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Strict in Theory, But Accommodating in Fact?

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ABSTRACT

As first-year law students quickly learn, the strict-scrutiny test governs challenges under the Equal Protection Clause to the government's classification of persons according to their race. To survive strict scrutiny, the government bears the heavy burden of persuasion to show a compelling interest in drawing a racial classification and narrowly tailored means to achieve that interest. Over the years, strict scrutiny has expanded to serve as a bulwark against government intrusions on other fundamental rights and liberties enshrined in the United States Constitution—including the right to vote, marry, access the courts, freedom of speech, and freedom of association. At times, the United States Supreme Court was so demanding of the government in its application of strict scrutiny that no government action seemed capable of meeting its demands. This prompted the Court to counter, in at least eleven opinions, that strict scrutiny was not "strict in theory, but fatal in fact." So long as the government met its burden—albeit a highly demanding one—the Court would uphold the government action as constitutional.

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

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

INTRODUCTION

The Supreme Court first announced the strict-scrutiny test in *Korematsu v. United States*, which, in a widely criticized opinion, upheld the internment of Japanese-Americans during

* J.D., The University of Iowa College of Law, 2007; B.A., Cornell University, 2003. The author is a former law clerk to the Honorable Carlos T. Bea, U.S. Court of Appeals for the Ninth Circuit. He is currently an associate at Keker & Van Nest LLP in San Francisco, California.

World War II.[1] The Court held that the "most rigid scrutiny" would govern all challenges under the Equal Protection Clause[2] to the government's classification of individuals according to their race.[3] Applying the strict-scrutiny test in a highly deferential manner to the government, the Court held that the government's interest in preventing espionage and sabotage by the Japanese justified its internment of Japanese-Americans during wartime.[4] Justice Murphy vehemently dissented from the Court's "legalization of racism" under the auspices of heightened scrutiny.[5]

Since *Korematsu*, the Court expanded the use of strict scrutiny from its initial application to racial classifications. In the Equal Protection Clause context, strict scrutiny now governs classifications on the basis of national origin[6] and state classifications on the basis of alienage.[7] Strict scrutiny applies also to infringements on fundamental rights under the Due Process and Equal Protection Clauses—including the right to marry,[8] to control the upbringing of one's children,[9] to vote,[10] to access the courts,[11] and to travel within the United States.[12] The First Amendment rights to freedom of speech[13] and freedom of association[14] also are subjected to strict scrutiny.

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[1] *See* Korematsu v. United States, 323 U.S. 214, 219 (1944); Grutter v. Bollinger, 539 U.S. 306, 351 (2003) (Thomas, J., concurring in part and dissenting in part) (noting that the strict-scrutiny test "was first enunciated in *Korematsu*").

[2] "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

[3] *Korematsu*, 323 U.S. at 215 ("[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.").

[4] *Id.* at 217-18.

[5] *Id.* at 242 (Murphy, J., dissenting).

[6] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 668 (2d ed. 2002).

[7] Examining Bd. v. Flores de Otero, 426 U.S. 572 (1976). There are some exceptions to the application of strict scrutiny to alienage classifications, such as state classifications related to self-government and the democratic process, *id.* at 743–44 (citing Foley v. Connelie, 435 U.S. 291, 296 (1978)), and congressionally approved alienage classifications, *id.* at 745–46 (citing Mathews v. Diaz, 426 U.S. 67 (1976)).

[8] *See generally* Zablocki v. Redhail, 434 U.S. 374 (1978).

[9] *See generally* Troxel v. Granville, 530 U.S. 57 (2000).

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

[11] *See generally* Bounds v. Smith, 430 U.S. 817, 828 (1977).

[12] *See generally* United States v. Guest, 383 U.S. 745 (1966).

[13] *See generally* Grayned v. City of Rockford, 408 U.S. 104 (1972).

To survive strict scrutiny, the government bears the heavy burden of persuasion to satisfy two elements—one relating to the government's ends and the other to its means.[15] As to its ends, the government must show a compelling interest in drawing a racial classification.[16] As to its means, the government must prove that it adopted narrowly tailored means to achieve that compelling interest.[17] A government action subject to strict scrutiny is unconstitutional if it fails either element of this test.[18]

Strict scrutiny, by definition, is strict—and for good reason. For racial classifications, the test is intended to "smoke out" unconstitutional uses of race by the government.[19] It properly presumes that whenever the government classifies persons according to their race, its decisions are "inherently suspect."[20] To serve its inquisitorial function, the test cannot accept blank assertions by the government for why it needs to use race in its decision-making. Rather, through the strict-scrutiny test, the courts ensure that "the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool."[21] The reason for this searching inquiry, no doubt, is the wound that government-sanctioned racial discrimination has inflicted on

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[14] *See generally* Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000).
[15] Johnson v. California, 543 U.S. 499, 505 (2005) ("We put the burden on state actors to demonstrate that their race-based policies are justified.").
[16] *Id.*
[17] *Id.*
[18] Not all government actions are subject to strict scrutiny. Certain government classifications offend the Equal Protection Clause less than those classifications subject to strict scrutiny. The intermediate-scrutiny test applies to government classifications on the basis of gender or illegitimacy. *See* United States v. Virginia, 518 U.S. 515 (1996); Caban v. Mohammed, 441 U.S. 380 (1979). That test requires the government to show an "important" government interest and means "substantially related" to the achievement of that interest. *Virginia*, 518 U.S. at 519. All other classifications under the Equal Protection Clause are subject to rational-basis review. Under the deferential rational-basis test, "legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 440 (1985).
[19] Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 226 (1995).
[20] *Id.*
[21] *Id.*

this Nation throughout its history.[22] When our government divvies us up by race, we assume foul play at work and put the government to its burden to show why its action must be upheld.[23]

At times, the Supreme Court has been so demanding in its application of the strict-scrutiny test that commentators questioned if any government action could survive the test.[24] This prompted the Court to counter—in at least eleven opinions—that strict scrutiny is not "'strict in theory, but fatal in fact.'"[25] So long as the government satisfied its burden under strict scrutiny—albeit a highly demanding one—the Court would uphold the government action as constitutional.

But times have changed. At least in certain contexts, strict scrutiny is strict no more. In its attempt to remedy the perceived rigidity of the strict-scrutiny test, the Supreme Court overcorrected. The pendulum has now swung in the opposite direction. In majority and dissenting opinions in *Grutter v. Bollinger*,[26] *Johnson v. California*,[27] and *Parents Involved in Community Schools v. Seattle School District No. 1*,[28] Supreme Court Justices diluted the strict-scrutiny test with a strong dose of deference to the government, creating a deferential version of

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[22] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., No. 1, 426 F.3d 1162, 1169 n.2 (9th Cir. 2005) (en banc) (Bea, J., dissenting) ("Because of our country's struggle with racial division and the injustices of compelled government de jure segregation, we must be especially suspicious of any compulsive government program based upon race, even when such a program is supposedly beneficial."), *rev'd* 551 U.S. 701.

[23] *See* League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 511 (2006) ("It is a sordid business, this divvying us up by race.") (Roberts, C.J., dissenting).

[24] Gerald Gunther, The Supreme Court, *1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (arguing that the Court's use of strict scrutiny in some cases was "'strict' in theory but fatal in fact").

[25] *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 833 (2007) (Breyer, J., dissenting); Johnson v. California, 543 U.S. 499, 514 (2005); Concrete Works of Colo., Inc. v. Denver, 124 S. Ct. 556, 559 (2003) (mem.) (Scalia, J., dissenting from the denial of certiorari); Grutter v. Bollinger, 539 U.S. 306, 326 (2003); Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 237 (1995); Missouri v. Jenkins, 515 U.S. 70, 112 (1995) (O'Connor, J., concurring); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 552 (1989) (Marshall, J., dissenting); United States v. Paradise, 480 U.S. 149, 166 n.17 (1987); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 285 (1986) (O'Connor, J., concurring in part and concurring in the judgment); Fullilove v. Klutznick, 448 U.S. 448, 507 (1980) (Powell, J., concurring); Regents of the Univ. of Calif. v. Bakke, 438 U.S. 265, 362 (1978) (Brennan, J., concurring in part and dissenting in part).

[26] 539 U.S. 306 (2003).

[27] 543 U.S. 499 (2005).

[28] 551 U.S. 701 (2007).

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

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

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

The remaining sections of the Article contrast *Grutter*'s deferential analysis to other cases from the Supreme Court's equal-protection jurisprudence. Part III discusses the Supreme Court's non-deferential analysis in *United States v. Virginia*, which addressed an equal-protection challenge to the male-only admissions policy of the Virginia Military Institute, another higher-education institution. Part IV contrasts *Grutter* to *Johnson v. California*, where

the Court refused to defer to prison officials in an equal-protection challenge to a prison policy requiring the segregation of inmates according to their race to prevent violence. Part V analyzes *Parents Involved in Community Schools v. Seattle School District No. 1*, where the Court struck down two school districts' student-assignment plans that relied in part on race to determine which public schools the students may attend. Although the four-Justice plurality in *Parents Involved* attempted to confine *Grutter*'s deference to the context of higher-education institutions, five Justices extended at least part of *Grutter*'s holding to K-12 schools. With this extension, this Part argues, deferential strict scrutiny has gained momentum and will be invoked in future Supreme Court opinions. Part VI concludes.

I. *GRUTTER V. BOLLINGER* AND THE INCEPTION OF DEFERENTIAL STRICT SCRUTINY

Deferential strict scrutiny has its roots in *Grutter v. Bollinger*. *Grutter* was a class-action case against the University of Michigan Law School challenging the Law School's use of race in its admissions criteria.[29] The plaintiffs asserted that race was the predominant factor in the Law School's admissions policy, which put non-minority applicants at a significant disadvantage in the application process.[30] This, the plaintiffs contended, constituted state-sanctioned racial discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment.[31] The Law School countered that it used race as one of many factors in its decision-making process, which it asserted was narrowly tailored to achieve its compelling interest in recruiting a "critical mass" of minority students to construct a diverse student body.[32]

The district court applied strict scrutiny and held the Law School's race-based-admissions criteria unconstitutional. It reasoned that the attainment of a racially diverse student

[29] Grutter v. Bollinger, 539 U.S. 306, 317 (2003).
[30] *Id.* (internal quotation marks omitted).
[31] *Id.*
[32] *Id.* at 314–16.

body was not a compelling state interest and even if such interest were compelling, the Law School had not used narrowly tailored means to achieve that interest.[33]

The Sixth Circuit reversed the district court.[34] It held that achieving a diverse student body was a compelling interest under binding Supreme Court precedent and that the Law School's use of race as a "potential plus factor" in its admissions criteria was narrowly tailored to serve that interest.[35]

In a 5–4 decision, the United States Supreme Court affirmed the Sixth Circuit.[36] The Court purported to apply strict scrutiny to the Law School's use of race in its admissions decisions, noting that the policy would survive the constitutional challenge only if the race-based classification was "narrowly tailored to further compelling government interests."[37] In describing the strict-scrutiny test, the Court emphasized that the test is intended to "'smoke out illegitimate uses of race'"[38] and that the determination of the admissions policy's constitutionality was "the job of the court"—not the Law School.[39] But the Court failed to note, perhaps deliberately, that the Law School would bear the burden of persuasion to satisfy the requirements of strict scrutiny.

The Court first discussed whether the Law School's stated interest in the educational benefits that flow from diversity was a compelling state interest.[40] On this point, the Court held that "[t]he Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer."[41] Despite this deference, the Court reassured its skeptics that

[33] *Id.* at 321.
[34] *Grutter*, 539 U.S. at 321.
[35] *Id.* (internal quotation marks omitted).
[36] *Id.* at 343.
[37] *Id.* at 326.
[38] *Id.* (quoting Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989)).
[39] *Grutter*, 539 U.S. at 327.
[40] *Id.* at 327–33.
[41] *Id.* at 328.

its scrutiny would be "no less strict."[42]

The Court explained that it would defer to the Law School because "context matters" in the Court's equal-protection analysis.[43] In other words, although all race-based classifications are suspect under the Equal Protection Clause, some racial classifications, depending on their context, are more suspect than others. Race-based classifications in the higher-education context, according to the Court, are less suspect than in other contexts because universities occupy a "special niche . . . in our constitutional tradition."[44] Citing Justice Powell's opinion in *Regents of the University of California v. Bakke*, the Court noted that universities enjoy educational autonomy under the First Amendment.[45] The decision of whom to admit to a university required "complex educational judgments . . . primarily within the expertise of the university," deserving of deference by the courts.[46]

Despite this broad rhetoric about deference to the Law School, the Court also examined the amicus briefs and expert studies in the record, concluding that the record supported the Law School's educational judgment about the benefits of diversity.[47] According to the Court, the record demonstrated that diversity promotes "'cross-racial understanding,'" "'helps to break down racial stereotypes,'" and enables livelier classroom discussion exposing students to a broad array of viewpoints.[48] These theoretical benefits of diversity had practical support from amicus briefs filed in support of the Law School by major American businesses,[49] high-ranking retired

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[42] *Id.*
[43] *Id.* at 327.
[44] *Grutter*, 539 U.S. at 329 (citing Wieman v. Updegraff, 344 U.S. 183, 195 (1952) (Frankfurter, J., concurring); Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957); Shelton v. Tucker, 364 U.S. 479, 487 (1960); Keyishian v. Bd. of Regents of Univ. of State of N.Y., 385 U.S. 589, 603 (1967)).
[45] *Id.* at 329 ("'The freedom of a university to make its own judgments as to education includes the selection of its student body.'" (quoting Regents of the Univ. of Calif. v. Bakke, 438 U.S. 265, 312 (1978))).
[46] *Id.* at 328.
[47] *Id.* at 330.
[48] *Id.* (quoting the district court's opinion).
[49] *Grutter*, 539 U.S. at 330–31 (citing amicus briefs filed by 3M and General Motors Corp.).

military officers and civilian leaders, and the Reserve Officer Training Corps ("ROTC"),[50] all of whom asserted that student-body diversity leads to many benefits in the work force.[51] Because universities—and especially law schools—were training arenas for the Nation's future leaders, diversity in legal education contributed to the creation of leaders from diverse backgrounds.[52]

Next, the Court analyzed whether the means that the Law School adopted were narrowly tailored to achieve its compelling interest in diversity.[53] The Court began its analysis under this section by reiterating—reminiscent of the Queen's "The lady doth protest too much methinks" remark from *Hamlet*—that it was not "abandon[ing] strict scrutiny."[54] The Court went on to hold that the Law School's admissions policy bore the "hallmarks of a narrowly tailored plan."[55] Instead of using a quota system that reserved a certain number of seats for minority students—which would have been unconstitutional[56]—the Law School engaged in an individualized consideration of all candidates, with race or ethnicity playing a role only as a potential "plus" factor.[57] The Law School also gave "substantial weight" to non-racial factors, such as "'employment experience, nonacademic performance, or personal background,'" which contribute to the diversity of its student body.[58]

The Court rejected the dissent's assertion that the Law School's daily consultation of its minority-admission statistics suggested that the Law School maintained a quota system. Rather, the Court accepted, with no scrutiny, the school officials' testimony that they did not give race

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[50] *Id.* at 331.
[51] *Id.* at 330–31.
[52] *Id.* at 332.
[53] *Id.* at 333.
[54] *Grutter*, 539 U.S. at 334.
[55] *Id.*
[56] *See generally* Gratz v. Bollinger, 539 U.S. 244 (2003) (holding unconstitutional the admissions policy of the University of Michigan's College of Literature, Science, and the Arts because the College assigned a fixed number of points on the basis of the minority status of an applicant and did not provide sufficient individual consideration).
[57] *Grutter*, 539 U.S. at 334.
[58] *Id.* at 338 (quoting Brief for Respondent Bollinger et al.).

more or less weight because of their constant reference to these statistics. The Court also dismissed the dissent's examination of the Law School's minority-admission statistics over a period of five years, which showed a close correlation between the percentage of minority applicants from a particular minority group and the percentage of admitted applicants from that group—suggestive of a quota system.[59]

Even though the narrowly-tailored-means prong of strict scrutiny ordinarily requires the state to show that it employed the least restrictive means to achieve its compelling interest,[60] the Law School was required to consider—but not required to exhaust—every race-neutral formula for attaining a diverse student body.[61] If the race-neutral alternatives sacrificed the elite status of the Law School or the level of diversity it sought to attain, the Law School could constitutionally use race as a factor in its admissions decisions.[62] As part of its narrowly-tailored-means analysis, the Court took the Law School "at its word" that the Law School would end its race-conscious admissions policy as soon as it found a race-neutral alternative to its liking.[63] Deference to the Law School's "word" thus helped the Court uphold the Law School's admissions policy as constitutional under strict scrutiny—the most exacting constitutional test.

II. *GRUTTER*'S ERRORS

A. Grutter*'s Deference Is Inconsistent with Strict Scrutiny*

By definition, the strict-scrutiny test puts the heavy burden of persuasion on the government to prove the two prongs of the test. For this reason, the Supreme Court has held: "[B]lind judicial deference to legislative or executive pronouncements of necessity has no place

[59] *Id.* at 383–85 (Rehnquist, C.J., dissenting).
[60] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 51 (1973).
[61] *Grutter*, 539 U.S. at 339.
[62] *Id.* at 340.
[63] *Id.* at 343.

in equal protection analysis."[64] Even Justice O'Connor, the author of *Grutter*, speaking for the Court in a later case stated: "[D]eference is fundamentally at odds with our equal protection jurisprudence. We put the burden on state actors to demonstrate that their race-based policies are justified."[65]

But the *Grutter* Court failed to place the burden on the Law School. Rather, it deferred to the Law School on both prongs of the strict-scrutiny test and held that it would "presume" "good faith" on the part of the Law School "absent a showing to the contrary."[66] This presumption switched the burden of persuasion from the Law School to the litigants challenging the Law School's race-conscious admissions policy to prove the absence of a compelling state interest and the absence of narrowly tailored means. This bait-and-switch all but guaranteed that the Law School's admissions policy would satisfy both prongs of the strict-scrutiny test.

1. Compelling-Interest Prong

On the compelling-interest prong, the Court failed to examine whether diversity was the actual purpose of the Law School's race-conscious admissions program—and not a post-hoc rationalization for a different, and perhaps unconstitutional, purpose. The Court discussed the benefits that derive from a diverse student body, but failed to inquire whether diversity was a mere pretext for the Law School's use of race in its admissions decisions. If, for example, the Law School had implemented its race-conscious admissions policy to remedy past societal discrimination against minorities—and not to further the diversity of its student body—that

[64] City of Richmond v. J.A. Croson Co., 488 U.S. 469, 501 (1989).
[65] Johnson v. California, 543 U.S. 499, 506 n.1 (2005) (O'Connor, J.). Justice O'Connor's criticism of deference in *Johnson* was directed at Justice Thomas, who, in his dissent, asserted that a "compelling showing [is] needed to overcome the deference we owe to prison administrators." *Id.* at 543 (Thomas, J., dissenting). See *infra* Part IV for an in-depth discussion of *Johnson v. California*.
[66] *Grutter*, 539 U.S. at 329 (citation and internal quotation marks omitted); *see* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., No. 1, 426 F.3d 1162, 1188 (9th Cir. 2005) (en banc) ("Implicit in the Court's [narrow-tailoring] analysis was a measure of deference toward the university[.]"), *rev'd* 551 U.S. 701.

policy would have been unconstitutional under well-established precedent.[67] Even in the intermediate-scrutiny context, where the government's burden is easier to meet,[68] the Court examines whether the government's justification for drawing a classification states "actual [government] purposes, not rationalizations for actions in fact differently grounded."[69] But the *Grutter* Court took the Law School "at its word" that attainment of diversity was its actual purpose. If the function of strict scrutiny, as the *Grutter* Court held, is to "smoke out" unconstitutional uses of race and to "carefully examin[e] . . . the sincerity of the reasons advanced by the governmental decisionmaker for the use of race,"[70] the Court cannot perform that function by taking the government "at its word" as to its actual motives.

A recent Supreme Court opinion, *Ricci v. DeStefano*,[71] exemplifies the *Grutter* Court's errors on this front. In *Ricci*, white and Hispanic firefighters sued the City of New Haven for racial discrimination, alleging violations of the Equal Protection Clause and Title VII of the Civil Rights Act, which prohibits employment discrimination on the basis of race, color, religion, sex, and national origin.[72] The firefighters asserted that the City had intentionally discriminated against them by discarding the results of a promotional examination—which they had successfully passed—on the basis that white candidates had substantially outperformed minority candidates.[73] The City countered that it had discarded the examination, not to discriminate against the plaintiffs, but to avoid liability under Title VII for implementing a policy that has a

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

[68] Intermediate scrutiny applies to quasi-suspect classifications, such as gender and illegitimacy. CHEMERINSKY, *supra* note 6. To meet its burden under intermediate scrutiny, the government must show only an "important" government interest and means "substantially related" to the achievement of that interest. United States v. Virginia, 518 U.S. 515, 533 (1996).

[69] *Virginia*, 518 U.S. at 535–36.

[70] *Grutter*, 539 U.S. at 327.

[71] 129 S. Ct. 2658 (2009).

[72] *Id.* at 2664, 2672.

[73] *Id.*

disparate impact on minority firefighters.[74]

The United States Supreme Court, in a 5–4 decision, held that the City's action constituted intentional discrimination in violation of Title VII and granted summary judgment to the firefighters.[75] As relevant here, Justice Alito examined in a separate concurrence whether the City's asserted reason for discarding the test results—concern for disparate-impact liability—was a mere pretext for an ulterior motive.[76] In his analysis, Justice Alito went through the district-court record in painstaking detail—to an extent rarely seen in a Supreme Court case.[77] He concluded that a reasonable jury could find that the City's actual reason for discarding the tests was not potential Title VII disparate-impact liability, but a simple desire to please a politically important racial constituency motivated by the lobbying efforts of a community leader.[78]

Justice Alito's detailed pretext analysis stands in stark contrast to the *Grutter* majority's non-existent one. Instead of taking the City of New Haven "at its word" that it discarded the test results to avoid disparate-impact liability, Justice Alito properly put the City to its burden. This the *Grutter* Court failed to do. Deferential strict scrutiny in *Grutter* lifted the Law School's burden on the pretext question, converting what might have been an unconstitutional program into a constitutional one.

2. Narrowly-Tailored-Means Prong

On the narrowly-tailored-means prong, the *Grutter* Court failed to inquire as to whether the Law School's stated use of race as a plus factor in its admissions decisions was in effect an unconstitutional quota system. This, too, resulted from the Court's deference to and presumption

[74] *Id.*
[75] *Id.* at 2664-65.
[76] *Ricci*, 129 S. Ct. at 2683-84 (Alito, J., concurring).
[77] *See id.* at 2684-88.
[78] *Id.* at 2687-88.

of good faith on the part of the Law School.[79] In dissent, Chief Justice Rehnquist criticized the Court's failure to engage in a thorough narrowly-tailored-means analysis, asserting that the close correlation between the percentage of minority applicants and the percentage of admitted minority students raised the inference of an unconstitutional quota system.[80] Without deference, the burden would have been on the Law School to prove the *non*-existence of an unconstitutional quota system—even absent evidence suggestive of a quota system at work.[81]

The Court also failed thoroughly to inquire as to whether the Law School had considered race-neutral alternatives to its race-conscious admissions policy. The Court did not cite any evidence in the record, whether in the form of testimony by an admissions officer or minutes from a board meeting, that the Law School had considered and rejected race-neutral alternatives—as it was required to do to satisfy strict scrutiny.[82] Instead, the Court dismissed the race-neutral alternatives proposed by the district court and the United States as unworkable because they *might* potentially compromise the educational mission of the Law School.[83] Even if these race-neutral alternatives may have turned out to be impracticable, the Constitution required—as the Court itself acknowledged—that the Law School give "serious, good faith

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

[80] Grutter v. Bollinger, 539 U.S. 306, 383–85 (2003) (Rehnquist, C.J., dissenting) ("For example, in 1995, when 9.7% of the applicant pool was African-American, 9.4% of the admitted class was African-American. By 2000, only 7.5% of the applicant pool was African-American, and 7.3% of the admitted class was African-American. This correlation is striking.").

[81] *See id.*

[82] A "distinguished committee of legal scholars" developed the admissions policy that was at issue in *Grutter*. Brief for Respondents at 3, Grutter v. Bollinger, 539 U.S. 306, 329 (2003) (No. 02-241), 2003 WL 402236. Presumably, these scholars would have created a record delineating the purposes behind the race-conscious policy and whether or not they had considered race-neutral alternatives.

[83] *Grutter*, 539 U.S. at 340.

consideration" to such alternatives.[84]

The Law School could have drawn upon the admissions policies of the universities in states where racial preferences in admissions are prohibited.[85] As Justice Thomas noted in his dissent, another elite public law school, Boalt Hall at the University of California, Berkeley, had managed to enroll more minority students *after* the adoption of Proposition 209, which prohibits race-conscious admissions criteria in California's public educational institutions.[86] Despite the Court's repeated protests to the contrary, the narrowly-tailored-means analysis it employed under the guise of strict scrutiny was in effect an application of intermediate scrutiny—which demands only means that are "substantially related" to the achievement of the governmental objective and not means that require the exhaustion of less restrictive alternatives.

For these reasons, the dissenting Justices criticized the majority's mix of strict scrutiny and deference. Justice Thomas asserted that "the Constitution [does not] countenance the unprecedented deference the Court gives to the Law School, an approach inconsistent with the very concept of 'strict scrutiny.'"[87] Likewise, Justice Kennedy noted, "Deference is antithetical to strict scrutiny, not consistent with it."[88]

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

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[84] *Id.* at 339.
[85] *See id.* at 342.
[86] *Id.* at 367 (Thomas, J., concurring in part, dissenting in part).
[87] *Id.* at 350.
[88] *Grutter*, 539 U.S. at 394 (Kennedy, J., dissenting).

considered and rejected race-neutral admissions criteria. The Law School could have met its burden on all three issues by presenting evidence in the form of minutes from a board meeting or testimony from school authorities that: (1) the achievement of diversity, and not an unconstitutional purpose such as remedying past societal discrimination against minorities, was the actual purpose of its admissions policy; (2) the statistics that the dissent cited were not sufficient to establish the existence of a quota system; and (3) the Law School had adequately researched, seriously considered, and rejected race-neutral alternatives for constitutionally valid purposes. This is the analysis that strict scrutiny—which should be strict in theory *and* strict in fact—demanded from the *Grutter* Court.

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

What made the *Grutter* Court's deference all the more unjustifiable was its deference to the Law School on a *legal* question.[89] Let us assume, as the Court held, that complex educational judgments lie beyond the competence of the judiciary, necessitating deference to the universities' educational policies. In that case, deference would be proper to specific educational policies implemented using constitutional means to meet constitutional ends. For example, were the Law School to implement a minimum GPA or LSAT score requirement for admissions, and were this requirement challenged as discriminatory under the Equal Protection Clause, deference would be proper to the Law School's educational judgment. Minimum GPA and LSAT score

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

requirements—unlike race—are not suspect classifications under the Equal Protection Clause.[90] The Court need not second-guess a particular educational policy or substitute its judgment for that of university officials, so long as the university acts within the bounds of the Constitution.

Described in this way, deference to a university's educational judgment is similar to deference to a Board of Directors' business judgment in the corporation-law context. When a stockholder challenges a Board of Directors' business decision, a presumption applies—dubbed the business-judgment rule—that the Directors made a fair and impartial decision in the best interests of the corporation.[91] In other words, courts defer to the Board of Directors on any business decision they make—absent evidence of conflict of interest or bad faith—because the Board of Directors knows how to manage a corporation better than a court.[92] While courts defer to the Board of Directors on the question whether its business decisions are in the best interests of the corporation, they do not defer to corporations on the question whether those decisions are lawful. A decision by the Board of Directors to discriminate on the basis of race in hiring, for example, would violate Title VII of the Civil Rights Act. A court would not defer to the Board of Directors' "business judgment" that such policy is lawful under Title VII.

And so was the case in *Ricci*. There, the City refused to certify the results of its

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[90] A claim that a minimum GPA or LSAT score requirement imposes a disparate impact on minorities would not, in and of itself, suffice to hold the requirement unconstitutional. Under well-established Supreme Court precedent, a showing of discriminatory purpose also would be required. *See* Washington v. Davis, 426 U.S. 229, 233 (1976).

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

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

Id. (internal citations and quotation marks omitted).

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

firefighter-promotion examination, believing that certification would expose it to Title VII liability for disparate impact.[93] But the Supreme Court refused to defer to the City's legal determination on this question. Far from showing any deference to the City, the Court held that the City "must have a *strong basis in evidence* to believe it will be subject to disparate-impact liability if it fails to take the race-conscious, discriminatory action."[94]

But the *Grutter* Court did precisely what the *Ricci* Court declined to do. *Grutter* did not merely defer to *which* constitutional course of conduct the Law School chose to achieve a constitutional objective. Instead, the Court deferred to the Law School on the questions *whether* the Law School's objective was constitutional and *whether* the means it adopted to achieve that objective were constitutional.[95] These are both legal questions. Deference on these questions to the Law School is no different than deference to a Board of Directors' statement that its discriminatory hiring policy is lawful under Title VII or deference to the City of New Haven's belief that certification of its firefighter-promotion exams would expose it to Title VII liability. The Law School's educational judgment would have been deserving of deference had the Law School, for example, picked one particular race-neutral admissions policy over another to further its interest in diversity. But when the issue concerns the constitutionality of a facial classification on the basis of race, deference to a non-judicial body that lacks any expertise on,

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[93] Ricci v. DeStefano, 129 S. Ct. 2658, 2664-65 (2009).
[94] *Id.* at 2677 (emphasis added).
[95] As Professor Karlan explains:

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

Pamela S. Karlan, *Compelling Interests/Compelling Institutions: Law Schools As Constitutional Litigants*, 54 UCLA L. REV. 1613, 1622 (2007); *see also* Michelle Adams, *Stifling the Potential of* Grutter v. Bollinger*:* Parents Involved in Community Schools v. Seattle School District No. 1, 88 B.U. L. REV. 937, 943 (2008) ("[T]he *Grutter* Court applied a deferential brand of strict scrutiny review, deferring to the Law School on both prongs of the strict scrutiny analysis.").

and indeed is certainly biased towards, the legality of its own actions is improper—especially under strict scrutiny.[96]

The Court's deference did not end there. Not only did the Court defer to the Law School on the legal question whether diversity is a compelling state interest, the Court also deferred, *sub silentio*, to the Law School's interest in maintaining its elite status.[97] The Law School contended that adopting race-neutral admissions policies—such as using a lottery system or decreasing its emphasis on LSAT or GPA—would undermine its high national ranking. The Court accepted this contention on its face, did not examine whether it has any merit, and neglected the fact that other public law schools such as Boalt Hall had maintained their elite status while adopting race-neutral admissions policies. In effect, the Court recognized a compelling state interest in maintaining an elite status by allowing the Law School to reject race-neutral alternatives because of its desire to maintain its prestigious spot in the U.S. News & World Report rankings.[98] The Law School, according to the Court, could have its cake and eat it too.

Under the business-judgment rule, courts would give deference to a Board of Directors' action intended to make the corporation more competitive, which one might argue is analogous to the Law School's wish to maintain its elite status in *Grutter*. But that business judgment

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

[97] *See* Grutter v. Bollinger, 539 U.S. 306, 356 (2003) (Thomas, J., concurring in part, dissenting in part) ("The proffered interest that the majority vindicates today, then, is not simply 'diversity.' Instead the Court upholds the use of racial discrimination as a tool to advance the Law School's interest in offering a marginally superior education while maintaining an elite institution."). Had the Court not recognized a compelling interest in elite status, the Law School would have been required to adopt race-neutral criteria (e.g., decreasing its emphasis on undergraduate GPA and LSAT scores) that would have sacrificed the Law School's high admissions standards, and eventually its elite status. *See id.* at 340 (majority opinion) (noting that the race-neutral alternatives of "'decreasing the emphasis on undergraduate GPA and LSAT scores'" or a "'lottery system'" "would require a dramatic sacrifice of diversity, the academic quality of all admitted students, or both.").

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

would not get deference if, for example, the Board of Directors decided to adopt a policy to hire employees of only a specific race because of its belief that the employees of that race perform better. This policy would violate Title VII, even though it is guided by a desire to make the corporation more competitive—just as the City of New Haven's decision to scrap its firefighter-promotion exams in *Ricci* was unlawful, even though the City's decision was guided by its desire to avoid Title VII liability. For the same reason, deference to the Law School's adoption of a race-conscious admissions policy was improper, regardless whether the Law School adopted such policy to maintain its elite status.

One commentator praised *Grutter*'s deference to the Law School for creating "mini-Supreme Courts out of higher education institutions," "shifting the primary policing duties from the courts to the admissions offices," and reorganizing the "division of labor between educational officials and the Court."[99] I do not view this as an improvement. The "labor" involved in *Grutter* was not the making of academic decisions better suited for admissions offices. It was the interpretation of the United States Constitution—which, ever since *Marbury v. Madison*, "emphatically" has been "the province and duty of the Judicial Department."[100] If the Court has jealously guarded its responsibility to interpret the Constitution and refused to shift it to any other branch of government, why should universities be granted an exception?[101] Our Constitution is built on a distrust of all government actors, including university officials.

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[99] Annalisa Jabaily, *Color Me Colorblind: Deference, Discretion, and Voice in Higher Education After* Grutter, 17 CORNELL J.L. & PUB. POL'Y 515, 526-27 (2008); *see also* Paul Horwitz, *Universities as First Amendment Institutions: Some Easy Answers and Hard Questions*, 54 UCLA L. REV. 1497, 1520 (2007) [hereinafter Horwitz, *Easy Answers*] (noting that under a "strong form" of deference to universities, they would "enjoy near-absolute discretion to self-regulate across a range of academic activities, from hiring and firing, to the selection of campus speech codes or the restriction of religious speech, to the composition of the student body based explicitly on considerations of race or gender"); *id.* at 1542 ("[C]ourts should grant universities substantial autonomy to engage in educational decisions; and they should defer, too, in determining what constitutes an academic decision.").

[100] *See* Marbury v. Madison, 5 U.S. 137, 177 (1803).

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

Allowing universities to play a role in policing the constitutionality of their very own actions while the courts take a back seat amounts to constitutional abdication—not constitutional improvement.[102]

Taken to its logical extreme, this position could have devastating consequences. A rule of deference, once in place, applies across the board. The Court would accord deference to all academic decisions by higher-education institutions—regardless whether their motives are good or bad and the consequences of their decisions beneficial or harmful. Higher-education institutions easily may abuse the deference granted to them to define the legality of their own conduct. However well intentioned the Law School's race-conscious admissions policy may have been, the same benign intentions do not motivate all educational policies.

Professor Horwitz argues that deference to higher-education institutions on legal questions is proper in part because "most academics . . . would resist any move by a university to engage in flagrant discrimination."[103] He further notes that an effort by a university to engage in open discrimination would run into numerous barriers—including from faculty members, students, and alumni.[104] Racial prejudice, according to Professors Horowitz and Bryne, is "'not an academic value.'"[105]

History begs to differ. Staying within the context of law schools, consider the Supreme Court's 1950 decision in *Sweatt v. Painter*.[106] In that case, Heman Sweatt was denied admission to the University of Texas Law School solely because of his African-American race.[107] Instead, the State of Texas offered a separate law school for African-Americans, but that law school had

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[102] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 766 (2007) (Thomas, J., concurring) ("To adopt the dissent's deferential approach would be to abdicate our constitutional responsibilities.").
[103] Horwitz, *Easy Answers*, *supra* note 99, at 1543.
[104] *Id.*
[105] *Id.* (quoting J. Peter Byrne, *Constitutional Academic Freedom After* Grutter*: Getting Real About the 'Four Freedoms' of a University*, 77 U. COLO. L. REV. 929, 941 (2006)).
[106] 339 U.S. 629 (1950).
[107] *Id.*

nowhere near the same stature as the University of Texas Law School in terms of "reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige."[108] Under these circumstances, the Supreme Court concluded that the State of Texas violated the Equal Protection Clause and required that Sweatt be admitted to the University of Texas Law School.[109]

Although *Sweatt* was decided more than fifty years ago, racial prejudice in higher-education institutions is not a relic of the past. Until 2000, Bob Jones University in South Carolina prohibited interracial dating among its students and denied admission to applicants who engage in an interracial marriage or dating.[110] Academics, as these cases show, are no more immune to prejudice than other government actors.

Consider also *Brown v. Board of Education* (*Brown I*). In *Brown I*, the Supreme Court held that segregation of students according to their race violates the Equal Protection Clause of the Fourteenth Amendment.[111] *Brown I* rightfully presented no signs of deference to educational institutions and local governments that had segregated students on the basis of race and held that "[s]eparate educational facilities are inherently unequal."[112] The segregationists in that case had advanced many of the same arguments that the supporters of *Grutter*'s deference now advance.[113] They argued for deference to the local authorities' judgments about how best to educate their students.[114] They purported to advocate "only a concept of constitutional law that

[108] *Id.* at 633-34.
[109] *Id.* at 635-36.
[110] Bob Jones Univ. v. United States, 461 U.S. 574, 580-81 (1983); Bob Jones University Ends Ban on Interracial Dating, CNN.com, http://archives.cnn.com/2000/US/03/04/bob.jones/ (Mar. 4, 2000).
[111] Brown v. Bd. of Educ. of Topeka (*Brown I*), 347 U.S. 483, 495 (1954).
[112] *Id.* at 495.
[113] *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 774 (2007) (Thomas, J., concurring).
[114] *Id.*

permits determinations of state and local policy to be made on state and local levels."[115] What would have happened if the *Brown* Court countenanced deference to the local authorities? What if the segregationists in *Brown* were allowed to sit as "mini-Supreme Courts," sharing the labor of interpreting the Equal Protection Clause with the United States Supreme Court? The Supreme Court in *Plessy v. Ferguson* had done just that in upholding the constitutionality of segregated railway cars and holding that "separate but equal" was sufficient to satisfy the Equal Protection Clause.[116] In so holding, *Plessy* accorded "a large discretion" to the state legislatures.[117]

Brown I expressly overruled *Plessy* and did not heed the segregations' pleas for deference—and for good reason. But when it came to the implementation of *Brown I*, the Court regrettably added deference to the mix. As a general matter, when a court finds a government action unconstitutional, that action is immediately unconstitutional. The government must implement an immediate remedy to correct its constitutional wrong. But in *Brown II*,[118] rather than demanding that states desegregate their schools immediately, the Supreme Court allowed them to desegregate only "with all deliberate speed."[119] The school authorities could take their time, deliberate, and devise a remedy to their liking for their very own constitutional wrongs. The Court justified this remarkable departure from constitutional norms by deference to school authorities, who had "the primary responsibility for elucidating, assessing, and solving these [school-segregation] problems."[120]

Brown II's deference undermined the historic holding of *Brown I* and significantly

[115] *Id.*
[116] 163 U.S. 537 (1896).
[117] *Id.* at 550.
[118] Brown v. Bd. of Educ., 349 U.S. 294 (1955).
[119] *Id.* at 301.
[120] *Id.* at 299, *quoted in* Parker, *supra* note 89, at 1706.

delayed the desegregation of schools.[121] Segregationists welcomed *Brown II* as a sign of relief following *Brown I*'s broad constitutional holding recognizing the rights of African-Americans to attend the schools of their choice.[122] While deference may seem harmless to some in the context of race-conscious admissions criteria in higher-education institutions, there is no legal basis on which to distinguish the benign deference accorded to the Law School in *Grutter* and the disastrous deference to the local authorities in *Brown II*.

The world of *Sweatt* and *Brown* is different than the one we live in today. Professor Horwitz might well be right that most of today's universities, even if granted deference on legal questions, "would still observe most of the civic norms . . . that are usually enforced through the law."[123] But why leave that to chance? Why undermine the courts' role in our delicate constitutional balance and leave university officials to be the judges of their own actions? Why take the often-neglected risk of history repeating itself? Whatever the benefits of according deference to educational institutions, they are, in my view, vastly outweighed by the potential risk of serious abuse. As Justice Thomas put it: "Can we really be sure that the racial theories that motivated *Dred Scott* and *Plessy* are a relic of the past or that future theories will be nothing but beneficent and progressive? That is a gamble I am unwilling to take and it is one the Constitution does not allow."[124]

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

The *Grutter* Court found a home in the First Amendment for its deference to the Law

[121] For an excellent discussion of the immediate aftermath of *Brown I and Brown II*, see generally Robert B. McKay, "*With All Deliberate Speed": A Study of School Desegregation*, 31 N.Y.U. L. REV. 991 (1956).
[122] Parker, *supra* note 89, at 1706 & n.89.
[123] Horwitz, *Easy Answers*, *supra* note 99, at 1543.
[124] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 782 (2007) (Thomas, J., concurring).

School on its race-conscious admissions policy.[125] The Court noted that "given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition."[126] This First Amendment interest, in turn, required the Court to defer to a higher-education institution's admissions policies, including the use of race to promote diversity.

What in the First Amendment's text or the Court's First Amendment jurisprudence accords a special constitutional status to higher-education institutions? What in the First Amendment protects a university's decision of whom to admit to its student body? Scholars have debated these two questions at length,[127] so I provide only a brief overview here. I then pose a question that the *Grutter* Court failed to confront: Even assuming that a school's admissions policy enjoys First Amendment protection, can that First Amendment interest trump an individual's right under the Fourteenth Amendment not to be subject to racial discrimination?

The recognition of an educational autonomy under the First Amendment can be traced to the Supreme Court's decision in *Sweezy v. New Hampshire*.[128] In that case, the Court invalidated the conviction of Paul Sweezy, who was convicted on the basis of several Marxist lectures he gave at the University of New Hampshire.[129] There, the Court recognized in dictum a First

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[125] Grutter v. Bollinger, 539 U.S. 306, 329 (2003) (noting that the Law School enjoys educational autonomy "grounded in the First Amendment").
[126] *Id.*
[127] For a thorough analysis of the roots of academic freedom under the First Amendment, see generally Paul Horwitz, Grutter*'s First Amendment*, 46 B.C. L. REV. 461, 481–502 (2005) [hereinafter Horwitz, *First Amendment*]. For a criticism of a First Amendment right to academic freedom, see William G. Buss, *Academic Freedom and Freedom of Speech: Communicating the Curriculum*, 2 J. GENDER RACE & JUST. 213, 220–24, 230–33 (1999) (asserting that "the impressive rhetoric about academic freedom" in Supreme Court opinions was "sweepingly proclaimed rather than carefully delineated"); Robert A. Caplen, *The "Fifth" Freedom: Freedom from Impermissible Expansion of Academic Freedom to University Admissions*, 36 SW. U. L. REV. 1 (2007); Richard H. Hiers, *Institutional Academic Freedom or Autonomy Grounded upon the First Amendment: A Jurisprudential Mirage*, 30 HAMLINE L. REV. 1, 4 (2007) ([T]he Supreme Court has never actually held that academic institutions are entitled to either academic freedom or autonomy under the First Amendment.").
[128] Sweezy v. New Hampshire, 354 U.S. 234 (1957) (plurality opinion), *cited in* Horwitz, *First Amendment*, *supra* note 127, at 482.
[129] Horwitz, *First Amendment*, *supra* note 127, at 482.

Amendment interest against the restriction of speech in an academic context.[130] Of course, this interest is not limited to higher-education institutions or to academic speech.[131] Any person—whether on or off the campus grounds—enjoys a First Amendment right, subject to certain exceptions, to engage in speech activities, join organizations, or deliver lectures, and do so without the fear of criminal liability.

Over time, this tenuously grounded First Amendment interest in academic speech was expanded further than its roots. In *Keyishian v. Board of Regents of the University of the State of New York*, the Court struck down a New York law making membership in the Communist Party prima facie evidence of disqualification for employment in the public-school system.[132] The Court held that the law was overbroad under the First Amendment because the law denied employment even to those persons who joined the Communist Party with no intent to further that Party's unlawful aims.[133] In what was otherwise a narrow holding based on overbreadth,[134] the Court broadly declared that a classroom serves as a "marketplace of ideas" and that the nation's future leaders are trained through "wide exposure to that robust exchange . . . which discovers truth 'out of a multitude of tongues . . . .'"[135] *Keyishian*'s focus on universities' role in the development of future leaders signaled a shift towards deference to a university's institutional policies—including the selection of its student body—even though *Keyishian* itself had nothing to do with admission policies.

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[130] *See Sweezy*, 354 U.S. at 250 (noting in dictum that the First Amendment protects academic speech because "[s]cholarship cannot flourish in an atmosphere of suspicion and distrust"), *cited in* Horwitz, *First Amendment*, *supra* note 127, at 483.

[131] According to Professor William Buss, the rhetoric about freedom of academic speech in this case was based—not on the freedom to teach—but on "the extramural freedom to participate as citizens in the political process by joining organizations or engaging in speech activities outside the classroom." Buss, *supra* note 127, at 222–23.

[132] Keyishian v. Bd. of Regents of the Univ. of the State of N.Y., 385 U.S. 589, 605-10 (1967).

[133] *Id.*

[134] Buss, *supra* note 127, at 223.

[135] *Keyishian*, 385 U.S. at 603 (quoting United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)), *quoted in* Horwitz, *First Amendment*, *supra* note 127, at 488.

Justice Powell recognized this extension in his opinion in *Regents of the University of California v. Bakke*. "The freedom of a university to make its own judgments as to education," according to Justice Powell, "includes the selection of its student body."[136] But why does a university's admissions policy constitute academic speech protected under the First Amendment? Does a university engage in protected speech when it decides whom to admit? Perhaps, as the *Keyishian* Court noted, the university facilitates the creation of a "marketplace of ideas" in the classroom by admitting a diverse student body. And that admissions decision, in turn, is protected by the First Amendment.

Let us assume, for the argument, that the First Amendment protects a university's admissions decisions. There is yet another hurdle that the *Grutter* Court failed to overcome. Justice Powell in *Bakke*, while recognizing a First Amendment interest in a university's selection of its student body, noted that a university's educational decisions are subject to "constitutional limitations protecting individual rights."[137] Surely, the right not to be subject to racial discrimination under the Equal Protection Clause is an individual right that should trump any institutional autonomy or educational freedom that the First Amendment protects.

Contrast *Grutter* to other cases where individual constitutional rights have trumped a higher-education institution's educational autonomy. In *Saxe v. State College Area School District*,[138] the Third Circuit—in an opinion authored by then-Judge Alito—struck down a university's anti-harassment policy as unconstitutionally overbroad under the First Amendment.[139] The Third Circuit's opinion does not even hint at deference to the university's educational judgment under the First Amendment—even though the university's policy, much

[136] Regents of Univ. of Calif. v. Bakke, 438 U.S. 265, 312 (1978).
[137] *Id.* at 313.
[138] 240 F.3d 200 (3d Cir. 2001) (Alito, J.), *cited in* Rachel F. Moran, *Let Freedom Ring: Making* Grutter *Matter in School Desegregation Cases*, 63 U. MIAMI L. REV. 475, 496 & n. 127 (2009).
[139] *Id.* at 214.

like the Law School's policy in *Grutter*, was adopted to preserve order and provide a "nurturing school environment."[140] The students' First Amendment rights to free speech trumped whatever institutional autonomy that the university enjoyed.

Likewise, in *Doe v. University of Michigan*,[141] the district court struck down under the First Amendment an anti-harassment policy that the University of Michigan had adopted in response to rising incidents of racism.[142] The court did not defer to the University of Michigan's educational judgment in adopting this policy, even though the very same University of Michigan's Law School was granted in *Grutter* the educational autonomy to use race in its admissions decisions.[143] If the First Amendment rights of students trump a university's educational autonomy, so must the Fourteenth Amendment rights of students not to be subject to discrimination because of their race.

There is yet another reason why a First Amendment interest in educational freedom has to give way to liberties protected by the Fourteenth Amendment. The Fourteenth Amendment was ratified after the First Amendment. The First Amendment could not have created an educational-autonomy exception in a constitutional provision that did not exist at the time of its adoption. Where there is a conflict between two constitutional provisions, the one enacted later in time controls.[144] If the First Amendment recognizes an interest in educational freedom, that interest therefore is subject to any limitations the Fourteenth Amendment subsequently imposed.

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[140] *Id.* at 202.
[141] 721 F. Supp. 852 (E.D. Mich. 1989), *cited in* Moran, *supra* note 138, at 496 & n. 127.
[142] *Id.* at 853-54.
[143] *See also* Moran, *supra* note 138, at 496 ("Judges generally have rejected 'hate speech' codes adopted to protect students from 'words that wound' because these measures chill the legitimate discussion of racial difference and curtail individual rights of expression.").
[144] *See* Friery v. Los Angeles Unified Sch. Dist., 300 F.3d 1120, 1124 (9th Cir. 2002) ("[I]t is a firmly established rule of constitutional jurisprudence that where two constitutional provisions conflict, the one that was enacted later in time controls." (citation omitted)); Premier Pabst Sales Corp. v. Grosscup, 12 F. Supp. 970, 972 (E.D. Pa. 1935) ("[Constitutional] provisions, if conflicting, are subject to the rule applied to conflicting statutes. The latest controls.").

For that reason, what has been labeled by several commentators as the First Amendment "educational benefits" exception to the Fourteenth Amendment is a misnomer.[145] If anything, there exists a Fourteenth Amendment exception to the institutional autonomy of universities under the First Amendment that prevents the use of that autonomy to discriminate on the basis of race. Because the Fourteenth Amendment, through the Equal Protection Clause, protects the right to be free from racial discrimination, deference to the Law School's use of race in its admissions decisions in *Grutter* cannot be justified under the First Amendment.

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

In support of its deference to the Law School, the Court relied on three cases: *Regents of the University of Michigan v. Ewing*,[146] *Board of Curators of the University of Missouri v. Horowitz*,[147] and a footnote from Justice Powell's opinion in *Bakke*.[148] The first two cases, *Ewing* and *Horowitz*, are distinguishable from *Grutter* because they accorded deference to university officials under rational-basis review—not strict scrutiny. Under the deferential rational-basis test, "legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest."[149]

In *Ewing*, the Court rejected the due-process claims of a student who was dismissed from the University of Michigan for poor academic performance and concluded that the dismissal was not arbitrary or capricious, in part by deferring to university officials.[150] Because there was no suspect classification at issue, rational-basis review, not strict scrutiny, applied. Importantly, the Court's deference was to the educational judgment of the university officials on "the substance

[145] *See* Beard, *supra* note 89, at 4–5 (noting that *Grutter* created an "educational benefits" exception "to the guarantee of racial equality under the Fourteenth Amendment").
[146] 474 U.S. 214 (1985).
[147] 435 U.S. 78 (1978).
[148] Regents of the Univ. of Calif. v. Bakke, 438 U.S. 265, 319 n.53 (1978) (Powell, J.).
[149] Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 440 (1985).
[150] *Ewing*, 474 U.S. at 222–23.

of a genuinely academic decision"[151]—i.e., the "'academic performance of students and their entitlement to promotion or graduation.'"[152] Despite deferring to the University, the Court also examined the record, noting that the district court had found that the University "'had good reason to dismiss Ewing from the program,'" namely, his poor academic performance.[153] Even though one might argue that the Law School's implementation of an admissions policy is no different than the University's decision to dismiss Ewing, the crucial difference between the two cases is the application of strict scrutiny in *Grutter* and rational basis in *Ewing*.[154] While deference is permissible under the latter, it is inconsistent with the former.

Similarly, in *Horowitz*, the Court, applying rational-basis review, rejected the due-process claims of a medical student dismissed for poor academic performance.[155] The Court applied the balancing test from *Mathews v. Eldridge*[156] and concluded that the procedures used in dismissing Horowitz were sufficient to satisfy the Due Process Clause.[157] Although the majority noted that public education is committed to state and local authorities and judicial intervention in public education requires "care and restraint," it never expressly mentioned deference to the educational institution.[158] Indeed, the *Grutter* Court cited, not the majority opinion in *Horowitz*, but a footnote from Justice Powell's concurrence to support its deference to the Law School.[159] The footnote addressed giving discretion to university officials in decisions concerning the "academic performance of students and their entitlement to promotion or graduation," which was the same

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[151] *Id.*
[152] *Id.* at 225 n.11 (quoting *Horowitz*, 435 U.S. at 96 n.8 (Powell, J., concurring)). Decisions about the "academic performance of students and their entitlement to promotion or graduation" concern inherently educational judgments, similar to the business decisions that a Board of Directors makes in managing a corporation.
[153] *Id.* at 227 (quoting the district-court decision).
[154] *See* Buss, *supra* note 127, at 232 (characterizing *Ewing* as a "garden-variety deference of the judiciary to an institutional decision to dismiss a student for failing to meet academic standards").
[155] *Horowitz*, 435 U.S. at 79.
[156] Mathews v. Eldridge, 424 U.S. 319 (1976).
[157] *Horowitz*, 435 U.S. at 85.
[158] *Id.* at 91.
[159] Grutter v. Bollinger, 539 U.S. 306, 328–29 (2003) (citing *Horowitz*, 435 U.S. at 96 n.6 (Powell, J., concurring)).

type of deference at issue in *Ewing* under rational-basis review and inapplicable to the racial classification judged by strict scrutiny in *Grutter*. Even in *Ewing* and *Horowitz*, however, where a deferential standard was applicable, the deference accorded to the educational institution was not tantamount to a carte blanche to violate the Constitution. Had the educational institution not provided *any* process to the student (*e.g.*, dismissed the student after flipping a coin), the Court in both cases would have found a due-process violation.

As the final support for its deference to the Law School, the *Grutter* Court cited a footnote from Justice Powell's opinion in *Bakke*.[160] That footnote stated: "Universities . . . may make individualized decisions, in which ethnic background plays a part, under a presumption of legality and legitimate educational purpose. So long as the university proceeds on an individualized, case-by-case basis, there is no warrant for judicial interference in the academic process."[161] Even though this footnote certainly provides support for the *Grutter* majority, it was anything but clear before *Grutter* that Justice Powell's statement on this point was controlling. *Bakke* was a badly fractured decision and had left lower courts confused as to whether a majority of the Justices had signed on to any portion of the opinion.[162] It was not until *Grutter* that Justice Powell's opinion was cited by the Supreme Court as controlling. As a result, this footnote provided little—if any—precedential support to the *Grutter* Court's conclusions.

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

The *Grutter* Court stated at least three limitations to its deferential analysis. First, the Court limited its deference to institutions of higher education, which occupy a "special niche" under the First Amendment. Second, the Court's deference would be to an institution's

[160] *Grutter*, 539 U.S. at 329 (citing Regents of the Univ. of Calif. v. Bakke, 438 U.S. 265, 319 n.53 (1978)).
[161] *Bakke*, 438 U.S. at 319 n.53.
[162] *See* United States v. Miami, 614 F.2d 1322, 1337 (5th Cir. 1980) ("[T]he Justices [in *Bakke*] have told us mainly that they have agreed to disagree.").

"educational judgment." If the constitutional challenge is to a policy unrelated to the educational purposes of the institution, then deference presumably would be improper. Third, the Court noted that the Law School's admissions criteria did not constitute a quota system, reiterating Justice Powell's holding in *Bakke* that racial quotas are unconstitutional.[163]

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

Even though the *Grutter* Court limited its holding to higher-education institutions, was there a sound legal basis for so doing? This limitation was based in part on the Court's assertion that universities are training grounds for the Nation's future leaders. This would limit the Court's deference to those institutions that similarly train leaders. But it is not only higher-education institutions that educate and produce leaders for the Nation's future. Suppose the Department of Justice forms a new division, which promises incomparable opportunities to bright law-school graduates, in part to prepare these young lawyers for lucrative leadership

[163] Grutter v. Bollinger, 539 U.S. 306, 335 (2003).

positions in government. Would deference be proper to the Department of Justice's decision to facilitate diversity in its new division by using race as a "plus" factor in making employment offers? If the Court's basis for deference to the Law School was the facilitation of a marketplace of ideas in an institution that develops leaders, the new division of the Department of Justice would be just as deserving of deference.

In addition to deferring to universities because they are training grounds for future leaders, the Court also reasoned that higher-education institutions make complex educational judgments that lie beyond the competence of the judiciary. This argument would be equally applicable to many institutions outside the higher-education context. The Department of Justice in the above hypothetical or the City of New Haven Fire Department in *Ricci* also makes complex decisions related to that institution that are just as much—if not more—beyond the competence of the judiciary as the educational judgments of a university. After all, four Justices on the current Court (Justices Scalia, Kennedy, Ginsburg, and Breyer) are former academics; the Court undoubtedly knows more about running a higher-education institution than a fire department or the Department of Justice. If such institution decides to use race as a factor in hiring decisions, what would justify distinguishing it from a higher-education institution?[164]

These hypothetical slippery-slope scenarios have practical grounding. At least one federal circuit court took *Grutter*'s deference out of the campus grounds and applied it to the employment context. In *Petit v. City of Chicago*, the Seventh Circuit upheld a policy of the Chicago Police Department that standardized the applicants' raw scores in promotion

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

examinations in a way that advantaged minorities.[165] The purpose of the policy was to create and maintain a diverse police department.[166] In support of its holding that the Chicago Police Department has a compelling interest in diversity, the court expressly relied on *Grutter* and deferred to "the views of experts and Chicago police executives that affirmative action [is] warranted to enhance the operations" of the Department.[167]

Employers are not the only institutions that might benefit from *Grutter*'s deference. Scholars have argued for the extension of *Grutter*'s deference to a plethora of other organizations—including libraries, news organizations, churches, and corporations.[168] Given the lack of coherent boundaries to *Grutter*'s reasoning, the deference applied in that case is unlikely to remain within the higher-education context.

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

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[165] Petit v. Chicago, 352 F.3d 1111, 1118 (7th Cir. 2003). According to Professor Estlund, the *Grutter* Court "seems to endorse the 'business case for diversity' itself." Cynthia L. Estlund, *Putting* Grutter *to Work: Diversity, Integration, and Affirmative Action in the Workplace*, 26 BERKELEY J. EMP. & LAB. L. 1, 20 (2005). "The proponents of workforce diversity will rightly take comfort in the majority's affirmation that student body diversity 'better prepares students for an increasingly diverse workforce and society,' and its reliance on corporate amici's contention that 'the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints.'" *Id.*

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

[167] *Id.*; *see also Lomack v. City of Newark*, No. Civ. A. 04-6085 (JWB), 2005 WL 2077479, at *6-*7 (D.N.J. Aug. 25, 2005) (applying *Grutter* to uphold the City of Newark's race-conscious policy to diversify its firehouses), *rev'd*, 463 F.3d 303 (3d Cir. 2006); Adams, *supra* note 95, at 980 ("Lower courts relied on *Grutter*'s more expansive vision of the governmental interest and its relaxed brand of narrow tailoring, and imported those innovations outside of the higher education context.").

[168] Elizabeth Dale, *Death or Transformation? Educational Autonomy in the Roberts Court*, 43 TULSA L. REV. 725, 728 (2008); Horwitz, *Easy Answers*, *supra* note 99, at 1502 ("[A] number of other institutions—the press, religious associations, libraries, and others . . . should enjoy substantial deference from courts . . . .").

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

A. Background

United States v. Virginia concerned an equal-protection challenge by the United States to the male-only admissions policy of the Virginia Military Institute ("VMI").[169] A public higher-education institution, VMI provided "incomparable" education to men and trained them to be "citizen-soldiers."[170] VMI used the "adversative method" of teaching—characteristic of traditional military instruction—seeking to instill in students a strong moral code via "'[p]hysical rigor, mental stress, absolute equality of treatment, absence of privacy, minute regulation of behavior, and indoctrination in desirable values.'"[171] VMI's unique educational method had proved to be rather fruitful; members of Congress, military generals, and business executives were among its impressive list of alumni.[172]

The district court applied intermediate scrutiny to VMI's single-sex policy and rejected the United States' equal-protection challenge.[173] The court found that the admission of women would necessitate fundamental changes in VMI's distinct adversative method,[174] which provided a sufficient constitutional justification for upholding its admissions policy.[175]

The Fourth Circuit reversed.[176] The proffered purpose of VMI's policy—the promotion of "autonomy and diversity"—could not survive constitutional scrutiny because the policy favored one gender while disadvantaging the other.[177] But the Fourth Circuit agreed with the district court that the admission of women would materially affect VMI's training program and

[169] United States v. Virginia, 518 U.S. 515, 519 (1996).
[170] *Id.* at 526.
[171] *Id.* at 520, 522 (quoting the district court's decision).
[172] *Id.* at 520.
[173] *Id.* at 523.
[174] *Virginia*, 518 U.S. at 524.
[175] *Id.*
[176] *Id.*
[177] *Id.* at 525.

thus provided three options to the Commonwealth of Virginia to remedy its constitutional violation: (1) establish a parallel institution for women; (2) allow the admission of women to VMI; or (3) withdraw state support from VMI.[178]

The Commonwealth opted for the first option, proposing the Virginia Women's Institute for Leadership ("VWIL").[179] But VWIL was fundamentally different from VMI because it lacked VMI's military model of education, which the Task Force in charge of designing VWIL found to be unsuitable for most women.[180] Instead, VWIL implemented a "'a cooperative method [that] reinforces self-esteem.'"[181] The district court held that the establishment of VWIL satisfied the Commonwealth's obligations under the Equal Protection Clause because VMI and VWIL would "'achieve substantially similar outcomes.'"[182] The Fourth Circuit affirmed the district court's decision, applying what the majority of the Supreme Court described as a deferential analysis to the Commonwealth.[183]

The Supreme Court, in a 7–1 decision, reversed the Fourth Circuit.[184] The Court applied intermediate scrutiny—which governs classifications on the basis of gender—and required the State to show: (1) an "exceedingly persuasive justification" for the single-sex policy and (2) the use of means "'substantially related to the achievement'" of that purpose.[185] Under intermediate scrutiny, the State's proffered purpose had to be "genuine, not hypothesized or invented *post hoc*

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[178] *Id.* at 525–26.
[179] *Virginia*, 518 U.S. at 526.
[180] *Id.* at 526–27.
[181] *Id.* at 527 (quoting the district court's decision).
[182] *Id.* at 528 (quoting the district court's decision).
[183] *Id.*
[184] *Virginia*, 518 U.S. at 519. Justice Thomas recused himself from participation in this case.
[185] *Id.* at 533 (quoting Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982)). The Court interchangeably referred to the requirement under the first prong of this test as "important governmental objective" and "exceedingly persuasive justification." *See, e.g.*, *id.* Justice Scalia, dissenting, criticized the latter characterization of the first prong, arguing that it amounted to strict scrutiny in disguise. *Id.* at 571–72 (Scalia, J., dissenting); s*ee also id.* at 559 (Rehnquist, C.J., concurring) ("While terms like 'important governmental objective' and 'substantially related' are hardly models of precision, they have more content and specificity than does the phrase 'exceedingly persuasive justification.' That phrase is best confined, as it was first used, as an observation on the difficulty of meeting the applicable test, not as a formulation of the test itself.").

in response to litigation" and could not rely on "overbroad generalizations about the different talents, capacities, or preferences of males and females."[186] The burden of persuasion in meeting these requirements was "demanding" and rested "entirely on the State."[187]

The Court first analyzed Virginia's purported purposes for drawing a gender-based classification: (1) the provision of important educational benefits that inhere to single-sex education, including the contribution of single-sex education to "diversity in educational approaches" and (2) the preservation of VMI's adversative method, which VMI would have to modify if it admitted women.[188] First, the Court refused to defer to VMI's asserted interest in diversity, holding that it failed to establish that the exclusion of women diversified educational opportunities in Virginia.[189] The Court emphasized that VMI's justification would "not be accepted automatically" and engaged in an exacting inquiry into whether VMI's proffered interest in diversity had any substance.[190] Examining in detail the history of VMI, its internal reports, history of other higher-education institutions in Virginia, and testimony from the record, the Court found no "persuasive evidence . . . that VMI's male-only admission policy is in furtherance of a stated policy of diversity."[191]

Second, VMI asserted that the admission of women would "destroy" VMI's unique educational method.[192] The district court found that "coeducation would materially affect 'at least these three aspects of VMI's program—physical training, the absence of privacy, and the adversative approach.'"[193] The Court refused to defer to VMI's proffered interest in maintaining its unique training method and rejected the district court's findings of fact. It held that these

[186] *Id.* at 533 (majority opinion).
[187] *Id.*
[188] *Id.* at 535 (internal quotation marks omitted).
[189] *Virginia*, 518 U.S. at 535–40.
[190] *Id.* at 535–36.
[191] *Id.* at 535–40.
[192] *Id.* at 540.
[193] *Id.* at 540–41 (quoting the district court's opinion).

findings amounted to unacceptable overbroad generalizations and "'fixed notions concerning the roles and abilities of males and females.'"[194] Citing historical evidence, such as the successful admission of women into the military, the Court noted that "Virginia's fears for the future of VMI may not be solidly grounded."[195] The Court therefore concluded that Virginia failed to establish an "exceedingly persuasive justification" for VMI's male-only admissions policy.[196]

Finally, the Court examined VWIL, Virginia's proposed female-only counterpart to VMI. The Court held that VWIL did "not qualify as VMI's equal" because "VWIL's student body, faculty, course offerings, and facilities" did not match VMI's.[197] Moreover, VWIL graduates could not "anticipate the benefits associated with VMI's 157-year history, the school's prestige, and its influential alumni network."[198] The Court went on to criticize the Fourth Circuit's deferential review to Virginia's proposal of VWIL, noting that deference is "inconsistent with the more exacting standard our precedent requires."[199] The Court stated that the Fourth Circuit's deferential approach yielded "little or no scrutiny of the effect of a classification directed at [single-gender education]."[200] Under these standards, VMI's male-only admissions policy violated the Equal Protection Clause of the Fourteenth Amendment.[201]

B. Similarities Between Grutter *and* Virginia

The similarities between *Grutter* and *Virginia* are striking. First, both cases concerned admission to elite institutions of higher learning. The University of Michigan Law School was

[194] *Virginia*, 518 U.S. at 541 (quoting Miss. Univ. for Women v. Hogan, 458 U.S. 718, 725 (1982)).
[195] *Id.* at 544–45.
[196] *Id.* at 546.
[197] *Id.* at 551.
[198] *Id.*
[199] *Virginia*, 518 U.S. at 555.
[200] *Id.* (internal quotation marks omitted) (alteration in original).
[201] *Id.* at 519.

"among the Nation's top law schools,"[202] and VMI was an "incomparable military college" with overwhelming alumni support and success at producing leaders.[203]

Second, the challenges in both cases concerned the institutions' "educational judgment," which, under *Grutter*'s reasoning, would deserve deference under the First Amendment. Specifically, the educational judgment at issue in both cases was the adoption of an admissions policy. As Justice Powell noted in his opinion in *Bakke*—which the *Grutter* Court accepted as controlling—a university must be allowed "to make its own judgments as to education[,] includ[ing] the selection of its student body."[204]

Third, both the Law School and VMI offered the same objective for drawing protected classifications in their admissions policies: the achievement of diversity. VMI argued that diversity is an important governmental objective and that single-sex schools can contribute to the attainment of diversity by "dissipat[ing,] rather than perpetuat[ing,] traditional gender classifications."[205] Likewise, the Law School offered—and the *Grutter* Court accepted via deference—a compelling interest in the achievement of diversity via the enrollment of a critical mass of minority students. If diversity is a "compelling" interest under strict scrutiny, it follows, *a fortiori*, that it is an "important" interest under the less exacting intermediate-scrutiny test.[206]

Rather than deferring to VMI's assertion that its interest in diversity was an "important" state interest—as did the *Grutter* Court—the *Virginia* Court held, after a meticulous analysis, that VMI's male-only admissions policy did not further its asserted diversity interest.[207] In contrast, the *Grutter* Court failed to scrutinize whether the Law School's stated interest in

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[202] Grutter v. Bollinger, 539 U.S. 306, 312–13 (2003).
[203] *Virginia*, 518 U.S. at 519.
[204] Regents of the Univ. of Calif. v. Bakke, 438 U.S. 265, 312 (1978).
[205] *Virginia*, 518 U.S. at 533 n.7.
[206] Even though both VMI and the Law School asserted that "diversity" was the purpose of their admissions policies, the diversity each sought to achieve was different in kind. *See infra* Part III.C.
[207] *Virginia*, 518 U.S. at 539-40.

diversity was its actual purpose behind its race-conscious admissions policy.[208] Even though strict scrutiny is a more exacting test than intermediate scrutiny, the *Virginia* Court engaged in a more exacting analysis under intermediate scrutiny than did the *Grutter* Court under strict scrutiny.

Fourth, both VMI and the Law School asserted that interference by the Court with their admissions policies would sacrifice the educational benefits of each institution. VMI asserted that the admission of females would require a "dramatic sacrifice" of the adversative method and the academic quality of its students. Indeed, the district court in VMI made a fact finding that, were females admitted, "some aspects of [VMI's] distinctive method would be altered'"[209] and VMI would "eventually find it necessary to drop the adversative system altogether."[210] Despite these findings that the Court cannot overturn absent clear error,[211] the majority rejected them by engaging in a virtual *de novo* analysis of the record. The Court refused to defer to VMI's educational judgment and held that VMI could alter its educational policy to allow the admission of females without having to forgo its adversative education method.[212]

Like VMI, the Law School maintained that a race-neutral admissions policy would "reduce 'academic selectivity'" and turn the Law School into a "very different institution" by forcing it to "sacrifice a core part of its educational mission."[213] The *Grutter* majority concluded, by deferring to the Law School, that a race-neutral admissions policy would

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[208] *See supra* Part II.A.1.

[209] *Virginia*, 518 U.S. at 524 (quoting the district-court opinion). That only *some* aspects of VMI's distinctive training method would be altered does not distinguish that case from *Grutter*. Adoption of race-neutral criteria likewise would have affected only *some* aspects of the Law School's educational policy—namely, the retention of its elite status.

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

[211] *Id.* at 589 n.5 ("The Court's do-it-yourself approach to factfinding . . . is contrary to our well-settled rule that we will not 'undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error . . . .'" (quoting Graver Tank & Mfg. Co. v. Linde Air Prods. Co., 336 U.S. 271, 275 (1949))).

[212] *Id.* at 550 n.19 (majority opinion).

[213] Grutter v. Bollinger, 539 U.S. 306, 355 (2003) (Thomas, J., concurring in part, dissenting in part).

necessitate a "dramatic sacrifice of diversity, the academic quality of all admitted students, or both."[214] The Court did not cite any evidence in the record for this proposition and dismissed in one paragraph the race-neutral methods that the district court had found the Law School failed to consider.[215] Rather, the *Grutter* Court took the Law School "at its word" that it would implement a race-neutral policy as soon as it found one that would not require fundamental changes in the school's prestigious status.[216]

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

Given the similarities between *Grutter* and *Virginia*, what justified the use of deference in *Grutter* but its rejection in *Virginia*? There are three potentially material differences between the two cases. First, the gender-based discrimination in *Virginia* excluded females, but the race-conscious admissions policy in *Grutter* included a critical mass of minority students. Perhaps, the Court in both cases was attempting to facilitate the admission of underrepresented students to elite educational institutions and ensure their inclusion among the leaders that both institutions produce. While this may be a noble cause, it is unconstitutional. The Supreme Court has consistently held that heightened scrutiny applies to *all* protected classifications—whether they seek to include or exclude a protected class.[217] Under this precedent, the same test would apply

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[214] *Id.* at 340 (majority opinion).
[215] *Id.*
[216] *Id.* at 340, 343. Deference to the Law School on this point was critical to the Court's decision because, according to the Court, race-conscious admissions policies have to be "limited in time" to be constitutional. *Id.* at 342.
[217] *See* Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 225–26 (1995); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493–94 (1989); *see also* Ricci v. DeStefano, 129 S. Ct. 2658, 2674 (2009) ("Whatever the City's ultimate aim—however well intentioned or benevolent it might have seemed—the City made its employment decision because of race."). As the Court later explained in *Parents Involved*:

> The reasons for rejecting a motives test for racial classifications are clear enough. "The Court's emphasis on 'benign racial classifications' suggests confidence in its ability to distinguish good from harmful governmental uses of racial criteria. History should teach greater humility . . . . '[B]enign' carries with it no independent meaning, but reflects only acceptance of the current generation's conclusion that a politically acceptable burden, imposed on particular citizens on the basis of race, is reasonable."

regardless whether the Law School in *Grutter* sought to include or exclude minority students and regardless whether VMI sought to include or exclude females.

Second, the difference between the outcomes also cannot be explained by the difference in the applicable tests. The *Virginia* Court applied intermediate scrutiny, requiring the state to show an "important" or "exceedingly persuasive" objective, and means substantially related to the achievement of that objective. In contrast, the *Grutter* Court applied strict scrutiny, requiring the state to show a "compelling" interest and narrowly tailored means to achieve that interest. Because strict scrutiny imposes a burden more difficult to meet than intermediate scrutiny, the non-deferential approach in *Virginia* cannot be reconciled on this basis with the *Grutter* Court's deferential analysis.

But the difference in the applicable tests between *Grutter* and *Virginia* does not mean that the *Virginia* Court should have deferred to the educational judgment of VMI and upheld its admissions policy. Deference is inconsistent with intermediate scrutiny for the same reason it is incompatible with strict scrutiny: under both tests, the government bears the burden of persuasion. While the state's interest in drawing a gender classification need not be as compelling nor its means as narrowly tailored, deference is no more proper under intermediate scrutiny. The ultimate burden of persuasion is an all-or-nothing matter: either a party bears the burden of persuasion or it does not. The *Virginia* Court correctly pointed out that "[t]he burden of justification [under intermediate scrutiny] is demanding and it rests *entirely* on the State."[218] Only the rational-basis test, under which the party challenging the state action bears the burden of persuasion, allows room for deference to the government.

Third, even though both VMI and the Law School asserted an interest in diversity, the

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Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 742 (2007) (quoting Metro Broadcasting, Inc. v. F.C.C., 497 U.S. 547, 609-610 (1990) (O'Connor, J., dissenting)).

[218] United States v. Virginia, 518 U.S. 515, 533 (1996) (emphasis added).

diversity each sought to achieve was different in kind. The Law School sought to include a critical mass of minority students in its own student body. In contrast, VMI's diversity interest was not in its own student body, but in maintaining single-sex institutions among the many other schools in Virginia. Even though universities enjoy educational autonomy under the First Amendment, that autonomy protects the decisions universities make with respect to their own policies. A broader diversity interest among all educational institutions in Virginia may not fall within the ambit of the autonomy accorded to higher-education institutions.

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

The diversity interests in *Virginia* and *Grutter* were different in another respect. VMI's interest in educational diversity benefited only males because no female-only public institution of VMI's caliber existed in Virginia.[219] In contrast, the diversity interest of the Law School in *Grutter* may have benefited all students, not just racial minorities. Racial minorities benefited from the Law School's admissions criteria because, with race considered as a plus factor, they had a better chance of getting admitted to the Law School. In addition, the rest of the student body also may have benefited from the Law School's admissions policy because they were exposed to different viewpoints and better trained for a diverse society and workforce than they

[219] *Id.* at 562 (Rehnquist, C.J., concurring).

may have been if the Law School employed a race-neutral admissions policy.[220] But the Law School's policy harmed those applicants who would have been admitted to the Law School were a race-neutral admissions policy in place. Thus, even though the Law School's policy may have benefited all *enrolled* students, it still harmed—similar to VMI's policy—a class of *applicants* solely because of their race.

In sum, there is no meaningful way to reconcile the Court's decisions in *Grutter* and *Virginia*. The only substantive difference between the two cases seems to be that the classification in *Grutter* was purportedly "benign," whereas the classification in *Virginia* was patently "discriminatory." As stated above, however, such distinction lacks any constitutional significance because the same heightened scrutiny applies to both classifications.

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

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

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

[220] *See* Grutter v. Bollinger, 539 U.S. 306, 330–33 (2003).

A. The Majority's Non-Deferential Analysis

Johnson v. California concerned an equal-protection challenge to the California Department of Corrections' ("CDC") policy of racially segregating prisoners for up to sixty days upon admittance to a correctional facility.[221] While other factors played a role in the cell-assignment process, race was the predominant factor.[222] Numerous incidences of race-based violence among prisoners, most of whom belonged to violent gangs, required this policy.[223] California prison officials testified that were prisoners not segregated according to their race, racial conflict and violence was certain to result.[224] Segregation was limited to the cells in the initial reception areas, and the rest of the prison facilities were fully integrated.[225]

In an opinion by Justice O'Connor—the author of *Grutter*—the Supreme Court applied strict scrutiny to the prison policy.[226] Justice O'Connor reaffirmed that strict scrutiny governed all racial classifications, whether benign or discriminatory[227] and whether or not they "'may be said to burden or benefit the races equally.'"[228] The Court reasoned that a "'searching judicial inquiry'" was necessary to determine "'what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics.'"[229] Previously, the Court had applied a deferential standard of review to prison officials in *Turner v. Safley*, which challenged a prison regulation that restricted the inmates' right to marry and correspond with other inmates.[230] Under *Turner*, a prison policy that burdened the inmates' constitutional rights would be upheld if

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[221] Johnson v. California, 543 U.S. 499, 502 (2005).
[222] *Id.* In addition to race, the prison officials also considered geographic and national origin, "age, mental health, medical needs, criminal history, and gang affiliation." *Id.* at 527 (Thomas, J., dissenting).
[223] *Id.* at 502–03 (majority opinion); *see also id.* at 526–27 (Thomas, J., dissenting).
[224] *Id.* at 502–03 (majority opinion).
[225] *Id.* at 503.
[226] *Johnson*, 543 U.S. at 503.
[227] *Id.* at 505.
[228] *Id.* at 506 (quoting Shaw v. Reno, 509 U.S. 630, 651 (1993)).
[229] *Id.* (quoting Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (plurality opinion)).
[230] *Id.* at 509–10 (discussing Turner v. Safley, 482 U.S. 78, 89 (1987)).

the policy was "reasonably related" to "legitimate penological interests"—which is similar to rational-basis review.[231] But the Court concluded that *Turner*'s deferential standard of review did not apply to this case because a suspect classification—race—was at issue.[232]

The prison officials asked the Court to defer to them on the legality of their segregation policy. After all, these officials had special expertise in managing prison operations—just as the university officials in *Grutter* had special expertise in managing law schools. The Court declined. Justice O'Connor noted, with no mention of *Grutter*, that the Court had "refused to defer to state officials' judgments on race in other areas where those officials traditionally exercise substantial discretion."[233] According to the Court, "'[m]echanical deference'" to the state prison officials would reduce constitutional protections to a nullity.[234]

Justice O'Connor criticized the dissent's deferential approach. She asserted that a "hands-off approach to racial classifications" is "fundamentally at odds with [the Court's] equal protection jurisprudence."[235] Under the Court's jurisprudence, the burden was on the "state actors to demonstrate that their race-based policies are justified"[236] and the deferential standard of *Turner* would be "too lenient" to "ferret out invidious uses of race."[237] *Turner* would allow prisons to draw racial classifications even when race-neutral methods existed to accomplish the same purpose.[238] Under *Turner*'s deferential review, the Court would have to defer to simple assertions by prison officials that racial segregation was necessary to prison management.[239] This the Court could not do.

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[231] *Johnson*, 543 U.S. at 509-10 (quoting *Turner*, 543 U.S. at 509-10).
[232] *Id.* at 510.
[233] *Id.* (citing Batson v. Kentucky, 476 U.S. 79, 89–96 (1986); Shaw v. Reno, 509 U.S. 630 (1993)).
[234] *Id.* at 511 (citing Spain v. Procunier, 600 F.2d 189 (9th Cir. 1979) (Kennedy, J.)).
[235] *Id.* at 506 n.1.
[236] *Johnson*, 543 U.S. at 506 n.1, 513.
[237] *Id.* at 513.
[238] *Id.*
[239] *Id.* at 514.

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

B. The Dissent's Deferential Analysis

Justice Thomas, joined by Justice Scalia, dissented and contended that the deferential standard from *Turner* should apply.[240] According to the dissent, even when prison officials drew racial classifications, deference to their reasonable and expert judgments was proper for three reasons.[241] First, federal courts had traditionally deferred to prison officials on matters concerning the administration of state prisons.[242] Second, incarcerated persons did not enjoy the full panoply of constitutional rights as other persons.[243] And third, federal courts were ill-equipped "to supervise the daily operations of prisons."[244] The challengers therefore had to make a "compelling showing . . . to overcome the deference" given to prison officials.[245] Justice Thomas applied a deferential analysis in the prison context even though in a concurrence two years later in *Parents Involved*, he would state that "as a general rule, all race-based government

[240] *Id.* at 524 (Thomas, J., dissenting).
[241] *Johnson*, 543 U.S. at 524.
[242] *Id.* at 528.
[243] *Id.* (Thomas, J., dissenting). Some exceptions to this rule include the right to due process and the right to free exercise of religion. *Id.*
[244] *Id.* at 529–30.
[245] *Id.* at 543.

decisionmaking—*regardless of context*—is unconstitutional."[246]

Turning to the merits, the dissent would uphold the policy under *Turner*'s deferential standard. The record supported the California prison officials' belief that racial integration in the reception centers would lead to "serious violence."[247] This interest in protecting inmates from gang violence, according to the dissent, constituted a "legitimate penological interest."[248]

Further, California's racial-segregation policy bore a rational relationship to this penological interest because the use of race was inevitable in a prison system where most prisoners were members of gangs that divided themselves along racial lines.[249] The challengers had not shown any "'obvious, easy alternatives'" to the racial-segregation policy.[250] Further, the segregation policy applied only at reception centers, and the rest of the prison areas were fully integrated.[251] As a result, the policy survived the deferential *Turner* standard.

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

The majority in *Johnson* was correct in applying strict scrutiny. At issue was a racial classification on the face of a government-sponsored policy. But the Court's deference to the Law School in *Grutter* and its refusal to defer to the prison officials in *Johnson* cannot be reconciled. The *Johnson* Court's analysis proceeded on the assumption that the applicable test was *either* strict scrutiny *or* the deferential *Turner* standard.[252] The Court did not consider the possibility that it had endorsed in *Grutter* of combining strict scrutiny with deference. The Court could have held that strict scrutiny was the correct standard but deferred, as in *Grutter*, to the

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[246] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 752 (2007) (Thomas, J., concurring) (emphasis added).
[247] *Johnson*, 543 U.S. at 532–34, 537 (Thomas, J., dissenting).
[248] *Id.* at 534–35.
[249] *Id.* at 535.
[250] *Id.* at 537.
[251] *Id.* at 536.
[252] *Johnson*, 543 U.S. at 509 (majority opinion) ("The CDC invites us to make an exception to the rule that strict scrutiny applies to all racial classifications, and *instead* to apply the deferential standard of review articulated in *Turner* . . . ." (emphasis added)).

judgment of the prison authorities on whether preventing prison violence was a compelling interest and whether segregating inmates according to their race was narrowly tailored to achieving that interest.

The *Johnson* majority did not explain why *Grutter* was distinguishable.[253] Both cases addressed an equal-protection challenge to a policy that drew a racial classification on its face. Both cases involved institutions that make complex judgments in which federal courts are ostensibly ill-advised to intervene.[254] What justified, then, deferring to the Law School in *Grutter* but applying a non-deferential strict scrutiny standard in *Johnson*? If, as the *Johnson* Court noted, "deference is fundamentally at odds with [the Court's] equal-protection jurisprudence," why was deference acceptable two terms before in *Grutter*? Why would the use of race undermine "public respect for our system of [criminal justice]" but not public respect for our education system?[255] The *Johnson* majority held that the deferential *Turner* standard was inapplicable, carving an exception to the applicability of that standard to prison policies that draw racial classifications. If deference should not be accorded to prison authorities on policies that draw classifications based on race, why must deference be given to higher-education institutions on *all* educational policies—even when they draw racial classifications?

One factor could potentially distinguish *Grutter* from *Johnson*. In *Grutter*, race was considered as a "plus" factor among other factors in deciding whom to admit to the Law School. In contrast, in *Johnson*, race was the predominant factor in segregating inmates. But this difference between *Grutter* and *Johnson* is likely to be material only when the Court reaches the

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

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

[255] *Johnson*, 543 U.S. at 511.

narrow-tailoring analysis on the merits of the case. That is, the use of race as the predominant factor (as opposed to one factor among many) is less likely to be narrowly tailored to achieving a compelling interest and thus more likely to be unconstitutional. This difference is not relevant, however, to determine what *test* to apply to the policy—a question that the Court must decide before it proceeds to the merits of the case.

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

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

Two school districts—one in Seattle, Washington and the other in Jefferson County, Kentucky—voluntarily adopted student-assignment plans that relied on race to determine which public schools students may attend.[256] To put it crudely, Seattle and Jefferson County placed school children into separate baskets for "white," "black," or "non-white" like apples and oranges and used those racial labels to assign students to schools.[257] Take Joshua McDonald, a kindergartener in Jefferson County. The government denied him admission to the kindergarten closest to his home because of his race. Until the government used Joshua's race to tell him where he could or could not go to school, he probably was unaware of the meaning or significance of "white" and "black." "Poor Joshua!"[258] Reduced to a racial label before he could

[256] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 709-10 (2007).
[257] *See id.*
[258] DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189 (1989) (Blackmun, J., dissenting).

even form his own identity, Joshua began his education in the United States of America.[259]

The *Parents Involved* case concerned a challenge under the Equal Protection Clause to the race-based assignment plans that denied students such as Joshua the opportunity to attend the schools of their choice. The Ninth Circuit, which considered the Seattle plan, applied strict scrutiny and upheld the plan as constitutional. Relying primarily on *Grutter*, the Ninth Circuit reasoned that Seattle has a compelling interest in attaining the educational and social benefits of racial diversity and in preventing racial isolation and concentration in its schools.[260] The Ninth Circuit further concluded that Seattle's assignment plan was narrowly tailored to serve its compelling interest in diversity.[261] In its analysis, the Ninth Circuit gave deference to the Seattle school district under *Grutter*, reasoning that secondary schools, like higher-education institutions, "occupy a unique position in our constitutional tradition."[262] In his dissent, Judge Bea took issue with the majority's deferential analysis: "[T]he majority conceives of strict scrutiny as some type of relaxed, deferential standard of review. I view it differently."[263]

Likewise, the Sixth Circuit, which considered the Jefferson County plan, upheld that plan as constitutional.[264] Also relying on *Grutter*, the court held that Jefferson County had a compelling interest in maintaining integrated schools and that its raced-based assignment plan was narrowly tailored to achieving that interest.[265] The court underscored the "historical importance of deference accorded to local school boards" and noted that such deference went "to

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[259] *Cf. Parents Involved*, 551 U.S. at 797 (Kennedy, J., concurring) ("Under our Constitution the individual, child or adult, can find his own identity, can define her own persona, without state intervention that classifies on the basis of his race or the color of her skin.").
[260] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., No. 1, 426 F.3d 1162, 1166 (9th Cir. 2005) (en banc), *rev'd* 551 U.S. 701.
[261] *Id.* at 1180.
[262] *Id.* at 1188 n.33.
[263] *Id.* at 1199 (Bea, J., dissenting).
[264] McFarland v. Jefferson County Public Sch., 330 F. Supp. 2d 834, 837 (W.D. Ky. 2004), *aff'd* 416 F.3d 513 (6th Cir. 2005), *rev'd* 551 U.S. 701.
[265] *Id.* at 850, 861-62.

the very heart of our democratic form of government."[266]

These cases eventually made their way to the United States Supreme Court. In a four-Justice plurality opinion authored by Chief Justice Roberts and joined by Justices Scalia, Thomas, and Alito, the Supreme Court reversed the Sixth and Ninth Circuits, holding that the school districts' race-based assignment plans violated the Equal Protection Clause.[267] Because the plans classified students according to their race, the Court applied strict scrutiny.[268] Under long-standing precedent, the Court held that strict scrutiny was the controlling test regardless whether the government's motives in drawing racial classifications were benign or malicious.[269] The assignment plans would fall if they did not further a compelling interest or did not employ narrowly tailored means to achieve that compelling interest.[270]

On the compelling-interest prong, the plurality noted that in the school context, two interests had qualified as compelling in previous decisions: (1) remedying the effects of past intentional discrimination and (2) the interest in diversity in higher-education institutions upheld in *Grutter*.[271] The first interest was not at issue. Seattle public schools never had been segregated by law.[272] Although Jefferson County schools were once segregated by law and subject to a desegregation decree, the decree had been dissolved in 2000 after a district-court finding that Jefferson County had eliminated the vestiges associated with its former segregation policy.[273]

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[266] *Id.* at 850.
[267] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 709-11 (2007).
[268] *Id.* at 720.
[269] *Id.* at 741-42 (quoting Johnson v. California, 543 U.S. 499, 505 (2005) ("We have insisted on strict scrutiny in every context, even for so-called 'benign' racial classifications"); Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 500 (1989) ("Racial classifications are suspect, and that means that simple legislative assurances of good intention cannot suffice.")).
[270] *Parents Involved*, 551 U.S. at 741-42.
[271] *Id.* at 720-22.
[272] *Id.* at 720.
[273] *Id.*

As to the second government interest in diversity recognized in *Grutter*, the plurality concluded that this diversity interest did not apply to elementary and secondary schools. The plurality noted that in upholding diversity as a compelling interest, *Grutter* had relied upon considerations unique to higher-education institutions—such as the expansive freedoms of speech and thought associated with the university environment and the "special niche" universities occupied "in our constitutional tradition."[274] These considerations, according to the plurality, were absent from K-12 schools.[275]

But the plurality was unsuccessful in its attempt to nail the coffin shut on *Grutter* and confine that case to higher-education institutions. Justice Kennedy concurred separately to note his disagreement with the plurality's analysis on this point. Consistent with the views of the four dissenting Justices,[276] Justice Kennedy would hold that the diversity interest recognized in *Grutter* may be, "depending on its meaning and definition," a compelling interest for primary and secondary schools.[277]

On the narrowly-tailored-means prong, the plurality, joined by Justice Kennedy, held that the race-based assignment plans were not necessary to achieve the school districts' stated interests.[278] The race-based classifications shifted only a small number of students between schools and therefore had minimal effect on student assignments—suggesting that other means

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[274] *Id.* at 724.
[275] *Parents Involved*, 551 U.S. at 724-25.
[276] *Id.* at 842 (Breyer, J., dissenting) ("In light of this Court's conclusions in *Grutter*, the 'compelling' nature of these interests in the context of primary and secondary public education follows here *a fortiori*. Primary and secondary schools are where the education of this Nation's children begins, where each of us begins to absorb those values we carry with us to the end of our days.").
[277] *Id.* at 797-98 (Kennedy, J., concurring) ("[A] district may consider it a compelling interest to achieve a diverse student population."); *id.* at 783 ("The plurality, by contrast, does not acknowledge that the school districts have identified a compelling interest here."); *id.* at 788 ("To the extent the plurality opinion suggests the Constitution mandates that state and local school authorities must accept the status quo of racial isolation in schools, it is, in my view, profoundly mistaken."). Justice Kennedy cautioned, however, that although race may be one component of this diversity interest, "other demographic factors, plus special talents and needs, should also be considered." *Id.* at 798.
[278] *Id.* at 733 (plurality opinion).

would be just as, if not more, effective in achieving diversity.[279] Further, the school districts had failed to show that they had seriously considered race-neutral alternatives to achieve their stated goals.[280] Unlike the *Grutter* Court, which allowed the Law School to reject race-neutral alternatives that might sacrifice its elite status, the *Parents Involved* Court required the school districts to give them serious consideration regardless of any undesirable consequences.

In a portion of the opinion that Justice Kennedy refused to join, the plurality rejected the dissent's pleas for deference to the school districts.[281] According to the plurality, the "good faith" of the school districts did not suffice to uphold their race-based assignment plans.[282] Contrast the plurality's statement in *Parents Involved* to the majority's holding in *Grutter*, where the Court expressly presumed "good faith" on the part of the Law School "absent a showing to the contrary."[283]

The dissent, authored by Justice Breyer and joined by Justices Stevens, Ginsburg, and Souter, rejected the majority's application of strict scrutiny. Justice Breyer argued that a different standard of review should apply where, as here, the government used race for beneficial rather than malignant purposes.[284] According to Justice Breyer, the plans should be evaluated under a "standard of review that is not 'strict' in the traditional sense of that word."[285] Under this diluted version of strict scrutiny, the government's race-conscious actions would be upheld if the action "is proportionate to the important ends it serves."[286] Justice Breyer's version of strict scrutiny seems to lie somewhere between the rational-basis test, which requires means rationally

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[279] *Id.*
[280] *Parents Involved*, 551 U.S. at 735.
[281] *Id.* at 744.
[282] *Id.*
[283] Grutter v. Bollinger, 539 U.S. 306, 329 (2003) (citation and internal quotation marks omitted).
[284] *Parents Involved*, 551 U.S. at 833-34 (Breyer, J., dissenting).
[285] *Id.* at 837.
[286] *Id.* at 837.

related to legitimate ends,[287] and intermediate scrutiny, which requires means substantially related to the achievement of important ends.[288] This deferential strict-scrutiny test incorporates the means part of the rational-basis test—"proportionate" or "rationally related"—and the ends of part of the intermediate-scrutiny test—"important" interests. Justice Kennedy described the dissent's standard of review "as permissive strict scrutiny," which he cautioned could "invite widespread governmental deployment of racial classifications."[289]

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

According to the dissent, deferential strict scrutiny was the proper standard of review because "context matters."[290] This does not answer the question, but begs it. Why does context matter? What in our unequivocal Equal Protection Clause—"No State shall . . . deny to any person within its jurisdiction the equal protection of the laws"—permits a context-based approach to race? Why is the government's use of race more legitimate in certain contexts than others? As the dissent noted, the use of race-based criteria 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

[287] Nguyen v. I.N.S., 533 U.S. 53, 77 (2001).
[288] United States v. Virginia, 518 U.S. 515, 519 (1996).
[289] *Parents Involved*, 551 U.S. at 791 (Kennedy, J., concurring).
[290] *Id.* at 833 (Breyer, J., dissenting) (quoting Grutter v. Bollinger, 539 U.S. 306, 326-27 (2003)).

jurors on the basis of race."[291] In which of these contexts does diluted strict scrutiny apply? When must lower courts, if ever, apply run-of-the-mill strict scrutiny? Even within each context, must the lower courts apply the same version of strict scrutiny—given that the *Grutter* Court deferred to a higher-education institution but the *Virginia* Court did not? What about the Court's holding in *Johnson v. California*—just two terms before—that the Court has "insisted on strict scrutiny *in every context*"?[292] Or the Court's holding in *Adarand Constructors, Inc. v. Peña* that strict scrutiny applies to "*all* racial classifications" and by "*any* governmental actor subject to the Constitution"?[293] Given the inconsistencies in its application, has strict scrutiny become an "I know it when I see it" test,[294] which allows the Supreme Court to uphold those government actions that the Court believes are beneficial and strike down those that the Court believes are ill-advised? These questions—and many others—abound.

Another important question remains. Does Justice Kennedy's acceptance of diversity as a compelling interest for primary and secondary schools also imply an agreement with the dissent's deferential strict-scrutiny test? Justice Breyer certainly thinks so: "Apparently Justice Kennedy also agrees that [traditional] strict scrutiny would not apply in respect to certain 'race-conscious' school board policies."[295] Further, Justice Kennedy refused to join the section of the plurality opinion criticizing the dissent's deferential approach—which suggests that he disagreed with the plurality and agreed with the dissent on that point. Supporting this view, Justice Kennedy's concurrence noted that a school district, in "its discretion and expertise," may choose to pursue a compelling interest in "avoiding racial isolation."[296] Heeding a school district's

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[291] *Id.* at 834.
[292] Johnson v. California, 543 U.S. 499, 505 (2005).
[293] Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 224 (1995).
[294] *See* Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).
[295] *Parents Involved*, 551 U.S. at 837 (Breyer, J., dissenting).
[296] *Id.* at 797 (Kennedy, J., concurring); *see also* Andrew LeGrand, Note, *Narrowing the Tailoring: How* Parents Involved *Limits the Use of Race in Higher Education Admissions*, 21 NAT'L BLACK L.J. 53, 76 (2009) ("[Justice

"discretion and expertise" sounds an awful lot like deferring to it.[297]

But in another part of his concurrence, Justice Kennedy criticized the dissent's deferential strict-scrutiny test, noting that the "dissent's permissive strict scrutiny (which bears more than a passing resemblance to rational-basis review) could invite widespread governmental deployment of racial classifications."[298] This view is similar to his dissent in *Grutter*, where he proclaimed that deference is "antithetical to strict scrutiny, not consistent with it."[299] But Justices do change their minds, and as Professor Gerken notes, Justice Kennedy significantly "softened his stance on race" in *Parents Involved*.[300] Given the mixed signals in Justice Kennedy's concurrence and Justice Breyer's reading of it, the possibility remains that deferential strict scrutiny garnered five votes in *Parents Involved*.

The fractured opinion in *Parents Involved* further muddied the waters in the Court's application of strict scrutiny. But one thing is clear: Deferential strict scrutiny is alive and well. It will be invoked again in future opinions and dissents in the Supreme Court and the lower courts alike. What remains unclear is whether the deferential strict-scrutiny test will assume a permanent spot among the tests that the Supreme Court uses to evaluate the constitutionality of government conduct.

VI. CONCLUSION

"[L]iberty finds no refuge in a jurisprudence of doubt."[301] With this remarkable language, the Supreme Court ardently cautioned against the creation of uncertainty in the realm

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Kennedy] proposed that some deference should be afforded to the local school districts, whose expertise informed their asserted interests.").

[297] *See* Adams, *supra* note 95, at 986-87 ("There are hints in the concurrence that Justice Kennedy is deferring to the school districts on the issue of the importance of racial diversity to primary and secondary education.").

[298] *Parents Involved*, 551 U.S. at 791 (Kennedy, J., concurring).

[299] Grutter v. Bollinger, 539 U.S. 306, 394 (2003) (Kennedy, J., dissenting).

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

[301] Planned Parenthood of Se. Pa v. Casey, 505 U.S. 833, 843 (1992) (O'Connor, Kennedy, and Souter, JJ.).

of fundamental rights and liberties. But uncertainty now dominates the Supreme Court's application of the strict-scrutiny test—which protects against governmental infringements on a range of rights and liberties under the Constitution, including the right to vote, the right to marry, the right to access the courts, freedom of speech, and freedom of association.

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