SQUARE PEGS INTO ROUND HOLES? STRICT SCRUTINY AND VOLUNTARY SCHOOL DESEGREGATION PLANS

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I. INTRODUCTION

For most of the second half of the Twentieth century, applying strict scrutiny to a challenged statute or policy meant that the statute at issue would be held unconstitutional. Beginning in 1995 with *Adarand Constructors, Inc. v. Pena*[1] and continuing up through the Supreme Court's decisions in *Grutter v. Bollinger*[2] and *Gratz v. Bollinger*,[3] however, the nature of strict scrutiny seems to be changing. Formerly "'strict' in theory and fatal in fact,"[4] strict scrutiny is no longer an automatic death sentence. Confusion remains when applying the standard, however, as the Court's pronouncements on the subject have not been entirely consistent.[5] What is and is not subject to strict scrutiny, and how strict scrutiny should operate, has confused some circuit courts.

This confusion is readily apparent in the area of voluntary elementary and high school desegregation programs. After *Grutter* and *Gratz*, questions quickly arose in the First[6] and Ninth[7] Circuits as to whether these holdings—that educational diversity constitutes a compelling governmental interest[8]—should extend to the K–12 context, and if so, how the strict scrutiny standard should operate in that context.. More interestingly, judges in those circuits, in footnotes and in concurring and dissenting opinions, also addressed the question of whether strict scrutiny was appropriate at all in the K–12 voluntary school

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1. 515 U.S. 200 (1995).

2. 539 U.S. 306 (2003).

3. 539 U.S. 244 (2003).

4. Gerald Gunther, *Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

5. *See* Johnson v. California, 543 U.S. 499 (2005), discussed *infra* at notes 100–09 and accompanying text.

6. Comfort v. Lynn Sch. Comm., 418 F.3d 1 (1st Cir. 2005) (en banc), *cert. denied*, 126 S. Ct. 798 (2005) (mem).

7. Parents Involved in Comm. Sch. v. Seattle Sch. Dist., No. 1, 426 F.3d 1162 (9th Cir. 2005) (en banc), *cert. granted*, 126 S. Ct. 2351 (2006) (mem).

8. *See Grutter*, 539 U.S. at 328; *Gratz*, 539 U.S. at 268.

desegregation context. Disappointingly, the majority in both circuits mechanistically applied strict scrutiny on the reasoning that the standard automatically applies to all uses of racial classifications by a governmental entity.

Although the majority in those circuits may have been correct to apply strict scrutiny,[9] such application should not be a foregone conclusion, and the courts have missed an opportunity to engage in an important debate into the nature and operation of the strict scrutiny standard. Very good arguments also support the proposition that strict scrutiny is not appropriate when reviewing voluntary school desegregation plans. The majorities in those circuits simply glossed over these arguments and failed to adequately refute them. A thorough discussion of the appropriateness and operation of the strict scrutiny standard after *Grutter* and *Gratz* in the school desegregation context is vital to understanding the future operation of the strict scrutiny standard.

Part II of this Comment will trace the evolution of strict scrutiny from its origins in the late 1930s until the Court's most recent opinion in *Johnson v. California*.[10] An exhaustive history of the evolution of strict scrutiny and its application, of course, is beyond the scope of this Comment. Instead, after a brief overview of the development and modern understanding of strict scrutiny, Part II will focus on how strict scrutiny came to be applied to remedial or affirmative action plans, and how the Supreme Court has interpreted the standard in that context. Part III will detail the decisions of the First and Ninth Circuits in the voluntary school desegregation programs at issue. Although the plans at issue, and the courts' reasoning when evaluating them, were substantially similar, important factual and analytical differences exist that will inform later discussion. Thus, the different plans and the reasoning of the different circuits are discussed at length. After discussing the school plans and the circuits' analysis under strict scrutiny, Part III will discuss each circuit's decision to apply strict scrutiny in the first place. Part IV will begin by critically analyzing the holdings and reasoning of the First and Ninth Circuits, exploring both criticism and praise of the opinions at issue. Close analysis of the opinions does not lead to a definitive conclusion that the circuits were either right or wrong. Part IV continues, then, by discussing past criticisms of strict scrutiny and the tiers of review as a whole, in both Supreme Court cases and scholarly articles. Part IV also proposes a new way to understand the new nature of strict scrutiny, as moving away

9. *See infra* text at Part IV.A.

10. 543 U.S. 499 (2005).

from a rule-based conception of strict scrutiny towards a more flexible, standard-based one. Part V concludes by calling on district and circuit courts to confront the issue of the evolving understanding of strict scrutiny head on and stop mechanistically relying on inapposite Supreme Court precedent. Part V also notes that the Supreme Court has recently accepted certiorari in the Ninth Circuit's case, and examines how the issues presented may or may not address the issues raised in this Comment.

II. THE EVOLUTION OF STRICT SCRUTINY AS APPLIED TO RACE

A. Beginnings of Strict Scrutiny

The most basic standard of review articulated by the Court is Justice Marshall's pronouncement in *McCulloch v. Maryland*: "[l]et the end be legitimate, let it be within the scope of the constitution, and all means are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."[11] The central idea of analyzing the connection between the means and the ends of legislation is the foundation for virtually all Supreme Court review, especially in the Equal Protection Clause context. The concept that different means and ends could warrant different levels of scrutiny, however, is a rather recent development.

The first rumblings of the existence of a heightened standard of review for laws that affect racial groups in some way can be found in *Yick Wo v. Hopkins*.[12] In *Yick Wo*, the Supreme Court used the Equal Protection Clause of the Fourteenth Amendment to invalidate a San Francisco statute that, though neutral on its face, was applied in a discriminatory manner against Chinese-Americans.[13] The Court found that the provisions of the Fourteenth Amendment protected all individuals, of all races and nationalities, within the territorial jurisdiction of the United States, and did not allow differential treatment based on race.

Yick Wo did not have much of an immediate impact and for a long time racial classifications were not subject to any heightened judicial scrutiny. The Equal Protection Clause as a whole was widely ignored at best, and ridiculed at worst, for much of the late 19th and early 20th centuries. Justice Holmes said as much when he described the Clause as

11. 17 U.S. 316, 421 (1819).

12. 118 U.S. 356 (1886).

13. *Id*. at 368–69.

"the usual last resort of constitutional arguments."[14] In 1938, however, the Court more directly expressed the idea that different levels of judicial scrutiny would be applied to constitutional claims depending on their context. In *United States v. Carolene Products Co*.,[15] the Court confronted a challenge to an act of Congress passed under the Commerce Clause. The Court stressed the general need for deference to the legislature, especially in areas of Congress' enumerated powers. The Court would presume that acts of Congress were constitutional unless they failed even a rational basis test.[16]

The Court warned, however, that such deference to the legislature was not always warranted. In perhaps the most famous footnote in Supreme Court history,[17] Justice Stone alluded to the possibility that laws and statutes that burden specific rights or groups would be reviewed with more vigor by the Court:

> There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments . . . . It is unnecessary to consider now whether . . . prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.[18]

This footnote became the foundation for the multi-tiered system of review currently used by the federal judiciary. Although Justice Stone did not definitively say that laws burdening "discrete and insular minorities" would be subject to heightened review, later Courts adopted that interpretation.

The first time the Supreme Court definitively held that laws burdening racial groups would be subjected to heightened review was in *Korematsu v. United States*.[19] In *Korematsu*, the government forcibly removed Americans of Japanese ancestry from the West Coast during World War II and put them in concentration camps based solely on their race and national origin and without any finding that they were disloyal to the United States.[20] An interned Japanese-American challenged the constitutionality of the government's decision to use race as the

14. Buck v. Bell, 274 U.S. 200, 208 (1927).
15. 304 U.S. 144 (1938).
16. *Id*. at 152.
17. *See, e.g.*, J.M. Balkin, *The Footnote*, 83 NW. U. L. REV. 275, 281 (1989).
18. *Carolene Products*, 304 U.S. at 152 n.4 (citations omitted).
19. 323 U.S. 214 (1944).
20. *Id*. at 215–16.

determining factor in evacuating and interning American citizens. The Court noted that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. . . . [C]ourts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can."[21] Despite this language and the obvious racial antagonism that motivated classifying all Japanese-Americans as security threats, however, the Court went on to find that the classification was constitutional due to the exigent circumstances of war.[22]

Korematsu is the only decision expressly upholding an overt racial classification that burdened a minority group,[23] and we should be mindful of the irony of recognizing that case as foundational in the development of a level of review usually described as "fatal in fact." Nevertheless, the Court has never overruled either the reasoning or the outcome of *Korematsu*, and it stands as the Court's first articulation of the requirement of applying strict scrutiny when reviewing laws and policies that create or rely on racial classifications. Strict scrutiny is now generally triggered whenever a court is evaluating a law or policy that creates a classification even partially based on race.[24]

B. Modern Operation of Strict Scrutiny

Courts have, of course, refined and expanded the *Korematsu* test into what we now know as modern strict scrutiny. Generally understood, "strict scrutiny" means that a challenged statute or policy will survive a constitutional attack only "if it is necessary to achieve a compelling governmental purpose."[25] This standard is commonly broken down into two components. First, the ends the policy is designed to achieve must be vital and of extreme importance. Whether an end is "compelling" enough to satisfy this prong of the strict scrutiny standard usually depends on both the subjective importance of the governmental interest and the strength of the evidence the government or policy maker presents to support its case.[26]

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21. *Id.* at 216.

22. *Id*. at 217–18.

23. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 9.3.3.1 (2d ed. 2002).

24. *See* Angelo N. Ancheta, *Contextual Strict Scrutiny and Race-Conscious Policy Making*, 36 LOY. U. CHI. L.J. 21, 39 (2004).

25. CHEMERINSKY, *supra* note 23, § 6.5; *see also, e.g.,* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).

26. Ancheta, *supra* note 24, at 25.

Second, the means used to achieve those ends must be narrowly tailored. In cases where the policy at issue creates a burden on a protected group, the policy must be the least restrictive means available to achieve the desired end. The existence of a less restrictive means will invalidate the policy. To determine if the means are narrowly tailored in the remedial or affirmative action context, courts usually turn to factors first set forth by the Supreme Court in *United States v. Paradise*[27] and most recently refined by *Grutter* and *Gratz*. The narrow tailoring analysis is generally described as a four or five part inquiry focusing on 1) whether the policy at issue creates a quota system; 2) the flexibility and individualized nature of the policy; 3) the effect of the policy on third parties and avoiding undue harm to other groups; 4) whether viable race-neutral or less restrictive means exist for achieving the desired end; and 5) whether the race-conscious policy at issue has an identifiable and realistic end point.[28]

Some commentators see different "tiers" within the strict scrutiny tier itself—an anti-subordination model, a remedial model, and at least two different deferential models.[29] The "anti-subordination model" is the strictest of the three and embodies the automatically fatal conception of strict scrutiny review. This model is used when evaluating policies that burden racial groups, including nonminority groups, and treats them as inferior.[30] The remedial model encompasses affirmative action plans. Although the Court usually credits remedial interests as important, this model stresses the high evidentiary burden on the policymaker to prove that remedial action is necessary to combat historical discrimination against the group benefiting from the plan. The narrow tailoring factors are also carefully scrutinized.[31] Finally, under the deferential model the courts will virtually waive the evidentiary basis requirement and simply credit the government entity's assertion that the interest advanced is a compelling one. Courts will also be more lenient in evaluating the narrow tailoring of the plan.[32] The Supreme Court has followed this deferential model in the context of military necessity[33] and academic

27. 480 U.S. 149 (1987) (plurality opinion).

28. *See* Grutter v. Bollinger, 539 U.S. 306, 334–43 (2003); Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., No. 1, 426 F.3d 1162, 1180 (9th Cir. 2005) (en banc); Comfort v. Lynn Sch. Comm., 418 F.3d 1, 16 (1st Cir. 2005) (en banc); McFarland v. Jefferson County Pub. Sch., 330 F. Supp. 2d 834, 856 (W.D. Ky. 2004), *aff'd,* 416 F.3d 513 (6th Cir. 2005) (per curiam); Ancheta, *supra* note 24, at 26.

29. Ancheta, *supra* note 24, at 44–45.

30. *Id*. at 44. *See, e.g.*, *Adarand*, 515 U.S. 200; Loving v. Virginia, 388 U.S. 1, 11 (1967).

31. Ancheta, *supra* note 24, at 44–45.

32. *Id*. at 45–48.

33. *Id* at 46–47. *See* Korematsu v. United States, 323 U.S. 214 (1944).

institutions of higher education.[34]

Strict scrutiny is the standard used for all laws that create racial classifications. Given this country's long and unfortunate history with racial discrimination, legislation that creates racial classifications "raise[s] special fears that [the classifications] are motivated by an invidious purpose."[35] Race is considered a "suspect tool" for a policymaker to utilize, and courts use strict scrutiny to "smoke out" harmful uses of race and separate them from instances in which the use of race is justified.[36] Invidious uses of race, of course, should always be "smoked out" and invalidated. Until 2003, however, benign uses of race were also virtually per se unconstitutional when reviewed under strict scrutiny.

C. Extension of Strict Scrutiny to Benign Uses of Race

Until 1978, the Court ruled only on racial laws and policies that burdened protected groups. Particularly in the education context,[37] the Court consistently applied strict scrutiny and struck down governmental uses of race that had the effect of burdening a minority group. The Court continues to adhere to that position today. The Court's application of strict scrutiny to benign uses of race, i.e. affirmative action, has been much more confused and convoluted.

1. Development

The Court's first opportunity to rule on a benign state use of race came in *Regents of the University of California v. Bakke*.[38] The University of California at Davis Medical School used a dual track admissions process for white and nonwhite applicants in which sixteen of the one-hundred spots for incoming students were reserved for nonwhite applicants.[39] A white applicant denied admission because of his race challenged the plan, alleging that it operated as a racial quota and discriminated against applicants based on race in violation of the

34. Ancheta, *supra* note 24, at 47–48. *See* Grutter v. Bollinger, 539 U.S. 306 (2003).

35. Johnson v. California, 543 U.S. 499, 505 (2005).

36. *See id*. at 506 (citing Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (plurality opinion)).

37. *See, e.g.*, Brown v. Bd. of Educ. of Topeka, 347 U.S. 483 (1954); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

38. 438 U.S. 265 (1978).

39. *Id*. at 272–79. The actual admission plan, of course, was significantly more complex, and for a full discussion see *id*. For the purposes of this article, however, all that is relevant is the sentence above.

Equal Protection Clause of the Fourteenth Amendment.[40] Applying strict scrutiny,[41] the Court struck down the program.

The only holding to come from a badly fragmented Court was Justice Powell's holding that a "State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin."[42] The Court could not produce an opinion, however, as to what that interest might be. Justice Powell rejected outright racial balancing,[43] remedying societal discrimination,[44] and increasing the number of minority doctors[45] as permissible state interests. Instead, Justice Powell found that "the attainment of a diverse student body"[46] could be a compelling state interest in the affirmative action context.[47] Despite this reasoning, Justice Powell provided the fifth vote to strike down the medical school's set aside program because in his opinion it constituted an impermissible racial quota.[48]

The Court next examined the affirmative action question in *Fullilove v. Klutznick*.[49] There, Congress provisioned the receipt of federal funds under the 1977 Public Works Employment Act upon the condition that state or local governments insure that at least 10% of those federal funds would be contracted to minority owned businesses.[50] *Fullilove* was a plurality opinion, and no consensus was reached as to the appropriate standard of review. A plurality of the Court, however, determined that strict scrutiny was not the appropriate standard to review congressional uses of affirmative action plans. The issue presented was whether Congress could validly attach racial restrictions on the use of federal funds. Looking to Section 5 of the Fourteenth Amendment, the plurality answered yes.[51] Section 5 states that "[t]he Congress shall have power

40. *Id*. at 277–78.

41. *Id*. at 290–91.

42. *Id*. at 320. Justices Brennan, White, Marshall, and Blackmun joined Justice Powell.

43. *Id*. at 306–07.

44. *Id*. at 310.

45. *Id*. at 306, 310.

46. *Id*. at 311.

47. This statement led to much confusion and disagreement in the circuit courts, as judges debated whether Justice Powell's statement was binding authority or just dicta. The Supreme Court did not resolve the issue until 2003, when in *Grutter v. Bollinger*, 539 U.S. 306 (2003), a majority of the Court endorsed Justice Powell's diversity holding. *See id.* at 325.

48. *Bakke*, 438 U.S. at 320.

49. 448 U.S. 448 (1980) (plurality opinion), *abrogated by* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).

50. *Id*. at 474.

51. *Id*. at 476.

to enforce, by appropriate legislation, the provisions of this article."[52] Section 5 gave Congress a broad grant of remedial power to enforce the provisions of the Fourteenth Amendment. Although in *Bolling v. Sharpe* the Court had stated that whatever applies to the states should apply to the federal government,[53] in *Fullilove* a plurality of the Court recognized the special role Section 5 gives to Congress. Although the plan at issue created a racial classification, the plurality did not apply strict scrutiny and a majority of the Court upheld the plan due to the existence of Congress' special grant of remedial powers under the Fourteenth Amendment.

Although the Court in *Fullilove* allowed the federal government to use race to further benign policies, state uses of race, even in the affirmative action context, have always been reviewed under strict scrutiny. In *City of Richmond v. J.A. Croson Co.*,[54] the Court struck down a local minority contracting plan very similar to the one at issue in *Fullilove*. Both plans conditioned the receipt of government funds on a set aside percentage of those funds going to minority owned businesses. The difference for the Court, however, was that in *Croson*, the government entity creating the condition had no special duty or grant of power to remedy past discrimination. The Court applied strict scrutiny to the plan at issue, and invalidated it on both the compelling interest prong[55] and the narrowly tailored prong[56] of the strict scrutiny analysis.

In 1990, one year after *Croson*, the Court reaffirmed its *Fullilove* plurality opinion in *Metro Broadcasting, Inc. v. Federal Communications Commission*.[57] Justice Brennan, speaking for the majority in *Metro Broadcasting*, held that Congress' special grant of power under Section 5 of the Fourteenth Amendment meant that the Court should give deference to congressional determinations that remedial action was necessary to correct racial imbalances. Specifically, in *Metro Broadcasting*, Congress and the FCC had determined that a percentage of airtime on national radio stations must be set aside for minority-oriented programming and programming created by minority owned businesses.[58] The Court evaluated the program using intermediate scrutiny, and held that "benign race-conscious measures mandated by Congress . . . are constitutionally permissible to the extent

52. U.S. CONST. amend. XIV, § 5.

53. 347 U.S. 497, 499 (1954).

54. 488 U.S. 469 (1989).

55. *Id*. at 500.

56. *Id*. at 507–08.

57. 497 U.S. 547 (1990), *overruled by* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).

58. *Id.* at 557.

that they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives."[59]

Metro Broadcasting was short lived, however. Five years later, the Court in *Adarand Constructors, Inc. v. Pena*[60] held that "[f]ederal racial classifications, like those of a State, must serve a compelling governmental interest, and must be narrowly tailored to further that interest."[61] *Adarand* involved a set aside program for funds for minority owned businesses almost exactly like the plans at issue in *Fullilove* and *Croson*. Justice O'Connor, writing for the majority, reasoned that *Bolling* meant that federal, like state, uses of racial classifications should be subject to strict scrutiny. Mandating congruence and consistency between the states and the federal government, the *Adarand* 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."[62] The *Adarand* Court failed to explain what had happened to Congress' special grant of remedial power under Section 5 of the Fourteenth Amendment.

Justice O'Connor in *Adarand* did, however, take the time to refine the meaning of "strict scrutiny." Perhaps recognizing that imposing strict scrutiny on federal uses of race would be a significant burden, Justice O'Connor took pains to make it clear that strict scrutiny should not be "fatal in fact." Recognizing that harmful racial discrimination still existed in society, Justice O'Connor noted that the government may indeed have a compelling interest in combating it.[63] She stated that "when race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the 'narrow tailoring' test this Court has set out in previous cases."[64]

2. Recent Statements

The Court applied Justice O'Connor's language from *Adarand* in the University of Michigan cases, *Grutter v. Bollinger*[65] and *Gratz v. Bollinger*.[66] Justice O'Connor carried a majority of the Court in *Grutter*

59. *Id*. at 564–65.
60. 515 U.S. 200 (1995).
61. *Id*. at 235.
62. *Id*. at 227.
63. *Id*. at 237.
64. *Id.*
65. 539 U.S. 306 (2003).
66. 539 U.S. 244 (2003).

to hold that "student body diversity is a compelling state interest that can justify the use of race in university admissions."[67] For the first time, a majority of the Court applied strict scrutiny to a benign state use of race and upheld the plan at issue.[68]

The University of Michigan Law School used a flexible admissions process that sought primarily to admit a group of students who would be able both to excel in the study and practice of law and who could use their diverse backgrounds to learn from and contribute to the school and community at large.[69] The admissions policy dictated that an applicant's entire file be reviewed and evaluated as a whole, including but not limited to GPA and LSAT scores, personal statements, and recommendations.[70] Beyond these quantifiable factors, however, the admissions policy also mandated that reviewers take into account other factors,[71] including whether an applicant could contribute to the racial and ethnic diversity of the incoming class,[72] as part of the Law School's commitment to "achiev[ing] that diversity which has the potential to enrich everyone's education and thus make a law school class stronger than the sum of its parts."[73] The policy sought to enroll a "critical mass" of minority students, defined as a "number that encourages underrepresented minority students to participate in the classroom and not feel isolated,"[74] as a way to reap the educational benefits that flow from student body diversity. These benefits were described as discouraging and destroying racial stereotypes, promoting cross-racial understanding, encouraging active classroom participation and discussion, and preparing law students for their interactions with people of different backgrounds in an increasingly diverse workplace and civic

67. *Grutter*, 539 U.S. at 325. Justices Stevens, Souter, Ginsburg, and Breyer joined Justice O'Connor.

68. *See id*. at 343 ("[T]he Equal Protection Clause does not prohibit the Law School's narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body.").

69. *Id*. at 313–14.

70. *Id*. at 315.

71. Other factors evaluated beyond race/ethnicity were "the enthusiasm of recommenders, the quality of the undergraduate institution, the quality of the applicant's essay, and the areas and difficulty of undergraduate course selection." *Id*.

72. *Id*. at 316. The Law School has a general policy encouraging "diversity," which could be defined in a broader way than merely race or ethnicity. *See id*. ("The policy does not restrict the types of diversity contributions eligible for 'substantial weight' in the admissions process, but instead recognizes 'many possible bases for diversity admissions.'"). *See also id*. ("The policy does not define diversity 'solely in terms of racial and ethnic status.'"). Race and ethnicity were simply the only bases articulated by the policy. *Id*.

73. *Id*. at 315.

74. *Id.* at 318.

life.[75]

The Supreme Court upheld the plan. Asserting that "context matters when reviewing race-based governmental action under the Equal Protection Clause,"[76] the Court relied heavily on the Law School's assertion and expert testimony at trial that student body diversity provided substantial benefits to the Law School's educational mission.[77] The Court agreed with the Law School that student body diversity could be a compelling state interest, noting both the Law School's interest in improving the quality of its instruction and the need for institutions of higher learning to adequately prepare graduates to become participants and leaders in later civic life.[78] Turning to the narrow tailoring inquiry, the Court stressed that race or ethnicity was only one factor among many the Law School considered, and did not preclude the admissions committee from giving each applicant a high degree of individualized review.[79] After finding that the Law School's plan posed no undue harm to individuals of other racial or ethnic groups,[80] contained a time limitation,[81] and was adopted only after the Law School had seriously considered race-neutral alternatives,[82] the Court upheld the plan under strict scrutiny.

Michigan's undergraduate admissions plan for the College of Literature, Science, and the Arts (LSA) did not fare as well. In *Gratz v. Bollinger*,[83] six other Justices joined Chief Justice Rehnquist[84] in striking down the LSA's race-conscious admissions plan. The *Gratz* majority was bound by *Grutter*'s holding that educational diversity constitutes a compelling interest for the purposes of strict scrutiny.[85] The Court thus invalidated the LSA's plan on narrow tailoring grounds.

75. *Id*. at 330–32.

76. *Id*. at 327.

77. *Id*. at 328–29. The dissenters, particularly Justice Thomas, objected most forcefully to this degree of deference. *Id*. at 350 (Thomas, J., dissenting) ("Nor does the Constitution countenance the unprecedented deference the Court gives to the Law School, an approach inconsistent with the very concept of 'strict scrutiny.'")

78. *Id*. at 330–33. The Court seemed particularly impressed with the positions of various *amici* in support of the Law School's position, such as major American businesses and military leaders.

79. *Id*. at 334–35.

80. *Id*. at 341 ("Because the Law School considers 'all pertinent elements of diversity,' it can (and does) select nonminority applicants who have greater potential to enhance student body diversity over underrepresented minority applicants.").

81. *Id*. at 343.

82. *Id.* at 339–41.

83. 539 U.S. 244 (2003).

84. Chief Justice Rehnquist was joined by Justices O'Connor, Scalia, Kennedy, and Thomas in full, while Justice Breyer concurred in the judgment.

85. *Gratz*, 539 U.S. at 268.

The LSA plan admitted students based on the number of points they received after a review of their file.[86] Points were awarded for, among other things, high school GPA, SAT and ACT scores, state residency, alumni connections, and personal statements and recommendations.[87] There was also a "miscellaneous" category, which included point values for the diversity contribution of the applicant. An applicant from an underrepresented minority group would receive twenty points, solely by virtue of being from that minority group.[88]

The Court rejected the LSA's plan on the grounds that it failed to afford each applicant individualized review.[89] Chief Justice Rehnquist argued that the LSA's practice of automatically awarding each minority applicant twenty points failed the individualized review requirement because it did not distinguish between the different experiences of minority and nonminority applicants. Unlike the Law School's plan that looked at an applicant's admissions file as a whole, evaluating all factors including but not only race, the LSA's plan awarded a minority applicant 20 points regardless of the other factors in his or her file. This was the central problem with the LSA plan for the *Gratz* majority.[90] The LSA argued that the sheer volume[91] of applications received precluded any individualized review. The Court, however, rejected this argument by saying "the fact that the implementation of a program capable of providing individualized consideration might present administrative challenges does not render constitutional an otherwise problematic system."[92]

Although the *Grutter* and *Gratz* opinions were noteworthy enough for their holdings concerning educational diversity, perhaps the most interesting thing about the cases came in Justice Ginsburg's dissenting opinion in *Gratz*,[93] in which she objected to the use of strict scrutiny.[94]

86. *Id*. at 255. The point scale was from 1 to 150 possible points. The scale was divided as follows: 100–150 (admit); 95–99 (admit or postpone); 90–94 (postpone or admit); 75–89 (delay or postpone); 74 and below (delay or reject). *Id*.

87. *Id*. at 255.

88. *Id*.

89. *Id*. at 271.

90. *Id*. at 271–74.

91. The Court did not provide statistics for the number of applications the LSA received during the years in question. The most recent statistics available online indicate that for the 2005–2006 freshman year the University of Michigan received 25,733 applications. University of Michigan Office of Undergraduate Admissions Freshman Class Profile, http://admissions.umich.edu/fastfacts.html (last visited July 23, 2006).

92. *Gratz*, 539 U.S. at 275.

93. *Id*. at 298 (Ginsburg, J., dissenting).

94. Justice Ginsburg also wrote a concurring opinion in *Grutter*, in which she stated that because the Court upheld the Law School's plan under strict scrutiny, "[that] case therefore [did] not require the

Pointing out that racial discrimination and its effects were still prevalent in American society,[95] Justice Ginsburg argued that there was a difference between government action that promoted inclusion rather than exclusion, saying "[a]ctions designed to burden groups long denied full citizenship stature are not sensibly ranked with measures taken to hasten the day when entrenched discrimination and its aftereffects have been extirpated."[96] She took issue with the Court's application of strict scrutiny to the admissions plan at issue, arguing that the Court's "insistence on 'consistency'"[97] was misplaced given the continuing effects of racial segregation on American society. Justice Ginsburg argued for what appears to be realistic or robust rational basis scrutiny[98] when reviewing benign race-conscious plans or policies. Justice Souter joined her opinion in full, and Justice Breyer joined in part.[99]

The Court's most recent statement about the appropriateness of strict scrutiny as applied to racial classifications came in 2005 in *Johnson v. California*.[100] The issue in *Johnson* was the California Department of Correction's unwritten policy of segregating new inmates by race in reception centers.[101] The state argued that racial considerations and classifications were necessary to prevent prison violence and racial conflict.[102] On an equal protection challenge brought by a pro se inmate litigant, the Ninth Circuit held that the prison's policy should be reviewed under intermediate scrutiny because the plan at issue neither burdened nor benefited one racial group over another, and affected all

Court to revisit whether all governmental classifications by race, whether designed to benefit or to burden a historically disadvantaged group, should be subject to the same standard of judicial review." Grutter v. Bollinger, 539 U.S. 306, 346 (2003) (Ginsburg, J., concurring). She was joined by Justice Breyer.

95. *Gratz*, 539 U.S. at 289–300 nn.1–9 (Ginsburg, J., dissenting) (citing reports and statistics detailing discrimination in the areas of unemployment, poverty, access to health care, housing patterns, education, income, hiring practices, real estate purchases, and consumer transactions).

96. *Id*. at 301.

97. *Id*. at 298 (citing Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 224 (1995)).

98. *Id*. at 302 ("Close review is needed to 'ferret out classifications in reality malign, but masquerading as benign" (quoting *Adarand*, 515 U.S. at 275 (Ginsburg, J., dissenting)).

99. Justice Breyer wrote a rather cryptic one-paragraph opinion concurring in the judgment of the Court, although not joining its opinion. He wrote separately, it seems, to make clear that he "agree[d] with Justice Ginsburg that, in implementing the Constitution's equality instruction, government decisionmakers may properly distinguish between policies of inclusion and exclusion . . . for the former are more likely to prove consistent with the basic constitutional obligation that the law respect each individual equally." *Id*. at 282 (Breyer, J., concurring in the judgment) (internal citations omitted).

100. 543 U.S. 499 (2005).

101. *Id*. at 502.

102. *Id*. at 503.

racial groups equally.[103] The Supreme Court, in an opinion by Justice O'Connor, reversed, emphasizing its language in *Adarand* that "*all* racial classifications [imposed by the government] . . . must be analyzed by a reviewing court under strict scrutiny."[104] The fact that the policy equally segregated all inmates did not matter to the Court. Rather, the majority noted that the special fears and inherently suspect nature of all racial classifications,[105] combined with the fundamental individual right to be free from racial discrimination and classifications based solely on race,[106] meant that the plan had to be reviewed under strict scrutiny. The Court remanded the case to the Ninth Circuit to determine whether or not the policy satisfied strict scrutiny.[107]

Three Justices in the *Johnson* opinion, however, indicated a willingness to move away from applying strict scrutiny. Reiterating the language from her dissenting opinion in *Gratz*, Justice Ginsburg, joined by Justices Souter and Breyer, while concurring with Justice O'Connor's majority opinion, wrote separately to voice her "conviction that the same standard of review ought not control judicial inspection of every official race classification."[108] Although Justice Ginsburg agreed with the majority that the California prison policy at issue in *Johnson* was the kind of blatant racial classification that strict scrutiny was originally designed to combat, she again seemed to stake out ground for a reduced standard for remedial uses of race. Reiterating her language from *Gratz* that policies of inclusion deserved a different degree of review than policies of exclusion or segregation,[109] Justice Ginsburg continued to indicate a willingness to entertain a lower level of scrutiny for the right type of policy.

III. CIRCUIT COURT OPINIONS AFTER *GRUTTER* AND *GRATZ*

Two Circuit Courts have ruled on the constitutionality of voluntary K–12 school desegregation plans after the Supreme Court's opinions in *Grutter* and *Gratz*.[110] Both the plans at issue were substantially similar,

103. Johnson v. California, 321 F.3d 791 (9th Cir. 2003).

104. *Johnson*, 543 U.S. at 505 (quoting Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995)) (emphasis added).

105. *Id.* at 505–06.

106. *Id*. at 510–11.

107. *Id*. at 515.

108. *Id*. at 516 (Ginsburg, J., concurring).

109. *Id*., (quoting Gratz v. Bollinger, 539 U.S. 244, 301 (2003) (Ginsburg, J., dissenting)).

110. The Sixth Circuit has also ruled on a voluntary school desegregation program virtually identical to the plans discussed *infra* and analyzed by the First and Ninth Circuits. *See* McFarland *ex rel.* McFarland v. Jefferson County Pub. Sch., 416 F.3d 513 (6th Cir. 2005) (per curiam), *cert. granted*

and involved taking a student's race into account in either transfers or initial student assignment. In upholding both plans under strict scrutiny, each circuit stressed Justice O'Connor's point from *Grutter* that "context matters when reviewing race-based governmental action under the Equal Protection Clause."[111] Therefore, the details of the plans and specific analysis of the reasoning of both of the circuits are set forth in some detail in subsection A, below. This is necessary to better understand how the unique context of each plan impacted the court's application of the strict scrutiny standard. Before applying strict scrutiny, moreover, each court questioned the wisdom of applying strict scrutiny at all. Subsection B will discuss this issue. Although in the end each court chose to apply strict scrutiny, valid and persuasive arguments for adopting a lower standard of scrutiny exist, and the discussion is an important one.

A. The School Desegregation Plans and Analysis

1. *Comfort v. Lynn School Committee*[112]

In *Comfort*, the First Circuit upheld a race-conscious plan adopted by the city of Lynn, Massachusetts controlling student transfers in all K–12 schools. The case came to the First Circuit with a somewhat lengthy procedural history. The original district court opinion dismissed the plaintiff's Equal Protection challenge to the plan on standing grounds.[113]

sub nom. Meredith v. Jefferson County Bd. of Educ., 126 S. Ct. 2351 (2006) (mem). That ruling, however, was just a summary affirmance of a district court opinion that upheld the plan at issue for the same reasons as the courts in *Comfort* and *Parents* upheld the plans at issue in those decisions, discussed *infra* text accompanying notes 112–217. *See* McFarland v. Jefferson County Pub. Sch., 330 F. Supp. 2d 834 (W.D. Ky. 2004). The Supreme Court has granted certiorari in *McFarland* in conjunction with *Parents*. This Comment will not discuss *McFarland* in the text because 1) the district and circuit opinions were issued before the *Johnson* opinion and do not contain an extended discussion of the appropriateness of strict scrutiny; and 2) the district court's reasoning as a whole does not substantially contribute to the discussion of the plans at issue beyond what will be discussed in connection with the First and Ninth Circuit opinions. However, the district court's narrow tailoring analysis is notable in that it provides a useful way to critique the reasoning of the First and Ninth Circuits. The *McFarland* district court's narrow tailoring analysis will be presented *infra* at text accompanying notes 222–224. Additionally, the district court's decision to invalidate part of Jefferson County's plan because it explicitly created a racial classification is useful for the argument that the assignment plans at issue in Lynn and Seattle did not create such classifications. This holding will be explored *infra* at text accompanying notes 247–50.

111. Grutter v. Bollinger, 539 U.S. 306, 327 (2003).

112. 418 F.3d 1 (1st Cir. 2005) (en banc), *cert. denied*, 126 S. Ct. 798 (2005) (mem).

113. Comfort v. Lynn Sch. Comm., 150 F. Supp. 2d 285 (D. Mass. 2001), *rescinded in part by* Comfort *ex rel.* Neumyer v. Lynn Sch. Comm., 283 F. Supp. 2d 328 (D. Mass. 2003).

That opinion was rescinded by the district court,[114] and subsequently that opinion was amended,[115] and the district court upheld the defendant school board's plan on Equal Protection grounds.[116] A panel of the First Circuit reversed the district court on Equal Protection grounds.[117] That opinion was later withdrawn when the First Circuit granted a rehearing en banc, and the First Circuit en banc upheld the second district court opinion affirming the Lynn Plan on Equal Protection grounds.

a) The Lynn Plan

The Lynn School Committee adopted a plan that used race only in the context of student transfer applications. The Committee organized Lynn schools by neighborhood. All students were entitled to attend their neighborhood school regardless of their race or the racial composition of the neighborhood school.[118] Both parties stipulated at trial and on appeal that the education offered at each school was roughly comparable to that offered at every other school.[119]

A student's race, and the racial composition of the schools in the system, became an issue when a student sought to transfer to another school from their neighborhood school. All schools in the system were placed into one of three racial categories. A "racially balanced" school was one in which the minority population of the specific school at issue was within +/– 15% for elementary and +/– 10% for all other schools of the overall population percentage for minority students system wide.[120] A "racially isolated" school was one whose minority population was less than 10% (for non-elementary schools) or 15% (for elementary schools) of the total minority student population in the Lynn school system.[121]

114. Comfort *ex rel.* Neumyer v. Lynn Sch. Comm., 263 F. Supp. 2d 209 (D. Mass. 2003), *amended by* 283 F. Supp. 2d 328 (D. Mass. 2003).

115. Comfort *ex rel.* Neuymer v. Lynn Sch. Comm., 283 F. Supp. 2d 328 (D. Mass. 2003).

116. *Id*.

117. Comfort v. Lynn Sch. Comm., No. 03-2415, 2004 WL 2348505 (1st Cir. Oct. 20, 2004), *opinion withdrawn on grant of rehearing en banc*, 418 F.3d 1 (1st Cir. 2005).

118. Comfort v. Lynn Sch. Comm., 418 F.3d 1, 7 (1st Cir. 2005) (en banc).

119. *Id*. at 7 n.1. The Lynn School Committee did create a set of "magnet" schools as part of the Lynn Plan. These were not magnet schools in the traditional, elite, restrictive admissions sense, however. Rather, they merely specialized in one area of instruction over another. The stipulation that all schools offered the same educational opportunities extended to these magnet schools. *See also* Comfort *ex rel.* Neumyer, 283 F. Supp. 2d at 365 n.72.

120. *Comfort*, 418 F.3d at 7. System wide, Lynn's minority students comprised 58% of the total student population. Therefore, an elementary school that was between 43% and 73% minority students would be considered racially balanced. Likewise, a middle or high school that was between 48% and 68% minority students would be considered racially balanced. *See id*.

121. *Id*. at 8. Any elementary school that was less than 43% minority would be racially isolated, and any middle or high school that was less than 48% minority would be racially isolated.

Conversely, a "racially imbalanced" school would have a majority student population either 10% (for non-elementary schools) or 15% (for elementary schools) greater than the minority student population in the system.[122]

All transfers between racially balanced schools were granted without question, space permitting. "Desegregative" transfers, or transfers that would either raise the percentage of nonminority students in a racially imbalanced school or would raise the percentage of minority students in a racially isolated school, were also granted.[123] "Segregative" transfers, however, were not permitted. A segregative transfer was one that would "exacerbate racial imbalance in the sending or receiving school,"[124] i.e., a transfer that would either increase the percentage of minority students in a racially imbalanced school or would raise the percentage of nonminority students in a racially isolated school. Students denied transfers had the right to appeal the denial, and about 50% of all appeals were usually granted.[125]

b) The First Circuit's Opinion

The First Circuit began by noting *Grutter*'s admonition that context matters in the strict scrutiny analysis, and that strict scrutiny should not be automatically fatal.[126] Turning to the question of whether the Lynn School Committee had a compelling interest in using its race conscious transfer plan, the First Circuit defined the interests asserted. The parties had stipulated to a long list of interests, which the district court condensed into two categories, obtaining the benefits of diversity and avoiding the negative impact of segregation.[127] The First Circuit thought that these were essentially the same thing, and defined the interests at stake as "obtaining the educational benefits of a racially diverse student body."[128]

122. *Id*. An elementary school's minority population must have been over 73% to be considered racially imbalanced, while a middle or high school would have to be greater than 68% minority to be racially imbalanced.

123. *Id*.

124. *Id*.

125. *Id*. "Common grounds for successful appeals are medical and safety concerns, daycare issues, and other types of hardship. Appeals will also be granted when the denial would result in siblings attending different schools." *Id.*

126. *Id*. at 13; *see* Grutter v. Bollinger, 539 U.S. 306, 327 (2003).

127. Comfort *ex rel.* Neuymer v. Lynn Sch. Comm., 283 F. Supp. 2d 328, 371 (D. Mass. 2003).

128. *Comfort*, 418 F.3d at 14.

Lynn argued that its stated interests were similar to those asserted by the Law School in *Grutter*,[129] and that these interests supported a finding of a compelling interest. The plaintiffs argued that *Grutter*'s holding was about obtaining the benefits of *viewpoint* diversity in higher education because the Law School did not aim for just racial diversity, and thus that *Grutter*'s holding was inapplicable in the K–12 context.[130]

The First Circuit disagreed. It noted that Lynn's interests bore "a strong familial resemblance to those that the *Grutter* Court found compelling,"[131] and might even be more compelling in the elementary and secondary school context.[132] Although the interests were not identical, the First Circuit again stressed that context matters, reasoning that "*Grutter* teaches that the compelling state interest in diversity should be judged in relation to the educational benefits that it seeks to produce."[133] While the Law School sought to improve the quality of classroom discussion and instruction, Lynn sought to improve safety and attendance as well as increase test scores. Safety and attendance are, of course, more important to an elementary school than a law school. But both are benefits that flow from having a racially diverse student body, and seeking those benefits, the First Circuit concluded, was a compelling interest in the K–12 context.[134]

As for the narrow tailoring analysis, the First Circuit again began by invoking the importance of context in the inquiry.[135] The court then described the test used in *Grutter* and *Gratz* as a four part test looking at 1) whether quotas existed or if any candidates were insulated from competition with other applicants denying individualized review; 2) whether race-neutral alternatives were considered; 3) whether the Plan would cause undue harm to any other group; and 4) whether the Plan

129. Lynn argued that its plan would produce the same benefits produced by the Law School's plan, such as breaking racial stereotypes, increasing tolerance, and preparing students to succeed in a diverse society. *Grutter*, 539 U.S. at 330. Expert testimony at trial supported this argument and the First Circuit agreed that Lynn's schools had increased in quality since the inception of the Plan. *Comfort*, 418 F.3d at 16.

130. *Comfort*, 418 F.3d. at 15.

131. *Id*.

132. *Id*. The First Circuit noted the important and primary place that K–12 education occupied in American society and went on to say "[i]n fact, there is significant evidence in the record that the benefits of a racially diverse school are more compelling at younger ages." *Id*. at 15–16 (citing McFarland v. Jefferson County Pub. Sch., 330 F. Supp. 2d 834, 852–53 (W.D. Ky. 2004)).

133. *Id*. at 16.

134. *Id*.

135. *Id*. The First Circuit characterized the narrow tailoring question as "a context-specific inquiry that must be 'calibrated to fit the distinct issues raised' in a given case, taking 'relevant differences into account.'" *Id*. (quoting Grutter v. Bollinger, 539 U.S. 306, 334 (2003)).

was limited in time.[136]

The First Circuit examined the second, third, and fourth factors and found that the Plan was narrowly tailored. The Lynn Plan was limited to student transfers, preserved the neighborhood school system, and had a robust appeal system, all of which minimized the harm it could have on different groups.[137] Furthermore, because the benefit at issue, i.e. being granted a transfer, was not exceptionally valuable since all schools in the system were roughly equal,[138] the First Circuit concluded the Plan was not unduly burdensome. The Lynn School Committee had also seriously considered a range of race-neutral alternatives and had plausibly rejected them,[139] satisfying the second requirement. Additionally the Plan called for periodic reviews of all schools's racial compositions and allowed for changing the racial percentages defining "racially balanced." The First Circuit held that this satisfied the duration requirement.[140]

The First Circuit, however, declined to apply the first *Grutter* requirement dealing with individualized review. Characterizing the *Grutter* and *Gratz* policies as geared towards achieving viewpoint diversity, which required individualized review of each applicant's file to determine how they could contribute a different viewpoint to the incoming class,[141] the First Circuit stressed that the Lynn plan sought to achieve racial diversity as opposed to viewpoint diversity. The First Circuit saw no need for the Lynn School Committee to afford any more individualized review of a transfer applicant because "[t]he only relevant criterion . . . is a student's race; individualized consideration beyond that is irrelevant to the compelling interest."[142] Because the Law School and LSA admissions plans applied to a competitive, zero sum game in which granting one application meant denying several others, individual review of each applicant's file was critical in determining who got the benefit of admission. Allowing race to be the sole determinant would create a stigmatic harm in the form of the perception that minorities could not

136. *Id*. at 17.

137. *Id*. at 19–20.

138. *See infra* text accompanying note 198.

139. These alternatives included prohibiting all transfers, allowing all transfers, redrawing district lines, busing, lottery, and substituting socioeconomic status for race when considering transfer requests. *Comfort*, 418 F.3d at 22. The plaintiffs argued that there were other options not considered, but the First Circuit stated that strict scrutiny did not require Lynn to exhaust all conceivable alternatives, just to prove a good faith effort to consider feasible alternatives. *Id*. at 23.

140. *Id*. at 22. *See* Grutter v. Bollinger, 539 U.S. 306, 342 (2003) ("[T]he durational requirement can be met by . . . periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity.").

141. *Comfort*, 418 F.3d at 18.

142. *Id*.

compete without special help.[143]

In contrast, under the Lynn Plan there was no competition for transfers because granting or denying a transfer was not related to merit or the skills of the applicant.[144] Furthermore, for the First Circuit, the Lynn Plan was designed to and did combat the precise fears articulated above by promoting integration and inter-race contact and increasing tolerance and understanding. The First Circuit declined to impose on the Lynn School Committee a requirement that they review each transfer application individually, saying "[i]f a non-competitive, voluntary student transfer plan is otherwise narrowly tailored, individualized consideration of each student is unnecessary."[145]

2. *Parents Involved in Community. Schools v. Seattle School Dist. No. 1*[146]

The Ninth Circuit, sitting en banc, in *Parents* upheld an open choice, noncompetitive student assignment plan created by the Seattle school district that used race as a tiebreaker when initially assigning students to public high schools. Similar to the *Comfort* litigation, the case came to the Ninth Circuit with a long procedural history. The original district court opinion upheld the Seattle Plan on both Equal Protection and state law issues.[147] That opinion was reversed by a panel of the Ninth Circuit on state law issues only.[148] Two months later, the Ninth Circuit withdrew the panel's decision, granted a rehearing, and certified a question to the Washington Supreme Court.[149] After the Washington

143. *Id*.

144. *Id*.

145. *Id*. at 19. Judge Selya, dissenting, railed against the majority's seemingly casual disdain for a component of strict scrutiny review clearly articulated by the Supreme Court. He emphasized that in *Grutter* and *Gratz* the Court "made it crystal clear" that individualized concentration was a necessary component of the narrow tailoring analysis. He then criticized the majority for "simply writ[ing] this requirement out of the narrow-tailoring analysis. That, to me, requires more than a soupcon of legal legerdemain." *Id*. at 30 (Selya, J., dissenting). He then set out a long list of the harms that mechanized uses of race create regardless of the context, and said "[t]he majority writes off these concerns, stating that Lynn's goal is increased harmony for the student body as a whole. But the end cannot be allowed to justify the use of unconstitutional means; even laudable goals must be attained in constitutional ways. The Lynn Plan's inflexible use of race offends this principle." *Id*. at 31. It is notable that the main reason the Court struck down the *Gratz* plan was that it failed to afford each candidate individualized review. *See supra* text accompanying note 89. *See also infra* text accompanying note 229.

146. 426 F.3d 1162 (9th Cir. 2006) (en banc), *cert. granted*, 126 S. Ct. 2351 (2006) (mem).

147. Parents Involved in Comm. Sch. v. Seattle Sch. Dist., No. 1, 137 F. Supp. 2d 1224 (W.D. Wash. 2001).

148. Parents Involved in Comm. Sch. v. Seattle Sch. Dist., No. 1, 285 F.3d 1236 (9th Cir. 2002), *withdrawn by* 294 F.3d 1084 (9th Cir. 2002).

149. Parents Involved in Comm. Sch. v. Seattle Sch. Dist., No. 1, 294 F.3d 1084 (9th Cir. 2002).

Supreme Court responded that the Seattle Plan did not violate Washington state law,[150] on rehearing the Ninth Circuit panel reversed the original district court's opinion, this time on federal Equal Protection grounds.[151] The Ninth Circuit then granted a rehearing en banc,[152] and ultimately affirmed the original district court opinion.[153]

a) The Seattle Plan

Unlike the plan at issue in *Comfort*, the Seattle Plan only applied to initial high school assignments.[154] It did not apply to elementary or middle schools, and also did not apply to transfers.[155] Implemented in 1998 after a series of voluntary desegregation plans had failed,[156] the Seattle Plan's purpose was to promote racially integrated education and to make all of Seattle's high schools equally desirable.[157]

Seattle had ten high schools grouped roughly by geography. Ninth graders entering the Seattle high school system could select any school in the district as their first choice of school. Some high schools were more popular than others, and those schools would usually be "oversubscribed."[158] Students were then assigned to that school based on a series of four tiebreakers. Students also had the option of selecting second, third, etc. choice schools. If a student, through the use of the tiebreakers, was not admitted into any of their choice schools, they were assigned to the nearest high school with space available.[159]

150. Parents Involved in Comm. Sch. v. Seattle Sch. Dist., No. 1, 149 Wash. 2d 660, 72 P.2d 151 (2003).

151. Parents Involved in Comm. Sch. v. Seattle Sch. Dist., No. 1, 377 F.3d 949 (9th Cir. 2004). Specifically, the panel found that, while the District did have a compelling interest in obtaining the benefits of a racially integrated student body, the District's plan was not narrowly tailored.

152. Parents Involved in Comm. Sch. v. Seattle Sch. Dist., No. 1, 395 F.3d 1168 (9th Cir. 2005).

153. Parents Involved in Comm. Sch. v. Seattle Sch. Dist., No. 1, 426 F.3d 1162 (9th Cir. 2005) (en banc), *cert. granted*, 126 S. Ct. 2351 (2006) (mem).

154. *Id*. at 1166.

155. *Id*. at 1170.

156. Since the early 1960s, Seattle had been experimenting with small scale, voluntary exchange programs and student transfer plans. These limited plans were unsuccessful and by the 1970s racial segregation in both housing and education was prevalent. The NAACP in 1977 initiated legal action against the Seattle School District, which responded by developing a large scale desegregation plan. Seattle became the first major American city to voluntarily implement such a plan without a court order. That plan proved confusing and unworkable, and several others were tried before the 1998 plan was ultimately implemented. *Id*. at 1167–69.

157. *Id*. at 1169.

158. *Id*. "Oversubscribed" simply meant that more students had selected that particular school as their first choice than the school had spots available for incoming freshmen.

159. *Id*. Students were almost never automatically assigned in this manner.

The first tiebreaker was sibling attendance. If an incoming freshman had an older sibling already attending their first choice school, the freshman would be admitted automatically. The sibling relationship accounted for 15% to 20% of all admissions decisions.[160] After the sibling tiebreaker, *if* the school in question was racially imbalanced,[161] a student's race would be considered. A school was considered "racially imbalanced" if "the racial make up of its student body differ[ed] by more than 15 percent from the racial make up of the Seattle public schools as a whole."[162] Originally the Seattle Plan used a 10% difference as the trigger for the racial tiebreaker, but that was changed in 2001 to 15% to soften the impact of the racial tiebreaker. The racial tiebreaker was applied equally to both white and nonwhite students, and accounted for approximately 10% of all student assignments.[163] The District also continuously monitored the racial composition of the high schools during the student assignment process. If a school that was racially imbalanced became balanced, the race tiebreaker would be turned off and race would cease to be a factor in student assignment for that school. Alternatively, if a previously balanced school became unbalanced as a result of other admissions decisions, the racial tiebreaker could be triggered temporarily for that school until it became balanced again.[164]

The last two tiebreakers were geographical distance and a lottery. Under the geographical tiebreaker, the students closest to the oversubscribed high school in question were admitted first, until all the spots for that high school's incoming freshman class were filled. This tiebreaker accounted for upwards of 75% of all admissions decisions.[165] If there were any students still unassigned after the geography tiebreaker, they would be randomly assigned to a school based on a lottery. This tiebreaker was "virtually never used."[166]

160. *Id*.

161. Whether or not a school was racially imbalanced was determined after the sibling tiebreaker assigned students. Thus, a school that was racially imbalanced before the tiebreaker could cease being so after siblings were assigned, and then race would not be considered in subsequent student assignments to that school. *Id*.

162. *Id*. The Seattle public schools were 60% nonwhite, so any high school that was either less than 45% nonwhite or more than 75% nonwhite would be considered racially imbalanced.

163. *Id*. at 1170.

164. *Id*.

165. *Id*. at 1171.

166. *Id*.

b) The Ninth Circuit's Analysis

Just as in *Comfort*, the Ninth Circuit began its analysis of the Seattle Plan under strict scrutiny[167] by noting the importance of context in Equal Protection Clause analysis.[168] Drawing from past Supreme Court precedent and the District's stated interests, the court found first that the District had articulated a compelling governmental interest.[169]

The court defined the interests asserted in terms of two categories: 1) obtaining the educational and social benefits created by racial diversity; and 2) avoiding the harms that a lack of racial diversity creates.[170] Beginning with the benefits of racial diversity in education, the court credited the District's position that racial diversity benefited students by increasing their critical thinking skills and ability to see and understand different viewpoints,[171] by improving race relations and cross-cultural and –ethnic relationships and helping "students not only to think critically but also democratically,"[172] and by helping to prepare students for later life, whether in work or in higher education.[173] This last point was especially important for the court. Noting that *Grutter* had recognized the Law School's interest in preparing its graduates to work in an increasingly diverse society,[174] the Ninth Circuit invoked context to hold that this interest is even more compelling to the Seattle Plan, given the central role of compulsory K–12 education in American civil life. Because not all high school students attended higher education after graduating from Seattle's public high schools,[175] the Ninth Circuit "reject[ed] the notion that only those students who leave high schools and enter the elite world of higher education should garner the benefits that flow from learning in a diverse classroom."[176] Finally, the court pointed out that significant social scientific evidence existed

167. *See infra* Part III.C for a discussion of the Ninth Circuit's decision to apply strict scrutiny to the Seattle Plan.

168. *Parents*, 426 F.3d at 1173.

169. *Id*. at 1179.

170. *Id*. at 1174.

171. *Id*. ("[B]oth white and minority students experienced improved critical thinking skills – the ability to both understand and challenge views which are different from their own.").

172. *Id*. at 1175.

173. *Id*.

174. *See* Grutter v. Bollinger, 539 U.S. 306, 332 (2003); *see also supra* text accompanying note 78.

175. *Parents*, 426 F.3d at 1176 n.16 (noting that for 2000, approximately only 34% of high school graduates attended a four year college, and only 38% more attended a two year college, meaning that for 28% of all Seattle high school students, high school would be their last opportunity to receive the benefits of racially diverse education).

176. *Id*. at 1176.

demonstrating that students were more receptive to the benefits of learning in a racially diverse environment at younger ages when their mindsets are not fully formed.[177]

The Ninth Circuit, after concluding that the District's interest in obtaining the benefits of racial diversity was compelling, also found that the District had a compelling interest in avoiding the harms that racial segregation creates. The court relied on expert testimony to the effect that learning in a racially isolated environment generally resulted in decreased levels of academic achievement.[178] Given Seattle's segregated residential patterns, simply allowing school attendance patterns to mirror residential demographics would unquestionably have resulted in racially segregated schools.[179] Citing to *Comfort*, the Ninth Circuit found that a school district can have a compelling interest in combating racial segregation regardless of whether that segregation was the result of state action or whether the district was under a court order.[180]

Moving to the narrow tailoring analysis, the *Parents* court recognized, similar to the *Comfort* court, that it was a context-specific inquiry designed to "smoke out" impermissible governmental uses of race but not necessarily to invalidate them all.[181] The court identified five factors that marked a narrowly tailored policy: "(1) individualized consideration of applicants; (2) the absence of quotas; (3) serious, good-faith consideration of race-neutral alternatives to the affirmative action program; (4) that no member of any racial group was unduly harmed; and (5) that the program had a sunset provision or some other end point."[182] Like the First Circuit did in *Comfort*, the Ninth Circuit

177. *Id*. Providing lessons in racial diversity early in a student's educational life and improving the quality of schooling for all students at the outset when all students are required to attend school, of course, would alleviate the need for racially conscious admissions policies in selective institutions of higher education, which are supposed to admit students based on merit.

178. *Id*. at 1177 ("Research regarding desegregation has found that racially concentrated or isolated schools are characterized by much higher levels of poverty, lower average test scores, lower levels of student achievement, with less-qualified teachers and fewer advanced courses").

179. *Id*.

180. *Id*. at 1178–79. The dissent argued that the Supreme Court had only recognized an interest in combating racial discrimination when the school board at issue was the cause of the segregation. *Id*. at 1208 n.17 (Bea, J., dissenting). The majority rejected this position, saying "[t]he fact that de jure segregation is particularly offensive to our Constitution does not diminish the real harms of separation of the races by other means." *Id*. at 1179. The Ninth Circuit supported this proposition by noting that the Supreme Court's school desegregation cases, such as *Swann v. Charlotte-Mecklenburg Bd. of Educ*., 402 U.S. 1 (1971), had traditionally recognized that voluntary school desegregation programs could be considered "sound educational policy." *Parents*, 426 F.3d at 1178–79.

181. *Id*. at 1180 (citing Grutter v. Bollinger, 539 U.S. 306, 334 (2003); and Richmond v. J.A. Croson Co., 488 U.S. 469 (1989)).

182. *Id*. (citing Comfort v. Lynn Sch. Comm., 418 F.3d 1, 17 (1st Cir. 2005)).

applied the last four factors but did not apply the requirement of individualized consideration.

The *Parents* court determined that, based on factors (2) through (5), the Seattle Plan was narrowly tailored. The +/– 15% range was sufficiently similar to the Law School's "critical mass" of underrepresented students to avoid being labeled a quota, as there was no set percentage but rather a broad range of acceptable ratios of minority to nonminority students.[183] The compelling interest in avoiding Seattle's segregated housing patterns made racial considerations necessary to the student assignment plan, and no other race-neutral alternatives existed that would further that interest.[184] Because no student had the right to attend a particular school, the racial tiebreaker applied to all students, and all students were placed in a high school regardless of the operation of the tiebreaker, the Ninth Circuit concluded that no student was unduly harmed by the operation of the Plan.[185] Last, the District periodically reviewed the racial composition of all the high schools subject to the Plan and could turn the racial tiebreaker on or off, even during the admissions process, once the goal of racial diversity was achieved. These periodic reviews satisfied the end point requirement.[186]

As for the first factor in the narrow tailoring analysis, the Ninth Circuit determined that the District did not need to afford all students individualized review of their files, despite the Supreme Court's holdings in *Grutter* and *Gratz*. The court relied on the difference between a competitive admissions process for a limited number of available spots and automatic admission to a public high school system. In a competitive admissions process, such as for admission to an elite institution of higher learning as in *Grutter* and *Gratz*, admission is based on an applicant's qualifications. Allowing race to function as a "mechanical proxy" for an applicant's qualifications would create unique harms, both to nonminority students who would be denied admission solely on the basis of race, and to minority students who might suffer from a perception that they could not compete without help.[187] Thus, individualized review of each file was necessary in a

183. *Id*. at 1184–86.

184. *Id*. at 1187–91. As noted in Part III(A)(2)(a), *supra* note 156, Seattle had a long history of combating racial segregation in its public schools, and had tried many different desegregation plans prior to the plan being discussed. In addition, when formulating the current plan, the District seriously considered other alternatives, such as using poverty or socioeconomic status as a substitute for race or a straight lottery program. *Id*. at 1188–90. The District rejected these plans, however, as not advancing its stated goals.

185. *Id*. at 1191–92.

186. *Id*. at 1192.

187. *Id*. at 1180–81.

competitive admissions process to ensure that a student's race, although still allowed to be persuasive, did not become dispositive. In a noncompetitive admissions process where applicants were not in competition for spots, however, the potential harms that individualized review was designed to combat are not present. Because there is no right to attend the school of the student's choice and the education offered at each school in the Seattle system was comparable, students were not in competition with each other and their individual qualifications were irrelevant. If individual qualifications were irrelevant to the admissions process, moreover, there was no danger that race would be used as a mechanical substitute for qualifications. The Ninth Circuit concluded that if there was no potential harm to be alleviated, the requirement of individualized review could be waived.[188]

Furthermore, the Ninth Circuit relied on other contextual differences between the *Grutter* and *Gratz* plans and the Seattle Plan to bolster its decision to forego the individualized review requirement. Because the Law School in *Grutter* sought to achieve a broad interest labeled "viewpoint diversity,"[189] the range of characteristics that could contribute to that interest was broader than just race. To achieve viewpoint diversity, the Law School had to evaluate how each individual applicant could contribute a different viewpoint.[190] The District, however, was not seeking "viewpoint diversity," but rather racial diversity, which the Ninth Circuit had previously found to be a compelling interest.[191] Because race was the only relevant qualification, what would individualized consideration beyond that do to further the District's compelling interest?[192] The District's second interest, avoiding replicating Seattle's segregated housing patterns in its school system, lent further support to this reasoning: "[b]ecause race itself is the relevant consideration when attempting to ameliorate de facto segregation, the District's tiebreaker must necessarily focus on the race of its students."[193] The Ninth Circuit thus declined to apply the individualized review requirement, and held the Seattle Plan narrowly tailored on the balance of the other four factors.[194]

188. *Id*. at 1181.

189. Grutter v. Bollinger, 539 U.S. 306, 329–30 (2003).

190. *Id*. at 338.

191. *See supra* text accompanying note 180.

192. *Parents*, 426 F.3d at 1183.

193. *Id*.

194. *Id*. *See supra* text accompanying notes 183–86 for a discussion of the application of the other four factors. Like Judge Selya in *Comfort*, Judge Bea, dissenting, blasted the majority for reading the individualized consideration requirement out of the narrow tailoring analysis. *Id*. at 1210 (Bea, J., dissenting). Reiterating the Supreme Court's repeated pronouncement that "the Fourteenth Amendment

B. Strict Scrutiny?

In both opinions discussed above, the courts also engaged in an initial discussion of whether or not strict scrutiny should even apply to the plan under review. Ultimately each court concluded that strict scrutiny was appropriate, but the arguments proposed for adopting a lesser standard of review are compelling and deserve discussion.

In *Comfort*, *amici* at the district court level[195] argued that intermediate scrutiny should be used to evaluate the Lynn Plan because the plan did not "make[] a racial classification in the sense of preferring the interests of one race over another."[196] Stated another way, the fact that the Lynn Plan merely took race into account did not mean that it created strict racial classifications and granted benefits or imposed burdens based on those classifications. Although the Supreme Court had long prohibited racial classifications in the affirmative action context,[197] the Court had never ruled on a plan like the one at issue in *Comfort*, in which the benefit at issue (the educational benefits of a particular school) was basically the same[198] and no one student was advantaged over another on the basis of race. The district court also cited to First Circuit precedent to the effect that "where differential treatment does not favor members of one race over another, there is no racial classification, *Adarand* is inapposite, and strict scrutiny does not apply."[199] Despite these arguments, however, the district court elected to apply strict scrutiny, saying

> I recognize, however, the need to proceed with caution. The parties may agree that all of Lynn's schools provide equal educational opportunities, but the voluntary transfer system is rooted in the principle that parents will find one school preferable to another for personal reasons – e.g., the convenience of its location or attractiveness of its "theme" program. As a

'protects *persons*, not *groups*,'" *id*. (quoting *Grutter*, 539 U.S. at 326), Judge Bea warned that the majority's holding went against the core values of the Equal Protection Clause and the Supreme Court's clear language in *Grutter* and *Gratz*. *Id*.

195. *Amici* were comprised of the NAACP Legal Defense Fund and various Boston area lawyer's committees and parents acting on behalf of their children in the Lynn school system. The *amici* intervened in the second district court opinion, after the first opinion dismissing the plaintiff's challenge on standing grounds was withdrawn. *See supra* text accompanying note 116.

196. Comfort *ex rel.* Neumyer v. Lynn Sch. Comm., 283 F. Supp. 2d 328, 364 (D. Mass. 2003).

197. *Id*. *See also supra* text accompanying notes 37, 60–62.

198. The parties in the *Comfort* litigation stipulated that the education offered by all of Lynn's public schools was comparable. *Id*. at 365.

199. *Id*. at 364 (citing Raso v. Lago, 135 F.3d 11, 16 (1st Cir. 1998)). The district court also cited precedent from the Sixth and Third Circuits that supported this proposition. *See, e.g.,* Jacobson v. Cincinnati Bd. of Educ., 961 F.2d 100, 102–03 (6th Cir. 1992); Kromnick v. Sch. Dist., 739 F.2d 894, 903 (3d Cir. 1984).

> result, although I am convinced by *amici* that intermediate scrutiny is the correct test to apply here, my analysis below will apply the more rigorous standard which the parties have briefed, strict scrutiny.[200]

The Lynn School Committee took up the *amici*'s position and argued for intermediate scrutiny on the basis that the Plan affected all racial groups equally, but the First Circuit was not persuaded.[201] The First Circuit merely held that this position was untenable after *Johnson v. California*,[202] which had been decided between the district court's decision and the First Circuit's review. The First Circuit did not attempt to distinguish *Johnson*[203] but merely cited to the case and moved on to applying strict scrutiny.

Chief Judge Boudin concurred with the majority and did not mention what level of review he thought was appropriate for the Lynn Plan. He wrote separately, however, to stress the uniqueness and novelty of the Lynn Plan, and the fact that the Supreme Court had never ruled on anything like it before.[204] He admonished the majority for relying too heavily on Supreme Court precedent that dealt with different contexts and issues, and argued against unquestioning reliance on Supreme Court holdings that "were made in contexts different than the one now presented . . . . There is very little to be said for mechanistically extrapolating from general phrases visibly addressed to different issues."[205]

The Ninth Circuit confronted the question more directly. Judge Kozinski, concurring, argued that "robust and realistic rational basis review"[206] should govern the review of the Seattle Plan. Writing that he "[heard] the thud of square pegs being pounded into round holes,"[207] Judge Kozinski cited Chief Judge Boudin's comments on the unique nature of the Lynn Plan from *Comfort* to support his argument that the standard of review used when evaluating the Seattle Plan should not be controlled by inapposite Supreme Court precedent.[208] Although past

200. *Comfort ex rel. Neumyer*, 238 F. Supp. 2d at 366.

201. It's unclear why Lynn based their argument for intermediate scrutiny on this position, rather than on the position advanced by *amici* below that the Plan at issue did not create racial classifications at all.

202. *See supra* text accompanying notes 100–09 for a discussion of the *Johnson* decision.

203. *See infra* text accompanying note 212 for Judge Kozinski's persuasive distinguishing of *Johnson* in *Parents*.

204. Comfort v. Lynn Sch. Comm., 418 F.3d 1, 27 (1st Cir. 2005) (Boudin, C.J., concurring).

205. *Id*. at 28.

206. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 426 F.3d 1162, 1194 (9th Cir. 2005) (Kozinski, J., concurring).

207. *Id*. at 1194.

208. *Id*. at 1195 (citing Comfort v. Lynn Sch. Comm., 418 F.3d 1, 29 (1st Cir. 2005) (Boudin, C.J., concurring)).

Supreme Court cases all dealt with plans either burdening minority groups or seeking to give minority groups an advantage over others based on race,[209] the Seattle Plan, in Judge Kozinski's opinion, contained or inflicted none of the harms or objectionable defects that mandated strict review of the "suspect tool" of racial classifications. Members of all races were given the same access to education, especially because the education offered by all of Seattle's high schools was comparable, it did not separate racial groups, created no competition between racial groups, and did not advantage one group over another.[210] Because of these "meaningful differences," Judge Kozinski agreed with Chief Judge Boudin that the Seattle (and Lynn) Plans were "'far from the original evils at which the Fourteenth Amendment was addressed.'"[211] Judge Kozinski gave heed to the *Johnson* opinion, but distinguished it on the grounds that policies of segregation, like in *Johnson*, are unlike policies of integration, as in the Seattle Plan.[212] He further stated:

> [T]he Supreme Court's opinions are necessarily forged by the cases presented to it; where the case at hand differs in material respects from those the Supreme Court has previously decided, I would hope that those seemingly categorical pronouncements will not be applied without consideration of whether they make sense beyond the circumstances that occasioned them.[213]

The *Parents* majority, however, disagreed. In a lengthy footnote after setting forth the strict scrutiny standard, the majority stated that "Judge Kozinski's concurrence makes a powerful case for adopting a less stringent standard of review here."[214] Noting the importance of context, the majority seemed to approve of Judge Kozinski's position and cited to past Ninth Circuit precedent that would support that position.[215] Nevertheless, the majority thought that *Johnson* foreclosed this argument. The majority even agreed with Judge Kozinski that *Johnson* was not "entirely analogous" to the case at issue.[216] The majority, however, still applied strict scrutiny to the Seattle Plan, citing to

209. *Id*. See opinion for a full list of cases and contexts cited by Judge Kozinski.

210. *Id*. at 1194.

211. *Id*. at 1195 (quoting Comfort v. Lynn Sch. Comm., 418 F.3d 1, 29 (1st Cir. 2005) (Boudin, C.J., concurring)).

212. *Id*. at 1193–94. While Judge Kozinski did not cite to Justice Ginsburg's dissenting opinion in *Gratz*, the reasoning is certainly similar. *See* Gratz v. Bollinger, 539 U.S. 244, 301 (2003) (Ginsburg, J., dissenting).

213. *Parents*, 426 F.3d at 1195.

214. *Id*. at 1172 n.12.

215. *Id*. (citing Coal. for Econ. Equity v. Wilson, 122 F.3d 692, 708 n.16 (9th Cir. 1997)).

216. *Id*.

Comfort as they did so.[217]

IV. STANDARDS AND RULES

A. Criticism and Praise

While initial reactions to the decisions discussed above might lead one to conclude that they are either absolutely right or absolutely wrong, a closer review leads one to admit that valid arguments exist on both sides. Recognizing the strength and validity of each side's argument will help to move beyond a simple discussion of whether the decisions were correct or not and towards an inquiry into the basic nature of the strict scrutiny standard.

1. Context is Just a Shield

The courts in *Comfort* and *Parents* relied on the importance of "context" to such an extraordinary degree as to cast doubt on the propriety of their rulings. Purporting to apply "strict scrutiny,"[218] these courts instead cried "context!" whenever faced with difficulties in applying strict scrutiny to achieve the result they wanted. For the compelling interest prong, are the contextual differences between a university or a law school and K–12 education enough to bridge the gap between an interest in achieving viewpoint diversity in the higher education classroom and an interest in racial diversity that seems to be outright racial balancing[219] in a public elementary or high school? Although the Supreme Court in *Grutter* largely deferred to the Law School's academic judgment of what constituted a compelling educational interest, do public high schools really occupy the same position in terms of First Amendment academic freedom? None of the courts at issue here required the various school boards and districts to produce evidence relating to the importance of their asserted interest.

217. *Id*. The dissent also criticized the majority's use of strict scrutiny, but for the purpose of attacking the majority's conclusion. Arguing that the District's plan was simply a mask for racial balancing, the dissent argued that "[t]he majority can arrive at the opposite conclusion only by applying a watered-down standard of review—improperly labeled 'strict scrutiny'—which contains none of the attributes common to our most stringent standard of review. *Id*. at 1197 (Bea, J., dissenting).

218. *See, e.g., id*.

219. Racial balancing, of course, has never been a permissible governmental interest in creating racial classifications. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 306–07 (1978) (discussed *supra* text accompanying note 43): *see also* Petition for Writ of Certiorari, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, No. 05-908, 2006 WL 1579631, at *15–17 (U.S. Jan. 18, 2006).

The courts' application of the "deferential model"[220] originally limited to institutions of higher learning to public school districts cannot rest on context alone. As Judge Bea, dissenting in *Parents*, aptly put it, "'context' matters, but the mention of 'context' should not be a talisman to banish further enquiry."[221]

Even more troubling is the *Comfort* and *Parents* majorities' decision to drastically alter the narrow tailoring inquiry by holding that individualized review of the plans was not required. This decision flies in the face of both well-settled Supreme Court precedent and an obvious easy resolution articulated in a district court opinion from Kentucky, *McFarland v. Jefferson County Public Schools*.[222] Analyzing a voluntary desegregation plan highly analogous to those at issue in *Comfort* and *Parents*, the district court's narrow tailoring analysis noted that the weight given to geographical and student choice considerations in these student assignment and transfer plans could satisfy the individualized review requirement. Because other factors were considered and given weight before a student's race, the *McFarland* court held that the individualized review requirement had been satisfied.[223] The district court did note the contextual differences between a noncompetitive admissions policy in compulsory K–12 education and a competitive admissions process to an elite university, but relied on that difference to hold that the plan at issue did not result in undue harm to any groups or individuals because students were not in competition with each other and all were placed in a district school where the education offered was roughly equal.[224]

The First and Ninth Circuits held that individualized review of each student's application was not necessary because of the noncompetitive nature of the admissions or transfer process in Lynn and Seattle, respectively.[225] Ever since *Bakke*, individualized review has been a central hallmark of the narrow tailoring analysis.[226] Affirmative action plans that fail to afford each applicant the right to have their file reviewed as a whole instead of based on racial grounds have consistently failed.[227] In fact, individualized review can be considered the *most*

220. *See supra* text accompanying notes 29–33.

221. *Parents*, 426 F.3d at 1202 (Bea, J., dissenting).

222. 330 F. Supp. 2d 834 (W.D. Ky. 2004). As noted *supra* note 110, this case was omitted from the main discussion.

223. *Id*. at 859.

224. *Id*. at 860–61.

225. Comfort v. Lynn Sch. Comm., 418 F.3d 1, 18 (1st Cir. 2005); *Parents*, 426 F.3d at 1180–81.

226. Univ. of Cal. v. Bakke, 438 U.S. 265, 318–19 (1978).

227. *See* Gratz v. Bollinger, 539 U.S. 244 (2003); Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).

important of all the narrow tailoring factors. It is widely recognized that the Fourteenth Amendment protects people, not groups.[228] The First and Ninth Circuits, however, eschewed this basic truth to instead advance the interests of a group, defined as the students, both black and white, in the Lynn and Seattle school systems. As admirable as that goal is, it is not in keeping with the central protections of the Fourteenth Amendment as defined by the courts. In *Gratz* especially, the Court's most recent statement on the contours of the narrow tailoring analysis, Chief Justice Rehnquist made clear that individualized review was absolutely essential to a narrowly tailored plan. In fact, the entire *Gratz* and *Grutter* opinions turned on this issue, as Justice O'Connor's swing vote rested on her view that the LSA admissions policy did not provide the degree of individualized review that the Law School's policy did.[229]

The response, of course, would be that the noncompetitive context in which the admissions or transfer decisions are made makes the individualized consideration requirement moot.[230] But why go to the extent of completely altering the factors involved in the inquiry when the district court's opinion in *McFarland*, if consulted, would have provided an easy way to avoid such drastic measures? The *McFarland* court's analysis relied on the weight given to other factors, such as geography and student choice, to hold that the school district had provided each student with an individualized review of his or her file.[231] The court stated that "[i]t is individualized attention of a different kind in a different context,"[232] and then went on to use the noncompetitive nature of K–12 admissions and transfers as the contextual basis for holding that the policy at issue did not result in undue harm because no one was in competition for limited resources.[233] Despite what one may or may not think about "context," this is a much more reasonable distinguishing of *Grutter* and *Gratz* than just simply reading the requirement out all together. The First and Ninth Circuit's decision to so drastically alter the standard of review makes one wonder if achieving what those majorities thought to be the proper result affected the law they applied.

228. *See* Grutter v. Bollinger, 539 U.S. 306, 326 (2003); *see also* Petition for Writ of Certiorari, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, No. 05-908, 2006 WL 1579631, at *22 (U.S. Jan. 18, 2006).

229. *Gratz*, 539 U.S. at 271–72. *See also id*. at 277 (O'Connor, J., concurring) ("The selection index thus precludes admissions counselors from conducting the type of individualized consideration the Court's opinion in *Grutter* . . . requires") (internal citations omitted).

230. *See infra* note 236.

231. *See supra* text accompanying notes 222–24.

232. McFarland v. Jefferson County Pub. Sch., 330 F. Supp. 2d 834, 859 (W.D. Ky. 2004).

233. *See supra* text accompanying notes 222–24.

2. Unique Issues Deserve Unique Analysis

On the other hand, however, it is obvious that the school plans at issue in Lynn and Seattle were "'fundamentally different from almost anything the Supreme Court has previously addressed.'"[234] Rote adherence to Supreme Court precedent dealing with different issues and problems should also be condemned. When faced with new contexts and issues, it is the job of the lower courts in the Article III hierarchy to develop and refine the applicable law to do justice to the case at issue. The law develops through dialogue and interaction between the different levels of the judicial department,[235] and it would be inappropriate to criticize the circuits here for confronting a unique situation, articulating their reasoning, and presenting a unique solution adapted to the particular needs of the cases before them.

Context is crucial in the Equal Protection Clause analysis, and the circuits here properly (and even admirably) let that context influence their reasoning. While individualized review has indeed been a central requirement, the Supreme Court has never ruled on plans dealing with noncompetitive admissions policies. If the main harm to be avoided by requiring individualized review is the stigmatic harm of insulating some groups from competition, there is no point in requiring individualized review when there is no competition.[236] There should not be individualized review only for the sake of having individualized review. Arguably, then, the *McFarland* court is the one that got it wrong by using factors such as geographical location and student choice to satisfy the individualized review inquiry—these factors are not "qualifications" that an applicant has,[237] but instead are just as rote and mechanical as race. But regardless of which or even whether the *McFarland* court or the *Comfort* and *Parents* courts got the inquiry wrong, these circuits were not obligated to follow each other's precedent. It is arguably a good thing, to a point, of course, that different courts are innovating and reasoning in different ways in response to unique issues, as it demonstrates that courts are not locked into routine thinking.

234. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 426 F.3d 1162, 1193 (9th Cir. 2005) (Kozinski, J., concurring) (quoting Comfort v. Lynn Sch. Comm., 418 F.3d 1, 27 (1st Cir. 2005) (Boudin, C.J., concurring)).

235. *See, e.g.,* Lindh v. Murphy, 96 F.3d 856, 887–88 (7th Cir. 1996) (Ripple, J., dissenting), *rev'd on other grounds*, 521 U. S. 320 (1997); *see also infra* text accompanying notes 294–302.

236. *See infra* note 250.

237. *See Parents*, 426 F.3d at 1180–81. *See also supra* text accompanying note 188.

3. The Necessity of Context

Despite the legitimate objections to the circuits' heavy reliance on context to justify their decisions, this Comment contends that the decisions of all the circuits were correct.[238] The long and unfortunate history of racial discrimination in America, particularly in American education, demands unique and creative solutions. The simplistic statement advanced by the dissenters in *Comfort* and *Parents* that the way to stop racial discrimination is to stop discriminating by race[239] ignores the reality of how racial discrimination works and how racially discriminatory thought patterns are created. Integration is the key to promoting nondiscriminatory behavior in students of all races. Diversity cannot be taught in lectures or readings, it has to be experienced to truly take hold. Furthermore, it seems counterintuitive that race conscious admissions programs should be allowed in the higher education context but not in the K–12 schools that prepare students for higher education. If affirmative action in university admissions is to truly be rendered unnecessary, it will be because affirmative action plans instituted at the lowest levels of compulsory education will have put all students on equal footing from the moment they enter the school system. Only then will all students truly be able to effectively compete in a selective university admissions process. The unique problems of the state of elementary and secondary public education in this country and the extent to which race can be addressed to combat those problems demand context-based and innovative solutions, like those created by the Lynn and Seattle plans. The First and Ninth Circuits were right to uphold those plans, and their reliance on the unique context in each case was permissible in light of the fact that there was no Supreme Court precedent directly on point to guide them.

Drawing from those points, however, it seems as if the courts in *McFarland*, *Comfort*, and *Parents* only got it half right. Their need to invoke the flexibility and room for reasoning that referencing context gave them was created by their initial inflexibility and unwillingness to depart from applying strict scrutiny. Instead of being flexible at the beginning of their analysis, they invoked inapposite precedent[240] and locked themselves into a rigid analysis that created problems later on and left their holdings subject to criticism and doubt. No matter how much one might approve of a context-based inquiry, the courts at issue here simply did not apply strict scrutiny as it is normally articulated.

238. Or at least partially correct. *See infra* text accompanying note 239.

239. *See Parents*, 426 F.3d at 1222 (Bea, J., dissenting).

240. *E.g.* Johnson v. California, 543 U.S. 499 (2005).

But the plans at issue were eminently sensible and were directed towards beneficial goals. How to resolve this problem?

B. Solutions or Explanations

1. A Lower Level of Scrutiny

One solution would be to simply adopt a lower level of scrutiny for these types of desegregation plans. The majority in both *Comfort* and *Parents* relied on *Johnson v. California* for the simple proposition that all racial classifications must be reviewed under strict scrutiny.[241] The courts simply assumed that the plans created racial classifications, which is the traditional trigger for applying strict scrutiny. It is debatable, however, whether the plans really created such classifications.

The district court in *Comfort* seemed to say that Comfort's plan did not create racial classifications.[242] Defining a "classification" as a grouping that prefers the members of one race over another,[243] the district court pointed out that because the education offered in all the schools is the same, no classification had been created. As noted above,[244] the district court decided to "proceed with caution" and applied strict scrutiny despite the conclusion that no classification had been created. The First Circuit did not address this point on appeal, instead just citing to *Johnson* and saying that all racial classifications deserve strict scrutiny review. But the Lynn Plan really didn't create a classification in the traditional sense. The Plan did not place all applicants together and then put some in category A, and some in category B. Rather, the student applicant pool was kept whole and transfer applications were dealt with as they arose. Although race was considered, both minority and nonminority students were equally subject to the Plan's restrictions, and because the outcome of being granted a transfer or not was essentially neutral, after the transfer applications had been dealt with there still was no classification, i.e. one group that got a benefit and one group that didn't. Should strict scrutiny really have been triggered here?

None of the opinions in *Parents* directly answered the question of whether a racial classification had been created—the arguments for a

241. *See* Comfort v. Lynn Sch. Comm., 418 F.3d. 1, 13 (1st Cir. 2005); *Parents*, 426 F.3d at 1172 n.12.

242. Comfort *ex rel.* Neumyer v. Lynn Sch. Comm., 283 F. Supp. 2d 328, 363–66 (D. Mass. 2003).

243. *Id*. at 363.

244. *See supra* text accompanying note 200.

lower level of scrutiny there turned on questions of integration versus segregation and exclusion, and advantaging one group over another.[245] But using the same reasoning as the district court did in *Comfort*, can it really be said that any of the plans created a classification based on race? In no case were students separated into discrete groups and then awarded benefits based on those groups, i.e. it was not the case that the nonminority group gets X benefit, while the minority group gets Y benefit. Instead, in all cases the applicable group of students, whether applying for transfers or initial admission, were kept together and were evaluated as a whole. Again, at the end of the admissions or transfer process, members of both minority and nonminority groups had received the "benefit"[246] of an assignment or a transfer, and the group of those who received the benefit was not segregated by race.

The argument that the school assignment plans at issue in Lynn and Seattle did not create racial classifications is bolstered by noting that the district court in the *McFarland* case did invalidate part of Jefferson County's school assignment plan.[247] The Jefferson County School Board used a target minority population percentage to control initial student assignments that was very similar to the plans used by Lynn and Seattle. Jefferson County also, however, created a different student assignment process for "traditional" magnet schools.[248] Students applying to these schools were divided into four categories – black males, black females, white males, and white females. The principal would then draw names for admission from the different lists. While the principal did not have discretion to deviate from the order in which the names appeared on their respective lists, the principal could choose which list to draw from. Thus, the principal could choose to only draw from the black male or black female lists in an effort to maintain racial balance at that school.[249] The district court invalidated this use of race because it insulated groups of students from competition with other groups and failed the narrow tailoring prong of the strict scrutiny analysis.[250] This kind of blatant classification created by Jefferson

245. *See* McFarland v. Jefferson County Pub. Sch., 330 F. Supp. 2d 834, 848–49 (W.D. Ky. 2004); *Parents*, 426 F.3d at 1193–94 (Kozinski, J., concurring).

246. Arguably, such a result was not even a benefit due to the fact that in each district the education offered at each school was roughly the same. *See supra* note 198.

247. McFarland v. Jefferson County Pub. Sch., 330 F. Supp. 2d 834, 862 (W.D. Ky. 2004). As noted *supra* note 110, a detailed discussion of the *McFarland* case has been omitted from the main text of the paper.

248. "Traditional" magnet schools offered the same curriculum and instruction as other schools in the county, but emphasized structure, discipline, courtesy, patriotism, and morality. *Id*. at 847.

249. *Id*. at 847–48.

250. *Id*. at 862–64.

County and invalidated in *McFarland* stands in stark contrast with the remainder of Jefferson County's assignment plan and the plans at issue in Lynn and Seattle, and illustrates how Lynn's and Seattle's plans did not create racial classifications. By using a flexible range of permissible minority population percentages to control the use of the racial tiebreaker, both Lynn and Seattle avoided creating such outright classifications.

While the question of whether a racial classification has been created such that strict scrutiny should be triggered is usually a rather straightforward question, in the unique context of these school desegregation programs, however, the issue is more complex. When evaluating "contextual" applications of strict scrutiny, one commentator proposes a three part triggering test.[251] The test would ask "(1) is the classification subject to categorical exclusion; (2) if not, does the policy-making process dictate that race predominate in order to trigger strict scrutiny; (3) if not, is race used as a significant factor in a classification that results in the unequal treatment of a group or an individual."[252] If all three questions are answered in the negative, then strict scrutiny should not apply.

Evaluated under these questions, strict scrutiny should not be applied to the Lynn and Seattle plans. First, no plan resulted in the categorical exclusion of the members of one racial group from receiving a benefit. Members of all racial groups were eligible to receive and did receive transfers and their choice of school assignments. The fact that some applicants were denied their requests based on their race does not mean that categorical exclusion occurred. Second, despite initial appearances, racial considerations did not predominate when ruling on transfer or application requests. Some commentators have argued that in the voluntary integration context race would always be the predominant factor in transfer decisions, and thus strict scrutiny would be appropriate in this context.[253] Not so. The Lynn Plan was based primarily on geography and a student's choice, and the plan used by the Seattle public high schools accounted for only 10% of all initial student assignments. Racial considerations clearly did not predominate transfer and student assignment decisions. Last, as explained above, race was not a significant factor in decisions that resulted in unequal treatment because in all these cases there was no unequal treatment.

251. Ancheta, *supra* note 24, at 50.

252. *Id*.

253. *Id.* at 54.

The Court has previously recognized in *Metro Broadcasting* that "benign" racial classifications deserve a lower level of scrutiny.[254] Justice Brennan there held that the federal government could use race in a benign way if such use satisfied intermediate scrutiny. *Metro Broadcasting* was overruled within five years,[255] but Justice Ginsburg's dissents in *Gratz* and *Johnson* may indicate a willingness to revive *Metro Broadcasting*'s holding.[256] Justice Ginsburg's argument that policies of inclusion merit different analysis than policies of exclusion strongly echoes Justice Brennan's position,[257] and could indicate the beginnings of a shift towards adopting intermediate scrutiny when reviewing race-based policies.

Although it seems clear that a lower standard of review is appropriate for these types of plans, the actual chances of courts adopting intermediate or realistic rational basis review for race-conscious laws or policies are probably low, due to historic concerns and the "special fears" that any government use of race creates.[258] One would hope, as Chief Judge Boudin and Judge Kozinski argued, that courts would be able to confront new situations with new reasoning, debate, and dialogue instead of "mechanistically extrapolating," as Chief Judge Boudin put it, from off-point holdings and phrases. But perhaps there are other solutions

2. Breaking Down the Tiers of Review

Even more radical than adopting a lower standard of review would be to eliminate the different tiers of review altogether. Although ever since *Carolene Products* and *Korematsu*[259] Equal Protection Clause analysis has been dominated by the tiers of review, all Equal Protection Clause review is basically a search for the fit between the means used to pursue

254. 497 U.S. 547 (1990), *overruled by* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995). *See supra* text accompanying notes 57–59.

255. *Adarand*, 515 U.S. at 235.

256. One commentator has even suggested that the *Grutter* majority's distortion of the strict scrutiny analysis could indicate an implicit endorsement of returning to Justice Brennan's *Metro Broadcasting* position. *See* Calvin Massey, *The New Formalism: Requiem for Tiered Scrutiny?*, 6 U. PA. J. CONST. L. 945, 979–80 (2004).

257. Justice Brennan based his position in *Metro Broadcasting* on the special role that Section 5 of the Fourteenth Amendment gives to Congress when passing laws combating racial discrimination, *see Metro Broadcasting*, 497 U.S. at 564, while Justice Ginsburg's reasoning is seemingly based more on core equal protection concerns, *see* Gratz v. Bollinger, 539 U.S. 244, 301 (2003); Johnson v. California, 543 U.S. 499, 516 (2005). However, despite the difference in reasoning, the two arguments closely resemble each other.

258. *See, e.g.,* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995).

259. *See supra* text accompanying notes 15–22.

the ends of legislation or government policy.[260] Should a footnote that was essentially dicta really have this much power over nearly seventy years of judicial review? As unconventional as this idea seems at first blush, such suggestions have been made.

"There is only one Equal Protection Clause,"[261] as Justice Stevens has said. Beginning in the early 1970s, Justices Thurgood Marshall and Stevens began to argue against the two-tier system of review while the Court was still defining its contours. Beginning with *Dandridge v. Williams*[262] and *San Antonio Independent School District v. Rodriguez*[263] in the early 1970s and up through *Plyler v. Doe*[264] in 1982, Justice Marshall argued that Equal Protection review was incompatible with rigid levels of analysis and a binary system of review. Instead, Justice Marshall reviewed past decisions and found that the Court had applied what he described as a spectrum of standards that depended on "the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn."[265] In Justice Marshall's opinion, Equal Protection Clause analysis should be reconceived as a sliding scale of review. As he said in *Rodriguez*:

> The task in every case should be to determine the extent to which constitutionally guaranteed rights are dependent on interests not mentioned in the Constitution. As the nexus between the specific constitutional guarantee and the nonconstitutional interest draws closer, the nonconstitutional interest becomes more fundamental and the degree of judicial scrutiny applied when the interest is infringed on a discriminatory basis must be adjusted accordingly.[266]

Justice Stevens likewise stated his belief that the different "levels" of scrutiny applied by the Court were really just different articulations of the same standard—one that, in essence, required the government to govern impartially.[267] Justice Marshall, joined by Justice Stevens, actually wrote a majority opinion for the Court in *Chicago Police*

260. *See, e.g.*, McCulloch v. Maryland, 17 U.S. 316, 421 (1819) (as cited *supra* note 11("Let the end be legitimate, let it be within the scope of the constitution, and all means are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional")).

261. Craig v. Boren, 429 U.S. 190, 211 (1976) (Stevens, J., concurring).

262. 397 U.S. 471, 519–21 (1970) (Marshall, J., dissenting).

263. 411 U.S. 1, 98–103 (1973) (Marshall, J., dissenting). Justice Marshall's dissent in *Rodriguez* was joined by Justice Douglas.

264. 457 U.S. 202, 230–31 (1982) (Marshall, J., concurring).

265. *Rodriguez*, 411 U.S. at 99.

266. *Id*. at 102–03.

267. Craig v. Boren, 429 U.S. 190, 211 (1976) (Stevens, J., concurring).

Department v. Mosley[268] that articulated a single, unitary standard of review for all Equal Protection analysis, asking "whether there is an appropriate governmental interest suitably furthered by the differential treatment."[269] The Court quickly moved away from this standard, however, to create and refine intermediate scrutiny as a way to relieve pressure between rational basis and strict scrutiny review.

These decisions prompted hopeful writing on the part of scholars and commentators, some of whom saw the possibility of doing away with the tiers and creating a more flexible, accurate system of review. Jeffrey Shaman's "Cracks in the Structure: The Coming Breakdown of the Levels of Scrutiny"[270] catalogued the inconsistencies and problems inherent in the formal two tier system, and wrote that the tiered system impairs constitutional analysis by both "deflecting the focus of inquiry towards abstractions (the tiers of scrutiny) that have little to do with the specific merits of a case"[271] and by using established but possibly inapposite definitions of rights to trigger each tier. Shaman praised Justice Marshall's standards from *Rodriguez* and *Mosley* for two reasons. First, abolishing the tiers of review would give the Court more flexibility to engage in proper constitutional analysis. If the tiers were eliminated, "the constitutionality of governmental action would not depend upon the level of scrutiny applied in a particular case. This would obviate the need now felt by the Court in a considerable number of cases to manipulate principle and precedent in order to reach a proper result."[272] Second, a unitary standard would allow courts to focus on the merits and specific facts[273] of the cases before them, instead of on the appropriate standard of review.[274]

Shaman wrote in 1984, and hoped that the collapse of the tiers was imminent. As was explained in Part II, however, the tiers have not collapsed. Rather, the Court has attempted to refine and tinker with the system to make it work. Yet scholars continue to be hopeful. Arguing in 2004 for a single standard of review,[275] Suzanne Goldberg contended that Equal Protection review had become "ossified" and inflexible. She wrote that "a single standard of review may provide a starting point for revitalizing meaningful equal protection review at the highest and lowest

268. 408 U.S. 92 (1972).

269. *Id*. at 95.

270. 45 OHIO ST. L.J. 161 (1984).

271. *Id*. at 164.

272. *Id*. at 177. *See supra* text accompanying notes 218–33 for an example of this kind of criticism applied to the First and Ninth Circuit's reasoning in *Comfort* and *Parents*.

273. I.e., the *context*.

274. Shaman, *supra* note 270, at 177–78.

275. Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481 (2004).

levels."[276] After proposing her own standard,[277] Goldberg argued that the tiers were a useful beginning point for the Court as it searched for a legitimate way to closely analyze legislative action after the charges of judicial activism that the *Lochner* era created.[278] By creating strict and rigid levels and classifications, the Court could rebut charges that it was legislating from the bench and could instead point to the clearly defined level of review as the guide to its analysis. But Goldberg argues that the training period is over, and that it is time for the Court to move towards a more flexible and open ended Equal Protection Clause jurisprudence.[279] Likewise in 2004, Calvin Massey has argued that the Court's decisions in *Grutter* and *Lawrence v. Texas* indicate that strict scrutiny is a "doctrine in disarray,"[280] and speculates that the Court may be moving towards several alternatives to strict scrutiny, including adopting Justices Marshall and Stevens' sliding scale of review[281] or an open embrace of judicial value selection. Whatever the outcome, however, Professor Massey agrees that tiered scrutiny is heading towards a collapse.

Shaman and Goldberg both argue that the development of the tiers was a direct reaction to the problems associated with and downfall of the substantive due process era.[282] The Court was eager to move away from the excesses of *Lochner* towards more deferential review to avoid the charges of judicial usurpation of legislative prerogatives, but needed a device by which to legitimately continue meaningful review of legislation that impinged on core and fundamental rights. Creating, and then hiding behind, rigid levels of review gave courts an easy out. Conversely, however, that rigidity has led to renewed charges of judicial activism. As the criticisms of the *Comfort* and *Parents* decisions presented in Part IV(A)(1) reveal, when presented with unique circumstances that need unique answers, the rigidity of strict scrutiny or any "tier" of review locks a court into a mode of analysis that is inappropriate to the question before it. If the court blindly adheres to the standard of review, it is accused of being out of touch and inflexible. If the court attempts to refine and stretch the level of review, however, it is charged with exercising base judicial activism and results-oriented

276. *Id*. at 491.

277. Professor Goldberg proposed a single standard composed of three questions—an "intracontextual" inquiry, an "extracontextual" inquiry, and a bias inquiry. *See id*. at 492.

278. *Id*. at 581–82.

279. *Id*.

280. *See* Massey, *supra* note 256, at 990.

281. *Id*. at 991. *See also supra* text accompanying notes 261–69.

282. *See* Shaman, *supra* note 270, at 161–62, 182; Goldberg, *supra* note 275, at 524–27.

jurisprudence. These, of course, were exactly the *Lochner*-esque charges that the tiers of review were designed to avoid.

The Court's recent attempts in *Adarand*, *Grutter*, *Gratz*, and *Johnson* to refine the nature of strict scrutiny are confusing. Is the Court beginning to refine and soften the level, most notably in *Grutter*, as a precursor to eventually discarding the training wheel tiers and move towards a unitary standard? If so, why only one term later did the Court so forcefully approve of strict scrutiny in *Johnson*? What about other recent statements, such as the confusing standard applied in *Romer v. Evans*?[283] Was there even a standard at all in *Lawrence v. Texas*?[284] Is there another way to understand what is happening?

3. Turning Rules into Standards

No one talks about the "strict scrutiny rule"—the level of analysis is referred to as the strict scrutiny standard. Yet up until 2003 and *Grutter*, strict scrutiny was essentially a rule—any policy that creates a racially-based policy is unconstitutional. The "ossified" nature of strict scrutiny in particular and the tiered system of Equal Protection Clause review in general, to use Professor Goldberg's words,[285] distorts what should be a nuanced and context-specific inquiry and "runs contrary to the Equal Protection Clause's core values."[286] Strict scrutiny should be a standard, not a rule. Thinking in terms of a shift from a rule to a standard helps to make sense of the *Comfort* and *Parents* decisions.

"A 'rule' is a norm whose application turns on the presence of relatively noncontentious facts, and turns on the presence of those facts regardless [of] whether the values that the rule is designed to serve are actually served or disserved by the particular application."[287] An obvious example of a rule is a speed limit. A speed limit is designed to

283. 517 U.S. 620 (1996) (striking down Colorado Constitutional amendment prohibiting legislation protecting homosexuals under rational basis review).

284. 539 U.S. 558 (2003). *See* Laurence H. Tribe, Lawrence v. Texas: *The 'Fundamental Right' that Dare not Speak Its Name*, 117 HARV. L. REV. 1893, 1917 (2004) ("The practice of announcing such a standard—naming a point somewhere on the spectrum from minimum rationality to per se prohibition in order to signal the appropriate level of judicial deference to the legislature and the proper degree of care the legislature should expect of itself—is of relatively recent vintage, is often more conclusory than informative, has frequently been subjected to cogent criticism, and has not shown itself worthy of being enshrined as a permanent fixture in the armament of constitutional analysis") (internal citations omitted).

285. Goldberg, *supra* note 275, at 504 ("The quieting of a once-vibrant analytic tool also suggests that the indicia themselves have become ossified or that they lack the specificity necessary to constrain misapplications of suspect classification analysis.").

286. *Id*. at 510.

287. Larry Alexander, *Incomplete Theorizing: A Review of Cass R. Sunstein's* Legal Reasoning and Political Conflict, 72 NOTRE DAME L. REV. 531, 541 (1997).

ensure road safety. But regardless of whether a driver can drive safely at speeds above the limit, or even whether the limit is posted too high and makes driving unsafe, the speed limit rule is applied to all drivers on the road.[288] Standards, conversely, are norms that have the opposite characteristics of rules. Standards tend to "collapse decision making back into the direct application of the background principle or policy to a fact situation."[289] A standard asks the decision-maker to reapply the core values of the norm to each new situation presented in an equitable way. Rules and standards, of course, have different benefits and burdens. "[R]elative to standards, rules are costly to promulgate, cheap to apply, and cheap to research"[290] Standards, again, have the opposite characteristics. "Given their different natures, rules and standards are each fit for different situations . . . the appropriateness of a rule or standard in a given situation hinges on (1) the frequency with which a legal question arises, (2) the homogeneity of the questions arising and (3) the resources of the actor making the decision."[291]

Most of the criticism leveled against the majority opinions by the dissenters in *Comfort* and *Parents* came from the dissenting judges' conceptions of strict scrutiny as a rule, not a standard. Criticizing the majorities for "watering down" strict scrutiny[292] and for failing to follow precedent,[293] the dissenters in both cases seemed to still adhere to the old rule that race-conscious policies, when reviewed under strict scrutiny, should always be struck down. But how applicable are rules in the Equal Protection Clause context? The heterogeneity of the questions alone counsels against strict rules in the Equal Protection Clause analysis. The difference between policies of inclusion and exclusion, as noted by Justice Ginsburg in *Gratz* and *Johnson*, is just one way in which two race-conscious laws or policies can vary. Creation and noncreation of classifications, the purposes motivating the laws, and the means used to achieve those purposes are just some of the ways in which laws or policies evaluated under strict scrutiny can differ. The uniqueness of the different fact patterns that give rise to Equal Protection Clause issues mitigates in favor of an Equal Protection Clause

288. *Id*. *See also* John F. Preis, *Jurisdiction and Discretion in Hybrid Law Cases*, 75 U. CIN. L. REV. 145, 169 (2006).

289. Kathleen M. Sullivan, *Forward: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 58 (1992).

290. Preis, *supra* note 288, at 170–71.

291. *Id*. at 171.

292. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 426 F.3d 1162, 1197 (9th Cir. 2005) (Bea, J., dissenting). *See also id*. at 1201 n.12 (While criticizing the majority's reliance on context, "context *always* matters in the application of general rules of law to varied factual settings") .

293. Comfort v. Lynn Sch. Comm., 418 F.3d 1, 29 (1st Cir. 2005) (Selya, J., dissenting).

jurisprudence that eschews rigid and formulaic rules and instead first identifies the core norms and concerns of the concept of equal protection under the law, and then directly applies those norms to the facts before the court.

The real value of a standards-based approach to Equal Protection Clause analysis is the dialogue and reasoned elaboration that standards create between the different levels of the federal judiciary. While proponents of rules argue that "[t]he Rule of Law as a Law of Rules"[294] provides a defense against popular disapproval with rulings,[295] proponents of standards counter by arguing that a rules-based jurisprudence allows judges to shirk their duties and abdicate their responsibilities while hiding behind the convenient justifications that rules provide.

"[S]tandards make the judge face up to his choices—he cannot absolve himself by saying 'sorry, my hands are tied.'"[296] A standards-based jurisprudence forces a judge to explain their decision and subject their reasoning to critical examination. While rules advocates argue that rules best cabin judicial discretion, there is a strong argument that rules actually facilitate a judge's decision to let predispositions color their opinions. Explaining an opinion arrived at by using a standard "make[s] it more difficult for judges to rest on their predispositions without ever subjecting them to the test of reason."[297]

The *Comfort* and *Parents* courts' open and exhaustive explanations of their respective opinions further an interest in reasoned dialogue that strengthens civic republicanism.[298] Constitutional democracy, at least in theory, depends on public deliberation and a civic responsibility to engage intelligently in public dialogue concerning issues impacting society. Regardless of whether the average citizen is currently an active participant in this process, members of the federal judiciary at the very least have an obligation to explain their decisions openly instead of hiding behind rules-based rationales that the average citizen would not understand. Important issues such as the use of race in public education assignment plans deserve to be subjected to open, rational discussion, not reflexive citation and application of precedent, especially when there are good arguments that such precedent is inapposite. An open and articulate discussion and explanation of reasoning is particularly

294. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

295. *Id*. at 1180; *see also* Sullivan, *supra* note 289, at 65.

296. Sullivan, *supra* note 289, at 67.

297. Wallace Mendelson, *On the Meaning of the First Amendment: Absolutes in the Balance*, 50 CAL. L. REV. 821, 825–26 (1962).

298. Sullivan, *supra* note 289, at 68.

important in such a context, as Judge Kozinski eloquently pointed out in his *Parents* concurrence.[299] Standards promote the reapplication of core, background principles to new situations,[300] and the plans at issue in *Comfort* and *Parents* were unlike anything past precedent had addressed.[301] While rules proponents argue that rules better establish judicial legitimacy, from a civic republicanism standpoint

> judicial legitimacy depends on using standards rather than rules, as standards 'affirm rather than deny . . . responsibility. Rules block the dialogue that standards promote. What the Court says about why a law is to be upheld or invalidated matters, and winners and losers alike benefit from explanations. The candor and flexibility of standards create a habit of mind in judges to take all perspectives into account.[302]

Perhaps Chief Judge Boudin came closest to articulating a standard-based mode of thought when in his *Comfort* concurrence he argued that "the Lynn plan is far from the original evils at which the Fourteenth Amendment was addressed."[303] Applying the core norm of the Fourteenth Amendment anew to the unique plan and *context* before the court, both the First and Ninth Circuits properly applied a standard-based understanding of strict scrutiny, not a rule-based one, and allowed their application of Equal Protection Clause norms to be flexibly guided by, but not dominated by, the standard of review articulated as strict scrutiny.

V. REMOVING THE TRAINING WHEELS

Professor Goldberg conceived of the rigid tiers of review as training wheels, and argued that the time was near for the wheels to be removed. That may be true, but it cannot be done all at once. Moving away from rules and towards more flexible standards-oriented tiers may be the first step towards removing them completely. District and circuit courts confronted with new and unique factual situations must stop applying strict scrutiny by rote, and should instead debate head-on whether the policy at issue deserves to be reviewed under strict scrutiny, and if so, how that standard should operate. Maybe they will determine that strict scrutiny is appropriate and should be applied as a rule, or maybe strict scrutiny is appropriate but should be flexible. Maybe intermediate or rational basis review is better suited to the plan, or maybe they will

299. *See supra* note 213.

300. Sullivan, *supra* note 289, at 58.

301. *See supra* note 234.

302. Sullivan, *supra* note 289, at 69.

303. Comfort v. Lynn Sch. Comm., 418 F.3d 1, 29 (1st Cir. 2005) (Boudin, C.J., concurring).

decide to try doing away with the tiers in one fell swoop and embrace a unitary standard of review. But whatever the outcome of the reasoning, it is critical that there be reasoning and not blind adherence to categorical pronouncements from higher courts. There must be reasoned and involved discussion between the different courts and levels of the judiciary if the proper future of strict scrutiny and Equal Protection review in general is to be determined.

The Supreme Court has given itself an excellent opportunity to begin this discussion by granting certiorari in *Parents*.[304] It is unclear, however, whether the Court will take advantage of it. Parents Involved in Community Schools's Petition phrases the question presented as "[h]ow are the Equal Protection rights of public high school students affected by the jurisprudence of [*Grutter* and *Gratz*]."[305] This goes to the question of the appropriateness of invoking "context" in the strict scrutiny inquiry. Neither the petitioner's brief nor the Seattle School District's Brief in Opposition,[306] however, presents the question of whether strict scrutiny is appropriate in the first place.

The Court heard oral argument on December 4, 2006. At oral argument, it quickly became clear that the school assignment plans at issue would be struck down by the Court.[307] Chief Justice Roberts, along with Justices Scalia and Alito, was openly skeptical of the plan and would probably attract Justice Thomas's vote,[308] and Justice Kennedy expressed grave doubts about both the applicability of *Grutter*'s holding in the K–12 context[309] and the means used to achieve the stated ends.[310]. None of the parties involved[311] and none of the justices raised the issue of whether strict scrutiny was appropriate to review the plan. The Justices did, however, briefly discuss the

304. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., No. 1, 126 S. Ct. 2351 (2006) (mem).

305. Petition for Writ of Certiorari, *Parents*, No. 05-908, 2006 WL at i.

306. Brief in Opposition, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, No. 05-908 (U.S. Mar. 22, 2006), 2006 WL 789611.

307. *See, e.g.*, Posting of Lyle Denniston to SCOTUSblog, http://www.scotusblog.com (Dec. 4, 2006, 12:54 EST); Linda Greenhouse, *Court Reviews Race as Factor in School Plans*, N.Y. TIMES, Dec. 5, 2006, at A1 ("By the time the Supreme Court finished hearing arguments on Monday on the student-assignment plans that two urban school systems use to maintain racial integration, the only question was how far the court would go in ruling such plans unconstitutional.").

308. Denniston, *supra* note 307.

309. *Id*.

310. Transcript of Oral Argument at 33–34, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, No. 05-908 (U.S. Dec. 4, 2006).

311. In addition to the petitioner and respondent, Solicitor General Paul D. Clement argued on behalf of the United States as *amicus curiae* in support of the petitioner school district opposing the plan. Order Granting Solicitor General's Motion for Leave to Participate in Oral Argument, *Parents*, No. 05-908 (U.S. Nov. 6, 2006).

differences between rules and standards and policies of segregation and integration.

Justice Scalia raised the issue of rules and standards when debating whether *Brown*'s prohibition on "separate but equal" made the Seattle plan unconstitutional.[312] Justice Scalia asked

> JUSTICE SCALIA: Can you think of any area of the law, in which we say whatever it takes, so long as there's a real need, whatever it takes – I mean, if we have a lot of crime out there and the only way to get rid of it is to use warrantless searches, you know, fudge on some of the protections of the Bill of Rights, whatever it takes, we've got to do it?
>
> Is there any area of the law that doesn't have some absolute restrictions?
>
> . . .
>
> [W]hat about the Fourteenth [Amendment]? I thought that was one of the absolute restrictions, that you cannot judge and classify people on the basis of their race. You can pursue the objectives that your school board is pursuing, but at some point you come against an absolute, and aren't you just denying that?
>
> MR. MADDEN [school board's counsel]: I think that in *Grutter* and *Gratz*, this Court rejected the absolute.[313]

Justice Scalia's insistence on absolute rules in enforcing the Fourteenth Amendment prompted Justice Ginsburg to argue that the difference between policies of integration and those of segregation meant that the same absolute rule could not be used in two different contexts:

> And the question of integration, whether there was any use of a racial criterion, whether integration, using racial integration is the same as segregation, it seems to me is pretty far from the kinds of headlines that attended the *Brown* decision. [There] were, at last, white and black children together on the same school bench. That seems to be worlds apart from saying we'll separate them.[314]

Similarly Justice Breyer argued for a distinction based on integration versus segregation.[315] Justice Scalia, however, clearly indicated that he did not agree with such a distinction.[316]

312. Chief Justice Roberts raised this issue initially. The school district argued that since all students were placed in a school in the system, individualized consideration of each student's application was unnecessary. Transcript of Oral Argument at 47–48, *Parents*, No. 05-908. The Chief Justice responded by saying "everyone got a seat in Brown as well; but because they were assigned to those seats on the basis of race, it violated equal protection. How is your argument that there's no problem here because everybody gets a seat distinguishable?" *Id*. at 48–49.

313. *Id*. at 49–50.

314. *Id*. at 50.

315. *Id*. at 25.

316. *Id*. at 27–29.

Given the scant attention paid to these issues at oral argument,[317] it is unlikely that the Court will seriously address them in its opinions. It is up to the lower federal district and circuit courts to confront these issues head on and engage in the sort of reasoned discussion that a standards-based Equal Protection jurisprudence will create, and in the process create a better Equal Protection jurisprudence and a better judiciary.

317. And the complete absence of these issues from the briefs.