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Tailoring the Narrow Tailoring Requirement in the Supreme Court’s Affirmative Action Cases

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Tailoring the Narrow Tailoring Requirement in the Supreme Court’s Affirmative Action Cases

By

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Abstract

When faced with the use of race by affirmative action programs, the Supreme Court has decided to subject any such program to its strict scrutiny test. In applying that test, the Court first determines whether there is a compelling interest for the use of race by the affirmative action program, and then the Court determines whether the program is narrowly tailored to meet that compelling interest. This Article focuses on the second part of the Court’s test: the narrow tailoring requirement.

This Article analyzes the narrow tailoring requirement by first detailing the history of the Supreme Court’s use of the requirement in its affirmative action cases. In detailing the history, this Article displays that the Supreme Court created the test when Justice Powell was the controlling member of the Court, and that the test was originally a very flexible one. Then the test was altered when Justice O’Connor became the controlling member, and the test became more formalistic and rules based. This Article also displays that it is unclear where Justice Kennedy will take the narrow tailoring requirement now that he is the controlling member of the Court, but that it appears that his view of the narrow tailoring requirement is different from Justice O’Connor’s view.

This Article then goes on to analyze and criticize Justice O’Connor’s formalistic approach to the narrow tailoring requirement, thereby showing why Justice Kennedy should adopt a view of the requirement that is more in line with Justice Powell’s flexible approach. Finally, this Article ends by suggesting a view of the narrow tailoring requirement that goes beyond what was suggested by Justice Powell in his opinions, and utilizes a more flexible multi-factored approach to evaluate whether race-based affirmative action programs are narrowly tailored.

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1 Associate, Weil, Gotshal & Manges LLP. J.D., University of California, Berkeley, School of Law, 2009, B.M., Berklee College of Music, 2005.
“Our Nation from the inception has sought to preserve and expand the promise of liberty and equality on which it was founded. Today we enjoy a society that is remarkable in its openness and opportunity. Yet our tradition is to go beyond present achievements, however significant, and to recognize and confront the flaws and injustices that remain. This is especially true when we seek assurance that opportunity is not denied on account of race. The enduring hope is that race should not matter; the reality is that too often it does.”

– Justice Kennedy.

I. Introduction

For many years, affirmative action has been one of the most controversial civil rights issues. It has had the effect of polarizing society into two camps: one side arguing that affirmative action is necessary to remedy both the past injustices of de jure segregation and the current injustices of de facto segregation; and the other side arguing that affirmative action is nothing more than present discrimination against those who are not responsible for the injustices of the past. For many years, the Supreme Court has

3 See Parents Involved, 551 U.S. at 823-37 (Breyer, J., dissenting) (advocating for the use of a standard that is less than strict scrutiny based on the context of the case, in particular, that it was an integration program that sought to remedy de facto segregation); Gratz v. Bollinger, 539 U.S. 244, 298 (2003) (Ginsburg, J., dissenting) (“The Court once again maintains that the same standard of review controls judicial inspection of all official race classification. This insistence on ‘consistency’ would be fitting were our Nation free of the vestiges of rank discrimination long reinforced by law. But we are not far distant from an overtly discriminatory past, and the effects of centuries of law-sanctioned inequality remain painfully evident in our communities and schools.” (citations omitted)); Fullilove v. Klutznick, 448 U.S. 448, 519 (1980) (Marshall, J., concurring in judgment) (“Because the consideration of race is relevant to remedying the continuing effects of past racial discrimination, and because governmental programs employing racial classification for remedial purposes can be crafted to avoid stigmatization, . . . such programs should not be subjected to conventional ‘strict scrutiny.’”); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 325 (1978) (Brennan, J., concurring in part and dissenting in part) (“Government may take race into account when it acts not to demean or insult any racial group, but to remedy disadvantages cast on minorities by past racial prejudice, at least when appropriate findings have been made by judicial, legislative, or administrative bodies with competence to act in this area.”); see also Kennedy, supra note 3, at 1327-34; Sullivan, supra note 3, at 78-79.
struggled with the concept of affirmative action.⁶ Like it has in broader society, affirmative action has sharply divided the Court’s members into those same two camps.⁷

Over the years, the controlling members of the Court, the swing voters, who have dealt with the affirmative action issue—Justice Powell, Justice O’Connor, and now Justice Kennedy—have been stuck in the middle between these two camps, attempting to bridge the two sides of the Court and create a compromise with respect to affirmative action.⁸ The normative vision of affirmative action adopted by these controlling members is that affirmative action is a sometimes necessary but dangerous tool.⁹ Because of its necessity, there should not be an outright ban on all forms of affirmative action, but because of its danger, the Supreme Court should carefully examine and evaluate each affirmative action program.¹⁰

The controlling members enforced this compromise through the language of the Supreme Court’s strict scrutiny test, which requires that a challenged government action be narrowly tailored to serve a compelling government interest.¹¹ Originally used as a test to quickly strike down invidiously discriminatory laws, when faced with the problem of affirmative action, the swing voters changed it into a detailed “means-ends” factual inquiry, examining whether the government’s actions met two constitutional requirements.¹² The first requirement is the “compelling interest” requirement, which

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⁶See Sullivan, supra note 3, at 78.
⁷See cases cited supra notes 5-4.
⁸See infra Parts II, III.
⁹See infra Part IV.
¹⁰See infra Part IV.
¹²See infra Part II.
examines the challenged government action’s “ends.” The Supreme Court has required that a government affirmative action program’s “ends” must be either to remedy past discrimination or to achieve diversity. While the Supreme Court has been fairly clear about what governmental “ends” constitute a compelling interest, the Court has been much more opaque when describing the second requirement—the narrow tailoring requirement—which examines the challenged government action’s “means.” This narrow tailoring requirement and the Supreme Court’s difficulty in defining its scope will be the focus of this Article.

The narrow tailoring requirement, as initially developed by Justice Powell through a series of cases, set out some loose factors for the Supreme Court to use in its evaluation of government affirmative action programs. The Powell Court seemed to take a somewhat contextual approach to the narrow tailoring requirement where the Court looked at the particular circumstances of each individual affirmative action program and based its determination on the set of factors that seemed pertinent to that particular situation, as opposed to relying on categorical requirements. However, in later cases, under Justice O’Connor, the Court’s narrow tailoring requirement became a highly formalistic inquiry that determined the constitutionality of government affirmative action programs by looking at whether the government program met certain categorical requirements. In particular, Justice O’Connor focused on whether the affirmative action

13 See id.
14 See Grutter v. Bollinger, 539 U.S. 306, 325-30 (2003) (stating that past cases found that remedying past discrimination is one compelling government interest and holding that student body diversity is another compelling state interest); see also Parents Involved in Cnty. Schs. v. Wash. Sch. Dist. No. 1, 551 U.S. 701, 788 (2007) (Kennedy, J., concurring) (stating that it is permissible for school boards “to consider the racial makeup of schools and to adopt general policies to encourage a diverse student body, one aspect of which is its racial composition”).
15 See infra Part II.
16 See infra Parts II.a, II.b.
17 See id.
18 See infra Part II.c.
programs attempted to grant benefits or burdens to individuals by employing set asides—which gave race a numerical quantification—or whether the programs made individualized determinations where race was one factor of many and not given a numerical quantification. Justice O’Connor disapproved of the former and approved of the latter. In addition to that requirement, she also required that government affirmative action programs adopt race-neutral alternatives if available and possess a sunset provision—a specified termination date for the program created at its outset.

Unfortunately, Justice O’Connor’s rigid and categorical inquiry did a poor job of reflecting the controlling Justices’ affirmative action compromise and properly policing affirmative action programs because it could be either too harsh or too lenient on affirmative action programs depending on the factual scenario. It could be too harsh because sometimes Justice O’Connor’s requirements could be so demanding that they created an absolute bar to some forms of affirmative action. Conversely, it could also be too lenient because sometimes the rigid factors allowed some affirmative action programs containing invidious discrimination to slip by. This discrepancy demonstrates that Justice O’Connor’s approach to narrow tailoring failed to strike the proper balance between outright banning affirmative action and fully accepting affirmative action. Thus, it did not reflect the compromise between the two camps of the Court that the controlling members—including herself—advocated for.

In his first and only affirmative action decision since becoming the controlling member of the Supreme Court, Justice Kennedy, in Parents Involved in Community

19 See id.
20 See id.
21 See id.
22 See infra Part IV.
23 See id.
24 See id.
Schools v. Washington School District No. 1, showed a possible willingness to go back to the looser, more contextualist view of the narrow tailoring requirement, that the Court embraced when Justice Powell was the swing vote. This Article argues that regardless of whether Justice Kennedy actually was moving back towards a more contextualist approach to narrow tailoring, a shift away from the highly formalistic inquiry adopted by Justice O’Connor back to the looser contextual standard used by Justice Powell has the potential to fix the previously mentioned problem of failing to achieve a proper compromise between the two sides of the Court. In addition, this Article also suggests how the Court could improve upon Justice Powell’s approach to narrow tailoring by enumerating a nonexclusive set of flexible factors that the Supreme Court could use in evaluating individual affirmative action programs and suggesting how the factors could be applied.

Part II of this Article details and comments on the history of the narrow tailoring requirement as developed by Justices Powell and O’Connor. Part III will then examine the Parents Involved decision, particularly focusing on Justice Kennedy’s controlling concurrence opinion and focusing on Professor Heather Gerken’s claim that Kennedy’s apparent shift from his concurrence in Grutter v. Bollinger can possibly be explained as him adopting a more contextualist approach to narrow tailoring. Part IV analyzes and criticizes Justice O’Connor’s formalistic approach by demonstrating that it was both too harsh and too lenient on affirmative action, and that the reason for this discrepancy is that affirmative action programs cannot be properly evaluated by rigid rules that are applied broadly to all such programs. Part IV also lays out a solution to the problems created by

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26 See infra Part IV.
27 See infra Part V.
Justice O’Connor’s rigid categorical requirements by describing why, regardless of whether Justice Kennedy actually was adopting a contextualist approach in *Parents Involved*, the Supreme Court should move back to the contextualist approach the Court used when Justice Powell was the controlling member. Finally, Part V explains how the Supreme Court could build upon Justice Powell’s contextualist approach by suggesting several loose factors that the Supreme Court could apply in its analysis and how those factors might be applied.

II. **A History of the Narrow Tailoring Requirement Under the Equal Protection Clause**

The words “strict scrutiny” and “narrowly tailored” do not appear anywhere in the Constitution. 29 The use of the words came about through a judicially crafted test that the Supreme Court developed over time. 30 Although the Supreme Court in cases like *Korematsu v. United States* 31 and *Bolling v. Sharpe* 32 used language that anticipates modern formulations of the strict scrutiny test, the birth for the modern strict scrutiny test as used in racial discrimination cases came in *McLaughlin v. Florida.* 33 *McLaughlin* dealt with a Florida statute that forbade the habitual occupation of a room at night by “any negro man and white woman, or any white man and negro woman, who [were] not married to each other.” 34 In *McLaughlin*, the Court stated that all racial classifications are

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30 Id.
31 323 U.S. 214 (1944) (“[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.”).
32 347 U.S. 497, 499 (1954) (“Classifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect.”).
33 379 U.S. 184 (1964); see Fallon, *supra* note 29, at 1277.
34 Id. at 184.
“constitutionally suspect,” and should be subjected “to the most rigid scrutiny.” In addition, the Court stated that a law containing racial classifications “even though enacted pursuant to a valid state interest, bears a heavy burden of justification, . . . and will be upheld only if it is necessary, and not merely rationally related, to the accomplishment of a permissible state policy.” Three years later, in *Loving v. Virginia*, a case dealing with the constitutionality of anti-miscegenation laws, the Court again used similar language to describe the strict scrutiny test: “[T]he Equal Protection Clause demands that racial classifications . . . be subjected to the ‘most rigid scrutiny,’ and, if they are ever to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate.”

The language used in these two cases clearly required reviewing courts to conduct a factual inquiry examining whether the challenged government action’s “ends” are legitimate or permissible—whether there is a permissible state policy or objective—and then determine if the “means” chosen by the government are necessary for the achievement of those “ends”—in other words, necessary to achieve that policy or objective.

Although these early strict scrutiny cases asked the Court to engage in a factual review of the challenged government program and determine whether the “ends” justified the “means,” some claimed that the Supreme Court appeared to engage in no such factual review and quickly struck down laws as soon as it was determined that they should be reviewed by strict scrutiny. Thus, it was assumed that the invocation of strict scrutiny as the standard of review meant that the challenged government action would be declared invalid.

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35 Id. at 192.
36 Id. at 196.
37 388 U.S. 1, 11 (1967).
unconstitutional no matter what facts were present in a particular case. This led Professor Gerald Gunther to famously call the strict scrutiny test “strict in theory, but fatal in fact.”

However, a closer examination reveals that Professor Gunther’s claim that strict scrutiny was an absolute bar to any government action was exaggerated. The Court in these cases did engage in a factual inquiry of each challenged law, but the Court each time found that the only justification for the challenged law was impermissible invidious discrimination, which the Court has held can never be a permissible or legitimate justification for a racial classification under strict scrutiny. Thus, the Court never had to go past the first prong of the strict scrutiny test, which examined the government’s purported “ends,”—what eventually became the compelling interest prong—because the government’s “ends” were always deemed illegitimate. It was not until the Supreme Court began to review race-based classifications related to affirmative action programs that the Court found racial classifications that were considered benign and not based on invidious discrimination. Once confronted with benign classifications, the Court found satisfactory governmental “ends”—compelling state interests—and, thereby, was finally forced to engage in a deeper factual inquiry into the challenged government programs to determine whether the chosen “means” were appropriate. Interestingly, this might have

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39 Id. at 8; Peter J. Rubin, *Reconnecting Doctrine and Purpose: A Comprehensive Approach to Strict Scrutiny After Adarand and Shaw*, 149 U. Pa. L. REV. 1, 4 (2000) (“Most have concluded that a judicial determination to apply “strict scrutiny” is little more than a way to describe the conclusion that a particular governmental action is invalid.”).

40 Gunther, *supra* note 38, at 8.

41 See, e.g., *Loving*, 388 U.S. at 11 (“There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification. The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy.”).


43 Professor Fallon has offered an alternative explanation for the Court’s apparent differences its strict scrutiny analysis between affirmative action cases and all other equal protection cases. He states that
been why the Court stopped using the word “necessary” to describe the second prong of
the strict scrutiny test, as it did in McLaughlin and Loving, and eventually moved to the
words, “narrowly tailored.” The words “necessary” would seem to demand a much
closer fit between the “ends” and the “means” than the words “narrowly tailored.” Thus,
adoption of the new language might have been a way of the Court saying that the second
step of the strict scrutiny test was going to be more lenient and more factually driven.

The Supreme Court actually did not begin using the exact words “narrowly
tailored” during the application of the strict scrutiny test until the early 1970s, and when
it did so, it was in cases involving the First Amendment not the Equal Protection Clause
of the Fifth and Fourteenth Amendments. It was not until 1980, in Fullilove v.
Klutznick, that the Supreme Court used the phrase “narrowly tailored” in an equal
protection case to describe the second prong of the strict scrutiny test.” However, by the
time of Regents of the University of California v. Bakke, the Court’s first affirmative
action decision in 1978, the Supreme Court had already begun using a very similar
phrase, “precisely tailored,” to describe the second prong of the strict scrutiny test.

a. Bakke: The Court’s First Look at Affirmative Action

In Regents of the University of California v. Bakke, the Supreme Court invalidated
the University of California, at Davis Medical School’s admission policy of setting aside

See, e.g., Grayned v. City of Rockford, 408 U.S. 104, 116-17 (1972); Police Dept. of the City of Chicago
v. Mosley, 408 U.S. 92, 101 (1972). That the Supreme Court borrowed the term “narrowly tailored” from
its First Amendment cases for its Equal Protection cases is not surprising. In McLaughlin v. Florida, the
Court’s first big step in articulating a standard for the strict scrutiny test, Justice Harlan in a concurring
opinion stated that the “necessity test”—what he called the strict scrutiny test at that time—had been first
developed in First Amendment free speech cases and is “equally applicable in a case involving racial
discrimination.” 397 U.S. 184, 197 (1964) (Harlan, J. concurring).

Fullilove, 448 U.S. at 480 (“We recognize the need for careful judicial evaluation to assure that any
congressional program that employs racial or ethnic criteria to accomplish the objective of remedying the
present effects of past discrimination is narrowly tailored to the achievement of that goal.” (emphasis
added)).

a specified number of seats for minority students. The University’s admission policy required that the school operate a dual system application process where 84 of the 100 slots where open to everyone, and the remaining 16 slots were eligible only to minority students. Chief Justice Burger and Justices Stewart, Stevens and Rehnquist all held that the admission policy was invalid but did not consider the constitutional question of whether the policy violated the Equal Protection Clause because they found that it violated Title VI of the 1964 Civil Rights Act. Justice Powell provided the fifth vote needed to invalidate the law, but argued that the policy should be found to be unconstitutional under the Equal Protection Clause because it failed to pass strict scrutiny. Justices Brennan, White, Marshall and Blackmun dissented and argued for the application of intermediate scrutiny and found that the policy passed the lower standard.

Although Justice Powell was only writing for himself, his view of the strict scrutiny standard as applied to affirmative action programs would help guide the Supreme Court in all of its future affirmative action decisions. First, in stating why the policy should be subjected to strict scrutiny and not intermediate scrutiny, Justice Powell focused on the language contained in the Fourteenth Amendment itself, which he interpreted as extending the clause to all “persons.” Therefore, the Equal Protection Clause could not mean one thing when applied to one person, but another thing when applied to someone else of a different race, meaning that all racial classifications should

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47 438 U.S. 265.
48 See id. at 272-76.
49 Id. at 418 (Stevens, J., concurring in judgment in part and dissenting in part).
50 Id. at 315-21.
51 Id. at 379 (Brennan, J., concurring in judgment and dissenting in part).
be subjected to the same level of scrutiny—strict—regardless of what race was receiving the benefits or burdens of the government’s program.\textsuperscript{53}

Justice Powell then turned to the first part of the strict scrutiny analysis and held that either rectifying past discrimination or achieving a diverse student body could satisfy the compelling interest requirement of the strict scrutiny test.\textsuperscript{54} However, Justice Powell found that there was no evidence of past discrimination by the University, so the University did not have a compelling interest in remedying past discrimination.\textsuperscript{55} Therefore, the University’s only possible compelling interest was in achieving diversity, and Justice Powell found that the medical school’s policy was not the only effective means of serving that interest.\textsuperscript{56} He disapproved of the University’s use of a rigid quota because it made race the sole deciding factor in determining whether some individuals obtained admission to the medical school.\textsuperscript{57} Instead, he stated that a proper model could be the one used by Harvard College where there is no numerical quota set for minorities and race is just used as a plus factor among many other factors in the admissions process to help increase a university’s diversity.\textsuperscript{58} Powell emphasized that a program like this treats each applicant as an individual and prevents an applicant’s race from being the sole deciding factor in determining their admission to the university.\textsuperscript{59}

\textit{b. Fullilove, Wygant, and Paradise: Justice Powell’s Interpretation of the Narrow Tailoring Requirement}

\textsuperscript{53} Id.
\textsuperscript{54} Id. at 307, 312.
\textsuperscript{55} Id. at 307.
\textsuperscript{56} Id. at 315-19. As noted in the previous section, at the time of Bakke, the Supreme Court had not begun to use the language “narrowly tailored” to refer to “means” analysis prong of the strict scrutiny test. Instead, in Bakke, Justice Powell used the language “precisely tailored.” Despite the difference in language, the Bakke decision remained highly influential in guiding the Supreme Court in its future narrow tailoring analyses. See, e.g., Grutter v. Bollinger, 539 U.S. 306 (2003); Gratz v. Bollinger 539 U.S. 244 (2003).
\textsuperscript{58} Id. at 316-18.
\textsuperscript{59} Id. at 317-18.
After Bakke, the Supreme Court—with Justice Powell as the controlling member—decided the constitutionality of three more affirmative action programs in Fullilove v. Klutznick,\(^{60}\) Wygant v. Jackson Board of Education,\(^{61}\) and United States v. Paradise.\(^{62}\) In these decisions, the Court expanded Bakke’s reasoning from the domain of education to employment and public contracting affirmative action programs. In each case, as in Bakke, the Court was faced with a government affirmative action program that employed a quota/set-aside, meaning that these programs gave race a numerical quantification. First, in Fullilove, the Supreme Court evaluated a federal law that required that any public works project seeking a federal grant to set-aside 10% of the grant for Minority Business Enterprises (MBEs).\(^{63}\) Next, in Wygant v. Jackson Board of Education, the Supreme Court evaluated a school system’s preferential protection against layoffs of minority workers where in the event that it became necessary, the Jackson Board of Education agreed that it would only layoff as many minority teachers as it would lay off non-minority teachers—a one-to-one quota—and adherence to this rule caused the Board to lay off tenured non-minority teachers rather than non-tenured minority teachers.\(^{64}\) Finally, in Paradise, the Court reviewed a federal district court order requiring the Alabama Department of Public Safety to create a set-aside where it would hire one black trooper for each white trooper hired—another one-to-one quota—until black troopers constituted approximately 25% of the state trooper force, in order to remedy past intentional employment discrimination by the Department of Public Safety.\(^{65}\)

Despite the fact that all four cases, including Bakke, involved government affirmative

\(^{60}\) 448 U.S. 448 (1980).
\(^{63}\) Fullilove, 448 U.S. at 492.
\(^{64}\) See Wygant, 476 U.S. at 267-71.
\(^{65}\) See Paradise, 480 U.S. at 154-166.
action programs that utilized numerical set-asides, the Court split over the four programs, finding two, the ones in *Bakke* and *Wygant*, unconstitutional,66 and two, the ones in *Fullilove* and *Paradise*, constitutional.67

This split shows that the Supreme Court with Justice Powell as the swing vote took a contextualized rather than categorical approach to the narrow tailoring requirement. Although the Court never announced clear, consistent principles for the narrow tailoring requirement in these cases, it was clear that the Court was moving in a direction where it would evaluate affirmative action programs on an individualized basis to determine whether the program was narrowly tailored. In finding the *Fullilove* program constitutional, the Court focused on these specific facts: the program was enacted through the legislative authority of Congress, who possesses broad remedial powers; the program was being challenged on its face rather than through a specific implementation; and the program contained a waiver and exemption provision stating that the set-aside could be waived if the contractor could demonstrate that there was not sufficient qualified minority business enterprises in the relevant market.68 In finding the *Wygant* program unconstitutional, Justice Powell focused particularly on the fact that this employment case dealt with layoffs rather than hiring.69 Justice Powell stated that “[d]enial of a future employment opportunity is not as intrusive as loss of an existing job” because while a hiring goal merely imposes “a diffuse burden, often foreclosing only one of several opportunities, layoffs impose the entire burden of achieving racial equality on particular individuals, often resulting in serious disruption of their lives.”70 Thus, he rejected layoffs as an appropriate means in employment affirmative action cases. In

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66 *Wygant*, 476 U.S. at 283-84; *Bakke*, 438 U.S. at 319-20.
68 See *Fullilove*, 448 U.S. at 480-89.
70 *Id.* at 282-83 (footnotes omitted).
finding the *Paradise* program constitutional, the Court focused the egregious facts of the case where the Alabama Department of Public Safety not only had a proven long history of discrimination in its employment practice but was also resistant to all of the district court’s attempts to remedy this discrimination.\(^{71}\) In addition to this, the Court focused on these facts: the requirement could be waived if no qualified black candidates were available; the district court’s goal of attaining a department comprised of 25% black troopers reflected the relevant work force; the program was temporary and extremely limited in nature; and, finally, that a district court’s determination of what relief is appropriate should be given deference.\(^{72}\) The Court’s appreciation of the different facts presented in each case shows that it was adopting a more contextualist approach.

In addition to outcomes of these cases, the Court’s language also shows that it was adopting a contextualist approach. In *Paradise*, both Justice Brennan and Justice Powell described the narrow tailoring analysis to require the Court to look at several factors.\(^{73}\) Just Powell stated:

> In determining whether an affirmative-action remedy is narrowly drawn to achieve its goal, I have thought that *five factors may be relevant*: (i) the efficacy of alternative remedies; (ii) the planned duration of the remedy; (iii) the relationship between the percentage of minority workers to be employed and the percentage of minority group members in the relevant population or work force; (iv) the availability of waiver provisions if the hiring plan could not be met; and (v) the effect of the remedy upon innocent third parties.\(^{74}\)

Although this is a list of categorical factors, the italicized language shows that Justice Powell was advocating for a contextualist approach. Powell used the word “may,” and, thus, thought that these were factors that a reviewing court might use in evaluating the constitutionality of a government affirmative action program depending on the facts.

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\(^{72}\) See id. at 177-86.

\(^{73}\) Id. at 171; id. at 187 (Powell, J., concurring).

\(^{74}\) Id. at 187 (Powell, J., concurring) (emphasis added).
before it, rather than absolute requirements the that court must find in each program. Unfortunately, a majority of the Court failed to adopt these factors because, in *Paradise*, Justice Stevens only concurred in judgment with Justices Brennan and Powell, leaving their multi-factored test adopted by only a plurality of the Court. That the Court with Justice Powell as its controlling member was utilizing a contextalist approach to the narrow tailoring requirement is key in understanding where requirement was at when Powell handed the controlling position over to Justice O’Connor and where she then took the requirement.

c. *Croson, Gratz, and Grutter*: Justice O’Connor’s Interpretation of the Narrow Tailoring Requirement

In 1987, Justice Powell retired from the Supreme Court, and Justice O’Connor eventually assumed the position of controlling member—the swing voter—of the Court with respect to its affirmative action decisions. Justice O’Connor took her first step in assuming this position by writing the Court’s first post-Justice Powell affirmative action opinion, *Richmond v. J.A. Croson Co.* In *Croson*, the Supreme Court declared unconstitutional a city affirmative action program similar to the law enacted by Congress that the Court declared constitutional in *Fullilove*. The city of Richmond, Virginia enacted a plan that awarded city contracts requiring the contractor to subcontract at least 30% of the total dollar amount of each contract to Minority Business Enterprises (MBEs). Like the set-aside in *Fullilove*, the Richmond plan defined MBEs as

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75 *Id.* at 189 (Steven, J., concurring in judgment).
77 *Id.* at 511.
78 *Id.* at 477.
businesses owned by “minority group members are citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts.”

As an initial matter, the Croson decision was very important as it was the first decision where a majority of the Court agreed that an affirmative action program should be reviewed under strict scrutiny although a majority failed to agree on what that standard entailed. In each of the four previous cases, the Court had fought over whether government affirmative action programs should be reviewed under strict or intermediate scrutiny. Thus, this was first time that the Court firmly held that government affirmative action programs must meet strict scrutiny’s narrow tailoring requirement although the holding was limited to state affirmative action programs and not federal ones.

Writing for the Court, Justice O’Connor began her analysis by stating that the plan was not linked to any identified past discrimination by the city of Richmond, but only a generalized assertion that discrimination had occurred in the past in that particular industry. She also pointed out that there was absolutely no evidence at all showing that any past discrimination had occurred against Spanish-speaking, Oriental, Indian, Eskimo, or Aleut person, and, therefore, the “random inclusion” of these races along with blacks as part of the set-aside scheme was improper. Thus, the Richmond plan failed the

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79 Id. at 478. In making that decision, the Court noted that even if it were to accept the position that affirmative action programs should be subject to a lesser level of scrutiny than strict scrutiny because they are program that are designed to help minorities. See id. at 495-98. Blacks constituted approximately 50% of the population of Richmond and were, thus, the ethnic majority not minority of the City of Richmond. See id. The Court stated because they represented the majority in this particular situation, their actions then were actually discrimination on an ethnic minority, whites, by the ethnic majority, blacks, rather than affirmative action. See id.

80 Id. at 494.


82 Id. at 498-507.

compelling interest prong of the strict scrutiny test because the government did not have a compelling interest in remedying general societal discrimination.\(^84\) Even though the plan failed the compelling interest prong, Justice O’Connor still made a few observations about whether the plan was narrowly tailored. She stated that there did not appear to be any consideration of the use of race-neutral means to increase minority business participation in city contracting.\(^85\) Furthermore, Justice O’Connor criticized the use of the 30% set aside which reflected the number of minorities in the city’s total population rather than the minority population in the relevant work force.\(^86\) Justice O’Conner also did not see why the rigid numerical quota was necessary, as bids and waivers are already determined on a case-by-case basis and, therefore, affirmative action decisions could be made on an individual basis.\(^87\) In conclusion, Justice O’Connor stated that she thought that the city’s only interest in establishing a quota when the city already had an individualized procedure was for simple administrative convenience, which is not a compelling interest and is not enough to justify the use of racial classifications.\(^88\)

Although Justice O’Connor did not expressly say she was doing so, it does appear that she was relying on Justice Powell’s factors in evaluating the constitutionality of the Richmond plan. Her criticism of the program 30% set-aside not being linked to the relevant job market was directly linked to Powell’s third factor of looking at the relationship of the set-aside with the relevant market, and her advocating for race-neutral alternatives is similar to Powell’s first factor of looking at the efficacy of alternative remedies, although it is much more specific than Powell’s factor. Instead of using the general term “alternative remedies,” Justice O’Connor made it clear that these

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\(^{84}\) See id. at 498.
\(^{85}\) Id. at 507.
\(^{86}\) Id.
\(^{87}\) Id. at 508.
\(^{88}\) Id.
alternatives should be race-neutral. However, it was unclear in her opinion whether
efficacy would remain a consideration, or if any available race-neutral means—effective
or not—should be adopted. Justice O’Connor’s preference for individualized
determinations rather than set-asides seems to be linked to Justice Powell’s fifth factor,
the program’s effect on the harm of third parties, because she felt that individualized
determinations “are less problematic . . . because they treat all candidates individually,
rather than making the color of an applicant’s skin the sole relevant consideration.”89
Thus, Justice O’Connor appeared to be adopting Powell’s fifth factor but making it more
specific by preferring individualized determinations rather than set-asides. This
preference will be elaborated on shortly.

Justice O’Connor’s analysis shows that while she did consider factors similar to
the ones Justice Powell relied on in Paradise, she sought to give these factors more
specificity by explaining exactly what they should entail in each program. Thus, Justice
O’Connor sought to use categorical factors that were narrower and more rigid than the
ones that Justice Powell had advocated for—in particular, her preferences for race-neutral
alternatives and for individualized determinations rather than set-asides. However, she
only referred to her categorical factors as “observations” and did not use words like
“may” or “should” in describing how to apply the factors.90 Thus, she left unclear
whether these categorical factors would be applied loosely as Justice Powell’s language
in Paradise suggested, or if Court would apply them rigidly, as absolute requirements
rather than factors.

Although the “narrow tailoring” requirement in Croson was far from being a clear
test, the Court did not take another case that involved a narrow tailoring determination of

90 Id. at 507.
an employment, educational, or public works affirmative action program for almost fifteen years. In the meantime, the Court issued two opinions that determined the appropriate level of review for federal government affirmative action programs, specifically, programs approved by Congress. In *Metro Broadcasting, Inc. v. Federal Communications Commission*, the Supreme Court in an opinion by Justice Brennan held that congressionally approved affirmative action programs should be reviewed under the intermediate scrutiny standard, but Justices O’Connor, Kennedy, Scalia and Rehnquist dissented and argued that reviewing courts should use strict as opposed to intermediate scrutiny. Over the next couple years, the makeup of the Court changed significantly with four new Justices—Thomas, Souter, Ginsberg and Breyer—joining the Court. The most important of these changes was the replacement of the highly liberal Justice Marshall with the highly conservative Justice Thomas, who later joined the four dissenting Justices in *Metro Broadcasting* to overrule it. In *Adarand Constructors, Inc v. Pena*, the Court held that “all racial classifications, imposed by whatever federal, state, or local government actor, must be analyzed by a reviewing court under strict scrutiny.” This meant that “[f]ederal racial classifications [including all forms of affirmative action], like those of the State, must serve a compelling governmental interest, and must be narrowly tailored to further that interest.”

Although *Adarand* only involved a determination of the appropriate level of scrutiny to be applied to the federal government program, Justice O’Connor, writing for the Court, stated that she wanted to “dispel the notion that strict scrutiny is strict in

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92 *Id.* at 602 (O’Connor, J., dissenting).
94 *Id.* at 235.
theory, but fatal in fact.”\textsuperscript{95} “When race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the ‘narrow tailoring’ test this Court has set out in previous cases.”\textsuperscript{96} This language sought to dispel the notion that the high “narrow tailoring” bar set forth by the Court in \textit{Croson} was impossible to meet and instructed lower courts that they should engage in a meaningful review when determining if government affirmative action programs meet the narrow tailoring requirement. The fact that Justice O’Connor felt it necessary to add this language in the \textit{Adarand} case reflects the likelihood that most courts and lawyers interpreted her observations in \textit{Croson} with respect to the narrow tailoring requirement to be rigid requirements rather than loose factors.\textsuperscript{97}

During this period, the Supreme Court also decided a series of cases involving a very specific type of affirmative action: racial gerrymandering, which is the drawing of voter district lines predominantly based on race.\textsuperscript{98} In the first case, \textit{Shaw v. Reno}, the Court merely held that racial gerrymandering is subject to strict scrutiny.\textsuperscript{99} And, in the second case, \textit{Miller v. Johnson}, the Court failed to reach the narrow tailoring prong of the strict scrutiny test because the court settled the case based on the compelling interest prong.\textsuperscript{100} In the final two cases, \textit{Shaw v. Hunt} and \textit{Bush v. Vera}, the Supreme Court

\textsuperscript{95} \textit{Id.} at 237.
\textsuperscript{96} \textit{Id.}
\textsuperscript{97} It is also possible that Justice O’Connor felt necessary to add the language stating that strict scrutiny was not “strict in theory, but fatal in fact” because \textit{Adarand} represented such a broad pronouncement of the strict scrutiny test. After \textit{Adarand}, it was clear that the Court would apply strict scrutiny to any case involving a facial racial classification (and with the Court’s decision in \textit{Shaw v. Reno}, 509 U.S. 630 (1993) (\textit{Shaw I}), even cases that involved classifications that were facially neutral), even when the government defended such classifications as benign. With an increasingly large category of cases being subject to strict scrutiny, Justice O’Connor wanted to be clear that this did not mean that the Court was going to find all of them unconstitutional.
\textsuperscript{99} \textit{Shaw I}, 509 U.S. at 649, 658.
\textsuperscript{100} See \textit{Miller}, 515 U.S. at 920-27.
finally reached the narrow tailoring prong of the strict scrutiny test. However, these two decisions did little to provide insight on the application of narrow tailoring in other contexts because, in both cases, the Court quickly dismissed the claim that the racial gerrymandering at issue was necessary to remedy past discrimination and instead focused on whether the redistricting was narrowly tailored to comply with Section 2 of the Voting Rights Act.

For example, in Shaw v. Hunt, the Supreme Court’s narrow tailoring analysis began by stating that the legislative action must, at a minimum, remedy the anticipated violation of or achieve compliance with Section 2 of the Voting Rights Act to be narrowly tailored. Also, “a plaintiff must show that the minority group is ‘geographically compact’ to establish [Section] 2 liability.” The Court next held that the legislation was not narrowly tailored because “[n]o one looking at District 12 could reasonably suggest that the district contains a ‘geographically compact’ population of any race. Therefore where that district sits, ‘there neither has been a wrong nor can be a remedy.’” The Court also rejected the State’s argument that once a Section 2 violation exists anywhere in the state, the state can draw majority-minority districts anywhere.

Although the voting rights cases do little to clarify the opaqueness of the Croson opinion, they are very important in this discussion because they represent an area where the Supreme Court, with Justice O’Connor as the swing vote, was willing to take a more contextualist approach to narrow tailoring. Instead of attempting to make factual inquiries that relied on categorical requirements that all forms of affirmative action

101 See Bush, 517 U.S. at 976-83; Shaw II, 517 U.S. at 915-18.
102 See Bush, 517 U.S. at 976-83; Shaw II, 517 U.S. at 915-18.
103 Shaw II, 517 U.S. at 915.
105 Id. (citations and footnote omitted).
106 Id. at 916-17.
should meet, the Court focused solely on the issue of racial gerrymandering and what facts would justify the use of race in that particular context—the narrow inquiry of whether the program was necessary in order to comply with Section 2 of the Voting Rights Act. Although the Court never expressly explained its rationale for adopting a different approach to narrow tailoring in these cases, it seems fairly clear that it adopted this different standard because the Court was faced with a different compelling interest, compliance with Section 2 of the Voting Rights Act, rather than the two compelling interests that are typically claimed and accepted by the Court in all other affirmative action cases, namely remedying past discrimination and achieving diversity. Thus, it seems that Justice O’Connor here was willing to expand the narrow tailoring evaluation past the factors identified in Croson because she was willing to expand the compelling interest requirement past the compelling interests that were mentioned in Croson.

Fourteen years after Croson, the Supreme Court decided a pair of cases involving the University of Michigan’s admission programs, which greatly clarified the narrow tailoring requirement because both cases reached the narrow tailoring inquiry with one program being declared constitutional and the other program being declared unconstitutional. In the first case, Gratz v. Bollinger, the Supreme Court reviewed the University of Michigan’s undergraduate admission program and held that it was

\[ \text{107 It should be noted that it is unclear whether the Supreme Court ever actually adopted compliance with Section 2 of the Voting Rights Act as a compelling state interest. In Shaw II, the Court clearly held that compliance with Section 5 of the Voting Rights Act could not serve as a compelling state interest, Shaw II, 517 U.S. at 912, but in both Shaw II and Bush, the Supreme Court analyzed whether the programs were necessary to comply with section 2 of the Voting Rights Act without expressly holding that compliance with Section 2 qualified as a compelling state interest. Id. at 915; Bush v. Vera, 517 U.S. 952, 979 (1996). However, in Bush, Justice O’Connor in a separate concurrence did state that she believed that compliance with section 2 of the voting rights act was a compelling state interest, and four justices—Justices Breyer, Ginsberg, Stevens, and Souter—in dissenting opinions, also stated that it was a compelling state interest. Bush, 517 U.S. at 992 (O’Connor, J., concurring); id. at 1033-35 (Stevens, J., dissenting); id. at 1072 (Souter, J., dissenting). Thus, in Bush, there appeared to be five votes on the Court that believed that it was a compelling state interest, but the makeup of the Supreme Court has changed since Bush, so it is unclear whether that view would still hold true today.} \]
unconstitutional because it failed to meet the Court’s “narrow tailoring” requirement.\textsuperscript{108}

The University of Michigan’s undergraduate admissions program operated by using a fixed point system that assigned each applicant a point-value for each factor that the University deemed relevant to an admissions decision.\textsuperscript{109} A total score of 100 points means that admission was guaranteed.\textsuperscript{110} As one of the factors, the University labeled African-Americans, Hispanics, and Native Americans “underrepresented minorities,” and automatically awarded each member of these groups twenty points on the basis of race.\textsuperscript{111} In comparison, a perfect SAT score was only awarded twelve points.\textsuperscript{112}

Chief Justice Rehnquist writing for the Court stated that the program was not narrowly tailored and was, thus, unconstitutional.\textsuperscript{113} In doing so, the Chief Justice compared the point system to the set-aside in Bakke, and stated that, as in Bakke, race could become the sole decisive factor in an admission decision.\textsuperscript{114} Chief Justice Rehnquist stated that although the system allowed some applicants to be flagged for individual review, that flagging was the exception rather than the rule, so that race remained decisive in virtually all cases.\textsuperscript{115} Furthermore, the twenty-point addition was fixed and automatic rather than individualized.\textsuperscript{116} He also rejected the college’s argument that the volume of applications made individual review impractical because administrative difficulties could not salvage an otherwise unconstitutional system.\textsuperscript{117}

Rehnquist’s firmness against claims of administrative difficulties is reminiscent of the

\textsuperscript{108} 539 U.S. 244 (2003).
\textsuperscript{109} Id. at 255.
\textsuperscript{110} Id.
\textsuperscript{111} Id. at 256.
\textsuperscript{112} Veterans Back Race-Conscious Admissions, WASH POST., Feb. 18, 2003, at A23.
\textsuperscript{113} Gratz, 539 U.S. at 275.
\textsuperscript{114} Id. at 271-72.
\textsuperscript{115} See id. at 272-75.
\textsuperscript{117} Id. at 275.
language used by Justice O'Connor in *Croson*.\(^{118}\) This firmness in both cases shows that the Court was being very strict about its race-neutral requirement and that it required the government to take less intrusive, race-neutral, means if they were available at all even if they were not possible or practical.

In the second case, *Grutter v. Bollinger*, the Supreme Court reviewed the University of Michigan’s law school admission program and held that it was constitutional and satisfied the Court’s narrow tailoring requirement.\(^{119}\) The University of Michigan Law School’s admission policy required individual review of an applicant’s file where race was a factor for consideration, but it was not assigned a quantitative value.\(^{120}\) Although the law school did not target a particular number or quota of underrepresented minority students, the admission department did seek to ensure that a “critical mass” of underrepresented minority students would be admitted to the law school.\(^{121}\)

In an opinion by Justice O’Connor, the Court adopted Justice Powell’s reasoning in *Bakke* and upheld the law school’s admissions policy.\(^{122}\) Interestingly, before beginning her strict scrutiny analysis, Justice O’Connor stated that “[c]ontext matters when reviewing race-based governmental action under the Equal Protection Clause.”\(^{123}\) It appears that Justice O’Connor made this statement to emphasize that the Court was dealing with diversity in the context of higher education and that in this context, the Supreme Court should show deference to a university’s academic decisions.\(^{124}\) This language certainly shows openness to Justice Powell’s contextual approach to narrow

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120 Id. at 314-16.
121 Id. at 316.
122 Id. at 343.
123 Id. at 327.
124 See id. at 327-28.
tailoring. However, as seen by her strict scrutiny analysis in the case, she continued to rely on rigid categorical requirements rather than loose factors in making her narrow tailoring determination.

Justice O’Connor began her strict scrutiny analysis by stating that the admission policy conformed to the ideal admissions program endorsed by Justice Powell where race is used as a “plus” factor. She stated that a discretionary, individualized system would be “flexible enough to consider all pertinent elements.” Furthermore, Justice O’Connor stated that race-neutral means such as “‘using a lottery system’ or ‘decreasing the emphasis for all applicants on undergraduate GPA and LSAT scores’” were not necessary, as they “would require a dramatic sacrifice of diversity, the academic quality, or both.” This was a strange flexibility Justice O’Connor embraced compared to the rigidness of requiring less intrusive means in Grutter and Croson. In this decision, Justice O’Connor seemed to think that race-neutral means were only necessary if they were as effective as the challenged government program. Finally, in order to satisfy the narrow tailoring requirement, Justice O’Connor added her own sunset provision for the program and held, in a rather arbitrary manner, that “25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.” For later purposes, it should be noted that in this case, Justice Kennedy dissented and claimed that the program was not narrowly tailored because it sought to achieve racial balancing.

125 Id. at 341.
126 Id. at 337.
129 Grutter, 539 U.S. at 343. In her opinion, Justice O’Connor explained that she derived the number 25 years because it had been 25 years since the Supreme Court had decided Bakke. Id.
130 Id. at 387 (Kennedy, J., dissenting).
These two cases clarified Justice O’Connor’s problem with set-asides. Her careful scrutiny of set-asides seemed to be based on fear of race-based harm to an individual person, which would violate the “person” language contained in the Fourteenth Amendment. This is the same concern that Powell wrote about in Bakke and listed as one of his narrow tailoring factors in Paradise. The distinction between affirmative action programs that utilize individual review and those that employ set-asides is based on whether an individual can point to the exclusion from himself to a specific benefit and the inclusion of another individual to that same benefit with the sole decisive reason for that inclusion or exclusion being the race of the individuals. For example, under the undergraduate admission program in Gratz, any non-underrepresented minority who had a point total of 80-99 and was denied admission, could state that race was the sole reason for failure to gain admission because had she received the twenty-point bonus for race, she would have been automatically admitted into the University. However, non-underrepresented minority applicants with competitive scores applying to the law school program, in Grutter, who are denied admission, cannot make this claim. Since race was not given a numerical value in the Grutter program, an applicant is unable to point to race as being the sole decisive factor for denying that individual admission. This encourages government agencies that would like to adopt affirmative action programs to engage in a type of “don’t tell, don’t ask” policy of granting benefits based on race without clarifying or quantifying them in advance, much like the Harvard program in Bakke.\footnote{See generally Ian Ayres & Sydney Foster, Don’t Tell, Don’t Ask: Narrow Tailoring After Grutter and Gratz, 85 TEX. L. REV. 517 (2007).}

After Grutter and Gratz, Justice O’Connor’s vision of the narrow tailoring requirement seemed to be a bit clearer. She appeared to endorse a formalistic approach that relied on three rigid requirements for all affirmative action programs: (1) they
should rely on individual determinations rather than set-asides that include or excluding an individual solely on the basis of their race; (2) they should adopt race-neutral means if available; and (3) although emphasized less in her opinions, they should possess a sunset provision.

III. Parents Involved: Justice Kennedy’s Initial Interpretation of the Narrow Tailoring Requirement

In its most recent affirmative action decision, Parents Involved in Community Schools v. Washington School District No. 1, the Supreme Court again displayed the polarizing nature of affirmative action cases.132 Reminiscent of Bakke, there were four justices striking down the program and arguing for colorblind constitutional principles, four justices dissenting and arguing for the need for affirmative action programs due to the problems of discrimination, and one justice, Justice Kennedy, left in the middle to find a compromise.133

The Seattle School District and the Louisville School District sought to achieve racial diversity in their public school systems.134 The school districts aimed to accomplish this end by instituting racial tie-breakers for admission to the school.135 In Seattle, where the schools were 41% white and 59% nonwhite, any school that was not within 10% of these two numbers would be deemed “integration positive,” and the District would apply the tie-breaker to admit the student whose race would serve to bring the school into balance.136 In Louisville, there was a similar program, but there the tie-breaker worked so that each school had to maintain a minimum black enrollment of 15% and a maximum

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133 See id.
134 See id. at 708-18.
135 See id.
136 Id. at 711-12.
black enrollment of 50%. The Supreme Court, by a 5-4, vote held these racial tie-breakers to be unconstitutional.

In a plurality opinion by Chief Justice Roberts—joined by Justices Alito, Scalia and Thomas—advocated for a colorblind approach to the Equal Protection Clause. Roberts stated a simple solution to the problem of racial discrimination: “The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”

Justice Breyer—joined by Justices Souter, Stevens and Ginsberg—wrote a dissent and advocated for a standard that appeared to be a looser form of strict scrutiny and found that the integration programs were constitutional.

The most important opinion in Parents Involved was written by Justice Kennedy concurring in judgment, who like Justice Powell in Bakke, wrote only for himself. Kennedy rejected both the plurality’s colorblind approach and the dissenters’ looser than strict scrutiny standard. Justice Kennedy concurred in judgment because he found that the integration programs were unconstitutional and did not satisfy the “narrow tailoring” requirement because the racial tie-breakers placed more reliance on race than the admission policy that was found to be unconstitutional in Gratz. In this aspect of the opinion, Justice Kennedy still seemed to be clearly aligned with Justice O’Connor’s rigid view of the narrow tailoring requirement where all set-asides are unconstitutional because they create too much harm on innocent third parties. Although Justice Kennedy found the program to be unconstitutional, what separated his opinion from the colorblind camp

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137 Id. at 716.
139 Id.
140 Id.
141 See id. at 803-69 (Breyer, J., dissenting).
142 See id. at 782-98 (Kennedy, J., concurring).
143 See id. at 792.
and Justice O'Connor and surprised constitutional scholars was his sweeping language
supporting race-conscious remedies. Justice Kennedy stated:

School boards may pursue the goal of bringing together students of diverse
backgrounds and races through other means, including strategic site selection of
new schools; drawing attendance zones with general recognition of the
demographics of neighborhoods; allocating resources for special programs;
recruiting students and faculty in targeted fashion; and tracking enrollments,

Rather than state that diversity is merely a permissible constitutional end, Justice
Kennedy stated that the government’s goal should be “to go beyond present
achievements, however significant, and to recognize and confront the flaws and injustices
that remain.”\footnote{Id. at 787.}

While Justice Kennedy’s language in his opinion is commendable, it is somewhat
contradictory. In his criticism of the numerical quantification of race, Justice Kennedy
seemed to be aligning himself with Justice O’Connor’s rigid view that individualized
determinations using race as one of many factors are required by the narrow tailoring
requirement. However, his description of race-conscious means that would be
appropriate in lower education affirmative action programs indicates that he was adopting
a looser standard where government affirmative action could expressly rely on race in
their decision making as long as it was in these certain specific instances. Because of this
contradiction, it remains to be seen where Justice Kennedy actually wants to take the
narrow tailoring requirement now that he is the controlling member of the Court.

After the \textit{Parent Involved} decision was released, many commentators accused
Justice Kennedy of softening his stance on affirmative action.\footnote{Gerken, \textit{supra} note 25, at 104.} They pointed to his
previous concurring and dissenting opinions in cases like \textit{Grutter} and \textit{Croson} where he

\begin{flushright}
\footnotesize 145 \textit{Id.} at 787.
\footnotesize 146 Gerken, \textit{supra} note 25, at 104.
\end{flushright}
appeared to be in line with the colorblindness camp that Justices Scalia and Thomas and now Chief Justice Roberts and Justice Alito advocated for and claimed that the pressures of being the swing vote have caused Justice Kennedy to now be aligned with the views of Justices Powell and O’Connor. They claimed that being the controlling member of the Court requires adoption of the “don’t tell, don’t ask” affirmative action policy, which condemns set-asides and tolerates individualized determinations, that was used by those two previous controlling members.

However, Professor Heather Gerken has offered a different explanation for this apparent shift. She stated that the apparent shift in Justice Kennedy’s views on affirmative action is not a shift at all: it merely demonstrates that he prefers a contextualist approach to the Equal Protection Clause. Rather than create a general “narrow tailoring” requirement that should be applied to all forms of affirmative action, Justice Kennedy is applying a different requirement for lower education than he would for higher education. The difference in his approach between Grutter and Parents Involved just shows that he views the compelling interest of achieving diversity to be more appropriate in lower education where children are still developing and need to learn how to work with others, than in graduate school where students are already young adults, and they have already developed their social skills. This shows that for Justice Kennedy where the affirmation action program is being applied is just as important as what the program mandates during the narrow tailoring inquiry.

Professor Gerken’s interpretation of the Parents Involved decision certainly displays that Justice Kennedy is open to the contextualist approach that the Court took.

147 See id. at 104-05.
148 See id.
149 Id. at 117.
150 See id. at 116-17.
when Justice Powell was the controlling member although Gerken admits that her view is not the only way to read *Parents Involved*.151 However, because Justice Kennedy’s opinion lacks much of the language that would support Gerken’s assertions,152 it is unclear if Justice Kennedy even knows he is doing this. Regardless of whether he is opening himself up to a more contextualist standard, consciously or subconsciously, the next section of this Article will display the flaws in Justice O’Connor’s approach and explain why a contextualist approach is more desirable. Therefore, Justice Kennedy should continue in the direction of taking a contextualist approach to the narrow tailoring requirement and align himself more with the views of Justice Powell.

IV. The Deficiencies of the Current State of Narrow Tailoring

This section of the Article argues that Justice O’Connor’s formalistic approach to the narrow tailoring requirement is flawed because as it is applied it can be both too lenient and too harsh on affirmative action. This difficulty arises from the fact that a rigid rule-based test cannot best serve the controlling members of the Court’s normative assumptions about affirmative action. As in the broader society, this issue has heavily polarized the Court mainly into two groups—both *Bakke* and *Parents Involved* reflect this. One camp of justices argues for a color-blind constitution and claims that racial

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151 Id. at 107.
152 In fact, Justice Kennedy’s lack of language supporting a contextual standard is striking when compared to Justice Breyer’s explicit demand for a more contextual approach:

[A]s *Grutter* specified, “[c]ontext matters when reviewing race-based governmental action under the Equal Protection Clause.” And contexts differ dramatically one from the other. Governmental use of race-based criteria can arise in the context of, for example, census forms, research expenditures for diseases, assignments of police officers patrolling predominantly minority-race neighborhoods, efforts to desegregate racially segregated schools, policies that favor minorities when distributing goods or services in short supply, actions that create majority-minority electoral districts, peremptory strikes that remove potential jurors on the basis of race, and others. Given the significant differences among these contexts, it would be surprising if the law required an identically strict legal test for evaluating the constitutionality of race-based criteria as to each of them.

classifications, no matter how well-intentioned, are unconstitutional.\textsuperscript{153} The other camp sees affirmative action as a necessity to right the wrongs of the past and to create a truly integrated society and claims that the benign intentions justify a lenient inquiry that gives wide discretion to lawmakers to implement affirmative action programs.\textsuperscript{154} These two different beliefs about affirmative action reflect the differing views about affirmative action in broader society.\textsuperscript{155} However, the Court as a whole, except perhaps briefly in the case of \textit{Metro Broadcasting} when it adopted the intermediate scrutiny test with respect to congressionally enacted affirmative action, has never fully accepted either principle.\textsuperscript{156} Instead, the controlling members of the Court have kept the constitution’s view on affirmative action somewhere in the middle, compromising between the two views.

In determining what is the Supreme Court’s normative vision of affirmative action, it is important to look not just at the tests used by the controlling members of the Court, but also the language they used in these decisions. In \textit{Bakke}, Justice Powell recognized that “the State has a legitimate and substantial interest in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination.”\textsuperscript{157} And, in \textit{Wygant}, he stated that “[a]s part of this Nation’s dedication to eradicating racial discrimination, innocent persons may be called upon to bear some of the burden of the remedy.”\textsuperscript{158} Thus, it seems that Justice Powell recognized that affirmative action might be necessary to truly remedy the effects of past discrimination. However, Justice Powell also stated, in \textit{Bakke}, that “[r]acial and ethnic distinctions of any sort are inherently

\textsuperscript{153} See cases cited supra note 5.
\textsuperscript{154} See cases cited supra note 4.
\textsuperscript{155} See sources cited supra note 3.
suspect and thus call for the most exacting judicial examination.”159 He explained that courts should thoroughly examine affirmative action programs because they forced innocent members of the public “to bear the burdens of redressing grievances not of their making,” and they might “only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a fact having no relationship to individual worth.”160 Therefore, it appears that Justice Powell’s view of affirmative action was that it might be necessary to fully remedy discrimination, but that it is a dangerous option and should be carefully monitored.

Justice O’Connor appeared to have a similar view to Justice Powell. While Justice O’Connor did not use as strong of language as Justice Powell in talking about the need for affirmative action, she did think that affirmative action should be allowed in certain circumstances and that is why, in Adarand, she stated that strict scrutiny is not “‘strict in theory, but fatal in fact.’”161 “Although all governmental uses of race are subject to strict scrutiny, not all are invalidated.”162 Thus, while not as supportive of affirmative action as Justice Powell, Justice O’Connor did seem to believe that affirmative action was important and necessary enough in certain circumstances that there should not be an outright ban.163 This is why she never aligned herself with the colorblind advocates on the Court. However, like Justice Powell, Justice O’Connor was concerned about the dangers of affirmative action programs and stated that courts should carefully evaluate any such program: “Absent searching judicial inquiry into the justification for . . . race-based measures, there is simply no way of determining what classifications are ‘benign’ or ‘remedial’ and what classifications are in fact motivated by

159 Bakke, 438 U.S. at 291.
160 Id. at 298.
163 See, e.g., id.
illegitimate notions of racial inferiority or simple racial politics.” She explained that the need for this searching inquiry was that racial classifications carry a danger of stigmatic harm because they might “promote notions of racial inferiority and lead to a politics of racial hostility.”

Despite having only one opinion as the controlling member of the Supreme Court, Justice Kennedy’s language quickly aligns with the same views on affirmative action as Justices Powell and O’Connor. Justice Kennedy, in Parents Involved, stated that it is our nation’s tradition to go past present achievements to “preserve and expand the promise of liberty and equality on which it was founded.” This is why Justice Kennedy refused to accept the claim that the Constitution is color-blind and that schools are required to ignore the problem of de facto segregation in schooling. Justice Kennedy like the other two Justices appears to be aware that the discrimination of the past is still a present day problem and that one of the ways to effectively remedy the problem is through affirmative action. That is why affirmative action should not be completely prohibited. But just like Justices Powell and O’Connor, Justice Kennedy warned of the dangers of affirmative action:

When the government classifies an individual by race, it must first define what it means to be of a race. Who exactly is white and who is nonwhite? To be forced to live under a state-mandated racial label is inconsistent with the dignity of individuals in our society. And it is a label that an individual is powerless to change. Government classifications that command people to march in different directions based on racial typologies can cause a new divisiveness. The practice can lead to corrosive discourse, where race serves not as an element of our diverse heritage but instead as a bargaining chip in the political process.

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165 Id.
167 Id. at 788.
168 Id. at 797.
Based on these dangers, Justice Kennedy, like the two previous controlling Justices, demands that courts engage in a thorough examination of any affirmative action program.\(^{169}\)

Although possibly to varying degrees, Justices Powell, O’Connor and Kennedy seem to share similar normative views on affirmative action.\(^{170}\) They realized that discrimination and segregation are not just problems of the past and that affirmative action might be an appropriate and necessary solution to those problems. Therefore, the Constitution should not require a complete ban on affirmative action. However, they recognized that affirmative action is a dangerous tool that has the potential to create more problems than it solves. Therefore, affirmative action programs must be carefully monitored and only allowed if their implementation is necessary because some affirmative action can actually harm minorities. This normative view of affirmative action presented by these three justices clearly represents a compromise between the color-blind camp on the Court and the pro-affirmative action camp on the Court. This compromise between competing values is also probably what caused these controlling justices to rely heavily on the narrow tailoring requirement because it allowed them some maneuverability around the tough constitutional questions presented by affirmative action.\(^{171}\)

\(^{169}\) Id. at 783.

\(^{170}\) Based solely on the language used in their opinions, it does appear that Justices Powell and Kennedy were more open to affirmative action than Justice O’Connor.

\(^{171}\) It should be noted that the controlling justices did not rely solely on the narrow tailoring requirement to maneuver around tough constitutional questions. The strict scrutiny test is a two-prong test, and the Justices to also relied on the first prong of the test, the compelling interest prong, to give the Justices the ability to adapt the strict scrutiny test to different types of affirmative action programs.

A perfect example of this was in the voting rights cases. There, the Supreme Court used the compelling interest prong to adapt the strict scrutiny test to that particular type of affirmative action. As the previous section explained, in the voting rights cases, the Supreme Court dealt with the unique situation of racial gerrymandering by allowing the state to reiterate a new compelling interest, compliance with section 2 of the voting rights act. See supra note 107. Then, all that was left for the narrow tailoring analysis was to determine whether the governmental action at issue in the case was necessary for compliance with
With this goal of achieving a proper compromise between the two camps in mind, the question then becomes what approach to narrow tailoring best serves this normative vision. As the rest of the Section below will explain, Justice O’Connor’s approach to narrow tailoring does a poor job of serving that vision because it can at times be too harsh on affirmative action and at other times too lenient on affirmative action. Thus, rather than using the narrow tailoring requirement to achieve a proper compromise between the two different sides of the Court, Justice O’Connor’s approach waivers between the two sides, sometimes aligning her test with the color-blind camp and sometimes aligning her test with the pro-affirmative action camp.

The individual harm factor is a clear example of a narrow tailoring factor that can be both too lenient and too harsh on affirmative action. The Supreme Court in *Grutter* and *Gratz* made clear that race can be used as a factor in admission decisions as long as applicants are reviewed on an individual basis with race being one of many factors considered, and race is not given a numerical value.\(^\text{172}\) The rationale behind creating this

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Other good examples are limitations the Supreme Court has placed on the other two compelling state interests, remedying past discrimination and achieving diversity. In *Croson*, the Supreme Court placed a very big limitation on the compelling interest of remedying past discrimination when it stated that there must be a “factual predicate” rather than mere “general assertions” of past discrimination to qualify as compelling interests. *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 498 (1989). In *Grutter*, when stating that diversity could be a compelling state interest in higher education, the Court held that it could only be one as long as the institution was seeking to admit only a “critical mass” of underrepresented minorities. *See* *Grutter v. Bollinger*, 539 U.S. 306, 329-33 (2003). In both these cases, the Supreme Court placed limitations on what qualifies as a compelling state interest in order to regulate affirmative action programs and make sure that they are the type of affirmative action that will properly meet the controlling Justices’ compromise.

However, because the controlling Justices have not been very open to accepting new compelling state interests—they have only found three compelling state interests in its affirmative action cases—, and the two primary compelling interests used by them, remedying past discrimination and achieving diversity are very broad, it appears that the controlling Justices primarily rely on the compelling interest prong as a gatekeeper function for affirmative action programs. With the compelling interest prong, Justices Powell and O’Connor sought to see if the affirmative action program met these basic broad requirements of being enacted for a proper reason. Then, in the narrow tailoring prong, the controlling Justices seemed to engage in most of the factual examination of whether the affirmative action program was constitutionally acceptable.

rule is that to give race a numerical value would amount to a set-aside, and the creation of a set-aside violates the Equal Protection Clause because at some point, a black applicant will be accepted solely on the basis of race and a white applicant will be denied acceptance solely on the basis of race. Thus, race will become the decisive factor, and this would be a clear violation of the language of the Equal Protection Clause, which the Court has repeatedly held protects individual people not groups.

This individual determination can create harsh results to affirmative action programs because for some government actors, it acts as an absolute bar to affirmative action programs. For example, many public universities like the undergraduate program at the University of Michigan have so many applicants every year that it is impractical to make individual determinations for each and every applicant. However, the Court in *Gratz* clearly stated that administrative burdens are not an excuse for the use of constitutionally impermissible set-asides. Since it is impractical for these universities to adopt an individualized review admissions program and unconstitutional for them to adopt a numerical system to take account of race, they are then forced to forgo their affirmative action programs and, thus, ban affirmative action from their admission decisions.

However, individual determinations of race can also be too lenient on affirmative action because in a program like the one in *Grutter*, where race is one of many factors, but is not given a numerical quantification, it is impossible to know how much weight race is being given. Without numbers to match the criteria, there is no possibility for judicial review that could examine how the government actor weighed the factors.

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173 *See supra* Part IIc.
175 *Gratz*, 539 U.S. at 275.
176 *Id.*
Because it is impossible to police a “don’t tell, don’t ask” policy, there is nothing to stop someone from relying entirely on race in making their decisions and brushing aside all other diversity factors. Further, the rationale behind making such a decision cannot be scrutinized. For example, an admissions officer might choose to grant a preference to a Mexican because they are generally liberal rather than a Cuban because they are generally conservative even though both are underrepresented minorities, but a reviewing court would have no ability to scrutinize this blatant invidious discrimination.

What this leniency and harshness on affirmative action shows is that Justice O’Connor’s approach does a poor job of balancing her policies. When the requirement for individual determinations is applied to situations where it creates an absolute bar to any affirmative action program, then Justice O’Connor’s narrow tailoring requirement moves from being a middle of the road policy and aligns itself with the color-blind camp. On the other hand, because the requirement for individual determinations does not allow courts to scrutinize determinations that rest on invidious stereotypes, Justice O’Connor’s narrow tailoring requirement moves away from being a middle of the road policy and aligns itself with the camp that believes in giving government actors broad discretion to use racial classifications. This shows that, depending on the factual context of the affirmative action program, Justice O’Connor’s narrow tailoring requirement fulfills the policy of one of the two camps. Therefore, her affirmative action test ends up actually being an “either or” policy rather than a middle of the road policy. This displays that when evaluating affirmative action programs, context should and does matter, and that a broad rigid rule applied to all factual scenarios is ineffective at striking the balance.

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178 See id.
between the controlling member’s competing policies because it results in the Court flip flopping between two extremes. It should also be noted that the flaws in the individual determination factor are very striking because in many of the Court’s affirmative action decisions, this requirement was clearly the most important one and often decisive.\footnote{See supra Part II, III.} One would think that such an important factor would do a better job of enforcing Justice O’Connor’s underlying policies.

Another important factor employed by Justice O’Connor is the requirement for race-neutral alternatives. This requirement, at first, seems sensible. Because affirmative action policies have the potential to harm third parties, these policies should not be allowed if there is an alternative solution that is just as effective at solving the problem without risking harm to third parties. However, this factor may not serve her policy goals depending on the factual situation. The requirement for race-neutral alternatives can act as an absolute bar to affirmative action programs even in situations were the race-neutral alternatives were completely ineffective. For example, in \textit{Walker v. City of Mesquite}, the Fifth Circuit held that a judge could not require race-conscious remedies to desegregate the city of Dallas when race-neutral remedies were available.\footnote{169 F.3d 973, 982 (5th Cir. 1999), cert. denied, 528 U.S. 1131 (2000) (Narrow tailoring “requires consideration of whether a race-neutral or less restrictive remedy could be used. This is because a race-conscious remedy should be the remedy of last resort.” (citations omitted)). For a thorough discussion and analysis of \textit{Walker}, see Michelle Wilde Anderson, \textit{Colorblind Segregation: Equal Protection as a Bar to Neighborhood Integration}, 92 CALIF. L. REV. 841 (2004).} However, the Court did not engage in any evaluation of the effectiveness of these race-neutral remedies; and the race-neutral remedies in this case were so ineffective that they created no practical remedy to the \textit{de facto} segregation problem at all.\footnote{See \textit{Walker}, 169 F.3d at 982-88; Anderson, supra note 180, at 866-68.} Thus, the absolute requirement for race-neutral alternatives in this case allowed the Fifth Circuit to align itself fully with the color-blind camp and reject the affirmative action program even if it was necessary to
remedy past harms. A requirement for race-neutral alternatives only when they are as effective as the affirmative action program or when they have at least demonstrated some efficacy would do a much better job of serving the Justice O’Connor’s policies.

The only requirement that actually seems to accurately serve the Court’s policy is the requirement for affirmative action programs to possess a sunset provision. Requiring that every affirmative action program have a definite end point rejects color-blindness in that it allows government actors to adopt affirmative action programs. But, by requiring that the programs last only for a limited duration, this ensures that the programs are carefully scrutinized because it requires that government actors monitor and re-evaluate their program in light of changing circumstances before re-enacting it. After all, the goals of these programs are to provide a remedy for past discrimination or to achieve diversity. Thus if the program has worked and achieved its goal, there is little reason for its continued existence. However, this requirement, like the others, is subject to abuse because Justice O’Connor has never been clear about how this factor is to be applied and evaluated by courts. Indeed, in Grutter, Justice O’Connor very loosely applied the factor at the end of the opinion, and based the program’s required length arbitrarily on the number of years since the Court decided Bakke.182 If the length of the program is made too short, then it could prove to be too burdensome on legislatures, who would constantly have to spend time to reevaluate the program. This burden could cause legislatures to then forgo enacting any affirmative action legislation. Thus, the factor in this situation would align the Court with the color-blind camp. However, if the length of the program is too long, then it will not serve its purpose of requiring government actors to closely monitor their programs and adapt them to changing circumstances. A lot can change in

twenty five years—the number adopted by the Court in *Grutter*—for better, for worse or not at all, so it does not seem that a length this long would not do a good job of adapting the program to changing circumstances. Justice O’Connor’s policies would greatly benefit from clarifying this standard.

The problems with these three factors also display a fundamental problem with using rules an opposed to standards.183 Rules are rigid inquiries that require a judge to apply the facts to the different elements of a judicial test almost like solving a mathematical formula.184 On the other hand, standards give much more discretion to the judge to take in all the facts and weigh them against each other in order to make his determination.185 A clear example of the distinction between rules and standards can be seen by looking at two different tort cases the Supreme Court decided in the early 1900s.186 Both cases dealt with what standard of conduct should govern the obligations of a driver who comes to an unguarded railroad crossing.187 In the first case, Justice Holmes suggested that the requirements of due care at railroad crossings are clear and, therefore, adopted a rule: the driver must stop and look back.188 In the second case, Justice Cardozo did not think it was so clear and gave examples of when it was neither wise nor prudent for a driver to stop and look at a railroad crossing.189 Therefore, he adopted a standard: the driver must act with reasonable caution.190

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183 The terminology rules and standards to refer to judicial decisionmaking was popularized by Duncan Kennedy. Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 Harv. L. Rev. 1685, 1685, 1687-89 (1976).
185 *Id.* at 383 (“A standard, by contrast, has a soft evaluative trigger and a soft modulated response.”)
187 Schlag, *supra* note 184, at 379.
188 *Goodman*, 275 U.S. at 70; *see* Schlag, *supra* note 184, at 379.
189 *Pokora*, 292 U.S. at 103-06.
190 *Id.* at 106; *see* Schlag, *supra* note 184, at 379.
The most important distinction between these two forms of adjudication is that rule based law is proper when the underlying values served by the law are completely clear. Standards based law is proper when the underlying values served by the law are obscured, contested, or ambivalently held. The previous example displays this distinction. Justice Holmes thought that the standard of care for a driver was clear, and that all a driver would have to do to not be negligent was to stop and look. Justice Cardozo did not think that the standard of care was clear, and described many instances where it would not make sense to stop and look. Thus, it is clear that for these judges in determining whether to adopt a rule or a standard, the primary issue was whether the underlying value served by the law—the proper standard of care—was clear.

This difference between rules and standards illuminates the problem with the Justice O’Connor’s affirmative action jurisprudence. Justice O’Connor was attempting to apply rigid rules to affirmative action when the underlying values were not clear and were potentially in conflict. As previously stated, both her and Justices Powell and Kennedy attempted to balance the need for affirmative action programs to rectify the injustices of the past against possible harm to third parties and the possible resentment it could create towards minorities. For these Justices affirmative action was permissible sometimes and impermissible other times depending on the circumstances.

Adopting a rules based approach might actually have seemed sensible to Justice O’Connor at first because equal protection law had historically taken a rules-based approach. However, she was mistaken in doing so because affirmative action presents a very different problem from much of the previous affirmative action cases. Previous

\[191 \textit{Goodman, } 275 \text{ U.S. at 70.} \]
\[192 \textit{Pokora, } 292 \text{ U.S. at 103-06.} \]
\[193 \textit{See supra} \textit{ Parts II-III.} \]
\[194 \textit{See supra} \textit{ Part II.} \]
equal protection jurisprudence could be rule-based because after *Brown v. Board of Education*, the underlying policies were clear: government laws and programs should not be based on racial stereotypes or based on a desire to subjugate one class of people to the benefit of another class. Therefore, the rigid old “strict in theory, but fatal in fact” rule, which struck down all the laws that the Court faced, was appropriate to enforce this policy because it was completely clear that any law based on invidious discrimination was wrong no matter its context.

Unfortunately, Justice O’Connor failed to appreciate the difference between her policies in dealing with affirmative action and those underlying desegregation. As previously stated, rather than align herself with the color-blind camp or the pro-affirmative action camp on the Court, Justice O’Connor, like Justices Powell and Kennedy, chose to attempt to find a compromise between the two. However, by choosing to find this compromise, Justice O’Connor was faced with unclear underlying values that were not amendable to a rule-based approach. For example, if Justice O’Connor had chosen to align herself with the color-blind camp, then the adoption of the rule-based approach would have made sense. That is because for Justices like Scalia and Thomas, the underlying value related to affirmative action is clear: any use of race by the government is unconstitutional even if for benign purposes. Therefore, a rule-based approach makes sense for the color-blind camp because for those justices the answer of what to do with affirmative action—hold that it is all unconstitutional—is as clear as the answer of what to do at a railroad crossing was for Justice Holmes—stop and look.

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195 347 U.S. 483 (1954) (holding that state mandated segregation is a violation of the Equal Protection Clause).
196 *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 11 (“There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification. The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy.”).
197 *See* cases cited *supra* note 5.
However, when it comes to looking at affirmative action, Justice O’Connor’s vision seems to be closer to Justice Cardozo in that she sees the answer of what to with it as being uncertain and depending on the circumstances. Justice O’Connor saw the value of affirmative action but was concerned about its danger. Therefore, for Justice O’Connor, some affirmative action programs like the one in *Grutter* might be acceptable while others like the one in *Croson* were not. This is similar to Justice Cardozo who saw stopping to look as being reasonable in some circumstances but unreasonable in others. Therefore, it made little sense for Justice O’Connor in construing the narrow tailoring requirement to rely on rigid rules, like whether an affirmative action program employs a set-aside or makes an individual determination. A standard-based approach that appreciates the context of each factual situation would have done a much better job of allowing Justice O’Connor to properly enforce her underlying values related to affirmative action.

In addition to problem of unclear values, a standard-based approach would also help the Supreme Court deal with the various faces of affirmative action. The problems of *de facto* segregation are complicated and wide-ranging. Therefore, the solutions are also going to be broad and wide-ranging. A standards based approach would help the Supreme Court be more adaptable to the different areas of affirmative action. The voting rights cases are a perfect example of this situation because racial gerrymandering was different from most other forms of affirmative action at that time. Unlike the affirmative action issues in education, employment, and public contracting, with racial gerrymandering, the government action was clearly race-conscious although not in its specific terms because it “did not appear to single out any identifiable class of persons for
special benefits or burdens.”198 In the face of this problem, the Court had to break from its previous rigid generalized approach for narrow tailoring and develop a compelling interest and a narrow tailoring requirement that was unique to that situation, whether the government action was necessary to comply with Section 2 of the Voting Rights Act.199

It is important to note that while this Section has shown the many problems created by Justice O’Connor’s rigid rules-based approach to defining narrow tailoring, the narrow tailoring requirement was not always this way. When Justice Powell was the swing vote, the Supreme Court was much more amendable to taking a looser standard-based approach.200 Justice Powell’s interpretation of the narrow tailoring requirement looked at the context of each individual affirmative action program and applied loose factors that might be relevant rather than factors that must be applied—bright-line rules.201 It is quite possible that Justice Powell chose to take a looser standard-based approach to the narrow tailoring requirement precisely because he saw that the answer to what to do with affirmative action was not very clear and that a standard-based approach would allow him the maneuverability necessary to find a proper middle space between the two affirmative action camps on the Court and to deal with the many faces of affirmative action. It is for these reasons, why Justice Kennedy, regardless of whether he was actually doing so in Parents Involved, should adopted in the future the contextual approach to narrow tailoring that was utilized by Justice Powell.

V. The Contextualist Approach to Narrow Tailoring

A contextualist approach would solve many of the problems created by Justice O’Connor’s interpretation of the narrow tailoring requirement because it would create a

199 See case cite supra note 98.
200 See supra Parts IIa, IIb.
201 See supra Part IIb.
test where the “narrow tailoring” requirement could be molded to meet the different scenarios where affirmative action is used. A contextualist approach would require a reviewing court to engage in a truly factual inquiry and balance competing factors against each other in order to determine whether each individual government affirmative action program is actually “narrowly tailored.” While Justice Powell’s approach was looser and more contextualist than Justice O’Connor’s, Justice Powell’s approach can still be improved upon and made more amendable to reconcile the Court’s competing values and solve the need for adaptability to the many different faces of affirmative action. Factors that can be looked at by the Supreme Court are (1) the harm to innocent third parties; (2) whether there is a waiver provision; (3) whether the goal of the program is to achieve diversity or to remedy discrimination; (4) the duration of the program; (5) the effectiveness of race-neutral alternatives; (6) which arm of the government enacted the program; (7) what type of government program is implementing the action; and, finally, (8) whatever other factors might be relevant in a particular circumstance. Below, I will give suggestions for how the Supreme Court might balance and apply these factors should it adopt a contextualist narrow tailoring requirement.

The first factor, the harm to innocent parties, should actually encourage numerical set-asides rather than condemn them. It is true that the Fourteenth Amendment aims to protect people from government classifications solely on the basis of their race, but as shown in the previous Section, the individual determination requirement does little to police this policy because people are free to make decisions solely based on race as long as they do not give it a numerical quantification. Therefore, it would seem to be a better approach to encourage affirmative action programs to give numerical quantifications to their racial determinations like the Michigan policy did in Gratz, so that it is amenable to
exact judicial review.\textsuperscript{202} Once courts know the weight given to race in numerical form, the courts can then criticize the weight given to race, and, therefore, minimize the harm to individuals.\textsuperscript{203} The Supreme Court’s decision in \textit{Gratz} gives a clear example of how this could work. Rather than creating a broad rule stating that any numerical quantification of race is unconstitutional, the Court should have criticized the university policy of weighing underrepresented minority status almost twice as much as a perfect SAT score.\textsuperscript{204} It might seem troubling to some at first that the courts would be given the power to determine what constitutes significant racial harm. However, a look at the Court’s equal protection jurisprudence reveals that Court has done this in the past. In \textit{Washington v. Davis}, the Court determined that harm created by facially neutral laws with a discriminatory racial impact could not be redressed by the Equal Protection Clause unless discriminatory intent can also be proven.\textsuperscript{205} Also in \textit{Allen v. Wright}, the Court decided that claims of stigmatic injuries caused by the government funding of discriminatory programs are not a significant enough harm to grant standing under Article III of the Constitution.\textsuperscript{206} Therefore, it seems permissible for the Court to make determinations of the appropriate amount of harm that third parties should suffer. For instance, Justice Powell said that harm to third parties is a relevant factor, but never stated that it should never happen. To the contrary, in \textit{Wygant}, he explained “that in order to remedy the effects of prior discrimination, it may be necessary to take race into account. As part of this Nation’s dedication to eradicating racial discrimination, innocent persons may be called upon to bear some of the burden of the remedy.”\textsuperscript{207}

\textsuperscript{202} See Crump, \textit{supra} note 178, at 534-37.  
\textsuperscript{203} See id.  
\textsuperscript{204} See id.  
\textsuperscript{205} 426 U.S. 229, 242 (1976).  
The second factor, whether there is a waiver provision, should simply be an absolute requirement for any affirmative action program, thus, making it so that affirmative action policies are not implemented in situations where it would not be possible to do so. Because I have stated that this is an absolute requirement, this might at first seem like I am advocating for a rigid rule much like the ones adopted by Justice O’Connor. However, because this factor explicitly requires that an affirmative action program look at the relevant work force or applicant pool in determining whether a certain set-aside is possible, this requirement is actually quite flexible and fact specific.

The third factor, whether the goal of the program is to achieve diversity or to remedy discrimination, should be weighed by giving programs that seek to remedy past discrimination—in particular past unconstitutional discrimination—more latitude than programs that aim to achieve diversity. This distinction is based on the fact that remedying past discrimination is a constitutional necessity while achieving diversity is not. The Fourteenth Amendment clearly prohibits invidious racial discrimination. This prohibition would be completely “toothless” unless it was interpreted to require that any violation of that prohibition be given a remedy. This means that the Constitution mandates that the government remedy past discrimination. On the other hand, although it encourages may encourage diversity, the Constitution clearly does not mandate that the government achieve diversity. Note that this same reasoning would also mean that affirmative action programs designed to remedy past discrimination arising from a violation of the Fourteenth Amendment should receive more latitude than a program


designed to remedy discrimination that was arose from a violation of a statute like the Civil Rights Act.

The fourth factor, the duration of the program, should be a period that is long enough so that it does not overly burden those that administer the program, yet short enough so that it can be adjusted accordingly to changes in circumstances. The duration could be shortened or lengthened based on the balance of these two factors. For example, in a university admission scheme that was implementing affirmative action it probably would be acceptable to have the university reevaluate its program every year since this would coincide with the university’s yearly admission cycle.

The fifth factor, the effectiveness of race-neutral alternatives, should require race-neutral alternatives only when it is clear that they are as effective as the affirmative action program in achieving the government’s compelling interest. This would ensure that innocent third parties are not harmed when it is unnecessary, but also make sure that the requirement for a race-neutral alternative does not nullify necessary affirmative action programs. It might seem extreme at first to require race neutral alternatives only when they are as effective as the affirmative action program. However, this is reasonable when factor one is taken into account. If the benefits of an affirmative action program are properly balanced against the harm to innocent third parties in factor one then there should be no reason for a race-neutral alternative that might further reduce harm to innocent third parties.

The sixth factor, which arm of the government enacted the program, should give more latitude to Congress and courts in designing affirmative action programs than it does to administrative agencies and state legislatures. First, Congress has express powers under Section Five of the Fourteenth Amendment to remedy the effects of past
discrimination that state government officials do not have.\textsuperscript{210} Therefore, a reviewing court should apply a more lenient narrow tailoring standard to Congressional enactments to reflect this power that Congress possesses, but that administrative agencies and state legislatures do not.\textsuperscript{211} Furthermore, courts should have a more lenient standard applied to them because judges have historically been given broad and flexible authority to remedy wrongs, particularly wrongs resulting from constitutional violations.\textsuperscript{212}

The seventh factor, what type of government program is implementing the action, should give some types of government programs more leniency based on the field they are being implemented in. For example, borrowing from Justice Kennedy’s approach in \textit{Grutter} and \textit{Parents Involved}, a more lenient standard should be applied to primary educational institutions than to graduate schools, if the goal is to achieve diversity. As Justice Scalia said ““cross-racial understanding”” and “good ‘citizenship’” are lessons to be learned by “people three feet shorter and 20 years younger than the full-grown adults at the University of Michigan Law School, in . . . public-school kindergartens.”\textsuperscript{213} This leniency can also be applied across different institutional contexts. For example, the same reasoning used above that cross-racial understanding is a better lesson to be learned when people are developing may justify applying a more lenient standard to affirmative action when it is employed in the education context than in other contexts like the public contracting or public employment.


\textsuperscript{211} It might be argued that the adoption of this standard would violate the Supreme Court’s decision in \textit{Adarand}, which overruled \textit{MetroBroadcasting}. In \textit{Adarand}, the Court held that all forms of affirmative action even those enacted by Congress should be subjected to strict scrutiny. \textit{Adarand Constructors, Inc. v. Pena}, 515 U.S. 200, 227 (1995). Thus, some might view being more lenient to affirmative action programs enacted by Congress as opposed to state actors as going against the broad language in \textit{Adarand}. However, under this standard, the Supreme Court in its analysis would still be applying the strict scrutiny standard of review mandated by \textit{Adarand}. This standard is merely asking for a revision of the narrow tailoring prong of that standard.

\textsuperscript{212} \textit{Swann v. Charlotte-Mecklenburg Bd. of Educ.}, 402 U.S. 1, 15-16 (1971).

The final factor, whatever other factors might be relevant in a particular circumstance, is a catch-all. This factor would differ from the other factors which are general in nature and allow to the Court to adopt a specific factor that might apply in only a discrete group of cases if the Court saw that factor to be necessary. Examples of such specific factors can already be found in the Supreme Court’s affirmative action decisions. One example was in *Wygant*, where in the context of employment cases, Justice Powell decided to make it a factor that hiring plans should be distinguished from lay-off plans because lay-off plans are more burdensome. Another example was in the voting rights cases, where the Court decided to make compliance with the Voting Rights Act a factor because the Court determined that compliance with the Voting Rights Act could be a compelling interest. Having a factor that can be adopted to specific circumstances will ensure that the narrow tailoring requirement remains flexible and loose.

The downside to an approach like this is that lower reviewing courts have little initial guidance on how to weigh this factor. It is questionable how much of an issue this would actually be since, as shown by the line of cases previously detailed in this Article, the Supreme Court does not mind keeping the lower courts completely confused on how exactly to apply the narrow tailoring test. Further, district courts have been able to manage other fairly abstract tests presented to them by the Supreme Court for the Due Process Clause and the Fourth Amendment. Therefore, it is possible for lower courts to manage a looser standard like this.

Another criticism of this standard might be that it would require the Supreme Court to take more affirmative action cases in order to clarify the standard and give lower

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215 See *supra* cases cited in fn. 98.
216 See *supra* Parts II, III.
courts guidance on how to balance the factors, and the Court has historically ducked affirmative action case. For example, between *Adarand* and *Gratz*, there was eight years where the Court did not take a single affirmative action case dealing with employment, education or public contracts despite significant circuit splits on certain issues.

One possible reason for this behavior by the Court is that affirmative action is such a hot button issue that the Court would rather avoid it and hope that the issue passes them by, much like how the Court has ducked the Guantanamo Bay detentions issues by deciding small issues on a case-by-case basis.\(^{217}\) Unfortunately, as represented by Court’s full circle from *Bakke* to *Parents Involved*, the issue of affirmative action is far from settled and will not simply go away. Further, complicating the problem is that ever since *Brown v. Board of Education*, the decision that elevated the Supreme Court to its exalted status, people have looked to the Supreme Court as the final voice on issues of race rather than the other political branches.\(^{218}\) Therefore, the Court cannot continue this policy of ducking affirmative action cases.

Also, a contextualist approach to “narrow tailoring” would likely help encourage the Supreme Court to take more affirmative action cases because it would allow the Court to solve small issues on a case-by-case basis and avoid significant controversies rather than attempt to answer the broader and more heated question of whether affirmative action is good or bad by figuring out what factors need to be applied to affirmative action across the board. Finally, this criticism relies on a faulty assumption that the Court must rule narrowly based on the facts of each case, requiring multiple rulings in order to clarify this standard. While some justices on the Court, in particular Justice O’Connor,


\(^{218}\) *See generally JAMES T. PATTERSON, BROWN V. BOARD OF EDUCATION: A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY (2002).*
frequently try to decide cases narrowly based on the facts presented before them, there is nothing to stop the Justices from laying out and detailing a more broad rule that applies to many different factual scenarios in an opinion first and then applying the broader rule to the individual factual situation in that particular case. Indeed, Justice Kennedy did something similar to this in *Parents Involved* where, in addition to stating that the government policy in front of him in that particular case was unconstitutional, he laid out many other government policies that would be constitutional.\(^{219}\)

A final criticism of the contextual approach might be that it gives lower judges too much discretion. People might worry that such a loose multi-factored approach could allow a judge to decide a case however she wants by just picking and choosing factors that support her position. Therefore, affirmative action would end up being a free-for-all in the lower courts. However, such an approach would bring greater transparency to lower court decisions because the multi-factored approach would help make clear what the lower court judge is valuing in making her decisions. This heightened transparency would help to keep lower judges from turning affirmative action into a free-for-all because, with greater transparency, these judges would be subjected to greater external political pressures when their reasoning deviates from higher court decisions. In addition, this transparency would aid the higher courts in being able to reverse and control the lower courts when their decisions deviate from the Supreme Court’s opinions. The Supreme Court taking more affirmative action cases on appeal or giving broader guidance to their decisions would also help this issue.

**Conclusion**

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The Supreme Court’s narrow tailoring requirement as developed by Justice O’Connor is a rigid inquiry that causes inconsistent results depending on the context of the affirmative action case and is maladapted at achieving a proper compromise between the two camps of the Supreme Court. A fact-intensive contextualist approach to narrow tailoring, similar to the one adopted by Justice Powell would be a much more effective approach. Therefore, Justice Kennedy, and anyone else who might one day assume the position of being the controlling member of the Supreme Court on affirmative action decisions, would benefit by going back and looking at Justice Powell’s approach to narrow tailoring.