter* has led some institutions to "make extremely conservative choices that have limited or ended important recruitment and retention efforts").

282. Ward, *supra* note 223, at 611–12. For exploration of these types of minority recruitment and retention programs, *see generally id.*

283. Ward, *supra* note 223, at 640–41.

284. *See* Brief Amicus Curiae of Gail Heriot et al. in Support of the Petitioner, Fisher v. University of Texas, No. 11-345, 2011 WL 4352286 (U.S. Sept. 15, 2011), 2011 WL 5007903, at *4 (arguing that race-preferential admissions have not facilitated the entry of minorities into higher education and high-prestige careers); Brief Amicus Curiae for Richard Sander and Stuart Taylor, Jr. in Support of Petitioner, Fisher v. University of Texas, No. 11-345, 2011 WL 4352286 (U.S. Oct. 19, 2011), 2011 WL 5015112, at *4–5 (asserting that that racial preference programs in universities have not proven to benefit minorities).

285. Moss, *supra* note 265, at 733–34.

Brown v. Board of Education.[286] A child can no longer be turned away from a school simply because of his race, and public universities openly aim for a racially diverse student body.[287] Any consideration of race in government decision making is now met with strict scrutiny,[288] and the current Court has expressed a strong commitment to colorblindness.[289]

Much of this transformation in the Court's race and education jurisprudence occurred during Justice O'Connor's tenure on the Court, largely due to both Justice O'Connor's influence on her fellow Justices and her firm commitment to both equality and the right of each student to receive an excellent and diverse education.[290] Her majority opinion in *Grutter* was a clear statement by the Court that not only would every race-conscious decision made by state actors undergo strict judicial scrutiny, but that public universities have a compelling interest in achieving a diverse student body.[291] To date, *Grutter* remains the central holding of the Court's race and education jurisprudence.[292]

As the Court is faced with claims challenging school placement schemes that consider race or university admissions processes that seek diverse applicants, particularly in *Fisher*, Justice O'Connor's race and education framework in *Grutter* is sure to be challenged.[293] These cases will be the ultimate measure of Justice O'Connor's influence on the Court's jurisprudence in this area. For now, perhaps it is enough to note that if nothing else, the first female Justice, from humble beginnings on a remote cattle ranch in Arizona, significantly altered the educational opportunities available in this nation for many.[294]

286. *See supra* notes 48–64 and accompanying text (outlining the Court's race and education jurisprudence before *Brown*).

287. *See supra* Section IV (exploring part of the Court's jurisprudence after *Brown*, specifically during Justice O'Connor's tenure on the Court).

288. *See supra* Section IV (tracing the Court's adoption of strict scrutiny review for all racial classifications).

289. Campbell, *supra* note 5, at 421 (noting a majority of the present Court's commitment to colorblindness).

290. *See supra* Section IV (exploring Justice O'Connor's race and education jurisprudence).

291. *See supra* Section V(A) (analyzing Justice O'Connor's opinion in *Grutter*).

292. *Supra* Section V (noting *Grutter*'s legacy).

293. *See, e.g.*, *supra* Section V(C) (discussing the challenge to *Grutter* by *Fisher v. University of Texas at Austin*).

294. *See supra* Section V(A) (exhibiting Justice O'Connor's impact on the Court's race and education jurisprudence).