

ALTHOUGH RISKY AFTER *RICCI* AND *PARENTS INVOLVED*,  
BENIGN RACE-CONSCIOUS ACTION IS OFTEN NECESSARY

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*Abstract*

*The decision in Parents Involved brings the Court very close to making strict scrutiny fatal in fact when considering benign race-conscious actions implemented to address racial inequality. Despite supplying the crucial fifth vote for striking down two race conscious student assignment plans, Justice Kennedy provides some hope that carefully adopted, benign, race-conscious programs can survive Supreme Court review. However, any optimism must be cautious because Justice Kennedy has never voted to uphold a benign race-conscious program, and he subsequently wrote the majority opinion for the Court in Ricci, which blocked a city's effort to integrate its fire department at the supervisory level. Against this background, I make two points.*

*First, it is critical that institutions, governmental and private, continue to pursue race-conscious actions aimed at promoting actual equality. Despite the Constitution and laws prohibiting invidious race discrimination and providing legal equality, both fail to secure actual racial equality. Second, institutions willing to implement voluntary programs must enlist the help of attorneys and other experts at every step in the process, taking into account each aspect of the Court's strict scrutiny analysis as well as its interpretation of Title VII in Ricci.*

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With the adoption of the Fourteenth Amendment, legal or formal equality became the law of the land. Yet after 140 years and the passage of several federal antidiscrimination statutes,<sup>1</sup> racial minorities in the United States do not enjoy actual equality. The failure of the Equal Protection Clause can be traced, in large part, to the United States Supreme Court and its interpretation of the Clause.<sup>2</sup> Eventually the Court took a tough stance on state and local laws containing explicit racial classifications for invidious purposes, as well as such federal laws challenged under the Fifth Amendment's Due Process Clause, applying strict scrutiny and its presumption of unconstitutionality to such laws.

However, the Court in 1976 drastically limited the effectiveness of the Equal Protection Clause by holding that it reaches only laws with a discriminatory intent or purpose.<sup>3</sup> Within two years, the Court, imposed a barrier by extending its jurisprudence developed in the context of invidious race discrimination to the benign efforts of government to address discrimination and the denial of equal opportunity with the *Regents of the University of California v. Bakke*.<sup>4</sup> Rejecting the Bakke holding, Justice Marshall dissented, in his dissenting opinion in *Bakke*, stated:

[I]t must be remembered that, during most of the past 200 years, the Constitution as interpreted by this Court did not prohibit the most ingenuous and pervasive forms of discrimination against the Negro. Now, when a State acts to remedy the effects of that legacy of discrimination, I cannot believe that the Constitution stands as a barrier.<sup>5</sup>

Following the *Bakke* decision, the Court, in *Richmond v. J.A. Croson Co.*<sup>6</sup> in 1989 and *Adarand Constructors, Inc. v. Peña*<sup>7</sup> in 1995, established that all attempts by government—federal, state, and local—to promote racial equality through benign actions that take race into account will be judged by the same standard as invidious discrimination, *i.e.*, strict

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<sup>1</sup> See Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* (2006); Civil Rights Act of 1866, as amended in 1870, 42 U.S.C. §§ 1981 and 1982 (2003); Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, *et seq.* (2006); Fair Housing Act, 42 U.S.C. § 3601, *et seq.* (2003).

<sup>2</sup> See Ivan E. Bodensteiner, *The Supreme Court as the Major Barrier to Racial Equality*, 61 RUTGERS L. REV. 199 (2008).

<sup>3</sup> *Washington v. Davis*, 426 U.S. 229, 239 (1976).

<sup>4</sup> *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

<sup>5</sup> *Id.* at 387 (Marshall, J., dissenting).

<sup>6</sup> *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

<sup>7</sup> *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

scrutiny, a standard that is nearly always fatal. Despite this fatality, in 2003 the Court approved the affirmative admissions policy adopted by the University of Michigan Law School in *Grutter v. Bollinger*.<sup>8</sup> Yet subsequently, in *Parents Involved in Community Schools v. Seattle School District No. (Parents Involved)*, four Justices, interpreted *Grutter* in a way that would make it nearly impossible to survive strict scrutiny.<sup>9</sup> However, Justice Kennedy's fifth vote may keep the door open to race conscious policies, even if narrowly. Most recently, in *Ricci v. DeStefano*,<sup>10</sup> the Court avoided the equal protection issue but made it very difficult for an employer to justify benign race-conscious action based on its concern that accepting the result of a promotional exam would subject it to disparate-impact liability under Title VII.

Treating the opinion of Justice Kennedy in *Parents Involved* as controlling and the decision in *Ricci* as not directly on point, this Article explores ways in which institutions, both government and private, might pursue affirmative steps aimed at achieving equality. This goal is too important to concede defeat. One possibility is that well-intentioned institutions will attempt to avoid the Supreme Court's jurisprudence by disguising their affirmative efforts. Yet, I expect more institutions are willing to disguise their invidious discrimination than are willing to disguise their benign actions.

Part I discusses the Supreme Court's equal protection analysis as applied to benign actions from *Croson* to *Parents Involved*, as well as the effect of the Court's interpretation of Title VII in *Ricci*. Parts II and III discuss in greater detail the two aspects of the Court's strict scrutiny analysis: a compelling governmental interest and narrowly tailored means. Part II identifies the two interests the Court has recognized as compelling and suggests other interests—such as operational needs in employment unconscious discrimination, and disparate-impact liability under Title VII—that should be accepted as compelling. Part III addresses the factors used to determine whether an institution's means are narrowly tailored. Part IV addresses benign actions undertaken by private institutions not subject to the Equal Protection Clause, the statutes available for challenging their actions, and the role of the religion clauses of the First Amendment when such actions are taken by private religious organizations. Finally, Part V

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<sup>8</sup> *Grutter v. Bollinger*, 539 U.S. 306 (2003). Compare *Gratz v. Bollinger*, 539 U.S. 244 (2003) (holding the University of Michigan undergraduate admissions policy unconstitutional).

<sup>9</sup> *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

<sup>10</sup> *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009).

argues that benign race-conscious actions are needed in order to achieve actual equality.

The goal of this Article is to encourage institutions to engage in benign race-conscious actions<sup>11</sup>, because of the importance of such actions in ending invidious discrimination and achieving actual equality in a manner that makes the actions most defensible under the current Court's rigid analysis.

## I. SUPREME COURT'S EQUAL PROTECTION ANALYSIS AND THE SIGNIFICANCE OF *RICCI*

### A. Croson: Strict Scrutiny Governs Invidious and Benign Racial Classifications

A minority business utilization plan adopted by the Richmond City Council required prime contractors, which were not minority-owned, to “subcontract at least thirty percent (30%) of the dollar amount of the contract to one or more Minority Business Enterprises.”<sup>12</sup> This plan was challenged, in *Richmond v. J.A. Croson Co.*, as a violation of the Equal Protection Clause and, for the first time, five Justices agreed that strict scrutiny governs all racial classifications, both invidious and benign, when the classification is made by state or local government.<sup>13</sup> Justice O'Connor, writing for three other Justices and herself, said that without “searching judicial inquiry into the justification for such 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.”<sup>14</sup> Strict scrutiny, she believes, is necessary to “smoke out” illegitimate uses of race and assures that the legislative body's goal is sufficiently important and the means

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<sup>11</sup> While “benign race-conscious action” and “affirmative action” generally refer to the same thing, I try to avoid using the term “affirmative action” because it has a pejorative connotation. The term has been politicized and is often used to suggest quotas and other sorts of discriminatory actions designed to benefit unqualified black persons at the expense of qualified white persons. Of course, such use conveniently ignores the fact that benign race-conscious action benefits only persons who meet the qualifications.

<sup>12</sup> *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 477 (1989).

<sup>13</sup> *Id.* at 493.

<sup>14</sup> *Id.* If “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,” how would a plaintiff alleging invidious discrimination in violation of the Equal Protection Clause ever prove intentional or purposeful discrimination, as required by *Washington v. Davis*, 426 U.S. 229 (1976).

chosen closely fit the goal. Because classifications based on race carry a danger of “stigmatic harm”, they must be “reserved for remedial settings.”<sup>15</sup>

Justice Scalia, writing separately and concurring in the judgment, agreed that “strict scrutiny must be applied to all governmental classification by race, whether or not its asserted purpose is ‘remedial’ or ‘benign.’”<sup>16</sup> Although mentioned, the Court did not address the standard of review for benign race-conscious actions taken by the federal government.

#### B. *Adarand*: Strict Scrutiny Applies to Race-Conscious Actions of Congress

Following *Croson*, in *Metro Broadcasting, Inc. v. Federal Communications Commission*,<sup>17</sup> the Court upheld a FCC policy that provided a preference to minority-owned businesses in broadcast licensing, holding that

benign race-conscious measures mandated by Congress—even if those measures are not “remedial” in the sense of being designed to compensate victims of past governmental or societal discrimination—are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to the achievement of those objectives.<sup>18</sup>

Thus, the Court held that intermediate scrutiny governs benign race-conscious action taken by Congress, as well as sex discrimination claims based on the Equal Protection Clause.<sup>19</sup> Five years later, in *Adarand Constructors, Inc. v. Pena*,<sup>20</sup> Justice Thomas, who was appointed between the two decisions, joined the four *Metro Broadcasting* dissenting Justices, O’Connor, Kennedy, Scalia, and Rehnquist, and overruled *Metro Broadcasting*. *Adarand* claimed that the Federal Government violated the Fifth Amendment by providing general contractors with a financial incentive to hire subcontractors controlled by “socially and economically

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<sup>15</sup> *Croson*, 488 U.S. at 493.

<sup>16</sup> *Id.* at 520 (Scalia, J., concurring).

<sup>17</sup> *Metro Broad., Inc. v. Fed. Comm’n Comm’n*, 497 U.S. 547 (1990).

<sup>18</sup> *Id.* at 564–65.

<sup>19</sup> *See, e.g., Craig v. Boren*, 429 U.S. 190 (1976).

<sup>20</sup> *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995).

disadvantaged individuals,” and using “race-based presumptions in indentifying such individuals.”<sup>21</sup>

The Court, overruled *Metro Broadcasting* and indicated it “departed from prior cases in two significant respects: it ‘turned its back on *Croson*’s explanation of why strict scrutiny of all governmental racial classifications is essential’, and squarely rejected a proposition established by earlier equal protection decisions, ‘namely, congruence between the standards applicable to federal and state racial classifications.’”<sup>22</sup> Accordingly, 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.”<sup>23</sup> Further, the Court clarified the strict scrutiny analysis stating, “we wish to dispel the notion that strict scrutiny is ‘strict in theory, but fatal in fact.’”<sup>24</sup> Therefore, the combination of *Croson* and *Adarand* established that strict scrutiny governs all equal protection challenges to benign race-conscious actions taken by government.

### C. The *Grutter* and *Gratz* Cases: Application of Strict Scrutiny to University Admissions Programs

Following the two cases involving government contracting, the Court had an opportunity to apply strict scrutiny in two separate cases challenging the University of Michigan’s admissions programs that incorporated race-conscious criteria.<sup>25</sup> In a five-four decision written by Justice O’Connor, the Court upheld the University of Michigan Law School Admissions program, pursuant to which race was used as a factor.<sup>26</sup> The Court held that the university had a compelling interest in creating a diverse student body.<sup>27</sup> It gave deference to the law school’s educational judgment that diversity in the student body is essential to the law school’s educational mission and its assessment that diversity would in fact yield educational benefits.<sup>28</sup>

Addressing the second prong of strict scrutiny, the Court concluded that the University of Michigan program was narrowly tailored and, therefore,

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<sup>21</sup> *Id.* at 204.

<sup>22</sup> *Id.* at 226.

<sup>23</sup> *Id.* at 227.

<sup>24</sup> *Id.* at 237.

<sup>25</sup> *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003).

<sup>26</sup> *Grutter*, 539 U.S. 306 (2003).

<sup>27</sup> *Id.* at 328.

<sup>28</sup> *Id.* at 328–29.

satisfied strict scrutiny.<sup>29</sup> Here it was important that the law school program required consideration of each applicant's individualized qualifications, including any contribution to diversity. Justices Rehnquist, Scalia, Thomas, and Kennedy dissented, with Justice Kennedy writing a separate opinion to criticize the majority for its "refusal to apply meaningful strict scrutiny."<sup>30</sup> Justice Kennedy reiterated his "approval of giving appropriate consideration to race in [university admissions]," but only if it survives "searching judicial review."<sup>31</sup>

In the companion case, *Gratz v. Bollinger*, the Court addressed the use of racial preferences in undergraduate admissions at the University of Michigan. Justice O'Connor now joined Justice Rehnquist's opinion for the Court holding that the "university's use of race in its current freshman admissions policy is not narrowly tailored to achieve [its] asserted compelling interest in diversity."<sup>32</sup> Justice O'Connor's concurring opinion stressed the difference between the university's undergraduate and law school programs, emphasizing the undergraduate program's assignment of an automatic twenty-point bonus to every underrepresented minority applicant.<sup>33</sup> This program allowed, race alone to be the determining factor.

These two cases established that student body diversity can be a compelling justification for considering race in higher education admissions. Yet these cases also demonstrated that the second prong of strict scrutiny is difficult to satisfy.

#### D. *Parents Involved*: Application of Strict Scrutiny to Public Schools' Efforts to Achieve Racial Balance

*Parents Involved* reached the Supreme Court just four years after the decisions in the University of Michigan cases. However, the make-up of the Court had changed with Justices Rehnquist and O'Connor being replaced by Justices Roberts and Alito. The two new Justices joined Justices Scalia and Thomas with Justice Kennedy appearing to have assumed Justice O'Connor's role. Justice Kennedy's vote decides many cases, with the court comprised of two solid voting blocks – Justices Roberts, Scalia, Thomas and Alito on the right and Justices Stevens, Souter, Breyer and Ginsburg on the left. In this case, Justice Kennedy supplied the fifth vote in favor of

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<sup>29</sup> *Id.* at 333–43.

<sup>30</sup> *Id.* at 393 (Kennedy, J., dissenting).

<sup>31</sup> *Id.* at 395 (Kennedy, J., dissenting).

<sup>32</sup> *Grutter*, 539 U.S. 306 at 275.

<sup>33</sup> *Id.* at 276–80 (O'Connor, J., concurring).

striking down the Seattle, Washington and Louisville, Kentucky school districts' use of race in assigning students to a particular school. These school districts desired a racial balance that falls within a predetermined range based on the racial composition of the school district's population.<sup>34</sup> While joining several parts of the Court's opinion,<sup>35</sup> Justice Kennedy did not join key portions.<sup>36</sup> Most importantly in his departure from the Court, Justice Kennedy suggests there is a compelling interest in taking steps to avoid racial isolation in public schools.<sup>37</sup>

The decision in *Marks v. United States*<sup>38</sup> establishes that Justice Kennedy's opinion in *Parents Involved* is entitled to great weight. In *Marks*, the Court said "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'"<sup>39</sup> *Marks* was cited in *Grutter*<sup>40</sup> as justification for endorsing the view of Justice Powell in his concurring opinion in *Bakke*.

Both Roberts and Kennedy are willing to interpret *Grutter* narrowly. They suggest that a student body's diversity may be a compelling government interest only in higher education because *Grutter* "relied upon considerations unique to institutions of higher education."<sup>41</sup> Despite their agreement on this point, the tone of Justice Kennedy's opinion is much different than that of Justice Roberts. Justice Kennedy says "[a] compelling interest exists in avoiding racial isolation, an interest that a school district, in its discretion and expertise, may choose to pursue."<sup>42</sup> He encourages school districts to continue "the important work of bringing together students of different racial, ethnic, and economic backgrounds."<sup>43</sup> For Justice Roberts, strict scrutiny is fatal: elementary and secondary school

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<sup>34</sup> *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 782 (2007) (Kennedy, J., concurring in part and concurring in the judgment).

<sup>35</sup> *Id.* (Kennedy, J., concurring, indicating he joins Parts I, II, III-A, and III-C of Justice Roberts' opinion).

<sup>36</sup> *Id.* at 782–83 (Kennedy, J., concurring, indicating he does not join Parts III-B and IV of Justice Roberts' opinion).

<sup>37</sup> *Id.*

<sup>38</sup> *Marks v. United States*, 430 U.S. 188 (1997).

<sup>39</sup> *Id.* at 193 (Quoting *Gregg v. Georgia*, 428 U.S. 153, 169 (1976)).

<sup>40</sup> *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003).

<sup>41</sup> *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 724 (2007).

<sup>42</sup> *Id.* at 797 (Kennedy, J., concurring).

<sup>43</sup> *Id.* at 798.

districts will simply have to accept resegregation that is not the direct result of government action.<sup>44</sup>

Because the four dissenting Justices would allow schools to take affirmative steps to address the inequality inherent to remedy racially segregated education,<sup>45</sup> the key will be whether a school district can convince Justice Kennedy that its plan is narrowly tailored.<sup>46</sup> In the current Supreme Court, benign race-conscious actions are doomed if Justice Roberts gets a fifth vote. While narrowly tailored programs, at least those involving education, have a slim chance of success, they depend on Justice Kennedy's swing vote.

#### E. *Ricci*: Locking in the Discriminatory Effects of Job Testing

*The Ricci* case addresses a City's effort to avoid implementation of the results of a promotional exam that adversely affected African American and Hispanic firefighters seeking a promotion. While African Americans and Hispanics composed thirty percent of the population of New Haven, Connecticut, in the 1970s, only 3.6% of its 502 firefighters were African Americans and Hispanics.<sup>47</sup> At the same time, only one of the 107 officers in the department was African American.<sup>48</sup> Prior litigation alleging race discrimination in employment by the fire department resulted in a settlement agreement.<sup>49</sup> This agreement leads to some improvement in minority representation in the fire department.<sup>50</sup> Yet in decades, the City's minority population increased to nearly forty percent African American and more than twenty percent Hispanics.<sup>51</sup> As of 2003, African Americans and Hispanics constituted thirty percent and sixteen percent of the City's firefighters, respectively.<sup>52</sup> Significant disparities remain in the supervisory positions, with the senior officer ranks (captain and higher) comprised of

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<sup>44</sup> *Id.* at 729–33.

<sup>45</sup> *Id.* at 837–41 (Breyer, J., dissenting).

<sup>46</sup> While Justice Kennedy's opinion in *Parents Involved* is encouraging to institutions interested in taking benign race-conscious actions, Justice Kennedy has voted consistently in favor of striking down such actions. *See, e.g.*, *Richmond v. J.A. Croson, Co.*, 488 U.S. 469 (1989); *Metro Broad., Inc. v. Fed. Comm'n Comm'n*, 497 U.S. 547 (1990); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

<sup>47</sup> *Ricci v. DeStefano*, 129 S. Ct. 2658, 2691 (2009) (Ginsburg, J., dissenting), (quoting from *Firebird Soc. of New Haven, Inc. v. New Haven Bd. of Fire Comm'rs*, 66 F.R.D. 457, 460 (D. Conn. 1975)).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Ricci v. DeStefano*, 129 S. Ct. 2658, 2691 (2009).

nine percent for both African American and Hispanics; only one of the twenty-one fire captains in the department is African American.<sup>53</sup>

Pursuant to the City's charter that establishes a merit system, the City is required to use competitive examinations to fill vacancies and the "system requires the City to fill vacancies in the classified civil-service ranks with the most qualified individuals, as determined by job-related examinations."<sup>54</sup> Candidates for both the lieutenant and captain positions took examinations in November and December of 2003.<sup>55</sup> Seventy-seven candidates completed the examination—forty-three whites, nineteen blacks, and fifteen Hispanics.<sup>56</sup> Thirty-four of the candidates passed—twenty-five whites, six blacks, and three Hispanics.<sup>57</sup> Applying the "rule of three," the hiring authority had to fill each vacancy by choosing a candidate from the top three on the list.<sup>58</sup> This meant the top ten candidates, all of whom are white, were eligible for an immediate promotion to lieutenant.<sup>59</sup>

For the captain position, forty-one candidates completed the examination—twenty-five whites, eight blacks, and eight Hispanics—and twenty-two candidates passed—sixteen whites, three blacks, and three Hispanics.<sup>60</sup> Applying the "rule of three," nine candidates were eligible for an immediate promotion to the seven vacant captain positions—seven whites and two Hispanics.<sup>61</sup> On the lieutenant examination, the highest scoring African American candidate ranked thirteenth and the top Hispanic candidate ranked twenty-sixth.<sup>62</sup> On the examination for the position of captain, the highest scoring African American candidate ranked fifteenth.<sup>63</sup>

After learning the results of the examinations, City officials were concerned about the disparate impact of its selection process and, after heated debate, the New Haven Civil Service Board (CSB) voted on a motion to certify the examinations, but a two-two deadlock resulted in a decision not to certify the results.<sup>64</sup> Seventeen white firefighters and one

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<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 2665.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 2666.

<sup>57</sup> *Ricci v. DeStefano*, 129 S. Ct. 2658, 2666 (2009).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Ricci v. DeStefano*, 129 S. Ct. 2658, 2666 (2009).

<sup>63</sup> *Id.* at 2692 (Ginsburg, J., dissenting).

<sup>64</sup> *Id.* at 2666–71 & 2691–95 (Ginsburg, J. dissenting).

Hispanic firefighter, all of whom passed the examination but were denied a chance at promotions due to the CSB's certification refusal, filed a lawsuit alleging disparate treatment in violation of the Equal Protection Clause of the Fourteenth Amendment and Title VII.<sup>65</sup>

Both sides filed for summary judgment, with or their defense, the City and its officials asserted a good-faith belief that they would have violated Title VII's disparate-impact provision if they had certified the examination results.<sup>66</sup> Further, they argued that they could not be liable under the disparate-treatment provision in Title VII for attempting to comply with the provision of Title VII prohibiting actions with a disparate impact.<sup>67</sup>

The district court granted summary judgment for the City and its officials holding that “[n]otwithstanding the shortcomings in the evidence on existing, effective alternatives, it is not the case that [defendants] *must* certify a test where they cannot pinpoint its efficiency explaining its disparate impact . . . simply because they have not yet formulated a better selection method.”<sup>68</sup> The court also ruled that the defendants’ “motivation to avoid making promotions based on a test with a racially disparate impact . . . does not, as a matter of law, constitute discriminatory intent” under Title VII.<sup>69</sup> In addition, the district court rejected the plaintiffs’ equal protection claim, holding that the defendants had not acted because of “discriminatory animus” toward the plaintiffs.<sup>70</sup> More specifically, the district court concluded the defendants’ actions were not “based on race” because “all applicants took the same test, and the result was the same for all because the test results were discarded and nobody was promoted.”<sup>71</sup>

The Second Circuit Court of Appeals affirmed in a one-paragraph per curiam opinion, adopting the district court’s reasoning.<sup>72</sup> A few days

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<sup>65</sup> *Id.* at 2671.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* Facially neutral employment practices or tests have a “disparate impact” when they affect one group differently than another group. For example, a height requirement (5’10”) for a job excludes females at a rate far higher than the rate for males. “Disparate treatment” refers to intentional discrimination, *e.g.*, “you were not hired because you are female.”

<sup>68</sup> *Ricci v. DeStefano*, 129 S. Ct. 2658, 2671 (2009).

<sup>69</sup> *Ricci v. DeStefano*, 554 F. Supp. 2d 142, 156 & 160 (D. Conn. 2006).

<sup>70</sup> *Id.* at 162.

<sup>71</sup> *Id.* at 161.

<sup>72</sup> *Ricci v. DeStefano*, 530 F.3d 87 (2d Cir. 2008).

later the court voted seven to six to deny rehearing *en banc*.<sup>73</sup> In a five–four decision, with Justice Kennedy writing the opinion for the majority, the Supreme Court reversed without addressing the equal protection argument.

There are several key points. First, the Court held that the “City’s actions would violate the disparate-treatment prohibition of Title VII absent some valid defense” because the “evidence demonstrates that the City chose not to certify the examination results because of the statistical disparity based on race—*i.e.*, how minority candidates had performed when compared to white candidates.”<sup>74</sup> According to Justice Kennedy,

[w]hatever the City’s ultimate aim—however well intended or benevolent it might have seemed—the City made its employment decision because of race. The City rejected the test results solely because the higher scoring candidates were white. The question is not whether that conduct was discriminatory but whether the City had a lawful justification for its race-based action.<sup>75</sup>

Second, Justice Kennedy appears to treat Title VII’s disparate-treatment prong as more important than the disparate-impact prong. This is consistent with the Court’s refusal, at least since *Washington v. Davis*, to find a violation of the Equal Protection Clause without a showing of intentional discrimination.<sup>76</sup> Use of disparate impact as a standard of liability promotes actual equality in that it looks to the results of an employer’s decisions. While not foreclosing the possibility that a City’s concern about disparate-impact liability under Title VII could constitute a valid defense to a disparate-treatment claim, the “strong-basis-in-evidence” standard the Court adopts<sup>77</sup> comes very close to requiring the

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<sup>73</sup> *Id.* at 88.

<sup>74</sup> *Ricci v. DeStefano*, 129 S. Ct. 2658, 2673 (2009).

<sup>75</sup> *Id.* at 2674. Justice Kennedy’s premise—that the “City’s actions would violate the disparate-treatment prohibition of Title VII absent some valid defense”—is not as obvious as he makes it appear. If the City’s motivation was to avoid disparate-impact liability under Title VII, and it refused to certify the examination for that reason, is that the same as rejecting an examination because of the race of the plaintiffs? The City did not act because of the race of the plaintiffs, but rather because of the racial disparity in the results. *See Personnel Adm’r of Mass. v. Feeney*, 442 U.S. 256, 278 (1979) (stating that a discriminatory purpose “implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group”).

<sup>76</sup> *Washington v. Davis*, 426 U.S. 229 (1976).

<sup>77</sup> In adopting the “strong-basis-in-evidence” standard “as a matter of statutory construction,” *Ricci*, 129 S. Ct. at 2676, Justice Kennedy assumes it is the standard adopted

City to prove a disparate-impact violation against itself.<sup>78</sup> The result in *Ricci* suggests that the Court will require a municipality, attempting to justify benign race-conscious action as a remedy for past discrimination to meet the “strong-basis-in-evidence” standard when facing a constitutional challenge.

Third is the disturbing warning in Justice Scalia’s concurring opinion:

I . . . write separately to observe that [the Court’s] resolution of this dispute merely postpones the evil day on which the Court will have to confront the question: Whether, or to what extent, are the disparate-impact provisions of Title VII of the Civil Rights Act of 1964 consistent with the Constitution’s guarantee of equal protection? The question is not an easy one.<sup>79</sup>

He ends his short opinion by stating “the war between disparate impact and equal protection will be waged sooner or later, and it behooves us to begin thinking about how—and on what terms—to make peace between them.”<sup>80</sup> This appears to be an invitation to employers facing a disparate-impact claim to challenge the constitutionality of the disparate-impact provision of Title VII on the ground that it is inconsistent with the Fifth Amendment to the U.S. Constitution.

Justice Scalia says, “if the Federal Government is prohibited from discriminating on the basis of race, then surely it is also prohibited from enacting acts mandating that third parties—*e.g.*, employers, whether private, State, or municipal—discriminate on the basis of race.”<sup>81</sup> Even though

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in cases challenging benign race-conscious actions based on the Equal Protection Clause. *Id.* at 2675. Specifically, he points to a plurality opinion in *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277–78 (1986), and the Court’s opinion in *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 498–506 (1989). See *Ricci*, 129 S. Ct. at 2675. A plurality opinion does not establish the rule and, in *Croson*, Justice O’Connor’s quotes from the plurality opinion in *Wygant*, 488 U.S. at 500, but does not specifically adopt the “strong-basis-in-evidence” standard. Rather, she indicates “[t]here is nothing approaching a prima facie case of a constitutional or statutory violation,” *Croson*, 488 U.S. at 500, and points to the need to “identify that discrimination . . . with some specificity before [the City] may use race-conscious relief.” *Croson*, 488 U.S. at 504. Justice Ginsburg, in her dissenting opinion in *Ricci*, says *Wygant* and *Croson* are “particularly inapt” because “they concern the constitutionality of absolute racial preferences,” meaning race “was the decisive factor.” *Ricci*, 129 S. Ct. at 2701 (Ginsburg, J. dissenting).

<sup>78</sup> *Ricci*, 129 S. Ct. at 2705 n.15 (Ginsburg, J., dissenting).

<sup>79</sup> *Id.* at 2681–82 (Scalia, J., concurring).

<sup>80</sup> *Id.* at 2683.

<sup>81</sup> *Id.* at 2682 (citations omitted).

*Ricci* severely limits the availability of a fear-of-disparate-impact-violation defense to a disparate treatment claim, Justice Scalia seems intent upon closing the door entirely. Given the obvious hostility of the majority in *Ricci* to benign race-conscious action, it is quite possible that the other four Justices in the majority will agree with Scalia. The combination of Justice Scalia's warning and the fact that the *Ricci* plaintiffs' equal protection challenge remains viable in future cases may be enough to discourage Congress from amending Title VII to overcome the result in *Ricci*.

The next two Parts will examine what governmental interests might be considered compelling and, if so, how institutions should structure a program to increase the chances of surviving the narrowly tailored prong of strict scrutiny.

## II. COMPELLING GOVERNMENT INTERESTS AND RELATIONSHIP TO INSTITUTIONAL MISSION

There is no magic formula for determining when a particular governmental interest is deemed "compelling" for purposes of constitutional analysis, whether it be in the context of the First Amendment or the Fourteenth Amendment. While the existence of a compelling governmental interest is generally treated as a question of law often without any factual basis, that does not mean institutions should ignore the importance of a factual record to help substantiate that a particular interest is in fact compelling.

An example of this can be found in *Grutter*, where the majority deferred to the law school's educational judgment that diversity is essential to its educational mission. The court also relied on expert studies and reports admitted as evidence in the trial court, and the *amici* briefs of professional associations, American businesses, and high-ranking retired officers and civilian leaders of the U.S. military, who all supported the educational judgment of the law school.<sup>82</sup> Thus, the starting point is the mission of the institution.

In cases challenging benign race-conscious programs, the Court has recognized two compelling government interests—remedying past discrimination by the institution that adopted the program and student body

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<sup>82</sup> *Grutter v. Bollinger*, 539 U.S. 306, 330–31 (2003). The Court's reliance on, for example, the retired military officers and civilian leaders suggests the Court was recognizing an "operational needs" justification for race-conscious actions.

diversity in higher education.<sup>83</sup> The former is rarely utilized in adopting a voluntary program because it requires an admission of at least a *prima facie* case of past discrimination.<sup>84</sup> The latter is limited in scope. There are other institutional interests that are just as compelling. However, institutions will have to utilize experts and develop a good record in order to persuade the courts that there are other compelling interests, in light of their institutional mission.<sup>85</sup>

#### A. Remedying Past Discrimination

At least since the early years following *Brown v. Board of Education*,<sup>86</sup> the Court approved race-conscious remedies for *de jure* segregation. For example, in *Swann v. Charlotte-Mecklenburg Board of Education*, the Court approved a variety of remedies that take race into account, including student assignments, altering of attendance zones, and transportation of students.<sup>87</sup> Earlier, in *Greene v. County School Board*, the Court held that school boards have “the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch.”<sup>88</sup> Similarly, in *United States v. Paradise*, the Court upheld a race-conscious order designed to remedy proven intentional employment discrimination by the Alabama Department of Public Safety, stating “the race-conscious relief at issue here is justified by a compelling interest in remedying the discrimination that permeated entry-level hiring practices and the promotional process alike.”<sup>89</sup> These cases illustrate the goal of remedying the past discrimination of the particular governmental unit involved, not past societal discrimination. Some Justices would limit the compelling governmental interest to victim-specific relief,<sup>90</sup> but that view has never gained the support of a majority of the Court.

Since most governmental units do not want to admit their own past race discrimination, the remedial justification most likely will surface to be utilized in situations where the Court, in a case alleging invidious race

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<sup>83</sup> See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995).

<sup>84</sup> Based on *Ricci*, this burden likely will be increased to a “strong-basis-in-evidence” standard. See *infra* Part II.E.

<sup>85</sup> See, e.g., *Wittmer v. Peters*, 87 F.3d 916, 920 (7th Cir. 1996).

<sup>86</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

<sup>87</sup> *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971).

<sup>88</sup> *Greene v. County Sch. Bd.*, 391 U.S. 430, 437–38 (1968).

<sup>89</sup> *United States v. Paradise*, 480 U.S. 149, 170 (1987) (plurality opinion).

<sup>90</sup> *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 526–27 (1989) (Scalia, J., concurring).

discrimination, finds such race discrimination and then proceeds to the remedial stage. This occurred in the early, post-*Brown* school desegregation cases,<sup>91</sup> as well as cases like *Paradise*.<sup>92</sup> In contrast, when a governmental unit engages in voluntary benign race-conscious action and its plan is challenged by a nonminority who claims to have been a victim of the plan, governmental units can rarely claim a remedial justification because, in adopting the plan, they did not make a finding of past discrimination.

For example, in *Croson*, the challenged plan declared that it was “remedial” in nature and enacted “for the purpose of promoting wider participation by minority business enterprises in the construction of public projects.”<sup>93</sup> Its proponents relied on a study indicating that “while the general population of Richmond was fifty percent black, only 0.67% of the city’s prime construction contracts had been awarded to minority businesses in the five-year period from 1978 to 1983.”<sup>94</sup> It also established that a “variety of contractors’ associations, whose representatives appeared in opposition to the ordinance, had virtually no minority businesses within their membership.”<sup>95</sup> However, the Court pointed out that there “was no direct evidence of race discrimination on the part of the City in letting contracts or any evidence that the City’s prime contractors had discriminated against minority-owned subcontractors.”<sup>96</sup>

Justice O’Connor, in a portion of her opinion for the Court, decided the City’s findings were insufficient to justify the plan. “a generalized assertion that there has been past discrimination in an entire industry provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy.”<sup>97</sup> She pointed out there was “nothing approaching a *prima facie* case of a constitutional or statutory violation by *anyone* in the Richmond construction industry” and, therefore, the City did not demonstrate a compelling interest.<sup>98</sup> Joined by only three other Justices, Justice O’Connor later described what might constitute a sufficient *prima*

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<sup>91</sup> See, e.g., *Norwood v. Harrison*, 413 U.S. 455 (1973); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); *Greene v. County Sch. Bd.*, 391 U.S. 430 (1968); *Griffin v. County Sch. Bd.*, 377 U.S. 218 (1964); *Cooper v. Aaron*, 358 U.S. 1 (1958).

<sup>92</sup> *United States v. Paradise*, 480 U.S. 149 (1987).

<sup>93</sup> *Croson*, 488 U.S. at 478.

<sup>94</sup> *Id.* at 469.

<sup>95</sup> *Id.* at 479–80.

<sup>96</sup> *Id.* at 480.

<sup>97</sup> *Id.* at 498.

<sup>98</sup> *Id.* at 500.

*facie* case of past discrimination, including evidence that “nonminority contractors were systematically excluding minority businesses from subcontracting opportunities,” or “a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality’s prime contractors.” Such evidence might justify “some form of narrowly tailored racial preference . . . to break down patterns of deliberate exclusion.”<sup>99</sup>

In his concurring opinion, Justice Scalia disagreed with what he called “Justice O’Connor’s dictum” and indicated a race-conscious remedy was constitutional only to provide a remedy to the specific victims of past race discrimination.<sup>100</sup>

Even Justice O’Connor’s version of what evidence would satisfy a remedial measure is problematic. She said a significant statistical disparity between the number of qualified minority contractors in the area and the number of such contractors actually obtaining contracts might give rise to an inference of discriminatory exclusion.<sup>101</sup> While this is true, what is the likelihood of a qualified minority contractor surviving in a locality in which the contractor does not receive any business? Ironically, it is the communities that have been most “successful” in suppressing the market for minority contractors that will be least able to justify an affirmative plan to promote opportunities for minority contractors.

In short, remedying past discrimination remains a compelling government interest that would justify benign race-conscious actions, but in reality it is of limited utility to governmental units seeking to take such actions voluntarily. Thus, in most circumstances, governmental units will have to search for another compelling justification for benign race-conscious actions.

#### B. Attaining Diversity in Higher Education

Justice O’Connor’s opinion in *Grutter v. Bollinger* is the only majority opinion of the Court holding that a university “has a compelling interest in attaining a diverse student body.”<sup>102</sup> An examination of her

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<sup>99</sup> *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509 (1989) (citations omitted). Compare the “strong-basis-in-evidence” standard adopted in *Ricci*.

<sup>100</sup> *Id.* at 526–27 (Scalia, J., concurring).

<sup>101</sup> *Id.* at 509.

<sup>102</sup> *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003).

opinion discloses a number of significant points. First, the Court gave deference to the “Law School’s educational judgment that such diversity is essential to its educational mission.”<sup>103</sup> The school’s determination that “diversity will, in fact, yield educational benefits [was] substantiated by [the university defendants] and their *amici*.”<sup>104</sup>

Second, Justice O’Connor pointed out that the Court has “long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition.”<sup>105</sup> She referred to Justice Powell’s opinion in *Regents of the University of California v. Bakke*, in which he recognized “a constitutional dimension, grounded in the First Amendment, of education autonomy,” that extends to the selection of a student body designed to achieve the fulfillment of the institution’s educational mission.<sup>106</sup> “[A]ttaining a diverse student body is at the heart of the Law School’s proper institutional mission, and . . . ‘good faith’ on the part of a university is ‘presumed’ absent ‘a showing to the contrary.’”<sup>107</sup> This demonstrates the importance of an institution’s mission. In developing a race-conscious plan, an institution should link the plan to a specific portion of its mission and demonstrate how the mission is served by the plan.

Third, Justice O’Connor discussed how the law school, as part of its goal of “assembling a class that is both exceptionally academically qualified and broadly diverse,” seeks to “enroll a ‘critical mass’ of minority students,” and that the school’s “concept of critical mass is defined by reference to the educational benefits that diversity is designed to produce.”<sup>108</sup> The law school’s “educational benefits” argument was supported not only by the benefits identified in the admissions policy, but also by the arguments of its *amici*.<sup>109</sup> This led the Court to conclude that “[t]hese benefits are not theoretical but real.”<sup>110</sup> Justice O’Connor also pointed out that the need for a critical mass was not justified by the

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<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 329.

<sup>106</sup> *Id.*

<sup>107</sup> *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003).

<sup>108</sup> *Id.* at 329–30.

<sup>109</sup> *Id.* at 330–31 (Amici ranged from experts who conducted studies to American businesses to retired officers and civilian leaders of the United States military).

<sup>110</sup> *Id.* at 330.

stereotypical notion that minority students would consistently express a minority viewpoint on issues.<sup>111</sup>

Thus, *Grutter* gives fairly specific guidance to higher education institutions interested in adopting a race-conscious admissions plan to achieve student body diversity. The precedential value of *Grutter*, however, has to be examined in light of the decision in *Parents Involved*, which confirmed that “in evaluating the use of racial classifications in the school context, [the Court has] recognized two interests that qualify as compelling”—remedying the effects of past intentional discrimination and diversity in higher education.<sup>112</sup> The first justification does not apply because the school districts in *Parents Involved* did not claim they were remedying the effects of their past discrimination, and the second justification, as recognized in *Grutter*, did not control here because (a) it involved broad-based diversity, not just racial diversity, and (b) it involved the unique context of higher education.<sup>113</sup> Justice Kennedy joined this part of Justice Roberts’ analysis.

Yet Justice Kennedy did not join Justice Roberts in the part of his opinion addressing the “additional interests” advanced by the school districts. First, Justice Roberts addressed the school districts’ argument that “educational and broader socialization benefits flow from a racially diverse learning environment, and . . . because the diversity they seek is racial diversity—not the broader diversity at issue in *Grutter*—it makes sense to promote that interest directly by relying on race alone.”<sup>114</sup> He indicated there was no need to decide whether this interest is compelling because the plan at issue was not narrowly tailored.<sup>115</sup> There was no demonstration by the schools of the level of diversity that provides these benefits; instead, the schools were “working backward” to achieve a level of diversity solely by reference to the demographics of the school district.<sup>116</sup> Second, Justice Roberts considered racial balancing, for its own sake, and he concluded it was not a compelling governmental interest because:

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<sup>111</sup> *Id.* at 333.

<sup>112</sup> *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720–22 (2007). In this case, the Court struck down the Seattle and Louisville school districts’ use of race in assigning students to a particular school. The districts’ goal was to assure that the racial balance at each school fell within a predetermined range based on the racial composition of the school district as a whole.

<sup>113</sup> *Id.* at 722–25. Broad-based diversity looks at a wide variety of factors or characteristics that increase the diversity of, for example, a student body.

<sup>114</sup> *Id.* at 725–26.

<sup>115</sup> *Id.* at 726.

<sup>116</sup> *Id.* at 727–30.

[a]ccepting racial balancing as a compelling state interest would justify the imposition of racial proportionality throughout American society, contrary to our repeated recognition that “[a]t the heart of the Constitution’s guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class.”<sup>117</sup>

Further, if racial balancing is not permitted, it “is not transformed from ‘patently unconstitutional’ to a compelling state interest simply by relabeling it ‘racial diversity.’”<sup>118</sup>

Justice Kennedy, in his concurring opinion, stated that the plurality “does not acknowledge that the school districts have identified a compelling interest here.”<sup>119</sup> He said that “[d]iversity, depending on its meaning and definition, is a compelling educational goal a school district may pursue.”<sup>120</sup> Justice Kennedy also concluded that the school districts have not shown their plans to be narrowly tailored to achieve their goals.<sup>121</sup> More importantly, Justice Kennedy says that parts of the plurality opinion “imply an all-too-unyielding insistence that race cannot be a factor in instances when, in my view, it may be taken into account” and “dismiss[es] . . . the legitimate interest government has in ensuring all people have equal opportunity regardless of their race.”<sup>122</sup>

Further, Justice Kennedy argued that school districts can seek to obtain *Brown*’s objective of equal educational opportunity and indicated that “[t]he plurality opinion was at least open to the interpretation that the Constitution requires school districts to ignore the problem of *de facto* resegregation in schooling.”<sup>123</sup> The plurality opinion in his view, is “profoundly mistaken” to the extent it suggested that the constitutional requirement for state and local school authorities to accept the *status quo* of racial isolation in schools.<sup>124</sup> He said Justice Harlan’s reference to the Constitution as “color-blind” was justified in the context of his dissent in

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<sup>117</sup> *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 730 (2007).

<sup>118</sup> *Id.* at 732.

<sup>119</sup> *Id.* at 783 (Kennedy, J., concurring).

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 783–87 (Kennedy, J., concurring).

<sup>122</sup> *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 787–88 (2007) (Kennedy, J., concurring).

<sup>123</sup> *Id.* at 788.

<sup>124</sup> *Id.*

*Plessy*; however, in the real world “it cannot be a universal constitutional principle.”<sup>125</sup>

In the administration of public schools . . . it is permissible 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. If school authorities are concerned that the student-body compositions of certain schools interfere with the objective of offering an equal educational opportunity to all of their students, they are free to devise race-conscious measures to address the problem in a general way and without treating each student in different fashion solely on the basis of a systematic, individual typing by race.<sup>126</sup>

Finally, after discussing what he describes as “two concepts of central importance” in determining the validity of efforts “designed to alleviate the hurt and adverse consequences resulting from race discrimination”—the difference between *de jure* and *de facto* segregation and the presumptive invalidity of the use of racial classifications to justify a difference in treatment of individuals<sup>127</sup>—Justice Kennedy encouraged “race-conscious

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<sup>125</sup> *Id.* (Kennedy, J., concurring).

<sup>126</sup> *Id.* at 788–89 (Kennedy, J., concurring) (citations omitted). Justice Kennedy further described race-conscious actions that are appropriate

School boards may pursue the goal of bringing together students of diverse backgrounds and races through other means, including strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race. These mechanisms are race conscious but do not lead to different treatment based on a classification that tells each student he or she is to be defined by race, so it is unlikely any of them would demand strict scrutiny to be found permissible. Executive and legislative branches . . . should be permitted to employ [such policies and procedures] with candor and with confidence that a constitutional violation does not occur whenever a decisionmaker considers the impact a given approach might have on students of different races. Assigning to each student a personal designation according to a crude system of individual racial classifications is quite a different matter; and the legal analysis changes accordingly.

*Id.*

<sup>127</sup> *Id.* at 793 (Kennedy, J., concurring).

measures that do not rely on differential treatment based on individual classifications.”<sup>128</sup> He said:

[t]his Nation has a moral and ethical obligation to fulfill its historic commitment to creating an integrated society that ensures equal opportunity for all of its children. A compelling interest exists in avoiding racial isolation, an interest that a school district, in its discretion and expertise, may choose to pursue. Likewise, a district may consider it a compelling interest to achieve a diverse student population.

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The decision today should not prevent school districts from continuing the important work of bringing together students of different racial, ethnic, and economic backgrounds . . . . Those entrusted with directing our public schools can bring to bear the creativity of experts, parents, administrators, and other concerned citizens to find a way to achieve the compelling interests they face without resorting to widespread governmental allocation of benefits and burdens on the basis of racial classifications.<sup>129</sup>

At least while Justice Kennedy holds the key vote on the Court, well-intentioned school districts have a limited license to pursue plans designed to avoid racial isolation and achieve a diverse student population as a means of promoting equal educational opportunity for all children.

While these compelling interests are probative, there are differences because of the obvious difference in the way a university student body is formed compared to the formation of a student body in school districts providing elementary and secondary education.

Universities recruit students with no geographic limitations, and then select from a group of qualified applicants that hopefully exceeds the number of available spaces. In contrast, school districts serve a geographic area and must accept all students residing in that area, with little or no ability to influence the racial makeup of the students, except to the extent that the quality of the education provided may influence families’ decisions on where to live. The goal in both situations is to improve education, with

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<sup>128</sup> *Id.* at 797 (Kennedy, J., concurring).

<sup>129</sup> *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 797-98 (2007).

elementary and secondary schools having the additional goal of achieving equality in educational opportunity.

School districts should enlist the services of experts to assist in identifying the actual benefit of avoiding racial isolation and achieving a diverse student population as well as quantifying the point between the two extremes at which racial isolation becomes harmful and the point at which a diverse student population becomes beneficial. This does not mean all experts have to agree. The key is a record showing that a school district sought the assistance of experts and obtained, at a minimum, supporting opinions<sup>130</sup> that would be admissible under the Court's current evidentiary analysis.<sup>131</sup> Such evidence would be helpful in assessing whether a plan is narrowly tailored, as discussed in Part III below.

### C. Operational Needs—Employment

While the Supreme Court has not addressed the issue, a few lower courts have recognized “operational needs” as a compelling governmental interest justifying race-conscious decisions in at least certain types of employment. In *Petit v. City of Chicago*, the Seventh Circuit Court of Appeals considered a challenge to a plan for the promotion of patrol officers to the rank of sergeant in the Chicago Police Department, pursuant to which the raw scores on a promotion examination were standardized for a number of factors, including race and ethnicity.<sup>132</sup> A number of nonminority police officers that had taken the promotional examination but were not promoted, challenged the plan and claimed that it deprived them of equal protection.<sup>133</sup> After discussing *Grutter*, the court concluded, “there is an even more compelling need for diversity in a large metropolitan police force charged with protecting a racially and ethnically divided major American city like Chicago.”<sup>134</sup> It concluded that the City of Chicago “set

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<sup>130</sup> *Wittmer v. Peters*, 87 F.3d 916, 918–20 (7th Cir. 1996).

<sup>131</sup> *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993) (determining a heightened standard for judges in assessing the admissibility of scientific expert testimony); *General Electric Co. v. Joiner*, 522 U.S. 136 (1997) (establishing an abuse-of-discretion standard for reviewing a trial court's decision on an expert testimony); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999) (applying the *Daubert* standard to all expert testimony).

<sup>132</sup> *Petit v. City of Chicago*, 352 F.3d 1111 (7th Cir. 2003). *See also* *Dietz v. Baker*, 523 F. Supp. 2d 407 (D. Del. 2007).

<sup>133</sup> While *Petit*, like *Ricci*, involves promotions, it does not raise the same issue because the City's justification for the challenged action was operational need rather than concern about a disparate-impact claim.

<sup>134</sup> *Petit*, 352 F.3d at 1114.

out a compelling operational need for a diverse police department” that justified the “modest affirmative action promotions” at issue in the case.<sup>135</sup>

Most significantly, the court relied on the record which included (i) the testimony of an expert in criminal justice and police community relations, including the results of “a survey he conducted to measure the perceptions and attitudes of Chicago residents about minority supervisors,” which concluded that “an increase in minorities enhanced the public’s perception of the [Chicago Police Department], which in turn enhanced the department’s ability to prevent and solve crime; (ii) the testimony of the former chief of police of Portland, Oregon, who “testified to the necessity of diversity among police supervisors, both for the community’s perceptions of police departments, but also internally in changing the attitudes of officers,” who are in a unique position to influence officers on the street; and (iii) the court’s previous recognition, in *Reynolds v. City of Chicago*, “that a visible presence of minorities in supervisory positions is critical to effective policing in a racially diverse city like Chicago because supervisors ‘set the tone for the department.’”<sup>136</sup>

The Seventh Circuit said the earlier case, *Reynolds*, also recognized the importance of “the presence of minority supervisors [as] an important means of earning the community’s trust.”<sup>137</sup> More specifically, the court in *Reynolds* said that the City of Chicago had proved a compelling need to increase the number of Hispanic lieutenants in the police department both because lieutenants “set the tone” for the department and because they act as “ambassadors” to the various communities in Chicago, including the Hispanic community.<sup>138</sup> Based on the record and its earlier precedent, the court in *Petit* concluded that the City “had a compelling interest in a diverse population at the rank of sergeant in order to set the proper tone in the department and to earn the trust of the community, which in turn increases police effectiveness in protecting the city.”<sup>139</sup>

Assuming the police department’s mission is to protect the city and the evidence shows that diversity in the rank of sergeant increases the effectiveness of the department in protecting the city, it is difficult to argue that such diversity is not a compelling governmental interest. Just as

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<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 1114–15, referring to *Reynolds v. City of Chicago*, 296 F.3d 524, 530 (7th Cir. 2002).

<sup>137</sup> *Id.* at 1115.

<sup>138</sup> *Reynolds*, 296 F.3d at 529–30.

<sup>139</sup> *Id.*

improving education is a compelling governmental interest, police protection is also a very important function of a city.<sup>140</sup> With that said, no unit of government interested in establishing a race-conscious program to increase the diversity of its police department should make any assumptions about what would be accepted as a compelling governmental interest. Instead, the institution should build a record confirming what to most people seems intuitive.<sup>141</sup> This interest is still important in light of the recent incident involving Harvard Professor, Henry Louis Gates Jr. The July 16, 2009, incident involving Professor Gates (African American) and the Cambridge, Massachusetts police officer (Caucasian) demonstrates the role of race in interactions between police and citizens.<sup>142</sup> More importantly, the incident demonstrates how people's perception of the incident differs along racial lines.<sup>143</sup>

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<sup>140</sup> *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954) (stating that education “is perhaps the most important function of state and local governments.”).

<sup>141</sup> *Wittmer v. Peters*, 87 F.3d 916, 918–19 (7th Cir. 1996).

<sup>142</sup> On July 16, 2009, black Harvard professor Henry Louis Gates Jr. was arrested for disorderly conduct by James Crowley, a white Cambridge, Massachusetts police sergeant. Cheryl W. Thompson, Krissah Thompson & Michael A. Fletcher, *Gates, Police Officer Share Beers and Histories with President*, WASH. POST, July 31, 2009, available at: <http://www.washingtonpost.com/wp-dyn/content/article/2009/07/30/AR2009073003563.html?sid=ST2009073004266> (last visited Aug. 24, 2009). Professor Gates had recently returned home from a trip overseas and was having difficulty getting in his front door. *Id.* A woman who saw Professor Gates attempting to enter the house contacted the police regarding a possible break-in. *Id.* In response to the call, Sergeant Crowley came to Professor Gates' house and requested to see Professor Gates' identification. *Id.* A verbal altercation ensued and Professor Gates was arrested. *Id.* However, the charges were later dropped. *Id.* The incident elicited discussions about racial profiling in America. *Id.* During a press conference, President Obama joined the discussion after a journalist asked him to share his thoughts about Professor Gates' arrest. *Id.* President Obama stated that the police had “acted stupidly” in arresting Professor Gates, but acknowledged that his understanding of the facts was limited. *Id.* In an attempt to quell some of the conflict, President Obama invited Professor Gates and Sergeant Crowley to meet at the White House, share a beer, and listen to each other's point of view. *Id.*

<sup>143</sup> The public's reaction to Professor Gates' arrest varied widely. See Paul Steinhauser, *Poll: Did Obama's reaction to Gates arrest hurt him?*, Aug. 3, 2009, <http://www.cnn.com/2009/POLITICS/08/04/obama.gates.poll/index.html>. For example, a survey by the CNN/Opinion Research Corporation, comprised of 1,136 adult Americans, including 226 African Americans and 773 whites, found a racial divide over whether Sergeant Crowley “acted stupidly” in his arrest of Professor Gates. *Id.* The poll showed that fifty-four percent of people questioned did not believe that Sergeant Crowley “acted stupidly,” while thirty-three percent of those polled believed that Sergeant Crowley did “act stupidly.” *Id.* However, in breaking down the statistics by race, the results show that fifty-eight percent of African American respondents believed that Sergeant Crowley “acted

Moving from education and police protection to other municipal services may be more of a challenge in seeking to justify race-conscious programs. For example, the Third Circuit Court of Appeals in *Lomack v. City of Newark*, the plaintiff successfully challenged a plan to eliminate all single-race fire companies in the Newark Fire Department in order to improve morale.<sup>144</sup> To implement the plan, dozens of firefighters were involuntarily transferred to different companies solely on the basis of their race.<sup>145</sup> Referring to *Grutter*, the City argued it had a compelling interest in integrating its fire companies because “integration in the workplace is no less important than in an educational setting.”<sup>146</sup> More specifically, the City argued that “integration in fire companies leads to greater camaraderie between coworkers, acceptance and consideration for people of varying backgrounds, sharing of information and steady support. It also promotes tolerance and mutual respect among colleagues.”<sup>147</sup> Neither the district court nor the court of appeals disagreed with this, and the district court “went on to find that the ‘educational, sociological, and job-performance enhancements’ supported, if not by themselves compelled, the diversity policy.”<sup>148</sup>

But, the court of appeals disagreed with the latter finding. Aside from its concern about the under-inclusiveness of the diversity plan, the Third Circuit held that educational benefits do not constitute a compelling interest for a fire department because of the difference in the missions of an educational institution and a fire department.<sup>149</sup> Further, the court said that

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stupidly,” while only twenty-nine percent of white respondents believed that Sergeant Crowley “acted stupidly”. *Id.*

The public’s perception of President Obama’s response to the incident also illustrates a racial divide. *Id.* In total, sixty-one percent of the respondents approved of the way in which President Obama has handled race relations overall. *Id.* However, only fifty-six percent of whites approve President Obama’s approach compared to ninety-two percent of African Americans who approve his approach. *Id.* A poll conducted by the Pew Research Center for the People and the Press reported that “the president’s approval ratings fell among non-Hispanic whites over the course of the interviewing period as the focus of the Gates story shifted from details about the incident to Obama’s remarks about the incident.” The Pew Research Center for the People & the Press, *Obama’s Ratings Slide Across the Board*, July 30, 2009, <http://people-press.org/report/532/obamas-ratings-slide> (last visited Aug. 24, 2009). The Pew Research Center poll failed to report president approval ratings for any other race or ethnic group. *See Id.*

<sup>144</sup> *Lomack v. City of Newark*, 463 F.3d 303 (3d Cir. 2006).

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 305, 309.

<sup>147</sup> *Id.* at 309.

<sup>148</sup> *Id.*

<sup>149</sup> *Lomack v. City of Newark*, 463 F.3d 303, 309-10 (3d Cir. 2006).

even if the City's assertions of increased "camaraderie," "acceptance," and "tolerance" constituted an argument of an operational need, there was no evidence to support such an argument.<sup>150</sup> Therefore, the court concluded that the City had not demonstrated a compelling interest to justify its diversity policy.

In another case, *Wittmer v. Peters*,<sup>151</sup> the Seventh Circuit Court of Appeals rejected a challenge to the defendants' race-conscious appointment of a lieutenant at a department of corrections "boot camp" for nonviolent male offenders between the ages of seventeen and thirty-five, sixty-eight percent of whom were black.<sup>152</sup> The idea of the boot camp "is to give the inmates an experience similar to that of old-fashioned military basic training, in which harsh regimentation, including drill-sergeant abuse by correctional officers, is used to break down and remold the character of the trainee."<sup>153</sup> Relying on expert testimony, the court rejected an equal protection challenge by three white applicants, who claimed they were more qualified but did not receive the appointment solely because of their race.<sup>154</sup> The court held that the "black lieutenant is needed because the black inmates are believed unlikely to play the correctional game of brutal drill sergeant and brutalized recruit unless there are some blacks in authority in the camp."<sup>155</sup> Thus, the court accepted the defendants' "penological necessity" argument to support the appointment of the black lieutenant.<sup>156</sup>

*Application of "Operational Needs" Analysis to Ricci:* Consider the New Haven, Connecticut Fire Department as described in *Ricci*.<sup>157</sup> In 2003, the population of New Haven was around forty percent African American and twenty percent Hispanic.<sup>158</sup> By that time, African Americans and Hispanics constituted thirty percent and seventeen percent of the City's firefighters, respectively.<sup>159</sup> The increase in the number of minority firefighters was the result, at least in part, of litigation-induced efforts to increase minority representation in the fire department. Even with the increase in the

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<sup>150</sup> *Id.* at 310.

<sup>151</sup> *Wittmer v. Peters*, 87 F.3d 916 (7th Cir. 1996).

<sup>152</sup> *Id.* at 917.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at 920.

<sup>156</sup> *Id.* at 917. While the Court frequently gives great deference to prison officials, *see e.g.*, *Turner v. Safley*, 482 U.S. 78 (1987), in a case challenging a racial classification, *Johnson v. California*, 543 U.S. 499 (2005), the Court applied strict scrutiny.

<sup>157</sup> *Ricci v. DeStefano*, 129 S. Ct. 2658, 2691 (2009).

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

percentage of minority firefighters, African Americans and Hispanics each constituted nine percent of the senior officers, with only one African American among the department's twenty-one captains.<sup>160</sup>

Independent of its failed disparate-impact defense, New Haven might have justified race-conscious decisions in filling the supervisory-level positions on the grounds that more minority supervisors would improve the quality of the fire department. Intuitively, an increase in the number of minority officers in supervisory positions in the New Haven Fire Department would substantially enhance the quality of the department. More empirical study would be helpful.

Even if the Third Circuit's decision in *Lomack* is correct, based on the record before the court, it does not mean that diversity in a fire department in a City with a substantial minority population could never be compelling. Part of the problem may have been the narrow statement of mission found in a Newark ordinance. The "control, fighting and extinguishment of any conflagration"<sup>161</sup> is obviously a portion of the mission of a fire department; however, fire departments might have a broader mission, particularly in light of all of the modern concerns about homeland security.<sup>162</sup> Further, a municipal fire department provides a service, just like sanitation and street departments, and it is not unusual for residents of a section of a municipality in which most of the residents are minority to be concerned about whether municipal services are provided on an equal basis. Because credibility and trust are important to the successful operation of a municipality, expert testimony may establish a compelling need for diversity in departments of a municipality that provide municipal services.<sup>163</sup> Put simply, a factual record is crucial and depending on the mission of any municipal department and the evidence supporting the need for diversity to fulfill its "operational needs," it may be possible to establish a compelling justification for a race-conscious plan.

Despite the current Supreme Court's hostility to benign race-conscious action, institutions should establish empirically that government

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<sup>160</sup> *Id.*

<sup>161</sup> *Lomack*, 463 F.3d 303, 310 (3d Cir. 2006).

<sup>162</sup> Note the role of the New York Fire Department following the attack on the World Trade Center on September 11, 2001.

<sup>163</sup> See, e.g., Bryan W. Leach, *Race as Mission Critical: The Occupational Need Rationale in Military Affirmative Action and Beyond*, 113 YALE L.J. 1093, 1124-33 (2004); Allan N. MacLean, *The "Critical Mass" and Law Enforcement*, 14 B.U. PUB. INT'L L.J. 297, 299-305 (2005).

services are more equally distributed, and thereby improved, when these institutions reflect the population being served.

An interesting question is whether recognition of an “operational needs” defense to an equal protection claim would be inconsistent with Title VII, because it recognizes a “bona fide occupational qualification” (BFOQ) defense to claims of religion, sex or national origin discrimination, but *not* race discrimination. 42 U.S.C. § 2000e. An “operational needs” argument differs from a BFOQ defense in that the former does not require a showing that all or substantially all white police officers cannot perform the job. Instead, the argument is that a police department needs a certain number of, e.g., black officers in order to make it a better, more effective department. When raising the BFOQ defense, an employer is arguing, e.g., that all or substantially all females cannot perform the job. *Id.* at 2000e-2(a).

#### D. Addressing Unconscious Discrimination

As discussed in Part II.A above, race-conscious actions designed to remedy an institution’s past race discrimination satisfy the first prong of strict scrutiny, because a governmental unit has a compelling interest in remedying its past discrimination. This section argues that a governmental unit also has a compelling interest in remedying current discrimination, particularly discrimination stemming from unconscious stereotyping.

Stereotyping is a form of categorization, a cognitive mechanism used by many people to help process and store information.<sup>164</sup> Cases recognize that a decision based on a negative stereotypical assessment of an individual constitutes discrimination.<sup>165</sup> Much has been written about social

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<sup>164</sup> Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1188 (1995). See also *Robinson v. Jacksonville Shipyards, Inc.*, 760 F.Supp. 1486, 1502 (M.D. Fla. 1991):

The study of stereotyping is the study of category-based responses in the human thought and perceptual processes. Stereotyping, prejudice, and discrimination are three basic kinds of category-based responses. Stereotyping exists primarily as a thought process, prejudice develops as an emotional or an evaluative process, primarily negative in nature, while discrimination manifests itself as a behavioral response. Discrimination in this context is defined by the treatment of a person differently and less favorably because of the category to which that person belongs. Either stereotyping or prejudice may form the basis for discrimination.

*Id.* (citations omitted).

<sup>165</sup> See, e.g., *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989) (addressing a “mixed-motive” defense in a Title VII case in which the plurality said, “[i]n the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman

cognition theory and its recognition that discrimination is often unconscious or the result of implicit bias.<sup>166</sup> This Article accepts the research showing that much discrimination is the result of stereotyping, and thus unconscious at the point of decision, and addresses why remedying such discrimination may take race-conscious actions.

To the extent that discriminatory actions are purposeful or intentional, laws prohibiting discrimination may help to reduce such actions. Similarly, we assume that criminal laws, which are generally aimed at intentional actions, and its corresponding violations, reduce the amount of criminal activity. However, unconscious discrimination is intentional discrimination because the decisionmaker intentionally decided to base his decisions on his stereotypical assessment of people.<sup>167</sup> Laws designed to address “old-fashioned” intentional race discrimination are likely to be far less effective in addressing discriminatory actions that are taken unconsciously at the point of decision. The challenge for a well-

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cannot be aggressive, or that she must not be, has acted on the basis of gender”; the two concurring Justices, White and O’Connor, do not appear to disagree with this). Several Supreme Court decisions recognize stereotyping as a form of discrimination. *See, e.g.*, *Kentucky Ret. Sys. v. EEOC*, 128 S. Ct. 2361, 2369 (2008); *Miller-El v. Dretke*, 545 U.S. 231, 238 (2005); *General Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 589 (2004); *Nevada Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 730–34 (2003); *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610–12 (1993); *Powers v. Ohio*, 499 U.S. 400, 410, 416 (1991); *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989); *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 990 (1988).

<sup>166</sup> *See, e.g.*, Tristan K. Greene, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91 (2003); Tristan K. Greene, *A Structural Approach as Antidiscrimination Mandate: Locating Employer Wrong*, 60 VAND. L. REV. 849 (2000); Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741 (2005); Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CAL. L. REV. 969 (2006); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1188 (1995); Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CAL. L. REV. 997 (2006). More articles are cited in the articles listed here. *See also* *Grutter v. Bollinger*, 539 U.S. 306, 345 (Ginsburg, J., concurring) (“[i]t is well documented that conscious and unconscious race bias, even rank discrimination based on race, remain alive in our land, impeding realization of our highest values and ideals.”). Compare Gregory Mitchell & Philip E. Tetlock, *Antidiscrimination Laws and Perils of Mindreading*, 67 OHIO ST. L.J. 1023 (2006) (criticizing the implicit bias research: “We . . . detail the numerous problems of scientific validity that plague the research program and discuss the conceptual confusions within this body of work that undercut its credence both as legislative authority and litigation evidence.” *Id.* at 1034).

<sup>167</sup> *See* Ivan E. Bodensteiner, *The Implications of Psychological Research Related to Unconscious Discrimination and Implicit Bias in Proving Intentional Discrimination*, 73 MO. L. REV. 83, 103–05, 117–18 (2008).

intentioned employer that is aware of the concept of unconscious discrimination and wants to address it is to devise a plan that effectively addresses such discrimination. May a plan to address unconscious discrimination include a race-conscious component and survive an equal protection challenge? More specifically, is there a compelling governmental interest that justifies a race-conscious component?

In this context, race-conscious plans should be understood “as attempts by [an institution] to correct for implicit bias, and thus to break the connection between such bias and outcomes.”<sup>168</sup> Scholars<sup>169</sup> refer to this as “debiasing” and refer to a person hired to help debias as a “debiasing agent,” an individual with characteristics that run counter to the attitudes and/or stereotypes associated with the category to which the agent belongs.<sup>170</sup> For example: a “business school hires an Asian professor partly to decrease bias against Asians among business school students,” rejecting a white candidate with comparable qualifications.<sup>171</sup> Assume the rejected candidate sues the business school and strict scrutiny applies. Based on *Grutter*, which recognized that student diversity could help “break down racial stereotypes” and better prepare students to function in an “increasingly diverse workplace and society,”<sup>172</sup> a “more focused objective of decreasing implicit bias” serves a compelling interest.<sup>173</sup> Further scholars argue that the plan, based on *Grutter*, is narrowly tailored.<sup>174</sup>

Scholars Kang and Banaji support this argument with a reference to an “operational needs” case,<sup>175</sup> *Wittmer v. Peters*,<sup>176</sup> in which a correctional facility, referred to as a “boot camp,” with a population that was sixty-five percent black hired a black lieutenant over white applicants with higher test scores. In upholding the hiring, the Seventh Circuit indicated it was not based on either a role-model theory<sup>177</sup> or an effort to have the staff reflect the racial composition of the population, but rather that the “black

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<sup>168</sup> Jolls & Sunstein, *supra* note 181, at 979.

<sup>169</sup> See, e.g., Jolls & Sunstein, *supra* note 181; Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of “Affirmative Action,”* 94 CAL. L. REV. 1063 (2006).

<sup>170</sup> *Id.* at 1109.

<sup>171</sup> *Id.* at 1111.

<sup>172</sup> *Grutter v. Bollinger*, 539 U.S. 306, 330, 308 (2003).

<sup>173</sup> Kang & Banaji, *supra* note 184, at 1112.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* at 1112–14.

<sup>176</sup> *Wittmer v. Peters*, 87 F.3d 916 (7th Cir. 1996).

<sup>177</sup> The role-model theory was rejected by the Court in *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274–76 (1986) (plurality opinion).

lieutenant is needed because the black inmates are believed unlikely to play the correctional game of brutal drill sergeant and brutalized recruit unless there are some blacks in authority in the camp.”<sup>178</sup> Judge Posner relied, at least in part, on expert testimony and suggested that more empirical research would be helpful.<sup>179</sup> Kang and Banaji suggest that the “scientific foundation for debiasing agents is at least as strong as that deemed acceptable in *Wittmer*.”<sup>180</sup>

Scholars Jolls and Sunstein say “[i]f decisionmakers, wholly without their intent and indeed to their great chagrin, are acting on the basis of race or another protected trait, the law may be able to help them to correct their unintended actions” through debiasing solutions.<sup>181</sup> One solution is to enforce existing laws that prohibit consciously biased decisionmaking because eliminating such old-fashioned discrimination will tend to increase diversity in institutions and increasing population diversity “tends to reduce the level of implicit bias in these environments.”<sup>182</sup> They also suggest that “the display of positive exemplars” in an institution “may do far more to reduce implicit bias than yet another mandatory training session on workplace diversity.”<sup>183</sup>

Because Jolls and Sunstein believe increased population diversity helps reduce implicit bias, race-conscious actions that increase diversity in an institution will reduce implicit bias.<sup>184</sup> This explanation shows diversity as acting directly to reduce implicit bias. Experts can assist in determining the “critical mass” needed to achieve this reduction in implicit bias in a particular institution.<sup>185</sup> Finally, Jolls and Sunstein suggest a prohibition on implicitly biased behavior would help reduce implicit bias by “encourag[ing] employers to adopt general decisionmaking structures or

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<sup>178</sup> *Wittmer*, 87 F.3d at 920. See also *Grutter*, 539 U.S. 306, 332 (2003) (“In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity.”).

<sup>179</sup> *Wittmer*, 87 F.3d at 920–21.

<sup>180</sup> Kang & Banaji, *supra* note 184, at 1114.

<sup>181</sup> Jolls & Sunstein, *supra* note 181, at 980.

<sup>182</sup> *Id.* at 981. Part of eliminating such discrimination is reducing hostile environments, and this too has a debiasing effect. *Id.* at 982–83.

<sup>183</sup> *Id.* at 984.

<sup>184</sup> *Id.* at 984–85. They warn that affirmative action, if not taken properly, might increase implicit bias.

<sup>185</sup> See *Grutter v. Bollinger*, 539 U.S. 306, 335 (2003).

processes that reduce the intensity and frequency of implicit bias, implicitly biased behavior, or both.”<sup>186</sup>

Unconscious discrimination and implicit bias result in stereotyping that affects racial minorities negatively, in that they lose opportunities due to their group status. Minorities subject to unconscious discrimination are not considered as individuals and evaluated on their individual merit. One way for an institution to address this is by implementing a system that requires individualized evaluations of all candidates, looking at all relevant factors and qualifications. To help overcome the built-in bias against racial minorities when the decision makers evaluate based on racist stereotypes, the institution should require that its decisionmakers treat racial minority status as a plus factor. Treating the trait that triggers a negative stereotype as a plus factor will help offset the effect of the stereotype. This action is justified to end unconscious discrimination.

In short, by using experts to both establish the existence of unconscious discrimination and implicit bias and the utility of race-conscious actions in addressing such discrimination, an institution could show a compelling interest in adopting a race-conscious plan as a means of reducing race discrimination. It would indeed be anomalous if the Equal Protection Clause precludes government action designed to prevent or reduce race discrimination.

#### E. Avoiding Disparate-Impact Liability Under Title VII

While the Court avoided the issue in *Ricci*, the plaintiffs alleged, “by discarding the test results, the City and the named officials discriminated against the plaintiffs based on their race, in violation of both Title VII . . . and the Equal Protection Clause of the Fourteenth Amendment.”<sup>187</sup> More specifically, the Court said

[o]ur statutory holding does not address the constitutionality of the measures taken here in purported compliance with Title VII. We also do not hold that meeting the strong-basis-in-evidence standard would satisfy the Equal Protection Clause in a future case. As we explain below, because respondents have not met their burden under Title VII, we need not decide whether a legitimate fear of disparate

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<sup>186</sup> Jolls & Sunstein, *supra* note \_\_\_\_, at 986.

<sup>187</sup> *Ricci v. DeStefano*, 129 S. Ct. 2658, 2664 (2009).

impact is ever sufficient to justify discriminatory treatment under the Constitution.<sup>188</sup>

If remedying past racial discrimination is a compelling governmental interest sufficient to justify benign race-conscious action, avoiding present or future illegal race discrimination should justify a similar action under the Equal Protection Clause. This demonstrates the importance of Justice Scalia's invitation in his concurring opinion.<sup>189</sup> It appears Justice Scalia would be willing to hold that Title VII is unconstitutional, at least insofar as it creates this dilemma, because the federal government is "prohibited from enacting laws mandating that third parties . . . discriminate on the basis of race."<sup>190</sup> In essence, Justice Scalia would treat the disparate-impact provisions of Title VII as mandating "affirmative action" that violates equal protection.<sup>191</sup> Even if Title VII's disparate-impact provision requires benign race-conscious action by employers, such action is justified when government has a compelling interest, and avoiding illegal disparate-impact discrimination should satisfy this requirement.<sup>192</sup>

Justice Ginsburg pointed out that "New Haven might well have avoided [an unfortunate situation] had it utilized a better selection process in the first place."<sup>193</sup> Despite the validity of this statement, there is no guarantee that a selection process, even one that is developed carefully by experts and utilizes validated written exams, will not have a disparate impact. City officials will not know until the results are available. This result would lead to promoting only white firefighters into an already all-white group of supervisors, should not the city be permitted to "intercept" the process, amend the aspects of the process that had a disproportionate impact, and then require all candidates to go through the amended process in an effort to identify a diverse pool of firefighters will enable the city to satisfy its compelling need for racial minorities in the supervisory ranks? Part of the amended process might include identification of *all* factors that contribute to one's qualifications, such as ability to improve morale and improve the public's perception of the department. If the city has a

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<sup>188</sup> *Id.* at 2676.

<sup>189</sup> *Id.* at 2682–83 (Scalia, J., concurring).

<sup>190</sup> *Id.* at 2682.

<sup>191</sup> He says, "Title VII's disparate-impact provisions place a racial thumb on the scales, often requiring employers to evaluate the racial outcomes of their policies, and to make decisions based on (because of) those racial outcomes." *Id.*

<sup>192</sup> *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984) (holding that a state has a compelling interest in eradicating discrimination against females).

<sup>193</sup> *Ricci*, 129 S. Ct. at 2710 (Ginsburg, J., dissenting).

compelling interest in having racial minorities in supervisory positions, then it must identify the qualifications that address its needs.

### III. NARROWLY TAILORED MEANS

As demonstrated by the different results in *Grutter* and *Gratz*, as well as Justice Kennedy's opinion in *Parents Involved*, the narrowly tailored prong of strict scrutiny is just as important as the compelling governmental interest prong, and may be more difficult to satisfy. Establishing a particular compelling governmental interest requires an institution to work closely with its legal counsel, experts, and potential *amici*. The same is true in developing a race-conscious plan that will survive the second prong of strict scrutiny. In *Grutter*, Justice O'Connor identified at least six factors that will be considered in determining whether a challenged plan or program is constitutional.<sup>194</sup> Each of these is addressed below, along with suggestions for developing a record that will facilitate the defense of a challenged race-conscious plan.

#### A. Race as a Plus Factor, Without a Quota

To satisfy the narrowly tailored requirement, a race-conscious plan or program cannot use a quota system, but may consider race as a "plus" factor in a manner that does not prohibit a comparative analysis between the individual and other applicants for a particular position. While this precludes an institution from setting aside a firm number of positions, as in the plan at issue in *Bakke*, it does not preclude an institution from setting a goal of attaining a "critical mass" of underrepresented applicants or candidates.<sup>195</sup> In determining what constitutes a "critical mass," an institution should seek the guidance of experts and take into account the size of the institution, the number of people associated with the institution, interactions and relationships within the institution, and relate this number to the compelling justification for the plan or program.<sup>196</sup> What constitutes a "critical mass" will depend, at least in part, on the institution's goal or purpose in implementing a race-conscious plan.<sup>197</sup>

#### B. Flexibility and Individual Evaluations

In approving the law school's admissions program in *Grutter*, the Court said if a university uses race as a "plus" factor, the "admissions

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<sup>194</sup> *Grutter v. Bollinger*, 539 U.S. 306, 334–36 (2003).

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

program must remain flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application."<sup>198</sup> The fact that the law school "engages in a highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment"<sup>199</sup> was of paramount importance in the Court's approval of the law school plan, which was compared to the "mechanical, predetermined diversity 'bonuses' based on race or ethnicity"<sup>200</sup> in the undergraduate program at issue in *Gratz*.<sup>201</sup>

This factor significantly addresses the unconscious discrimination discussed above in Part II.D. If all candidates or applicants are given individualized consideration, decisions are less likely to be influenced by stereotyping. Here there is no automatic acceptance or rejection based on a single factor, such as race. Candidate A might benefit from her gender; Candidate B might benefit from his age; Candidate C might benefit from her geographic roots; Candidate D might benefit from his race. Further, each candidate might benefit from a combination of "plus" factors. In most settings, individualized consideration is viewed as inefficient because of the amount of time such consideration takes. Nevertheless, if individual consideration helps eliminate unconscious discrimination and serves a compelling interest, eventually the inefficiency will be more than offset by the benefits. What constitutes a "plus" factor will depend on the mission of the entity and its compelling interest that justifies the race-conscious action.

### C. Consideration of Diversity Factors Other Than Race

The law school plan at issue in *Grutter* did not "limit in any way the broad range of qualities and experiences that may be considered valuable contributions to student body diversity."<sup>202</sup> The policy made clear that "[t]here are many possible bases for diversity admissions," and provided a number of examples including experience abroad, fluency in several languages, overcoming personal or family hardships, exceptional records of community service, and successful careers in fields other than law.<sup>203</sup>

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<sup>198</sup> *Id.* at 337.

<sup>199</sup> *Grutter v. Bollinger*, 539 U.S. 306, 337 (2003).

<sup>200</sup> *Id.*

<sup>201</sup> *Gratz v. Bollinger*, 539 U.S. 244 (2003).

<sup>202</sup> *Grutter v. Bollinger*, 539 U.S. 306, 338. (2003).

<sup>203</sup> *Id.*

Applicants were given the opportunity to identify and highlight their potential contributions to diversity through their own personal statements, an essay, and letters of recommendation.<sup>204</sup> The fact that the law school in *Grutter* accepted nonminority applicants with grades and test scores lower than underrepresented minority applicants, as well as other nonminority applicants who were rejected, confirmed that the law school gave substantial weight to diversity factors other than race.<sup>205</sup> Thus the law school was serious about promoting diversity in the student body, both racially and otherwise.

Through examples, institutions should identify the “plus” factors other than race. These factors may vary, depending on the goal of the race-conscious program and the makeup of the relevant community. For example, where operational needs of a police department provide the compelling government justification, there should be some correlation between the diversity factors and the makeup of the community served by the police department. In a “college town,” a college education might be a “plus” factor since a better understanding of college students might make the department better equipped to deal with college students in the community. Here again, expert evidence will be useful in identifying the relevant factors to be considered in light of the makeup of the community to be served.

#### D. Consideration of Race-Neutral Alternatives

While “[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative,” it does “require serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the [institution] seeks.”<sup>206</sup> Once an institution identifies its goal, it should search for a race-neutral means of achieving the goal before establishing a race-conscious program. The search should include a review of the experiences of other institutions, consultation with experts, and consideration of empirical studies. Most importantly, the search for race-neutral alternatives must be sincere and real, and not manufactured, after-the-fact, for trial. Institutions should make a good faith effort to identify race-neutral alternatives, consider the advantages and disadvantages of each such alternative, and provide an explanation, based on facts and opinions, for rejecting each of the race-neutral alternatives considered.

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<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> *Id.* at 339.

The Court does not require that an institution actually try each of the alternatives identified; rather, it requires a search for race-neutral alternatives, a serious assessment of each such alternative, and an explanation of why there is no adequate alternative to the selected race-conscious program. Justice O'Connor saw this as an example of how the "[s]tates may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear."<sup>207</sup>

#### E. No Racial Group Unduly Harmed

Due to justice concerns inherent in preferences, narrow tailoring "requires that a race-conscious admissions program not unduly harm members of any racial group."<sup>208</sup> To put it another way, any race-conscious program must not "unduly burden individuals who are not members of the favored racial and ethnic groups."<sup>209</sup> Justice Powell, in his opinion in *Bakke*, highlighted the importance of a race-conscious program that uses race as a "plus" factor in the context of individualized consideration. In this context, he said a rejected applicant

will not have been foreclosed from all consideration for that seat simply because he was not the right color or had the wrong surname . . . . His qualifications would have been weighed fairly and competitively, and he would have no basis to complain of unequal treatment under the Fourteenth Amendment.<sup>210</sup>

The Court in *Grutter* agreed with Justice Powell, saying that "in the context of its individualized inquiry into the possible diversity contributions of all applicants, the Law School's race-conscious admissions program does not unduly harm nonminority applicants."<sup>211</sup> In many situations, satisfaction of the first three factors considered above will assure satisfaction of this factor. However, in the employment context a benign race-conscious plan that results in a non-minority worker losing a job or a promotion, in contrast to not being hired, is likely to be treated as an undue burden even if the first three factors are satisfied.

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<sup>207</sup> *Id.* at 342 (quoting Justice Kennedy in *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring)).

<sup>208</sup> *Grutter v. Bollinger*, 539 U.S. 306, 341 (2003).

<sup>209</sup> *Id.* (quoting *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 630 (1990) (O'Connor, J., dissenting)).

<sup>210</sup> *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 318 (1978).

<sup>211</sup> *Grutter*, 539 U.S. at 341.

#### F. Limited Duration

According to the Court in *Grutter*, “race-conscious admissions policies must be limited in time” because “racial classifications, however compelling their goals, are potentially so dangerous that they be employed no more broadly than the interest demands.”<sup>212</sup> This means “that all governmental use of race must have a logical end point.”<sup>213</sup> This factor is relatively easy to satisfy and addresses the concern reflected in the fourth factor whether there are race-neutral alternatives available. All race-conscious programs should include a provision requiring periodic review to determine whether the compelling governmental justification still exists. The plan or program should include a reasoned, meaningful justification for the frequency of a comprehensive review. For example, depending on the nature of the program, it may take two to three years before there can be a meaningful assessment.

To assure that the periodic reviews are meaningful, the plan should require a regular assessment of both the compelling governmental interest identified and each of the narrowly tailored factors. For example, the success of a race-neutral plan in a similar institution could suggest the race-conscious plan should be revisited. Each periodic review should result in a written report, addressing whether the program needs to be continued until the next review and, if so, any appropriate modifications or adjustments. Participation of a neutral party, with expertise, would help assure that the review is not simply a self-serving effort to satisfy this requirement. Including measurable goals in the initial plan will help to make the periodic reviews more objective and meaningful.

Justice O’Connor’s statement in *Grutter* — “[w]e expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today”<sup>214</sup>— has to be taken as her wish. It would be irrational to attempt to set any ending point because the analysis required by the Court necessitates careful consideration of the facts, which are unpredictable.

#### V. PRIVATE INSTITUTIONS—APPLICATION OF STATUTES

Private institutions, which take voluntary race-conscious actions absent any government participation, are not subject to equal protection

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<sup>212</sup> *Id.* at 342.

<sup>213</sup> *Id.*

<sup>214</sup> *Grutter*, 539 U.S. at 343.

challenges.<sup>215</sup> However, a private institution's race-conscious action may be subject to challenge based on one or more federal statutes addressing race discrimination. These statutes are: (a) Title VI of the Civil Rights Act of 1964,<sup>216</sup> which prohibits race discrimination by institutions receiving federal financial assistance, including employment discrimination when the financial assistance is for employment; (b) Title VII of the Civil Rights Act of 1964,<sup>217</sup> which prohibits employment discrimination based on race, as well as other factors; and (c) the Civil Rights Act of 1866,<sup>218</sup> which prohibits race discrimination in contracting. More specifically, a race-conscious plan involving employment would be subject to a challenge based on § 1981, Title VI, if the private employer receives federal financial assistance for employment purposes, and Title VII, assuming the private employer has at least fifteen employees.

#### A. Current Statutes Applicable to Private Institutions

A race-conscious plan involving contracting would be subject to challenge based on Title VI, if the institution receives federal financial assistance, and § 1981. Similarly, a race-conscious plan involving admission to a private educational institution, or student assignment, would be subject to challenge based on Title VI, if the institution receives federal financial assistance, and § 1981.

Like the Equal Protection Clause, § 1981 was aimed at invidious race discrimination. The primary impetus for § 1981, passed during the Reconstruction Era, was to remove some of the badges and incidents of slavery.<sup>219</sup> Yet this provision has been interpreted to protect white persons alleging so-called reverse discrimination.<sup>220</sup>

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<sup>215</sup> See, e.g., *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982) (stating that to be actionable under the Fourteenth Amendment, the challenged conduct must be fairly attributable to the state).

<sup>216</sup> Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, *et seq.* Many private institutions, and most private educational institutions, receive federal financial assistance and, therefore, are subject to Title VI. State and local governments receiving federal financial assistance also are subject to Title VI's prohibition of race discrimination.

<sup>217</sup> Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* Its prohibition on race discrimination in employment applies to state and local government, as well as private employers, with fifteen or more employees.

<sup>218</sup> Civil Rights Act of 1866, 42 U.S.C. § 1981. At least since *Runyon v. McCrary*, 427 U.S. 160 (1976), § 1981 has been interpreted to reach discrimination by private educational institutions.

<sup>219</sup> While “the immediate impetus for [§ 1981] was the necessity for further relief of the constitutionally emancipated former Negro slaves, the general discussion of the scope of

Title VI was passed as part of the Civil Rights Act of 1964, a broad act aimed at discrimination in employment,<sup>221</sup> in public accommodations,<sup>222</sup> and in the use of federal financial assistance.<sup>223</sup> Passed within ten years of *Brown II*,<sup>224</sup> the Act reflected Congress's desire to make federal funds available to assist schools in complying with *Brown I* and to assure that the federal funds were not used to perpetuate invidious race discrimination by institutions resisting or circumventing *Brown*.<sup>225</sup>

In general, there is little reason to believe that current Court possibly will treat a challenge to a race-conscious plan under either Title VI or § 1981 similarly as a challenge to such a plan based on the Equal Protection Clause. In fact, in *Gratz*, the Court concluded that Michigan's undergraduate admissions program "also violates Title VI and [§ 1981],"<sup>226</sup> with no explanation for its conclusion except the following:

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the bill did not circumscribe its broad language to that limited goal." *McDonald v. Sante Fe Trail Transp. Co.*, 427 U.S. 273, 289 (1976).

<sup>220</sup> *Id.*

<sup>221</sup> Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*

<sup>222</sup> Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a, *et seq.*

<sup>223</sup> Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, *et seq.*

<sup>224</sup> *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955) (crafting a desegregation remedy for public school education).

<sup>225</sup> Justice Brennan addressed this concern in his opinion in *Regents of the University of California v. Bakke*, 438 U.S. 265, 328–29 (1978) (Brennan, J., concurring in the judgment in part and dissenting in part), stating that:

Title VI prohibits only those uses of racial criteria that would violate the Fourteenth Amendment if employed by a State or its agencies; it does not bar the preferential treatment of racial minorities as a means of remedying past societal discrimination to the extent that such action is consistent with the Fourteenth Amendment. The legislative history of Title VI, administrative regulations interpreting the statute, subsequent congressional and executive action, and the prior decisions of this Court compel this conclusion. None of these sources lends support to the proposition that Congress intended to bar all race-conscious efforts to extend the benefits of federally financed programs to minorities who have been historically excluded from the full benefits of American life.

In addition, Justice Brennan says:

[t]he history of Title VI—from President Kennedy's request that Congress grant executive departments and agencies authority to cut off federal funds to programs that discriminate against Negroes through final enactment of legislation incorporating his proposals—reveals one fixed purpose: to give the Executive Branch of Government clear authority to terminate federal funding of private programs that use race as a means of disadvantaging minorities in a manner that would be prohibited by the Constitution if engaged in by government.

*Id.*

<sup>226</sup> *Gratz v. Bollinger*, 539 U.S. 244, 275 (2003).

We have explained that discrimination that violates the Equal Protection Clause of the Fourteenth Amendment committed by an institution that accepts federal funds also constitutes a violation of Title VI. Likewise, with respect to § 1981, we have explained that the provision was “meant, by its broad terms, to proscribe discrimination in the making or enforcement of contracts against, or in favor of, any race.” Furthermore, we have explained that a contract for educational services is a “contract” for purposes of § 1981. Finally, purposeful discrimination that violates the Equal Protection Clause of the Fourteenth Amendment will also violate § 1981.<sup>227</sup>

Despite this similar treatment, a Title VII challenge to a private employer’s benign race-conscious employment plan may be treated differently from a challenge based on the Equal Protection Clause in that it may be easier for the employer to defend.<sup>228</sup> The possibility of different treatment is based primarily on two factors. First, Title VII provides a limited defense.<sup>229</sup> A private employer, with a voluntary race-conscious hiring plan must adopt its plan in accordance with certain regulatory guidelines, to maintain a statutory defense to a Title VII challenge.<sup>230</sup> Additionally, any statutory defense based on Title VII must be evaluated in light of the decision in *Ricci*.

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<sup>227</sup> *Id.* at 276 n.23 (2003) (citations omitted).

<sup>228</sup> Of course, assuming that this assertion is correct, plaintiffs challenging such a plan will usually base their challenge on § 1981, rather than Title VII, so the practical effect of the difference is small.

<sup>229</sup> See 42 U.S.C. § 2000e-12(b) (stating “[i]n any action or proceeding based on any alleged unlawful employment practice, no person shall be subject to any liability or punishment for or on account of (1) the commission by such person of an unlawful employment practice if he pleads and proves that the act or omission complained of was in good faith, in conformity with, and in reliance on any written interpretation or opinion of the Commission . . . . Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that (A) after such act or omission, such interpretation or opinion is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect . . .”).

<sup>230</sup> 42 U.S.C. § 2000e-12(b). The defense remains in effect, even if the Guidelines are modified or rescinded or struck down by a court, as to plans adopted before the change. *Id.* The Equal Employment Opportunity Commission (EEOC) “Guidelines constitute ‘a written interpretation and opinion’ of the [EEOC], as that term is used in [§ 2000e-12(b)(1)].” 29 C.F.R. § 1608.2 (2009). These Guidelines “constitute the [EEOC’s] interpretation of title VII and will be applied in the processing of claims of discrimination which involve voluntary affirmative action plans and programs.” 29 C.F.R. § 1608.1(d).

A second factor suggesting that a challenge based on Title VII may be treated differently from a challenge based on the Equal Protection Clause, at least where the race-conscious plan at issue has a remedial purpose, is found in the Court's decision in *United Steelworkers of America v. Weber*.<sup>231</sup> The plan at issue in *Weber* provided that one of every two persons admitted to a training program had to be black and it was designed "to abolish traditional patterns of racial segregation and hierarchy."<sup>232</sup> In rejecting the challenge, the Court interpreted Title VII in light of the broad remedial purposes intended by Congress and concluded that the Act allowed private employers and unions "to take such race-conscious steps to eliminate manifest racial imbalances in traditionally segregated job categories."<sup>233</sup> Thus the *Weber* decision makes it easier for the employer to satisfy the government-interest prong in a Title VII case.<sup>234</sup>

While the Title VII analysis in *Weber* feels less rigid than the Court's equal protection analysis, this distinction could change. Given the current Court's hostility toward benign race-conscious plans and actions, the Court may either distinguish *Weber* based on its facts or interpret the prohibitions of Title VII<sup>235</sup> the same, whether the plaintiff is challenging invidious race discrimination or a benign race-conscious action, in order to avoid an equal protection challenge to the statute itself.

#### B. Religious Institutions Unique Legal Defense For Race-Conscious Actions

When a religious organization or institution engages in a benign race-conscious action, which is challenged based on one of the three statutes discussed above in Part IV.A, the First Amendment may provide a defense if the action is based on the organization's religious mission. In *Grutter*, the educational mission of the University of Michigan Law School, as defined by the Law School, was an important factor in the Court's finding that it had a compelling interest in its admissions program.<sup>236</sup> Similarly, if the mission of a religious institution calls for the promotion of

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<sup>231</sup> *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979). The plant at issue was located in Gramercy, Louisiana, and prior to 1974 only 1.83% of the skilled craftworkers were black, even though the workforce in the area was around thirty-nine percent black. *Id.* at 193. For a long period of time, black workers were excluded from craft unions.

<sup>232</sup> *Id.* at 204.

<sup>233</sup> *Id.* at 197.

<sup>234</sup> The "means" analysis in Title VII cases is essentially the same as in equal protection cases.

<sup>235</sup> 42 U.S.C. § 2000e-2(a).

<sup>236</sup> *Grutter v. Bollinger*, 539 U.S. 306, 328–33 (2003).

actual racial equality in education or employment opportunities, or acceptance of persons of a different race, it may be able to rely on the constitutional protection of religious freedom and/or freedom of association.<sup>237</sup> More specifically, there may be circumstances under which a religious institution can successfully defend a challenge to its race-conscious action or plan based on the argument that striking down the action or plan as a violation of an antidiscrimination statute would interfere with its constitutionally-protected freedoms.

Assume a religious institution adopts a race-conscious hiring plan for its school and a white applicant who was not hired challenges this plan based on Title VI, § 1981, and Title VII. The institution responds, at least in part, by raising a First Amendment defense, arguing that the hiring plan is part of its religious mission and thus protected by the Constitution. This sets up a tension between application of the federal statutes and the Constitution.

When confronting a tension between a federal statute and a provision of the Constitution, well-accepted jurisprudence suggests that courts attempt to interpret the statute in a way that avoids the conflict.<sup>238</sup> In the above situation, the conflict can be avoided either by determining that the religious institution has a compelling interest in its plan, utilizing strict scrutiny analysis in accordance with § 1981 or Title VI jurisprudence,<sup>239</sup> or by applying a less demanding scrutiny insofar as the plan is challenged under Title VII.<sup>240</sup>

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<sup>237</sup> See U.S. CONST. amend. I.

<sup>238</sup> “[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.” *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (citing *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 499-501, 504 (1979)).

<sup>239</sup> Assuming the institution receives employment-related federal funds.

<sup>240</sup> Before the rejected applicant may proceed in court with a Title VII claim, she must file a charge with the Equal Employment Opportunity Commission. See 42 U.S.C. § 2000e-5(b). An administrative complaint, alleging a violation of Title VI, may be filed with the U.S. Department of Education, pursuant to 34 C.F.R. § 100.7(b). In rejecting an administrative complaint of discrimination based on a race-conscious hiring plan of a religious school, under either Title VI or Title VII, the federal government could argue it has a compelling interest in avoiding a violation of the First Amendment. In another context, the Court indicated a state interest in avoiding an Establishment Clause violation “may be characterized as compelling,” and thereby justifying a content-based regulation of speech. *Widmar v. Vincent*, 454 U.S. 263, 270-1 (1981). Compare *Good News Club v.*

First Amendment-based exemptions to statutes prohibiting discrimination have been considered in a number of contexts. In *Bob Jones University v. United States*, two universities with racially discriminatory admissions policies challenged the Internal Revenue Service's revocation of their tax-exempt status based on a Revenue Ruling determining that such private schools were not "charitable."<sup>241</sup> The universities argued that the Revenue Ruling could not be applied constitutionally to schools engaging in invidious racial discrimination based on sincerely held religious beliefs banning interracial marriage.<sup>242</sup> The Court rejected their free exercise argument based on the religion clauses of the First Amendment because the government's "fundamental, overriding interest in eradicating racial discrimination in education" was compelling and "substantially outweighs whatever burden denial of tax benefits places on [the universities'] exercise of their religious beliefs."<sup>243</sup>

In another case, *Roberts v. United States Jaycees*, the Court rejected a freedom of association defense based on the First Amendment in upholding the constitutionality of a state law prohibiting sex discrimination by public accommodations, including the Jaycees.<sup>244</sup> Here the state's "compelling interest in eradicating discrimination against its female citizens justifies the impact that application of the statute to the Jaycees may have on the male members' associational freedoms."<sup>245</sup> Similarly, the Court held that it does not violate the First Amendment rights of the Rotary Club to

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Milford Cent. Sch., 533 U.S. 98 (2001) (questioning whether avoiding an Establishment Clause violation would justify viewpoint discrimination in regulating speech).

<sup>241</sup> *Bob Jones Univ. v. United States*, 461 U.S. 575, 579 (1983).

<sup>242</sup> *Id.* at 580-81 & 583.

<sup>243</sup> *Id.* at 604.

<sup>244</sup> *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984). The Jaycees is a nonprofit membership organization that, according to its bylaws, pursues "such educational and charitable purposes as will promote and foster the growth and development of young men's civic organizations." *Id.* at 612. The Jaycees' limited membership to males while they allowed females to become associate members. *Id.* at 613. Associate members could not vote, hold office, or participate in some training programs. *Id.*

<sup>245</sup> *Id.* at 623. This case was made easier by the fact that the Jaycees "failed to demonstrate that the Act imposes any serious burdens on the male members' freedom of expressive association." *Id.* at 626. Compare *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000) (holding that application of New Jersey's public accommodation law, prohibiting discrimination based on sexual orientation, to the Boy Scouts violates the First Amendment right of expressive association); *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995) (holding that application of Massachusetts' public accommodation law to private citizens who organize a parade, and requiring them to allow the plaintiff organization to participate, violates the First Amendment because it requires inclusion of a group imparting a message that the organizers do not wish to convey).

force it to admit women, in compliance with a California law prohibiting sex discrimination.<sup>246</sup> Again, the government's interest in addressing sex discrimination was sufficient to trump the First Amendment.

Title VII presents a number of potential conflicts with the religion clauses. In order to avoid a conflict with religious freedom, Congress amended the Act in 1972<sup>247</sup> to exempt religious institutions from the prohibition on religion-based discrimination in employment.<sup>248</sup> Such institutions, however, remain subject to the prohibition on race, national origin, and sex discrimination, thereby creating a tension when a religious institution faces a challenge from an applicant for a ministerial position who was rejected because of race, national origin, or sex. While the Supreme Court has not addressed this issue, several circuits have recognized a "ministerial exception" in order to avoid the tension with the religion clauses.<sup>249</sup> Courts that recognize the "ministerial exception" to Title VII's prohibition on invidious race discrimination, to avoid a conflict with the religion clauses, presumably would recognize an exception in the context of a challenge by a white applicant for a ministerial position claiming he or she was rejected because of the religious institution's race-conscious hiring plan designed to include an African American minister in a congregation with a substantial number of African American members. This situation is analogous to a religious institution taking race-conscious steps to attract racial minorities to its educational program, in order to fulfill its mission. In both situations, the religious institution is claiming a tension between its religious mission and a law prohibiting race discrimination.

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<sup>246</sup> Board of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537 (1987).

<sup>247</sup> 42 U.S.C. § 2000e-1(a).

<sup>248</sup> An Establishment Clause challenge to this exemption was rejected in *Corporation of Presiding Bishop of the Church of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987).

<sup>249</sup> See, e.g., *Petruska v. Gannon Univ.*, 462 F.3d 294 (3d Cir. 2006), *cert. denied*, 550 U.S. 903 (2007) (holding that the Free Exercise Clause bars claims that would limit a religious institution's right to select who will perform particular spiritual functions); *Scharon v. St. Luke's Episcopal Presbyterian Hosps.*, 929 F.2d 360, 362–63 (8th Cir. 1991) (relying on the Establishment Clause as the source for the ministerial exception). See also *Bryce v. Episcopal Church in the Diocese of Colorado*, 289 F.3d 648, 655–59 (10th Cir. 2002); *EEOC v. Roman Catholic Diocese of Raleigh, N.C.*, 213 F.3d 795, 801–04 (4th Cir. 2000); *Starkman v. Evans*, 198 F.3d 173, 175–77 (5th Cir. 1999), *cert. denied*, 531 U.S. 814 (2000); *Bollard v. Cal. Province of the Soc'y of Jesus*, 196 F.3d 940, 945–47 (9th Cir. 1999); *EEOC v. Catholic Univ. of America*, 83 F.3d 455, 460–65 (D.C. Cir. 1996); *Young v. Northern Ill. Conference of United Methodist Church*, 21 F.3d 184, 187 (7th Cir. 1994), *cert. denied*, 513 U.S. 929 (1994); *Rayburn v. General Counsel of Seventh-Day Adventists*, 772 F.2d 1164, 1167–72 (4th Cir. 1985), *cert. denied*, 478 U.S. 1020 (1986).

However, the “ministerial exception” might fail under current Supreme Court precedent. In *Employment Division, Department of Human Resources of Oregon v. Smith*<sup>250</sup> the Court held that religion-neutral laws of general applicability need only survive rational basis review when challenged by one who claims the law interferes with the Free Exercise Clause. This decision raises questions about the continuing viability of the “ministerial exception.”<sup>251</sup> Since both Title VI and § 1981 are religion-neutral laws of general applicability, courts could apply *Smith* and reject a defense based on the Free Exercise Clause of the First Amendment on the grounds that these statutes are not aimed at religious practices and, therefore, need only survive rational basis review.

The courts response to religious institutions may be the same as the Supreme Court’s response to the Native American challenger in *Smith, i.e.*, seek an exemption in Congress.<sup>252</sup> However, several circuits have decided

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<sup>250</sup> *Employment Div., Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990). In this case, a Native American challenger lost his job because of his ceremonial use of peyote, and was therefore denied unemployment compensation benefits. The Court’s response was that he should seek an exemption from the Oregon legislature, even though the Court recognized the difficulty non-mainstream, minority religions face in the political process. *Id.* at 890.

<sup>251</sup> The Religious Freedom Restoration Act (RFRA) of 1993, Pub. L. No. 103-141, 1993 U.S.C.C.A.N. 107 Stat. 1488, expressed disagreement with the result in *Smith* and provided a statutory right to free exercise consistent with pre-*Smith* interpretation of the Free Exercise Clause. This statute was subsequently found to be unconstitutional by the Supreme Court in 1997. *See City of Boerne v. Flores*, 521 U.S. 507 (1997).

<sup>252</sup> The Court’s suggestion to look to the political process was more viable in *Smith* because neither the Establishment Clause nor any other constitutional provision prevents a state from granting a religion-based exemption from its drug laws. In fact, many states, as well as the federal government, have provided a peyote exemption. *Smith*, 494 U.S. at 890, 912 n.5 (Blackmun, J., dissenting). It is less clear how the Court would view an equal protection challenge to an act of Congress amending Title VI and § 1981 to authorize religious institutions to consider race in making decisions. Having decided in *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995), that strict scrutiny governs affirmative action programs initiated by the federal government, the Court may strike down, based on the Fifth Amendment, a federal statute intended to authorize private religious institutions to make race-conscious decisions, thus eliminating the political process as an avenue of relief. In light of *Smith*, it is not clear how the Court would decide a religious freedom challenge to the application of Title VI or § 1981 to a religious institution’s race-conscious action. This presents a confrontation between two constitutional principles, religious freedom and equal protection. The religious institutions would argue that the government’s interest in prohibiting religious institutions from taking race-conscious actions, in order to carry out their religious missions, is not sufficient to trump the religion clauses of the First Amendment and their guarantee of religious freedom. In short, *Smith* should not control because it did not address a tension between two constitutional principles.

that the “ministerial exception” survives *Smith*.<sup>253</sup> Some of these cases indicate that *Smith* does not control because the nature of the burden on free exercise in *Smith* is substantially different than where government interferes with internal management of a church and a church’s authority over its own affairs.<sup>254</sup> Another potential means of avoiding the impact of the rational basis standard adopted by *Smith* is to characterize the institution’s claim as a “hybrid” case, based on both the Free Exercise Clause and the First Amendment protection of freedom of association.<sup>255</sup> Several cases recognize that the freedom of expressive association protected by the First Amendment triggers strict scrutiny.<sup>256</sup> To come within the ambit of expressive association, “a group must engage in some form of expression, whether it be public or private.”<sup>257</sup>

In holding that educational institutions have a “compelling interest in attaining a diverse student body,”<sup>258</sup> the Court in *Grutter* referred to the “expansive freedoms of speech and thought associated with the university

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<sup>253</sup> See, e.g., *Petruska v. Gannon Univ.*, 462 F.3d 294, 299 (3d Cir. 2006), *cert. denied*, 550 U.S. 903 (2007); *Bryce v. Episcopal Church in the Diocese of Colorado*, 289 F.3d 648, 655–59 (10th Cir. 2002); *EEOC v. Roman Catholic Diocese of Raleigh, N.C.*, 213 F.3d 795, 801–804 (4th Cir. 2000); *Starkman v. Evans*, 198 F.3d 173, 175–77 (5th Cir. 1999), *cert. denied*, 531 U.S. 814 (2000); *Bollard v. Cal. Province of the Soc’y of Jesus*, 196 F.3d 940, 945–947 (9th Cir. 1999).

<sup>254</sup> See, e.g., *Gellington v. Christian Methodist Episcopal Church*, 203 F.3d 1299, 1301–1304 (11th Cir. 2000); *Combs v. Cent. Tex. Annual Conference of United Methodist Church*, 173 F.3d 343, 347–50 (5th Cir. 1999); *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 461–63 (D.C. Cir. 1996).

<sup>255</sup> *Smith*, 494 U.S. at 882. In *Smith*, the Court referred to *Wisconsin v. Yoder*, 406 U.S. 205 (1972), as an example of such a “hybrid” case. *Id.* However, several courts have questioned the “hybrid” rationale. See, e.g., *Leebaert v. Harrington*, 332 F.3d 134, 143–44 (2d Cir. 2003) (language in *Smith* relating to hybrid cases is dicta and not binding); *Kissinger v. Bd. of Trustees of the Ohio State Univ., Coll. of Veterinary Med.*, 5 F.3d 177, 180 (6th Cir. 1993) (holding there is no reason why the standard of review should vary depending on the number of constitutional claims asserted by the plaintiff). The “hybrid” argument is sound only if the additional constitutional claim triggers strict scrutiny independent of the free exercise claim; then, of course, the plaintiff does not need the free exercise claim.

<sup>256</sup> See *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984) (holding that the state’s compelling interest in prohibiting sex discrimination trumped the association right). *But see Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000) (holding that the First Amendment right to expressive association trumped the government’s interest in prohibiting discrimination based on sexual orientation).

<sup>257</sup> *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000).

<sup>258</sup> *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003).

environment”<sup>259</sup> and the university’s interest in the “robust exchange of ideas.”<sup>260</sup> Based on this rationale, a religious educational institution’s interest in a diverse student body fits comfortably within the First Amendment right of expressive association and triggers strict scrutiny when government interferes with this right.

Since *Grutter* established that educational institutions have a “compelling interest in attaining a diverse student body,” the courts should not interfere with a religious institution’s choice of how to go about accomplishing this goal when it coincides with its religious mission. When a race-conscious admissions program in a religious educational institution is challenged, Title VI and § 1981 should be interpreted in a manner that avoids conflict with the religion clauses of the First Amendment.<sup>261</sup>

## VI. CONTINUING IMPORTANCE OF BENIGN RACE-CONSCIOUS ACTIONS

Unfortunately, many people blindly accept the notion that “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”<sup>262</sup> Aside from the absence of convincing evidence showing that this simple solution would work, it ignores reality in a number of ways. First, it assumes that invidious race discrimination and benign race-conscious actions are equally bad. It is difficult to understand why action designed to harm someone or a group of persons based on race is the same as action designed to end evil, invidious discrimination, and to achieve true equality. The former is not a legitimate reason or justification for government action,<sup>263</sup> while the latter should be a goal of government at all levels. Opponents of benign race-conscious action, and there are many, have lumped all such actions under what has become a pejorative term, “affirmative action,” which stands for the proposition that all benign race-conscious action is simply a way of preferring an unqualified minority applicant over a qualified white applicant. This position is misleading and

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<sup>259</sup> *Id.* at 329.

<sup>260</sup> *Id.* (citing *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 313 (1978)).

<sup>261</sup> Similarly, any state constitutional amendments prohibiting “affirmative action” should not be allowed to interfere with religious freedom guaranteed by federal law.

<sup>262</sup> *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007).

<sup>263</sup> *See, e.g., Romer v. Evans*, 517 U.S. 620, 634–35 (1996) (where a classification is “born of animosity” toward a class of persons, the governmental interest is not legitimate); *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) (“[I]f the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.”).

represents a blatant attempt to politicize an issue for individual or party gain. It perpetuates the myth that selection is generally based on merit otherwise, in the absence of affirmative action.<sup>264</sup>

Second, benign race-conscious action is designed, at least in part, to help end invidious race discrimination. Given the important role of influence or connections in obtaining admission to college,<sup>265</sup> employment or contracts, and the role of unconscious discrimination in decisionmaking, invidious discrimination does not go away simply because it has been made illegal. Third, many years of formal or legal equality have demonstrated a continuing gap between this type of equality and actual equality in our society. If society is truly interested in equal opportunity, it needs to take affirmative steps designed to overcome the many barriers that stand in the way of actual equality.

The “operational needs” cases, discussed in Part II.C, provide an excellent example of the need for benign race-conscious actions to improve our system of justice. A justice system, including law enforcement, cannot be effective when the system lacks credibility among a substantial percentage of the population subject to it. An important aspect of credibility is perception. Studies show significant perceptual differences between

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<sup>264</sup> See *supra* Part II–D, addressing unconscious discrimination.

<sup>265</sup> In May of 2009, the *Chicago Tribune* reported that the University of Illinois was using a “clout” admissions system. Scott Jaschik, Inside Higher Ed, *Damning Report on Illinois Scandal*, INSIDE HIGHER ED, Aug. 7, 2009, <http://www.insidehighered.com/news/2009/08/07/Illinois>. The University first issued a statement claiming that although the school tracked certain applications, such actions did not mean that the school admitted unqualified individuals to the University. *Id.* In response to the allegations, the State of Illinois Admissions Review Commission was created to investigate the alleged “clout” system and undue influence in admissions at the University. *Id.* On August 6, 2009, the Commission published its Report and Recommendations. See State of Illinois Admissions Review Commission, *Report of Findings & Recommendations*, Aug. 6, 2009, <http://admissionsreview.illinois.gov/documents/FinalReport.pdf>. The Commission concluded that the University had created an admissions process referred to as “Category I” through which “the influence of prominent individuals—and the University’s refusal or inability to resist that influence—operated to override the decisions of admissions professionals and resulted in the enrollment of students who did not meet the University’s admissions standards.” *Id.* at 1. In fact, the Commission noted that even applicants who were initially denied admission were placed on the Category I list. *Id.* at 16. The Commission recommended that the University eliminate Category I and further require the members of the Board of Trustees to voluntarily resign from their positions. *Id.* at 6–7. As of August 21, 2009, the Associated Press reported that all but two of the trustees had resigned. The Associated Press, David Mercer, *U of I Trustees who Resigned Push to Get Jobs Back*, THE ASSOCIATED PRESS, Aug. 21, 2009, <http://www.newsday.com/u-of-i-trustees-who-resigned-push-to-get-jobs-back-1.1385187> (last visited Aug. 24, 2009).

blacks and whites on the issue of race discrimination in a variety of settings and institutions.<sup>266</sup> Even where this difference in perception is not factually accurate, it affects people in a variety of ways.<sup>267</sup> The relationship between the police and a community is very different when the community views the police with suspicion, making it more difficult for the police to serve their function and less likely that members of the community will cooperate and feel that they can call upon the police for protection. Members of a black community view every arrest, every search, every confrontation, every use of deadly force and every criminal charge involving white police officers with suspicion when the targets of the police action are black.

Treatment of black inmates in correctional facilities controlled by white officials is viewed with distrust. Court proceedings against black persons accused of a crime, including jury trials, are viewed with suspicion, particularly when the participants, except the accused, are primarily white. Application of the death penalty has been viewed with suspicion in light of the results showing that the race of the accused and the race of the victim make a difference. As suggested above in Part III.C, improvement of law enforcement through race-conscious plans that would ameliorate some of these perceptual gaps, is a compelling government interest.

Formal equality is rather hollow if actual inequality pervades the daily lives of a substantial portion of our population. Since formal equality became the “law of the land” over 140 years ago with the adoption of the Fourteenth Amendment in 1868, which was supplemented more than forty years ago with the passage of the Civil Rights Act of 1964, actual equality is still a dream; therefore, one could reasonably conclude that formal equality is simply not enough. Similarly, a reasonable person could be suspicious of the simple suggestion that “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”<sup>268</sup> Could it be that those who oppose race-conscious actions are opposed to and/or threatened by actual equality?

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<sup>266</sup> See generally Russell K. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093 (2008). See also *supra* note 139 (Prof. Gates incident in Cambridge, Massachusetts).

<sup>267</sup> At least since *Buckley v. Valeo*, 424 U.S. 1 (1976), the Court has recognized that government has a strong interest in addressing perceptions that undermine the government’s legitimacy. *Buckley v. Valeo*, 424 U.S. 1, 26-27 (1976) (holding that the federal government’s concern about curtailing the appearance of corruption spawned by large financial contributions to candidates for elected offices is a legitimate state interest).

<sup>268</sup> *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007).

## VII. CONCLUSION

Benign race-conscious action is needed to achieve true racial equality in the United States. While the current Supreme Court is very close to abolishing such action under the guise of equal protection, making strict scrutiny fatal in fact, Justice Kennedy's concurring opinion in *Parents Involved* has kept the door slightly ajar. However, Justice Kennedy's opinion for the Court, in *Ricci*, undermines his commitment to racial equality. Nevertheless, given the critical importance of true racial equality, institutions must continue to pursue benign race-conscious actions. In doing so, they must recognize the risks involved—their actions will be challenged and there will be no guarantees in court.

Yet through lawyers and experts' involvement from the beginning to develop a comprehensive record to support of their actions, institutions can place themselves in the best possible position to defend their actions within Justice Kennedy's framework in *Parents Involved*. For too many years, institutions have been willing to risk liability as they pursued invidious discriminatory actions. Now it is time for them to take the same risk in pursuit of actual racial equality.