Contextual Strict Scrutiny and Race-Conscious Policy Making

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I. INTRODUCTION

In his oft-cited article analyzing the United States Supreme Court's Equal Protection jurisprudence of the 1960s and early 1970s, Professor Gerald Gunther proposed that the Court's most exacting standard of judicial review reflected a "scrutiny that was 'strict' in theory and fatal in fact."[1] The Court's review of laws based on suspect classifications, such as race or national origin, and laws infringing on fundamental rights, including the right to vote, demonstrated that strict scrutiny would prove lethal to a statute challenged on Equal Protection grounds. In particular, the Court's evaluation of laws that subordinated minority groups—including school segregation policies, discriminatory public accommodations and transportation laws, and anti-miscegenation statutes prohibiting interracial marriages—consistently led to the invalidation of racial classifications.[2]

Recent challenges to race-conscious policies, including laws designed to remedy discrimination and to expand opportunities for racial minorities, have confirmed the rigor of strict scrutiny. In *City of Richmond v. J. A. Croson Co.*[3] and *Adarand Constructors, Inc. v. Peña*,[4] the Supreme Court held that strict scrutiny must be applied to all racial classifications regardless of whether the policies subordinate

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

2. *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967) (discussing anti-miscegenation laws); Gayle v. Browder, 352 U.S. 903 (1956) (per curiam) (discussing segregation in local bus system), *aff'g* 142 F. Supp. 707 (N.D. Ala. 1956); Mayor of Balt. v. Dawson, 350 U.S. 877 (1955) (per curiam) (discussing segregation in public beaches and bathhouses), *aff'g* 220 F.2d 386 (4th Cir. 1955); Brown v. Bd. of Educ., 347 U.S. 483 (1954) (eliminating school segregation).

3. 488 U.S. 469 (1989).

4. 515 U.S. 200 (1995).

minorities, remedy past discrimination, or promote the inclusion of minorities in civic life.[5] The federal courts have addressed an array of race-conscious policies in recent years, including affirmative action programs in employment, education, and contracting; race-conscious legislative districting designed to empower minority voters; and voluntary efforts to address racial isolation in public schools.[6] In most of these cases, the courts have found these laws and policies to be unconstitutional.[7]

Yet, in the Supreme Court's most recent affirmative action cases involving challenges to race-conscious admissions at the University of Michigan, the Court reaffirmed its earlier pronouncement in the *Adarand* case that, while strict in theory, strict scrutiny is not invariably fatal in fact.[8] Context matters in strict scrutiny analysis, and within the context of evaluating an inclusive admissions policy in *Grutter v. Bollinger*, the Supreme Court applied a more relaxed version of strict scrutiny to uphold the consideration of race in selective university admissions.[9] In doing so, the Court deferred to the University's

5. Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995) (holding that under the Fifth and Fourteenth Amendments, "all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny . . . ."); City of Richmond v. J. A. Croson Co., 488 U.S. 469, 494 (1989) (plurality opinion) (reaffirming *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986), and finding that the highly suspect nature of racial classifications mandates strict scrutiny regardless of the race of those burdened or benefited).

6. *See, e.g.*, Miller v. Johnson, 515 U.S. 900 (1995) (holding that a state's race-based congressional redistricting plan was not narrowly tailored to promote the compelling interest created by the Voting Rights Act); *Croson*, 488 U.S. 469 (1989) (striking down a city ordinance that required at least thirty percent of the dollar amount of each city contract to be awarded to minority-owned subcontractors); *Wygant*, 476 U.S. 267, 276 (1986) (stating that "societal discrimination is insufficient and over expansive" to justify the use of racial classification in a school district's layoff policy); Johnson v. Bd. of Regents of Univ. of Ga., 263 F.3d 1234 (11th Cir. 2001) (striking down a university's admission policy that awarded a fixed numerical bonus to non-White applicants); Tuttle v. Arlington County Sch. Bd., 195 F.3d 698 (4th Cir. 1999) (stopping a public school from using a weighted lottery in its admission process to promote racial and ethnic diversity in its student body), *cert. dismissed*, 529 U.S. 1050 (2000).

7. Recent exceptions to the federal courts' pattern of striking down race-conscious policies include Hunter ex rel. Brandt v. Regents of the Univ. of Cal., 190 F.3d 1061, 1063 (9th Cir. 1999) (upholding race-conscious admissions policy for university-based elementary school designed to promote interest in educational research), *cert. denied*, 531 U.S. 877 (2000); and *Wittmer v. Peters*, 87 F.3d 916 (7th Cir. 1996) (upholding the use of race preferences in a non-remedial employment policy of prison guards), *cert. denied*, 519 U.S. 1111 (1997).

8. *See* Grutter v. Bollinger, 539 U.S. 306, 326–27 (2003) (stating "[a]lthough all governmental uses of race are subject to strict scrutiny, not all are invalidated by it"); Gratz v. Bollinger, 539 U.S. 244, 270 (2003) (implying that some racial classifications may withstand strict scrutiny).

9. *See Grutter*, 539 U.S. at 327 (stating that "[n]ot 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 decision-maker for the use in that particular context.").

judgment in that the University had a compelling interest in attaining a diverse student body and upheld the use of race as a "plus" among many factors employed in a flexible admissions process. Strict scrutiny may be strict in theory, but it is contextual in practice.[10]

While illuminating the boundaries for race-conscious policies in higher education, the rulings in the University of Michigan cases shed only partial light on the more general questions of when and how context affects strict scrutiny. If, as the *Grutter* analysis implies, the courts may on occasion employ more deferential versions of strict scrutiny, what contexts determine such occasions? Was the Court's contextual scrutiny in *Grutter* specific to higher education, where the Court deferred to policy-making associated with academic freedoms rooted in the First Amendment?[11] Or, was context grounded in a distinction between exclusionary and subordinative legislation on the one hand and inclusionary and integrative policies on the other—a distinction that the Court ostensibly rejected in *Croson* and *Adarand* when it ruled that both "invidious" and "benign" racial classifications are subject to strict scrutiny?[12] Or, is context to be addressed on an ad hoc, case-by-case basis? Moreover, assuming that context properly determines the rigor of strict scrutiny, how should the courts customize their analyses to fit a given context?

Strict scrutiny focuses on both the ends as well as the means employed in a racial classification, and the courts engage in two related inquiries, either of which can lead to a holding of unconstitutionality.[13] First, the court must ask whether the underlying goal of a policy constitutes a compelling governmental interest of sufficient importance to justify the use of race.[14] Second, if the interest is indeed compelling, the court must inquire into whether the policy is "narrowly tailored" to fit its underlying goal.[15] Should the court adjust these inquiries to accommodate contextual differences, and, if so, how should such inquiries be adjusted?

This Article analyzes recent case law applying strict scrutiny to racial classifications and offers a set of principles to guide a contextual review of race-conscious policy-making. Part II reviews the basic elements of

10. *Id*.

11. *See id.* at 362 (Thomas, J., concurring in part and dissenting in part) (arguing that the Law School's use of race in admissions is "not entitled to any sort of deference, grounded in the First Amendment or anywhere else.").

12. *Id.* at 326.

13. *Id.* at 326–27.

14. *Id.* at 326.

15. *Id.*

strict scrutiny and the Supreme Court's rulings in *Adarand* and *Grutter*, where the Court advanced the contextual review of race-conscious affirmative action policies.[16] Part III examines federal case law in which the courts have engaged in contextual analyses of racial classifications, and discusses both the uses and limitations of these analyses.[17] Part IV proposes a model of contextual strict scrutiny that examines legislative intent and purpose, governmental role, institutional prerogatives, historical deference, and the nature of a policy in order to determine the context and the appropriate scrutiny of race-conscious policies.[18] Finally, this Article concludes with the application of contextual analysis to a set of education-related policies.[19]

II. STRICT SCRUTINY AND CONTEXTUAL ANALYSIS IN *ADARAND* AND *GRUTTER*

The Supreme Court's three-tiered framework of judicial review[20] retains its force in equal protection jurisprudence, but *Grutter* and other recent cases demonstrate that the framework is actually more fluid. Contextual analyses, rather than an adherence to a more rigid multi-tiered approach, may become the Court's model in future cases. This Part provides an overview of strict scrutiny analysis and the contextual model developed in the *Adarand* and *Grutter* cases.

A. Strict Scrutiny Principles

1. Overview

Because of America's long history of racial discrimination, government race-based classifications are inherently suspect and demand careful and exacting analysis by the courts. Since its beginning, strict scrutiny has been a vehicle by which the courts uncover illicit motives behind laws that appear to promote legitimate

16. *See infra* Part II (discussing the evolution of strict scrutiny and its application in *Adarand* and *Grutter*).

17. *See infra* Part III (reviewing the application of varying forms of strict scrutiny analysis to racial classifications in different contexts).

18. *See infra* Part IV.A (proposing an analytical model to improve the strict scrutiny analysis by including more emphasis on context).

19. *See infra* Part IV.B (applying contextual strict scrutiny to a variety of race-conscious education policies).

20. *See* Nguyen v. INS, 533 U.S. 53, 74–78 (2001) (O'Connor, J., dissenting) (elucidating the differences between heightened scrutiny analysis and rational basis analysis). Specifically, the Supreme Court employs one of three analyses: (1) strict scrutiny of racial and other suspect classifications; (2) intermediate-level scrutiny of gender and other "semi-suspect" classifications; or (3) rational basis scrutiny of most other classifications. *Id.*

governmental interests but are actually motivated by discriminatory animus.[21] Because of the harms associated with racial classifications, including group subordination and stereotyping, governments must demonstrate the necessity of using a race-conscious policy. Thus, strict scrutiny requires courts to carefully assess both the means and the ends of a racial classification: A policy must be narrowly tailored to effectively advance a compelling interest. Courts balance the competing interests of the government and racial groups under strict scrutiny, but because of the rarity of compelling justifications and the stringency of narrow tailoring, strict scrutiny tips the balance strongly in favor of plaintiffs successfully challenging a racial classification.

The courts typically incorporate multiple inquiries into the two prongs of the strict scrutiny analysis. Under the compelling interest test, the courts focus on both the importance of the government interest and the evidentiary basis for that interest.[22] The Supreme Court has recognized, for instance, that a government entity can have a compelling interest in remedying the present effects of its own past discrimination which would thereby justify a racial classification.[23] However, a governmental entity must also establish a factual predicate in support of its compelling interest in remedying discrimination. In other words, an interest in remediation cannot simply be asserted; there must be "a strong basis in evidence" to show that there has been past discrimination, as well as a showing that the present effects of the discrimination requires race-conscious remediation measures.[24] As a method of uncovering true governmental motives, the heavy evidentiary burden ensures that the government is seeking genuine remedial goals,

21. *See* Grutter v. Bollinger, 539 U.S. 306, 326 (2003) (quoting *Croson* to emphasize that "'[a]bsent searching judicial inquiry into the justification for . . . race-based measures,' [the Court] has no way to determine what 'classifications are "benign" or "remedial" and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics'"); City of Richmond v. J. A. Croson Co., 488 U.S. 469, 493 (1989) (plurality opinion) (explaining that "[t]he purpose of strict scrutiny is to 'smoke out' illegitimate uses of race . . . .").

22. *See* Goodwin Liu, *Affirmative Action in Higher Education: The Diversity Rationale and the Compelling Interest Test*, 33 HARV. C.R.-C.L. L. REV. 381, 401–10 (1998) (discussing how the Supreme Court makes a "compelling interest" inquiry based on substantive policy judgments and then focuses on the evidentiary basis of that interest in order to uncover racial classification schemes created from unconstitutional motives).

23. *See Croson*, 488 U.S. at 493 (plurality opinion) (discussing the remedying of past discrimination as a compelling interest that justifies racial classifications).

24. *See Croson*, 488 U.S. at 500 (reaffirming *Wygant* and finding no strong basis in evidence); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 277 (1986) (plurality opinion) (holding that in cases where a remedial action is challenged by a non-minority, "the trial court must make a factual determination that the employer had a strong basis in evidence for its conclusion that remedial action was necessary.").

rather than an unconstitutional goal such as racial balancing, which simply seeks racial proportionality for proportionality's sake.

While there is no single test for narrow tailoring, courts frequently turn to a set of inquiries established by the Supreme Court plurality in *United States v. Paradise*, a case in which the Court upheld a court-ordered promotions quota designed to remedy extensive racial discrimination in the Alabama Department of Public Safety. [25] Applied in remedial cases, the *Paradise* factors focus on the following: (1) "the necessity for the relief and the efficacy of alternate remedies," particularly race-neutral alternatives; (2) "the flexibility and duration of the relief"; (3) "the relationship of numerical goals to the relevant market"; and (4) "the impact of the relief on the rights of third parties."[26] The courts weigh all of these factors, and any significant departure from the standards, such as insufficient flexibility, the availability of a viable race-neutral alternative, or an undue burden on third parties, can render a racial classification unconstitutional.

In addition, Supreme Court pluralities have articulated narrow tailoring guidelines in cases such as *Wygant v. Jackson Board of Education* and *City of Richmond v. J. A. Croson Co.*, in which the Justices required that race-conscious remedial programs have a "logical stopping point" at which the remedy is complete and where the race-conscious policy can therefore end.[27] The *Croson* plurality also inquired into the potential over-inclusiveness of a remedial policy as an element of narrow tailoring.[28] For example, a race-conscious contracting program that includes Asian-Americans, Pacific Islanders, and Latinos as beneficiaries can be over-inclusive if those groups have only recently entered the contracting market, and the remedy need only address past discrimination against African-Americans.[29]

25. United States v. Paradise, 480 U.S. 149, 185–86 (1987) (pluraliy opinion).

26. *Id*. at 171 (plurality opinion). Although originally applied to labor markets, the *Paradise* factors are often adjusted based on the facts of the case; for example in a case involving educational admissions, a court may treat the potential applicant pool of students as the relevant market. *See, e.g.*, Tuttle v. Arlington County Sch. Bd., 195 F.3d 698, 706–07 (4th Cir. 1999) (adopting the *Paradise* factors and adjusting them to fit the facts of a K–12 educational admissions case), *cert. dismissed*, 529 U.S. 1050 (2000).

27. *Croson*, 488 U.S. at 498; *Wygant*, 476 U.S. at 275 (plurality opinion).

28. *Croson*, 488 U.S. at 506 (stating that "[t]he gross overinclusiveness of Richmond's racial preference strongly impugns the city's claim of remedial motivation.").

29. *See id.* (stating that "[t]he random inclusion of racial groups that, as a practical matter, may never have suffered from discrimination in the construction industry in Richmond suggests that perhaps the city's purpose was not in fact to remedy past discrimination.").

2. Triggering Strict Scrutiny

Although the Supreme Court has held that strict scrutiny should be applied to all racial classifications resulting in unequal treatment, not every governmental consideration of race will trigger strict scrutiny. As discussed in Part III below, the courts have not applied strict scrutiny to certain categories of legislation because of traditional deference to other branches of government or because of the nature of the legislation.[30] In the area of Native American policy, for instance, heightened judicial review has not been invoked for classifications based on Native American ancestry because the courts have recognized the political relationship of Native Americans to the federal government, and have deferred to congressional prerogatives involving tribal relations.[31]

In the area of legislative districting, a field in which policy makers drawing political boundaries typically examine an array of political and demographic factors, the Supreme Court has held that strict scrutiny is not automatically triggered when race is a factor. Race is an unavoidable consideration in districting, particularly because districting bodies must include race in their calculations to comply with the Federal Voting Rights Act.[32] Race must instead be the *predominant* factor in drawing district boundaries before the courts invoke strict scrutiny.[33]

In addition, when racial considerations do not result in unequal treatment—clear examples include gathering racial data for research purposes or to document patterns of discrimination—strict scrutiny is not triggered, as the consideration of race is not directly related to the allocation of burdens or benefits.[34] In essence, if there is no unequal treatment of individuals or of groups, there is no cognizable injury resulting from a consideration of race that would trigger strict scrutiny.

30. *See infra* Part III.A–B (discussing the categorical deference generally employed by the Supreme Court in strict scrutiny cases as well as what triggers the strict scrutiny analysis).

31. *See* Morton v. Mancari, 417 U.S. 535, 554–55 (1974) (citing several cases to establish that Native Americans have long held a unique relationship with the Federal Government, and to reject the application of heightened judicial review to this particular class).

32. 42 U.S.C. § 1973 (2000 & West Supp. 2004). As the Supreme Court clarified in *Miller v. Johnson*, 515 U.S. 900, 916 (1995), "[r]edistricting legislatures will . . . almost always be aware of racial demographics; but it does not follow that race predominates in the redistricting process."

33. *See infra* Part II.B (emphasizing how race must be the predominant factor, rather than one of many factors, in cases to trigger the strict scrutiny analysis).

34. *See* Peter J. Rubin, *Reconnecting Doctrine and Purpose: A Comprehensive Approach to Strict Scrutiny After* Adarand *and* Shaw, 149 U. PA. L. REV. 1, 50–52 (2000) (discussing how uses of race that are unrelated to the distribution of benefits or burdens do not trigger strict scrutiny so long as there is a legitimate justification for the race-conscious measure).

B. Adarand *and the Roots of Contextual Scrutiny*

In its 1995 ruling in *Adarand Constructors v. Peña*, the Supreme Court articulated three principles that guide its analysis of racial classifications under the Equal Protection Clause and under the Fifth Amendment's Due Process Clause: skepticism, consistency, and congruence.[35] Skepticism directs the courts to be highly wary of race-based classifications and to review such classifications with the most exacting scrutiny.[36] Consistency requires the courts to examine all racial classifications under the same standard of review, regardless of the race of the group that the classification benefits or burdens.[37] Congruence mandates that the same analysis be applied under the Due Process Clause of the Fifth Amendment as under the Equal Protection Clause of the Fourteenth Amendment; thus, federal classifications are subject to the same equal protection standards as applied to state and local classifications.[38] According to the *Adarand* Court, "[t]aken together, these three propositions lead to the conclusion that any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny."[39]

By ruling that a race-conscious affirmative action plan designed to remedy discrimination in federal contracting would be subject to strict scrutiny, the *Adarand* Court cast aside its 1990 ruling in *Metro Broadcasting, Inc. v. FCC*,[40] in which the Court applied a lower, intermediate level of scrutiny to uphold a federal program designed to promote racial diversity in broadcasting.[41] Applying the congruency principle, the *Adarand* Court elevated the standard of review for federal

35. Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 223–24 (1995).

36. *Id.* at 223 (citing *Wygant v. Jackson Board of Education*, 476 U.S. 267, 273 (1986) (plurality opinion) and *Fullilove v. Klutznick*, 448 U.S. 448, 491 (1980) (opinion of Burger, C.J.)).

37. *Id.* at 224 (citing *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 494 (1989) (plurality opinion) and *Regents of the University of California. v. Bakke*, 438 U.S. 265, 289–90 (1978) (opinion of Powell, J.)).

38. *Id.* at 224 (citing *Buckley v. Valeo*, 424 U.S. 1, 93 (1976)).

39. *Id.*

40. Metro Bradcasting, Inc. v. FCC, 497 U.S. 547 (1990).

41. *Id*. at 564–65. Holding that:

> [B]enign race-conscious measures mandated by Congress—even if those measures are not "remedial" in the sense of being designed to compensate victims of past [governmental or societal] discrimination—are constitutionally permissible to the extent that they serve important governmental objectives [within the power of Congress] and are substantially related to achievement of those objectives.

Id.

racial classifications to strict scrutiny.[42] In doing so, the Court underscored its earlier opinions in *Wygant* and *Croson*, holding that even benign racial classifications designed to benefit racial minorities are subject to strict scrutiny.[43]

Nevertheless, in addressing the dissenting Justices' concern that invoking strict scrutiny would sound a death toll for race-conscious affirmative action programs, Justice O'Connor's majority opinion in *Adarand* clarified that strict scrutiny is not always fatal in fact, noting, "[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."[44] "[T]he point of strict scrutiny," Justice O'Connor added, "is to 'differentiate between' permissible and impermissible governmental use of race."[45]

The *Adarand* majority further emphasized that contextual differences can considered in a strict scrutiny analysis.[46] Justice O'Connor stated:

> [S]trict scrutiny *does* take 'relevant differences' into account—indeed, that is its fundamental purpose. The point of carefully examining the interest asserted by the government in support of a racial classification, and the evidence offered to show that the classification is needed, is precisely to distinguish legitimate from illegitimate uses of race in governmental decision making.[47]

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42. *See Adarand*, 515 U.S. at 225. "[M]ore than good motives should be required when government seeks to allocate its resources by way of an explicit racial classification system." *Id*. (quoting Drew S. Days, *Fullilove*, 96 YALE L.J. 453, 485 (1987)).

43. *See* City of Richmond v. J. A. Croson Co., 488 U.S. 469, 493 (1989) (plurality opinion) (stating that "[a]bsent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics."); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 278 (1986) (plurality opinion) (noting that unless the trial court makes a determination that the employer has a strong basis in evidence for a remedial action, a reviewing court "cannot determine whether the race-based action is justified as a remedy for prior discrimination.").

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

45. *Id.* at 228 (emphasizing that strict scrutiny does distinguish between invidious and benign discrimination).

46. *See id.* at 237 (dispelling the notion that strict scrutiny disqualifies the government from using race-based action to combat discrimination).

47. *Id.* at 228 (emphasis in original). Responding directly to Justice Stevens' criticism that the consistency principle would fail to recognize any meaningful differences between classifications that subordinate racial minorities and classifications that benefit racial minorities, Justice O'Connor wrote:

> [A]ccording to Justice Stevens, our view of consistency "equate[s] remedial preferences with invidious discrimination," . . . and ignores the difference between "an engine of oppression" and an effort "to foster equality in society," or, more colorfully, "between a 'No Trespassing' sign and a welcome mat." It does nothing of the kind.

Because the Supreme Court remanded *Adarand* and did not itself evaluate the policy under a strict scrutiny analysis, the Court did not elaborate as to how relevant differences might affect the strict scrutiny analysis. Yet, it is clear from the majority opinion that context is highly relevant to an evaluation of a racial classification. Both benign and invidious classifications are subject to the same basic requirements of strict scrutiny in that they must be narrowly tailored to serve a compelling interest; however, courts can take into account the differences in the government's purpose and motive when applying the strict scrutiny analysis.

C. Contextual Scrutiny in Grutter v. Bollinger

Absent the specific application of strict scrutiny to the facts in *Adarand*, the Supreme Court's consideration of race-conscious admissions policies in the University of Michigan cases, *Grutter v. Bollinger*[48] and *Gratz v. Bollinger*,[49] provided the first setting for the Court's application of a strict scrutiny analysis under a framework in which the principles of consistency and congruence were to be applied to all racial classifications.

1. *Grutter* and *Gratz*

In the companion cases of *Grutter* and *Gratz*, the Supreme Court reaffirmed Justice Powell's controlling opinion in *Regents of the University of California v. Bakke*,[50] which held that race can be employed as a plus factor in a flexible admissions process designed to promote a university's interest in achieving a diverse student body.[51] Strongly asserting the value of diversity and racial integration in American education, the *Grutter* Court laid to rest any doubts about whether a university's interest in obtaining a diverse student body is compelling and, along with the *Gratz* Court, established the boundaries for narrowly tailored admissions policies.[52]

> The principle of consistency simply means that whenever the government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection. It says nothing about the ultimate validity of any particular law; that determination is the job of the court applying strict scrutiny.

Id. at 229-30 (citations omitted).

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

49. Gratz v. Bollinger, 539 U.S. 244 (2003).

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

51. *Id.* at 314–15 (opinion of Powell, J.).

52. *See Grutter*, 539 U.S. at 329 (reaffirming *Bakke* to find that "the Law School has a compelling interest in a diverse student body," which is "at the heart of the Law School's proper

The *Grutter* Court upheld the Law School admissions policy at the University of Michigan, a review process in which race is considered as one of several factors, including grades, standardized test scores, individual background, and life and work experiences. Relying on *Bakke*'s prohibition of quotas and separate tracks for minority applicants and adapting narrow tailoring guidelines from *Paradise*, the Court concluded the following: (1) that the Law School policy was flexible and did not employ inappropriate quotas or separate application tracks; (2) that no workable race-neutral alternatives were available; (3) that non-minority applicants were not unduly burdened by the policy; and (4) that the policy was properly subject to time limits because of the administration's periodic review of the policy.[53] However, in evaluating the University of Michigan's undergraduate policy—a policy that automatically assigned twenty out of a possible total of 150 points to each underrepresented minority applicant—the *Gratz* Court concluded that the automatic assignment of points as a racial advantage would practically guarantee admission to minority students and, further, that the policy lacked the necessary flexibility to be sufficiently narrowly tailored.[54] Together, the decisions signal that an admissions policy, to pass constitutional muster, should be based on the individualized consideration of applicants and should flexibly employ race as one factor among many.[55]

The University of Michigan decisions established clear guidance on admissions policies, but the *Grutter* Court's strict scrutiny analysis also developed important equal protection principles that are applicable to an array of racial classifications both within and outside of higher education. First, in upholding the University's interest in maintaining student body diversity, the *Grutter* Court clarified that an interest in remedying past discrimination is not the only governmental interest that can be constitutionally compelling.[56] The Court thus opened the door to

institutional mission, and that 'good faith' on the part of a university is 'presumed' absent 'a showing to the contrary.'"). *See also Gratz*, 539 U.S. at 275 (finding that the undergraduate point system "is not narrowly tailored to achieve [the] asserted compelling interest in diversity . . . .").

53. *Grutter*, 539 U.S. at 334–43.

54. *Gratz*, 539 U.S. at 269–76. It is not clear, however, if the Court's ruling was predicated specifically on the inflexibility of the admissions policy or on the heavy weighting of race, which in the Court's view, almost ensured admission for minority students. *Id*. at 271–72.

55. *See id.* at 270 (stating that "[w]e find that the University's policy, which automatically distributes 20 points, or one-fifth of the points needed to guarantee admission, to every single 'underrepresented minority' applicant solely because of race, is not narrowly tailored to achieve the interest in educational diversity . . . ."). *But see Grutter*, 539 U.S. at 343 (holding that the Law School's highly individualized admissions process is sufficiently flexible to satisfy the narrow tailoring requirement derived from the Equal Protection Clause).

56. *Grutter*, 539 U.S. at 328 (stating that "we have never held that the only governmental use

potentially upholding any number of non-remedial interests as justifications for race-conscious policies.

Second, the *Grutter* Court's reliance on several of the *Paradise* factors to evaluate the Law School admissions policy indicates that the Court has moved toward a single test—or at least a set of closely aligned inquiries—for narrow tailoring. Justice Powell's analysis in *Bakke* focused largely on the flexibility of a policy and the prohibition of quotas and separate admissions tracks.[57] However, the *Grutter* Court further elaborated on the *Paradise* factors by adding inquiries into such factors as race-neutral alternatives,[58] third-party burdens,[59] and time limits.[60]

Third, the *Grutter* Court explicitly acknowledged that the context of a given case affects the strict scrutiny analysis, stating: "[C]ontext matters when reviewing race-based governmental action under the Equal Protection Clause."[61] Drawing on the *Adarand* Court's command that strict scrutiny shall take "'relevant differences' into account,"[62] Justice O'Connor's majority opinion in *Grutter* noted that "[n]ot 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 decision-maker for the use of race in that particular context."[63]

2. The *Grutter* Court's Contextual Scrutiny

While the *Grutter* Court stated that its analysis was "no less strict for taking into account complex educational judgments in an area that lies primarily within the expertise of the University,"[64] the Court's review of the Law School admission policy was more relaxed than its strict scrutiny analyses in prior cases. The Court's assessment of the compelling interest requirement was especially deferential. Recognizing the Court's history of yielding to academic decision

of race that can survive strict scrutiny is remedying past discrimination.").

57. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 315–20 (1978) (opinion of Powell, J.).

58. *Grutter*, 539 U.S. at 339–40.

59. *Id*. at 341.

60. *Id*. at 343.

61. *Id.* at 327.

62. *Id*. (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 228 (1995)).

63. *Id.*

64. *Id.* at 328.

making because of the freedoms grounded in the First Amendment,[65] Justice O'Connor stated, "[t]he Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer . . . . 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."[66] The *Grutter* Court went on to conclude that the interest in attaining a diverse student body is sufficiently important and genuine and lies "at the heart of the Law School's proper institutional mission."[67]

The Court's compelling interest analysis was specifically deferential in its consideration of the Law School's evidentiary burden justifying its diversity interest. Although the Court discussed the University's extensive evidence of the educational benefits of diversity, as well as arguments and studies contained in the *amicus curiae* briefs in support of the University, the Court did not impose the "strong basis in evidence" standard that has been mandated in remedial affirmative action cases.[68] Indeed, the Court imposed no formal evidentiary requirement at all. Instead, the Court ruled that "'good faith' on the part of a University is 'presumed' absent 'a showing to the contrary.'"[69]

In addition, the *Grutter* Court held that the narrow tailoring inquiry "must be calibrated to fit the distinct issues raised by the use of race to achieve student body diversity in public higher education."[70] The Court grafted core elements of the *Paradise* inquiry onto Justice Powell's *Bakke* prohibition on quotas and set-asides to impose a narrow tailoring

65. *Id.* at 328–29 (citing *Regents of University of Michigan v. Ewing*, 474 U.S. 214, 225 (1985); Bd. of Curators of Univ. of Mo. v. Horowitz, 435 U.S. 78, 96 n.6 (1978); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 319 n.53 (1978) (opinion of Powell, J.)).

66. *Id*. at 328. The Court further stated: "We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition." *Id*. at 329.

67. *Id.*

68. *Id.* at 330–32. The court further stated that "[i]n 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.'" *Id*. at 370 (citing Brief of Amici Curiae American Educational Research Association et al. at 3).

69. *Id.* at 329 (quoting *Bakke*, 438 U.S. at 319). Similarly, Justice Powell stated in his *Bakke* opinion:

> "[A] court would not assume that a university, professing to employ a facially nondiscriminatory admissions policy, would operate it as a cover for the functional equivalent of a quota system. In short, good faith would be presumed in the absence of a showing to the contrary in the manner permitted by our cases."

Bakke, 438 U.S. at 318–19.

70. *Grutter*, 539 U.S. at 333–34.

test focused on the individualized consideration of applicants and the flexible use of race.[71] Although the dissent in *Grutter* accused the majority of skirting the narrow tailoring mandates, the Court's analysis is not as openly deferential as that of its compelling interest analysis. For instance, the dissenting opinions of both Chief Justice Rehnquist and Justice Kennedy criticized the majority for upholding the Law School's process of achieving a critical mass of minority students in an effort to achieve a racial balance.[72] Justice O'Connor's majority opinion addressed this concern not by conceding a deferential standard of narrow tailoring but by arguing that a selective admissions process with specific target goals does not constitute racial balancing at all, emphasized in *Grutter* by the evidence of wide variations in annual enrollment statistics for minority students.[73]

Nonetheless, one element of narrow tailoring that both the *Grutter* majority and the dissent recognized as a departure from the traditional analysis—excessively deferential in the eyes of the dissent, merely contextual in the eyes of the majority—was the durational requirement for narrow tailoring. Justice Powell imposed no time limits on admissions policies in *Bakke*, but the *Grutter* Court, drawing on the *Paradise* factors, imposed the following requirement specific to colleges and universities: "In the context of higher education, the durational requirement can be met by sunset provisions in race-conscious admissions policies and periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity."[74] The *Grutter* majority further acknowledged that it was

71. The Court did not impose any requirements related to the inclusiveness of the policy, as it had imposed in *Adarand*. Inclusiveness has direct relevance in the evaluation of a remedial policy because it ensures that the remedy closely fits the injury suffered by particular racial groups, but when applied to a non-remedial admissions policy, inclusiveness may have less salience because race is tied, not to a remedy, but to a broader process in which it can be considered as one of several factors. *See* City of Richmond v. J. A. Croson Co., 488 U.S. 469, 506 (1989) (plurality opinion) (discussing problems of remedial inclusiveness); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 284 n.13 (1986) (plurality opinion) (discussing the same). Still, inclusiveness can be a problem in a non-remedial policy if the policy fails to consider race in the applications of individuals whose race ought to be considered because doing so would advance the university's diversity interest.

72. *Grutter*, 539 U.S. at 379–87 (Rehnquist, C.J., dissenting); *id.* at 387–95 (Kennedy, J., dissenting). The Court has made clear that racial balancing—namely seeking specific numbers or percentages of racial minorities within an institution simply to achieve some form of proportional representation—is not, in and of itself, a compelling interest. *See id.* at 329–30.

73. *Id.* at 336. The weakness in Justice O'Connor's reply is that *enrollment* statistics, while reflective of admissions goals, can be less indicative of admission processes than *admitted student* statistics, because enrollment figures introduce factors outside the control of the admissions process, namely student decision-making on whether to attend the university after being admitted.

74. *Id.* at 342.

presuming the University's good faith in regularly reviewing its admissions policy and considering alternatives in stating: "We take the Law School at its word that it would 'like nothing better than to find a race-neutral admissions formula' and will terminate its race-conscious admissions program as soon as practicable."[75] In his dissenting opinion, Chief Justice Rehnquist found the majority's discussion of time limits to be the "vaguest of assurances" and concluded that a critical element of strict scrutiny had been "casually subverted."[76] Regardless, the *Grutter* Court's recognition of a "relevant difference" in the context of a university admissions policy meant that the Law School did not have to impose a fixed end date on its policy.[77]

3. *Grutter*'s Effects on Strict Scrutiny Analysis

The *Grutter* Court's analysis implies that institutions of higher learning, at least when making decisions traditionally protected by the First Amendment, will enjoy significant deference in advancing academic interests when carefully crafting race-conscious policies. For instance, the courts may defer to the academic judgments of educators who choose to advance a faculty diversity interest because faculty selection decisions—and the related effects on teaching, curriculum development, and research—are central to the basic missions of universities, as well as because the benefits of faculty diversity can be expected to parallel the benefits of student body diversity.[78] Moreover, the courts may grant more latitude to institutions in setting target goals and flexible time limits in faculty hiring because of the narrow tailoring guidelines in *Grutter*.[79]

Yet, notwithstanding its implications for higher education, *Grutter* leaves unaddressed several questions regarding the context and the calibration of strict scrutiny analysis. Should universities be granted the same level of deference for *all* of their decisions, including employment

75. *Id*. at 343.

76. *Id.* at 386 (Rehnquist, C.J., dissenting).

77. *See id.* at 343 (arguing that the Law School should be given latitude to terminate the program as soon as the administration feels it is practicable).

78. *See* Univ. & Cmty. Coll. Sys. of Nev. v. Farmer, 930 P.2d 730, 735 (Nev. 1997) (stating that "the desirability of a racially diverse faculty [is] sufficiently analogous to the constitutionally permissible attainment of a racially diverse student body . . . ."), *cert. denied*, 523 U.S. 1004 (1998).

79. Deference in narrow tailoring is certainly not absolute, however, both *Grutter* and *Gratz* imposed limits on the range of admissions policies that are constitutionally permissible, and one would expect that a faculty hiring process that is not flexible and that employs race in a heavily weighted and overly mechanical way would encounter the same problems as the undergraduate admissions policy struck down in *Gratz.*

and other decisions that involve those individuals or businesses that are not engaged in academic functions? Should elementary and secondary school districts that employ race-conscious diversity plans be granted the same level of deference as institutions of higher education? What other institutions, if any, are entitled to the same degree of deference as colleges and universities?

If the *Grutter* Court's strict scrutiny analysis is not specific to higher education admissions, then the Court will need to address the following questions, among others, in order to maintain the stability of its strict scrutiny jurisprudence. Does the government's evidentiary burden for demonstrating a compelling interest change depending on its context? What evidentiary standards, if any, fall between the "strong basis in evidence" test required in remedial cases and the deferential good-faith standard described in *Grutter?* How should the courts determine when an element of narrow tailoring should be modified within a given context? Are time limits the only element that may be adjusted, or can other narrow tailoring elements vary according to context?

The courts may employ contextual analysis on a case-by-case basis; however, given the history of the federal courts' review of cases involving racial classifications, it is likely that the courts will turn to several pre-*Grutter* cases and principles to develop a contextual strict scrutiny jurisprudence. The following Part explores some of the analyses in which courts have adjusted strict scrutiny based on context.

III. CONTEXTUAL JURISPRUDENCE AND RACIAL CLASSIFICATIONS

The *Adarand* Court's directive that all racial classifications should be subject to strict scrutiny is designed to maintain symmetry across different levels of government and a wide range of policies. *Grutter*, however, appears to introduce a new element of instability into this symmetry by allowing context to affect strict scrutiny. But contextual analysis is not an entirely new development in equal protection jurisprudence.[80] Courts have engaged in considerably more fluid analyses of group classifications, and there have been significant exceptions to the standard script of strict scrutiny. Indeed, courts began applying deferential standards of review well before challenges to affirmative action appeared on recent Supreme Court dockets.[81]

Many of the federal courts' techniques for reviewing racial classifications can be divided into core variations, including the

80. *See infra* Part III.A (discussing certain categories of legislation in which courts have not applied strict scrutiny although the legislation involves a consideration of race).

81. *Id.*

following: (1) categorically excluding race-based classifications from heightened review; (2) establishing separate triggers for strict scrutiny, such as the "predominant factor" test in legislative districting; and (3) employing distinctive forms of strict scrutiny itself, including deferential versions found in cases involving military necessity and in higher education admissions. Each of these variations is discussed below.

A. Categorical Deference

Although the Supreme Court's consistency and congruence principles ostensibly dictate that all racial classifications are subject to strict scrutiny, longstanding traditions of deference in other areas of constitutional law suggest that such principles are not truly universal. In areas where the Supreme Court has recognized that Congress exercises plenary power over certain matters, the Court has fully deferred to Congress or has applied a lower standard of review and upheld race-based classifications. In the area of immigration policy, for example, the courts have upheld immigration laws that differentiate on the basis of race or national origin, dating back to the Chinese exclusion laws of the late nineteenth century, because of judicial deference to congressional and executive power over sovereignty and the regulation of entry into the United States.[82] Deference in the immigration field has been so broad that the courts barely engage in rational basis review under the Equal Protection Clause, let alone apply a strict scrutiny analysis.

Similarly, in the arena of public policies affecting Native Americans, the Supreme Court has recognized congressional plenary powers and has treated laws that differentiate on the basis of Native American status, not as race- or ancestry-based classifications, but as political classifications arising from the unique relationship between Native American tribes and the federal government. In *Morton v. Mancari*, the Court recognized Congress's extensive powers over tribal affairs and upheld an employment preference that favored qualified Native Americans for employment in the Bureau of Indian Affairs.[83] Because

82. *See* Fong Yue Ting v. United States, 149 U.S. 698, 705 (1893) (holding that it is the power of every sovereign nation to forbid the immigration of foreigners, or to admit them only "upon such conditions as it may see fit to prescribe."); Chae Chan Ping v. United States, 130 U.S. 581, 609 (1889) (holding that Congress has the power to control our borders). *See generally* Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1 (1998) (arguing that racial classifications used in immigration are deeply at odds with the contemporary mores).

83. Morton v. Mancari, 417 U.S. 535, 555 (1974) (holding that the federal government can establish preferences in employment for those of Native American ancestry).

of Congress' special relationship with Native American tribes, the Court ruled that heightened review was inappropriate and concluded that the employment criterion was a legitimate means of furthering the cause of tribal self-governance, thereby making the Bureau of Indian Affairs more responsive to the needs of its constituent groups.[84]

In addition to areas involving congressional plenary powers, categorical deference has also appeared in judicial review of state and local laws. For example, the Ninth Circuit has recently ruled that racial classifications in the area of state prison administration are categorically excluded from strict scrutiny review. In *Johnson v. California*,[85] a case in which the Supreme Court granted certiorari in March 2004, the Ninth Circuit addressed the constitutionality of a California prison policy that temporarily segregated prisoners by race and ethnicity in assigning cell mates. Relying on Supreme Court precedent in which the Court sanctioned a deferential approach to evaluating constitutional challenges to prison regulations,[86] the Ninth Circuit ruled that California officials were entitled to significant deference in the conduct of prison affairs and that rational basis review was the appropriate standard for analyzing this policy.[87] Under the lower standard, the court upheld the segregation policy as a legitimate measure that was reasonably related to the state's penal interest in preventing inter-prisoner racial violence.[88]

The Ninth Circuit did not attempt to distinguish the Supreme Court's prison administration line of cases from the holdings of *Adarand* and *Croson*, and as such, the Supreme Court's approval of such a broad exception to *Adarand's* consistency principle could be problematic. Nonetheless, even if the Court were to decide that there should be no exception to strict scrutiny for prison policies, the application of a contextual strict scrutiny analysis granting deference to prison officials may lead the Court to reach the same conclusion, thereby upholding the temporary segregation policies as constitutional.

Categorical deference for racial classifications is unusual and limited, but it suggests that the courts may be willing to disregard or loosen the *Adarand* mandates in areas in which the judiciary has been historically deferential, such as when Congress acts in an area over which it has special and extraordinary powers, or when the courts are reluctant to

84. *Id*. at 554-55.

85. Johnson v. California, 321 F.3d 791 (9th Cir. 2003), *cert. granted*, 124 S. Ct. 1505 (2004).

86. *Id.* at 798-99 (citing *Turner v. Safley*, 482 U.S. 78 (1987), for the proposition that the deferential test is to be applied when assessing prisoners' constitutional rights).

87. *Id*. at 798–99, 803.

88. *Id*. at 807.

tread in certain areas of law because of the highly specialized expertise of other branches of government.

B. Triggering Strict Scrutiny

The University of Michigan cases confirm that in the context of university admissions, courts employ strict scrutiny even if race is only one among several factors under consideration. Although strict scrutiny is typically invoked whenever a classification is based at least in part on race, federal courts have adopted different triggers for their analyses based on the type of policy involved. In the area of race-conscious legislative districting, the Supreme Court has held that strict scrutiny is not triggered unless race is the predominant factor in the creation of "majority-minority" districts designed to maintain the voting power of minority voters. In other cases, the form of a policy has dictated the applicability of strict scrutiny, and a number of courts have held that when policies do not subject individuals to unequal treatment—as in the case of minority-targeted outreach programs that increase opportunities for minorities—strict scrutiny is not triggered.

1. Race-Conscious Legislative Districting

In *Miller v. Johnson*, the Supreme Court addressed the constitutionality of a Georgia districting plan creating two Black-majority congressional districts that were designed to concentrate minority voting power.[89] The Court struck down the plans after applying strict scrutiny. In doing so, Justice Kennedy concluded in his majority opinion that examining racial demographics is all but inevitable in legislative districting and that not every use of race requires the courts to invoke strict scrutiny.[90] Indeed, in order to avoid diluting minority voting power and to comply with the Voting Rights Act of 1965, redistricting bodies must consider race and may have to create majority-minority districts to prevent a violation of the Act. Therefore, plaintiffs in constitutional challenges to districting plans must demonstrate that:

> race was the *predominant factor* motivating the legislature's decision to place a significant number of voters within or without a particular district . . . [and] must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests, to racial

89. Miller v. Johnson, 515 U.S. 900, 920–28 (1995).

90. *Id.* at 913.

considerations.[91]

Once strict scrutiny is triggered, however, the analysis in districting cases parallels the review in other race cases. For example, in *Miller* itself, the Court ruled that race was a predominant factor in the state's districting decisions and therefore applied strict scrutiny.[92] The Court went on to conclude that the State lacked a strong basis in evidence to support its interest in remedying past discrimination, and further, the Court held that no deference should be granted to the U.S. Department of Justice's determination that the district lines were necessary to comply with the Voting Rights Act.[93] *Miller* thus implies that without a strong factual predicate to show that majority-minority districts are needed to advance a remedial interest or to prevent a violation of the Voting Rights Act, line drawing in which race is the predominant factor is likely to be unconstitutional.

Nevertheless, the Supreme Court has also confirmed that when race does not predominate as a factor in districting, strict scrutiny should not be invoked. In *Easley v. Cromartie*,[94] the Court held that race was not the predominant factor in the creation of a North Carolina majority-minority congressional district and that strict scrutiny was not triggered because the Court found that race highly correlated with political party affiliation and the State's legislative lines were drawn primarily for political rather than racial purposes.[95]

The Supreme Court has yet to articulate other settings in which racial predominance is a prerequisite to triggering strict scrutiny, but the Court's recent redistricting decisions imply that when race is a predictable and central consideration in a multi-factor decision-making process—and especially when race must be considered to comply with a constitutional or statutory mandate—then a predominance test may be more appropriate than a per se rule that automatically triggers strict scrutiny whenever race is a factor among many considered in the development of a policy.

The Supreme Court neglected this level of analysis altogether in its University of Michigan decisions, where it automatically applied strict scrutiny to the University's race-conscious admissions policies, even though race was only one of several factors considered in each of the challenged admissions policies. The Court could have drawn parallels

91. *Id.* at 916 (emphasis added).
92. *Id.* at 920.
93. *Id.* at 920-21.
94. Easley v. Cromartie, 532 U.S. 234 (2001).
95. *Id*. at 243–44, 248.

between redistricting and admissions to avoid reaching the strict scrutiny question, particularly in the *Grutter* case, where race was held not to be a predominant factor in admissions. Like redistricting bodies, colleges and universities monitor the overall racial composition of their student bodies, and universities must also comply with statutory and regulatory mandates under federal law such as Title VI of the Civil Rights Act of 1964, which prohibits racial discrimination by recipients of federal funding.[96] On the other hand, even if it had addressed the triggering question in the Michigan cases, the Court might have distinguished districting from affirmative action because districting does not involve a competitive process—no one is deprived of the basic right to vote in redistricting, compared to an applicant who may be denied a slot in a university program—or because districting might be *sui generis* and an exception to the Court's more general triggering rules. Whether the Court will apply the predominant factor trigger in other types of cases may ultimately turn on whether a race-conscious policy is sufficiently analogous to legislative districting so that racial considerations are an inevitable element of a legislative process, but could violate equal protection if they predominate over other factors.

2. The Unequal Treatment Trigger

Another line of cases involving triggering for strict scrutiny has distinguished those policies which result in unequal treatment because of race and those which do not result in unequal treatment. The form of the policy is the central inquiry, and several courts have upheld policies that provide greater opportunities for racial and ethnic minorities but do not impose differential benefits and burdens on the basis of race; in essence, the policies do not result in any unequal treatment that would trigger strict scrutiny. In cases involving minority-targeted outreach and recruitment programs designed to increase the pool of applicants for a limited number of positions, courts have upheld programs involving student enrollment[97] and faculty hiring in higher education,[98] housing opportunities,[99] and government employment.[100]

96. *See* 42 U.S.C. § 2000(d) (2000 & West Supp. 2004) (stating that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance"); *see also* Pamela S. Karlan, *Easing The Spring: Strict Scrutiny and Affirmative Action After the Redistricting Cases*, 43 WM. & MARY L. REV. 1569, 1598–1602 (2002) (arguing that by targeting only intentional discrimination, strict scrutiny fails groups that it was intended to protect).

97. *See* Weser v. Glen, 190 F. Supp. 2d 384, 395–407 (E.D.N.Y. 2002) (upholding the validity of an admissions program that was committed to increasing the diversity of the school).

98. *See* Honadle v. Univ. of Vt., 56 F. Supp. 2d 419, 427–29 (D. Vt. 1999) (upholding race-

For example, in *Shuford v. Alabama State Board of Education*, a case involving affirmative action in faculty hiring, the district court indicated that inclusive programs do not trigger strict scrutiny because their purpose is to ensure that the pool of candidates is as large as possible.[101] The court stated: "Recruitment and other techniques of inclusion do not affect the selection process for hiring or promotion. Rather, inclusive techniques seek to ensure that as many qualified candidates as possible make it to the selection process."[102] As long as recruitment increases the pool of applicants and does not exclude non-minority applicants, strict scrutiny is not triggered.[103] On the other hand, exclusive programs that select some applicants over others may create benefits for minorities and can also impose undue burdens on non-minorities.[104] As the *Shuford* court concluded, exclusive programs trigger strict scrutiny because "selection by necessity requires excluding some people" and "[t]he concern is discriminatory exclusion that causes harm to third parties . . . ."[105]

However, not all lower courts have ruled that minority-targeted outreach programs necessarily escape strict scrutiny. In *MD/DC/DE Broadcasters Ass'n v. FCC*, the District of Columbia Circuit ruled that an FCC policy requiring licensees to engage in race-conscious recruitment efforts triggered strict scrutiny, even though non-minorities might still have full access to the application process.[106] The court stated:

> [T]he Commission has designed a rule under which nonminorities are less likely to receive notification of job openings solely because of their race; that the most qualified applicant from among those recruited will presumably get the job does not mean that people are being treated equally—that is, without regard to their race—in the qualifying round. The new rule is therefore subject to strict scrutiny

conscious faculty inducement program as long as the program affects faculty recruitment and not faculty hiring).

99. *See* Raso v. Lago, 135 F.3d 11, 17 (1st Cir. 1998) (holding that limited preference to former residents, many of whom were minorities, established by the developer to comply with the Fair Housing Act, did not violate equal protection because other units could be rented by any applicant, regardless of race).

100. *See* Duffy v. Wolle, 123 F.3d 1026, 1038–39 (8th Cir. 1997) (upholding an outreach program to recruit more female probation officers).

101. Shuford v. Ala. State Bd. of Educ., 897 F. Supp. 1535, 1551–52 (M.D. Ala. 1995).

102. *Id.* at 1551.

103. *Id.* at 1552 (holding that "techniques of inclusion do not require the traditional Title VII and equal protection analysis that courts have used for techniques of exclusion.").

104. *Id.* at 1551–52.

105. *Id.* at 1551.

106. MD/DC/DE Broad. Ass'n v. FCC, 236 F.3d 13, 21 (D.C. Cir. 2001).

> for compliance with the constitutional requirement that all citizens receive equal protection under the law.[107]

The District of Columbia Circuit's more mechanical analysis proposes that even the most incidental benefits and burdens resulting from the consideration of race in recruitment will cause unequal treatment and therefore should trigger a strict scrutiny analysis. Such an approach is considerably more formalistic than the analyses in other recent cases evaluating minority-targeted programs, and the weight of authority in the lower courts suggests that the better-reasoned approach is to invoke strict scrutiny only if a race-conscious policy leads directly to an identifiable and concrete harm, such as the exclusion of some applicants because of race.[108]

C. Variations of the Standard Strict Scrutiny Analysis

Taking *Adarand* and *Grutter* together, the Supreme Court has employed two distinct models of strict scrutiny analysis in affirmative action cases: (1) a remedial model in which the government is required to demonstrate that its interest in remedying past discrimination is substantiated by "a strong basis in evidence," and that its policy is narrowly tailored under the *Paradise* multifactor test; and (2) a deferential model in which the interest is presumed to be valid based on governmental good faith, and the constitutionality of the policy rests primarily on whether it is narrowly tailored (allowing for some degree of good-faith deference in narrow tailoring). However, the Supreme Court's pre-*Adarand* cases, as well as recent lower court cases, indicate that the landscape is actually more complex and that courts have employed multiple models of strict scrutiny, including an anti-subordination model, since the Supreme Court first developed the strict scrutiny concept in the 1940s. This Sub-Part will begin by discussing the pre-*Adarand* model, and conclude by discussing the two distinct models employed by *Adarand* and *Grutter*.

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107. *Id.*

108. Assuming that strict scrutiny is not triggered by a race-conscious policy, the courts have not provided exact guidance on whether the policy is then subject to rational basis scrutiny or to intermediate scrutiny. Recent cases suggest that rational basis scrutiny becomes the default standard of review if strict scrutiny is not invoked, although one lower court has ruled that race-conscious policies involving elementary and secondary school assignment policies should meet the intermediate standard of review. *See* Comfort *ex rel*. Neumyer v. Lynn Sch. Comm., 283 F. Supp. 2d 328, 364–66 (D. Mass. 2003) (noting that although the court would apply a strict scrutiny analysis as briefed by the parties, intermediate scrutiny was the correct standard to apply in this case).

1. Anti-Subordination Model

The Supreme Court's "strict in theory, fatal in fact" jurisprudence of the 1960s and 1970s epitomizes the Court's anti-subordination model of strict scrutiny: any classification that burdens a racial minority group and treats the group as inferior is irrational and presumed unconstitutional. Under this model, courts have rejected the interests underlying racial classifications as either invalid or pretextual; moreover, courts have found that racial animus was the true motivation for the discriminatory legislation and have struck down policies with little inquiry into the "fit" of the policy advancing the stated interest. For instance, in striking down anti-miscegenation laws prohibiting interracial marriages, the Supreme Court in *Loving v. Virginia* stated, "[t]here is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies [the racial] classification. The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy."[109] Although overtly subordinating policies have become a rarity, the basic model is still available to analyze policies whose motivation is racial animus against any racial group, including whites.[110]

2. Remedial Model

In contemporary litigation, the most commonly employed model of strict scrutiny has become the remedial model applied to affirmative action policies and legislative districting plans designed to benefit minority groups. Under this model, courts have presumed the importance of remedial interests, at least when confined to remedying the present effects of past discrimination created by an institution. However, the evidentiary burdens on the institution are considerable: an institution must show a strong basis in evidence documenting the need for remediation, and each of the elements of the narrow tailoring analysis outlined in *Paradise* must be satisfied.[111]

Because the Supreme Court has not addressed the constitutionality of *non*-remedial interests outside of the university admissions context, it is not entirely clear whether the remedial model constitutes the default

109. Loving v. Virginia, 388 U.S. 1, 11 (1967).

110. Although subordinating policies have historically targeted non-White racial groups, the more recently articulated "consistency" principle in *Adarand* appears to extend the anti-subordination model to include group subordination against any racial group, including Whites. Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 229–30 (1995).

111. United States v. Paradise, 480 U.S. 149, 171, 187 (1987) (plurality opinion).

model of strict scrutiny which courts must apply whenever they do not extend significant deference to an institution, as in *Grutter v. Bollinger*. Several elements of the remedial model appeared in the *Grutter* Court's narrow tailoring analysis, which suggests that the Court may be inclined to apply most, if not all, of the *Paradise* factors in non-remedial cases. Moreover, lower courts that have addressed the constitutionality of non-remedial interests have required the presentation of significant evidence to justify the governmental interests.[112] Although the strong basis in evidence requirement need not be the same standard applied in non-remedial cases, a substantial evidence requirement that the government document both the importance of the interest and the genuineness of its motive would maintain the core skepticism of strict scrutiny.

3. Deferential Models

Although the *Adarand* Court repudiated the use of a lower standard of review (i.e., the intermediate level of scrutiny) out of deference to racial classifications developed by Congress and the federal government to benefit racial minorities, at least two models of deferential strict scrutiny may still be available to the Court: the military necessity model employed in *Korematsu v. United States*;[113] and, the academic deference model employed in both *Bakke* and *Grutter*.[114]

a. National Security and Military Necessity

Recent anti-terrorism policies that endorse forms of racial and ethnic profiling[115] raise the possibility that the traditional anti-subordination model could be invoked in the near future. Nevertheless, the not-so-strict analysis found in *Korematsu*,[116] the case in which the Supreme Court first offered strict scrutiny terminology in reviewing and

112. *See, e.g.*, Wittmer v. Peters, 87 F.3d 916, 918 (7th Cir. 1996) (stating that "[t]he concern and the response, moreover, must be substantiated and not merely asserted.").

113. Korematsu v. United States, 323 U.S. 214, 223 (1944) (upholding a 1942 military order excluding all persons of Japanese ancestry from designated areas and noting that "we are at war with the Japanese Empire" and that the "properly constituted military authorities . . . decided that the military urgency of the situation demanded that [these individuals] be segregated from the West Coast temporarily . . . .").

114. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 318–19 & n.53 (1978) (holding that "good faith" will be presumed on the part of a university making individualized admissions decisions "in which ethnic background plays a part"). *See also* Grutter v. Bollinger, 539 U.S. 306, 328 (2003) (holding that "[t]he Law School's educational judgment that such [racial] diversity is essential to its educational mission is one to which we defer.").

115. *See* Deborah A. Ramirez et al., *Defining Racial Profiling in a Post-September 11 World*, 40 AM. CRIM. L. REV. 1195, 1195–1202 (2003) (discussing the movement toward increased racial profiling during the period after the September 11 attacks).

116. *Korematsu*, 323 U.S. 214.

ultimately upholding the World War II exclusion of Japanese-Americans, suggests that a deferential model of strict scrutiny might be employed to analyze racial classifications justified by national security interests, particularly during wartime.

Widely condemned both for its failure to recognize the racial animus underlying the exclusion and internment of Japanese-Americans, and for its loose analysis of the means employed to address the government's military necessity interest, *Korematsu* has never been overruled and contains language that might be invoked for the proposition that Congress and the executive branch enjoy significant deference when employing wartime racial classifications. By stating that it could not "reject as unfounded the judgment of the military authorities and of Congress,"[117] and that it could not "say that the war-making branches of the Government did not have ground for believing that in a critical hour"[118] the exclusion of Japanese-Americans was unjustified by military necessity, the *Korematsu* Court established a strict-in-theory, but deferential-in-fact threshold for its then-emerging strict scrutiny standard. Despite the weakness of the government's evidence of military necessity—later proved to be based on prosecutorial misconduct and outright deception[119]—the Court upheld the racial classification out of deference to the military.[120]

The wholesale detention of every member of a racial or ethnic group in the interest of national security is not a likely scenario today; however, the deferential standard of *Korematsu* might still be invoked to analyze less burdensome policies such as targeted security checks, certain racial profiling during wartime, or strong anti-terrorism efforts. While the traditional anti-subordination model is the appropriate model for analyzing such policies, the national security model still lies, as Justice Jackson stated in his *Korematsu* dissent, like "a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need."[121]

b. Academic Deference

The *Grutter* Court's model of deferential scrutiny contains several key elements: (1) recognition of decision making rooted in First Amendment academic freedoms; (2) good faith deference to the

117. *Id.* at 218.

118. *Id.*

119. *See* Korematsu v. United States, 584 F. Supp. 1406, 1420 (N.D. Cal. 1984) (stating that there is evidence in the record that the government deliberately omitted relevant information).

120. *Korematsu*, 323 U.S. at 219, 223–24.

121. *Id.* at 246 (Jackson, J., dissenting).

importance and sincerity of an academic institution's compelling interest; and (3) skepticism with a modest degree of deference in assessing whether an academic policy is narrowly tailored. The *Grutter* Court specifically deferred to the University's good faith review of its admissions policies as a sufficient limitation on the duration of a race-conscious policy.[122]

As a general model of strict scrutiny, however, the Supreme Court's analysis in *Grutter* may be difficult to extend beyond academic decision making and outside of the higher education context because of the key element of academic freedom under the First Amendment. Universities often act in multiple roles, including employer and contractor, in which academic decision making arguably does not inhere. For instance, an affirmative action plan designed to increase the diversity of the primary care staff at a university-run hospital may generally advance a university's goals of research and public service, but may not enjoy the same level of deference because *academic* functions are not central to the roles played by the hospital staff. Similarly, an affirmative action plan designed to remedy a university's past discrimination in contracting may invoke a remedial model of strict scrutiny rather than an academic deference model because many contracting functions—the construction of buildings and the physical plant, for example—are not unique to a university and extend beyond its special role as an academic policy maker.

Parallels between higher education and other governmental institutions may also be problematic. Courts have granted significant deference to elementary and secondary schools in areas of constitutional law that set boundaries on students' rights, including procedural due process, Fourth Amendment search and seizure, and free speech under the First Amendment.[123] Nevertheless, deference to public schools has not been rooted in academic freedoms typically ascribed to higher education, where the free exchange of ideas and viewpoints is highly valued; indeed, K-12 education is often highly standardized and regimented, particularly in the lower grade levels. The courts, however, have recognized that some degree of deference is appropriate in

122. At least one lower court addressing academic decision-making has also deferred to a university's expertise in determining the necessity of its policy and the adequacy of race-neutral alternatives. *See* Hunter *ex rel.* Brandt v. Regents of Univ. of Cal., 190 F.3d 1061, 1062–63 (9th Cir. 1999) (upholding race-conscious admissions policy for university-based elementary school designed to promote university's interest in educational research), *cert. denied*, 531 U.S. 877 (2000).

123. *See* James E. Ryan, *The Supreme Court and Public Schools*, 86 VA. L. REV. 1335, 1346–69 (2000) (discussing a secondary student's constitutional rights as to speech, searches, and sanctions).

assessing academic decision making within the purview of school districts because of their expertise in educational matters and their detailed knowledge of local conditions. Other institutions outside of the education area may also enjoy deference because of their specialized expertise, but the absence of a First Amendment interest, or some other concurrent constitutional interest, could preclude the same degree of deference granted to a college or university.

D. Contextual Patterns

Because of the limited number of Supreme Court cases in this area, it is difficult to discern exact patterns that would dictate the outcomes in future cases involving racial classifications. Nevertheless, existing case law suggests that the Court is likely to apply different variations of strict scrutiny based on contextual factors such as governmental motivation (e.g., subordinating vs. non-subordinating motives, or remedial vs. non-remedial interests), institutional prerogatives and powers (e.g., Congress's or the military's special powers), institutional expertise (e.g., academic decision making), governmental role (e.g., educator vs. contractor), and the type of policy implemented (e.g., inclusive vs. exclusive). Courts are therefore much less likely to uphold racial classifications developed by institutions to which they grant little or no deference, and that are acting out of animosity to subordinate a racial group. On the other hand, courts are much more likely to uphold minimally burdensome policies enacted by institutions that possess special prerogatives and expertise to which courts defer and that are acting with the clear motivation of assisting racial minority group members. The outcomes in cases falling between these two bounds would likely be dictated by the interaction of various contextual factors and by the specific facts of a case.

The next Part attempts to sort through such key contextual factors and proposes a model of strict scrutiny that incorporates both triggering mechanisms and strict scrutiny variants to help guide the analysis of racial classifications.

IV. A FRAMEWORK FOR CONTEXTUAL STRICT SCRUTINY ANALYSIS

As the foregoing discussion suggests, courts can and should consider multiple factors in evaluating the context of cases involving racial classifications. These factors can include government motive, institutional prerogatives and expertise, governmental role, traditions of judicial deference, and the nature of the policy itself. Integrating the various strands of case law in which context has mattered implies a strict scrutiny framework that first evaluates whether strict scrutiny

should be triggered at all and then applies an appropriate model of analysis for the compelling interest and narrow tailoring inquiries. Employing different models of strict scrutiny analysis, ranging from the highly deferential to the highly skeptical, can properly allocate evidentiary burdens on a governmental institution and can accord, when dictated, the appropriate level of deference to an institution's decision making. The remainder of this Part elaborates on an ideal framework and applies the framework to a sampling of educational policies.

A. The Contextual Scrutiny Inquiry

Judicial inquiry into the constitutionality of a race-conscious policy should ideally involve a two-step process: (1) a triggering evaluation to determine whether strict scrutiny is the appropriate analysis or whether another mode of equal protection analysis, such as a rational basis test, is warranted; and (2) a strict scrutiny evaluation that allows the court to employ variations—archetypes—that can allow some degree of judicial deference, as well as more heightened scrutiny when appropriate, to accommodate relevant contextual differences.

1. Strict Scrutiny Triggering

Case law involving categorical exclusions and case law involving legislative districting and minority recruitment suggest that a triggering inquiry should be a routine first step of strict scrutiny analysis. Many courts, including the Supreme Court in its University of Michigan decisions, often elide this inquiry; however, failing to perform a triggering inquiry could change the outcome of a case and could lead to improper lines of analysis, such as overweighing race as a factor in a decision-making process or misallocating the benefits to and burdens on different racial groups.

A contextual triggering inquiry might employ three levels of questioning: (1) is the classification subject to categorical exclusion; (2) if not, does the policy-making process dictate that race predominate in order to trigger strict scrutiny; and (3) if not, is race used as a significant factor in a classification that results in the unequal treatment of a group or an individual. As discussed in Part III.A, categorical exclusion applies to those rare exceptions in which courts defer outright to governmental decision making and should be reserved for circumstances in which the government possesses extraordinary prerogatives and powers—and courts have historically deferred to those prerogatives and powers. A racial predominance test might be imposed in cases in which policy makers must, as in the legislative districting context, routinely weigh racial data and other demographic information

in order to create policies that are not only sound and effective but also comply with anti-discrimination laws' mandates.

If neither the categorical exclusion nor the racial predominance test is applicable, then a baseline triggering inquiry could focus on whether a governmental classification employs race as a significant factor and results in the unequal treatment of a group or an individual because of race. If race is not a significant factor, it would not have an identifiable role in causing a constitutional injury. Similarly, unless a policy actually results in unequal treatment, there would be no injury in need of redress. Thus, a hiring policy that provides a "plus" for members of certain racial minority groups and makes a difference in hiring decisions would trigger strict scrutiny because race is a significant factor in the process and imposes some burdens (a slightly lower probability of hiring) on non-minority applicants. However, a minority-targeted outreach policy that increases the number of minority applicants, while employing race as a significant factor, would not trigger strict scrutiny if it does not result in unequal treatment, such as preventing non-minority applicants from receiving information about a program that would enable them to apply.

2. Strict Scrutiny Archetypes

Although factoring contextual variables might lead to a large and potentially unwieldy number of strict scrutiny models, a more manageable approach is employing a set of archetypes, ranging from a deferential archetype on one end to a highly skeptical archetype on the opposite end, with a mid-range archetype that would serve as the default model for most race-conscious policies. All of the archetypes would impose the essential strict scrutiny requirements of establishing a compelling interest and employing a narrowly tailored policy, but evidentiary burdens and good-faith deference would vary depending on which archetype is being employed.

The Supreme Court's current remedial model of strict scrutiny could form the core of a mid-level archetype. The remedial model imposes a dual burden on government to demonstrate its compelling interest: (1) the interest must be sufficiently important as a matter of policy; and (2) the genuineness of the interest must be documented through a substantial quantum of evidence, specifically the "strong basis in evidence" requirement. A core archetype could impose these basic requirements on non-remedial policies as well. The remedial narrow tailoring inquiry, drawn largely from *United States v. Paradise*, could impose basic requirements of proving necessity, flexibility, time limits,

no undue burdens on third parties, and the non-availability of workable alternatives.[124]

Ratcheting the elements of strict scrutiny analysis up or down to reach the other archetypes would depend on the weight of various contextual factors, including governmental motive, institutional prerogative and role, and a history of judicial deference. A high skepticism archetype—based essentially on an anti-subordination model—could be imposed in contexts in which racial animosity motivates a governmental classification and there are no other factors, such as a historical deference to institutional expertise, that militate against a ruling of unconstitutionality. The government's evidentiary burden for both the compelling interest and narrow tailoring components of strict scrutiny would be high, but even an extraordinary quantum of evidence might not overcome the presumption of unconstitutionality.

A deferential archetype, however, would lower the evidentiary burden and relax some elements of narrow tailoring because of factors weighing in favor of judicial deference. A combination of benign motivations and historical deference to an institution might produce an inquiry similar to the *Grutter* Court's analysis, in which there is a minimal evidentiary burden imposed to demonstrate the institution's compelling interest, and good faith can be presumed along several dimensions of narrow tailoring, including time limits, documenting the necessity of a policy, and considering viable alternative policies.

When several contextual factors are at play and, in effect, cancel each other, the default model of strict scrutiny can be invoked as the appropriate level of analysis. For instance, courts may be inclined to grant deference to Congress and the executive branch when evaluating policies that pursue national security interests, but a policy that appears to be motivated by racial or ethnic animus may lead the courts to adopt the mid-level archetype that grants no deference and requires full documentation in support of the compelling interest and narrow tailoring requirements. Similarly, a higher education institution that is engaging in a remedial affirmative action policy or moving outside its traditional role as an educator and academic policy maker would not be extended the same degree of deference as the *Grutter* Court extended to the University of Michigan, and would instead be bound by the mid-level form of strict scrutiny.

124. *See* United States v. Paradise, 480 U.S. 149, 183–85 (1987) (plurality opinion) (discussing the analysis to determine if remedial plans are sufficiently narrowly tailored).

B. Application to Educational Policies

To illustrate how this proposed framework might work in practice, consider the analyses applied to a variety of race-conscious educational policies, including the drawing of boundaries for school attendance zones, a selective high school admissions policy, and a voluntary district-wide racial integration plan.

1. School Assignment Boundaries

An example of a race-conscious K-12 educational policy that might be screened out by a contextual triggering inquiry is a policy that employs race in drawing the boundaries for school attendance zones. Like legislative districting plans, boundaries for school attendance zones are typically drawn with a school board's knowledge and consideration of the racial demographics of a district.[125] The school board might have an underlying goal of preventing racial isolation, as well as preventing any violation of the Constitution or civil rights laws, by drawing school attendance boundaries that more evenly distribute white and minority students across the zones. However, race might not be the predominant factor considered in the creation of the attendance zones. Achieving population equality across the districts, ensuring geographically compact zones, and maintaining socioeconomic balance among the zones might be equally important factors that are weighed in tandem with race.

Moreover, even if a court concluded that a racial predominance test was not applicable to the attendance zone policy, it still might hold that strict scrutiny should not be triggered because the policy does not result in unequal treatment based on race. A student may be required to attend one school versus another, but the educational experience should be fungible across zone lines and no student would be deprived of a basic education within the district. Without an analysis of context through a triggering inquiry, a court might mechanically apply strict scrutiny to the policy and therefore fail to address the basic questions of how much weight the school board gave to race in drawing the attendance zones or whether the policy actually resulted in unequal treatment because of race.

2. Selective Admissions

A more extensive strict scrutiny analysis would be needed to assess the constitutionality of a selective, race-conscious admissions policy at

125. *See* Rubin, *supra* note 34, at 37–46.

an elite public high school.[126] Suppose that after performing an initial triggering inquiry, a court concluded that strict scrutiny should be applied to the policy because there were no applicable exceptions, race was a significant factor in admissions, and the policy resulted in the unequal treatment of non-minority applicants to the school. A court would then weigh contextual factors to guide its use of a model of strict scrutiny. Based on an inquiry into the intent and motives underlying the policy—say, to achieve a more diverse student body at an elite school that prepares students for entry into four-year colleges—as well as factors affecting institutional deference, the court would assess whether the appropriate model should be deferential strict scrutiny or the default model based on the Supreme Court's remedial cases.

The court may be inclined to employ a deferential model based on a number of factors: the benign motivation of the school district; the expertise and role of the school district in deciding who should attend an elite school; and perhaps even a recognition of a First Amendment interest because of the college preparatory curriculum of the school as a parallel to higher education. This is not to say that the policy would necessarily be constitutional; indeed, even with good faith deference the court may find that the policy is not narrowly tailored, or it could hold as a matter of law that a school district's diversity interest differs significantly from a higher education interest and is not important enough to justify the use of race as a factor. But the context of the admissions policy and its parallels with higher education could lead the court to use a deferential framework comparable to the *Grutter* analysis.

3. Voluntary Integration

An example of educational policy that may lead a court to employ the default version of strict scrutiny is a voluntary racial integration plan. A typical plan is one in which a school district prohibits the voluntary transfer of students from one school to another if the percentage of students of a particular racial or ethnic group either exceeds a maximum or falls below a minimum at a school. The underlying goal is to prevent racial isolation or imbalance that can lead to educational harms, or at least to address the problem of fewer educational benefits arising from the diversity of the student body.[127]

126. *See* Wessman v. Gittens, 160 F.3d 790, 793–94 (1st Cir. 1998) (describing an example of a selective admissions policy at an elite public high school).

127. *See* Brewer v. W. Irondequoit Cent. Sch. Dist., 212 F.3d 738, 749–52 (2d Cir. 2000) (upholding race-conscious voluntary integration plan designed to reduce racial isolation); Comfort *ex rel.* Neumyer v. Lynn Sch. Comm., 283 F. Supp. 2d 328, 384–86 (D. Mass. 2003) (upholding race-conscious voluntary integration plan designed to promote benefits of racial

Because race is the predominant factor in approving student transfers, there would be little question that strict scrutiny would be triggered. What is less clear, however, is whether a deferential model of strict scrutiny should necessarily apply. If academic decision-making by a school district is always to be given some degree of deference because of its expertise and academic role, then a deferential model could be invoked. However, a court might be inclined to rule that policy-makers in elementary and secondary school education should not be accorded the same degree of deference as higher education institutions in promulgating a district-wide integration plan because of the absence of First Amendment academic freedoms in the lower grade levels, or because correcting racial imbalances promotes social rather than purely academic goals. A court's use of the default strict scrutiny model would require the school district to provide substantial evidence of the benefits of racially diverse schools, as well as the harms of segregated schools, and would require the district to thoroughly document that its policy is narrowly tailored under the *Paradise* factors. Again, the ultimate ruling on the policy's constitutionality may not change because of the more demanding analysis, but the burdens on the district would certainly be more onerous.

V. CONCLUSION

With its recent affirmative action rulings, the Supreme Court has opened the door to a more extensive array of race-conscious policy-making. A more flexible strict scrutiny framework that accommodates the wider variety of settings, as well as policy-makers, is essential if courts are to properly evaluate the constitutionality of such policies. The Supreme Court has provided initial guidance on the importance of context in strict scrutiny analysis, and as courts begin to address these new policies, a contextual strict scrutiny framework can offer both courts and policy makers the appropriate tools to assess their legality.

diversity and to reduce harmful effects of racial isolation).