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AFFIRMATIVE ACTION INVIDIOUSNESS

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ABSTRACT

Since 2003 in *Gratz v. Bollinger* and *Grutter v. Bollinger* the Supreme Court appeared to have established a relatively stable doctrine for applying the Equal Protection Clause of the 14th Amendment in affirmative action cases. But more recently in *Parents Involved in Community Schools v. Seattle School District* and *Fisher v. University of Texas at Austin* the Court has deviated from the expected results that doctrine would produce while still claiming to uphold the precedent from *Gratz* and *Grutter*. This Article describes the holdings in *Gatz* and *Grutter*, explains how the Court applied those decisions to *Parents Involved* and *Fisher*, and argues the once presumably stable doctrine was modified in 2014 with the Court's holding in *Schuetz v. Coalition to Defend Affirmative Action*.

INTRODUCTION

*Gratz v. Bollinger*¹ and *Grutter v. Bollinger*² lay out the current approach to race-conscious admissions in education. That approach may have been slightly modified in *Parents Involved in Community Schools v. Seattle School District*³ and *Fisher v. University of Texas at Austin*,⁴ although the Court claimed to have been applying the same standard—strict scrutiny—in each case. While the Court could modify that approach in subsequent cases,⁵ the jurisprudence currently appears relatively stable. That appearance is deceptive, however, because the jurisprudence has already been changed *sub silentio* in *Schuetz v. Coalition to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equality By Any Means Necessary (BAMN)*.⁶

Part I of this Article discusses *Grutter*, *Gratz*, *Parents Involved*, and *Fisher*, noting how the same legal standard was applied when assessing the constitutionality of school policies employing express racial classifications to help determine who would be afforded an opportunity to attend a particular school. Whether the Court's application of the standard was consistent across cases is controversial,⁷ although the Court at least claimed to be ap-

¹ *Gratz v. Bollinger*, 539 U.S. 244, 249–51, 280 (2003).

² *Grutter v. Bollinger*, 539 U.S. 306, 311, 343 (2003).

³ *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 720 (2007).

⁴ *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2421-22 (2013).

⁵ *Fisher v. Univ. of Tex. at Austin*, 136 S.Ct. 2198, 2209-10 (2016).

⁶ *Schuetz v. Coalition to Defend Affirmative Action*, 134 S. Ct. 1623, 1650-1651 (2014).

⁷ *Grutter*, 539 U.S. at 328 (“Our scrutiny of the interest asserted by the Law School is no less strict for

plying strict scrutiny across the board. Part II examines *Schuette*, noting how the Court subverts the accepted jurisprudence while claiming to apply it. The Article concludes that the Court must correct *Schuette* at its earliest opportunity, because the current jurisprudence exemplifies exactly what equal protections guarantees are designed to prevent.

I. SCHOOL ADMISSIONS AND STRICT SCRUTINY

The United States Supreme Court has examined several cases involving policies employing an express racial classification as a consideration in determining who would receive an offer to attend a particular school.⁸ In each of the cases, the Court applied strict scrutiny. In three of those cases, the Court upheld the constitutionality of the system at issue; in the others, the Court either remanded the case or struck down the policy.⁹ The differing results were at least arguably attributable to differences in the particular admissions policies employed by the state entities whose policies were challenged or, perhaps, a misapplication of the doctrine by a lower court.

A. Gratz and Grutter

Gratz involved an examination of the admissions policies of the University of Michigan College of Literature, Science, and the Arts.¹⁰ To assure acceptance, an applicant needed to have the requisite number of points on a scale of 150.¹¹ Students receiving at least 100 points would receive an offer of admission.¹² Points would be earned in a variety of categories.¹³ Students

taking into account complex educational judgments in an area that lies primarily within the expertise of the university. Our holding today is in keeping with our tradition of giving a degree of deference to a university's academic decisions, within constitutionally prescribed limits.”); *but see Grutter*, 134 S. Ct. at 387 (Kennedy, J., dissenting) (“The Court, however, does not apply strict scrutiny. By trying to say otherwise, it undermines both the test and its own controlling precedents.”).

⁸See generally *Community Schools v. Seattle School District*, 551 U.S. 701 (2007); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Texas v. Lesage*, 528 U.S. 18 (1999); *Regents of Univ. of California v. Bakke*, 438 U.S. 265 (1978); *DeFunis v. Odegaard*, 416 U.S. 312 (1974).

⁹See *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Regents of Univ. of California v. Bakke*, 438 U.S. 265 (1978); *DeFunis v. Odegaard*, 416 U.S. 312 (1974) (showing where the Court upholds the race-based policy held by the school's admissions); *but see*, *Texas v. Lesage*, 528 U.S. 18 (1999); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Community Schools v. Seattle School District*, 551 U.S. 701 (2007) (showing where the Court remands or strikes down the race-based policy held by the school's admissions).

¹⁰See *Gratz*, 539 U.S. at 257 (“Petitioners asserted that the LSA's use of race as a factor in admissions violates Title VI of the Civil Rights Act of 1964, 78 Stat. 252, 42 U.S.C. § 2000d, and the Equal Protection Clause of the Fourteenth Amendment.”).

¹¹*Id.* at 255.

¹²*Id.*

¹³*Id.* at 253. (OUA [Office of Undergraduate Admissions] considers a number of factors in making admissions decisions, including high school grades, standardized test scores, high school quality, curriculum strength, geography, alumni relationships, and leadership.”).

belonging to a qualifying underrepresented minority group would receive 20 points by virtue of their minority status.¹⁴ In contrast, a student with “‘extraordinary artistic talent’ rival[ing] that of Monet or Picasso ... would receive, at most, five points.”¹⁵

The *Gratz* Court explained, “[A]ll racial classifications reviewable under the Equal Protection Clause must be strictly scrutinized.”¹⁶ Further, the appropriate “standard of review [...] is not dependent on the race of those burdened or benefited by a particular classification.”¹⁷ Thus, any individual “of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest of judicial scrutiny.”¹⁸ Such scrutiny is very difficult to withstand because those defending the classification “must demonstrate that the University’s use of race in its current admissions program employs ‘narrowly tailored measures that further compelling governmental interests.’”¹⁹ The Court found that “because the University’s use of race in its current freshman admissions policy is not narrowly tailored to achieve respondents’ asserted compelling interest in diversity, the admissions policy violates the Equal Protection Clause of the Fourteenth Amendment.”²⁰

Justice O’Connor explained in her concurring opinion that “the procedures employed by the University of Michigan’s [...] Office of Undergraduate Admissions do not provide for a meaningful individualized review of applicants.”²¹ Because “every underrepresented minority applicant [was assigned] the same, automatic 20–point bonus without consideration of the particular background, experiences, or qualities of each individual applicant,”²² the admissions decision for each applicant was “by and large, automatically determine[d].”²³

Just as the majority opinion suggested that race was overvalued compared to artistic talent,²⁴ Justice O’Connor implied that the Admissions Of-

¹⁴ *Id.* at 271. (“The LSA’s policy automatically distributes 20 points to every single applicant from an underrepresented minority’ group, as defined by the University.”).

¹⁵ *Id.* at 273.

¹⁶ *See Gratz*, 539 U.S. at 270 (citing *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 224 (1995)).

¹⁷ *Id.* (citing *Adarand*, 515 U.S. at 224).

¹⁸ *Id.* (citing *Adarand*, 515 U.S. at 224).

¹⁹ *Id.* (citing *Adarand*, 515 U.S. at 224).

²⁰ *Id.* at 275.

²¹ *Gratz*, 539 U.S. at 276 (O’Connor, J., concurring).

²² *Id.* at 276-77 (O’Connor, J., concurring).

²³ *Id.* at 277 (O’Connor, J., concurring).

²⁴ *See id.* at 273.

fice had not assigned appropriate weights to the different categories.²⁵ “Although the Office of Undergraduate Admissions does assign 20 points to some ‘soft’ variables other than race, the points available for other diversity contributions, such as leadership and service, personal achievement, and geographic diversity, are capped at much lower levels.”²⁶ For example, “the most outstanding national high school leader could never receive more than five points for his or her accomplishments—a mere quarter of the points automatically assigned to an underrepresented minority solely based on the fact of his or her race.”²⁷ Here, Justice O’Connor was at least implicitly suggesting that the University was overvaluing race as compared to some of the other categories upon which points would be awarded.

Some racial classifications are permissible,²⁸ although benign and animus-based racial classifications are subject to the same strict scrutiny. When closely examining the methods employed by the University, the *Gratz* Court apparently felt obliged to decide for itself which categories were worthy of receiving (up to) 20 points and which should receive fewer.²⁹ In addition, the Court implicitly and Justice O’Connor explicitly suggested that there must be individualized differentiation within each category.³⁰ Thus, Justice O’Connor criticized Michigan’s program because “every underrepresented minority applicant [was assigned] the same, automatic 20–point bonus without consideration of the particular background, experiences, or qualities of each individual applicant.”³¹ She implied that it was important for admissions committees to “consider[] [...] each applicant’s individualized qualifications, including the contribution each individual’s race or ethnic identity will make to the diversity of the student body, taking into account diversity within and among all racial and ethnic groups.”³²

²⁵ See *Gratz*, 539 U.S. at 279 (O’Connor, J., concurring) ([T]he selection index, by setting up automatic, predetermined point allocations for the soft variables, ensures that the diversity contributions of applicants cannot be individually assessed. This policy stands in sharp contrast to the law school’s admissions plan, which enables admissions officers to make nuanced judgments with respect to the contributions each applicant is likely to make to the diversity of the incoming class.”).

²⁶ *Id.*

²⁷ *Id.*

²⁸ See *Grutter*, 539 U.S. at 343 ([T]he Equal Protection Clause does not prohibit the Law School’s narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body.”).

²⁹ *But see Gratz*, 539 U.S. at 294 (Souter, J., dissenting) (“A nonminority applicant who scores highly in these other categories can readily garner a selection index exceeding that of a minority applicant who gets the 20–point bonus.”).

³⁰ *Cf. id.* at 293 (Souter, J., dissenting) (“*Grutter* reaffirms the permissibility of individualized consideration of race to achieve a diversity of students, at least where race is not assigned a preordained value in all cases.”).

³¹ *Id.* at 276–77 (O’Connor, J., concurring).

³² *Id.* at 277 (O’Connor, J., concurring).

While Justice O'Connor was correct that the undergraduate admissions committee was using a kind of toggle switch in that a student would either be awarded twenty points or no points in this category, it is simply unclear what kinds of distinctions should be made when deciding how many points to award. Would someone who was bi-racial or multi-racial receive fewer points or more points? Which minority racial identities should increase/decrease points?³³ Should minorities whose skin color is darker receive more points?³⁴ Perhaps the committee should assign differing numbers of points based on its assumptions about how particular minorities would contribute to viewpoint diversity,³⁵ although the Court has been quick to criticize those who would attribute to a student a particular point of view on the basis of his/her race.³⁶

Gratz is helpfully contrasted with *Grutter v. Bollinger*, which involved the admissions policies of the University of Michigan Law School.³⁷ Admissions personnel would “evaluate each applicant based on all the information available in the file, including a personal statement, letters of recommendation, and an essay describing the ways in which the applicant will contribute to the life and diversity of the Law School.”³⁸ As a testament to the individualized nature of the assessment, the Court noted that “even the highest possible [credentials] score does not guarantee admission to the Law School”³⁹ and, by the same token, “a low score [does not] automatically disqualify an applicant.”⁴⁰

The Law School sought “to ensure that a critical mass of underrepresented minority students would be reached so as to realize the educational bene-

³³ Cf. Gayle Pollack, *The Role of Race in Child Custody Decisions Between Natural Parents over Biracial Children*, 23 N.Y.U. REV. L. & SOC. CHANGE 603, 620 (1997) (“Biracial people may feel pressured to identify more strongly with their minority race [Or, they] may reject or negatively stereotype their minority heritage in an attempt to lay claim to what they may see as their part of the dominant majority.”).

³⁴ Cf. Trina Jones, *Shades of Brown: The Law of Skin Color*, 49 DUKE L.J. 1487, 1490–91 (2000) (“Studies show, however, that Blacks in positions of prominence and authority tend to be lighter-skinned. Thus, some employers may be hiring only a subset of the Black population, a subset selected, in part, based on skin color.”).

³⁵ Cf. *Grutter*, 539 U.S. at 319–20 (discussing testimony suggesting that “when a critical mass of underrepresented minority students is present, racial stereotypes lose their force because nonminority students learn there is no ‘minority viewpoint’ but rather a variety of viewpoints among minority students.”).

³⁶ Cf. *Schutte*, 134 S. Ct. at 1634 (“It cannot be entertained as a serious proposition that all individuals of the same race think alike.”).

³⁷ 539 U.S. at 311 (“This case requires us to decide whether the use of race as a factor in student admissions by the University of Michigan Law School (Law School) is unlawful.”).

³⁸ *Id.* at 315.

³⁹ *Id.*

⁴⁰ *Id.*

fits of a diverse student body.”⁴¹ However, that did not mean that there was a “particular number or percentage of underrepresented minority students”⁴² that had to be admitted. Nonetheless, having a critical mass of minority of students was important for a variety of reasons. For example, “when a critical mass of underrepresented minority students is present, racial stereotypes lose their force because nonminority students learn there is no ‘minority viewpoint’ but rather a variety of viewpoints among minority students.”⁴³

The *Grutter* Court reaffirmed the applicability of the standard discussed in *Gratz*.⁴⁴ Thus, “all racial classifications imposed by government ‘must be analyzed by a reviewing court under strict scrutiny,’”⁴⁵ which “means that such classifications are constitutional only if they are narrowly tailored to further compelling governmental interests.”⁴⁶ The Court expressly refused to use a different level of scrutiny for a racial classification claimed to be benign rather than invidious.⁴⁷ “‘Absent searching judicial inquiry into the justification for such race-based measures,’ we have no way to determine what ‘classifications are “benign” or “remedial” and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics.’”⁴⁸

The *Grutter* Court explained “the Law School has a compelling interest in attaining a diverse student body.”⁴⁹ But even where the implicated state interest is compelling, government is still “constrained in how it may pursue that end.”⁵⁰ Unlike the program used by the University of Michigan in undergraduate admissions, “the Law School’s admissions program bears the hallmarks of a narrowly tailored plan.”⁵¹ That system did “not operate as a quota.”⁵²

Merely because the Law School’s admissions criteria did not operate as a quota did not end the analysis, because “a university’s admissions program must remain flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant’s race or ethnicity the

⁴¹ *Id.* at 318.

⁴² *Grutter*, 539 U.S. at 318.

⁴³ *Id.* at 319-20.

⁴⁴ *Id.* at 343-44.

⁴⁵ *Id.* at 326 (citing *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995)).

⁴⁶ *Id.*

⁴⁷ *Grutter*, 539 U.S. at 326-27.

⁴⁸ *Id.* (citing *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989)).

⁴⁹ *Id.* at 328.

⁵⁰ *Id.* at 333 (citing *Shaw v. Hunt*, 517 U.S. 899, 908 (1996)).

⁵¹ *Id.* at 334.

⁵² *Id.* at 335.

defining feature of his or her application.”⁵³ How could the Court be sure that race was not being weighed too heavily? The Court noted that the “Law School frequently accepts nonminority applicants with grades and test scores lower than underrepresented minority applicants (and other nonminority applicants) who are rejected,”⁵⁴ and then concluded that the “Law School’s current admissions program considers race as one factor among many, in an effort to assemble a student body that is diverse in ways broader than race.”⁵⁵

In the Court’s eyes, the Law School was not assigning inordinate weight⁵⁶ to race because non-minority students with comparatively worse credentials were receiving offers of admission when minorities with better credentials were not.⁵⁷ Nonetheless, it was not especially clear how the Law School admissions committee was operating, for example, whether race was given less comparable weight as a general matter or, instead, whether race was given much weight in some cases and less weight in others.⁵⁸ Nor was it clear whether the reason that some qualified minority applicants were refused admission to the law school but no qualified minority applicants were refused admission to the College⁵⁹ was due to the admissions committee practices or, instead, to the quality of the minority applicant pool at the College level.⁶⁰

Gratz and *Grutter* raised but did not answer a variety of questions, for example, when an institution was placing too much weight on racial diversity.⁶¹ A separate issue involves the degree of deference that educational in-

⁵³ *Grutter*, 539 U.S. at 337.

⁵⁴ *Id.* at 338.

⁵⁵ *Id.* at 340.

⁵⁶ *Id.* at 341; *see also Gratz*, 539 U.S. at 296 (Frankfurter, J., dissenting) (“Any argument that the ‘tailoring’ amounts to a set-aside, then, boils down to the claim that a plus factor of 20 points makes some observers suspicious, where a factor of 10 points might not.”); *but see Gratz*, 539 U.S. at 280 (O’Connor, J., concurring) (illustrating how the majority in *Gratz* believed that too much weight was assigned to race).

⁵⁷ *See Grutter*, 539 U.S. at 341.

⁵⁸ *Cf. Gratz*, 539 U.S. at 271-73 (“The LSA’s policy automatically distributes 20 points to every single applicant from an underrepresented minority’ group, as defined by the University.”), *and Gratz*, 539 U.S. at 273-77 (O’Connor, J., concurring) (discussing how much weight was given in the undergraduate context and the undergraduate committee’s refusal to vary how many points race would receive in individual cases).

⁵⁹ *See Gratz*, 539 U.S. at 254 (“[I]t is undisputed that the University admits ‘virtually every qualified ... applicant’ from these [minority] groups.”).

⁶⁰ *See id.* at 296 (Souter, J., dissenting) (“[T]he fact that the university admits ‘virtually every qualified under- represented minority applicant’ may reflect nothing more than the likelihood that very few qualified minority applicants apply . . .”).

⁶¹ *Cf. Gratz*, 539 U.S. at 270 (O’Connor, J., concurring) (discussing Justice O’Connor’s implicit if not explicit criticism that too much weight was being assigned to race).

stitutions should receive from the Court.⁶² An issue not raised in *Grutter* and *Gratz* is whether elementary and secondary schools employing racial classifications in admissions decisions should receive deference with respect to their assessments of the need for school diversity.⁶³ That issue, among others, was addressed in *Parents Involved*.⁶⁴

B. Parents Involved

Parents Involved in Community Schools v. Seattle School District involved a constitutional challenge to public school districts that “voluntarily adopted student assignment plans that rely upon race to determine which public schools certain children may attend.”⁶⁵ The Seattle and Louisville school districts whose policies were at issue had somewhat differing approaches.⁶⁶

In Seattle, students were allowed to list the public high schools “in order of preference.”⁶⁷ Some schools were more popular than others.⁶⁸ If a school was oversubscribed, certain tiebreakers were used. First, an individual with a sibling in the school would be given preference.⁶⁹ Second, if the school’s racial composition was outside of the desired range, then individuals who would help the school achieve greater diversity would be given preference.⁷⁰ Third, if the previous tiebreakers were not dispositive, geographical proximity to the school would then be used as the tiebreaker.⁷¹ The plurality noted that while Seattle had never been subject to a court-ordered desegregation plan and had never been found by a court to have operated racially segregated schools,⁷² it had nonetheless adopted the plan to combat “the ef-

⁶² Cf. *Grutter*, 539 U.S. at 328 (“The Law School’s educational judgment that such diversity is essential to its educational mission is one to which we defer.”).

⁶³ See Generally Mark Strasser, *Was Brown’s Declaration of Per Se Invalidity Really Out of the Blue? The Evolving “Separate but Equal” Education Jurisprudence from Cumming to Brown*, 47 *How. L.J.* 769 (2004) (discussing how the Court has treated race-conscious decisions in college and post-graduate education versus primary and secondary schools).

⁶⁴ See *infra* Section B.

⁶⁵ 551 U.S. 701, 709-10 (2007).

⁶⁶ *Id.* at 711 (“[T]he specifics of the two plans, and the circumstances surrounding their adoption, are in some respects quite different.”).

⁶⁷ *Id.*

⁶⁸ *Id.* (“Some schools are more popular than others.”).

⁶⁹ *Id.* at 711-12 (“The first tiebreaker selects for admission students who have a sibling currently enrolled in the chosen school.”).

⁷⁰ *Parents Involved*, 551 U.S. at 712 (“If an oversubscribed school is not within 10 percentage points of the district’s overall white/nonwhite racial balance, it is what the district calls ‘integration positive,’ and the district employs a tiebreaker that selects for assignment students whose race ‘will serve to bring the school into balance.’”).

⁷¹ *Id.* (“If it is still necessary to select students for the school after using the racial tiebreaker, the next tiebreaker is the geographic proximity of the school to the student’s residence.”).

⁷² *Id.* (“Seattle has never operated segregated schools—legally separate schools for students of different

fects of racially identifiable housing patterns on school assignments.”⁷³

In contrast, the Louisville school system was found to maintain a segregated school system and was under court supervision.⁷⁴ However, that supervision ended in 2000.⁷⁵

Under the Louisville plan at issue in *Parents Involved*, each elementary school student was assigned a “resides” school based on where he or she lived.⁷⁶ Students would be assigned to a non-magnet school based on their articulated preferences.⁷⁷ However, if a school “has reached the ‘extremes of the racial guidelines,’”⁷⁸ a student who would contribute to an even greater racial imbalance would not be assigned to that school.⁷⁹

When evaluating the constitutionality of the systems before it, the plurality articulated the same standard that had been used in *Gratz* and *Grutter*: “In order to satisfy this searching standard of review, the school districts must demonstrate that the use of individual racial classifications in the assignment plans here under review is ‘narrowly tailored’ to achieve a ‘compelling’ government interest.”⁸⁰ The plurality then sought to show that the governing standard had not been met.⁸¹

As an initial point, the plurality noted that neither system could claim that the policy was an attempt to combat the invidious effects of prior intentional segregation,⁸² emphasizing that Seattle had never been under court supervision⁸³ and that Louisville no longer was.⁸⁴ The plurality then examined whether the race-based decision-making could be justified on another basis.

Both school districts argued that “educational and broader socialization

racess—nor has it ever been subject to court-ordered desegregation.”).

⁷³ *Id.* (“[T]he effects of racially identifiable housing patterns on school assignments.”).

⁷⁴ *Id.* at 715.

⁷⁵ See *Parents Involved*, 551 U.S. at 715-16.

⁷⁶ *Id.* at 716 (“At the elementary school level, based on his or her address, each student is designated a ‘resides’ school to which students within a specific geographic area are assigned.”).

⁷⁷ *Id.* (“Parents of kindergartners, first graders, and students new to the district may submit an application indicating a first and second choice among the schools within their cluster.”).

⁷⁸ *Id.*

⁷⁹ *Id.* at 716-17. (“If a school has reached the ‘extremes of the racial guidelines,’ a student whose race would contribute to the school’s racial imbalance will not be assigned there.” (quoting App. in No. 05-915, at 38-39, 82)).

⁸⁰ *Parents Involved*, 551 U.S. at 720 (citing *Adarand*, 515 U.S. at 227).

⁸¹ See *id.* at 720-21.

⁸² *Id.*

⁸³ *Id.* at 720 (“Yet the Seattle public schools have not shown that they were ever segregated by law, and were not subject to court-ordered desegregation decrees.”).

⁸⁴ *Id.* at 721 (“Once Jefferson County achieved unitary status, it had remedied the constitutional wrong that allowed race-based assignments. Any continued use of race must be justified on some other basis.”).

benefits flow from a racially diverse learning environment, and each [district] contends that because the diversity they seek is racial diversity [...] it makes sense to promote that interest directly by relying on race alone.”⁸⁵ The *Parents Involved* plurality rejected that the school districts’ announced ends passed constitutional muster.⁸⁶ “However closely related race-based assignments may be to achieving racial balance, that itself cannot be the goal, whether labeled ‘racial diversity’ or anything else.”⁸⁷ Rather than being the goal, racial diversity would have to be the means to achieve other desired goals.⁸⁸ But the plurality rejected that the means adopted by the districts met the narrow tailoring requirement.⁸⁹ Indeed, the plurality believed the method chosen by the school districts undercut rather than promoted the stated goals,⁹⁰ and summed up its understanding of the best approach to achieving equal treatment on the basis of race by writing: “The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”⁹¹

Unlike the more deferential approach adopted by the Court in the case involving the University of Michigan Law School, the plurality rejected out of hand that deference should be accorded to local school boards. “Such deference ‘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.’”⁹²

In his *Parents Involved* concurrence, Justice Kennedy suggested that “[d]iversity, depending on its meaning and definition, is a compelling educational goal a school district may pursue.”⁹³ While rejecting the methods adopted by these school districts, he would be open, “if necessary, [to] a more nuanced, individual evaluation of school needs and student characteristics that might include race as a component.”⁹⁴

Justice Kennedy advised school districts to adopt approaches that did not

⁸⁵ *Parents Involved*, 551 U.S. 701 at 725-26.

⁸⁶ *Id.* at 726.

⁸⁷ *Id.* at 733.

⁸⁸ *Id.* at 733.

⁸⁹ *Id.* at 726 (“[I]t is clear that the racial classifications employed by the districts are not narrowly tailored to the goal of achieving the educational and social benefits asserted to flow from racial diversity.”).

⁹⁰ *Parents Involved*, 551 U.S. at 733 (“To the extent the objective is sufficient diversity so that students see fellow students as individuals rather than solely as members of a racial group, using means that treat students solely as members of a racial group is fundamentally at cross-purposes with that end.”).

⁹¹ *Id.* at 748.

⁹² *Id.* at 744. (citing *Johnson v. California*, 543 U.S. 499, 506 n.1 (2005)).

⁹³ *Id.* at 783. (Kennedy, J. concurring in part and concurring in the judgment).

⁹⁴ *Id.* at 790.

“tell[] each student he or she is to be defined by race.”⁹⁵ While such programs might be “race conscious,”⁹⁶ he nonetheless thought it unlikely “any of them would demand strict scrutiny to be found permissible.”⁹⁷ For example, he suggested:

School boards may pursue the goal of bringing together students of diverse backgrounds and races through other means, including strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race.⁹⁸

Justice Kennedy’s concurrence makes it somewhat difficult to understand the current jurisprudence in that he would find certain practices constitutionally permissible that would presumably be found unconstitutional by the *Parents Involved* plurality.⁹⁹ It is unclear whether the practices whose constitutionality he would uphold are only those outlined that allegedly do not trigger strict scrutiny¹⁰⁰ or whether in addition he would uphold certain “necessary [...] nuanced [policies] [...] that might include race as a component”¹⁰¹ even if triggering strict scrutiny. In any event, he left the door open to use race as a factor,¹⁰² although the next opinion he authored in this area cast doubt on his openness to employing express racial classifications in the educational admissions context.¹⁰³

C. Fisher

In *Fisher v. University of Texas at Austin*,¹⁰⁴ the Court again examined

⁹⁵ *Parents Involved*, 551 U.S. at 789.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ Michael C. Dorf, *Foreward: The Most Confusing Branch*, 45 TULSA L. REV. 191, 192 (2009) (“Justice Kennedy split the difference. He would have permitted race-conscious measures that the plurality’s reasoning would have forbidden.”).

¹⁰⁰ See *Parents Involved*, 551 U.S. at 726 (plurality opinion) (“[I]t is clear that the racial classifications employed by the districts are not narrowly tailored to the goal of achieving the educational and social benefits asserted to flow from racial diversity.”).

¹⁰¹ *Id.* at 790 (Kennedy, J. concurring).

¹⁰² Matthew Scutari, Note, “*The Great Equalizer*”: *Making Sense of the Supreme Court’s Equal Protection Jurisprudence in American Public Education and Beyond*, 97 GEO. L.J. 917, 938 (2009) (“Justice Kennedy’s controlling opinion suggests that race-conscious measures could be employed to achieve certain compelling interests, including avoiding racial isolation in schools and promoting diversity”).

¹⁰³ Eboni S. Nelson, *Reading Between the Blurred Lines of Fisher v. University of Texas*, 48 VAL. U. L. REV. 519, 522-23 (2014) (“If and when the current Court considers the constitutionality of future race-based admissions policies, including that challenged in *Fisher*, it is doubtful that Justice Kennedy will be affirmative action’s saving grace as many have hoped.”); See generally Jonathan W. Rash, *Affirmative Action on Life Support: Fisher v. University of Texas at Austin and the End of Not-So-Strict-Scrutiny*, 8 DUKE J. CONST. L. & PUB. POL’Y SIDEBAR 25 (2002).

¹⁰⁴ 133 S. Ct. 2411 (2013).

the use of race in the higher education context, this time by the University of Texas at Austin. The university made use of the Top Ten program, which “grants automatic admission to any public state college, including the University, to all students in the top 10% of their class at high schools in Texas that comply with certain standards.”¹⁰⁵ To supplement their consideration of grades and test scores, the University also considered a “‘Personal Achievement Index’ (PAI), [which] measures a student's leadership and work experience, awards, extracurricular activities, community service, and other special circumstances that give insight into a student's background.”¹⁰⁶ That program was helpful in increasing the diversity of the student population.¹⁰⁷

After the United States Supreme Court issued *Grutter*, the University of Texas modified its admissions process.¹⁰⁸ This modification included express consideration of race in the PAI.¹⁰⁹ When examining the University's use of race, the *Fisher* Court reaffirmed the appropriate standard: “Race may not be considered unless the admissions process can withstand strict scrutiny.”¹¹⁰ The Court also reaffirmed that strict scrutiny is a daunting test. “Strict scrutiny is a searching examination, and it is the government that bears the burden to prove ‘that the reasons for any [racial] classification [are] clearly identified and unquestionably legitimate.’”¹¹¹

The Court noted that strict scrutiny would be employed when examining both the end sought and the means used to achieve that end.¹¹² “Once the University has established that its goal of diversity is consistent with strict scrutiny, however, there must still be a further judicial determination that the admissions process meets strict scrutiny in its implementation.”¹¹³ For example, the reviewing court must “verify that it is ‘necessary’ for a university to use race to achieve the educational benefits of diversity.”¹¹⁴

¹⁰⁵ *Id.* at 2416.

¹⁰⁶ *Id.* at 2415-16.

¹⁰⁷ *Id.* at 2416 (“The University's revised admissions process, coupled with the operation of the Top Ten Percent Law, resulted in a more racially diverse environment at the University.”).

¹⁰⁸ *Id.* (“Following this Court's decisions in *Grutter v. Bollinger* . . . and *Gratz v. Bollinger* . . . the University adopted a third admissions program . . .”).

¹⁰⁹ 133 S. Ct. at 2416 (“[T]he University included a student's race as a component of the PAI score . . .”).

¹¹⁰ *Id.* at 2418.

¹¹¹ *Id.* at 2419 (citing *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 505 (1989)).

¹¹² *See id.* at 2420 (“The University must prove that the means chosen by the University to attain diversity are narrowly tailored to that goal.”); *See id.* at 2424 (Thomas, J., concurring) (“[T]he educational benefits allegedly produced by diversity must rise to the level of a compelling state interest in order for the program to survive strict scrutiny.”).

¹¹³ *Id.* at 2419-20.

¹¹⁴ 133 S. Ct. at 2420 (citing *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 305 (1978)).

The *Fisher* Court noted that the Fifth Circuit had been rather deferential, only requiring that the University acted in good faith.¹¹⁵ However, the Court explained, “*Grutter* did not hold that good faith would forgive an impermissible consideration of race.”¹¹⁶ The Court remanded the case to the Fifth Circuit.¹¹⁷

On remand, the Fifth Circuit reaffirmed the constitutionality of the University of Texas approach.¹¹⁸ The United States Supreme Court granted certiorari to consider whether the Fifth Circuit’s holding was correct,¹¹⁹ and affirmed.¹²⁰

The *Fisher II* Court reiterated that racial classifications must be examined with strict scrutiny¹²¹ and that no deference would be given to universities with respect to whether their chosen means is narrowly tailored to promoting diversity.¹²² Ultimately, the Court found that the particular system at issue passed muster, perhaps because it was *sui generis*.¹²³ That said, merely because the University of Texas policy survived this challenge does not mean that the same policy would survive a constitutional challenge ten years from now because the University has a “continuing obligation to satisfy the burden of strict scrutiny in light of changing circumstances.”¹²⁴

The jurisprudence from *Grutter* and *Gratz* through *Parents Involved* and *Fisher* suggests that race-conscious admissions procedures in education are constitutionally permissible under certain conditions. Because the Court does not distinguish between benign and animus-based racial discrimination, express racial classifications will be examined with strict scrutiny. Such classifications will be struck down as violating equal protection guarantees unless narrowly tailored to promote compelling state interests. However, *Schuette* may modify that understanding.

¹¹⁵ See *id.* (“[T]he Court of Appeals held petitioner could challenge only ‘whether [the University’s] decision to reintroduce race as a factor in admission was made in good faith.’” (citing *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213, 236 (5th Cir. 2011))).

¹¹⁶ *Id.* at 2421.

¹¹⁷ *Id.* at 2422 (“The judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.”).

¹¹⁸ *Fisher v. Univ. of Tex. at Austin*, 758, 633, 660 (5th Cir. 2014), *cert. granted*, 135 S. Ct. 2888 (2015).

¹¹⁹ *Fisher v. Univ. of Tex. at Austin*, 135 S. Ct. 2888 (2015) (granting certiorari).

¹²⁰ *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198, 2215 (2016).

¹²¹ See *id.* at 2208.

¹²² *Id.*

¹²³ See *id.*

¹²⁴ *Id.* at 2209–2210.

II. SCHUETTE AND EQUAL PROTECTION

The state of Michigan adopted by referendum a constitutional amendment that, *inter alia*, precluded discriminating against or granting preferential treatment to anyone on the basis of his or her race. That amendment was challenged as a violation of federal equal protection guarantees. When upholding the constitutionality of the amendment, the United States Supreme Court offered an analysis that was difficult to understand in light of the prevailing jurisprudence.

A. *Schuette*

At issue in *Schuette v. Coalition to Defend Affirmative Action* was the constitutionality of a state constitutional amendment adopted by referendum.¹²⁵ The amendment read:

(1) The University of Michigan, Michigan State University, Wayne State University, and any other public college or university, community college, or school district shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

(2) The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.¹²⁶

On its face, the amendment classifies on the basis of race, among other categories, and an important determination involves the level of scrutiny that should be employed when examining the constitutionality of the enactment. While the plurality did not provide an analysis that was as clear and detailed as one might like with respect to the appropriate standard of review, the Court rejected the Sixth Circuit's conclusion that strict scrutiny was triggered,¹²⁷ and it will be helpful to see why.

The Sixth Circuit had read *Washington v. Seattle School District*¹²⁸ as holding that "any state action with a 'racial focus' that makes it 'more difficult for certain racial minorities than for other groups' to 'achieve legisla-

¹²⁵ *Schuette v. Coalition to Defend Affirmative Action et al.*, 134 S. Ct. 1623, 1629 (2014) ("The Court in this case must determine whether an amendment to the Constitution of the State of Michigan, approved and enacted by its voters, is invalid under the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.").

¹²⁶ *Id.* (citing Mich. Const. art. I, § 26).

¹²⁷ *See id.* at 1634.

¹²⁸ 458 U.S. 457 (1982).

tion that is in their interest' is subject to strict scrutiny."¹²⁹ The *Schuette* plurality criticized that approach as likely inconsistent with the current jurisprudence.¹³⁰ After all, talking about which legislation is in a particular group's interest suggests a uniformity of interests that might not exist.¹³¹

In cautioning against "impermissible racial stereotypes," this Court has rejected the assumption that "members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls."¹³²

The plurality further cautioned, "[I]f it were deemed necessary to probe how some races define their own interest in political matters, still another beginning point would be to define individuals according to race."¹³³ But such a project would itself pose significant problems. "[I]n a society in which those lines are becoming more blurred, the attempt to define race-based categories also raises serious questions of its own."¹³⁴

Even if those problems could be solved, there would be additional difficulties in determining which policies benefited particular groups. Allegedly, the Sixth Circuit approach "would risk ... the creation of incentives for those who support or oppose certain policies to cast the debate in terms of racial advantage or disadvantage."¹³⁵

Consider how different groups react to affirmative action policies. Some believe they are not only beneficial but necessary,¹³⁶ whereas others claim such policies are harmful.¹³⁷ Whether employing racial classifications is more beneficial than harmful is an empirical matter.¹³⁸

¹²⁹ *Schuette*, 134 S. Ct. at 1634 (citing *Seattle*, 458 U.S. at 474).

¹³⁰ *Schuette*, 134 S. Ct. at 1634 ("The expansive reading of *Seattle* has no principled limitation and raises serious questions of compatibility with the Court's settled equal protection jurisprudence.").

¹³¹ *Id.* at 1634. ("It cannot be entertained as a serious proposition that all individuals of the same race think alike.").

¹³² *Id.* (citing *Shaw v. Reno*, 509 U.S. 630, 647 (1993)).

¹³³ *Id.*

¹³⁴ *Schuette*, 134 S. Ct. at 1634.

¹³⁵ *Id.* at 1635.

¹³⁶ See William B. Turner, "A Bulwark Against Anarchy": *Affirmative Action, Emory Law School, and Southern Self-Help*, 5 HASTINGS RACE & POVERTY L.J. 195, 247 (2008) (discussing the view that affirmative action is both beneficial and necessary).

¹³⁷ See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 241 (1995) (Thomas, J., concurring) (stating that affirmative action programs can be "poisonous and pernicious" and "stamp minorities with a badge of inferiority").

¹³⁸ See Michael Selmi, *The Facts of Affirmative Action*, 85 VA. L. REV. 697, 698 (1999) (reviewing WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS*. (1990) ("[T]he authors demonstrate that the benefits of affirmative action far outweigh the costs, suggesting that affirmative action is, indeed, a desirable social bargain. This is not to suggest... that affirmative action is costless or a panacea

The *Schuette* plurality suggested the Constitution does not require or even permit the cost/benefit assessment of racial preferences to be decided by the courts rather than the electorate.¹³⁹ Indeed, the suggestion that this was not a matter to be left to the voters was “demeaning to the democratic process,”¹⁴⁰ because taking such a decision away from the electorate would “presume that the voters are not capable of deciding an issue of this sensitivity on decent and rational grounds.”¹⁴¹

In his concurrence, Chief Justice Roberts asserted both that reasonable people might disagree about whether affirmative action is more beneficial than harmful¹⁴² and that impugning the motivation of those criticizing racial preferences was itself harmful.¹⁴³ He seemed especially interested in rejecting the proposition that “it is [...] ‘out of touch with reality’ to conclude that racial preferences may themselves [...] do more harm than good.”¹⁴⁴

Justice Scalia in his concurrence asked rhetorically, “Does the Equal Protection Clause of the Fourteenth Amendment forbid what its text plainly requires?”¹⁴⁵ Echoing his concurring and dissenting opinion in *Grutter*, Justice Scalia suggested that the “Constitution proscribes government discrimination on the basis of race, and state-provided education is no exception.”¹⁴⁶ He rejected that a compelling interest in diversity permits a university to employ a racial classification.¹⁴⁷

Members of the Court clearly disagree about whether race-conscious policies promote more harm than good.¹⁴⁸ Yet, a more basic question for con-

for our social ills--it is neither.”).

¹³⁹ *Schuette*, 134 S. Ct. at 1638 (“There is no authority in the Constitution of the United States or in this Court’s precedents for the Judiciary to set aside Michigan laws that commit this policy determination to the voters.” (citing *Sailors v. Board of Ed. of City of Kent*, 387 U.S. 105, 109 (1967))).

¹⁴⁰ *Id.* at 1637.

¹⁴¹ *Id.*

¹⁴² *Id.* at 1639 (Roberts, C.J., concurring) (“People can disagree in good faith on this issue.”).

¹⁴³ *Id.* (Roberts, C.J., concurring) (“[I]t similarly does more harm than good to question the openness and candor of those on either side of the debate.”).

¹⁴⁴ *Schuette*, 134 S. Ct. at 1638-39 (quoting *Schuette*, 134 S. Ct. at 1675-76 (Sotomayor, J., dissenting)).

¹⁴⁵ *Id.* at 1639 (Scalia, J., concurring) (emphasis omitted).

¹⁴⁶ *Id.* (citing *Grutter*, 539 U.S. at 349 (Scalia, J., concurring in part and dissenting in part)).

¹⁴⁷ *Cf. Fisher*, 133 S. Ct. at 2422 (Scalia, J., concurring) (citation omitted) (“The petitioner in this case did not ask us to overrule *Grutter*’s holding that a ‘compelling interest’ in the educational benefits of diversity can justify racial preferences in university admissions. I therefore join the Court’s opinion in full.”).

¹⁴⁸ *Compare Grutter*, 539 U.S. at 373 (Thomas, J., concurring in part and dissenting in part) (“Beyond the harm the Law School’s racial discrimination visits upon its test subjects, no social science has disproved the notion that this discrimination ‘engender[s] attitudes of superiority or, alternatively, provoke[s] resentment among those who believe that they have been wronged by the government’s use of race. These programs stamp minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are ‘entitled’ top references.”) (citation omitted) (quoting *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 241 (2000) (Thomas, J., concurring in part and con-

stitutional purposes is whether the Michigan amendment employs a race-based classification and, if so, whether that classification triggers strict scrutiny.

B. What Counts as a Racial Classification?

The current equal protection jurisprudence requires strict scrutiny of all racial classifications.¹⁴⁹ The Michigan amendment expressly incorporated race as a forbidden category upon which to award benefits or impose burdens, and a basic question is whether the express inclusion of race itself operates as a racial classification. The plurality implicitly and Justice Scalia explicitly denied that the Michigan amendment classified on the basis of race, and that denial must be explored.

Justice Scalia addressed the question directly, noting the respondents argued it was unnecessary to discern whether the Michigan electorate had passed the amendment out of animus, because “§ 26 may be struck more straightforwardly as a racial ‘classification.’”¹⁵⁰ He quickly dismissed that contention because “§ 26 does not on its face ‘distribut[e] burdens or benefits on the basis of individual racial classifications.’”¹⁵¹ Because in his view there was no distribution of benefits or burdens on that basis, the amendment should be treated as if it were racially neutral. He continued, “[T]he question in this case, as in every case in which neutral state action is said to deny equal protection on account of race, is whether the action reflects a racially discriminatory purpose.”¹⁵²

In what sense was the amendment neutral? It prohibited using race as a plus factor or as a minus factor when deciding who would receive an offer of admission. In what way was this not neutral? Other groups would not need to pass a state constitutional amendment before they could receive preferential treatment on their preferred basis. Thus, Justice Scalia was correct that the Michigan amendment was neutral in that it did not privilege one race over another, but incorrect in that one classification (race) could not be used as a basis for preferential treatment in admissions while other

curing in the judgment)), with *Schuetz*, 134 S. Ct. at 1680 (Sotomayor, J., dissenting) (“The elimination of race-sensitive admissions policies in California has been especially harmful to black students.”).

¹⁴⁹ *Adarand*, 515 U.S. at 224 (“[A]ny person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny.”).

¹⁵⁰ *Schuetz*, 134 S. Ct. at 1647-48 (Scalia, J., concurring).

¹⁵¹ *Id.* at 1648 (alteration in original) (citing *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 720 (2007)).

¹⁵² *Id.* at 1648 (Scalia, J., concurring).

bases (geography, income) could be so used.¹⁵³

If the Michigan amendment was neutral in one sense but not in another, then it is important to figure out which sense of neutrality is used in equal protection jurisprudence. Consider *Hunter v. Erickson*.¹⁵⁴ At issue was the following city charter amendment adopted by referendum:

Any ordinance enacted by the Council of The City of Akron which regulates the use, sale, advertisement, transfer, listing assignment, lease, sublease or financing of real property of any kind or of any interest therein on the basis of race, color, religion, national origin or ancestry must first be approved by a majority of the electors voting on the question at a regular or general election before said ordinance shall be effective. Any such ordinance in effect at the time of the adoption of this section shall cease to be effective until approved by the electors as provided herein.¹⁵⁵

The charter amendment did not itself directly accord benefits or impose burdens on the basis of race, and the *Hunter* Court recognized the amendment was neutral within certain categories. “It is true that the section draws no distinctions among racial and religious groups. Negroes and whites, Jews and Catholics are all subject to the same requirements if there is housing discrimination against them which they wish to end.”¹⁵⁶ Using Justice Scalia’s sense of neutrality, the Akron amendment was neutral. But the *Hunter* Court examined this amendment with strict scrutiny, viewing it as a racial classification.¹⁵⁷ In what way was it harmful? Certain groups could only receive protections from the City after securing voter ratification of those protections, while other groups did not need voter ratification to make city council protections effective. When striking down the amendment, the *Hunter* Court noted, “[T]he State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person’s vote or give any group a smaller representation than another of comparable size.”¹⁵⁸

It is fair to suggest that in some ways *Hunter* no longer represents the current jurisprudence. The *Hunter* Court struck down the amendment because it “discriminates against minorities, and constitutes a real, substantial, and invidious denial of the equal protection of the laws.”¹⁵⁹ But the current

¹⁵³ See *id.* at 1653 (Sotomayor, J., dissenting) (“As a result of § 26, there are now two very different processes through which a Michigan citizen is permitted to influence the admissions policies of the State’s universities: one for persons interested in race-sensitive admissions policies and one for everyone else.”).

¹⁵⁴ 393 U.S. 385 (1969).

¹⁵⁵ *Id.* at 387.

¹⁵⁶ *Id.* at 390.

¹⁵⁷ See *id.* at 391-92.

¹⁵⁸ *Id.* at 393 (citing *Reynolds v. Sims*, 377 U.S. 533 (1964)).

¹⁵⁹ *Hunter*, 393 U.S. at 385 (citing *Reynolds*, 377 U.S. 533).

jurisprudence neither requires nor permits the Court to decide whether statutes containing express racial classifications are more beneficial than harmful. Instead, the current jurisprudence requires all such statutes to be examined with strict scrutiny,¹⁶⁰ which is why it was somewhat surprising for some of the Court members to air their differing views about the costs and benefits of racial preferences.¹⁶¹ According to the current jurisprudence, it does not matter whether the justices believe race-conscious admission policies a good idea or a bad one—strict scrutiny is triggered in either event.¹⁶²

The position offered here that the Michigan amendment should have been subjected to strict scrutiny might seem open to the following objection: If a state constitutional amendment bars discrimination on the basis of race, then its having expressly included race in the state constitution would trigger strict scrutiny, which would mean the state constitution provision could not include such a provision unless narrowly tailored to promote a compelling interest. But it would seem absurd to strike down a state constitutional provision barring racial discrimination.

Yet, there are a number of reasons this objection proves unavailing. First, suppose such a prohibition did trigger strict scrutiny. The Court would presumably say that prohibiting discrimination on the basis of race was narrowly tailored to promote a compelling state interest.

Second, if indeed the state constitutional amendment was simply mirroring Fourteenth Amendment protections and if the state constitutional amendment was interpreted in a way that tracked Fourteenth Amendment equal protection guarantees, then Justice Scalia's rhetorical question would seem apt. "Does the Equal Protection Clause of the Fourteenth Amendment *forbid* what its text plainly *requires*?"¹⁶³ Presumably, the Fourteenth Amendment would not invalidate a state measure that merely reiterated federal constitutional requirements.

Suppose for whatever reason the Court would strike down a state constitutional provision barring racial discrimination if that amendment had to be subjected to strict scrutiny. Even if the Fourteenth Amendment were interpreted to require invalidation of a state constitutional provision mirroring federal requirements, that would merely mean the state would still have to

¹⁶⁰ See *Schuetz*, 134 S. Ct. at 1674 (Sotomayor, J., dissenting) ("Justice Scalia . . . would acknowledge . . . that an act that draws racial distinctions or makes racial classifications triggers strict scrutiny regardless of whether discriminatory intent is shown. That should settle the matter: Section 26 draws a racial distinction.").

¹⁶¹ See *supra* notes 133-38, 140-45 and accompanying text; See also *supra* note 139 (Roberts, J., concurring) (citing Sotomayor, J., dissenting).

¹⁶² *Schuetz*, 134 S. Ct. at 1663 (Sotomayor, J., dissenting).

¹⁶³ *Id.* at 1639 (Scalia, J., concurring).

abide by the limitations imposed by the Fourteenth Amendment rather than being forced to abide by the requirements because of both federal and state constitutional guarantees.

The qualification above about the state amendment mirroring federal guarantees must be emphasized because it suggests where Justice Scalia's analysis is in error. Even without the Michigan amendment, Michigan state universities could not accord preferences based on race unless narrowly tailored to promote compelling state interests. To the extent the Michigan amendment merely prohibits what the Fourteenth Amendment bars anyway, the state constitutional amendment has no real effect. But the Michigan amendment precludes according preferences on race even when doing so is narrowly tailored to promote compelling state interests, which is going above and beyond what the Fourteenth Amendment requires. Basically, the Michigan amendment precludes the state from affording benefits on the basis of race that would be permissible under the Federal Constitution, and such a denial of possible benefits should have been examined with strict scrutiny.¹⁶⁴ It is difficult to see how denying the possibility that minorities might receive additional educational benefits would be narrowly tailored to promote a compelling state interest. Thus, although Justice Scalia is correct that the Fourteenth Amendment would not bar a state from having within its own constitution a provision mirroring the requirements of the Federal Constitution, he is incorrect to imply that a state constitutional provision would be immune from invalidation if that provision denied opportunities to minorities that were permissibly accorded in light of federal constitutional guarantees.¹⁶⁵

CONCLUSION

The Court has decided several cases involving express consideration of race in school admissions and in each case employed strict scrutiny when evaluating the constitutionality of the policy at issue.¹⁶⁶ The Court has expressly rejected distinguishing between benign and animus-based classifications, believing that all racial classifications must be subjected to exacting consideration. Such a policy has costs, since it means that the state cannot adopt race-based programs unless those programs are narrowly tailored to promote compelling interests.

In *Schuette*, the plurality ignored its own jurisprudence to achieve a re-

¹⁶⁴ *Id.* at 1663 (Sotomayor, J., dissenting).

¹⁶⁵ *Id.* at 1673 (Sotomayor, J. dissenting) (quoting *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457, 487 (1982)).

¹⁶⁶ *See, e.g., Fisher*, 134 S. Ct. at 2415; *Gratz*, 539 U.S. at 270; *Grutter*, 539 U.S. at 326.

sult, which at least some suggest is racially discriminatory.¹⁶⁷ For example, the plurality refused to impute animus to the electorate when adopting the amendment at issue by referendum.¹⁶⁸ But the Court has already eschewed treating benignly motivated racial classification more deferentially, so it should not matter why the electorate adopted the measure. So, too, the discussion about whether race-conscious measures benefit or harm racial minorities was also beside the point. Whether helping or hurting minorities, an express racial classification must be subjected to strict scrutiny.

If one combines *Schuette* with the other cases on race-conscious school admissions, one comes up with the following constitutional rule: Attempts by the State to accord benefits on the basis of race will only be upheld if narrowly tailored to promote compelling interests. However, if the State passes a law expressly prohibiting state entities from according constitutionally permissible benefits to racial minorities, that prohibition will not trigger close scrutiny.

Such a policy at least appears to be stacked against racial minorities,¹⁶⁹ which might make individuals question whether members of the Court are really committed to promoting equality and fair treatment.¹⁷⁰ *Schuette* not only ignores the past jurisprudence and denies minorities possible benefits, but it may cause people to question either the integrity or the perspicacity of various members of the Court. *Schuette* must be overruled at the first opportunity.

¹⁶⁷ Girardeau A. Spann, *Good Faith Discrimination*, 23 WM. & MARY BILL RTS. J. 585, 608 (2015) (“The Supreme Court’s recent decision in *Schuette v. Coalition to Defend Affirmative Action*, upholding the Michigan anti-affirmative action voter initiative, provides another illustration of how the Court’s holdings can be racially discriminatory.”).

¹⁶⁸ See *Schuette*, 134 S. Ct. at 1637 (“It is demeaning to the democratic process to presume that the voters are not capable of deciding an issue of this sensitivity on decent and rational grounds.”).

¹⁶⁹ See Spann, *supra* note 167, at 608 (“*Schuette* seems to have adopted a one-way ratchet approach to affirmative action, pursuant to which the Supreme Court defers to the preferences of the political process when the political process chooses to reject affirmative action, but invalidates the preferences of the political process when the political process chooses to adopt affirmative action.”).

¹⁷⁰ *Id.* at 593 (“[I]t sometimes appears as if the Supreme Court is manipulating the two categories in ways that end up legitimating racial discrimination.”).

