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

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TAILORING THE NARROW TAILORING REQUIREMENT IN THE SUPREME COURT'S AFFIRMATIVE ACTION CASES

LUIZ ANTONIO SALAZAR ARROYO*

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Our Nation from the inception has sought to preserve and expand the promise of liberty and equality on which it was founded. Today we enjoy a society that is remarkable in its openness and opportunity. Yet our tradition is to go beyond present achievements, however significant, and to recognize and confront the flaws and injustices that remain. This is especially true when we seek assurance that opportunity is not denied on account of race. The enduring hope is that race should not matter; the reality is that too often it does.¹ – Justice Kennedy.

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¹ Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 787 (2007) (Kennedy, J., concurring).

I. INTRODUCTION

For many years, affirmative action has been one of the most controversial civil rights issues.² It has polarized society into two camps: one side arguing that affirmative action is necessary to remedy both the past injustices of *de jure* segregation and the current injustices of *de facto* segregation,³ and the other side arguing that affirmative action is nothing more than present discrimination against those who are not responsible for the injustices of the past.⁴ For many years, the Supreme Court has struggled with the concept of affirmative action.⁵ Like its effect in broader society, affirmative action has sharply divided the Court's members into those same two camps.⁶

Over the years, the controlling members of the Court, the swing voters who have dealt with the affirmative action issue—Justice Powell, Justice O'Connor, and now

² See Kathleen M. Sullivan, *The Supreme Court, 1985 Term: Comment: Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 HARV. L. REV. 78 (1986); see also John Hart Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723 (1974); Randall Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 HARV. L. REV. 1327 (1986).

³ See *Parents Involved*, 551 U.S. at 823-37 (Breyer, J., dissenting) (advocating for the use of a standard that is less than strict scrutiny based on the context of the case, in particular, that it was an integration program that sought to remedy *de facto* segregation); *Gratz v. Bollinger*, 539 U.S. 244, 298 (2003) (Ginsburg, J., dissenting) (“[T]he Court once again maintains that the same standard of review controls judicial inspection of all official race classification. This insistence on ‘consistency’ would be fitting were our Nation free of the vestiges of rank discrimination long reinforced by law. But we are not far distant from an overtly discriminatory past, and the effects of centuries of law-sanctioned inequality remain painfully evident in our communities and schools.” (citations omitted)); *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980) (Marshall, J., concurring) (“Because the consideration of race is relevant to remedying the continuing effects of past racial discrimination, and because governmental programs employing racial classification for remedial purposes can be crafted to avoid stigmatization, . . . such programs should not be subjected to conventional ‘strict scrutiny.’”); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 325 (1978) (Brennan, J., concurring in part and dissenting in part) (“Government may take race into account when it acts not to demean or insult any racial group, but to remedy disadvantages cast on minorities by past racial prejudice, at least when appropriate findings have been made by judicial, legislative, or administrative bodies with competence to act in this area.”); see also Kennedy, *supra* note 2, at 1327-34; Sullivan, *supra* note 2, at 78-79.

⁴ See *Parents Involved*, 551 U.S. at 748 (Roberts, C.J., plurality) (“The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”); *Grutter v. Bollinger*, 539 U.S. 306, 378 (2003) (Thomas, J., dissenting) (“‘Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.’” (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting))); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring) (“[G]overnment can never have a ‘compelling interest’ in discriminating on the basis of race in order to ‘make up’ for past racial discrimination in the opposite direction.”); *Fullilove*, 448 U.S. at 525 (Stewart, J., dissenting) (“Under our Constitution, the government may never act to the detriment of a person solely because of that person’s race.”); see also Kennedy, *supra* note 2, at 1327-34; Sullivan, *supra* note 2, at 78-79.

⁵ See Sullivan, *supra* note 2, at 78.

⁶ See *supra* notes 3-4.

Justice Kennedy—have been stuck in the middle between these two camps, attempting to bridge the two sides of the Court and create a compromise with respect to affirmative action.⁷ The normative vision of affirmative action adopted by these controlling members is that affirmative action is a sometimes necessary but dangerous tool.⁸ They believe that because of its necessity, there should not be an outright ban on all forms of affirmative action, but because of its danger, the Supreme Court should carefully examine and evaluate each affirmative action program.⁹

The controlling members enforced this compromise through the Supreme Court's strict scrutiny test, which requires that a challenged government action be narrowly tailored to serve a compelling government interest.¹⁰ Originally used as a test to quickly strike down invidiously discriminatory laws, the swing voters changed strict scrutiny into a detailed "means-ends" factual inquiry when faced with the problem of affirmative action, examining whether the government's actions met two constitutional requirements.¹¹ The first requirement is the "compelling interest" requirement, which examines the challenged government action's "ends."¹² The Supreme Court has required that a government affirmative action program's "ends" must be either to remedy past discrimination or to achieve diversity.¹³ While the Supreme Court has been fairly clear about what governmental "ends" constitute a compelling interest, the Court has been much more opaque when describing the second requirement—the narrow tailoring requirement—which examines the challenged government action's "means."¹⁴ This narrow tailoring requirement and the Supreme Court's difficulty in defining its scope will be the focus of this Article.

The narrow tailoring requirement, as initially developed by Justice Powell through a series of cases, set out some loose factors for the Supreme Court to use in its evaluation of government affirmative action programs.¹⁵ The Powell Court seemed to take a somewhat contextual approach to the narrow tailoring requirement in which the Court looked at the particular circumstances of each individual affirmative action program and based its determination on the set of factors that seemed pertinent to that particular situation, as opposed to relying on categorical

⁷ See *infra* Parts II, III.

⁸ See *infra* Part IV.

⁹ *Id.*

¹⁰ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995).

¹¹ See *infra* Part II.

¹² *Id.*

¹³ See *Grutter v. Bollinger*, 539 U.S. 306, 325-30 (2003) (stating that past cases have found that remedying past discrimination is one compelling government interest and holding that student body diversity is another compelling state interest); see also *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 788 (2007) (Kennedy, J., concurring) (stating that it is permissible for school boards "to consider the racial makeup of schools and to adopt general policies to encourage a diverse student body, one aspect of which is its racial composition").

¹⁴ See *infra* Part II.

¹⁵ See *infra* Parts II.A, II.B.

requirements.¹⁶ In later cases under Justice O'Connor, the Court's narrow tailoring requirement became a highly formalistic inquiry that determined the constitutionality of government affirmative action programs by looking at whether the government program met certain categorical requirements.¹⁷ In particular, Justice O'Connor focused on whether the affirmative action programs attempted to grant benefits or burdens to individuals by employing set-asides—which gave race a numerical quantification—or whether the programs made individualized determinations where race was one factor of many and not given a numerical quantification.¹⁸ Justice O'Connor disapproved of the former and approved of the latter.¹⁹ In addition to that requirement, she also required that government affirmative action programs adopt race-neutral alternatives, if available, and possess a sunset provision—a specified termination date for the program created at its outset.²⁰

Unfortunately, Justice O'Connor's rigid and categorical inquiry did a poor job of reflecting the controlling Justices' affirmative action compromise and properly policing affirmative action programs because it could be either too harsh or too lenient on affirmative action programs depending on the factual scenario.²¹ It could be too harsh because sometimes Justice O'Connor's requirements could be so demanding that they created an absolute bar to some forms of affirmative action.²² Conversely, it could also be too lenient because sometimes the rigid factors allowed some affirmative action programs containing invidious discrimination to slip by.²³ This discrepancy demonstrates that Justice O'Connor's approach to narrow tailoring failed to strike the proper balance between outright banning affirmative action and fully accepting affirmative action. Thus, it did not reflect the compromise between the two camps of the Court that the controlling members—including herself—advocated for.

In his first and only affirmative action decision since becoming the controlling member of the Supreme Court, Justice Kennedy, in *Parents Involved in Community Schools v. Seattle School District No. 1*, showed a possible willingness to go back to the looser, more contextualist view of the narrow tailoring requirement that the Court embraced when Justice Powell was the swing vote.²⁴ This Article argues that regardless of whether Justice Kennedy actually was moving back toward a more contextualist approach to narrow tailoring, a shift away from the highly formalistic inquiry adopted by Justice O'Connor back to the looser contextual standard used by Justice Powell has the potential to fix the previously mentioned problem of failing to

¹⁶ *Id.*

¹⁷ *See infra* Part II.C.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *See infra* Part IV.

²² *Id.*

²³ *Id.*

²⁴ *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 782 (2007) (Kennedy, J., concurring); *see* Heather K. Gerken, *The Supreme Court, 2006 Term: Comment: Justice Kennedy and the Domains of Equal Protection*, 121 HARV. L. REV. 104 (2007).

achieve a proper compromise between the two sides of the Court.²⁵ In addition, this Article also suggests how the Court could improve upon Justice Powell's approach to narrow tailoring by enumerating a nonexclusive set of flexible factors that the Supreme Court could use in evaluating individual affirmative action programs and suggesting how the factors could be applied.²⁶

Part II of this Article details and comments on the history of the narrow tailoring requirement as developed by Justices Powell and O'Connor. Part III examines the *Parents Involved* decision, particularly focusing on Justice Kennedy's controlling concurrence opinion and focusing on Professor Heather Gerken's claim that Kennedy's apparent shift from his concurrence in *Grutter v. Bollinger*²⁷ can possibly be explained as his adopting a more contextualist approach to narrow tailoring. Part IV analyzes and criticizes Justice O'Connor's formalistic approach by demonstrating that it was both too harsh and too lenient on affirmative action, and that the reason for this discrepancy is that affirmative action programs cannot be properly evaluated by rigid rules that are applied broadly to all such programs. Part IV also lays out a solution to the problems created by Justice O'Connor's rigid categorical requirements by describing why, regardless of whether Justice Kennedy actually was adopting a contextualist approach in *Parents Involved*, the Supreme Court should move back to the contextualist approach the Court used when Justice Powell was the controlling member. Finally, Part V explains how the Supreme Court could build upon Justice Powell's contextualist approach by suggesting several loose factors that the Supreme Court could apply in its analysis and how those factors might be applied.

II. A HISTORY OF THE NARROW TAILORING REQUIREMENT UNDER THE EQUAL PROTECTION CLAUSE

The words "strict scrutiny" and "narrowly tailored" do not appear anywhere in the Constitution.²⁸ The use of the words came about through a judicially crafted test that the Supreme Court developed over time.²⁹ Although the Supreme Court in cases like *Korematsu v. United States*³⁰ and *Bolling v. Sharpe*³¹ used language that anticipates modern formulations of the strict scrutiny test, the birth of the modern strict scrutiny test as used in racial discrimination cases came in *McLaughlin v.*

²⁵ See *infra* Part IV.

²⁶ See *infra* Part V.

²⁷ *Grutter v. Bollinger*, 539 U.S. 306 (2003).

²⁸ Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1268 (2007). For a thorough analysis of the history of the Supreme Court's strict scrutiny test, see *id.*

²⁹ *Id.*

³⁰ *Korematsu v. United States*, 323 U.S. 214 (1944) ("[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.").

³¹ *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) ("Classifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect.").

Florida.³² *McLaughlin* dealt with a Florida statute that forbade the habitual occupation of a room at night by “[a]ny negro man and white woman, or any white man and negro woman, who [were] not married to each other.”³³ In *McLaughlin*, the Court stated that all racial classifications are “constitutionally suspect” and should be subjected “to the most rigid scrutiny.”³⁴ In addition, the Court stated that a law containing racial classifications, “even though enacted pursuant to a valid state interest, bears a heavy burden of justification, . . . and will be upheld only if it is necessary, and not merely rationally related, to the accomplishment of a permissible state policy.”³⁵ Three years later, in *Loving v. Virginia*, a case dealing with the constitutionality of anti-miscegenation laws, the Court again used similar language to describe the strict scrutiny test:

[T]he Equal Protection Clause demands that racial classifications . . . be subjected to the “most rigid scrutiny,” and, if they are ever to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate.³⁶

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

Although these early strict scrutiny cases asked the Court to engage in a factual review of the challenged government program and determine whether the “ends” justified the “means,” some claimed that the Supreme Court appeared to engage in no such factual review and quickly struck down laws as soon as it was determined that they should be reviewed by strict scrutiny.³⁷ Thus, it was assumed that the invocation of strict scrutiny as the standard of review meant that the challenged government action would be declared unconstitutional no matter what facts were present in a particular case.³⁸ This led Professor Gerald Gunther to famously call the strict scrutiny test “‘strict in theory’, but fatal in fact.”³⁹

³² *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964); see Fallon, *supra* note 28, at 1277.

³³ *McLaughlin*, 379 U.S. at 184.

³⁴ *Id.* at 192.

³⁵ *Id.* at 196.

³⁶ *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (citation omitted).

³⁷ See generally Gerald Gunther, *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

³⁸ *Id.* at 8; Peter J. Rubin, *Reconnecting Doctrine and Purpose: A Comprehensive Approach to Strict Scrutiny After Adarand and Shaw*, 149 U. PA. L. REV. 1, 4 (2000) (“[M]ost have concluded that a judicial determination to apply ‘strict scrutiny’ is little more than a way to describe the conclusion that a particular governmental action is invalid.”).

³⁹ Gunther, *supra* note 37, at 8.

However, a closer examination reveals that Professor Gunther's claim that strict scrutiny was an absolute bar to any government action was exaggerated. The Court in these cases did engage in a factual inquiry of each challenged law, but each time, the Court found that the only justification for the challenged law was impermissible invidious discrimination, which the Court has held can never be a permissible or legitimate justification for a racial classification under strict scrutiny.⁴⁰ Thus, the Court never had to go past the first prong of the strict scrutiny test, which examined the government's purported "ends"—what eventually became the compelling interest prong—because the government's "ends" were always deemed illegitimate. It was not until the Supreme Court began to review race-based classifications related to affirmative action programs that the Court found racial classifications that it considered benign and not based on invidious discrimination.⁴¹ Once confronted with benign classifications, the Court found satisfactory governmental "ends"—compelling state interests—and, thereby, was finally forced to engage in a deeper factual inquiry into the challenged government programs to determine whether the chosen "means" were appropriate.⁴² Interestingly, this might have been why the Court stopped using the word "necessary" to describe the second prong of the strict scrutiny test, as it did in *McLaughlin* and *Loving*, and eventually moved to the words, "narrowly tailored." The word "necessary" seems to demand a much closer fit between the "ends" and the "means" than the words "narrowly tailored." Thus, adoption of the new language might have been a way of the Court saying that the second step of the strict scrutiny test was going to be more lenient and more factually driven.

The Supreme Court actually did not begin using the exact words "narrowly tailored" during the application of the strict scrutiny test until the early 1970s, and when it did so, it was in cases involving the First Amendment, not the Equal Protection Clause of the Fifth and Fourteenth Amendments.⁴³ It was not until 1980, in *Fullilove v. Klutznick*, that the Supreme Court used the phrase "narrowly tailored"

⁴⁰ See, e.g., *Loving*, 388 U.S. at 11 ("There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification. The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy.").

⁴¹ See, e.g., *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 299 (1978).

⁴² Professor Fallon has offered an alternative explanation for the Court's apparent differences in its strict scrutiny analysis between affirmative action cases and all other equal protection cases. He states that, over time, the Supreme Court has actually adopted three different strict scrutiny standards, and the Court has applied different ones at different times. See Fallon, *supra* note 28, at 1302-15.

⁴³ See, e.g., *Grayned v. City of Rockford*, 408 U.S. 104, 116-17 (1972); *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 101 (1972). That the Supreme Court borrowed the term "narrowly tailored" from its First Amendment cases for its Equal Protection cases is not surprising. In *McLaughlin v. Florida*, the Court's first big step in articulating a standard for the strict scrutiny test, Justice Harlan in a concurring opinion stated that the "necessity test"—what he called the strict scrutiny test at that time—had been first developed in First Amendment free speech cases and is "equally applicable in a case involving . . . racial discrimination." *McLaughlin v. Florida*, 379 U.S. 184, 197 (1964) (Harlan, J., concurring).

in an equal protection case to describe the second prong of the strict scrutiny test.⁴⁴ However, by the 1978 case of *Regents of the University of California v. Bakke*, the Court's first decision on affirmative action, the Court had already begun using a very similar phrase, "precisely tailored," to describe the second prong of the strict scrutiny test.⁴⁵

A. *Bakke: The Court's First Look at Affirmative Action*

In *Regents of the University of California v. Bakke*, the Supreme Court invalidated the University of California at Davis Medical School's admission policy of setting aside a specified number of seats for minority students.⁴⁶ The university's admission policy required that the school operate a dual system application process where eighty-four of the one-hundred slots were open to everyone, and the remaining sixteen slots were available only to minority students.⁴⁷ Chief Justice Burger and Justices Stewart, Stevens, and Rehnquist all held that the admission policy was invalid but did not consider the constitutional question of whether the policy violated the Equal Protection Clause because they found that it violated Title VI of the 1964 Civil Rights Act.⁴⁸ Justice Powell provided the fifth vote needed to invalidate the policy, but argued that the policy was unconstitutional under the Equal Protection Clause because it failed to pass strict scrutiny.⁴⁹ Justices Brennan, White, Marshall, and Blackmun dissented and argued for the application of intermediate scrutiny and found that the policy passed the lower standard.⁵⁰

Although Justice Powell was only writing for himself, his view of the strict scrutiny standard as applied to affirmative action programs would help guide the Supreme Court in all of its future affirmative action decisions. First, in stating why the policy should be subjected to strict scrutiny and not intermediate scrutiny, Justice Powell focused on the language contained in the Fourteenth Amendment itself, which he interpreted as extending the clause to all "persons."⁵¹ Therefore, the Equal Protection Clause could not mean one thing when applied to one person, but another thing when applied to someone else of a different race, meaning that all racial classifications should be subjected to the same level of scrutiny—strict—regardless of what race was receiving the benefits or burdens of the government's program.⁵²

Justice Powell then turned to the first part of the strict scrutiny analysis and held that either rectifying past discrimination or achieving a diverse student body could

⁴⁴ Fullilove v. Klutznick, 448 U.S. 448, 480 (1980) ("We recognize the need for careful judicial evaluation to assure that any congressional program that employs racial or ethnic criteria to accomplish the objective of remedying the present effects of past discrimination is *narrowly tailored* to the achievement of that goal." (emphasis added)).

⁴⁵ *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 299 (1978).

⁴⁶ *Id.* at 270-72.

⁴⁷ *See id.* at 272-76.

⁴⁸ *Id.* at 418 (Stevens, J., concurring in judgment in part and dissenting in part).

⁴⁹ *Id.* at 315-21 (plurality opinion).

⁵⁰ *Id.* at 379 (Brennan, J., concurring in judgment and dissenting in part).

⁵¹ *Id.* at 293-94 (plurality opinion).

⁵² *Id.*

satisfy the compelling interest requirement of the strict scrutiny test.⁵³ However, Justice Powell found that there was no evidence of past discrimination by the university, so the university did not have a compelling interest in remedying past discrimination.⁵⁴ Therefore, the university's only possible compelling interest was in achieving diversity, and Justice Powell found that the medical school's policy was not the only effective means of serving that interest.⁵⁵ He disapproved of the university's use of a rigid quota because it made race the sole deciding factor in determining whether some individuals obtained admission to the medical school.⁵⁶ Instead, he stated that a proper model could be the one used by Harvard College where there is no numerical quota set for minorities and race is just used as a "plus" factor among many other factors in the admissions process to help increase a university's diversity.⁵⁷ Powell emphasized that a program like this treats each applicant as an individual and prevents an applicant's race from being the sole deciding factor in determining his or her admission to the university.⁵⁸

B. Fullilove, Wygant, and Paradise: Justice Powell's Interpretation of the Narrow Tailoring Requirement

After *Bakke*, the Supreme Court—with Justice Powell as the controlling member—decided the constitutionality of three more affirmative action programs in *Fullilove v. Klutznick*,⁵⁹ *Wygant v. Jackson Board of Education*,⁶⁰ and *United States v. Paradise*.⁶¹ In these decisions, the Court expanded *Bakke*'s reasoning from the domain of education to employment and public contracting affirmative action programs. In each case, as in *Bakke*, the Court was faced with a government affirmative action program that employed a quota or set-aside, meaning that these programs gave race a numerical quantification. First, in *Fullilove*, the Supreme Court evaluated a federal law that required that any public works project seeking a federal grant to set-aside 10% of the grant for Minority Business Enterprises (MBEs).⁶² Next, in *Wygant v. Jackson Board of Education*, the Supreme Court evaluated a school system's preferential protection against layoffs of minority workers where, in the event that it became necessary, the Jackson Board of

⁵³ *Id.* at 307, 312.

⁵⁴ *Id.* at 309-10.

⁵⁵ *Id.* at 315-19. As noted in the previous section, at the time of *Bakke*, the Supreme Court had not begun to use the language "narrowly tailored" to refer to the "means" analysis prong of the strict scrutiny test. Instead, in *Bakke*, Justice Powell used the language "precisely tailored." Despite the difference in language, the *Bakke* decision remained highly influential in guiding the Supreme Court in its future narrow tailoring analyses. *See, e.g.*, *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003).

⁵⁶ *Bakke*, 438 U.S. at 319-20.

⁵⁷ *Id.* at 316-18.

⁵⁸ *Id.* at 317-18.

⁵⁹ *Fullilove v. Klutznick*, 448 U.S. 448 (1980).

⁶⁰ *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986).

⁶¹ *United States v. Paradise*, 480 U.S. 149 (1987).

⁶² *Fullilove*, 448 U.S. at 448.

Education agreed that it would only layoff as many minority teachers as it would lay off non-minority teachers—a one-to-one quota.⁶³ Adherence to this rule caused the Board to lay off tenured non-minority teachers rather than non-tenured minority teachers.⁶⁴ Finally, in *Paradise*, the Court reviewed a federal district court order requiring the Alabama Department of Public Safety to create a set-aside in which it would hire one black trooper for each white trooper hired—another one-to-one quota.⁶⁵ This program would continue until black troopers constituted approximately 25% of the state trooper force, in order to remedy past intentional employment discrimination by the Department of Public Safety.⁶⁶ Despite the fact that all four cases, including *Bakke*, involved government affirmative action programs that utilized numerical set-asides, the Court split over the four programs, finding two, the ones in *Bakke* and *Wygant*, unconstitutional,⁶⁷ and two, the ones in *Fullilove* and *Paradise*, constitutional.⁶⁸

This split shows that the Supreme Court with Justice Powell as the swing vote took a contextualized rather than categorical approach to the narrow tailoring requirement. Although the Court never announced clear, consistent principles for the narrow tailoring requirement in these cases, it was clear that the Court was moving in a direction in which it would evaluate affirmative action programs on an individualized basis to determine whether the program was narrowly tailored. In finding the *Fullilove* program constitutional, the Court focused on these specific facts: the program was enacted through the legislative authority of Congress, who possesses broad remedial powers; the program was being challenged on its face rather than through a specific implementation; and the program contained a waiver and exemption provision stating that the set-aside could be waived if the contractor could demonstrate that there were not sufficient qualified minority business enterprises in the relevant market.⁶⁹ In finding the *Wygant* program unconstitutional, Justice Powell focused particularly on the fact that this employment case dealt with layoffs rather than hiring.⁷⁰ Justice Powell stated that “[d]enial of a future employment opportunity is not as intrusive as loss of an existing job”⁷¹ because while a hiring goal merely imposes “a diffuse burden, often foreclosing only one of several opportunities, layoffs impose the entire burden of achieving racial equality on particular individuals, often resulting in serious disruption of their lives.”⁷² Thus, he rejected layoffs as an appropriate means in employment affirmative action cases.

⁶³ See *Wygant*, 476 U.S. at 267-71.

⁶⁴ *Id.*

⁶⁵ See *Paradise*, 480 U.S. at 154-66.

⁶⁶ *Id.*

⁶⁷ *Wygant*, 476 U.S. at 283-84; *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 319-20 (1978).

⁶⁸ *Paradise*, 480 U.S. at 185-86; *Fullilove*, 448 U.S. at 492.

⁶⁹ See *Fullilove*, 448 U.S. at 480-89.

⁷⁰ See *Wygant*, 476 U.S. at 282-84.

⁷¹ *Id.* at 282-83.

⁷² *Id.* at 283.

In finding the *Paradise* program constitutional, the Court focused on the egregious facts of the case, where the Alabama Department of Public Safety not only had a proven long history of discrimination in its employment practice but was also resistant to all of the district court's attempts to remedy this discrimination.⁷³ In addition, the Court focused on these facts: the requirement could be waived if no qualified black candidates were available; the district court's goal of attaining a department comprised of 25% black troopers reflected the relevant work force; the program was temporary and extremely limited in nature; and, finally, that a district court's determination of what relief is appropriate should be given deference.⁷⁴ The Court's appreciation of the different facts presented in each case shows that it was adopting a more contextualist approach.

In addition to outcomes of these cases, the Court's language also shows that it was adopting a contextualist approach. In *Paradise*, both Justice Brennan and Justice Powell stated that the narrow tailoring analysis requires the Court to look at several factors.⁷⁵ Justice Powell stated:

In determining whether an affirmative-action remedy is narrowly drawn to achieve its goal, I have thought that *five factors may be relevant*: (i) the efficacy of alternative remedies; (ii) the planned duration of the remedy; (iii) the relationship between the percentage of minority workers to be employed and the percentage of minority group members in the relevant population or work force; (iv) the availability of waiver provisions if the hiring plan could not be met; and (v) the effect of the remedy upon innocent third parties.⁷⁶

Although this is a list of categorical factors, the italicized language shows that Justice Powell was advocating for a contextualist approach. Powell used the word "may," and thus thought that these were factors that a reviewing court might use in evaluating the constitutionality of a government affirmative action program depending on the facts before it, rather than absolute requirements that the court must find in each program. Unfortunately, a majority of the Court failed to adopt these factors because, in *Paradise*, Justice Stevens only concurred in judgment with Justices Brennan and Powell, leaving their multi-factored tests adopted by only a plurality of the Court.⁷⁷ That the Court with Justice Powell as its controlling member was utilizing a contextualist approach to the narrow tailoring requirement is key in understanding where the requirement was at when Powell handed the controlling position over to Justice O'Connor and where she then took the requirement.

C. Croson, Gratz, and Grutter: Justice O'Connor's Interpretation of the Narrow Tailoring Requirement

In 1987, Justice Powell retired from the Supreme Court, and Justice O'Connor eventually assumed the position of controlling member—the swing voter—of the

⁷³ See *Paradise*, 480 U.S. at 171-77.

⁷⁴ See *id.* at 177-86.

⁷⁵ *Id.* at 171; *id.* at 187 (Powell, J., concurring).

⁷⁶ *Id.* at 187 (Powell, J., concurring) (emphasis added).

⁷⁷ *Id.* at 189 (Steven, J., concurring in judgment).

Court with respect to its affirmative action decisions. Justice O'Connor took her first step in assuming this position by writing the Court's first post-Justice Powell affirmative action opinion, *Richmond v. J.A. Croson Co.*⁷⁸ In *Croson*, the Supreme Court declared unconstitutional a city affirmative action program similar to the federal law that the Court declared constitutional in *Fullilove*.⁷⁹ The city of Richmond, Virginia, enacted a plan that awarded city contracts requiring the contractor to subcontract at least 30% of the total dollar amount of each contract to Minority Business Enterprises (MBEs).⁸⁰ Like the set-aside in *Fullilove*, the Richmond plan defined MBEs as businesses owned by minority group members who are "[c]itizens of the United States [and] who are Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts."⁸¹

As an initial matter, the *Croson* decision was very important as it was the first decision in which a majority of the Court agreed that an affirmative action program should be reviewed under strict scrutiny, although a majority failed to agree on what that standard entailed.⁸² In each of the four previous cases, the Court had fought over whether government affirmative action programs should be reviewed under strict or intermediate scrutiny.⁸³ Thus, this was first time that the Court firmly held that government affirmative action programs must meet strict scrutiny's narrow tailoring requirement, although the holding was limited to state affirmative action programs and not federal programs.

Writing for the Court, Justice O'Connor began her analysis by stating that the plan was not linked to any identified past discrimination by the city of Richmond, but only a generalized assertion that discrimination had occurred in the past in that particular industry.⁸⁴ She also pointed out that there was absolutely no evidence at all showing that any past discrimination had occurred against any Spanish-speaking, Oriental, Indian, Eskimo, or Aleut person, and, therefore, the "random inclusion" of these races along with blacks as part of the set-aside scheme was improper.⁸⁵ Thus, the Richmond plan failed the compelling interest prong of the strict scrutiny test

⁷⁸ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

⁷⁹ *Id.* at 511.

⁸⁰ *Id.* at 477.

⁸¹ *Id.* at 478 (alteration in original). In making that decision, the Court noted that even if it were to accept the position that affirmative action programs should be subject to a lesser level of scrutiny than strict scrutiny because they are programs that are designed to help minorities, a level of heightened scrutiny would still be appropriate. *See id.* at 495-98. Blacks constituted approximately 50% of the population of Richmond and were thus the ethnic majority, not the ethnic minority. *See id.* at 495. The Court stated that because blacks represented the ethnic majority in this particular situation, their actions constituted discrimination against whites as the ethnic minority, and as a consequence, the program did not constitute affirmative action. *See id.* at 495-98.

⁸² *Id.* at 493-94.

⁸³ *See, e.g.,* *United States v. Paradise*, 480 U.S. 149 (1987); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

⁸⁴ *Croson*, 488 U.S. at 498-507.

⁸⁵ *Id.* at 506.

because the government did not have a compelling interest in remedying general societal discrimination.⁸⁶ Even though the plan failed the compelling interest prong, Justice O'Connor still made a few observations about whether the plan was narrowly tailored. She stated that "there [did] not appear to [be] any consideration of the use of race-neutral means to increase minority business participation in city contracting."⁸⁷ Furthermore, Justice O'Connor criticized the use of the 30% set-aside, which reflected the number of minorities in the city's total population rather than the minority population in the relevant work force.⁸⁸ Justice O'Connor also did not see why the rigid numerical quota was necessary because bids and waivers were already determined on a case-by-case basis, allowing the affirmative action decisions to be made on an individual basis.⁸⁹ In conclusion, Justice O'Connor stated that she thought that the city's only interest in establishing a quota, despite already having an individualized procedure, was simple administrative convenience, which is not a compelling interest and is not enough to justify the use of racial classifications.⁹⁰

Although Justice O'Connor did not expressly say she was doing so, it does appear that she was relying on Justice Powell's factors in evaluating the constitutionality of the Richmond plan. Her criticism of the program's 30% set-aside not being linked to the relevant job market was directly linked to Powell's third factor of looking at the relationship of the set-aside with the relevant market. Also, her advocacy for race-neutral alternatives is similar to Powell's first factor of looking at the efficacy of alternative remedies, although it is much more specific than Powell's factor. Instead of using the general term "alternative remedies," Justice O'Connor made it clear that these alternatives should be race-neutral. However, it was unclear in her opinion whether efficacy would remain a consideration, or if any available race-neutral means—effective or not—should be adopted. Justice O'Connor's preference for individualized determinations rather than set-asides seems to be linked to Justice Powell's fifth factor, the program's effect on the harm of third parties, because she felt that individualized determinations "are less problematic . . . because they treat all candidates individually, rather than making the color of an applicant's skin the sole relevant consideration."⁹¹ Thus, Justice O'Connor appeared to be adopting Powell's fifth factor, but she made it more specific by preferring individualized determinations rather than set-asides. This preference will be elaborated on shortly.

Justice O'Connor's analysis shows that while she did consider factors similar to those Justice Powell relied on in *Paradise*, she sought to give these factors more specificity by explaining exactly what they should entail in each program. Thus, Justice O'Connor sought to use categorical factors that were narrower and more rigid than those that Justice Powell had advocated for—in particular, her preferences for race-neutral alternatives and for individualized determinations rather than set-asides. However, she only referred to her categorical factors as "observations" and did not

⁸⁶ *See id.* at 505.

⁸⁷ *Id.* at 507.

⁸⁸ *Id.* at 507-08.

⁸⁹ *Id.* at 508.

⁹⁰ *Id.*

⁹¹ *Id.*

use words like “may” or “should” in describing how to apply the factors.⁹² Thus, she left unclear whether these categorical factors would be applied loosely as Justice Powell’s language in *Paradise* suggested, or if the Court would apply them rigidly, as absolute requirements rather than factors.

Although the “narrow tailoring” requirement in *Croson* was far from a clear test, the Court did not take another case that involved a narrow tailoring determination of an employment, educational, or public works affirmative action program for almost fifteen years.⁹³ In the meantime, the Court issued two opinions that determined the appropriate level of review for federal government affirmative action programs, specifically programs approved by Congress. In *Metro Broadcasting, Inc. v. FCC*, the Supreme Court in an opinion by Justice Brennan held that congressionally approved affirmative action programs should be reviewed under the intermediate scrutiny standard,⁹⁴ but Justices O’Connor, Kennedy, Scalia, and Rehnquist dissented and argued that reviewing courts should use strict as opposed to intermediate scrutiny.⁹⁵ Over the next couple years, the makeup of the Court changed significantly with four new Justices—Thomas, Souter, Ginsberg and Breyer—joining the Court. The most important of these changes was the replacement of the highly liberal Justice Marshall with the highly conservative Justice Thomas, who later joined the four dissenting Justices from *Metro Broadcasting* to overrule it. In *Adarand Constructors, Inc. v. Peña*, the Court held that “all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny.”⁹⁶ This meant that “[f]ederal racial classifications [including all forms of affirmative action], like those of a State, must serve a compelling governmental interest, and must be narrowly tailored to further that interest.”⁹⁷

Although *Adarand* only involved a determination of the appropriate level of scrutiny to be applied to the federal government program, Justice O’Connor, writing for the Court, stated that she wanted to “dispel the notion that strict scrutiny is ‘strict in theory, but fatal in fact.’”⁹⁸ “When race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the ‘narrow tailoring’ test this Court has set out in previous cases.”⁹⁹ This language sought to dispel the notion that the high “narrow tailoring” bar set forth by the Court in *Croson* was impossible to meet and instructed lower courts that they should engage in a meaningful review when determining if government affirmative action programs meet the narrow tailoring requirement. The fact that Justice O’Connor felt it necessary to add this language in the *Adarand* case reflects the likelihood that most

⁹² *Id.* at 507.

⁹³ The Court did not decide another case until 2003, when it decided the pair of cases, *Gratz v. Bollinger*, 539 U.S. 244 (2003), and *Grutter v. Bollinger*, 539 U.S. 306 (2003).

⁹⁴ *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 564-65 (1990).

⁹⁵ *Id.* at 602 (O’Connor, J., dissenting).

⁹⁶ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995).

⁹⁷ *Id.* at 235.

⁹⁸ *Id.* at 237.

⁹⁹ *Id.*

courts and lawyers interpreted her observations in *Croson* with respect to the narrow tailoring requirement to be rigid requirements rather than loose factors.¹⁰⁰

During this period, the Supreme Court also decided a series of cases involving a very specific type of affirmative action: racial gerrymandering, which is the drawing of voter district lines predominantly based on race.¹⁰¹ In the first case, *Shaw v. Reno*, the Court merely held that racial gerrymandering is subject to strict scrutiny.¹⁰² In the second case, *Miller v. Johnson*, the Court failed to reach the narrow tailoring prong of the strict scrutiny test because the court settled the case based on the compelling interest prong.¹⁰³ In the final two cases, *Shaw v. Hunt* and *Bush v. Vera*, the Supreme Court finally reached the narrow tailoring prong of the strict scrutiny test.¹⁰⁴ However, these two decisions did little to provide insight on the application of narrow tailoring in other contexts because, in both cases, the Court quickly dismissed the claim that the racial gerrymandering at issue was necessary to remedy past discrimination and instead focused on whether the redistricting was narrowly tailored to comply with Section 2 of the Voting Rights Act.¹⁰⁵

For example, in *Shaw v. Hunt*, the Supreme Court's narrow tailoring analysis began by stating that the legislative action must, at a minimum, remedy the anticipated violation of, or achieve compliance with, Section 2 of the Voting Rights Act to be narrowly tailored.¹⁰⁶ Also, "a plaintiff must show that the minority group is 'geographically compact' to establish [Section] 2 liability."¹⁰⁷ The Court next held that the legislation was not narrowly tailored because "[n]o one looking at District 12 could reasonably suggest that the district contains a 'geographically compact' population of any race. Therefore where that district sits, 'there neither has been a wrong nor can be a remedy.'"¹⁰⁸ The Court also rejected the State's argument that once a Section 2 violation exists anywhere in the state, the state can draw majority-minority districts anywhere.¹⁰⁹

¹⁰⁰ It is also possible that Justice O'Connor felt it necessary to add the language stating that strict scrutiny was not "strict in theory, but fatal in fact" because *Adarand* represented such a broad pronouncement of the strict scrutiny test. After *Adarand*, it was clear that the Court would apply strict scrutiny to any case involving a facial racial classification (and with the Court's decision in *Shaw v. Reno* (*Shaw I*), 509 U.S. 630 (1993), even cases that involved classifications that were facially neutral), even when the government defended such classifications as benign. With an increasingly large category of cases subject to strict scrutiny, Justice O'Connor wanted to be clear that this did not mean that the Court was going to find all of them unconstitutional.

¹⁰¹ See, e.g., *Bush v. Vera*, 517 U.S. 952 (1996); *Shaw v. Hunt* (*Shaw II*), 517 U.S. 899 (1996); *Miller v. Johnson*, 515 U.S. 900 (1995); *Shaw I*, 509 U.S. at 630-58.

¹⁰² *Shaw I*, 509 U.S. at 649, 658.

¹⁰³ *Miller*, 515 U.S. at 922.

¹⁰⁴ See *Bush*, 517 U.S. at 977; *Shaw II*, 517 U.S. at 915.

¹⁰⁵ See *Bush*, 517 U.S. at 982; *Shaw II*, 517 U.S. at 916.

¹⁰⁶ *Shaw II*, 517 U.S. at 915.

¹⁰⁷ *Id.* at 916.

¹⁰⁸ *Id.* (citation omitted).

¹⁰⁹ *Id.* at 916-17.

Although the voting rights cases do little to clarify the opaqueness of the *Croson* opinion, they are very important in this discussion because they represent an area where the Supreme Court, with Justice O'Connor as the swing vote, was willing to take a more contextualist approach to narrow tailoring. Instead of attempting to make factual inquiries that relied on categorical requirements that all forms of affirmative action should meet, the Court focused solely on the issue of racial gerrymandering and what facts would justify the use of race in that particular context—the narrow inquiry of whether the program was necessary in order to comply with Section 2 of the Voting Rights Act. Although the Court never expressly explained its rationale for adopting a different approach to narrow tailoring in these cases, it seems fairly clear that it adopted this different standard because the Court was faced with a different compelling interest, compliance with Section 2 of the Voting Rights Act,¹¹⁰ rather than the two compelling interests that are typically claimed and accepted by the Court in all other affirmative action cases, namely remedying past discrimination and achieving diversity. Thus, it seems here that Justice O'Connor was willing to expand the narrow tailoring evaluation beyond the factors identified in *Croson* because she was willing to expand the compelling interest requirement beyond the compelling interests that were mentioned in *Croson*.

Fourteen years after *Croson*, the Supreme Court decided a pair of cases involving the University of Michigan's admission programs. These cases greatly clarified the narrow tailoring requirement because both cases reached the narrow tailoring inquiry with one program being declared constitutional and the other program being declared unconstitutional. In the first case, *Gratz v. Bollinger*, the Supreme Court reviewed the University of Michigan's undergraduate admission program and held that it was unconstitutional because it failed to meet the Court's "narrow tailoring" requirement.¹¹¹ The University of Michigan's undergraduate admissions program operated by using a fixed point system that assigned each applicant a point-value for each factor that the university deemed relevant to an admissions decision.¹¹² A total score of 100 points means that admission was guaranteed.¹¹³ As one of the factors, the university labeled African-Americans, Hispanics, and Native Americans

¹¹⁰ It should be noted that it is unclear whether the Supreme Court ever actually adopted compliance with Section 2 of the Voting Rights Act as a compelling state interest. In *Shaw II*, the Court clearly held that compliance with Section 5 of the Voting Rights Act could not serve as a compelling state interest. *Shaw II*, 517 U.S. at 911-12. But in both *Shaw II* and *Bush*, the Supreme Court analyzed whether the programs were necessary to comply with Section 2 of the Voting Rights Act without expressly holding that compliance with Section 2 qualified as a compelling state interest. *Id.* at 915; *Bush*, 517 U.S. at 979. However, in *Bush*, Justice O'Connor stated in a separate concurrence that she believed that compliance with Section 2 of the Voting Rights Act was a compelling state interest, and four justices—Justices Breyer, Ginsberg, Stevens, and Souter—in dissenting opinions, also stated that it was a compelling state interest. *Bush*, 517 U.S. at 992 (O'Connor, J., concurring); *id.* at 1033-35 (Stevens, J., dissenting); *id.* at 1072 (Souter, J., dissenting). Thus, in *Bush*, there appeared to be five votes on the Court that believed that it was a compelling state interest, but the makeup of the Supreme Court has changed since *Bush*, so it is unclear whether that view would still hold true today.

¹¹¹ *Gratz v. Bollinger*, 539 U.S. 244, 246 (2003).

¹¹² *Id.* at 255.

¹¹³ *Id.*

“underrepresented minorities,” and automatically awarded each member of these groups twenty points on the basis of race.¹¹⁴ In comparison, a perfect SAT score was only awarded twelve points.¹¹⁵

Chief Justice Rehnquist writing for the Court stated that the program was not narrowly tailored and was thus unconstitutional.¹¹⁶ In doing so, the Chief Justice compared the point system to the set-aside in *Bakke* and stated that, as in *Bakke*, race could become the sole decisive factor in an admission decision.¹¹⁷ Chief Justice Rehnquist stated that although the system allowed some applicants to be flagged for individual review, that flagging was the exception rather than the rule, so that race remained decisive in virtually all cases.¹¹⁸ Furthermore, the twenty-point addition was fixed and automatic rather than individualized.¹¹⁹ He also rejected the college’s argument that the volume of applications made individual review impractical because administrative difficulties could not salvage an otherwise unconstitutional system.¹²⁰ Rehnquist’s firmness against claims of administrative difficulties is reminiscent of the language used by Justice O’Connor in *Croson*.¹²¹ This firmness in both cases shows that the Court was being very strict about its race-neutral requirement and that it required the government to take less-intrusive, race-neutral means if they were available at all, even if they were not possible or practical.

In the second case, *Grutter v. Bollinger*, the Supreme Court reviewed the University of Michigan’s law school admission program and held that it was constitutional and satisfied the Court’s narrow tailoring requirement.¹²² The University of Michigan Law School’s admission policy required individual review of an applicant’s file where race was a factor for consideration, but it was not assigned a quantitative value.¹²³ Although the law school did not target a particular number or quota of underrepresented minority students, the admission department did seek to ensure that a “critical mass” of underrepresented minority students would be admitted to the law school.¹²⁴

In an opinion by Justice O’Connor, the Court adopted Justice Powell’s reasoning in *Bakke* and upheld the law school’s admissions policy.¹²⁵ Interestingly, before beginning her strict scrutiny analysis, Justice O’Connor stated that “[c]ontext matters

¹¹⁴ *Id.* at 254, 256.

¹¹⁵ Associated Press, *Veterans Back Race-Conscious Admissions*, WASH. POST, Feb. 18, 2003, at A23.

¹¹⁶ *Gratz*, 539 U.S. at 275.

¹¹⁷ *Id.* at 272.

¹¹⁸ *See id.* at 273-74.

¹¹⁹ *See id.* at 271.

¹²⁰ *Id.* at 275.

¹²¹ *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 508 (1989).

¹²² *Grutter v. Bollinger*, 539 U.S. 306, 353 (2003).

¹²³ *Id.* at 315-16.

¹²⁴ *Id.* at 316.

¹²⁵ *Id.* at 343.

when reviewing race-based governmental action under the Equal Protection Clause.”¹²⁶ It appears that Justice O’Connor made this statement to emphasize that the Court was dealing with diversity in the context of higher education and that in this context, the Supreme Court should show deference to a university’s academic decisions.¹²⁷ This language certainly shows openness to Justice Powell’s contextual approach to narrow tailoring. However, as seen by her strict scrutiny analysis in the case, she continued to rely on rigid categorical requirements rather than loose factors in making her narrow tailoring determination.

Justice O’Connor began her strict scrutiny analysis by stating that the admission policy conformed to the ideal admissions program endorsed by Justice Powell in which race is used as a “plus” factor.¹²⁸ She stated that a discretionary, individualized system would be “flexible enough to consider all pertinent elements.”¹²⁹ Furthermore, Justice O’Connor stated that race-neutral means such as “‘using a lottery system’ or ‘decreasing the emphasis for all applicants on undergraduate GPA and LSAT scores’”¹³⁰ were not necessary, as they “would require a dramatic sacrifice of diversity, the academic quality of all admitted students, or both.”¹³¹ This was a strange flexibility Justice O’Connor embraced compared to the rigidity of requiring less intrusive means in *Gratz* and *Croson*.¹³² In this decision, Justice O’Connor seemed to think that race-neutral means were only necessary if they were as effective as the challenged government program. Finally, in order to satisfy the narrow tailoring requirement, Justice O’Connor added her own sunset provision for the program and held, in a rather arbitrary manner, that “25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.”¹³³ For later purposes, it should be noted that in this case, Justice Kennedy dissented and claimed that the program was not narrowly tailored because it sought to achieve racial balancing.¹³⁴

These two cases clarified Justice O’Connor’s problem with set-asides. Her careful scrutiny of set-asides seemed to be based on fear of race-based harm to an individual person, which would violate the “person” language contained in the Fourteenth Amendment. This is the same concern that Powell wrote about in *Bakke* and listed as one of his narrow tailoring factors in *Paradise*.¹³⁵ The distinction

¹²⁶ *Id.* at 327.

¹²⁷ *See id.* at 327-28.

¹²⁸ *Id.* at 341.

¹²⁹ *Id.* at 337.

¹³⁰ *Id.* at 340.

¹³¹ *Id.*

¹³² *Gratz v. Bollinger*, 539 U.S. 244, 275 (2003); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 508 (1989).

¹³³ *Grutter*, 539 U.S. at 343. In her opinion, Justice O’Connor explained that she derived the number twenty five years because it had been twenty five years since the Supreme Court had decided *Bakke*. *Id.*

¹³⁴ *Id.* at 387 (Kennedy, J., dissenting).

¹³⁵ *United States v. Paradise*, 480 U.S. 149, 197 (1987) (Powell, J., concurring) (“(v) the effect of the remedy on innocent third parties”); *Regents of the Univ. of Cal. v. Bakke*, 438

between affirmative action programs that utilize individual review and those that employ set-asides is based on whether an individual can point to the exclusion from himself to a specific benefit and the inclusion of another individual to that same benefit with the sole reason for that inclusion or exclusion being the race of the individuals.¹³⁶ For example, under the undergraduate admission program in *Gratz*, any non-underrepresented minority who had a point total of 80-99 and was denied admission could state that race was the sole reason for her failure to gain admission because had she received the twenty-point bonus for race, she would have been automatically admitted into the university. However, non-underrepresented minority applicants with competitive scores denied admission to the law school program in *Grutter* could not make this claim. Since race was not given a numerical value in the *Grutter* program, an applicant was unable to point to race as being the sole decisive factor for being denied admission. This encourages government agencies that would like to adopt affirmative action programs to engage in a type of “don’t tell, don’t ask” policy of granting benefits based on race without clarifying or quantifying them in advance, much like the Harvard program in *Bakke*.¹³⁷

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

III. PARENTS INVOLVED: JUSTICE KENNEDY’S INITIAL INTERPRETATION OF THE NARROW TAILORING REQUIREMENT

In its most recent affirmative action decision, *Parents Involved in Community Schools v. Seattle School District No. 1*, the Supreme Court again displayed the polarizing nature of affirmative action cases.¹³⁸ Reminiscent of *Bakke*, there were four justices striking down the program and arguing for colorblind constitutional principles, four justices dissenting and arguing for the need for affirmative action programs due to the problems of discrimination, and one justice, Justice Kennedy, left in the middle to find a compromise.¹³⁹

The Seattle School District and the Louisville School District sought to achieve racial diversity in their public school systems.¹⁴⁰ The school districts aimed to

U.S. 265, 293-94 (1978) (“this Court has embarked upon the crucial mission of interpreting the Equal Protection Clause with the view of assuring to all persons ‘the protection of equal laws’”).

¹³⁶ Constitutional scholars have referred to this concept as the Non-Preferment Principle. See generally Samuel Estreicher, *The Non-Preferment Principle and the “Racial Tiebreaker” Cases*, 2007 CATO SUP. CT. REV. 239 (2007).

¹³⁷ See generally Ian Ayres & Sydney Foster, *Don’t Tell, Don’t Ask: Narrow Tailoring After Grutter and Gratz*, 85 TEX. L. REV. 517 (2007).

¹³⁸ *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

¹³⁹ See *id.*

¹⁴⁰ See *id.* at 709-18.

accomplish this end by instituting racial tie-breakers for admission to the school.¹⁴¹ In Seattle, where the schools were 41% white and 59% nonwhite, any school that was not within 10% of these two numbers would be deemed “integration positive,” and the District would apply the tie-breaker to admit the student whose race would serve to bring the school into balance.¹⁴² In Louisville, there was a similar program, but there the tie-breaker worked so that each school maintained a minimum black enrollment of 15% and a maximum black enrollment of 50%.¹⁴³ The Supreme Court, by a 5-4 vote, held that these racial tie-breakers were unconstitutional.¹⁴⁴

In a plurality opinion by Chief Justice Roberts—joined by Justices Alito, Scalia and Thomas—the plurality advocated for a colorblind approach to the Equal Protection Clause.¹⁴⁵ Roberts stated a simple solution to the problem of racial discrimination: “The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”¹⁴⁶ Justice Breyer—joined by Justices Souter, Stevens, and Ginsberg—wrote a dissent and advocated for a standard that appeared to be a looser form of strict scrutiny and found that the integration programs were constitutional.¹⁴⁷

The most important opinion in *Parents Involved* was written by Justice Kennedy concurring in judgment, who, like Justice Powell in *Bakke*, wrote only for himself. Kennedy rejected both the plurality’s colorblind approach and the dissenters’ looser-than-strict-scrutiny standard.¹⁴⁸ Justice Kennedy concurred in judgment because he found that the integration programs were unconstitutional and did not satisfy the “narrow tailoring” requirement because the racial tie-breakers placed more reliance on race than the admission policy that was found to be unconstitutional in *Gratz*.¹⁴⁹ In this aspect of the opinion, Justice Kennedy still seemed to be aligned with Justice O’Connor’s rigid view of the narrow tailoring requirement that all set-asides are unconstitutional because they create too much harm on innocent third parties. Although Justice Kennedy found the program to be unconstitutional, what separated his opinion from the colorblind camp and Justice O’Connor and surprised constitutional scholars was his sweeping language supporting race-conscious remedies. Justice Kennedy stated:

School boards may pursue the goal of bringing together students of diverse backgrounds and races through other means, including strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources

¹⁴¹ *See id.*

¹⁴² *Id.* at 711-12.

¹⁴³ *Id.* at 716.

¹⁴⁴ *See id.* at 708, 748.

¹⁴⁵ *Id.* at 701-748.

¹⁴⁶ *Id.* at 748.

¹⁴⁷ *See id.* at 803-69 (Breyer, J., dissenting).

¹⁴⁸ *See id.* at 782-98 (Kennedy, J., concurring).

¹⁴⁹ *See id.* at 792.

for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race.¹⁵⁰

Rather than state that diversity is merely a permissible constitutional end, Justice Kennedy stated that the government's goal should be "to go beyond present achievements, however significant, and to recognize and confront the flaws and injustices that remain."¹⁵¹

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

After the *Parents Involved* decision was released, many commentators accused Justice Kennedy of softening his stance on affirmative action.¹⁵² They pointed to his previous concurring and dissenting opinions in cases like *Grutter* and *Crosby* where he appeared to be in line with the colorblindness camp that Justice Scalia, Justice Thomas, now Chief Justice Roberts, and Justice Alito advocated for and claimed that the pressures of being the swing vote caused Justice Kennedy to now align with the views of Justices Powell and O'Connor.¹⁵³ They claimed that being the controlling member of the Court requires adoption of the "don't tell, don't ask" affirmative action policy, which condemns set-asides, tolerates individualized determinations, and was used by those two previous controlling members.¹⁵⁴

However, Professor Heather Gerken has offered a different explanation for this apparent shift. She stated that the apparent shift in Justice Kennedy's views on affirmative action is not a shift at all: it merely demonstrates that he prefers a contextualist approach to the Equal Protection Clause.¹⁵⁵ Rather than create a general "narrow tailoring" requirement that should be applied to all forms of affirmative action, Justice Kennedy is applying a different requirement for lower education than he would for higher education.¹⁵⁶ The difference in his approach between *Grutter* and *Parents Involved* just shows that he views the compelling interest of achieving diversity to be more appropriate in lower education, where children are still developing and need to learn how to work with others, than in graduate school, where students are already young adults and have already

¹⁵⁰ *Id.* at 789.

¹⁵¹ *Id.* at 787.

¹⁵² Gerken, *supra* note 24, at 104.

¹⁵³ *See id.* at 104-06.

¹⁵⁴ *See id.*

¹⁵⁵ *See id.* at 116-18.

¹⁵⁶ *Id.* at 117.

developed their social skills.¹⁵⁷ For Justice Kennedy, this shows that where the affirmation action program is being applied is just as important as what the program mandates during the narrow tailoring inquiry.

Professor Gerken's interpretation of the *Parents Involved* decision certainly displays that Justice Kennedy is open to the contextualist approach that the Court took when Justice Powell was the controlling member, though Gerken admits that her view is not the only way to read *Parents Involved*.¹⁵⁸ However, because Justice Kennedy's opinion lacks much of the language that would support Gerken's assertions,¹⁵⁹ it is unclear if Justice Kennedy even knows he is doing this. Regardless of whether he is opening himself up to a more contextualist standard, consciously or subconsciously, the next section of this Article will display the flaws in Justice O'Connor's approach and explain why a contextualist approach is more desirable. Justice Kennedy should therefore continue in the direction of taking a contextualist approach to the narrow tailoring requirement and align himself more with the views of Justice Powell.

IV. THE DEFICIENCIES OF THE CURRENT STATE OF NARROW TAILORING

This section of the Article argues that Justice O'Connor's formalistic approach to the narrow tailoring requirement is flawed because, as applied, it can be both too lenient and too harsh on affirmative action. This difficulty arises from the fact that a rigid, rule-based test cannot best serve the Court's controlling members' normative assumptions about affirmative action. As in the broader society, this issue has heavily polarized the Court into two groups, and both *Bakke* and *Parents Involved* reflect this. One camp of justices argues for a colorblind Constitution and claims that racial classifications, no matter how well-intentioned, are unconstitutional.¹⁶⁰ The other camp sees affirmative action as a necessity to right the wrongs of the past and to create a truly integrated society, and it claims that the benign intentions justify a lenient inquiry that gives wide discretion to lawmakers to implement affirmative

¹⁵⁷ *See id.*

¹⁵⁸ *Id.* at 107-08.

¹⁵⁹ In fact, Justice Kennedy's lack of language supporting a contextual standard is striking when compared to Justice Breyer's explicit demand for a more contextual approach:

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

Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 834 (2007) (alteration in original) (citations omitted).

¹⁶⁰ *See supra* note 4.

action programs.¹⁶¹ These two different beliefs about affirmative action reflect the differing views about affirmative action in broader society.¹⁶² However, the Court as a whole, except perhaps briefly in the case of *Metro Broadcasting* when it adopted the intermediate scrutiny test with respect to congressionally enacted affirmative action, has never fully accepted either principle.¹⁶³ Instead, the controlling members of the Court have kept the Constitution's view on affirmative action somewhere in the middle, compromising between the two views.

In determining the Supreme Court's normative vision of affirmative action, it is important to look not just at the tests used by the controlling members of the Court, but also at the language they used in these decisions. In *Bakke*, Justice Powell recognized that "[t]he State certainly has a legitimate and substantial interest in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination."¹⁶⁴ And, in *Wygant*, he stated that "[a]s part of this Nation's dedication to eradicating racial discrimination, innocent persons may be called upon to bear some of the burden of the remedy."¹⁶⁵ Thus, it seems that Justice Powell recognized that affirmative action might be necessary to truly remedy the effects of past discrimination. However, Justice Powell also stated, in *Bakke*, that "[r]acial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination."¹⁶⁶ He explained that courts should thoroughly examine affirmative action programs because they force innocent members of the public "to bear the burdens of redressing grievances not of their making," and they might "only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth."¹⁶⁷ Therefore, it appears that Justice Powell's view of affirmative action was that it might be necessary to fully remedy discrimination, but that it is a dangerous option and should be carefully monitored.

Justice O'Connor appeared to have a view similar to Justice Powell's. While Justice O'Connor did not use language as strong as Justice Powell in talking about the need for affirmative action, she did think that affirmative action should be allowed in certain circumstances and that is why, in *Adarand*, she stated that strict scrutiny is not "strict in theory, but fatal in fact."¹⁶⁸ "Although all governmental uses of race are subject to strict scrutiny, not all are invalidated by it."¹⁶⁹ Thus, while not as supportive of affirmative action as Justice Powell, Justice O'Connor did seem to believe that affirmative action was important and necessary enough in certain

¹⁶¹ See *supra* note 3.

¹⁶² See sources cited *supra* note 2.

¹⁶³ See *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 564-65 (1990).

¹⁶⁴ *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978).

¹⁶⁵ *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280-81 (1986).

¹⁶⁶ *Bakke*, 438 U.S. at 291.

¹⁶⁷ *Id.* at 298.

¹⁶⁸ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995) (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980) (Marshall, J., concurring)).

¹⁶⁹ *Grutter v. Bollinger*, 539 U.S. 306, 326-27 (2003).

circumstances that there should not be an outright ban.¹⁷⁰ This is why she never aligned herself with the colorblind advocates on the Court. However, like Justice Powell, Justice O'Connor was concerned about the dangers of affirmative action programs and stated that courts should carefully evaluate any such program: "Absent searching judicial inquiry into the justification for . . . race-based measures, there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics."¹⁷¹ She explained that the need for this searching inquiry existed because racial classifications carry a danger of stigmatic harm because they might "promote notions of racial inferiority and lead to a politics of racial hostility."¹⁷²

Despite having only one opinion as the controlling member of the Supreme Court, Justice Kennedy's language quickly aligns with Justice Powell's and Justice O'Connor's views on affirmative action. Justice Kennedy, in *Parents Involved*, stated that it is our nation's tradition to go past present achievements "to preserve and expand the promise of liberty and equality on which it was founded."¹⁷³ This is why Justice Kennedy refused to accept the claim that the Constitution is colorblind and that schools are required to ignore the problem of *de facto* segregation in schooling.¹⁷⁴ Justice Kennedy, like the other two prior swing justices, appears to be aware that the discrimination of the past is still a present day problem and that one of the ways to effectively remedy the problem is through affirmative action. That is why affirmative action should not be completely prohibited. But just like Justices Powell and O'Connor, Justice Kennedy warned of the dangers of affirmative action:

When the government classifies an individual by race, it must first define what it means to be of a race. Who exactly is white and who is nonwhite? To be forced to live under a state-mandated racial label is inconsistent with the dignity of individuals in our society. And it is a label that an individual is powerless to change. Governmental classifications that command people to march in different directions based on racial typologies can cause a new divisiveness. The practice can lead to corrosive discourse, where race serves not as an element of our diverse heritage but instead as a bargaining chip in the political process.¹⁷⁵

Based on these dangers, Justice Kennedy, like the two previous controlling Justices, demanded that courts engage in a thorough examination of any affirmative action program.¹⁷⁶

Although possibly to varying degrees, Justices Powell, O'Connor, and Kennedy seemed to share similar normative views on affirmative action.¹⁷⁷ They realized that

¹⁷⁰ See, e.g., *id.*

¹⁷¹ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989).

¹⁷² *Id.*

¹⁷³ *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 787 (2007).

¹⁷⁴ *Id.* at 788.

¹⁷⁵ *Id.* at 797.

¹⁷⁶ *Id.* at 783.

discrimination and segregation were not just problems of the past and that affirmative action might be an appropriate and necessary solution to those problems. Therefore, the Constitution should not require a complete ban on affirmative action. However, they also recognized that affirmative action is a dangerous tool that has the potential to create more problems than it solves. Therefore, affirmative action programs must be carefully monitored and only allowed if their implementation is proper and necessary because some affirmative action can actually harm minorities. This normative view of affirmative action presented by these three justices clearly represents a compromise between the colorblind camp on the Court and the pro-affirmative action camp on the Court. This compromise between competing values is also probably what caused these controlling justices to rely heavily on the narrow tailoring requirement because it allowed them some maneuverability around the tough constitutional questions presented by affirmative action.¹⁷⁸

¹⁷⁷ Based solely on the language used in their opinions, it does appear that Justices Powell and Kennedy were more open to affirmative action than Justice O'Connor.

¹⁷⁸ It should be noted that the controlling justices did not rely solely on the narrow tailoring requirement to maneuver around the tough constitutional questions. The strict scrutiny test is a two-prong test, and the Justices also relied on the first prong of the test, the compelling interest prong, to give them the ability to adapt the strict scrutiny test to different types of affirmative action programs.

A perfect example of this was in the voting rights cases. There, the Supreme Court used the compelling interest prong to adapt the strict scrutiny test to that particular type of affirmative action. As the previous section explained, in the voting rights cases, the Supreme Court dealt with the unique situation of racial gerrymandering by allowing the state to reiterate a new compelling interest, compliance with Section 2 of the Voting Rights Act. *See supra* note 110 and accompanying text. Then, all that was left for the narrow tailoring analysis was to determine whether the governmental action at issue in the case was necessary for compliance with Section 2. *See, e.g.,* *Bush v. Vera*, 517 U.S. 952, 976-83 (1996); *Shaw v. Hunt (Shaw II)*, 517 U.S. 899, 915-18 (1996).

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

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

With this goal of achieving a proper compromise between the two camps in mind, the question then becomes which approach to narrow tailoring best serves this normative vision. As the rest of the section below will explain, Justice O'Connor's approach to narrow tailoring serves the vision poorly because it can be at times too harsh on affirmative action and at other times too lenient on affirmative action. Thus, rather than using the narrow tailoring requirement to achieve a proper compromise between the two different sides of the Court, Justice O'Connor's approach waivers between the two sides, sometimes aligning her test with the colorblind camp and sometimes aligning her test with the pro-affirmative action camp.

The individual harm factor is a clear example of a narrow tailoring factor that can be both too lenient and too harsh on affirmative action. The Supreme Court in *Grutter* and *Gratz* made clear that race can be used as a factor in admission decisions as long as applicants are reviewed on an individual basis with race being one of many factors considered and race is not given a numerical value.¹⁷⁹ The rationale behind creating this rule is that giving race a numerical value would amount to a set-aside, and the creation of a set-aside violates the Equal Protection Clause because, at some point, a black applicant would be accepted solely on the basis of race and a white applicant would be denied acceptance solely on the basis of race.¹⁸⁰ Thus, race would become the decisive factor, and this would be a clear violation of the language of the Equal Protection Clause, which the Court has repeatedly held protects individual people, not groups.¹⁸¹

This individual determination factor can create harsh results to affirmative action programs because for some government actors, it acts as an absolute bar to affirmative action programs. For example, many public universities like the undergraduate program at the University of Michigan have so many applicants every year that it is impractical for them to make individual determinations for each and every applicant.¹⁸² However, the Court in *Gratz* clearly stated that administrative burdens are not an excuse for the use of constitutionally impermissible set-asides.¹⁸³ Because it is impractical for these universities to adopt an individualized review admissions program and unconstitutional for them to adopt a numerical system to take account of race, they are then forced to forgo their affirmative action programs and, thus, ban affirmative action from their admission decisions.

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

Justices seemed to engage in most of the factual examination of whether the affirmative action program was constitutionally acceptable.

¹⁷⁹ See *Grutter*, 539 U.S. at 337-41; *Gratz v. Bollinger*, 539 U.S. 244, 271-75 (2003).

¹⁸⁰ See *supra* Part II.C.

¹⁸¹ *Croson*, 488 U.S. at 493; *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 299 (1978).

¹⁸² *Gratz*, 539 U.S. at 275.

¹⁸³ *Id.*

the factors. Because it is impossible to police a “don’t tell, don’t ask” policy, there is nothing to stop someone from relying entirely on race in making these decisions and brushing aside all other diversity factors.¹⁸⁴ Further, the rationale behind making such a decision cannot be scrutinized. For example, an admissions officer might choose to grant a preference to a Mexican, believing Mexicans are generally liberal, rather than a Cuban, believing Cubans are generally conservative, even though both are underrepresented minorities. A reviewing court, however, would have no ability to scrutinize this blatant invidious discrimination.¹⁸⁵

What this leniency and harshness on affirmative action shows is that Justice O’Connor’s approach does a poor job of balancing her policies. When the requirement for individual determinations is applied to situations in which it creates an absolute bar to any affirmative action program, then Justice O’Connor’s narrow tailoring requirement moves from being a middle-of-the-road policy and aligns itself with the colorblind camp. On the other hand, because the requirement for individual determinations does not allow courts to scrutinize determinations that rest on invidious stereotypes, Justice O’Connor’s narrow tailoring requirement moves away from being a middle-of-the-road policy and aligns itself with the camp that believes in giving government actors broad discretion to use racial classifications. This shows that, depending on the factual context of the affirmative action program, Justice O’Connor’s narrow tailoring requirement fulfills the policy of one of the two camps. Therefore, her affirmative action test ends up actually being an “either or” policy rather than a middle-of-the-road policy. This demonstrates that when evaluating affirmative action programs, context should and does matter, and that a broad rigid rule applied to all factual scenarios is ineffective at striking the balance between the controlling members’ competing policies because it results in the Court flip-flopping between two extremes. It should also be noted that the flaws in the individual determination factor are very striking because in many of the Court’s affirmative action decisions, this requirement was clearly the most important one and often decisive.¹⁸⁶ One would think that such an important factor would do a better job of enforcing Justice O’Connor’s underlying policies.

Another important factor employed by Justice O’Connor is the requirement for race-neutral alternatives. This requirement, at first, seems sensible. Because affirmative action policies have the potential to harm third parties, these policies should not be allowed if there is an alternative solution that is just as effective at solving the problem without risking harm to third parties. However, this factor may not serve her policy goals depending on the factual situation. The requirement for race-neutral alternatives can act as an absolute bar to affirmative action programs even in situations where the race-neutral alternatives were completely ineffective. For example, in *Walker v. City of Mesquite*, the Fifth Circuit held that a judge could not require race-conscious remedies to desegregate the city of Dallas when race-neutral remedies were available.¹⁸⁷ However, the Court did not engage in any

¹⁸⁴ See David Crump, *The Narrow Tailoring Issue in the Affirmative Action Cases: Reconsidering the Supreme Court’s Approval in Gratz and Grutter of Race-Based Decision-Making by Individualized Discretion*, 56 FLA. L. REV. 483, 497-98 (2004).

¹⁸⁵ See *id.*

¹⁸⁶ See *supra* Parts II, III.

¹⁸⁷ *Walker v. City of Mesquite*, 169 F.3d 973, 982-83 (5th Cir. 1999) (stating that narrow tailoring “requires consideration of whether a race-neutral or less restrictive remedy could be

evaluation of the effectiveness of these race-neutral remedies, and the race-neutral remedies in this case were so ineffective that they created no practical remedy to the *de facto* segregation problem at all.¹⁸⁸ Thus, the absolute requirement for race-neutral alternatives in this case allowed the Fifth Circuit to align itself fully with the colorblind camp and reject the affirmative action program even if it was necessary to remedy past harms. A requirement for race-neutral alternatives only when they are as effective as the affirmative action program or when they have at least demonstrated some efficacy would do a much better job of serving Justice O'Connor's policies.

The only requirement that actually seems to accurately serve the Court's policy is the requirement for affirmative action programs to possess a sunset provision. Requiring that every affirmative action program have a definite end point rejects colorblindness in that it allows government actors to adopt affirmative action programs. But, by requiring that the programs last only for a limited duration, this provision ensures that the programs are carefully scrutinized because it requires that government actors monitor and reevaluate their program in light of changing circumstances before reenacting it. After all, the goals of these programs should be to provide a remedy for past discrimination or to achieve diversity. Thus if the program has worked and achieved its goal of remedying past discrimination or achieving diversity, there is little reason for its continued existence.

However, this requirement, like the others, is nevertheless subject to abuse because Justice O'Connor has never been clear about how this factor is to be applied and evaluated by courts. Indeed, in *Grutter*, Justice O'Connor very loosely applied the factor at the end of the opinion and based the program's required length arbitrarily on the number of years since the Court decided *Bakke*.¹⁸⁹ If the length of the program is made too short, then it could prove to be too burdensome on legislatures, who would constantly have to spend time to reevaluate the program. This burden could cause legislatures to then forgo enacting any affirmative action legislation. Thus, the factor in this situation would align the Court with the colorblind camp. However, if the length of the program is too long, then it will not serve its purpose of requiring government actors to closely monitor their programs and adapt them to changing circumstances. Much can change in twenty-five years—the number adopted by the Court in *Grutter*—for better, for worse, or not at all; thus, it seems that a length this long would do a fine job of adapting the program to changing circumstances. Justice O'Connor's policies would greatly benefit from clarifying this standard.

The problems with these three factors also display a fundamental problem with using rules as opposed to standards.¹⁹⁰ Rules are rigid inquiries that require a judge

used . . . because a race-conscious remedy should be the remedy of last resort" (citations omitted)). For a thorough discussion and analysis of *Walker*, see Michelle Wilde Anderson, *Colorblind Segregation: Equal Protection as a Bar to Neighborhood Integration*, 92 CALIF. L. REV. 841 (2004).

¹⁸⁸ See *Walker*, 169 F.3d at 981-88; Anderson, *supra* note 187, at 866-68.

¹⁸⁹ *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).

¹⁹⁰ Using the terminology "rules" and "standards" to refer to judicial decisionmaking was popularized by Duncan Kennedy. Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1685, 1687-89 (1976).

to apply the facts to the different elements of a judicial test almost like solving a mathematical formula.¹⁹¹ On the other hand, standards give much more discretion to the judge to take in all the facts and weigh them against each other in order to make his determination.¹⁹² A clear example of the distinction between rules and standards can be seen by looking at two different tort cases the Supreme Court decided in the early 1900s.¹⁹³ Both cases dealt with the standard of conduct that should govern the obligations of a driver who comes to an unguarded railroad crossing.¹⁹⁴ In the first case, Justice Holmes suggested that the requirements of due care at railroad crossings are clear and, therefore, adopted a rule: the driver must stop and look back.¹⁹⁵ In the second case, Justice Cardozo did not think it was so clear and gave examples of when it was neither wise nor prudent for a driver to stop and look at a railroad crossing.¹⁹⁶ Therefore, he adopted a standard: “[t]he driver must act with reasonable caution.”¹⁹⁷

The most important distinction between these two forms of adjudication is that rule-based law is proper when the underlying values served by the law are completely clear. Standards-based law is proper when the underlying values served by the law are obscured, contested, or ambivalently held. The previous example displays this distinction. Justice Holmes thought that the standard of care for a driver was clear, and that all a driver would have to do to not be negligent was to stop and look.¹⁹⁸ Justice Cardozo did not think that the standard of care was clear and described many instances where it would not make sense to stop and look.¹⁹⁹ Thus, for these judges it is clear that when determining whether to adopt a rule or a standard, the primary issue was whether the underlying value served by the law—the proper standard of care—was clear.

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

¹⁹¹ Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 382-83 (1985) (“The paradigm example of a rule has a hard . . . empirical trigger and a hard determinate response.”).

¹⁹² *Id.* at 383 (“A standard, by contrast, has a soft evaluative trigger and a soft modulated response.”).

¹⁹³ Compare *Baltimore & Ohio R.R. v. Goodman*, 275 U.S. 66 (1927), with *Pokora v. Wabash Ry.*, 292 U.S. 98 (1934). This particular example was taken from Schlag, *supra* note 191, at 379-80.

¹⁹⁴ Schlag, *supra* note 191, at 379.

¹⁹⁵ *Goodman*, 275 U.S. at 70; see Schlag, *supra* note 191, at 379.

¹⁹⁶ *Pokora*, 292 U.S. at 103-06.

¹⁹⁷ Schlag, *supra* note 191, at 379; see *Pokora*, 292 U.S. at 106.

¹⁹⁸ *Goodman*, 275 U.S. at 69-70.

¹⁹⁹ *Pokora*, 292 U.S. at 103-06.

Justices, affirmative action was permissible sometimes and impermissible other times, depending on the circumstances.²⁰⁰

Adopting a rules-based approach might actually have seemed sensible to Justice O'Connor at first because equal protection law had historically taken a rule-based approach.²⁰¹ However, she was mistaken in doing so because affirmative action presents a problem very different from much of the previous equal protection cases. Previous equal protection jurisprudence could be rule-based because after *Brown v. Board of Education*,²⁰² the underlying policies were clear: government laws and programs should not be based on racial stereotypes nor based on a desire to subjugate one class of people to the benefit of another class.²⁰³ Therefore, the rigid old "strict in theory, but fatal in fact" rule, which struck down all the laws that the Court faced, was appropriate to enforce this policy because it was completely clear that any law based on invidious discrimination was wrong no matter its context.

Unfortunately, Justice O'Connor failed to appreciate the difference between her policies in dealing with affirmative action and those underlying desegregation. As previously stated, rather than align herself with the colorblind camp or the pro-affirmative action camp on the Court, Justice O'Connor, like Justices Powell and Kennedy, chose to attempt to find a compromise between the two. However, by choosing to find this compromise, Justice O'Connor was faced with unclear underlying values that were not amendable to a rule-based approach. For example, if Justice O'Connor had chosen to align herself with the colorblind camp, then the adoption of the rule-based approach would have made sense. That is because for Justices like Scalia and Thomas, the underlying value related to affirmative action is clear: any use of race by the government is unconstitutional even if for benign purposes.²⁰⁴ Therefore, a rule-based approach makes sense for the colorblind camp because for those justices the answer of what to do with affirmative action—hold that it is all unconstitutional—is as clear as the answer of what to do at a railroad crossing was for Justice Holmes—stop and look. However, when it comes to looking at affirmative action, Justice O'Connor's vision seems to be closer to Justice Cardozo's in that she sees the answer of what to do with it as being uncertain and depending on the circumstances. Justice O'Connor saw the value of affirmative action but was concerned about its danger. Therefore, for Justice O'Connor, some affirmative action programs like the one in *Grutter* might be acceptable while others like the one in *Croson* were not. This is similar to Justice Cardozo who saw stopping to look as being reasonable in some circumstances but unreasonable in others. Therefore, it made little sense for Justice O'Connor in construing the narrow tailoring requirement to rely on rigid rules. A standard-based approach that

²⁰⁰ See *supra* Parts II, III.

²⁰¹ See *supra* Part II.

²⁰² *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (holding that state mandated segregation is a violation of the Equal Protection Clause).

²⁰³ See, e.g., *Loving v. Virginia*, 388 U.S. 1, 11 (1967) ("There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification. The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy.").

²⁰⁴ See *supra* note 4.

appreciates the context of each factual situation would have done a much better job of allowing Justice O'Connor to properly enforce her underlying values related to affirmative action.

In addition to helping with the problem of unclear values, a standard-based approach would also help the Supreme Court deal with the various faces of affirmative action. The problems of *de facto* segregation are complicated and wide-ranging. Therefore, the solutions are also going to be broad and wide-ranging. A standard-based approach would help the Supreme Court be more adaptable to the different areas of affirmative action. The voting rights cases are a perfect example of this situation because racial gerrymandering was different than most other forms of affirmative action at that time. Unlike the affirmative action issues in education, employment, and public contracting, with racial gerrymandering the government action was clearly race-conscious, although not in its specific terms, because it "did not appear to single out any identifiable class of persons for special benefits or burdens."²⁰⁵ In the face of this problem, the Court had to break from its previous rigid generalized approach for narrow tailoring and develop compelling interest and narrow tailoring requirements that were unique to that situation, whether the government action was necessary to comply with Section 2 of the Voting Rights Act.²⁰⁶

It is important to note that while this section has shown the many problems created by Justice O'Connor's rigid rule-based approach to defining narrow tailoring, the narrow tailoring requirement was not always this way. When Justice Powell was the swing vote, the Supreme Court was much more amenable to taking a looser, standard-based approach.²⁰⁷ Justice Powell's interpretation of the narrow tailoring requirement looked at the context of each individual affirmative action program and applied loose factors that might be relevant rather than bright line rules that must be applied.²⁰⁸ It is quite possible that Justice Powell chose to take a looser, standard-based approach to the narrow tailoring requirement precisely because he saw that the answer of what to do with affirmative action was not very clear and that a standard-based approach would allow him the maneuverability necessary to find a proper middle space between the two affirmative action camps on the Court and to deal with the many faces of affirmative action. It is for these reasons that Justice Kennedy, regardless of whether he was actually doing so in *Parents Involved*, should adopt in the future the contextual approach to narrow tailoring that was utilized by Justice Powell.

V. THE CONTEXTUALIST APPROACH TO NARROW TAILORING

A contextualist approach would solve many of the problems created by Justice O'Connor's interpretation of the narrow tailoring requirement because it would create a test where the "narrow tailoring" requirement could be molded to meet the different scenarios in which affirmative action is used. A contextualist approach would require a reviewing court to engage in a truly factual inquiry and balance

²⁰⁵ Melissa L. Saunders, *Equal Protection, Class Legislation, and Color Blindness*, 96 MICH. L. REV. 245, 311 (1997).

²⁰⁶ See *supra* note 101.

²⁰⁷ See *supra* Parts II.A-B.

²⁰⁸ See *supra* Part II.B.

competing factors against each other in order to determine whether each individual government affirmative action program is actually “narrowly tailored.” While Justice Powell’s approach was looser and more contextualist than Justice O’Connor’s, Justice Powell’s approach can still be improved upon so that it will better reconcile the Court’s competing values and solve the need for adaptability to the many different faces of affirmative action. Factors that can be looked at by the Supreme Court are: (1) the harm to innocent third parties; (2) whether there is a waiver provision; (3) whether the goal of the program is to achieve diversity or to remedy discrimination; (4) the duration of the program; (5) the effectiveness of race-neutral alternatives; (6) which arm of the government enacted the program; (7) what type of government program is implementing the action; and (8) whatever other factors might be relevant in a particular circumstance. Below, I will give suggestions for how the Supreme Court might balance and apply these factors should it adopt a contextualist narrow tailoring requirement.

The first factor, the harm to innocent parties, should actually encourage numerical set-asides rather than condemn them. It is true that the Fourteenth Amendment aims to protect people from government classifications solely on the basis of their race, but as shown in the previous section, the individual determination requirement does little to police this policy because people are free to make decisions solely based on race as long as they do not give it a numerical quantification. Therefore, it is a better approach to encourage affirmative action programs to give numerical quantifications to their racial determinations, like the Michigan policy did in *Gratz*, so that it is amenable to exacting judicial review.²⁰⁹ Once courts know the weight given to race in numerical form, the courts can then criticize the weight given to race and, therefore, minimize the harm to individuals.²¹⁰ The Supreme Court’s decision in *Gratz* gives a clear example of how this could work. Rather than creating a broad rule stating that any numerical quantification of race is unconstitutional, the Court should have criticized the university’s policy of weighing underrepresented minority status almost twice as much as a perfect SAT score.²¹¹ It might seem troubling to some at first that the courts would be given the power to determine what constitutes significant racial harm. However, a look at the Court’s Equal Protection jurisprudence reveals that Court has done this in the past. In *Washington v. Davis*, the Court determined that harm created by facially neutral laws with a discriminatory racial impact could not be redressed by the Equal Protection Clause unless discriminatory intent can also be proven.²¹² Also, in *Allen v. Wright*, the Court decided that claims of stigmatic injuries caused by the government funding of discriminatory programs are not a significant enough harm to grant standing under Article III of the Constitution.²¹³ Therefore, it seems permissible for the Court to make determinations of the appropriate amount of harm that third parties should suffer. For instance, Justice Powell said that harm to third parties is a relevant factor, but never stated that it should never happen. To the contrary, in *Wygant*, he explained “that in order to remedy the effects of prior

²⁰⁹ See Crump, *supra* note 184, at 534-37.

²¹⁰ See *id.*

²¹¹ See *id.* at 535.

²¹² *Washington v. Davis*, 426 U.S. 229, 242 (1976).

²¹³ *Allen v. Wright*, 468 U.S. 737, 754-56 (1984).

discrimination, it may be necessary to take race into account. As part of this Nation's dedication to eradicating racial discrimination, innocent persons may be called upon to bear some of the burden of the remedy."²¹⁴

The second factor, whether there is a waiver provision, should simply be an absolute requirement for any affirmative action program. This would ensure that affirmative action policies are not implemented in situations in which it would not be possible to do so. Because I have stated that this is an absolute requirement, this might at first seem like I am advocating for a rigid rule much like the ones adopted by Justice O'Connor. However, because this factor explicitly requires that an affirmative action program look at the relevant work force or applicant pool in determining whether a certain set-aside is possible, this requirement is actually quite flexible and fact specific.

The third factor, whether the goal of the program is to achieve diversity or to remedy discrimination, should be weighed by giving programs that seek to remedy past discrimination—in particular past unconstitutional discrimination—more latitude than programs that aim to achieve diversity. This distinction is based on the fact that remedying past discrimination is a constitutional necessity while achieving diversity is not. The Fourteenth Amendment clearly prohibits invidious racial discrimination.²¹⁵ This prohibition would be completely "toothless" unless it were interpreted to require that any violation of that prohibition be given a remedy. This means that the Constitution mandates that the government remedy past discrimination.²¹⁶ On the other hand, although it may encourage diversity, the Constitution clearly does not mandate that the government achieve diversity. Note that this same reasoning would also mean that affirmative action programs designed to remedy past discrimination arising from a violation of the Fourteenth Amendment should receive more latitude than a program designed to remedy discrimination that had arisen from a violation of a statute like the Civil Rights Act.

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

The fifth factor, the effectiveness of race-neutral alternatives, should require race-neutral alternatives only when it is clear that they are as effective as the affirmative action program in achieving the government's compelling interest. This would ensure that innocent third parties are not harmed unnecessarily, but would also make sure that the requirement for a race-neutral alternative does not nullify necessary affirmative action programs. It might seem extreme at first to require race-neutral alternatives only when they are as effective as the affirmative action program; however, this is reasonable when factor one is taken into account. If the

²¹⁴ *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280-81 (1986).

²¹⁵ *See, e.g., Loving v. Virginia*, 388 U.S. 1 (1967); *McLaughlin v. Florida*, 379 U.S. 184 (1964); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

²¹⁶ *See Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294 (1955).

benefits of an affirmative action program are properly balanced against the harm to innocent third parties in factor one, then there should be no reason for a race-neutral alternative that might further reduce harm to innocent third parties.

The sixth factor, which arm of the government enacted the program, should give more latitude to Congress and courts in designing affirmative action programs than it does to administrative agencies and state legislatures. First, Congress has express powers under Section 5 of the Fourteenth Amendment to remedy the effects of past discrimination that state government officials do not have.²¹⁷ Therefore, a reviewing court should apply a more lenient narrow tailoring standard to congressional enactments to reflect this power that Congress possesses, but that administrative agencies and state legislatures do not.²¹⁸ Furthermore, a more lenient standard should be applied to courts because judges have historically been given broad and flexible authority to remedy wrongs, particularly wrongs resulting from constitutional violations.²¹⁹

The seventh factor, what type of government program is implementing the action, should give some types of government programs more leniency based on the field in which the action is being implemented. For example, borrowing from Justice Kennedy's approach in *Grutter* and *Parents Involved*, a more lenient standard should be applied to primary educational institutions than to graduate schools if the goal is to achieve diversity. As Justice Scalia said, "cross-racial understanding" and "good citizenship" are lessons to be learned by "people three feet shorter and twenty years younger than the full-grown adults at the University of Michigan Law School, in . . . public-school kindergartens."²²⁰ This leniency can also be applied across different institutional contexts. For example, the same reasoning used above that cross-racial understanding is a better lesson to be learned when people are developing may justify applying a more lenient standard to affirmative action when it is employed in the education context rather than in other contexts like public contracting or public employment.

The final factor, whatever other factors might be relevant in a particular circumstance, is a catch-all. This factor is different than the other factors which are general in nature, and it allows the Court to adopt a specific factor that might apply in only a discrete group of cases if the Court believes that factor is necessary. Examples of such specific factors can already be found in the Supreme Court's affirmative action decisions. One example was in *Wygant*, where, in the context of employment cases, Justice Powell decided to make it a factor that hiring plans

²¹⁷ U.S. CONST. amend. XIV, § 5; see *Fullilove v. Klutznick*, 448 U.S. 448, 476-77 (1980); *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966).

²¹⁸ It might be argued that the adoption of this standard would violate the Supreme Court's decision in *Adarand*, which overruled *Metro Broadcasting*. In *Adarand*, the Court held that all forms of affirmative action, even those enacted by Congress, should be subjected to strict scrutiny. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995). Thus, some might view being more lenient to affirmative action programs enacted by Congress than to those enacted by state actors as contrary to the broad language in *Adarand*. However, under this standard, the Supreme Court in its analysis would still be applying the strict scrutiny standard of review mandated by *Adarand*. This standard is merely asking for a revision of the narrow tailoring prong of that standard.

²¹⁹ *Swann*, 402 U.S. at 15-16.

²²⁰ *Grutter v. Bollinger*, 539 U.S. 306, 347 (2003).

should be distinguished from lay-off plans because lay-off plans are more burdensome.²²¹ Another example was in the voting rights cases, where the Court decided to make compliance with the Voting Rights Act a factor because the Court determined that compliance with the Voting Rights Act could be a compelling interest.²²² Having a factor that can be adapted to specific circumstances will ensure that the narrow tailoring requirement remains flexible and loose.

The downside to an approach like this is that lower reviewing courts have little initial guidance on how to weigh these factors. It is questionable how much of an issue this would actually present because, as shown by the line of cases previously detailed in this Article, the Supreme Court does not mind keeping the lower courts confused on how to apply the narrow tailoring test.²²³ Further, district courts have been able to manage other fairly abstract tests presented to them by the Supreme Court for the Due Process Clause and the Fourth Amendment. Therefore, it is possible for lower courts to manage a looser standard like this.

Another criticism of this standard might be that it would require the Supreme Court to take more affirmative action cases in order to clarify the standard and give lower courts guidance on how to balance the factors, and the Court has historically ducked affirmative action cases. For example, between *Adarand* and *Gratz*, there were eight years during which the Court did not take a single affirmative action case dealing with employment, education, or public contracts, despite significant circuit splits.²²⁴

One possible reason for this behavior by the Court is that affirmative action is such a hot-button issue that the Court would rather avoid it and hope that the issue passes them by, much like how the Court has ducked the Guantanamo Bay detention issues by deciding small issues on a case-by-case basis.²²⁵ Unfortunately, as represented by the Court's full circle from *Bakke* to *Parents Involved*, the issue of affirmative action is far from settled and will not simply go away. Further complicating the problem is that ever since *Brown v. Board of Education*, the decision that elevated the Supreme Court to its exalted status, people have looked to the Supreme Court, rather than the other political branches, as the final voice on

²²¹ See *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 283-84 (1986).

²²² See *supra* note 101.

²²³ See *supra* Parts II, III.

²²⁴ See also *Tuttle v. Arlington Cnty. Sch. Bd.*, 195 F.3d 698, 704-05 (4th Cir. 1999) (noting that whether diversity can be a compelling interest is "unresolved"); *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 356 (D.C. Cir. 1998) (stating that the court did "not think diversity could be elevated to the 'compelling' level"); *McNamara v. City of Chicago*, 138 F.3d 1219, 1222 (7th Cir. 1998) (stating that whether diversity can be a compelling interest is "unsettled"). Compare *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996) (holding that achieving diversity is not a compelling interest), with *Smith v. Univ. of Wash. Law Sch.*, 233 F.3d 1188, 1200-01 (9th Cir. 2000) and *Wessman v. Gittens*, 160 F.3d 790, 796 (1st Cir. 1998) (holding that achieving diversity is a compelling interest).

²²⁵ See generally Linda Greenhouse, *The Mystery of Guantanamo Bay: Jefferson Lecture*, *University of California, Berkeley, September 17, 2008*, 27 *BERKELEY J. INT'L L.* 1 (2009).

issues of race.²²⁶ Therefore, the Court cannot continue this policy of ducking affirmative action cases.

Also, a contextualist approach to “narrow tailoring” would likely encourage the Supreme Court to take more affirmative action cases. It would allow the Court to solve small issues on a case-by-case basis and avoid significant controversies rather than attempt to answer the broader and more heated question of whether affirmative action is good or bad by figuring out what factors need to be applied to affirmative action across the board. Finally, this criticism relies on a faulty assumption that the Court must rule narrowly based on the facts of each case, requiring multiple rulings in order to clarify this standard. While some justices on the Court, in particular Justice O’Connor, have frequently tried to decide cases narrowly based on the facts presented before them, there is nothing to stop the justices from laying out and detailing a more broad requirement that applies to many different factual scenarios in an opinion first, and then applying the broader requirement to the individual factual situation in that particular case. Indeed, Justice Kennedy did something similar to this in *Parents Involved* where, in addition to stating that the government policy in front of him in that particular case was unconstitutional, he laid out many other government policies that would be constitutional.²²⁷

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

VI. CONCLUSION

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

²²⁶ See generally JAMES T. PATTERSON, *BROWN V. BOARD OF EDUCATION: A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY* (2001).

²²⁷ See *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 789 (2007).