Contextual Strict Scrutiny

ERIC K. YAMAMOTO*
CARLY MINNER**
KAREN WINTER***

"One wonders whether the majority still believes that race discrimination—or more accurately, race discrimination against nonwhites—is a problem in our society, or even remembers that it ever was."[1]

Justice Harry Blackmun

INTRODUCTION

Justice Blackmun's famous dissent highlighted a stark truth about the Supreme Court's late 1980s' equality jurisprudence—an accelerating judicial myopia that Justice Marshall characterized as turning a blind eye to racial history and contemporary realities.[2] That judicial blindness to racial context presumed a level present-day social and economic playing field. And it thereby legitimated dismantling "preferential" government programs, particularly those designed to uplift racial communities from long years of legally and socially sanctioned subordination.[3]

That rising jurisprudential tide shifted, however, imperceptibly at first, then momentously. Over the last decade, without expressly saying so, the Court transformed the Equal Protection Clause's strict scrutiny analysis. A minority of the current Court continues to argue

* Professor of Law, William S. Richardson School of Law, University of Hawaii.
** William S. Richardson School of Law, 2006; Law Clerk to Judge Michael Seabright, U.S. District Court for District of Hawaii.
*** William S. Richardson School of Law; Law Clerk to Chief Justice Ronald Moon, Hawaii Supreme Court. We thank Leslie Patacil and Shellie Park for their valuable research assistance, and Susan Serrano and Dean Avi Soifer for their insight and inspiration.

1. Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 662 (1989) (Blackmun, J., dissenting).
2. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 543-46 (1989) (Marshall, J., dissenting).
3. *See infra* Part III.B.2.

forcefully for a largely context-blind version of strict scrutiny that automatically invalidates nearly all racial classifications[4]—scrutiny that is "strict in theory and fatal in fact."[5] A majority of the Justices, however, now supports a more contextualized approach[6] for reviewing, and sometimes affirming, government initiatives that involve race.[7]

This more flexible, contextualized version of strict scrutiny is "no less strict"[8] than its traditional counterpart—it still closely examines ends, means, and motives. For government initiatives designed to address the effects of long-standing discrimination, however, it is "less fatal."[9] As the Court explained in 2005, the mere invocation of strict scrutiny no longer predetermines the legal outcome. It "says nothing about the ultimate validity of any particular law."[10]

What it does mean is a genuine searching judicial inquiry into the linkage of racial group history to current social and economic conditions undergirding the challenged classification. Both its strong pro-

4. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 239 (1995) (Scalia, J., concurring) ("In the eyes of government, we are just one race here."); *id.* at 240 (Thomas, J., concurring) ("The government may not make distinctions on the basis of race."). *But see* Johnson v. California, 543 U.S. 499, 541 (2005) (Thomas, J., dissenting) ("*Adarand*'s statement that 'all racial classifications' are subject to strict scrutiny [only] addressed the contention that classifications favoring rather than disfavoring blacks are exempt" from strict scrutiny); *id.* at 1157 (Thomas, J., dissenting) ("The Constitution has always demanded less [than strict scrutiny for racial classifications] within the prison walls.").

5. 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) (coining this well-known, aptly descriptive phrase). *See also*, Jaideep Venkatesan, *Fatal in Fact: Federal Courts' Application of Strict Scrutiny to Racial Preferences in Public Education*, 6 TEX. F. ON C.L. & C.R. 173 (2001) (arguing that lower federal courts employed "fatal-in-fact" strict scrutiny and thus misapplied Supreme Court precedent which indicated a more contextual form of strict scrutiny).

6. *See* Gratz v. Bollinger, 539 U.S. 244, 301 (2003) (Ginsburg, J., dissenting) ("But where race is considered 'for the purpose of achieving equality,' no automatic proscription is in order.") (quoting Norwalk Core v. Norwalk Redevelopment Agency, 395 F.2d 920, 932 (2d Cir. 1968)); Grutter v. Bollinger, 539 U.S. 306, 327 (2003) ("Not every decision influenced by race is equally objectionable and strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decisionmaker for the use of race in that particular context."); *Adarand*, 515 U.S. at 228 (stating that strict scrutiny takes "relevant differences" into account "to distinguish legitimate from illegitimate uses of race in governmental decisionmaking"); Shaw v. Reno, 509 U.S. 630, 642 (1993) (questioning appellants' invocation of Justice Harlan's "color-blind" constitutionalism and stating that "[t]his Court has never held that race-conscious state decisionmaking is impermissible in *all* circumstances").

7. Brief of Amici Curiae the Coalition for Economic Equity et al. at 22, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241) [hereinafter *Grutter* amicus brief]. Co-author of this Article, Yamamoto, was a signatory to the brief.

8. *Grutter*, 539 U.S. at 328.

9. *See* Gunther, *supra* note 5, at 8 (describing the standard as "scrutiny that [is] 'strict' in theory and fatal in fact").

10. Johnson v. California, 543 U.S. 499, 515 (2005) (quoting *Adarand*, 515 U.S. at 229-30).

ponents, Justices O'Connor,[11] Ginsburg,[12] and Stevens; and its opponents, particularly Justice Kennedy,[13] acknowledge generally the emergence of a new form of strict scrutiny review. Yet, even in its 2005 pronouncements,[14] the Court has not formally articulated a method for implementing its evolving mode of analysis.

What, then, is the new contextual strict scrutiny? And how does it work? With what consequences, practical and jurisprudential? This Article offers the first comprehensive methodological response to the first two questions and lays a foundation for further inquiry into the latter. It does so in three parts.

Part I concisely traces the high Court's movement from a formal strict scrutiny analysis toward a significantly more contextualized approach. It also observes that while the justices and most commentators concur that this shift is manifest, they are uncertain about the method of application and likely consequences.

With this uncertainty as the backdrop, Part II puts meat on the bones by coalescing the Court's various pronouncements into a method for operationalizing the new contextual strict scrutiny for lawyers, judges and scholars. A workable analytical method is particu-

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11. *See infra* notes and accompanying text; *see also* Linda S. Greene, *The* Constitution *and Racial Equality After* Gratz *and* Grutter, 43 WASHBURN L.J. 253, 274 (2004) ("Though Justice O'Connor did offer obeisance to strict scrutiny, her joinder of strict scrutiny with 'context' and 'deference' weakens the standard and signals a retreat from the 'skepticism' about all racial classifications that marked her *Metro* dissent and her *Adarand* opinion.").

12. *See infra* notes and accompanying text. While Justice Ginsburg's opinions demonstrate her commitment to a context-sensitive strict scrutiny, they do not support categorical strict scrutiny for all racial classifications. *See Adarand*, 515 U.S. at 276 (Ginsburg, J., dissenting) ("While I would not disturb the programs challenged in this case . . . I see today's decision as one that allows precedent to evolve, still to be informed by and responsive to changing conditions."). Most recently, Justice Ginsburg was joined by Justices Souter and Breyer challenging as unsettled the Court's pronouncement that strict scrutiny is to be applied to all racial classifications. *See Johnson*, 543 U.S. at 516 (Ginsburg, J., concurring) ("Disagreeing with the Court that 'strict scrutiny' properly applies to any and all racial classifications, but agreeing that the stereotypical classification at hand warrants rigorous scrutiny, I join the Court's opinion.").

13. *See Grutter*, 539 U.S. at 395 (Kennedy, J., dissenting). Justice Kennedy agreed that the Court was no longer applying traditional strict scrutiny:

> It is regrettable the Court's important holding allowing racial minorities to have their special circumstances considered in order to improve their educational opportunities is accompanied by a suspension of the strict scrutiny which was the predicate of allowing race to be considered in the first place. If the Court abdicates its constitutional duty to give strict scrutiny to the use of race in university admissions, it negates my authority to approve the use of race in pursuit of student diversity. The Constitution cannot confer the right to classify on the basis of race even in this special context absent searching judicial review. For these reasons, though I reiterate my approval of giving appropriate consideration to race in this one context, I must dissent in the present case.

Id. Justice Kennedy's dissent indicates that he did not entirely disagree with the Court, noting that he approves of "giving appropriate consideration to race in this one context." *Id.*

14. *See generally Johnson*, 543 U.S. 499.

larly important when the challenged government initiatives are designed to promote present-day equality in the face of discriminatory legacies.

In brief, the contextual strict scrutiny method discerned here entails four analytical inquiries. First, contextual strict scrutiny takes racial group history and current racial conditions into account, as they relate to the specific classification.[15] Second, in taking relevant racial group differences into account, contextual strict scrutiny distinguishes classifications designed to promote inclusion from those designed to exclude particular groups, especially groups historically excluded from the opportunities and benefits of mainstream American life by law and social practice.[16]

Third, contextual strict scrutiny checks whether initiatives designed to address group-based forms of exclusion and inequality may actually be motivated by prejudice or harmful stereotypes.[17] These first three inquiries help to guide the assessment of whether the government's interest is "compelling."

Lastly, in the absence of a governmental design to perpetuate racial exclusion and in the absence of apparent negative stereotyping, contextual strict scrutiny checks to see that the government considered a range of realistic alternatives and, if it did so, then accords a measure of judicial respect to the government's selected means for addressing long-standing group disadvantages.[18]

This analytical method for operationalizing the Court's new contextual strict scrutiny, which is subject to critique and refinement, is drawn largely from language in the opinions of the Justices.[19]

With the method in mind, to facilitate further inquiry, Part III of the article teases out salient jurisprudential implications of the new contextual strict scrutiny. Part III observes that contextual strict scrutiny is quietly momentous because it largely inters the long-standing jurisprudential notion of "law as an autonomous discipline,"[20] particu-

15. *See infra* Part II.A.
16. *See infra* Part II.B.
17. *See infra* Part II.C.
18. *See infra* Part II.D.
19. *See* Grutter v. Bollinger, 539 U.S. 306, 311 (2003) (O'Connor, J., majority opinion); Gratz v. Bollinger, 539 U.S. 244, 298 (2003) (Ginsburg, J., dissenting, joined by Souter, J. and Breyer, J.). The method also draws upon arguments advanced by various amici in *Grutter*. *See Grutter* amicus brief, *supra* note 7, at 5-6.
20. *See, e.g.*, Owen M. Fiss, *The Autonomy of Law*, *available at* http://islandia.law.yale.edu/sela/efiss.pdf ("Law is an autonomous sphere of human activity that serves no master other than justice."); *cf.* Richard A. Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*,

larly in race cases.[21] In 1987, the Court declared in *McKleskey v. Kemp*[22] that vast empirically verified racial disparities in death penalty sentencing were irrelevant to equal protection analysis;[23] it marked the apogee of the Court's acontexual race analysis. In 2003, *Grutter*'s emphasis on history, current racial conditions and "relevant racial differences" informed a contemporary version of Legal Realism[24]—a "racial realism"[25] grounded in a systemic examination of social science studies and documented historical research.[26] *Grutter* stamped the Court's imprimatur on multidisciplinary analysis of race in context.

Most importantly, Part III characterizes contextual strict scrutiny as loudly significant because it marks for the first time the Court majority's controversial rejection of "formal colorblindness" as the lynchpin for equal protection race analysis.[27] Contextual analysis now legitimates in some situations a government race-consciousness that is designed to promote inclusion in realms of social life historically marked by racial exclusion.

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100 HARV. L. REV. 761 (1987). Professor Fiss argued that Law and Economics and Critical Legal Studies ("CLS") were dangerous movements because they "mean the death of the law, as we have known it throughout history, and as we have come to admire it." Owen M. Fiss, *The Death of the Law?*, 72 CORNELL L. REV. 1, 16 (1986); see also Paul D. Carrington's criticism of the emerging CLS movement, *Of Law and the River*, 34 J. LEGAL EDUC. 222 (1984), and the subsequent exchanges between Paul Brest, Guido Calabresi, Paul D. Carrington, Owen M. Fiss, Robert W. Gordon, Phillip E. Johnson, Peter W. Martin, Louis B. Schwartz, and William W. Van Alstyne, in *"Of Law and the River," and of Nihilism and Academic Freedom*, 35 J. LEGAL EDUC. 1 (1984).

21. *See* Elizabeth Mensch, *The History of Mainstream Legal Thought*, *in* THE POLITICS OF LAW 46 (David Kairys ed., 3d ed. 1998) (explaining that by the 1990s, the Supreme Court had "return[ed] to an almost classical conservative formal-activism . . . by refusal to acknowledge historical or social reality as having any relevance to judicial decision making").

22. 481 U.S. 279 (1987).

23. *Id.* at 292-99.

24. *See generally* Joseph William Singer, *Legal Realism Now*, 76 CAL. L. REV. 467 (1988) (book review).

25. *See generally* Derrick Bell, *Racial Realism*, 25 CONN. L. REV. 363 (1992).

26. For a discussion of the extensive historical accounts and social science studies relied upon by the Court in *Grutter*, see *infra* notes and accompanying text. By referring here to "the systematic examination of social science studies" and "documented" history we are distinguishing, and rejecting, the pseudo-scientific ethnography of the 19th Century and early 20th Century that created a racial hierarchy based upon the superiority and inferiority of the races. *See* JOE FEAGIN & CLAIRECE BOOHER FEAGIN, RACIAL AND ETHNIC RELATIONS 6-9 (5th ed. 1996).

27. Contextual strict scrutiny also operates as a rejection of "formal gender-blindness" in gender cases. *See generally* Frances Lee Ansley, *Stirring the Ashes: Race, Class and the Future of Civil Rights Scholarship*, 74 CORNELL L. REV. 993 (1989); David B. Cruz, *Disestablishing Sex and Gender*, 90 CAL. L. REV. 997 (2002); Mary Ellen Gale, *Calling in the Girl Scouts: Feminist Legal Theory and Police Misconduct*, 34 LOY. L.A. L. REV. 691 (2001); Mary Ellen Gale, *Unfinished Women: The Supreme Court and the Incomplete Trans-Formation of Women's Rights in the United States*, 9 WHITTIER L. REV. 445, 488 (1987); Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111 (1997).

At bottom, context matters for the Supreme Court in 2005 when racial equality is at issue. This Article addresses what that means methodologically and jurisprudentially.

I. THE NEW CONTEXTUAL STRICT SCRUTINY

A. "Formal" Strict Scrutiny

The Supreme Court initially developed the strict scrutiny standard of equal protection review to protect members of groups that were denied full participation in the democratic political process.[28] Courts first applied this traditional strict scrutiny standard to invalidate invidious discrimination by the states.[29] Because exclusionary

28. Scholars have contested the origins and content of strict scrutiny review. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 135-80 (1980) (urging closer scrutiny of political process failures, whereby the level of review would reflect the group's influence and access to the political process, as derived from *Carolene Products* Footnote Four). Process failures require close scrutiny because "courts should protect those who can't protect themselves politically." *Id.* at 160; *see also* AVIAM SOIFER, LAW AND THE COMPANY WE KEEP 129-49 (1995). This view locates Equal Protection analysis in group relationships and draws upon an anti-subordination (or anti-caste) principle. *See* CASS R. SUNSTEIN, RADICALS IN ROBES: WHY EXTREMIST RIGHT-WING COURTS ARE WRONG FOR AMERICA 132-33 (2005); Ruth Colker, *Anti-Subordination Above All*, 61 N.Y.U. L. REV. 1003 (1986). *But see* Felix Gilman, *The Famous Footnote Four: A History of the* Carolene Products *Footnote*, 46 S. TEX. L. REV. 163 (2004). Gilman argues the modern understanding of the footnote is a myth, that the actual influence of the footnote is overstated and its fame only more recently acknowledged. *See id.* at 166-67. "Far from being an epochal moment in the history of constitutional law, the footnote was in fact largely ignored by academics and judges until the 1970s or even 1980s. The Court carried out its most important efforts on behalf of minorities without reference to the footnote." *Id.* at 166.

Most judges locate the first explicit pronouncement of strict scrutiny in the Japanese American interment case, Korematsu v. United States, 323 U.S. 214 (1944), in which the Supreme Court declared that racial restrictions are subject to the "most rigorous scrutiny." *Id.* at 216. Despite this pronouncement, the Court in *Korematsu* applied a deferential standard of review in upholding the exclusion orders. *See* ERIC K. YAMAMOTO ET AL., RACE, RIGHTS AND REPARATION: LAW AND THE JAPANESE AMERICAN INTERNMENT 159-66 (2001). Supreme Court cases citing *Korematsu* for the "most rigid scrutiny" proposition include: Mobile v. Bolden, 446 U.S. 55, 113 (1980); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 291 (1978); Hunter v. Erickson, 393 U.S. 385, 392 (1969); Loving v. Virginia, 388 U.S. 1, 11 (1967); McLaughlin v. Florida, 379 U.S. 184, 192 (1964). Justice O'Connor most recently discussed *Korematsu* in the strict scrutiny context in Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 213-18 (1995); *see also* YAMAMATO ET AL., *supra*, at 451-55.

29. *See, e.g.*, Anderson v. Martin, 375 U.S. 399, 404 (1964) ("Race is the factor upon which the statute operates and its involvement promotes the ultimate discrimination which is sufficient to make it invalid."); Goss v. Bd. of Educ., 373 U.S. 683, 687 (1963) ("[R]acial classifications are obviously irrelevant and invidious.") (citations omitted); Burton v. Wilmington Parking Auth., 365 U.S. 715, 727 (1961) (Stewart, J., concurring) (finding unconstitutional Delaware's "legislative enactment as authorizing discriminatory classification based exclusively on color."); Garner v. Louisiana, 368 U.S. 157, 184 (1961) (Douglas, J., concurring) ("Race is an impermissible classification when it comes to parks or other municipal facilities by reason of the Equal Protection Clause."); *see also* McLaughlin v. Florida, 379 U.S. 184 (1964) (invalidating a Florida statute that applied only to a white person and a Negro who habitually occupy the same room at nighttime).

forms of discrimination were widespread and overt, for instance anti-miscegenation laws,[30] courts found it unnecessary to distinguish between legitimate and illegitimate uses of race since Jim Crow segregation laws were patently invidious. Because no compelling justification could be advanced, strict scrutiny review in practice was a formal exercise—"strict in theory and fatal in fact."[31]

In response, states eliminated explicit exclusionary racial references in their laws and programs over time (although some of those laws and programs continued to have discriminatory impacts).[32] Affirmative action programs thereafter became the only state programs expressly to mention race.[33] Whites filing "reverse discrimination" suits began to challenge affirmative action and used strict scrutiny as the weapon to strike down those government programs.[34] In an ironic twist, the strict scrutiny standard became automatically "fatal" for programs designed to advance the interests of historically subordinated "discrete and insular minorities."[35] Formal strict scrutiny review thus faced increasing criticism because of its reflexive striking down of remedial laws without careful analysis of context, purposes, and effects.[36]

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30. *See, e.g.*, *Loving*, 388 U.S. 1 (1967). In fact, among Jim Crow laws, anti-miscegenation laws were the last to fall during the civil rights era. *See* Peter Wallenstein, *Freedom: Personal Liberty and Private Law: Race, Marriage, and the Law of Freedom: Alabama and Virginia, 1860s-1960s*, 70 CHI.-KENT. L. REV. 371, 435 (1994).

31. Gunther, *supra* note 5, at 8.

32. *See* Siegel, *supra* note 27, at 1131-35; Angela Harris, *Equality Trouble: Sameness and Difference in Twentieth-Century Race Law*, 88 CAL. L. REV. 1923, 2002-14 (2000) (describing the transition of state-sponsored discrimination from overt to subtle).

33. *See* Eric K. Yamamoto et al., *Dismantling Civil Rights: Multiracial Resistance and Reconstruction*, 31 CUMB. L. REV. 523, 543-50 (2000-2001). *But see* Gabriel J. Chin, *Jim Crow's Long Goodbye*, 21 CONST. COMMENT. 107 (2004) (cataloging Jim Crow-like statutes still on the books, and concluding that much of the statutory effort to evade *Brown* in the former Confederate states—which remains on the books—could be used to discriminate on the basis of race at present).

34. *See, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986). "Reverse discrimination" challenges to some affirmative action programs were also upheld during this era. *See, e.g.*, Fullilove v. Klutznick, 448 U.S. 448 (1980); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 276 (1978).

35. *See* United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938); *see also* Darren Lenard Hutchinson, *"Unexplainable on Grounds Other Than Race": The Inversion of Privilege and Subordination in Equal Protection Jurisprudence*, 2003 U. OF ILL. L. REV. 615, 637 (2003) (asserting that current equal protection analysis inverts notions of privilege and subordination, thereby reserving the most exacting level of scrutiny for laws burdening historically privileged groups, as opposed to historically subordinated groups).

36. *See Croson*, 488 U.S. at 543-46 (Marshall, J., dissenting); *Wygant*, 476 U.S. at 312 (Stevens, J., dissenting).

B. Movement From "Fatal-in-Fact" Review Towards Contextual Strict Scrutiny

Rumblings of a more flexible, contextualized version of strict scrutiny in the Supreme Court's 1995 *Adarand Constructors, Inc. v. Pena*[37] decision erupted in the Court's 2003 *Grutter v. Bollinger*[38] majority opinion. For the first time, the Court embraced a new context-sensitive form of strict scrutiny analysis—albeit without clear guidance on its practical operation.

1. Recent Opinions

The Court continues to structure its equal protection analysis around the established two-part "compelling interest" and "narrow tailoring" test.[39] Yet a strong shift in jurisprudential positions informing that test can be teased out of recent opinions. In short, a majority of the Court has taken halting, yet significant, steps toward a transition from formal "fatal-in-fact" review to contextual strict scrutiny. It does so by effectively recognizing that "socially constructed racial categories [are] not equal in status. They are highly contextualized, with powerful, deeply embedded social and political meanings."[40]

Long acknowledged as the Court's pivotal swing vote on racial justice issues, recently departed Justice Sandra Day O'Connor authored the plurality and majority opinions in the Court's recent affirmative action cases. In those opinions, she signaled her evolving role in reshaping strict scrutiny jurisprudence. Her opinions in *Richmond v. J.A. Croson Co.*,[41] *Shaw v. Reno*,[42] *Adarand*,[43] *Grutter*,[44] and *Johnson v. California*[45] reveal Justice O'Connor's[46]—and a majority of

37. 515 U.S. 200 (1995).
38. 539 U.S. 306 (2003).
39. Professor Robert Post aptly notes, "[w]hether a classification serves a 'compelling' governmental interest or is 'narrowly tailored' are questions that must be answered primarily by reference to the legal precedents of the Court. . . . The Court can shape [equal protection] controversies . . . by manipulating the definition of a 'compelling' state interest or by construing the meaning of 'narrow tailoring.'" Robert C. Post, *The Supreme Court, 2002 Term: Forward: Fashioning the Legal Constitution: Culture, Courts and Law*, 117 HARV. L. REV. 4, 58 (2003). It is "no accident that strict scrutiny doctrine is framed in terms that are opaque to common usage." *Id.*
40. Neil Gotanda, *A Critique of "Our Constitution in Color-Blind,"* 44 STAN. L. REV. 1, 6 (1991). *See infra* Part III.A. (discussing the concept of "contextual race" in strict scrutiny analysis).
41. 488 U.S. 469.
42. 509 U.S. 630 (1993).
43. 515 U.S. 200.
44. 539 U.S. 306 (2003).
45. 543 U.S. 499.

the Court's—gradual embrace of a more contextual form of strict scrutiny. In tracing a selection of Justice O'Connor's opinions, a less formalistic, more nuanced model of strict scrutiny emerges. What the majority of the Court now says about strict scrutiny reveals a more sophisticated and realistic conceptualization of race and racial inequality in modern U.S. society.[47]

Justice O'Connor's plurality opinion in the 1989 *Croson* case—in sharp contrast with Justice Marshall's dissent—showed little willingness to take account of the history of racial group subordination.[48] Instead, she implicitly treated racial groups as fungible and their history as largely irrelevant to the consideration of individual rights. Justice O'Connor faulted the City of Richmond for denying:

> certain [mainly White] citizens the opportunity to compete for a fixed percentage of public contracts based solely upon their race. To whatever racial group these citizens belong, their "personal rights" to be treated with equal dignity and respect are implicated by a rigid rule erecting race as the sole criterion in an aspect of public decisionmaking.[49]

Justice O'Connor examined the city's affirmative action in contracting programs without significant regard to history or relevant group differences, instructing that "[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color."[50] Justice O'Connor, therefore, characterized race as "irrelevant."[51] Under this

46. Professor Kenneth Karst observes that when it comes to principles of formal colorblindness, Justice O'Connor's opinions illustrate that, "she can take this model or leave it alone." *See* Kenneth Karst, *Justice O'Connor and the Substance of Equal Citizenship*, 55 SUP. CT. REV. 357 (2003). In the affirmative action cases in particular, Justice O'Connor's more recent opinions indicate less willingness to accept the formal strict scrutiny model. *See Johnson*, 543 U.S. 499; *see infra* Part II.

47. How Justice O'Connor's replacement Justice Samuel Alito and former Chief Justice Rehnquist's replacement Chief Justice John Roberts respond is, of course, an open question. Significantly, in their recent confirmation hearings, Justice Alito and Chief Justice Roberts emphasized their fealty to stare decisis. *See* Transcript of U.S. Senate Judiciary Committee Hearing on Judge Samuel Alito's Nomination to the Supreme Court (Jan. 10, 2006), *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/01/10/AR2006011000781.html; Transcript U.S. Senate Judiciary Committee Hearing On the Nomination of John Roberts to be Chief Justice of the Supreme Court (Sept. 13, 2005), *available at* http://www.washingtonpost.com/wp-dyn/content/article/2005/09/13/AR2005091300876.html.

48. *See* Thomas Ross, *The Richmond Narratives*, 68 TEX. L. REV. 381 (1989).

49. City of Richmond v. J.A. Croson Co., 488 U.S. at 493 (1989).

50. *Id.* at 494 (quoting Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 289-90); *see also* PATRICIA WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS (1992).

51. *Croson*, 488 U.S at 495. ("[A] watered-down version of equal protection review effectively assures that race will always be relevant in American life, and that the ultimate goal of

approach to formal strict scrutiny, other than as an extremely narrow remedy for direct and continuing racial discrimination by a defendant,[52] there are no permissible uses of race in government decisionmaking. Because all racial groups are fungible, any use of race is necessarily unlawful discrimination.[53]

Yet, upon closer examination, somewhat ironic and limited moments of context informed Justice O'Connor's overridingly formalistic tone. Looking at the majority-Black composition of the Richmond City Council, Justice O'Connor found that Blacks were no longer a discrete and insular minority in need of the judiciary's protection.[54] By attempting to explain the relative power of Blacks in city politics, Justice O'Connor engaged in a limited discussion of racial context.[55] In doing so, Justice O'Connor slightly opened the door to affirmative action, but with a high threshold—in the "extreme case, some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion."[56]

Four years later, Justice O'Connor signaled a further shift from formal towards contextual strict scrutiny in *Shaw v. Reno*.[57] In ruling on a voter redistricting challenge, Justice O'Connor's majority opinion opened in largely formalistic tones. Race is an irrelevant factor in government decisionmaking because, "[r]acial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political sys-

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eliminating entirely from governmental decisionmaking such irrelevant factors as a human being's race will never be achieved.") (internal quotations omitted).

52. *See id.* at 524 (Scalia, J., concurring) ("In my view there is only one circumstance in which the States may act by race to 'undo the effects of past discrimination': where that is necessary to eliminate their own maintenance of a system of unlawful racial classification.").

53. *See* Reginald Oh, *Re-Mapping Equal Protection Jurisprudence: A Legal Geography of Race and Affirmative Action*, 53 AM. U. L. REV. 1305, 1307 (2004) (explaining *Croson*'s significance as "the way the Court produced and mapped a new social reality of race relations in America. In the decision, the Court asserted that African Americans had achieved racial parity with Whites, and as such, that African Americans could no longer rely on a history of racial discrimination to justify the enactment of affirmative action programs.").

54. *See Croson*, 488 U.S. at 495-96 ("In this case, blacks constitute approximately 50% of the population of the city of Richmond. Five of the nine seats on the city council are held by blacks. The concern that a political majority will more easily act to the disadvantage of a minority based on unwarranted assumptions or incomplete facts would seem to militate for, not against, the application of heightened judicial scrutiny in this case.") (internal citations omitted).

55. Justice O'Connor, however, omitted the deeper social and historical context of White racism against Blacks in all aspects of public life that Justice Marshall wove throughout his dissent. *See Croson*, 488 U.S. at 528-44 (Marshall, J., dissenting).

56. *Id.* at 509.

57. 509 U.S. 630, 657 (1993).

tem in which race no longer matters."[58] Building upon her moment of limited context in *Croson*, however, Justice O'Connor observed that "[t]his Court never has held that race-conscious state decisionmaking is impermissible in *all* circumstances."[59]

The majority's discernable shift toward contextual strict scrutiny emerged in 1995 with its pronouncement in *Adarand* that the Court would take relevant differences into account in assessing race-as-a-factor affirmative action in federal contracting. Strict scrutiny "does not treat dissimilar race-based decisions as though they were equally objectionable."[60]

Writing for the majority, Justice O'Connor announced that strict scrutiny accounts for relevant group differences to "distinguish legitimate from illegitimate uses of race in governmental decisionmaking."[61] Justice O'Connor stressed the importance of a searching review "in order to ferret out classifications in reality malign, but masquerading as benign."[62] The Court signaled that each racial classification would be viewed in light of its particular setting.

Justice O'Connor also disputed the familiar characterization that strict scrutiny is strict in theory, but fatal in fact.[63] Rather, the decision to apply strict scrutiny "says nothing about the ultimate validity of any particular law; that determination is the job of the court applying strict scrutiny."[64]

In *Adarand*, Justice O'Connor unveiled her evolving socio-historical view of strict scrutiny—one that allows governments to address the "lingering effects" of racism. The "unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and govern-

58. *Id.* The Court derided "impermissible racial stereotypes" where

> [a] reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid. It reinforces the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls. We have rejected such perceptions elsewhere as impermissible racial stereotypes. *Id.* at 647.

59. *Id.* at 642.

60. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 228 (1995).

61. *Id.; see also* Grutter v. Bollinger, 539 U.S. 306, 334 ("[W]e adhere to *Adarand*'s teaching that the very purpose of strict scrutiny is to take such 'relevant differences into account.'") (citations omitted).

62. *Adarand*, 515 U.S. at 275 (Ginsburg, J., dissenting) (reiterating the majority's viewpoint).

63. *Id.* at 237.

64. *Id.* at 230.

ment is not disqualified from acting in response to it."[65] This language in *Adarand* highlighted Justice O'Connor's emerging contextual analysis of racial classifications and opened the door for close examination of history and current social conditions. Yet, in application, the Court's majority struck down the affirmative action program in federal contracting.

Dissenting to the outcome in *Adarand*, Justice Stevens chided the majority in its assessment of the facts for ignoring the obvious "difference between a 'No Trespassing' sign and a welcome mat."[66] For Justice Stevens, racial groups are not fungible. Racial groups have differing histories and present-day social and economic circumstances. Courts, therefore, should not treat "dissimilar race-based decisions as though they were equally objectionable."[67]

Building on the contextual foundation established in *Adarand*, explicit language from Justices O'Connor and Ginsburg's *Grutter* and *Gratz* opinions solidified the movement by the majority toward a new contextual strict scrutiny. Writing for the *Grutter* majority (which included Justices Stevens, Souter, Ginsburg and Breyer), Justice O'Connor declared that "[c]ontext matters when reviewing race-based governmental action under the Equal Protection Clause."[68] Rejecting formal strict scrutiny, she explained that racial minority status does matter, because "[j]ust as growing up in a particular region or having particular professional experiences is likely to affect an individual's views, so too is one's own, unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters."[69]

Justice Ginsburg's concurring opinion also evinced a contextual approach to strict scrutiny review.[70] It carefully described differences in the social situations of minority students attributable to past and current discrimination.[71] Together, the O'Connor and Ginsburg opinions firmly embraced contextual, rather than formal, review of racial classifications.

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65. *Id.* at 237.
66. *Id.* at 245 (Stevens, J., dissenting).
67. *Id.* (Stevens, J., dissenting)
68. Grutter v. Bollinger, 593 U.S. 306, 327 (2003) (emphasis added).
69. *Id.* at 333.
70. *See infra* Part II.A. (describing the particulars of Justice Ginsburg's embrace of a contextual form of strict scrutiny).
71. *See Grutter*, 539 U.S. at 346 (Ginsburg, J., concurring) ("[I]t remains the current reality that many minority students encounter markedly inadequate and unequal educational opportunities.").

The opponents of contextual strict scrutiny, too, acknowledged its emergence. Dissenting in *Grutter*, Justice Kennedy observed that the Court's deference to the law school's use of race in its admissions program was "antithetical to strict scrutiny, not consistent with it."[72] The Court's analysis was "accompanied by a suspension of strict scrutiny."[73] Despite these pronouncements, Kennedy indicated that he did not disagree entirely with the majority's heightened scrutiny analysis—"[t]here is no constitutional objection to the goal of considering race as one modest factor among many others to achieve diversity."[74] Indeed, Kennedy even acknowledged that in a given "special context"[75] race may be taken into consideration.

Former Chief Justice Rehnquist likewise observed that the Court had shifted towards a more contextual review of racial classifications. Chief Justice Rehnquist noted that "[b]efore the Court's decision today, [the Court] consistently applied the same strict scrutiny analysis regardless of the government's purported reason for using race and regardless of the setting in which race was being used."[76] Like Justice Kennedy, Chief Justice Rehnquist recognized the Court's higher level of deference to government decisionmakers' judgments about the need for equality measures. Despite the majority's "recit[ation of] the language of our [previous] strict scrutiny analysis, its application of that review is unprecedented in its deference."[77] At the end of his dissent, Chief Justice Rehnquist conceded that the majority's partially deferential posture fits within the Court's new strict scrutiny analysis: "The Court, in an unprecedented display of deference *under our strict scrutiny analysis*, upholds the Law School's program."[78]

2. Commentators Recognize a Shift

Commentators from varying political perspectives also acknowledge the Court's discernable shift toward a more race-conscious, context-sensitive strict scrutiny analysis. For example, law and economics Professor Richard Epstein observes that, "the defenders of the [for-

72. *Id.* at 394 (Kennedy, J., dissenting); *see also id.* at 388 (Kennedy, J., dissenting) ("The majority today refuses to be faithful to the settled principle of strict review.").

73. *Id.* at 395 (Kennedy, J., dissenting).

74. *Id.* at 392-93 (Kennedy, J., dissenting); *see also id.* at 395 (Kennedy, J., dissenting) (offering his approval of "giving appropriate consideration to race in this one context").

75. *Id.* at 395 (Kennedy, J., dissenting).

76. *Grutter*, 539 U.S. at 380 (Rehnquist, C.J., dissenting) ("We likewise rejected calls to apply more lenient views based on the particular setting in which race is being used.").

77. *Id.* (Rehnquist, C.J., dissenting).

78. *Id.* at 387 (Rehnquist, C.J., dissenting) (emphasis added).

mal] color-blind principle regarded the outcome [in *Grutter*] as a major defeat, which for them it indeed was."[79] Professor Guy-Uriel Charles agrees that, "the Court rejected the argument that the Constitution is colorblind and that classifications based upon race . . . are per se unconstitutional."[80]

Others have interpreted *Grutter*'s seemingly far-reaching language on strict scrutiny as more smoke than fire.[81] Professor Barbara Flagg, for instance, sees *Grutter*'s smoke in language of a new kind of strict scrutiny, but fails to see the actual fire.[82] The Court's "application of strict scrutiny tends to implement a principle of colorblindness,"[83] rather than a new kind of grounded, racial group awareness.

Other commentators acknowledge that the Court's majority altered traditional, formal strict scrutiny analysis, but perceive the change to be inadequate. For instance, Professor Pauline Kim is cognizant of a shift, but is also frustrated by what she views as the Court's continuing reliance on tenets of formal strict scrutiny.[84]

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79. Richard A. Epstein, *Of Same Sex Relationships and Affirmative Action: The Covert Libertarianism of the United States Supreme Court*, 12 SUP. CT. ECON. REV. 75, 99 (2004). Professor Epstein recognizes that formal colorblindness "makes it appear that all racial classifications are equally suspect and that the direction of the discrimination simply does not matter." *Id.* at 102. As Epstein acknowledges, "[t]hat conclusion is not sustainable once the attention is placed instead on the institutional matters. There has been no history of black domination in the United States that would lead inexorably to the conclusion that any racial classifications in their favor are suspect." *Id.*

80. Guy-Uriel E. Charles, *Affirmative Action and Colorblindness from the Original Position*, 78 TUL. L. REV. 2009, 2010 (2004) ("[T]he Court adopted the right approach in *Grutter* and justly rejected the allure of the colorblindness principle."); *see also* Angelo N. Ancheta, *Contextual Strict Scrutiny and Race-Conscious Policy Making*, 36 LOY. U. CHI. L.J. 21 (2004).

81. *See* David Kairys, *More or Less Equal*, 13 TEMP. POL. & CIV. RTS. L. REV. 675, 683 n.56 (2004) ("*Grutter* did not alter the approach or framework."); Keith R. Walsh, *Color-blind Racism in* Grutter *and* Gratz, 24 B.C. THIRD WORLD L.J. 443 (2004) (reviewing EDUARDO BONILLA-SILVA, RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY (2003)).

82. Professor Flagg, who has argued against a jurisprudence of formal colorblindness, posits that despite some of the majority's language, its opinion in application advances the irrelevance of race by invoking individualism and personal rights as pivotal concepts. *See* Barbara J. Flagg, *Diversity Discourses*, 78 TUL. L. REV. 827, 839 (2004).

83. *Id.* at 831. Professor Flagg has provided many compelling insights into race and law in America. This particular observation, however, offered soon after the *Grutter* decision, appears to miss the mark. As this Part later demonstrates, for the Court's majority, contextual strict scrutiny is not simply a new short-hand for formal colorblindness. Contextual strict scrutiny does not treat race as "irrelevant." Flagg argues that the *Grutter* opinion is deeply intertwined with "images of abstract individualism." *Id.* at 832. However, as distilled in this Article, the emerging contextual strict scrutiny directs courts to recognize the relevance of race, without locking them into a narrow framework of abstract individualism.

84. *See* Pauline T. Kim, *The Colorblind Lottery*, 72 FORDHAM L. REV. 9 (2003). Professor Kim explains that in strictly scrutinizing the Michigan Law School program, the "*Grutter* Court took a step away from embracing formal colorblindness as a deciding principle. Nevertheless, the current structure of equal protection analysis, which the Court's decision in *Grutter* left in-

In contrast, other scholars perceive a significant and salutary shift. Following "*Grutter*, it is now more apparent that strict scrutiny is a more flexible and functional inquiry"[85] and no longer the fatal-in-fact, formal strict scrutiny. "*Grutter* clarified. . . that the concept of strict scrutiny as a mechanical and wooden test" was incorrect.[86]

From the post-*Grutter* cacophony, one point rings clear: formal strict scrutiny no longer exists, and some form of a contextualized ends-means analysis has emerged in its place. Neither the courts nor commentators, however, agree on what the new strict scrutiny looks like or how it operates. Disaffected Justices Rehnquist and Kennedy, for instance, have voiced serious concern that the new strict scrutiny will amount to a green light for all race-as-a-factor programs.[87] Justice Kennedy warned that the *Grutter* majority, "in a review that [was] nothing short of perfunctory, accept[ed] the University of Michigan Law School's assurances that its admissions process [met] with constitutional requirements"[88]—the judicial equivalent of a rubber stamp.

The Court's language in *Grutter* and *Johnson v. California*[89], however, and its invalidation of Michigan's undergraduate affirmative action program in *Gratz*, reveal these fears to be unfounded or at least premature. Indeed, post-*Grutter* and *Gratz*, lower courts have employed contextual strict scrutiny—albeit with some uncertainty—both to uphold and to invalidate race-conscious programs.[90]

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tact, lends particular weight to the notion of colorblindness." *Id.* at 11. This is so because, under traditional strict scrutiny review, race is singled-out for the most heightened standard of review. *Id.* "By treating race as exceptional, the Court's jurisprudence suggests that any use of race is inherently wrong, regardless of the purpose, context, or effects of the policy in question." *Id.* at 11-12. Professor Kim also observes that "the multiple opinions in *Grutter* and *Gratz* reveal deep tensions within the Court about the legitimacy of race-conscious policies and the meaning of equal protection." *Id.* at 9. Kim explains that "conflict over the notion of colorblindness" is at the heart of the Justices' disagreement. *Id.* at 10.

85. Luis Fuentes-Rohwer & Guy-Uriel E. Charles, *In Defense of Deference*, 21 CONST. COMMENT. 133, 166 (2004).

86. *Id.* at 166.

87. Dissenting in *Grutter*, Justice Kennedy found "regrettable the Court's important holding . . . a suspension of the strict scrutiny which was the predicate of allowing race to be considered." Grutter v. Bollinger, 539 U.S. 306, 395 (2003) (Kennedy, J., dissenting). According to Former Chief Justice Rehnquist, although the majority "recite[d] the language of our strict scrutiny analysis, its application of that review is unprecedented in its deference." *Id.* at 380 (Rehnquist, C.J., dissenting). Justice Thomas derided the majority's application of the standard of review as "antithetical to strict scrutiny." *Id.* at 362 (Thomas, J., dissenting).

88. *Id.* at 388-98 (Kennedy, J., dissenting).

89. 543 U.S. 499 (2005).

90. Contextual strict scrutiny will be applied to uphold what are determined to be meritorious programs that address real world inequalities. *See, e.g.*, Smith v. Univ. of Washington, Law School, 392 F.3d 367 (9th Cir. 2004) (upholding University's use of race in law school admissions); Petit v. Chicago, 352 F.3d 1111 (7th Cir. 2003) (finding the City of Chicago proved a

Because of this uncertainty[91] and the significance of the stakes, in the next section, we distill language from various opinions before and through Grutter and offer an analytical method for operationalizing the new contextual strict scrutiny.

II. A METHOD FOR OPERATIONALIZING CONTEXTUAL STRICT SCRUTINY

The 2003 *Grutter* Court profoundly marked the legal landscape: "*[c]ontext matters* when reviewing race-based governmental action under the Equal Protection Clause."[92] Strict scrutiny "is designed to provide a framework for carefully examining the importance and sincerity of the reasons advanced by the governmental decisionmaker for the use of race *in that particular context.*"[93]

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compelling operational need for a diverse police department and satisfied narrow tailoring where procedures minimized harm to members of any racial group).

Conversely, contextual strict scrutiny will be applied to invalidate programs that do not satisfy the rigorous ends-means analysis. *See* Gratz v. Bollinger, 539 U.S. 244 (2003) (invalidating University's use of race in undergraduate admissions because it was not narrowly tailored to achieve the compelling state interest in diversity); Cavalier v. Caddo Parish School Bd., 403 F.3d 246 (5th Cir. 2005) (invalidating magnet school's race-based admissions policy because it was not narrowly tailored to remedy the present effects of past segregation).

91. The "uncertainty" referenced here concerns the analytical method for applying the new strict scrutiny. The Court's earlier uncertainty about whether strict scrutiny applied at all in affirmative action cases, *see, e.g.,* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978), was resolved in *Croson* and *Adarand.*

92. *Grutter,* 539 U.S. at 327 (emphasis added). *See* Gomillion v. Lightfoot, 364 U.S. 339, 343-44 (1960) ("[I]n dealing with claims . . . which derive content by an interpretive process of inclusion and exclusion, it is imperative that generalizations, based on and qualified by the concrete situations that gave rise to them, must not be applied out of context in disregard of variant controlling facts.").

93. *Grutter,* 539 U.S. at 327 (emphasis added). The Court in *Grutter* and Justice Ginsburg in *Gratz* undertook a careful examination of the classifications in context. *See id.* at 330 (recognizing that the Law School's admissions program fosters "cross-racial understanding," helps eliminate racial stereotypes, and encourages minorities and non-minorities to better understand each other); *id.* at 333 (acknowledging current racial conditions by noting that "[j]ust as growing up in a particular region or having particular professional experiences is likely to affect an individual's views, so too is one's own, unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters"); Brief of Amici Curiae NAACP Legal Defense and Educational Fund, Inc. and the American Civil Liberties Union, at 3-4, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241) ("Racial segregation and isolation continue to be a menace in this society, producing and perpetuating sharp disparities in the quality of life and opportunities for advancement of African Americans. Their manifestation in the continued scourge of residential segregation leave institutions of higher education as one of the few venues for meaningful cross-racial interaction.").

Justice Ginsburg cited numerous historical and empirical studies and articles for her basic proposition that "[i]n the wake of a system of racial caste only recently ended, large disparities endure." Gratz v. Bollinger, 539 U.S. 244, 299 (2003) (Ginsburg, J., dissenting) (internal quotations and citation omitted). Ian Ayres, *Further Evidence of Discrimination in New Car Negotiations and Estimates of its Cause,* 94 MICH. L. REV. 109 (1995) (noting that prejudice and bias still exists in routine consumer transactions such as purchasing a vehicle); James E. Ryan, *Schools,*

The method we proffer here for assessing how context matters in strict scrutiny review is comprised of four analytical inquiries. The first explores group histories as they shape current racial conditions informing the challenged initiative. The second assesses whether the initiative is designed to promote group inclusion rather than exclusion, particularly in situations where a group historically has been excluded by law and social practice. The third query asks whether even an intended inclusionary program is rooted in harmful stereotypes. These first three inquiries are particularly useful in deciding if the government's interest is "compelling." The final assessment focuses on the appropriateness of an added measure of judicial respect to be accorded the government actor's chosen means for achieving inclusionary goals in light of history and current conditions.

A. Contextual Strict Scrutiny Takes Serious Account of the Racial Context of the Specific Classification

1. Racial Group History as it Relates to the Racial Classification

Strict scrutiny analysis now considers context by meaningfully examining racial group history in relation to current social and economic conditions supporting racial classifications.[94] An example of this kind

Race, and Money, 109 YALE L.J. 249 (1999) (finding that African American and Hispanic schoolchildren are often educated in less adequate institutions compared to their non-minority counterparts); *see, e.g.*, U.S. Dept. of Commerce, Bureau of Census, Statistical Abstract of the United States: 2002, p. 368 (2002) (Table 562) (noting the disproportionate levels of unemployment by race); U.S. Dept. of Commerce, Bureau of Census, Poverty in the United States: 2000, p. 291 (2001) (Table A) (noting the high poverty rates of minorities). Justice Ginsburg also acknowledged the importance of recalling the racial group history of African Americans when dealing with present-day problems, citing an article by Professor Stephen L. Carter. *See Gratz*, 539 U.S. at 301 (citing Stephen L. Carter, *When Victims Happen to be Black*, 97 YALE L.J. 420, 433-34 (1988) ("To pretend . . . that the issue presented in *Bakke* was the same as the issue in *Brown* is to pretend that history never happened and that the present doesn't exist."). Additionally, Justice Ginsburg relied on empirical evidence for the proposition that in "any admissions process where applicants greatly outnumber admittees, and where white applicants greatly outnumber minority applicants, substantial preferences for minority applicants will not significantly diminish the odds of admission facing white applicants." *Gratz*, 539 U.S. at 303 (Ginsburg, J., dissenting) (citing Goodwin Liu, *The Causation Fallacy: Bakke and the Basic Arithmetic of Selective Admissions*, 100 MICH. L. REV. 1045, 1049 (2002)).

94. Contextual strict scrutiny reflects what historian Eric Foner describes as the continuing significance of the historic memory and current reality of racial inequality. *See* Expert Report of Eric Foner, Grutter v. Bollinger, 137 F. Supp. 2d 874 (E.D. Mich. 1999) (No. 97-75321), *available at* http://www.umich.edu/~urel/admissions/legal/expert/foner.html (last visited Mar. 12, 2005) ("In part because of historic memory, and in part because of current reality, race continues to affect outlook, perception, and experience."); *see also* Sharon K. Hom & Eric K. Yamamoto, *Collective Memory, History, and Social Justice*, 47 UCLA L. REV. 1747 (2000) (describing how collective memory is shaped by a contested struggle over history in defining specific acts of injustice).

of analysis, pre-*Grutter*, is Justice Marshall's dissent in *Richmond v. J.A. Croson Co.*[95] Marshall detailed the "disgraceful history" of race in Richmond as it related to the city's contractor set-aside ordinance.[96] Richmond's "deliberate diminution of black residents' voting rights, resistance to school desegregation, and publicly sanctioned housing discrimination"[97] collectively generated the need for city intervention in the form of the contractor set-aside legislation. More specifically, Justice Marshall catalogued the history of African American exclusion from city contracting to set the contextual foundation for the ordinance.[98] It was only "against this backdrop of documented . . . discrimination" that Richmond's program could be properly understood.[99]

By contrast, the formal strict scrutiny approach tended to ignore racial group histories and thereby to miss stark inequalities.[100] The majority opinions in *Croson* largely ignored the history of African Americans in Richmond,[101] the former capital of the Confederacy, in order to find that the city initiative failed strict scrutiny. Justice O'Connor's plurality opinion discounted the city's "sorry history" by disconnecting it from the city initiative and then declaring it legally irrelevant "standing alone."[102] While "there is no doubt that the sorry history of both private and public discrimination in this country has contributed to a lack of opportunities for black entrepreneurs, this observation, standing alone, cannot justify a rigid racial quota in the awarding of public contracts in Richmond, Virginia."[103]

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95. 488 U.S. 469 (1989) (Marshall, J., dissenting).

96. *Id.* at 528-32 (Marshall, J., dissenting). Justice Marshall found "deep irony in second-guessing Richmond's judgment on this point. As much as any municipality in the United States, Richmond knows what racial discrimination is; a century of decisions by this and other federal courts has richly documented the city's disgraceful history of public and private racial discrimination." *Id.* at 529.

97. *Id.* at 544 (Marshall, J., dissenting).

98. *Id.* at 534-35. "[N]ot a single person who testified before the city council denied that discrimination in Richmond's construction industry had been widespread." *Id.* Specifically, Richmond's program was a response to "the general conduct in the construction industry in this area, and the State and around the nation . . . in which race discrimination and exclusion on the basis of race is widespread." *Id.* at 535 n.5.

99. *Id.* at 530 (Marshall, J., dissenting). *See* Ross, *supra* note 48.

100. Contextual strict scrutiny considers that "[the Court's] jurisprudence ranks race a 'suspect' category, 'not because race is inevitably an impermissible classification, but because it is one which usually, to our national shame, has been drawn for the purpose of maintaining racial inequality.'" Gratz v. Bollinger, 539 U.S. 244, 301 (2003) (Ginsburg, J., dissenting) (quoting Norwalk Core v. Norwalk Redev. Agency, 395 F.2d 920, 931-32 (2d Cir. 1968)).

101. *See generally* Robert Pratt, *Simple Justice Denied: The Supreme Court's Retreat from School Desegregation in Richmond, Virginia*, 24 RUTGERS L.J. 709 (1993); Ross, *supra* note 48.

102. *Croson*, 488 U.S. at 499 (O'Connor, J., plurality opinion).

103. *Id.*

Concurring, Justice Scalia described affirmative action as a "decision-making process infected with racial bias."[104] In addition to ignoring racial group history in Richmond, Scalia relied on racial fungibility to justify striking down the city's program. "The relevant proposition is not that it was blacks or Jews, or Irish who were discriminated against, but that it was individual men and women, 'created equal' who were discriminated against."[105] Differing group histories of subordination and present racial conditions were moot in Scalia's a-contextual formulation.[106]

In a contested, post-*Grutter* case, the Fifth Circuit's majority and dissent dueled at the threshold over the relevance of racial group history to the court's strict scrutiny analysis. In *Cavalier v. Caddo Parish School Board*,[107] a divided Fifth Circuit panel held the school district's magnet school race-as-a-factor admissions policy unconstitutional. The majority generally acknowledged and then expressly declared irrelevant the long history of racial segregation in Louisiana schools that had earlier led to a consent decree ordering racial admissions targets as a remedy for specific past acts of racial discrimination.[108] Upon declaring the history of exclusion towards African Americans irrelevant and because court supervision of the consent decree had ended, the majority found no compelling evidence to support the city's racial integration component of the admissions policy for the magnet school.[109]

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104. *Id.* at 528 (Scalia, J., concurring).

105. *Id.; see also* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 239 (1995) (Scalia, J., concurring) ("Individuals who have been wronged by unlawful racial discrimination should be made whole; but under our Constitution there can be no such thing as either a creditor or debtor race."). Justice Scalia has long countenanced the use of race only in the "most dire emergency situations," which, in his view, are apparently not tied to histories of racial group oppression. *See* Linda S. Greene, *The Constitution and Racial Equality After* Gratz *and* Grutter, 43 WASHBURN L.J. 253, 272 (2004).

106. *See* Ross, *supra* note 48, at 404; Alan Freeman, *Antidiscrimination Law From 1954 to 1989: Uncertainty, Contradiction, Rationalization, Denial, in* THE POLITICS OF LAW, *supra* note 21, at 285.

107. 403 F.3d 246 (5th Cir. 2005).

108. *Id.* at 248-50. The consent decree had its roots in a 1965 lawsuit filed by seven Black children against the school district. *Id.* at 248. In 1981, the consent decree directed the school system to desegregate, and called for the establishment of three new magnet schools with a "projected racial enrollment." *Id.* at 249.

109. *Id.* at 258-61. "There is no evidence on the record of current segregation within the school system . . . or vestiges of past discrimination." *Id.* The majority admitted in a footnote that "[a]t oral argument, counsel for the School Board suggested two vestiges of past segregation: the fact that the school system still has several one-race schools and the test-score disparity between white and black students. As this 'evidence' is not in the record and was suggested for the first time at oral argument, it is not properly before us." *Id.* at 259 n.14.

Judge Weiner's dissent chastised the majority for its largely ahistorical strict scrutiny analysis,[110] declaring racial history crucial to a realistic understanding of the issues. His dissent focused on the school board's comprehensive and continuing efforts "generally to eradicate all vestiges of past segregation."[111] When viewed in this historical framework, the "school board's discretionary decision to retain its magnet school admissions policy as an integral tool in the Board's ongoing struggle to achieve its [originally] court-ordered, yet-unrealized goal of total desegregation easily passes our scrutiny."[112] Judge Weiner observed that the cessation of court supervision of magnet schools under the consent decree "is *not* the equivalent of a court declaration that the persistent vestiges of more than a century of school segregation have ceased to plague a substantial majority of Caddo's minority school students."[113] The court's "review of the Caddo Magnet admissions policy must take into account the timing and history of that policy and the circumstances under which the school district operates."[114]

Croson and *Cavalier* both illustrate the difference between formal and contextual strict scrutiny. The latter approach, reflected in Justice Marshall's and Judge Weiner's opinions and now sanctioned by the Court's majority, examines the linkage of the historical background of the racial groups involved to the specific racial classification at issue. This linkage is significant. Mounting scholarly work identifies the causal relationship between group histories of racial discrimination and current social and economic disparities that inform a need for modern race-conscious measures.[115]

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110. *See id.* at 261-64 (Weiner, J., dissenting).

111. *Id.* at 261-63 (Weiner, J., dissenting).

112. *Id.*; *see also* Eric K. Yamamoto, *Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-Civil Rights America*, 95 MICH. L. REV. 821, 821-27 (1997) (describing a similar challenge by Chinese Americans to an early school desegregation order).

113. *Cavalier*, 403 F.3d at 261-63 (Weiner, J., dissenting).

114. *Id.* (Weiner, J., dissenting).

115. *See* Kim Forde-Mazrui, *Taking Conservatives Seriously: A Moral Justification for Affirmative Action and Reparations*, 92 CAL. L. REV. 683, 697-706 (2004) (outlining the causal connection between racial disparities and past discrimination); *id.* at 704 ("Given the history of discrimination against blacks in this country, the persistence of substantial disparities between whites and blacks is not surprising.") Deborah C. Malamud, *Affirmative Action, Diversity and the Black Middle Class*, 68 U. COLO. L. REV. 939, 967 (1997) (discussing past and current examples of housing and employment discrimination as the source of current inequality for middle-class African Americans); *infra* Part III.B.1 (discussing the importance of social science studies and data gathering to "racial realism").

For instance, during the *Grutter*[116] trial, historian John Hope Franklin testified about crucial racial matters that would be deemed irrelevant by a formal strict scrutiny approach. He described in depth African Americans' stark history of educational inequalities[117] and noted that "recent challenges to race-sensitive admissions programs were the latest in a long line of improvisational maneuvers in furtherance of segregation."[118]

Additionally, amicus curiae offered evidence on prominent law schools in California and Texas showing that, consistent with Professor Franklin's observation, eliminating race-conscious admissions policies at law schools inevitably re-segregates those institutions.[119] Dismantling race-as-a-factor admissions policies "means turning back the clock on more than three decades of progress in legal education made possible by the Civil Rights Movement."[120]

As one commentator aptly concluded, "[n]o nation can enslave a race of people for hundreds of years, set them free bedraggled and penniless, pit them without assistance in a hostile environment against privileged victimizers, and then reasonably expect the gap between the heirs of the two groups to narrow. Lines, begun parallel and left alone, can never touch."[121] Contextual strict scrutiny acknowledges the significance of racial group history and directs courts to seriously examine that history as it relates to racial conditions informing a particular classification.

2. Current Racial Conditions as They Relate to Racial Classification

The link between history and current conditions provides key context for assessing potentially racially exclusionary actions or attempts to address their consequences. For Professor Alan Freeman this judicial inquiry "focuses on the persistence of conditions traditionally associated" with racially discriminatory practices—exclusion

116. Grutter v. Bollinger, 137 F. Supp. 2d 821 (E.D. Mich. 2001).

117. *Grutter* amicus brief, *supra* note 7, at 13.

118. *Id.* (quoting John Hope Franklin Transcript, at 155 ¶¶ 4-11, in Grutter v. Bollinger, No. 97-75928 (E.D. Mich. 2001)).

119. *Id.* at 13-14 (citing William C. Kidder, *The Struggle for Access from Sweatt to Grutter: A History of African American, Latino, and American Indian Law School Admissions, 1950-2000*, 19 HARV. BLACKLETTER L.J. 1 (2003)).

120. *Grutter* amicus brief, *supra* note 7, at 15; *see generally* CHARLES R. LAWRENCE III & MARI J. MATSUDA, WE WON'T GO BACK: MAKING THE CASE FOR AFFIRMATIVE ACTION (1997).

121. RANDALL ROBINSON, THE DEBT: WHAT AMERICA OWES TO BLACKS 74 (2000).

from jobs, neighborhoods, schools, politics and government contracts.[122]

During the *Grutter* trial, Professor Thomas Sugrue presented evidence on the overwhelming level of residential and educational segregation currently experienced by African Americans.[123] In uplifting schools as rare sites of communal interaction, Professor Sugrue concluded that "there are unfortunately few places in American society where people of different backgrounds interact, learn from each other, and struggle to understand their differences and discover their commonality."[124]

Drawing upon this evidence, Justice Ginsburg's dissent in *Gratz* highlighted contemporary forms of racial exclusion—a distinctly unequal racial playing field:

> Unemployment, poverty, and access to health care vary disproportionately by race. Neighborhoods and schools remain racially divided. African-American and Hispanic children are all too often educated in poverty-stricken and underperforming institutions. Adult African-Americans and Hispanics generally earn less than whites with equivalent levels of education. Equally credentialed job applicants receive different receptions depending on their race. Irrational prejudice is still encountered in real estate markets and consumer transactions.[125]

Justice Ginsburg's dissent extended beyond mere recognition of contemporary forms of exclusion. It also identified the roots of exclusionary barriers: "*Bias both conscious and unconscious*, reflecting traditional and unexamined habits of thought, keeps up barriers that must come down if equal opportunity and nondiscrimination are ever genuinely to become this country's law and practice."[126]

Formal colorblindness in strict scrutiny review largely ignores this kind of evidence of continuing discrimination in America and result-

122. Alan Freeman, *Antidiscrimination Law: The View From 1989*, *in* THE POLITICS OF LAW 125 (David Kairys ed., 2d ed. 1991).

123. *See* Expert Report of Thomas J. Sugrue, Grutter v. Bollinger, 137 F. Supp. 2d 874 (E.D. Mich. 1999) (No. 97-75321), *available at* http://www.umich.edu/~urel/admissions/legal/expert/sugrutoc.html (last visited April 4, 2005).

124. *Grutter* amicus brief, *supra* note 7, at 17 (citing Expert Report of Thomas J. Sugrue, Gratz v. Bollinger, No. 97-75321 (E.D. Mich.), Grutter v. Bollinger, No. 97-75928 (E.D. Mich.)).

125. Gratz v. Bollinger, 539 U.S. 244, 300 (2003) (Ginsburg, J., dissenting) (internal citations and footnotes omitted).

126. *Id.* at 300-01 (citations omitted) (emphasis added). For a discussion of unconscious or implicit bias, see Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995); Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489 (2005).

ing racial inequalities.[127] In the words of Professor Freeman, it assumes that all racial groups are now "fungible"—they are interchangeable in terms of current racial conditions.[128] The plaintiff in *Grutter* advanced a formal colorblindness argument, and in doing so denied one aspect of social reality that is critical to thorough constitutional analysis: "race continues to have a profound impact on the distribution of opportunity and justice in America."[129]

Formal colorblindness generally assumes a level present-day racial playing field, making current racial group conditions irrelevant.[130] Racial group members all have equal prospects of achieving the American dream—only individual talent and initiative matter.

This syllogism is appealing in its simplicity. Contextual strict scrutiny, however, rejects it. It fails to reflect hard racial realities. While America has become more racially diverse, the 2000 census indicated that "[our] 'nation's inner cities are more segregated now than they were 50 years ago' during the era of official segregation."[131] A massive study by the J. Russell Sage Foundation at the new millen-

127. Advocates of formal colorblindness in strict scrutiny review argue that racial history could only be relevant to finding the specific perpetrator who committed specific acts of discrimination against the plaintiff. *See, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469, 528 (1989) (Scalia, J., concurring).

128. *See* Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1066 (1978). By "abstracting racial discrimination into a myth-world where all problems of race . . . are fungible, the color-blind theory turns around and denies concrete demands of blacks with the argument that to yield to such demands would be impossible since every other ethnic group would be entitled to make the same demand[s]." *Id.*

129. *Grutter* amicus brief, *supra* note 7, at 17; *see also* Vasquez v. Hillery, 474 U.S. 254, 264 (1986) ("114 years after the close of the War Between the States . . . racial and other forms of discrimination still remain a factor of life, in the administration of justice as in our society as a whole.") (citations omitted).

130. See *infra* Part III.A.1.

131. *See* Leland Ware, *Strict Scrutiny, Affirmative Action, and Academic Freedom: The University of Michigan Cases*, 78 TUL. L. REV. 2097, 2113 (2004) (citing Leland Ware & Antoine Allen, *The Geography of Discrimination: Hypersegregation, Isolation and the Fragmentation Within the African-American Community*, *in* THE STATE OF BLACK AMERICA 69 (Lee A. Daniels ed., 2002)). "Studies conducted regularly by the federal Department of Housing and Urban Development, by academic researchers, and by private organizations, all demonstrate conclusively that today's residential segregation stems not from the private choices of individual families but from decades of official segregation and the persistence of unlawful discriminatory practices." *Id.* at 2113-14; *see also* Brief of the American Sociological Association, et al., as Amici Curiae, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241):

> Blacks living in Detroit, New York, and Chicago today are almost as segregated from whites as were blacks living in South Africa under apartheid. More than seventy percent of black children in the United States attend schools that are majority nonwhite. For Latino children, segregation is also pronounced: seventy-six percent attend schools that are majority nonwhite. These segregated schools are generally inferior in staffing, resources, and programs to predominantly white schools in similar neighborhoods.

Id. at 2.

nium—covering 8,600 individuals and 3,200 businesses—found significant continuing and often-subtle workplace discrimination in America.[132] African Americans were the primary targets of discrimination because of their race.[133] As historians John Hope Franklin and Alfred Moss explain, the end of the twentieth century "saw heightened economic deprivation and social problems" in Black communities.[134] Poverty and social problems, exacerbated by racial discrimination, also persist in Latino, Asian American and Native

132. *See* Russell Sage Foundation, Multi-City Study of Urban Inequality, *available at* http://www.russellsage.org/programs/proj_reviews/multicity.shtml (last visited March 31, 2005).

133. *See id.*

134. JOHN HOPE FRANKLIN & ALFRED A. MOSS, JR., FROM SLAVERY TO FREEDOM: A HISTORY OF AFRICAN AMERICANS (8th ed. 2000). Statistical data overwhelmingly shows "chronic unemployment, rampant violence, drug addiction, HIV infection and AIDS, soaring homicide rates for young black males, high levels of illegitimate births to young black females, and public school systems overwhelmed by all these problems." *Id.* at 551-52. *See* STEPHEN STEINBERG, TURNING BACK: THE RETREAT FROM RACIAL INJUSTICE IN AMERICAN THOUGHT AND POLICY 212-13 (1995) (citing statistics and observing that in terms of major social indicators "a far less sanguine picture emerges—one of persistent and even widening gaps between blacks and whites in incomes and living standards").

American communities in varying locales across the country.[135] The racial playing field remains sharply tilted.[136]

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135. Among Hispanics, poverty increased from 8.6 million in 2002 to 9.1 million in 2003. *See* U.S. Dept. of Commerce, Bureau of Census, Income Stable, Poverty Up, Numbers of Americans With and Without Health Insurance Rise, Census Bureau Reports, *available at* http://www.census.gov/Press-Release/www/releases/archives/income_wealth/002484.html (last visited April 6, 2005). In the same study, poverty of those who indicated Asian as their only race rose from 1.2 million in 2002 to 1.4 million in 2003. *Id.* "Vietnamese, Cambodians, Laotians, and Hmong are amongst the poorest Asian ethnic groups in this country." Harvey Gee, *Expanding The Civil Rights Dialogue in an Increasingly Diverse America: A Review of Frank Wu's Yellow: Race in America Beyond Black and White*, 20 TOURO L. REV. 425, 474 (2004) (*citing* A Report of the U.S. Commission on Civil Rights, Civil Rights Facing Asian Americans in the 1990s, at 16 (1992)). Consequently, "there are a disproportionate number of Southeast Asians on public assistance" and they are the "fastest growing segment of welfare recipients and have the highest welfare dependency rates of any ethnic or racial group." *Id.* at 474-75. Between 1990-2000, the poverty level for Native Americans living in the Northern Plains, coastal Alaska, the Southwest and Oklahoma was 40.7%. *See* Calvin L. Beale, *The Ethno/Racial Context of Poverty in Rural and Small Town America*, POVERTY & RACE (March/April 2003), *available at* http://www.prrac.org/full_text.php?text_id=804&item_id=7806&newsletter_id=67&header=Poverty+%2F+Welfare (last visited April 6, 2005) (research conducted in non-metro counties). In 1990, 36.1% of Native American families lived below the poverty line. *See* Brenda Donelan, *The Unique Circumstances of Native American Juveniles Under Federal Supervision*, 63-DEC FED. PROBATION 68, 70 tbl. 2 (1999). "With the exception of Hispanics, American Indians are the least likely of all minority groups to graduate from high school or college." *Id.* at 70.

On the importance of transcending the Black-White race paradigm, see Mari Matsuda, *Beyond, and Not Beyond, Black and White: Deconstruction Has a Politics*, *in* CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY 393 (Francisco Valdes et al. eds., 2002); John O. Calmore, *Exploring Michael Omi's "Messy" Real World of Race: An Essay for "Naked People Longing to Swim Free,"* 15 LAW & INEQ. 25 (1997); Joe R. Feagin, *White Supremacy and Mexican Americans: Rethinking the "Black-White Paradigm,"* 54 RUTGERS L. REV. 959 (2002); Chris K. Iijima, *The Era of We Construction: Reclaiming the Politics of Asian Pacific American Identity and Reflections in the Critique of the Black/White Paradigm*, 29 COLUM. HUM. RTS. L. REV. 47 (1997); Rachel F. Moran, *What if Latinos Really Mattered in the Public Policy Debate?*, 85 CAL. L. REV. 1315 (1997); Juan F. Perea, *The Black/White Binary Paradigm and The "Normal Science" of American Racial Thought*, 85 CAL. L. REV. 1213 (1997); Frank H. Wu, *Neither Black Nor White: Asian Americans and Affirmative Action*, 15 B.C. THIRD WORLD L.J. 225 (1995).

136. African American socioeconomic conditions, for instance, continue to reflect stark inequalities. The poverty rate for blacks in 2001 was 22.7%, higher than the rates for people of all other racial and ethnic groups. Bernadette D. Proctor & Joseph Dalaker, U.S. Dep't. of Commerce, Poverty in the United States: 2001 (2002), *available at* http://www.census.gov/prod/2002pubs/p60- 219.pdf.

Racial minorities continue to face discrimination in employment, housing, and access to health care. *See* U.S. Gen. Accounting Office, Equal Employment Opportunity: Displacement Rates, Unemployment Spells, and Reemployment Wages by Race, GAO/HEHS-94-229FS (Sept. 1994), *available at* http://archive.gao.gov/t2pbat2/152533.pdf. In 2000, African American applicants were more than twice as likely to be turned down for a conventional mortgage loan as White applicants. Thomas Grillo, *ACORN Finds Lending Disparities Continue*, BOSTON GLOBE, Oct. 6, 2001, at E1. Latinos were rejected almost 50% more often than Whites. *Id.* "There are continuing [statistical] disparities in the burden of illness and death experienced by African Americans, Hispanic Americans, Asian Americans/Pacific Islanders, and American Indians/Alaska Natives, as compared to the U.S. population as a whole." U.S. Dep't. of Health and Human Services, HHS Fact Sheet: Minority Health Disparities At a Glance (July 12, 2004), *available at* http://raceandhealth.hhs.gov/glance.htm.

In education, many public schools are segregated along racial and ethnic lines, with marked differences in the quality of education. *See* Erica Frankenberg et al., *A Multiracial Society with*

As Justice Ginsburg expressed in *Gratz*, contemporary forms of exclusion, and their historical sources, are integral to understanding present-day racial conditions as the foundation for government initiatives. Formal colorblindness ignores them. Contextual strict scrutiny examines them closely.

B. In Taking "Relevant Differences" into Account, Contextual Strict Scrutiny Distinguishes Classifications Designed to Promote Inclusion from Those Designed to Perpetuate Historical Exclusion

While taking racial group history and current racial conditions into consideration, contextual strict scrutiny closely examines the government initiative in terms of relevant differences. Unlike its formal counterpart, contextual strict scrutiny distinguishes classifications designed to promote inclusion from those designed to exclude groups from participation in important realms of the American polity.

Barbara Grutter argued that the Supreme Court should treat all racial classifications identically, without considering the "entrenched and systematic disadvantage to African Americans and other racial minorities."[137] She recalled the words of the NAACP's Robert Carter in *Brown v. Board of Education*:[138] that "no state has any authority under the equal protection clause . . . to use race as a factor in affording educational opportunities among its citizens."[139] By employing Carter's words from the historic school desegregation cases of the 1950s to bolster her argument against affirmative action in 2003, Grutter ripped Carter's statement out of its context and distorted its actual meaning. She did so by ignoring the stark difference "between a classification that systematically excludes African Americans as a group (which Carter was opposing) and one that addresses the exclusionary effects of long-standing racial discrimination in education (which Carter was not then addressing, but would have supported)."[140]

Segregated Schools: Are We Losing the Dream? (2003), http://www.civilrightsproject.harvard.edu/research/reseg03/AreWeLosingtheDream.pdf (reporting that the desegregation of African American students has receded to levels not seen in the previous three decades).

137. *See Grutter* amicus brief, *supra* note 7, at 6 (characterizing Grutter's argument).

138. 347 U.S. 483 (1954).

139. *Grutter* Amicus Brief, *supra* note 7, at 6 (citing Brief for the Petitioner, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241), at 18).

140. *Id.* at 6-7. *See* Robert L. Carter, *A Reassessment of Brown v. Board*, *in* SHADES OF BROWN: NEW PERSPECTIVES ON SCHOOL DESEGREGATION 21 (Derrick Bell ed., 1980).

Grutter's approach thus ignored Carter's underlying rationale and the racial conditions that made his statement compelling—continuing legalized racial apartheid in America. By equating efforts to remedy the continuing effects of group-based discrimination with efforts designed to further exclude traditionally subordinated racial groups, Grutter aimed to erase from legal consideration the continuing institutionalized disadvantage of many racial minorities.[141] Her formal colorblind approach to strict scrutiny would automatically strike down all racial classifications without careful examination of current racial conditions.[142]

By contrast, contextual strict scrutiny now expressly acknowledges that not all racial classifications are the same.[143] It distinguishes legislation and administrative programs developed for the purpose of fostering equality in light of historical racism and current conditions of racial inequality from those programs designed to exclude "discrete and insular minorities" from full participation in the polity.[144] Federal courts have recognized that the former type of legislation, unlike the latter, may serve significant and legitimate governmental objectives.[145]

In a significant post-*Grutter* case, outside of the affirmative action context, the Court reconfirmed the role of "relevant differences" in

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141. *See Grutter* amicus brief, *supra* note 7, at 7-8. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 243 (1995) (Stevens, J., dissenting) ("There is no moral or constitutional equivalence between a policy that is designed to perpetuate a caste system and one that seeks to eradicate racial subordination.").

142. *See* Kenneth L. Karst, *Justice O'Connor and the Substance of Equal Citizenship*, 55 SUP. CT. REV. 357 (2003) (analyzing the model of "formal racial neutrality").

> In this tunnel vision[,] a race-conscious remedy—one aimed at redressing the myriad corruptions of public life produced by the stigma of caste—is itself a transgression of formal neutrality, for it alters the equilibrium of the status quo. In other words, the mode of formal *racial neutrality*, much in vogue during the years of the Rehnquist Court, *is a recipe for civil rights deregulation.*

Id. (emphases added).

143. *See* Gratz v. Bollinger, 539 U.S. 244, 301 (2003) (Ginsburg, J., dissenting) ("The Constitution instructs all who act for the government that they may not 'deny to any person . . . the equal protection of the laws.' Amdt. 14, § 1. In implementing this equality instruction, as I see it, government decisionmakers may properly distinguish between policies of exclusion and inclusion."). *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 316 (1986) (Stevens, J., dissenting) ("Actions 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 after effects have been extirpated.").

144. The Court as a whole has acknowledged that government programs designed to promote equality are different from those motivated by prejudice. Justice Stevens emphasized the need for courts to differentiate between invidious discrimination, which he characterized as an "engine of oppression," and "benign" legislation which stems from a "desire to foster equality." *Adarand*, 515 U.S. at 243 (Stevens, J., dissenting).

145. *See Adarand*, 515 U.S. 200 (1995); Adarand v. Slater, 228 F.3d 1147, 1161 (10th Cir. 2000).

strict scrutiny analysis. In *Johnson v. California*,[146] the Court reiterated that the reason for strict scrutiny, is that "[r]acial classifications raise special fears that they are motivated by an invidious purpose."[147]

Analyzing California's policy of temporarily segregating prisoners based on their race, the Court again acknowledged that not all uses of race are the same. Justice O'Connor explained that "[p]risons are dangerous places, and the special circumstances they present may justify racial classifications in some contexts. Such circumstances can be considered in applying strict scrutiny, which is designed to take relevant differences into account."[148] *Johnson* thus recognized judicial competence to draw these kinds of distinctions and apply the evolving strict scrutiny standard "within constitutionally prescribed limits."[149]

Similarly, in *Grutter*, the Court determined that the University of Michigan Law School's use of limited racial criteria in selecting students from historically excluded groups promoted inclusion rather than perpetuated exclusion. Specifically, the Court found that the Law School's use of racial criteria advanced the inclusion of "talented and qualified individuals of every race and ethnicity, so that all members of [America's] heterogeneous society may participate in the educational institutions that provide the training and education necessary to succeed in America."[150]

C. Contextual Strict Scrutiny Evaluates Whether Inclusionary Initiatives are Actually Motivated by Hidden Racial Prejudice or Harmful Stereotypes.

Instances may arise where seemingly well-intentioned government initiatives are actually motivated by subtle racial prejudice or

146. 543 U.S. 499 (2005).

147. *Id.* at 505. The Court also reaffirmed the importance of the context in which the government used the racial classification. The Court explained that "[i]n the prison context, when the government's power is at its apex, we think that searching judicial review of racial classifications is necessary to guard against invidious discrimination." *Id.* at 511.

148. *Id.* at 515.

149. Grutter v. Bollinger, 539 U.S. 306, 328 (2003). The *Adarand* Court implicitly acknowledged its competence to take relevant racial group differences into account in order to "distinguish legitimate from illegitimate uses of race in governmental decisionmaking." *Adarand*, 515 U.S. at 228; *see also*, *Grutter*, 539 U.S. at 334 ("[W]e adhere to *Adarand*'s teaching that the very purpose of strict scrutiny is to take such 'relevant differences into account.'") (citations omitted). *See* Adarand v. Slater, 228 F.3d at 1198.

150. *Grutter*, 539 U.S. at 332-33. The Law School's admissions program promoted inclusion, which the Court found significant. "Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized." *Id.* at 332.

stereotypes. The *Adarand* majority stressed the importance of a searching review "in order to ferret out classifications in reality malign, but masquerading as benign"[151] in order to assure that there "is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype."[152] Justice Ginsburg's dissent affirmed that point in recalling the Court's prior failures to unearth negative stereotyping underlying paternalistic sex-based classifications.[153]

Ginsburg later also recognized that beyond well-meaning stereotyping, there exist more invidious forms of unconscious stereotyping.[154] Expanding social science research shows that unacknowledged stereotypes sometimes inform decisionmakers' discriminatory ac-

151. 515 U.S. at 275 (Ginsburg, J., dissenting) (reiterating the majority's viewpoint).

152. *Id.* at 226; *see also* Gratz v. Bollinger, 539 U.S. 244, 302 (2003) (Ginsburg, J., dissenting) ("The mere assertion of a laudable governmental purpose . . . should not immunize a race-conscious measure from careful judicial inspection.").

153. *Gratz*, 539 U.S. at 275 (Ginsburg, J., dissenting). Justice Ginsburg cites two cases where the Court did not rigorously scrutinize the use of sex-based classifications: Hoyt v. Florida, 368 U.S. 57, 60 (1961) (upholding women's "privilege" of automatic exemption from jury duty); Goesaert v. Cleary, 335 U.S. 464 (1948) ("protecting" women by barring them from employment as bartenders). This is consistent with Justice Ginsburg's early work illustrating that laws designed to grant benefits to women (based on stereotypical assumptions about their roles in society) served to perpetuate those stereotypes, if not examined carefully. *See* Ruth Bader Ginsburg, *Some Thoughts on Benign Classification in the Context of Sex*, 10 CONN. L. REV. 813, 821 (1978); *see also* Sidney Buchanan, *Affirmative Action: The Many Shades of Justice*, 39 HOUS. L. REV. 149, 156 (2002) (noting the existence of "paternalistic stereotyping," which assumes that women are considered "unfit" for particular roles in society); Elizabeth M. Schneider, *Feminism and the False Dichotomy of Victimization and Agency*, 38 N.Y.L. SCH. L. REV. 387, 393 (1993) (discussing how "the theme of feminism as being victimization dominates popular culture").

154. *See* Gratz v. Bollinger, 539 U.S. at 300-01 ("Bias both conscious and unconscious, reflecting traditional and unexamined habits of thought, keeps up barriers that must come down if equal opportunity and nondiscrimination are ever genuinely to become this country's law and practice.") (quoting Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 274).

tions.[155] Despite some initial reluctance,[156] courts are now generally receptive to analyzing underlying governmental motives.[157]

155. In California, judges were criticized for excluding Mexican Americans from grand jury service. When challenged, the judges indicated that they were searching for well-qualified jurors to assemble a strong, viable grand jury. They also denied any discriminatory intent. *See* Ian F. Haney Lopez, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L.J. 1717, 1721-22 (2000) (discussing "institutional racism" in California Superior Courts) [hereinafter Lopez, *Institutional Racism*]. The detailed research of Professor Haney-Lopez nevertheless revealed hidden racial stereotypes underlying at least some of the judges' exclusionary decisions. Haney-Lopez illustrates this theory by analyzing the "East L.A." and "Biltmore 6" cases, between the years 1968 and 1970: "While the record reveals in stark numbers the near total exclusion of Mexican Americans from service on grand juries in Los Angeles over the decade preceding these cases, each judge testified that he harbored no intention to discriminate." *Id.*; *see also* IAN F. HANEY LOPEZ, RACISM ON TRIAL: THE CHICANO FIGHT FOR JUSTICE (2003).

On unconscious racism, see generally Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987). On cognitive bias, see Linda Hamilton Krieger, *Civil Rights Perestroika: Intergroup Relations after Affirmative Action*, 86 CAL. L. REV. 1251 (1998); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995); *see also* Tanya K. Hernandez, *An Exploration of the Efficacy of Class-Based Approaches to Racial Justice: The Cuban Context*, 33 U.C. DAVIS L. REV. 1135, 1137 (2000) (discussing the Cuban government's attempts to "whiten" its population and the "interconnections" between race and class); Natsu Taylor Saito, *Symbolism Under Siege: Japanese American Redress and the "Racing" of Arab Americans as "Terrorists,"* 8 ASIAN L.J. 1 (2001) (discussing the "racing" of Arab Americans and Muslims by the U.S. government and portraying such groups as terrorists and a threat to national security); Rennard Strickland, *The Genocidal Premise in Native American Law and Policy: Exorcising Aboriginal Ghosts*, 1 J. GENDER RACE & JUST. 325, 325 (1998) (explaining that non-Indians view Indians in a dual role, as "Savage Sinners" and "Redskinned Redeemers"); Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575 (2002) (describing the U.S. government's use of racial profiling against persons who appear Middle Eastern, Arab, or Muslim).

156. *See* Siegel, *supra* note 27, at 1132-33. Siegel observes that in the years after *Brown*, legal scholars suggested that "it was inappropriate for judges to inquire into the motives of legislators in determining whether statutes comported with constitutional requirements." *Id.* Siegel acknowledges that courts have since departed from this viewpoint. *See id.* at 1133-34 (describing the Court's commitment to motive review following *Washington v. Davis*, 426 U.S. 229 (1976)).

157. *See* Chin v. Runnels, 343 F. Supp. 2d 891, 906 (N.D. Cal. 2004) ("A number of courts have recognized that subjective decision-making allows for subtle biases or unconscious stereotyping to affect selection processes."). In *Chin*, the District Court cited several cases in which courts examined "motivations" of government actors in connection with racial discrimination claims. *See, e.g.*, Georgia v. McCollum, 505 U.S. 42, 68 (1992) (O'Connor, J., dissenting) ("It is by now clear that conscious and unconscious racism can affect the way white jurors perceive minority defendants and the facts presented at their trials, perhaps determining the verdict of guilt or innocence."); Gonzalez-Rivera v. INS, 22 F.3d 1441, 1450 (9th Cir. 1994) (observing that "racial stereotypes often infect our decision-making processes only subconsciously"); Bush v. Commonwealth Edison Co., 990 F.2d 928, 931-32 (7th Cir. 1993) (evidence that employer's subjective determinations "reflected unconscious racial bias"); United States v. Bishop, 959 F.2d 820, 826-28 (9th Cir. 1992) (stating that juror's area of residence was not a valid racially-neutral justification for peremptory challenge because court found it to be "a stereotypical racial reason"); EEOC v. Inland Marine, 729 F.2d 1229, 1236 (9th Cir. 1984), *cert. denied*, 469 U.S. 855 (1984) (citations omitted) (observing that some subjective selection processes, "though harmless in appearance, may hide subconscious [discriminatory] attitudes"); Lynn v. Regents of the Univ. of California, 656 F.2d 1337, 1343 & n.5 (9th Cir. 1981) (where decision is "highly subjective"

Contextual strict scrutiny thus, in part, ascertains whether seemingly ameliorative classifications are actually motivated by prejudice or harmful stereotypes.[158] For example, by strictly scrutinizing the University of Michigan Law School's reasons for wanting to admit a "critical mass" of minorities, the *Grutter* Court considered whether the law school's reasons were motivated by improper stereotyping:

> The Law School does not premise its need for critical mass on any belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue. To the contrary, diminishing the force of such stereotypes is both a crucial part of the Law School's mission, and one that it cannot accomplish with only token numbers of minority students.[159]

In making this assessment and finding that the Law School's efforts were in part directed toward breaking down harmful stereotypes, Ginsburg recognized that, with informed assistance,[160] courts are competent to determine whether apparently inclusionary racial classifications are grounded on negative racial stereotypes.

D. Contextual Strict Scrutiny Reflects a Greater Degree of Judicial Respect to Government Initiatives Designed to Promote Equality.

Contextual strict scrutiny examines racial group history, current racial conditions, and relevant differences, and ascertains that the government initiative is not motivated by hidden racial prejudice or based

courts should "scrutinize attitudes and motivation" to determine if discriminatory stereotypes affected the selection process).

158. *See, e.g.*, Smith v. Univ. of Washington, 392 F.3d 367, 376 (9th Cir. 2004) (deciding that the University of Washington Law School's use of race in its admissions program was motivated by the goal of attaining a "diverse educational environment"); Concrete Works of Colo., Inc. v. City of Denver, 321 F.3d 950 (10th Cir. 2003) (finding that Denver's race-based ordinances were enacted as an attempt to eliminate marketplace discrimination and to foster a more equal playing field for minority business enterprises); Adarand Constructors, Inc. v. Slater, 228 F.3d 1147, 1164 (10th Cir. 2000) (determining that the SCC racial presumptions were motivated by the goal of attempting to remove deeply-rooted barriers prominent in the construction industry).

159. Grutter v. Bollinger, 539 U.S. 306, 333 (2003) (citations and quotations omitted). The Court cited the testimony of several witnesses supporting the Law School's use of a critical mass, recognizing that their reasoning was not motivated by any improper stereotyping or purpose. *See, e.g., id.* at 318-19 (citing the testimony of the current Dean of the Law School, Jeffrey Lehman, who testified that "critical mass means numbers such that underrepresented minority students do not feel isolated or like spokespersons for their race"); *id.* at 319-20 (citing the testimony of Kent Syverud, a professor at the Law School when the admissions policy was adopted, whose testimony "indicated that when a critical mass of underrepresented minority students is present, racial stereotypes lose their force because nonminority students learn there is no 'minority viewpoint' but rather a variety of viewpoints among minority students") (internal quotation marks and citation omitted).

160. *See infra* Part III.B.1.

on harmful stereotypes. After making that determination, the courts extend a greater degree of judicial respect for legislative and executive judgments[161]—particularly respect for the judgments of government actors in their selection of mechanisms to affirmatively carry out constitutional and legislative equality mandates.[162]

For example, in *Grutter* the Court accorded a degree of respect to the judgment of the Michigan Law School within its area of expertise.

> The Law School's assessment that diversity will, in fact, yield educational benefits is substantiated by [the Law School] and their amici. Our scrutiny of the interest asserted by the Law School is no less strict for taking into account complex educational judgments in an area that lies primarily within the expertise of the university. Our holding today is in keeping with our tradition of giving a degree of deference to a university's academic decisions, within constitutionally prescribed limits.[163]

The Court deferred in this limited fashion to the Law School's educational judgment only after taking history, current conditions, relevant differences and likely consequences for minorities into account and only after determining that the Law School's race-as-a-factor admissions program was created for the purpose of fostering diversity through inclusion in an otherwise largely exclusive educational setting.[164]

The *Grutter* majority deferred to the Law School's "complex" educational judgment, bolstered by evidence, partially because of the

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161. Conversely, if a court finds realistically that the goal or the effect of the initiative is to perpetuate group exclusion, or that the program relies on harmful racial stereotypes, then the court should not accord any degree of respect to the government's chosen means.

162. *Grutter* amicus brief, *supra* note 7; *see* Smith v. Univ. of Washington, Law School, 392 F.3d 367, 372 (9th Cir. 2004); Adarand v. Slater, 228 F.3d 1147 (10th Cir. 2000).

163. *See Grutter*, 539 U.S. at 328. For further discussion of the Court's deference to government expertise in *Grutter* and its implications, see Wendy Parker, *Connecting the Dots:* Grutter, *School Desegregation, and Federalism*, 45 WM & MARY L. REV. 1691, 1696-97 (2004) ("For reasons similar to those supporting local control in school desegregation, federalism supports a role of deference for education officials in affirmative action litigation.").

164. *See Grutter*, 539 U.S. at 328. Acknowledging its "tradition of giving a degree of deference to a university's academic decisions," the Court explained that, "given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition." *Id.* at 329. This language suggests that the Court may have accorded an added measure of judicial respect to the Law School's chosen means only because of the educational setting. This suggestion is undercut, however, by United States v. Paradise, 480 U.S. 149 (1987), in which the court abandoned the "least restrictive alternative" test in favor of "narrow tailoring" analysis, and thereby accorded government actors greater flexibility in choosing the vehicles for achieving equality goals outside the educational setting. *See also* City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (applying a "narrow tailoring" rather than "least restrictive alternative" test); *see infra* notes and accompanying text.

"expertise of the University" and partially because the Law School's admissions program was carefully designed to promote inclusion of qualified students of all races. The Ninth Circuit reaffirmed this view in a post-*Grutter* case that also dealt with race in law school admissions. In *Smith v. University of Washington, Law School*,[165] the court reasoned that when analyzing the law school's admissions policy, courts "must assume that [the law school] acted in good faith in the absence of a showing to the contrary and defer to its educational judgments."[166]

Significantly, the court did not analyze rigidly whether the law school's use of race was the least restrictive alternative to achieving the compelling state interest in student diversity.[167] The court accepted the educational expertise of the law school that race as a plus factor in admissions decisions was necessary to achieve its goal of diversity even though it recognized that other non-race criteria also promoted diversity.[168] This more flexible analysis of the "narrow tailoring" component of strict scrutiny reflects a continuing evolution of the heightened scrutiny standard in the face of mounting challenges to race-conscious forms of affirmative action.

Grutter's more flexible recasting of the narrowly tailored prong of strict scrutiny analysis built upon the Court's previous reformation of that criteria for evaluating race-conscious programs beyond education in *United States v. Paradise*.[169] In *Paradise*, the Court considered whether a "one-black-for-one-white promotion requirement to be applied as an interim measure to state trooper promotions in the Alabama Department of Public Safety . . . [was] permissible under the equal protection guarantee."[170] The Court upheld the promotion requirement, finding that the requirement was narrowly tailored to serve the compelling governmental interest of remedying past and present discrimination by the Alabama Department of Public Safety.[171]

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165. 392 F.3d 367.

166. *Id.* at 372 (citing *Grutter*, 539 U.S. at 328-29).

167. *Id.* at 375-76.

168. *Id.* at 378-79.

169. 480 U.S. 149 (1987).

170. *Id.* at 153.

171. *Id.* at 166-67. The district court also found "that for almost four decades the [Alabama] Department had excluded blacks from all positions, including jobs in the upper ranks." *Id.* at 167. The Court noted that the United States conceded that "the pervasive, systematic, and obstinate discriminatory conduct of the Department created a profound need and a firm justification

Justice Brennan outlined a multi-faceted flexible analysis for determining whether race-conscious relief was "narrowly tailored," remarking that courts should consider the "necessity for the relief and the efficacy of alternative remedies; the flexibility and duration of the relief, including the availability of waiver provisions; the relationship of the numerical goals to the relevant labor market; and the impact of the relief on the rights of third parties."[172] In addition to these factors, Brennan also "acknowledge[d that] the respect owed to a district judge's judgment that specified relief is essential to cure a violation of the Fourteenth Amendment."[173]

Crucially, Brennan observed that the remedial plans did not have to be limited to "the least restrictive means of implementation."[174] Government actors need some latitude in choosing among alternative means of achieving equality goals. Taking these factors into consideration, and affording the Department's choice of the means a measure of judicial respect, even though it may not have been the "least drastic alternative," the Court upheld the Department's promotion program, finding it to be an "effective, temporary, and flexible measure."[175]

Grutter refined this more flexible casting of "narrow tailoring" and then broadened its application. First, although the Court's majority required the law school to give "serious, good faith consideration" to alternatives that would achieve diversity,[176] it did not require the law school to adopt the "least restrictive alternative" if doing so would force the school to "abandon the academic selectivity" integral to its reputation.[177] Significantly, *Grutter* "does not require exhaustion of

for the race-conscious relief ordered by the [d]istrict [c]ourt." *Id.* (citing Brief for United States, at 21).

172. *Id.* at 171.

173. *Id.* at 183.

174. *Id.* at 184.

175. *Id.* at 185.

176. Grutter v. Bollinger, 539 U.S. 306, 339 (2003). The Court further explained its previous narrow tailoring pronouncements: Richmond's set-aside plan was "not narrowly tailored where 'there does not appear to have been any consideration of the use of race-neutral means.'" *Id.* (citing City of Richmond v. J.A. Croson Co., 488 U.S. 469, 507 (1989)); narrow tailoring only "'requires consideration' of 'lawful alternative and less restrictive means,'" but the Court did not require the least drastic alternative. *Id.* at 339-40 (citing Wygant v. Jackson Bd. of Educ., 476 U.S. 276, 280, n. 6 (1986)).

177. *Grutter*, 539 U.S. at 339. One example of this factor is the Court's conclusion that the law school reasonably refused to lower its emphasis on GPA and LSAT scores because such alternatives would threaten its elite status. *Id.*

every conceivable race-neutral alternative"[178] in order to satisfy the narrowly-tailored prong of strict scrutiny.[179]

Second, the Court concluded that universities could meet the narrow tailoring durational requirement through sunset provisions and "periodic reviews to determine whether racial-preferences are still necessary."[180] The Court deemed that requirement satisfied by the law school's representation that it intended to end its race-conscious program "as soon as practicable."[181]

Finally, *Grutter* broadened the reach of *Paradise*'s narrow tailoring formulation. *Paradise* involved a specific remedy for de jure discriminatory acts by the Department. *Grutter* applied the multifaceted, flexible test to mechanisms designed to achieve diversity through inclusion, even in the absence of specific acts of discrimination by the law school.

E. Summary

Under *Grutter*, contextual strict scrutiny does not mean every race conscious program will be upheld. It does indicate that although strict in theory is no longer fatal in fact, the court will actually engage in heightened scrutiny and invalidate undeserving race conscious programs. *Gratz* is a salient illustration.[182] Contextual strict scrutiny validates some race conscious programs and invalidates others. Most importantly, it engages judges in a thorough analysis of history, current racial conditions, decisionmaker motives and likely conse-

178. *Id.* at 339.

179. The *Grutter* majority also concluded that the admissions program did not unduly burden members of any racial group. *Id.* at 341. The law school's program did not unduly burden non-minority students because it evaluated a number of diversifying factors and sometimes selected non-minority applicants with diverse potential over underrepresented minority applicants. *Id.*

180. *Id.* at 342-43.

181. *Id.* at 343.

182. *Gratz* stemmed from the University of Michigan Office of Undergraduate Admission's ["OUA"] policy of automatically awarding twenty points to all applicants from underrepresented minority groups. Gratz v. Bollinger, 539 U.S. 244, 256 (2003). In addressing the reverse discrimination lawsuit, the Court, held that the OUA's policy was not narrowly tailored to achieve the University of Michigan's compelling interest in educational diversity. *Id.* at 275. The Court emphasized that it would utilize "a most searching examination." *Id.* at 270 (internal quotations and citations omitted). Unlike in *Grutter*, where the Law School conducted individualized determinations of every applicant, the OUA quantified its factors in making admissions decisions, presumably due to the volume of applicants applying to the University of Michigan's undergraduate program. *Id.* at 275. Additionally, the Court compared the University of Michigan's admissions program with the Harvard College Admissions Program, where the latter offered applicants a more individualized selection process. *Id.* at 272-73. Thus, *Gratz* indicates that the Court, while employing a contextual strict scrutiny review, will invalidate certain race-conscious programs.

quences. Indeed, following *Grutter* and *Gratz*, lower federal courts have applied somewhat uncertain forms of contextual strict scrutiny in both upholding and invalidating differing race-conscious measures.[183]

Since *Grutter* addressed the specific issue of educational diversity, the question arises whether its contextual approach applies in areas other than affirmative action. In 2005, the Court's majority affirmed its embrace of contextual strict scrutiny for all racial classifications, including those beyond the realm of education and affirmative action.

In 2005, *Johnson v. California*[184] raised the threshold question of whether strict scrutiny was the proper standard of review for Garrison Johnson's challenge to California's unwritten policy of racially segregating prison inmates.[185] Writing for the majority, Justice O'Connor reiterated that strict scrutiny applied to all government racial classifications[186] and demanded careful inquiry into the "particularized circumstances" of the state's interest in maintaining prison security, discipline and good order.[187] Correction's officials would be subjected to the same contextual strict scrutiny as any other decisionmaker, even in the prison setting, because "[w]hen government officials are permitted to use race as a proxy for gang membership and violence without demonstrating a compelling government interest and proving their means are narrowly tailored, society as a whole suffers."[188]

While endorsing heightened scrutiny, Justice O'Connor pointedly reiterated the larger message of *Grutter*—"[s]trict scrutiny is not 'strict in theory, but fatal in fact.'"[189] Thus, applying strict scrutiny does not indicate the "ultimate validity of any particular law."[190] Significantly, Justice O'Connor affirmed the current-conditions and relevant-differences inquiries introduced in *Grutter* and kept the door open for race-conscious measures. Prisons are "dangerous places, the special circumstances they present may justify racial classifications in some *contexts*. Such circumstances can be considered in applying strict scrutiny, which is designed to take *relevant differences* into account."[191]

183. *See infra* Part II.F.
184. 543 U.S. 499 (2005).
185. *Id.* at 1144.
186. *Id.* at 1148. The majority rejected the Ninth Circuit's deferential standard in the prison context, which required only that the policy be reasonably related to a legitimate penological interest. *Id.* at 1146-47.
187. *Id.* at 1147.
188. *Id.* at 1149.
189. *Id.* at 1151 (quoting Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995)).
190. *Id.* at 1152.
191. *Id.* (emphasis added).

It remains to be seen whether post-*Grutter* cases fully bear out Justice O'Connor's instruction that, "[a]lthough all governmental uses of race are subject to strict scrutiny, not all are invalidated by it."[192] The Court remanded *Johnson* for a lower court determination of whether strict scrutiny, properly applied, invalidates California's prison policy. One lower court applied a form of contextual strict scrutiny in a non-education, affirmative action setting to uphold the government diversity initiative.[193] Other lower courts applied post-*Grutter* strict scrutiny to invalidate race-conscious procedures in public school student assignments[194] and admissions.[195] Thus, in light of *Grutter*, some federal and state courts[196] are ready and willing to construe the two-part ends-means strict scrutiny test contextually.

F. Two Case Illustrations

The following detailed discussions of *Adarand v. Slater*[197] on remand and *Parents Involved in Community Schools v. Seattle District No. 1*[198] illuminate how contextual strict scrutiny can operate. The

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

193. *See* Petit v. City of Chicago, 352 F.3d 1111, 1114 (7th Cir. 2003) (holding, pursuant to *Grutter*, that the City of Chicago proved a compelling operational need for a diverse police department).

194. *See* Parents Involved in Community Schools v. Seattle District No. 1, 377 F.3d 949 (9th Cir. 2004), *rev'd en banc*, 426 F.3d 1162 (9th Cir. 2005).

195. *See* Cavalier v. Caddo Parrish School Bd., 403 F.3d 246 (5th Cir. 2005).

196. Ahead of the federal courts, the Hawai'i appellate courts have employed a contextual strict scrutiny standard of review reflecting a greater degree of judicial respect in several cases outside the realm of race and education. McCloskey v. Honolulu Police Dept., 799 P.2d 953 (Haw. 1990), involved a challenge to the City of Honolulu's compelled drug-testing of police officers. Employing the strict scrutiny standard of review, the Hawai'i Supreme Court concluded that the police department's program served compelling state interests in police and public safety. *Id.* at 957. Significantly, the court did not require the police department to provide detailed factual proof that drug use was an on-duty problem or that off-duty drug use by a police officer actually threatened police and public safety. *Id.* at 958. In reaching this conclusion, the court largely deferred to the police department's judgment that prior methods of testing for drug use by direct observations and investigation were ineffective and that the current test was the best way to deal with a potentially serious problem. *Id. McCloskey* recited traditional strict scrutiny language. In the absence of indicia of illegitimate motives, however, the Hawai'i Supreme Court applied a more contextual standard by giving a degree of deference to the agency's chosen means to carry out its statutory duties.

For other Hawai'i appellate decisions illustrating a greater degree of judicial respect, see Holdman v. Olin, 581 P.2d 1164 (Haw. 1978) (applying a flexible form of strict scrutiny under the Hawai'i Equal Protection Clause and upholding a Department of Corrections gender-based directive as necessary to meet a compelling state interest in public safety, even though less restrictive alternatives existed); Coyle v. Compton, 940 P.2d 404 (Haw. Ct. App. 1997) (upholding a domestic abuse statute by flexibly accepting the legislature's broad findings in the domestic violence area).

197. 228 F.3d 1147 (10th Cir. 2000).

198. 377 F.3d 949 (9th Cir. 2004), *rev'd en banc*, 426 F.3d 1162 (9th Cir. 2005).

conflicting majority and dissenting approaches to strict scrutiny in the latter post-*Grutter* case also underscore the need for a settled, workable analytical method of application.

1. The Tenth Circuit's Decision in *Adarand*, a Federal Contracting Case, Illustrates the Application of Contextual Strict Scrutiny

The Tenth Circuit's recent decision on remand in *Adarand* employs a form of contextual strict scrutiny outside the educational diversity realm, and, more importantly, demonstrates how contextual strict scrutiny can be applied in practice.[199] The government identified the compelling interest at stake in the use of racial presumptions in the SCC program as "remedying the effects of racial discrimination and opening up federal contracting opportunities to members of *previously excluded* minority groups."[200] In applying a contextual form of strict scrutiny review, the court took relevant differences into account and determined that the government's racial presumptions were designed to promote inclusion and remove deeply-rooted disadvantages and barriers prominent in the construction industry.[201]

The Tenth Circuit paid special attention to context. The court agreed that the government's evidence regarding minority business formation and competition in the subcontracting industry and the kinds of obstacles minority subcontracting businesses face, constituted a strong basis for the conclusion that those obstacles were *not* "the same problems faced by any new business, regardless of the race of the owners."[202]

The court also seriously considered the impact of racial group history on current racial conditions for minority-owned business firms. It determined that the government's evidence demonstrated that discrimination by "prime contractors, unions, and lenders ha[d] woefully impeded the formation of qualified minority business enterprises in the subcontracting market nationwide."[203] In addition, the court con-

199. *Id.* at 1164.
200. *Id.* (quoting Appellants' Br. at 21) (emphasis added).
201. *Id.*
202. *Id.* at 1172 (quoting Appellee's Br. at 28). The court took notice of the fact that "Congress repeatedly has considered the issue of discrimination in government construction procurement contracts, finding that racial discrimination and its continuing effects have distorted the market for public contracts – especially construction contracts – necessitating a race-conscious remedy." *Id.* at 1167.
203. *Id.* at 1168.

cluded that discrimination by prime contractors, private sector customers, business networks, suppliers, and bonding companies "fosters a decidedly uneven playing field for minority subcontracting enterprises seeking to compete in the area of federal construction subcontracts."[204] For those collective reasons, the court found both that the racial presumptions in the subcontracting regulations were enacted to foster equality in the federal contracting market and that the government had a compelling interest in eradicating the "economic roots" of racial discrimination in construction programs funded by federal monies.[205]

After scrutinizing history, current conditions, relevant differences, and likely consequences, the court assessed whether the inclusionary classification was actually motivated by "illegitimate notions of racial inferiority or simple racial politics" in order to "smoke out" an invalid classification.[206]

Finally, because that inquiry revealed no illicit motive, the court afforded a greater degree of judicial respect to Congress' extensive findings of discrimination in the nationwide construction contracting market.[207] The court also largely accepted the government's judgment that the subcontracting program was narrowly tailored to the government interest of increasing minority participation because other methods for addressing unequal opportunity had failed.[208] The court did not require rigid proof that the challenged mechanism was the "least restrictive mechanism" even though it incidentally burdened third parties.[209]

2. The Ninth Circuit's Panel in *Parents Involved* Applied Post-*Grutter* Contextual Strict Scrutiny to Invalidate a Race-As-a-Factor Educational Policy

The Ninth Circuit applied a variation of the emerging contextual strict scrutiny, post-*Grutter*, to strike down race-conscious measures in secondary public schools.[210] The majority opinion in *Parents Involved*

204. *Id.* at 1170.
205. *Id.* at 1176 (citing City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989)).
206. *Id.* at 1166.
207. *Id.* at 1168-71.
208. *Id.* at 1178, 1181.
209. *Id.* at 1183.
210. The Fifth Circuit has also invalidated the race-conscious admissions policy of a public magnet school. *See* Cavalier v. Caddo Parish School Bd., 403 F.3d 246 (5th Cir. 2005). *See infra* notes and accompanying text.

shows that contextual strict scrutiny does not function as a judicial rubber stamp by approving all race-conscious measures.

At trial, the Western District Court of Washington applied strict scrutiny and upheld a school district's "open choice" assignment plan.[211] On appeal, the Ninth Circuit reversed, holding that the school district's racial tiebreaker open-choice assignment plan violated the Equal Protection Clause.[212]

In line with *Grutter*, the three-judge panel of the Ninth Circuit first found that "'constitutionally compelling internal educational and external societal benefits flow from the presence of racial and ethnic diversity' in high schools."[213] Engaging in a limited form of contextual analysis, the court's general examination of current racial conditions revealed that "continuing patterns of residential segregation . . . mean that the daily events and experiences that make up most Americans' lives take place in strikingly homogenous settings."[214] As a result, "most students entering college have had few opportunities for meaningful interactions across lines of race and ethnicity. *This separation . . . provides little opportunity to disrupt racial stereotypes.*"[215] The former "fatal in fact" scrutiny would have rendered this kind of inquiry unnecessary.

The court thus accepted as legitimate the school district's larger diversity goal in creating the racial tiebreaker in light of history and current racial conditions. The court, however, ultimately struck down

211. 137 F. Supp. 2d 1224 (W.D. Wash. 2001), *rev'd*, 377 F.3d 949 (9th Cir. 2004), *rev'd en banc*, 426 F.3d 1162 (9th Cir. 2005). Under the open choice plan, each student was asked to rank which high schools he or she would like to attend. A student would be assigned to a school if all chosen schools were full. 377 F.3d 949, 955 (9th Cir. 2004). Problems arose when schools were "oversubscribed." *Id.* To resolve this problem, the school district used four tiebreakers. *Id.* If a school was still oversubscribed after applying the first tiebreaker, the school district proceeded to a second tiebreaker, which was based entirely on race. *Id.* For the racial tiebreaker, student reported race on registration forms. *Id.* Registration forms were filled out in-person by a parent. *Id.* If a parent chose not to specify a racial category, the school district assigned the student a category "based on a visual inspection of the parent" or the student, if present. *Id.* Next, if "students whose race (coded by the school district simply as white or non-white) could push an integration positive school closer to the desired racial ratio, [the students were] automatically admitted." *Id.* at 955-56.

212. 377 F.3d at 988-89. The district's student assignment plan was subsequently upheld en banc by the Ninth Circuit in 2005. Parents Involved in Community Schools v. Seattle School District No. 1, 426 F.3d 1162 (9th Cir. 2005).

213. 377 F.3d at 964. The court acknowledged that in *Grutter*, the "social scientific evidence and observational reports from business, industry, and military leaders regarding the 'substantial' educational and societal benefits that flow from an educational institution's 'enroll[ment of] a critical mass of minority students.'" *Id.* at 963.

214. *Id.* (citing Brief for Respondents at 11, Gratz v. Bollinger, 539 U.S. 244 (2003)).

215. *Id.* (emphasis added).

the racial tiebreaker aspect of the plan. The court conducted a secondary inquiry into empirical socio-economic data and determined that the method chosen for achieving the goal was only one of several realistic possibilities.[216]

The court reached this conclusion after exploring three alternatives to the racial tiebreaker that the school district never considered.[217] After comparing the demographics with the racial tiebreaker to those without it, the court found that "the data demonstrat[ed] that the tiebreaker produces only the most trivial annual changes in school demography."[218]

The dissent argued that the "means" embodied in the school district's plan had to be more closely viewed in its "historical and factual context."[219] Seattle's dark history of racial school segregation was highly relevant to the district's integration efforts through its desegregation plan of the late 1970s.[220] The dissent examined statistical data in far greater depth than the majority in finding that despite other remedial attempts, patterns of racial segregation persisted.[221] This information demonstrated a cogent need for strong measures, such as a racial tie-breaker.

In making these assessments, the dissent focused on broader present-day racial conditions in Seattle and observed that the district had a compelling interest in preventing Seattle's school system from re-

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216. *Id.* at 970 ("[A]lthough numerous alternative admission structures have been proposed to solve the School District's oversubscription dilemma without prominently featuring race in the equation, not all have been (or ever were) seriously considered by the Board.").

217. The court discussed three alternative programs: (1) a citywide high school admissions lottery; (2) a diversity-oriented policy that does not rely exclusively on race but accounts for the wider array of characteristics that comprise true diversity rather than their racial and ethnic identities; and (3) a more comprehensive plan proposed by the Seattle Urban League. *See id.* at 970-75.

218. *Id.* at 984-85. The court's majority then noted that the school district never "sought to appraise the long-term social effects of engineering proportional demographic changes in connection with its design of the tiebreaker." *Id.* at 983.

219. *Id.* at 998 (Graber, J., dissenting). "After decades of more coercive efforts to counteract the effects of segregated housing patterns, [the district] adopted a high school assignment plan to maximize school choices for students and their families while continuing to ensure that integrated public schools are available to all." *Id.* at 989 (Graber, J., dissenting).

220. *See id.* at 1001-03 (Graber, J., dissenting).

221. *Id.* at 1005 (Graber, J., dissenting). The dissent noted the following statistics:

> The District has consistently faced a pattern in which its white students live predominantly in the northern half of the city (in 2000-2001, 66.8 percent of the District's white students lived in the northern half of the city) and its students of color—in each of the three largest categories that the District tracks—live predominantly in the southern half of the city. In 2000-2001, 74.2 percent of the District's Asian students, 83.6 percent of its Black students, and 65 percent of its Hispanic students lived in the southern half of the city[.]

Id.

sembling the city's segregated housing pattern.[222] The dissent also relied upon educational research showing the importance of early school experiences in breaking down racial and cultural stereotypes and the relevance of desegregated institutions in providing long-lasting benefits.[223] Finally, the dissent examined the motives behind the school district's plan—addressing de facto segregation in the education system—and suggested the appropriateness of a degree of judicial deference to the district's chosen means.[224]

On rehearing en banc at the end of 2005, the Ninth Circuit vacated the panel's opinion and instead sided with the dissent's narrow tailoring strict scrutiny analysis.[225] Both the panel majority and dissent in *Parents Involved* and the Ninth Circuit en banc applied versions of context-sensitive strict scrutiny.[226] However, without clear guidance from the Supreme Court about the necessary analytical queries to be addressed and, particularly, the degree of respect owed to the district's selection of the vehicle for achieving its goals, the judges on the case disagreed over how to appropriately apply the new strict scrutiny.

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222. *Id.* at 990-91 (Graber, J., dissenting). By examining the district's housing map, the dissent found striking that most non-white students were segregated in the south and southeast areas of Seattle while only a small percentage lived in the economically-privileged northside. The Ninth Circuit's en banc panel also considered Seattle's residential segregation. *See* Parents Involved in Community Schools v. Seattle School Dist. No. 1, 426 F.3d 1162, 1166-69 (9th Cir. 2005) (identifying Seattle's "historical struggle with the problem of racial isolation in its public school system"); *id.* at 1179 (holding that the "District's interests in obtaining the educational and social benefits of racial diversity in secondary education and in avoiding racially concentrated or isolated schools resulting from Seattle's segregated housing pattern are clearly compelling").

223. 377 F.3d at 992 n.9 (Graber, J., dissenting).

224. Prior court decisions supported the concept that "voluntary integration of schools [is a] sound educational policy within the discretion of local school officials." *Id.* at 995 (citing Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971); N.C. State Bd. of Educ. v. Swann, 402 U.S. 43, 45 (1971); Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 242 (1973) (Powell, J., concurring in part and dissenting in part); Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 473 (1982)).

225. Parents Involved in Community Schools v. Seattle School Dist. No. 1, 426 F.3d 1162, 1166 (9th Cir. 2005) (en banc).

226. Context is a key component of the strict scrutiny formulation in the Ninth Circuit's en banc *Parents Involved* decision upholding the district's student assignment plan. *See* 426 F.3d 1162, 1172-73 (9th Cir. 2005). According to the en banc panel, strict scrutiny will examine the use of race in a particular context:

> This heightened standard of review provides a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decisionmaker for the use of race in that particular context. In evaluating the District's Plan under strict scrutiny, we also bear in mind the Court's directive that "[c]ontext matters when reviewing race-based governmental action under the Equal Protection Clause." *Grutter*, 539 U.S. at 326, 123 S.Ct. 2325.

Id. at 1173 (internal citations omitted).

G. Practical Critique

The four-part analytical method for contextual strict scrutiny offered in Part II aims to address that problem. It distills concepts and language from Supreme Court opinions. In preliminary fashion, its practical application is illuminated by the discussions of *Adarand* and *Parents Involved*—the former upholding and the latter initially rejecting race-as-a-factor government initiatives designed to address long-standing racial inequality. Like every analytical formulation, the method is subject to critique. Because the Court has yet to describe a method for applying its concepts, critiques of *Grutter* understandably do not focus on the particulars of contextual strict scrutiny analysis.[227]

Instead, those critiques raise broad questions about its workability. Some of those questions raise "how to apply it" issues that are addressed directly by the contextual strict scrutiny method we just described. Others raise important jurisprudential issues about strict scrutiny and colorblindness that are addressed in Part III. Still other questions address the breadth of discretion now apparently afforded judges. We discuss those questions here.

One version of this critique suggests that *Grutter* injected undue uncertainty into strict scrutiny analysis.[228] More specifically, judges now can discretionarily apply the strict scrutiny test as rigidly or as moderately as they please.[229] This unbounded discretion undermines strict scrutiny and the Court's precedents.[230] Over time rigid scrutiny will morph into widely varying approaches to judicial review, effectively destroying the concept of strict scrutiny review all together.[231]

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227. For instance, one "conservative" reading of the *Grutter* opinion is that "the [Court] was intellectually dishonest given that its pro-affirmative action result was secured by a Court that purports to be dedicated to the protection of individual rights, race notwithstanding." Michelle Adams, *Searching for Strict Scrutiny in* Grutter v. Bollinger, 78 TUL. L. REV. 1941, 1944 (2004).

228. *See* Libby Huskey, Note, *Affirmative Action in Higher Education—Strict in Theory, Intermediate in Fact?* Grutter v. Bollinger, 123 S. Ct. 2325 (2003), 4 WYO. L. REV. 439, 472 (2003). Even before *Grutter*, Ashutosh Bhagwat criticized the Court's inconsistent application of strict scrutiny involving benign and invidious discrimination cases. Ashutosh Bhagwat, *Affirmative Action and Compelling Interests: Equal Protection Jurisprudence at the Crossroads*, 4 U. PA. J. CONST. L. 260 (2002). Bhagwat explains, "at a minimum, this level of scrutiny, which might be called relaxed strict scrutiny permits governments to offer a wider range of governmental interests to justify their actions than might be available in other contexts, especially in comparison to invidious discrimination, where essentially no governmental interests are considered sufficiently to survive review." *Id.* at 278.

229. Huskey, *supra* note 228, at 472.

230. *Id.*

231. *Id.*; *see also* Eileen Kaufman, *Discrimination Cases of the 2002 Term*, 20 TOURO L. REV. 195, 213 (2004) ("[O]ne cannot help but be struck by the lack of rigor in the Court's use of strict scrutiny in *Grutter*.").

This critique is correct in describing the Court's announcement of a new kind of context-sensitive strict scrutiny without providing a specific method for its application—that is why this Article undertakes that task earlier in this Part. It is also correct in that post-*Grutter* strict scrutiny requires a more searching and wide-ranging judicial inquiry. Judges will need to identify the contextual grounding for their decisions and to carefully explain their judgment calls. Thus, now some race conscious programs now may be upheld under the contextual approach that would have been invalidated under the former fatal-in-fact approach.[232]

This assessment of contextual strict scrutiny's impact on strict scrutiny review itself,[233] however, misses the mark. It avoids the bigger picture—the historical and contemporary realities driving the evolution of strict scrutiny. Because overt government racial exclusion eventually subsided after *Brown* (and in instances transformed into more subtle forms), the only remaining government initiatives mentioning race were those purposely designed to rectify continuing racial inequality in schools, housing and jobs—programs of affirmative action.[234] Thus, rigid application of the old fatal-in-fact strict scrutiny approach generated a hugely ironic result: strict scrutiny did not touch subtly discriminatory government actions against members of subordinated groups (because race was not explicitly mentioned);[235] yet strict scrutiny invalidated every ameliorative racial equality initiative (because race was addressed).

Without movement toward a more contextual method of analysis, strict scrutiny would continue to stand equality on its head—turning a blind eye to stark group-based inequality in real living conditions while overturning government efforts to address those very inequalities.

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232. *See* Adarand v. Pena, 515 U.S. 200, 239 (Scalia, J., concurring) ("[R]acial entitlement—even for the most admirable and benign of purposes—is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred. In the eyes of the government, we are just one race here. . . . It is unlikely, if not impossible, that the challenged program would survive this understanding of strict scrutiny. . . .").

233. *See* Marisa Lopez, Comment, *Lowering the Standard of Strict Scrutiny*, 56 FLA. L. REV. 841, 846-47 (2004).

234. *But see* Gabriel J. Chin, *Jim Crow's Long Goodbye*, 21 CONST. COMMENT. 107 (2004).

235. The intent doctrine requires plaintiffs challenging the constitutionality of a facially neutral law to prove a racially discriminatory purpose on the part of those responsible for the law's enactment or administration. *See* Washington v. Davis, 426 U.S. 229 (1976); *see also* Lawrence, *supra* note 155.

By seriously examining context, a court is not simply applying the means-ends test rigidly or moderately according to its desire. Instead, as part of the method described earlier, a reviewing court is instructed to make a series of careful analytical inquiries, to announce its findings while revealing its informational sources, and to explain and justify its evaluation.[236] Because discrimination claims "derive content by an interpretive process of inclusion and exclusion, it is imperative that generalizations, based on and qualified by the concrete situations that gave rise to them, must not be applied out of context in disregard of variant controlling facts."[237]

A second version of the undue discretion and uncertainty critique maintains that "strict scrutiny analysis is [now] a *frightening concept* because it is a step backwards towards a time when strict scrutiny did not exist, a time when the Court upheld several malicious discrimination policies despite the existence of the Equal Protection Clause."[238] On its face the critique raises a serious issue. Beneath the surface, however, it reveals less of a concern for the welfare of groups facing malicious discrimination than for maintaining a group-based hierarchy.

For instance, the John H. Finley Pacific Legal Foundation (PLF) recently employed the "frightening concept" language in an attempt to broadly re-instate the former fatal-in-fact strict scrutiny approach. In its Brief Amicus Curiae in *Johnson*, PLF warned that *Grutter*'s strict scrutiny approach threatened equality.[239] Its proof? The Court's decision upholding the Japanese American internment in *Korematsu v. United States*.[240] In *Korematsu*, the Court purportedly

236. *See* Singer, *supra* note 24 (articulating and explaining social, political and economic influences upon judicial decisionmaking).

237. Grutter v. Bollinger, 539 U.S. 306, 327 (2003) (citing Gomillion v. Lightfoot, 364 U.S. 339, 343-344 (1960)); *see also* Elizabeth Anderson, *Integration, Affirmative Action, and Strict Scrutiny*, 77 N.Y.U.L. REV. 1195, 1200 (2002) ("Racial segregation in the institutions of American civil society operates at three main levels: residential, educational, and occupational."). According to Census data, "in U.S. metropolitan areas as a whole, sixty-five percent of blacks would have to move to attain a uniform distribution, a modest decline since 1980." *Id.* (citing Douglas S. Massey & Nancy A. Denton, *American Apartheid: Segregation and the Making of the Underclass* 64 tbl. 3.1 (1993)). Furthermore, Anderson notes that "jobs are segregated at the regional, firm, and intrafirm levels." *Id.* at 1200. For example, within a white-owned firm located in black neighborhoods, "one third still have no minority employees." *Id.* Moreover, "[o]ne survey of jobs found that half of all job titles were occupied by whites only, and one-quarter of blacks worked in jobs to which only blacks were assigned." *Id.*

238. *See* Huskey, *supra* note 228 (emphasis added).

239. Brief of Amicus Curiae Pacific Legal Foundation at 11-19, Johnson v. California, 540 U.S. 1217 (2004) (No. 03-636).

240. 323 U.S. 214 (1944).

applied strict scrutiny to assess the internment but actually deferred to the judgment of military officials.[241] Consequently, "the Court engaged in a minimal review of the record . . . and then refused to second-guess the determination of 'the properly constituted military authorities' that internment of Japanese Americans was an appropriate policy measure."[242] That assessment is accurate.

But the PLF distorted legal history by equating the Court's approval of the WWII incarceration of 120,000 mainly American citizens on account of race without charges or a trial, with the Court's approval of the Michigan Law School's race-as-a-factor admissions policy designed to promote diversity in an otherwise largely segregated student body. Missing from PLF's argument was context and an acknowledgment of PLF's larger objectives in pushing the analogy.

PLF's amicus brief supported neither party in *Johnson*, and it expressed no view on the propriety of the challenged prison segregation policy. Its underlying goal of removing context from strict scrutiny emerged only indirectly in its argument that "[d]eference is incompatible with strict scrutiny analysis, and threatens the effectiveness of strict scrutiny as a mechanism for protecting individual rights and equal treatment."[243]

Rather than ending harmful exclusion and stigmatization, PLF aimed to resurrect formal colorblindness, arguing that the old strict scrutiny, fatal-in-fact, should be applied to all race-as-a-factor programs. Its "frightening concept" characterization of contextual strict scrutiny was not actually about equal treatment and was not about concern for people incarcerated without charges or trial on account of race, as was the case in *Korematsu*. Rather, it was a side-door attempt to invalidate every affirmative action program. PLF's critique thus actually spoke to contextual strict scrutiny's jurisprudential underpinnings, particularly its rejection of formal colorblindness through its embrace of a contemporary version of Legal Realism.

III. JURISPRUDENTIAL IMPLICATIONS OF CONTEXTUAL STRICT SCRUTINY

The Supreme Court's palpable embrace of contextual strict scrutiny has weighty implications. As described in Part II, contextual

241. Brief of Amicus Curiae Pacific Legal Foundation at 13, *Johnson*, 540 U.S. 1217 (2004) (No. 03-636).

242. *Id.* at 33.

243. *Id.* at 17.

strict scrutiny brings depth and nuance to traditional ends-means equal protection analysis. When scrutinizing race-conscious laws, courts are now encouraged to distinguish government initiatives designed to promote inclusion from those aimed at perpetuating historic exclusion. While strict in "theory," the new approach comprehends relevant differences by taking serious account of group histories and current racial conditions in "fact."

In this fashion, a majority of the Court for the first time signaled an explicitly contextual understanding of race and racial discrimination. In doing so, it implicitly rejected "formal colorblindness" as the equal protection norm. What will this mean for government race-based initiatives, and for civil rights litigation? Commentators' predictions vary widely,[244] and recent changes on the Supreme Court bench will undoubtedly affect how contextual strict scrutiny develops.[245]

One potential consequence is judicial movement toward reclamation of the historic purpose of the Equal Protection Clause and civil rights laws—to foster equality in the face of stark social and economic realities of inequality in America.[246] A different kind of possibility is a judicial slide back towards "fatal in fact" strict scrutiny review—a principal use of the Equal Protection Clause to invalidate affirmative action initiatives. Whether either of these possibilities, or any other, mature into practical reality will depend on at least two things. The first is the workability in practice of the new contextual strict scrutiny—this practical concern is addressed in Part II's description and evaluation of a method for operationalizing contextual strict scrutiny. The second is the strength of the jurisprudential underpinnings of that method.

Part III encourages further discussion of these underpinnings, Recall that Part II first frames the jurisprudential debate over the new strict scrutiny's treatment of colorblindness in equal protection analy-

244. *See supra* section I.B.2; *infra* notes and accompanying text.

245. See *supra* note 46.

246. *See* Kimberlé W. Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988). Professor Cass Sunstein illuminates the original color-consciousness of U.S. civil rights laws. *See* SUNSTEIN, *supra* note 28, at 138-40. The "Reconstruction Congress that approved the Fourteenth Amendment simultaneously enacted a number or race-specific programs for African-Americans," including the Freedmans Bureau Act and legislation to assist African American soldiers. *Id.* Sunstein concludes that "history cuts hard against the fundamentalists' view" of civil rights laws as originally embracing pure color-blindness. *Id.* at 138; Eric K. Yamamoto, *Reclaiming Civil Rights in Uncivil Times*, 1 HASTINGS RACE & POVERTY L.J. 11 (2003).

sis. Part III begins by sketching two competing legal understandings of race—"formal race," and what we are calling "contextual race." It traces a majority of the justices' movement through their strict scrutiny analysis towards a more contextual understanding of race, racial discrimination and equality initiatives, and then assesses that movement.

Part III also characterizes *Grutter*'s emphasis on history, current racial conditions and relevant differences as a contemporary version of Legal Realism—a "racial realism" shaped in part by empirical studies and documented historical research. Part III concludes that this realism in racial equality analysis provides grounded and nuanced jurisprudential support for the Court majority's acceptance of race-in-context in strict scrutiny review.

A. Different Meanings of Race In Anti-Discrimination Law: Formal Race vs. Contextual Race

The Court's consideration of racial groups histories as linked to current socio-economic conditions marks its embrace of a more contextual understanding of race itself. Prior to *Grutter*, uncertainty loomed over which understanding of race the Court would employ in its equal protection analysis. The Court's decisions in *City of Richmond v. Croson Co.*[247] and *Adarand Constructors, Inc. v. Pena*[248] and the Fifth Circuit's decision in *Hopwood v. Texas*[249] seemed to invoke divergent meanings of race in assessing affirmative action programs. As a result, murkiness characterized the Court's equal protection analysis.

Drawing upon the early work of Neil Gotanda,[250] this section examines two important definitions of race discernable from the Court's equal protection cases—"formal race" and "contextual race" (or "race-in-context"). It also traces the recent shift towards contextual-race as a central component of contextual strict scrutiny.

1. Formal race and colorblindness

Formal race is the view of race as a neutral concept. It is unconnected to historical events and cultural understandings—it is merely

247. 488 U.S. 469 (1989).
248. 515 U.S. 200 (1995).
249. 78 F.3d 932 (5th Cir. 1996).
250. *See* Gotanda, *supra* note 40.

"skin color."[251] Gotanda sees formal race as the central idea behind the prevailing view of colorblindness: that race is socially irrelevant, a matter of appearance or skin color only.[252] As an aspirational concept, colorblindness is admirable. When used formally, however, it is deeply problematic.[253] As Gotanda explains, a mode of constitutional analysis that ignores history "often fails to recognize connections between the race of an individual and the real social conditions underlying a litigation or other constitutional dispute."[254]

Professor Alan Freeman describes ethnic or racial fungibility as "the notion that each of us bears an 'ethnicity' with an equivalent legal significance and with an identical claim to protection against 'discrimination,' despite the grossly disproportionate experience that generated the legal intervention in the first place."[255] Employing colorblindness informed by formal race, courts do not need to distinguish between laws designed to maintain historical exclusion from those designed to promote inclusion, since all races are "fungible." This view of race divorced from context treats all racial groups the same, despite marked differences in racial group histories, wide disparities in current socio-economic conditions, and empirically verified discrimination against some groups but not others in housing and employment matters.[256] Racial group fungibility thus presumes, often wrongly, a level racial group playing field in terms of status, socio-economic conditions and life opportunities.

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251. *See id.* at 4.

> [F]ormal-race refers to socially constructed formal categories. Black and white are seen as neutral, apolitical descriptions, reflecting merely 'skin color' or country of ancestral origin. Formal-race is unrelated to ability, disadvantage, or moral culpability. Moreover, formal-race categories are unconnected to social attributes such as culture, education, wealth, or language.

Id.

252. *See id.* at 18 (1991) ("[N]onrecognition is a means of avoiding or repressing consideration of the social relations and social context that are associated with race.").

253. Colorblindness as a general concept emerged from Justice Harlan's famous dissent in Plessy v. Ferguson, which declared "[o]ur Constitution is colorblind." 163 U.S. 537, 559 (1896) (Harlan, J., dissenting). Numerous scholars have demonstrated the problem of removing Justice Harlan's famous metaphor from its historical context. *See* Reva B. Siegel, *The Racial Rhetorics of Colorblind Constitutionalism: The Case of Hopwood v. Texas*, *in* RACE AND REPRESENTATION: AFFIRMATIVE ACTION 29, 50 (Robert Post & Michael Rogin eds., 1998); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-22, at 1525 (2d ed. 1988); T. Alexander Aleinikoff, *Re-Reading Justice Harlan's Dissent in* Plessy v. Ferguson*: Freedom, Antiracism, and Citizenship*, 1992 U. ILL. L. REV. 961, 968-69 (1992); Ross, *supra* note 48, at 401.

254. Gotanda, *supra* note 40, at 7.

255. Freeman, *supra* note 122, at 1066.

256. *See supra* Part II.A.2.

With striking clarity, the Fifth Circuit employed formal race and its concomitant racial fungibility in *Hopwood v. Texas*.[257] Holding that the University of Texas "may not use race as a factor in law school admissions,"[258] the Fifth Circuit framed the issue in terms of White students suffering discrimination at the hands of minority students. Drawing upon Justice Scalia's approach in *Croson*,[259] the court did not distinguish between a program designed to promote the inclusion of African Americans and Latinos from those that had systematically excluded those groups. Nor did the court closely examine the long history of de jure racial exclusion in the Texas Law School itself[260] or scrutinize the vast continuing educational and socio-economic disparities between whites and persons of color in Texas as a whole.[261]

The Fifth Circuit's opinion treated race as merely skin color, a morphological accident,[262] declaring that "[t]he use of race, in and of itself, to choose students simply achieves a student body that looks different. Such a criterion is no more rational on its own terms than would be choices based upon the physical size or blood type of applicants."[263] The court therefore concluded that race has no socially relevant role and provided no basis for selecting among Latino, Black, or White applicants.[264] Therefore, because the state law school's admission's process explicitly referenced race, formal strict scrutiny invalidated the program. As a result, minority admissions fell sharply—a resegregating of the prestigious Texas Law School.[265]

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257. 78 F.3d 932 (5th Cir. 1996).

258. *Id.* at 935.

259. The opinion begins with a quote from Justice Scalia, that "[r]acial preferences appear to 'even the score'. . . only if one embraces the proposition that our society is appropriately viewed as divided into races, making it right that an injustice rendered in the past to a black man should be compensated for by discriminating against a white." *Id.* at 934-35 (quoting City of Richmond v. J.A. Croson Co., 488 U.S. 469, 528 (1989) (Scalia, J., concurring)).

260. *See* Kidder, *supra* note 119.

261. The trial court found the admissions program constitutional and that racial discrimination "in Texas is well documented in history books, case law, and the record of this trial." Hopwood v. Texas, 861 F. Supp. 551, 554 (W.D. Tex. 1994); *see also* Charles R. Lawrence III, *Race and Affirmative Action: A Critical Race Perspective*, *in* THE POLITICS OF LAW, *supra* note 21, at 312-13 (describing the Fifth Circuit panel's disregard for the district court's "detailed findings of fact and cavalier[ ] deni[al] [of] the reality of racism in Texas").

262. *See* Siegel, *supra* note 253.

263. *Hopwood*, 78 F.3d at 945.

264. For a thorough discussion of the colorblindness principle in this case see Siegel, *supra* note 253.

265. At the law schools at the University of Texas, UCLA, and Boalt Hall combined, African Americans made up two percent of enrollments in the five years following bans on the use of race-as-a-factor admissions programs. *See* Kidder, *supra* note 119.

2. Contextual race

The second definition of race discernable from the Court's equal protection cases is what we call "contextual race." Contextual-race, or "race-in-context," is a melding of what Gotanda terms "historical race"[266] and "culture race."[267] Historical race describes social and economic situations of racial groups that can be attributed to past events and institutional practices, particularly long-standing discrimination.[268] Culture race comprehends cultural traditions and social practices that may be generally tied to group identity.[269] Contextual race recognizes that the significance of the government's use of race in any given instance is linked to history,[270] culture, and current socio-economic conditions.[271]

Justice Ginsburg demonstrated her fealty to contextual race in *Adarand*[272] and *Gratz*.[273] Writing in favor of minority set-asides in

266. Gotanda, *supra* note 40.

> Historical-race does assign substance to racial categories. Historical-race embodies past and continuing racial subordination, and is the meaning of race that the Court contemplates when it applies 'strict scrutiny' to racially disadvantaging government conduct. The state's use of racial categories is regarded as so closely linked to illegitimate racial subordination that it is automatically judicially suspect.

Id. at 4.

267. *Id.* Gotanda uses African Americans as an example to demonstrate the operation of culture-race:

> [C]ulture-race uses "Black" to refer to African-American culture, community, and consciousness. Culture refers to broadly shared beliefs and social practices; community refers to both the physical and spiritual senses of the term; and African-American consciousness refers to . . . traditions of self-awareness and to action based on that self-awareness. Culture-race is the basis for the developing concept of cultural diversity.

Id. at 4-5.

268. *See id.* at 4.

269. *See id.* at 56 ("Culture-race includes all aspects of culture, community, and consciousness.").

270. *See id.* at 40 ("[I]n historical-race usage, racial categories describe relations of oppression and unequal power. Historical-race usage of Black does not have the same meaning as usage of white: Black is the reification of subordination; white is the reification of privilege and super-ordination.").

271. *See* MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES FROM THE 1960S TO THE 1980S (2nd ed. 2001).

272. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 271 (1995) (Ginsburg, J., dissenting). Justice Stevens' *Adarand* dissent also resonates with race contextually defined. Justice Stevens chided the majority for ignoring "the difference between a 'No Trespassing' sign and a welcome mat." *Id.* at 245 (Stevens, J., dissenting). For Justice Stevens, racial group classifications are not fungible. Black and White have divergent historical and present-day social meanings, and the Court should explicitly recognize this and not treat "dissimilar race-based decisions as though they were equally objectionable." *Id.* Professor Reva B. Siegel notes the "eerie parallels between Justice Harlan's passionate challenge to legal formalism" urging courts to take account of what "everyone knows" about the "real meaning" of segregation, and Justice Steven's appeal to common social understanding in *Adarand*. Reva B. Siegel, *Discrimination In the Eyes of the Law: How "Colorblindness" Discourse Disrupts and Rationalizes Social Stratification*, 88 CAL. L. REV. 77, 108-09 (2000).

federal sub-contracting, Justice Ginsburg highlighted the importance of racial context, specifically "history and practical consequences."[274] Justice Ginsburg's legal realism emphasized "discrimination's lingering effects," and underscored the sharp difference between Black and White experiences in American history.[275] To pretend "that the issue presented in *Bakke* was the same as the issue in *Brown* is to pretend that history never happened and that the present doesn't exist."[276]

Justice Ginsburg's dissent in *Gratz* also reflected contextual race. Taking account of the United States' history of discrimination and its pernicious effects, Justice Ginsburg linked the state university's use of race to present-day conditions generated by historical forces. We are "not far distant from an overtly discriminatory past, and the effects of centuries of law-sanctioned inequality remain painfully evident in our communities and schools."[277] Black and White are more than skin colors, and actions "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 after effects have been extirpated."[278]

Justice Ginsburg's deployment of contextual race in this nuanced fashion illuminated two key understandings of color in constitutional law, one deprecatory and one salutary:

> The Constitution is both color blind and color conscious. To avoid conflict with the Equal Protection Clause, a classification that denies a benefit, causes harm, or imposes a burden must not be based on race. In that sense, the Constitution is color blind. But the Constitution is color conscious to prevent discrimination being perpetuated and to undo the effects of past discrimination.[279]

Along these lines, Justice O'Connor, writing for the majority in *Adarand*, *Grutter*, and *Johnson*, gradually embraced a more contextual approach to race and strict scrutiny. As described in Part I, Justice O'Connor's *Adarand* opinion revealed an evolving contextual

273. Gratz v. Bolinger, 539 U.S. 244, 298 (2003) (Ginsburg, J., dissenting).

274. *Adarand*, 515 U.S. at 274 (Ginsburg, J., dissenting).

275. *See id.* at n.8 ("[W]hatever the source of racism, to count it the same as racialism, to say that two centuries of struggle for the most basic of civil rights have been mostly about freedom from racial categorization rather than freedom from racial oppression, is to trivialize the lives and deaths of those who have suffered under racism.") (quoting Stephen L. Carter, *When Victims Happen to be Black*, 97 YALE L.J. 420, 433-34 (1988)).

276. *Id.*

277. *See Gratz*, 539 U.S. at 298 (Ginsburg, J., dissenting).

278. *Id.* at 301 (Ginsburg, J., dissenting).

279. *Id.* at 302 (quoting United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 876 (5th Cir. 1966)).

view of race, explaining that "[t]he unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it."[280] Justice O'Connor thus invoked current racial conditions and a history of subordination—hallmarks of a contextual definition of race in strict scrutiny review—in order to evaluate race-conscious decision-making.[281]

As discussed in Part II, race-in-context now treats race in relation to its group histories, social conditions and cultural expression.[282] By embracing "context," the Court's majority now signals a willingness to recognize patterns of differences that distinguish groups of people for social, economic and political purposes.[283] Context informs interpretation and assessment—the key tasks of strict scrutiny analysis.[284]

B. Jurisprudential Underpinnings of the Shift Toward Contextual Race

1. Contemporary "Racial Realism"

When context informs strict scrutiny review in this fashion it "exposes how the [old] rules governing equal protection review actually disadvantage communities of color."[285] Courts no longer can resort to an abstraction—like formal race—to easily invalidate race-as-a-factor government affirmative action initiatives.[286] Contextual strict scrutiny demands that courts make realistic, rather than formalistic, assessments.

Those demands for realistic assessments are an outgrowth of the 1930s "Legal Realism."[287] Legal Realism emerged as a potent cri-

280. *Adarand*, 515 U.S. at 237.

281. *See* Johnson v. California, 543 U.S. 499, 505-06 (2005).

282. See *infra* Part II. For a discussion of the varying meanings and uses of "context," see Martha Minow & Elizabeth V. Spelman, *In Context*, 63 S. CAL. L. REV. 1597 (1990).

283. *See id.* at 1600.

284. "Social scientists . . . emphasize the important role that context plays in generating the meanings associated with race and in mediating the harms associated with racially stigmatized status." *See*, R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803, 847-48 (2004).

285. DERRICK BELL, RACE, RACISM, AND AMERICAN LAW 126-27 (5th ed. 2004).

286. *See* Hopwood v. Texas, 488 U.S. 469 (1989) (adopting a strong version of formal color-blindness to invalidate the Texas Law School's affirmative action program). *See supra* notes and accompanying text.

287. *See* AMERICAN LEGAL REALISM (William W. Fisher III, Morton J. Horwitz & Thomas A. Reed eds., 1993); Edward A. Purcell, Jr., *American Jurisprudence Between the Wars: Legal Realism and the Crisis of Democratic Theory*, 75 AM. HIST. REV. 424 (1969); Singer, *supra* note 24.

tique of legal formalism.[288] It challenged the notion of "law as an autonomous" system of internally consistent rules that functioned objectively and that could be understood without reference to other disciplines.[289] For those committed to formal legal reasoning, rules were applied to facts to produce just results—by definition.[290] The identity of the parties and judges, the social and historical setting of the controversy, judges' value judgments on close-calls and likely human consequences—all fell largely beyond the ken.[291]

Legal realist scholars exploded this conception of the legal process. They enabled one to look at, and then behind, stated rules and traditional reasoning methods to comprehend the social and political dynamics informing actual judicial decisionmaking.[292] While most judges endeavored to be fair and follow the law, the judges' political perspectives and cultural experiences created the lens that shaped how they viewed history, construed legal norms, and ascertained "rel-

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Professor Karl Llewellyn first identified Legal Realism as a jurisprudential movement in 1930. *See* Karl N. Llewellyn, *A Realistic Jurisprudence - The Next Step*, 30 COLUM. L. REV. 431, 431 (1930) and developed a description shortly thereafter. *See* Karl N. Llewellyn, *Some Realism About Realism - Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1222-24 (1931). Legal Realism spawned many varied schools of legal thought—all with the rejection of legal formalism at their core. Those diverse schools of thought include Law and Economics, Critical Race Theory, Feminist Legal Theory, Legal Pragmatism and LatCrit Theory and Practice. *See generally* Bell, *supra* note 25 at 368 n.17.

288. *See* Mensch, *supra* note 21, at 32-36. The Realist critique was such a potent "assault upon conventional legal reasoning, cutting so deeply into the premises of American legal thought, that subsequent legal thinkers are still struggling to rebuild a convincingly coherent structure." *Id.* at 33.

289. *See id.* at 32-33 ("[R]ealists urged judges to eschew the rigid, abstract formalism . . . thus removed law from its sphere of autonomous logic, and placed it squarely within the larger political/social system."); s*ee also* Singer, *supra* note 24 at 474 (offering that the significance of Legal Realism was the desire to replace formalism with a pragmatism that understands law as "based on human experience, policy, and ethics, rather than formal logic").

290. *See* Mensch, *supra* note 21, at 30 (explaining that rules were to "be applied rigidly and formally, to *any* particular social context; in fact failure to do so would be evidence of judicial irrationality and/or responsibility").

291. *See* Singer, *supra* note 24, at 470-73 (describing the wide range of factors excluded from consideration in evaluation of judicial decisions).

292. *See* Mensch, *supra* note 21, at 34 (explaining the Realist illumination that rules, like words, "are created by people in history, and their definition inevitably varies with particular context and with the meaning brought to them by the judges who are asked to interpret them. The act of interpretation is, in every instance, an act of social choice."); *see also* Aviam Soifer, *Courting Anarchy*, 82 B.U. L. REV. 699 (2002) (analyzing the political underpinnings of the Court's analysis in Bush v. Gore and other recent Rehnquist Court decisions).

evant" facts.[293] For legal realists, sociology, psychology and economics helped unravel "formalism" and replace it with "realism."[294]

Grutter's movement away from formal race and firmly toward contextual race implicates a contemporary version of Legal Realism[295]—a "racial realism"[296] grounded in a systematic examination of social science studies and documented historical research.[297] The

293. *See* K. N. LLEWELLYN, THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY (1930); Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 53 COLUM. L. REV. 809 (1935); *see also* Mensch, *supra* note 21, at 34 ("There was *no such thing* as objective legal methodology behind which judges could hide in order to evade responsibility for the social consequences of legal decision making. Every decision they made was a moral and political choice.").

294. *See* Bell, *supra* note 25 at 365. For an analysis of the empirical research component of Legal Realist thought, see generally JOHN H. SCHLEGEL, AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE (1995).

295. *See generally* Singer, *supra* note 24.

296. Bell, *supra* note 25, at 364 (coining the phrase "Racial Realism" to denote legal realism in racial justice analysis). Professor Karl Llewellyn may have been an early "racial realist" as well. *See* Karl N. Llewellyn, *Group Prejudice and Social Education*, *in* CIVILIZATION AND GROUP RELATIONSHIPS 11, 29-30 (R.M. MacIver ed., 1954) ("I happen to be a realist in jurisprudence, in sociology, and in psychology, and the job of a realist is to begin by seeing exactly what he is up against . . . and finds ways and means that will work [and] implements ideals with hands and feet that stand on and can take hold of the here and now."); Karl N. Llewellyn, *What Law Cannot Do For Inter-Racial Peace*, 3 VILL. L. REV. 30, 31 (1957) (maintaining that the legal system could be employed to "set up ideals still far from full attainment, [and] to set up tension [between actual and aspirational racial reality]," but warning the tension could lead to a popular backlash). Other possible early examples of "racial realism" include FELIX S. COHEN, HANDBOOK ON FEDERAL INDIAN LAW (1942); Felix S. Cohen, *To Secure These Rights: The Report of the President's Committee on Civil Rights*, 57 YALE L.J. 1141 (1948); Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470, 471-79 (1923) (arguing that no interaction is free from the coercive forces of the government because all interactions, including ostensibly private ones, take place against the background of public law, which confers rights, obligations, and liberties on parties in a systemically discriminatory manner and, therefore, constitutional rights could not protect individuals from state coercion); Robert L. Hale, *Rights Under the Fourteenth and Fifteenth Amendments Against Injuries Inflicted by Private Individuals*, 6 LAW. GUILD REV. 627, 628-29 (1947) (noting that although lynching was a crime in most states, "lynchers are rarely if ever punished" and arguing that racial discrimination practiced by private individuals is "just as effective as if it were practiced by the state itself").

297. By referring here to social science and "documented" history we are distinguishing, and rejecting, the pseudo-scientific ethnography of the 19th Century and early 20th Century that created a racial hierarchy based upon the superiority and inferiority of the races. *See* FEAGIN & FEAGIN, *supra* note 26, at 6-9. For example, in *Grutter* the Court relied on various social science and empirical studies to support its holding that Michigan had a compelling state interest in diversity in university admissions. Justice O'Connor explains:

> In addition to the expert studies and reports entered into evidence at trial, numerous studies show that student body diversity promotes learning outcomes, and "better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals." Brief for American Educational Research Association et al. as Amici Curiae 3; *see, e.g.*, W. Bowen & D. Bok, The Shape of the River (1998); Diversity Challenged: Evidence on the Impact of Affirmative Action (G. Orfield & M. Kurlaender eds. 2001); Compelling Interest: Examining the Evidence on Racial Dynamics in Colleges and Universities (M. Chang, et al., eds. 2003).

Grutter, 539 U.S. 306, 330 (2003). For additional historical accounts and social science studies relied upon by the Court in *Grutter*, see *supra* notes 88-89 and accompanying text.

Brandeis brief[298] and *Brown*'s Black/White doll studies[299] were empirical precursors. With its emphasis on history in relation to current racial conditions and its close examination of relevant racial differences as reflected in government initiatives, *Grutter* quietly yet momentously stamped the Court's imprimatur on "racial realism" through multidisciplinary analysis of law in context.

The high Court, of course, has long asked historical questions. But those queries often have focused narrowly on the intent of legislators or framers at the time of enactment[300] or provided general background (never later referenced).[301] Many of the historical accounts have presented skewed views of events, interactions and impacts.[302] *Grutter*'s multidisciplinary analysis invites historical accounts from va-

298. Brief for the State of Oregon, Muller v. Oregon, 208 U.S. 412 (1908). In *Muller*, future-Justice Brandeis introduced this new type of appellate legal brief, emphasizing economic and social evidence rather than legal precedents, which was cited by the Court in its opinion. *See* Muller v. Oregon, 208 U.S. 412, 419, n.1 (1908).

299. *See* Brown v. Bd. of Educ., 347 U.S. 483, 494 n.11 (1954) (citing K. B. Clark, Effect of Prejudice and Discrimination on Personality Development (Midcentury White House Conference on Children and Youth, 1950)); *see also* RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *Brown v. Board of Education* and Black America's Struggle for Equality 315-21 (Vintage Books 2004). In addition to the Doll Studies, the Supreme Court relied on the influential study by Swedish sociologist GUNNAR MYRDAL, AN AMERICAN DILLEMA (1944). *See Brown*, 347 U.S. at 494 n.11.

300. *See, e.g.*, Dred Scott v. Sandford, 60 U.S. 393 (1856).

301. *See, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); *see also supra* notes 89-99 and accompanying text.

302. For example, in upholding the Japanese American internment, the Court did not acknowledge the deep history of West Coast government and business hostility toward Japanese Americans. *See* Korematsu v. United States, 323 U.S. 214, 219 (1944) ("The judgment that exclusion of the whole group was for . . . a military imperative answers the contention that the exclusion was in the nature of group punishment based on antagonism to those of Japanese origin."); *cf. id.* at 239, n.12 (Murphy, J., dissenting) ("The reasons [for the internment] appear, instead, to be largely an accumulation of much of the misinformation, half-truths and insinuations that for years have been directed against Japanese Americans by people with racial and economic prejudices—the same people who have been among the foremost advocates of the evacuation."). *See also* Rice v. Cayetano, 528 U.S. 495, 527-28 (2000) (Stevens, J., dissenting) ("The Court's holding today rests largely on the repetition of glittering generalities that have little, if any, application to the compelling history of the State of Hawai'i.").

rying perspectives,[303] particularly from the standpoint of those engaged in long-term struggles for equality.[304]

The Court also has entertained empirical studies in an array of cases.[305] *Brown*'s use of social science to establish the inherent harm of racially separate schools is the touchstone.[306] The Court's overall approach to the utility, and indeed appropriateness, of social science for racial disputes, however, has been sporadic at best. The Court has often ignored or discounted that genre of information even when it shed bright light on the grounds for a discrimination challenge or the

303. History-telling is itself a selective accounting of events and trends, and historical accounts are often contested. Professor Yamamoto's writing on "collective memory" describes the intense debates at the threshold of justice struggles to frame the history of grievance and injustice. *See* Sharon K. Hom & Eric K. Yamamoto, *Collective Memory, History, and Social Justice*, 47 UCLA L. REV. 1747 (2000) (analyzing the selective accounting of Hawaiian history in Justice Kennedy's majority opinion in Rice v. Cayetano, 528 U.S. 495 (2000)). Professor Alfred Brophy's careful research on the little-known White Tulsa Race Riot of 1921 is an exemplar of a documented, credible historical-legal account. Working with a state commission, Brophy documented the complete destruction of a flourishing African American township and the killing of over 100 Blacks by Whites following a White woman's false rape accusation. ALFRED BROPHY, RECONSTRUCTING THE DREAMLAND: THE TULSA RIOT OF 1921 (2002). His description of neighboring Whites' subsequent manipulation of the legal system to acquire title to the African Americans' lands, and their ensuing code of silence, gave voice eighty years later to the 100 Black survivors and illuminated in real-life terms the meanings of violence and legal subordination in Jim Crow America. That history provided the foundation for proposed state reparations legislation and emerged as the heart of a federal court reparations lawsuit. *See* Alexander v. Oklahoma, 382 F.3d 1206 (10th Cir. 2004); *see also* Plaintiffs' Second Amended Complaint, Alexander v. Oklahoma, No. 03-CV-133 (N.D. Okla. Apr. 29, 2003), *available at* http://www.tulsareparations.org/Complaint2ndAmend.pdf (last visited Apr. 6, 2005).

304. *See* Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987) (describing how court opinions tend to overlook the perspectives of those "at the bottom" and arguing for the necessity of having those perspectives presented and considered); *see also* Minow & Spelman, *supra* note 282 (demonstrating how attention to context often has the effect of bringing forward often bypassed perspectives of those outside society's mainstream).

305. *See* Judith Olans Brown et al., *Some Thoughts About Social Perception and Employment Discrimination Law: A Modest Proposal for Reopening the Judicial Dialogue*, 46 EMORY L.J. 1487 (1997). Many of those studies have been used to shed light on aspects of the legal system's operations—for example, the comparative effects of mediation rather than trial in domestic violence disputes. *See* Carrie Menkel-Meadow, *The Trouble With the Adversary System in a Postmodern, Multicultural World*, 38 WM. & MARY L. REV. 5 (1996).

306. Brown v. Bd. of Educ., 347 U.S. 483 (1954); *see also* Michael Heise, Brown v. Board of Education, *Footnote 11, and Multidisciplinarity*, 90 CORNELL L. REV. 279 (2005); William E. Nelson, *Brown v. Board of Education and the Jurisprudence of Legal Realism*, 48 ST. LOUIS U. L.J. 795 (2004). The Clark doll studies have themselves been the source of contestation. *See* LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 42-43 (2000) (describing the "numerous problems with the study"); Sanjay Moody, Note, *Brown Footnote Eleven in Historical Context: Social Science and the Supreme Court's Quest for Legitimacy*, 54 STAN. L. REV. 793 (2002) (describing the historical debate over Footnote 11 and critiques of the technical quality of the research cited therein).

foundation for the government initiative aimed at remedying past discrimination.[307]

Grutter's approach to comprehending race in context elevates the status of social science in law to new heights,[308] as an integral means of establishing context. And *Grutter* does so just ahead of an on-rushing realist research juggernaut.

Over the last ten years a new kind of socio-legal research has exploded into the legal arena.[309] In the racial equality realm alone, this research addresses a startling array of issues. It encompasses what race is and how racial categories are constructed,[310] how people stereotype others and how this informs differing types of discriminatory behavior,[311] how internalized negative stereotyping can hurt individual performance,[312] how standardized aptitude tests can reflect

307. The *McCleskey* majority declared irrelevant to equal protection analysis vast empirically verified racial disparities in death penalty sentencing. *See* McCleskey v. Kemp, 481 U.S. 279, 314 (1987). Likewise, in invalidating a minority set-aside city ordinance in *Croson*, Justice O'Connor discounted strong empirical data on discrimination in government contracting. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 500-06 (1989).

308. Justice Thomas explicitly acknowledged the degree to which the *Grutter* majority relied on historical and sociological research. Revealing his own formalist approach, Justice Thomas took issue with how "the Court relied heavily on social science evidence to justify its deference." Grutter v. Bollinger, 539 U.S. 306, 364 (2003) (Thomas, J., dissenting). Scholars have noted that the Court's reliance on this kind of source material "is consistent with a growing trend of judicial opinions embracing an increasingly multidisciplinary approach." Heise, *supra* note 306, at 313.

309. This research is an outgrowth of, but distinct from, the initial "Law and Society Association" research that focused on measuring how "law on books" differed from "law in action." *See* Bell, *supra* note 25, at 368 n.17; *see also* Michael Heise, *The Past, Present, and Future of Empirical Legal Scholarship: Judicial Decision Making and the New Empiricism*, 2002 U. ILL. L. REV. 819 (2002) (describing the growth of empirical legal scholarship); Austin Sarat & Jonathan Simon, *Beyond Legal Realism?: Cultural Analysis, Cultural Studies, and the Situation of Legal Scholarship*, 13 YALE J.L. & HUMAN. 3 (2001); Thomas S. Ulen, *The Unexpected Guest: Law and Economics, Law and Other Cognate Disciplines, and the Future of Legal Scholarship*, 79 CHI.-KENT L. REV. 403 (2004) (describing the importance of empirical inquiry in Law and Economics, and the corresponding influence on broader legal scholarship); Ian Ayres, *Is Discrimination Elusive?*, 55 STAN. L. REV. 2419, 2428 (2003) (book review) (describing the importance of empirical evidence for lawmakers). *See generally* Symposium: *Empirical Legal Realism: A New Social Scientific Assessment of Law and Human Behavior*, 97 Nw. U. L. Rev. 1075 (2003); Symposium: *Empirical and Experimental Methods in Law*, 2002 U. ILL. L. REV. 791. (2002).

310. *See* OMI & WINANT, *supra* note 271 (outlining a groundbreaking sociological theory on the formation of racial categories and the creation of racial meanings in American society).

311. *See* Gary Blasi, *Advocacy Against the Stereotype: Lessons from Cognitive Social Psychology*, 49 UCLA L. REV. 1241 (2002); Ronald Chen & Jon Hanson, *Categorically Biased: The Influence of Knowledge Structures on Law and Legal Theory*, 77 S. CAL. L. REV. 1103 (2004); Thierry Devos & Mahzarin R. Banaji, *American = White?*, 88 J. PERSONALITY & SOC. PSYCHOL. (forthcoming Mar. 2005); Kang, *supra* note 126; Krieger, *supra* note 126; Brian A. Nosek et al., *Harvesting Implicit Group Attitudes and Beliefs from a Demonstration Web Site*, 6 GROUP DYNAMICS 101 (2002).

312. *See* Claude M. Steele, *A Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance*, 52 AM. PSYCHOLOGIST 613 (1997).

cultural biases,[313] how jurors' cultural perceptions affect their understanding of facts and legal concepts,[314] how seemingly neutral institutional practices can contribute to differing racial (and gender) treatment,[315] how economics influences corporate responses to issues of diversity and discrimination,[316] and how gender[317] and race are connected to poverty.[318] These studies, theoretical and empirical,[319] underscore a salient point: race in context matters.

Contextual strict scrutiny is jurisprudentially significant, then, because it embraces a socio-historical "racial realism" and, in doing so, controversially rejects the utility of "formal race" in strict scrutiny review.

313. *See* William C. Kidder, *Does the LSAT Mirror or Magnify Racial and Ethnic Differences in Educational Attainment?: A Study of Equally Achieving "Elite" College Students*, 89 CAL. L. REV. 1055 (2001); William C. Kidder, *Portia Denied: Unmasking Gender Bias on the LSAT and Its Relationship to Racial Diversity in Legal Education*, 12 YALE J.L. & FEMINISM 1 (2000); William C. Kidder, *The Bar Examination and the Dream Deferred: A Critical Analysis of the MBE, Social Closure, and Racial and Ethnic Stratification*, 29 LAW & SOC. INQUIRY 547 (2004).

314. Justin D. Levinson, *Suppressing the Expression of Community Values in Juries: How "Legal Priming" Systematically Alters the Way People Think*, 73 U. CINN. L. REV. 1059 (2005).

315. *See* Lopez, *Institutional Racism supra* note 155.

316. *See* Kellye Testy, *Capitalism and Freedom—For Whom?: Feminist Legal Theory and Progressive Corporate Law*, 67 LAW & CONTEMP. PROBS. 87 (2004).

317. *See* Regina Austin, *"Step on a Crack, Break Your Mother's Back": Poor Moms, Myths of Authority, and Drug-Related Evictions from Public Housing*, 14 YALE J.L. & FEMINISM 273 (2002); Athena Mutua, *Why Retire the Feminization of Poverty Construct?*, 78 DENV. U.L. REV. 1179 (2001); Laura M. Padilla, *Gendered Shades of Property: A Status Check on Gender, Race & Property*, 5 J. GENDER RACE & JUST. 361 (2002).

318. *See* CHRISTOPHER JENCKS, RETHINKING SOCIAL POLICY: RACE, POVERTY, AND THE UNDERCLASS (1992); Robert B. Chapman, *Missing Persons: Social Science and Accounting for Race, Gender, Class, and Marriage in Bankruptcy*, 76 AM. BANK. L.J. 347 (2002); Alex M. Johnson, Jr., *How Race and Poverty Intersect To Prevent Integration: Destablilizing Race as a Vehicle to Integrate Neighborhoods*, 143 U. PA. L. REV. 1595 (1995); Daria Roithmayr, *Locked In Inequality: The Persistence of Discrimination*, 9 MICH. J. RACE & L. 31 (2003).

319. This socio-legal research on race is set within the broader expansion of empirical legal research. *See generally* Elizabeth Warren, *The Market for Data: The Changing Role of Social Sciences in Shaping the Law*, 2002 WIS. L. REV. 1 (2002); Ayres, *supra* note 309, at 2428; Devon W. Carbado & Mitu Gulati, *The Law and Economics of Critical Race Theory*, 112 YALE L.J. 1757, 1785 (2003) (book review) (describing the utility of statistical analysis along with personal narratives in law). Of course, social science research rarely produces definitive results, and the starting points and assumptions for any research project shape its path and findings. There is definite value in critique and counter-studies. For instance, recent path-breaking empirical studies employing social cognition theory to test for decisionmakers' implicit racial bias have had profound implications for anti-discrimination law. *See* Nosek et al., *supra* note 311. Those studies have been followed by dozens of others both to cross-check the original work and extend or modify it. *See, e.g.*, William A. Cunningham et al., *Implicit and Explicit Ethnocentrism: Revisiting the Ideologies of Prejudice*, 30 PERSONALITY & SOC. PSYCHOL. BULL. 1332 (2004).

2. Contextual Race Versus Formal Race In Strict Scrutiny Review

Grutter's jurisprudential realism is thus rekindling the fires of the long-simmering debate about constitutional colorblindness. By embracing government race-consciousness in some circumstances (what we are calling contextual race), the Court's majority cast into disfavor the pure colorblindness, or formal race, advocated by several justices. As evidenced by heated justice and commentator reactions, the debate over the propriety of that shift will continue if not intensify.

To further the debate over contextual race versus formal colorblindness in strict scrutiny review, we make our assessment at this stage of the discussion with two realist concepts in mind: first, abstraction, and second, masking stratification.

a. Abstraction

Legal arguments favoring formal colorblindness often appear compelling when presented abstractly as issues of "fairness."[320] When narrowly framed without regard to history or current conditions, fairness focuses solely on the unsituated individual—each of us should be judged as an individual and not on an irrelevant measure like race.[321] This conception of fairness is appealing in the abstract. Yet, it is impoverished. All people are tied inextricably to social structures—schools, family, spiritual centers, social clubs, cultural activities.[322] Our identities determine, in part, the tenor of our daily social interactions. In terms of treatment by social institutions or the law, fairness can only be assessed in actual social settings.[323] Professor Richard Delgado aptly describes the fallacy of treating fairness in university admissions as an abstract principle:

> Fairness, including fairness in testing, is always a contested concept, always relative to someone's interests, perspectives, and purposes. It does not stand outside experience in some external realm. It's a matter of what we deem important. And the 'we' is generally those

320. These arguments tend to equate evenhandedness with fairness so that only rules that treat everyone the same qualify as fair. *See* Barbara Flagg & Katherine Goldwasser, *Fighting for Truth, Justice, and the Asymmetrical Way*, 76 WASH. U. L. Q. 105, 108 (1998).

321. In a speech to university students, Linda Chavez argued that the *Grutter* and *Gratz* opinions were flawed because they "read like social science textbooks, not law books[.] I believe every individual should be viewed as an individual. They need to be looked at on the content of their character and their effort and performance, not based on a racial group." Sarah Goldfarb, *Chavez Shares Opinions on Affirmative Action*, THE DIGITAL COLLEGIAN, Mar. 30, 2004, http://www.collegian.psu.edu/archive/2004/03/03-30-04tdc/03-30-04dnews-09.asp.

322. *See generally* Minow & Spelman, *supra* note 282.

323. *Id.*

> who are in a position to assure that their own merits, values, standing and excellence remain untouched.[324]

Abstract notions of fairness employed in the color-blindness debate are impractical because they run counter to what empirical studies continue to show—race is relevant to a person's social opportunities and obstacles.[325] Formal colorblindness is blind to the present-day effects of America's glaring history of racial discrimination.[326]

Unlike formal colorblindness, contextual race in strict scrutiny review does not resort principally to abstractions. This is significant because in the realm of anti-discrimination law, "abstract principles lead to legal results that [can] harm blacks and perpetuate their inferior status."[327] As mentioned, contextual race in strict scrutiny review embraces a contemporary version of racial realism.[328] This is important, since "[w]e are all legal realists now."[329] Realism "clear[s] the air of beguiling but misleading conceptual categories . . . so that thought [can] be redirected to . . . a close, contextual examination of social reality—to *facts* . . . and ethics."[330] Racial groups are not treated as fungible abstractions, but are placed within their particular historical and social contexts.

Beguiling tropes of formal colorblindness and individual fairness are recognized as problematic abstractions when courts define race in context. As aptly observed by Professor Phillip Frickey concerning federal Indian law specifically, but applicable generally to anti-discrimination law, "[u]nless injected with a heavy dose of historical perspective and legal realism, formal lawyerly analysis not only often fails to illuminate the [real] issues. . . but can also result in deceiving conclusions."[331] Strict scrutiny review informed by contextual race does

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324. Richard Delgado, *Rodrigo's Tenth Chronicle: Merit and Affirmative Action*, 83 GEO. L.J. 1711, 1742 (1995).

325. *See supra* Part II.A.2; *see also* CORNELL WEST, RACE MATTERS (1993).

326. *See, e.g.*, Kim Forde-Mazrui, *supra* note 115, at 705-06 (discussing the causal connection between past discrimination and racial disparities in female-headed households and out-of-wedlock births); Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A "Magic Mirror" into the Heart of Darkness*, 73 IND. L.J. 1111 (1998) (examining America's history of racial discrimination in immigration policy).

327. Bell, *supra* note 25, at 369.

328. *See supra* Part III.B.1.

329. Singer, *supra* note 24, at 467.

330. Mensch, *supra* note 21, at 35.; *see also* Bell, *supra* note 25, at 367.

331. Philip P. Frickey, *Adjudication and its Discontents: Coherence and Conciliation in Federal Indian Law*, 110 HARV. L. REV. 1754, 1757 (1997).

not ignore "social questions about which race in fact has power and advantages and which race has been denied entry for centuries."[332]

For instance, in *Grutter*, colorblindness proponents obscured the significant distinction between race-as-a-factor affirmative action at the Michigan Law School on the one hand and Jim Crow segregation in every facet of African American life on the other. Equating the race-as-a-factor admissions at issue in *Grutter* with de jure segregation in *Brown* empowered supporters of formal colorblindness to channel our moral disgust for slavery and segregation and direct it against government efforts to ameliorate the continuing effects of slavery and segregation.[333] A likely consequence of that position—the exclusion of African Americans, Latinos, and Native Americans from the law school student body and the reinstitutionalization of a racial hierarchy in elite higher education.[334]

By contrast, the contextual view of race in strict scrutiny analysis discussed in Part II distinguishes between race-as-a-factor admissions and Jim Crow segregation laws. It recognizes that the affirmative action program challenged in *Grutter* could never be the moral equivalent of the white racial apartheid laws in *Brown*.[335] It does not mean that every affirmative action program will be upheld. It does mean that contextual race is more solidly grounded than formal color-

332. Bell, *supra* note 25, at 369 (discussing the formalistic interpretation of the Fourteenth Amendment in *Bakke*).

333. Professor Guy-Uriel E. Charles explains that "from this perspective, colorblindness as a constitutional principle is a moral imperative." Charles, *supra* note 80, at 2023. To illustrate the point, Professor Charles explains that both "the actions of *Sweatt v. Painter* and *Hopwood v. Texas* are constitutionally suspect. . . . By lumping both cases into the same broad category, an affirmative action remedy to facilitate the legal education of people of color is classified on the same moral plane as a plan that categorically denied admission to any person of color." *Id.* at 2022.

334. *See* Karst, *supra* note 46, at 385 (If the "racial status quo is taken as equilibrium . . . a race-conscious remedy—one aimed at redressing the myriad corruptions of public life produced by the stigma of caste—is itself a transgression of formal neutrality, for it alters the equilibrium of the status quo"); *see generally* WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER: LONG TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS (1998).

Barbara Grutter's invocation of colorblindness is also problematic because formal-race limits the idea of racism as a simple, individual centered prejudice, downplaying the persistence of system racial subordination in university admissions. *See* Gotanda, *supra* note 40, at 43 ("Formal-race and the application of strict scrutiny lend themselves to superficial critiques of affirmative action programs, thus legitimizing the continued subordination of [historically disadvantaged groups].").

335. Rather than invoking abstractions, contextual race in strict scrutiny review directs courts to a practical inquiry. Courts need not hide behind amorphous formalisms, but acknowledge that "there is no moral or constitutional equivalence between a policy that is designed to perpetuate a caste system and one that seeks to eradicate racial subordination." Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 243 (Stevens, J., dissenting).

blindness in constitutional analysis precisely because it makes salient real-life distinctions and does not abjure history in evaluating the validity of a program.

Practically speaking, then, formal colorblindness in strict scrutiny review is intensely problematic because it entreats courts to employ an abstraction (all racial groups are identically situated) to strike down all race-conscious programs.

b. Masking Stratification

Professor Derrick Bell sees an even deeper problem with formal colorblindness in strict scrutiny analysis. Some judges and advocates "use abstract concepts, such as equality, to mask policy choices and value judgments."[336] For Professor Bell, some opponents of contextual race employ colorblindness as a rhetorical device less to achieve racial equality than to stymie government ameliorative efforts.

Using colorblindness to mask policy choices and value judgments obscures racial motivations and helps perpetuate stratification along racial lines. According to Professor Reva B. Siegel, colorblindness discourse serves as a mask because it "functions as a semantic code"[337] for maintaining group-based inequalities (racial stratification).[338] For Siegel, colorblindness disguises the distributive consequences of ostensibly race-blind practices.

Indeed, racial stratification remains a reality in America. Social and economic goods have long been distributed along racial lines—for instance, between 1946 and 1960, of 350,000 new homes built with Federal Housing mortgage support in northern California, fewer than 100 went to Black families, while White families routinely received FHA mortgages.[339] This kind of huge racial disparity in housing op-

336. Bell, *supra* note 25, at 369. Abstraction can serve the same "masking" purpose as stare decisis where it is used to obscure the court's actual reasoning.

337. Siegel, *supra* note 272, at 89.

338. *Id.* at 84 ("When we say we are distributing goods and opportunities in a race- and gender-blind fashion, we recognize group identity but ignore the ordinary status consequences [that is, maintaining hierarchy] of group identity for purposes of the relevant social transaction.").

339. *See* Troy Duster, *Individual Fairness, Group Preferences, and the California Strategy*, *in* RACE AND REPRESENTATION: AFFIRMATIVE ACTION 111, 118 (Robert Post & Michael Rogin eds., 1998). According to Professor Duster, "[t]hat same pattern [of discrimination in distributive practices] holds for the whole state [of California], and for the nation as well." *Id.* According to the Census Bureau, in 1999, 74% of suburban residents owned their own homes, while only about half of urban residents are homeowners. The proportion is similar when you compare homeowners by race—in 1999, 74% of Whites were homeowners, while only 45% of Latinos, 46% of Blacks and 51% of Asians owned their homes. U.S. CENSUS BUREAU, AMERICAN

portunities for first-time homebuyers contributed significantly to the immense difference between White and Black family net wealth. At the start of the new millennium, White family net wealth (and corresponding education and cultural development opportunities)[340] was more than fourteen times greater than that of Black families—$88,000 compared to $6,000.[341]

According to Siegel, one cannot judge the fairness of these kinds of distributive practices without considering actual racial conditions. Formal colorblindness avoids consideration of economic stratification along racial lines by assuming a more or less level racial playing field. It conceals the "distributive consequences or group-salient practices in a misleading semantic code [of] race-neutral[ity]."[342]

Siegel thus concludes that colorblindness is jurisprudentially flawed because it "defines race in [masking] ways that are deeply at odds with the [contextual] understandings of race that would seem to be relevant to evaluating the justice of our distributive practices"[343] along racial lines.[344] As Professor Jerome McCristal Culp, Jr. observes,

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HOUSING SURVEY FOR THE UNITED STATES: 1999 42 (2000). Modified version of the original text, issued in 2003 is *available at* http://www.census.gov/prod/2000pubs/h150-99.pdf.

340. *See* DALTON CONLEY, BEING BLACK, LIVING IN THE RED: RACE, WEALTH, AND SOCIAL POLICY IN AMERICA 5 (1999) ("In contemporary America, race and property are intimately linked and form the nexus for the persistence of black-white inequality."). Professor Conley explains that since "wealth accumulation depends heavily on intergenerational support issues such as gifts, informal loans and inheritances, net worth has the ability to pick up both the current dynamics of race and the legacy of past inequalities that may be obscured in simple measures of income, occupation or education." *Id.* at 6.

341. *See* RAKESH KOCHAR, PEW HISPANIC CTR., The Wealth of Hispanic Households: 1996 to 2002, at 2 (Oct. 2004), *at* http://pewhispanic.org/files/reports/34.pdf. The median net worth of Hispanic households in 2002 was $7,932, or nine percent of the median wealth of non-Hispanic White households at the same time ($88,651), while the net worth of Blacks was only $5,988. *Id.* This recent study found that, after adjusting for inflation, the net worth for White households increased 17% between 1996 and 2002, and rose for Hispanic homes by 14%, but decreased for Blacks by 16%. *Id.* The Pew study demonstrated that the wealth of Latino and Black households is less than one-tenth the wealth of White households even though Census data show their income is two-thirds as high. *Id.* The report concluded that the reasons for this disparity are minorities' limited access to financial markets and greater barriers to homeownership, since ownership of a home bears a strong relationship to the net worth of a household. *Id.*

342. Siegel, *supra* note 272, at 101.

343. *Id.* at 99.

344. An example is Proposition 209, the "California Civil Rights Initiative" to "further equality," which would have the (ostensibly) intended effect of reinforcing racial stratification. *See* Girardeau A. Spann, *Proposition 209*, 47 DUKE L. J. 187 (1997). On the effects of Proposition 209 in law school admissions see William C. Kidder, *Situating Asian Pacific Americans in the Law School Affirmative Action Debate: Empirical Facts About Thernstrom's Rhetorical Acts*, 7 ASIAN L.J. 29 (2000); Kidder, *supra* note 119.

> [T]he argument for colorblindness ultimately argues in favor of a racialized status quo that leaves black people and other racial minorities in an unequal position . . . . "[R]acial status quo" [means] the economic reality that African Americans are twice as likely to be unemployed [and] less likely to be employed in positions that provide status or higher income.[345]

Contextual race looks for the possibility of racial stratification both by examining racial group history, current racial conditions and by identifying and explaining relevant differences in assessing government ends, means and motivations.

The masking function of ahistorical colorblindness hides the reality that the "ways in which the legal system enforces social stratification are various and evolve over time."[346] Siegel describes this process as "preservation-through-transformation."[347] Social stratification is preserved by those with political and economic power when, in the face of mounting challenges to clear legal inequality, they change the justificatory rhetoric and substantive rules enough to relieve social pressure, but without fully dismantling the hierarchy.[348]

By repudiating past practices, like slavery and overt segregation, formal colorblindness allows its supporters to subtly advocate preservation of inequalities in today's racial order by transforming the justificatory rhetoric. The law no longer espouses Black inferiority; it ascribes to the "irrelevance of race." Yet, this irrelevance-of-race is

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345. Jerome McCristal Culp, Jr., *Colorblind Remedies and the Intersectionality of Oppression: Policy Arguments Masquerading as Moral Claims*, 69 N.Y.U. L. REV. 162, 167 (1994) (internal footnotes omitted); *see also* Cheryl I. Harris, *Mining in Hard Ground*, 116 HARV. L. REV. 2487, 2500 (2003) ("While colorblindness obscures entrenched racial inequality and renders the racial stratifications in the economy and in accumulated wealth a product of individual failure [contextual race does not ignore] the dynamics that produce significant barriers to attaining equality.") (reviewing LANI GUNIER & GERALD TORRES, THE MINER'S CANARY (2002)). To identify particular social practices that are "distributively just . . . we would have to reason about race as it is socially instantiated, whether in historical or cultural terms." Siegel, *supra* note 272, at 100.

346. Siegel, *supra* note 27, at 1113.

347. Just as the "interpretation of equal protection offered in *Plessy* emerged from the Court's efforts to disestablish slavery, the interpretation of equal protection we inherit to day has emerged from the Court's efforts to disestablish segregation." *Id.* at 1129.

348. *Id.* at 1113. Professor Siegel elaborates,

> [a]s civil rights advocates challenged the conventional practices and rationales supporting race and gender inequality, they precipitated a shift in the rule structure and justificatory rhetoric of these status regimes. In time, an antidiscrimination principle that had been elaborated with respect to the status-enforcing practices and rationales of the early twentieth century became ill-suited for challenging the kinds of status-enforcing practices and rationales that emerged in their wake.

Siegel, *supra* note 272, at 111.

actually employed to invalidate affirmative action and preserve group inequalities in major realms of American life.

As Siegel presciently notes, "[t]oday, no less than the past, the nation gives [new] reasons for sanctioning practices that perpetuate the race and gender stratification of American society."[349] Is colorblindness one of the "new reasons" given for that purpose? Will it remain persuasive, or will it "one day appear to be [an] insubstantial rationalization[ ] for practices that helped perpetuate entrenched relations of inequality?"[350]

Understandably, the most strident critics of contextual race in strict scrutiny review are normatively devoted to colorblindness.[351]

Commentators Abigail and Stephan Thernstrom urge adherence to what amounts to formal race in strict scrutiny review. The Thernstroms criticize the *Grutter* majority for "deceiv[ing] the American people."[352] They view any use of race in decision-making as odious because "if race [is] in the mix, then race [is] inevitably decisive."[353] In their view, not mentioning race is preferable to the only alternative—allowing race to "make all the difference."[354] Their view of race leads to a peculiar rhetorical reframing of affirmative action programs. Michigan's race-as-a-factor admissions policy is pejoratively cast as a "racial double-standard."[355] Affirmative action is "ongoing racial sorting,"[356] the moral equivalent of Jim Crow.

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349. Siegel, *supra* note 27, at 1147.

350. *Id.* at 1148.

351. *See, e.g.*, THOMAS SOWELL, CIVIL RIGHTS: RHETORIC OR REALITY? 37(1984) (arguing that because of the irrelevance of race "[a]ll individuals should be treated the same under the law, regardless of their race, religion, sex or other such social categories"); DINESH D'SOUZA, THE END OF RACISM: PRINCIPLES FOR A MULTIRACIAL SOCIETY 297 (1995) (arguing that "[discrimination] is hardly remedied by racial preferences which treat incompetent individuals as competent on account of their membership in a favored group"); John Marquez Lundin, *The Call for Color-Blind Law*, 30 COLUM. J.L. & SOC. PROBS. 407, 409 (1997) (claiming that any classifications based on race violate the Constitution and hinder attempts at equality). For an analysis and critique of the normative arguments in favor of formal colorblindness, see John E. Morrison, *Colorblindness, Individuality, and Merit: An Analysis of the Rhetoric Against Affirmative Action*, 79 IOWA L. REV. 313 (1994).

352. Abigail Thernstrom & Stephen Thernstrom, *Secrecy and Dishonesty: The Supreme Court, Racial Preferences, and Higher Education*, 21 CONST. COMMENT. 251, 257 (2004). Some scholarly criticism of *Grutter* attacks the "dishonesty" of upholding affirmative action, but does not advance a substantive critique of the majority's shift toward contextual race. *See e.g.*, Lino Graglia, *Fraud by the Supreme Court: Racial Discrimination by a State Institution of Higher Education Upheld on "Diversity" Grounds*, 36 LOY. U. CHI. L.J. 57, 81 (2004).

353. Thernstrom & Thernstrom, *supra* note 352, at 252.

354. *Id.* at 253.

355. *Id.* at 253, 255.

356. *Id.* at 255. "At the center of that dishonesty lay the notion that, with ongoing racial sorting, the nation would move beyond race—that old habits would bring new benefits." *Id.*

Consistent with formal-race discourse, the Thernstroms' call for colorblindness admonishes government decision-makers for their obsession with equality for Blacks in American society. "Preferential policies are primarily driven by concern over the status of blacks in American society, and as long as the admissions process at elite institutions of higher education fails to create a 'critical mass' of African American students, schools will not abandon racial preferences unless compelled to do so."[357] Instead of overcoming a history of racial subordination, the Supreme Court's "dishonesty about racial equality perpetuates the corruption surrounding uses of race that has been deeply and perniciously embedded in the history of the nation."[358]

Through their firestorm of words, the Thernstroms criticize *Grutter*'s contextual treatment of race. "Racial classifications in the United States have a long and ugly history; racial subordination was all about double standards, with different entitlements depending on your racial identity."[359] Detached from historical and contemporary realities, this abstract logic transforms affirmative action automatically into racial discrimination—and more specifically, discrimination against (but not subordination of) Whites. For this reason, *Grutter* "is a bleak day in American constitutional law."[360] In effect, the Thernstroms disparage the *Grutter* majority for acknowledging that races are not fungible—that Michigan Law School's admissions program is not Jim Crow-style racial exclusion (completely excluding an entire racial group from access to societal opportunity in order to maintain their subordinated status).

The Thernstroms fail to make these distinctions. Nor do they think the Constitution should. Instead, they advocate a kind of formal race that sanitizes history beyond recognition.[361] In their colorblind view of history, as one scholar notes, the "Thernstroms inhabit a world that has been turned upside down. In that world, power rela-

357. *Id.* at 265.
358. *Id.* at 267.
359. *Id.* at 274.
360. *Id.*
361. The Thernstroms advocate a colorblind reading of the Civil Rights Act of 1964 and the Voting Rights Act because they have been "radically rewritten behind closed doors to embrace race-driven strategies." *Id.* at 256. The Thernstroms argue that the statutes were intended merely to "open the restaurants on a color-neutral basis [and] enforce the Fifteenth Amendment." *Id.* The social, political and historical context of racial segregation and the Civil Rights Movement's struggle against racial oppression is completely absent from their analysis.

tionships are inverted so that whites are powerless and blacks are powerful."[362]

Justice Thomas, dissenting in *Grutter*, also attacked the majority's contextual understanding of race. He criticized the majority's turn away from colorblindness and "the Court's implicit rejection of *Adarand*'s holding that beneficial and burdensome racial classifications are equally invalid."[363] Thomas relied in part on the same rhetorical scheme as the Thernstroms, treating racial segregation of Blacks as the legal equivalent of race-conscious programs aimed at addressing the current effects of historical racism. He warned, "[c]ontained within today's majority opinion is the seed of a new constitutional justification for a concept I thought long and rightly rejected—racial segregation."[364]

Like the Thernstroms, Thomas can only draw such an equivalence[365] by distorting racial history and the actual design of the Law School's race-as-a-factor affirmative action program.[366] For Thomas, "the Equal Protection Clause renders the color of one's skin constitutionally irrelevant."[367] Cast in the most beneficent light,[368] Justice

362. Deborah Waire Post, *The Salience of Race*, 15 TOURO L. REV. 351, 375 (1999). Professor Post explains that "[t]he Thernstroms are not the only critics who use this technique, but they are among the very worst when it comes to dredging up unconscious racism and playing with the emotions of white readers." *Id.* at 373.

363. Grutter v. Bollinger, 539 U.S. 306, 371 (2003) (Thomas, J., concurring in part and dissenting in part).

364. *Id.* at 365-66.

365. Professor Alan Freeman noted that this "facile assumption of equivalence becomes questionable, however, when one recognizes that the very reason for focusing on race as a relevant characteristic is our specific historical record of discrimination." Freeman, *supra* note 106, at 285.

366. Justice Thomas, without apparent irony, cites the *Korematsu* decision as an appropriate use of the strict scrutiny standard of review.

> A majority of the Court has validated only two circumstances where 'pressing public necessity' or a 'compelling state interest' can possibly justify racial discrimination by state actors. First, the lesson of *Korematsu* is that national security constitutes a 'pressing public necessity,' though the government's use of race to advance that objective must be narrowly tailored.

Grutter, 539 U.S. at 351-52 (Thomas, J., concurring in part and dissenting in part) (internal citations omitted).

367. *Grutter*, 539 U.S. at 355 n.3.

368. Justice Thomas appeared most concerned with what he perceives to be the stigma attached to beneficiaries of race-conscious policies. Michigan Law School's admissions policy "stamps minorities with a badge of inferiority and may cause them to develop dependencies or to adopt and attitude that they are 'entitled' to preferences." *Grutter*, 539 U.S. at 373 (internal citations omitted). Thomas criticized the contextual race view of the majority, admonishing that, "[t]he Constitution abhors classifications based on race, not only because those classifications can harm favored races or are based on illegitimate motives, but also because every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all." *Id.* at 354.

Thomas invoked colorblindness to highlight what he perceives as the stigmatization of beneficiaries of race-conscious decision-making.[369] Thomas' dissent nevertheless reverberates with tones of formal colorblindness.

In sum, formal colorblindness justifies striking down race-conscious initiatives without carefully examining whether their goal is to perpetuate historic forms of exclusion or promote equality through inclusion. Cast in this realistic light, colorblindness may be seen in two ways: at its best, as a social aspiration; at worst, as a mask for maintaining racial stratification and rationalizing practices that sustain group inequality.[370]

By contrast, the Court's close examination of the linkage of racial group histories to current socio-economic conditions and its differing assessments of inclusionary and exclusionary initiatives mark the embrace of a more contextual understanding of race and racial discrimination. This realism in equal protection analysis provides more grounded and nuanced jurisprudential support for the Court's acceptance of race-in-context in strict scrutiny review.

CONCLUSION

In *Korematsu v. United States*,[371] the Supreme Court announced that it was subjecting the government's World War II exclusion of West Coast Japanese Americans to the "most rigid scrutiny" and that only "pressing public necessity" could justify the racial restriction. The Court then contradicted itself by deferring to the government's assertion—later found to be false—that "military necessity" justified the racial exclusion and ultimately incarceration without charges or trial. An ignominious start in the life of strict scrutiny review.

369. Scholars have noted that Justice Thomas may speak from personal feelings of stigmatization. Professor Derrick Bell explains that Black Conservatives, like Thomas, "tend to be high achievers who may feel diminished by the notion they got where they are because of affirmative action. They are really trying to affirm that their status is the result of a fair fight." Bell, *supra* note 25, at 370 (quoting Julianne Malveaux, *Why Are the Black Conservatives All Men?*, Ms., Mar./Apr. 1991, at 60); *see also* Bryan K. Fair, *Taking Educational Caste Seriously: Why Grutter Will Help Very Little*, 78 TUL. L. REV. 1843, 1858 n.70 (2004) (noting that Thomas's *Grutter* dissent "complains about overmatched minority students. Yet, [Thomas] does not indicate whether he was overmatched at Holy Cross or Yale Law School.").

370. *See* Gotanda, *supra* note 40, at 62-63; *see* Siegel, *supra* note 27, at 85.

371. 323 U.S. 214, 216 (1944).

Strict scrutiny reemerged in its first modern incarnation with *Bolling v. Sharpe*[372] (contemporaneous to *Brown*) through *Loving v. Virginia*.[373] It invalidated the vestiges of state Jim Crow segregation by means of a review that was strict in theory and fatal in fact. However, as state legislation and agency programs ended formal segregation, strict scrutiny turned its focus onto the only race-conscious target in its sights—affirmative action programs. Still fatal in fact and treating all racial classifications as if they were the same, strict scrutiny entombed programs designed to address continuing racial inequalities rooted in past legalized segregation. With unacknowledged irony, strict scrutiny's second modern incarnation stood equal protection analysis on its head.

Over time, pressure mounted for a more realistic, more nuanced strict scrutiny formulation. In 2003, after fits and starts, the Supreme Court's majority embraced a third incarnation—what we are calling "contextual strict scrutiny." By emphasizing the linkage of history to current conditions and scrutinizing "relevant racial differences," the new strict scrutiny now draws from a "racial realism" grounded in a systematic examination of social science studies and documented historical research. In doing so, it rejects formal colorblindness as the lynchpin for equal protection analysis and, in appropriate situations, sanctions government initiatives designed to address the effects of long-standing discrimination.

Yet to date, the Court has not articulated an analytical method for applying its race-in-context strict scrutiny review. For these reasons, among justices, lower court judges and scholars, contextual strict scrutiny engenders controversy.

With this situation in mind, this Article has offered a four-part method for operationalizing contextual strict scrutiny distilled from the Justices' opinions. A workable analytical method is particularly important when the challenged government initiatives are designed to promote present-day equality in the face of discriminatory legacies. We have also laid a foundation for further debate by identifying and assessing two salient jurisprudential implications: the import of the contemporary version of Legal Realism, a racial realism, informing

372. 347 U.S. 497, 499 (1954) (declaring that "classifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect").

373. 388 U.S. 1, 11 (1967).

the Court's "context matters" mandate and the comparative merits of race-in-context analysis versus a formal version of colorblindness.

We close with the over-arching question: "Why does race-in-context matter" for strict scrutiny review? From our vantage point, there are three key responses. It matters first because the way strict scrutiny is conceived and applied directly affects peoples' daily lives and life prospects. The difference between fatal-in-fact review and race-in-context scrutiny in practical terms is this: it will in some instances mean the difference between law school and no law school education for a promising Native Hawaiian student with public school background and limited resources, who is his extended family's first to attend professional school (let alone college), in a setting where indigenous Hawaiians fall at the bottom of the state's socio-economic ladder and are starkly underrepresented in the lawyers' bar.[374]

Second, it matters because a formal strict scrutiny review undercuts courts' capacity to engage the public in a sophisticated analysis of one of the persistent, pressing issues of contemporary America—racial inequality. By contrast, when context matters in evaluating a government initiative, courts entertain in public view competing versions of history as linked to current racial conditions along with arguments about the realistic need for carefully framed government action. In addition to rendering judgments on narrow legal questions, the courts are storytelling institutions and their major cases are moral parables. They "engage dialectically with other dominant political institutions, with [people's] preexisting cultural assumptions, and other sources of cultural authority."[375] When realism informs judicial debate and context matters, courts are better able to fulfill their integral public educational role of illuminating justice under law.

Finally, the tenor of courts' strict scrutiny review matters because it bears on the judiciary's legitimacy. Will courts say one thing (announcing the most rigid scrutiny) and then do another (turn a blind eye to racial realities), as the Supreme Court did in *Korematsu*—all to strident, enduring criticism?[376] Will courts automatically, without careful examination of actual racial circumstances, invalidate all af-

374. *See* Eric K. Yamamoto & George K. Yamamoto, *Ethnicity and the Hawaii Bar: Looking Back, Looking Forward*, 3-OCT HAW. B.J. 111 (1990).

375. Freeman, *supra* note 122, at 122.

376. *See, e.g.*, Eugene V. Rostow, *The Japanese American Cases—A Disaster*, 54 YALE L.J. 489 (1945); Eric K. Yamamoto, *Korematsu Revisited—Correcting the Injustice of Extraordinary Government Excess and Lax Judicial Review: Time for a Better Accommodation of National Security Concerns and Civil Liberties*, 26 SANTA CLARA L. REV. 1 (1986); Susan Kiyomi Serrano &

firmative action programs? Or will courts seriously examine how history shapes current racial conditions and carefully assess the importance of measures drawn to promote inclusion in areas of social and economic life marked historically by social and legal exclusion?

Collectively, these differing questions illuminate the dismay expressed by Justice Harry Blackmun in 1989 about the Court majority's then racial myopia: "One wonders whether the majority still believes that race discrimination—or more accurately, race discrimination against nonwhites—is a problem in our society, or even remembers that it ever was."[377] Contextual strict scrutiny says to the public, as well as to judges and lawyers, that racial inequality was and is a problem in our society and that courts will engage government racial initiatives realistically through the most searching inquiry.

Dale Minami, *Korematsu v. United States: A "Constant Caution" in a Time of Crisis*, 10 ASIAN L.J. 37 (2003).

377. Wards Cove Packing Co. v. Atonio, 490 U.S. 442, 462 (1989) (Blackmun, J., dissenting).