CONSTITUTIONAL LAW — EQUAL PROTECTION — NINTH CIRCUIT HOLDS THAT HIGH SCHOOL RACIAL BALANCING PLAN DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE. — *Parents Involved in Community Schools v. Seattle School District, No. 1*, 426 F.3d 1162 (9th Cir. 2005) (en banc).

In 2003, when the Supreme Court heard *Gratz v. Bollinger*[1] and *Grutter v. Bollinger*,[2] it appeared that the Court would end years of confusion[3] and lay out a clear affirmative action doctrine. However, the decisions, in which the Court held one program constitutional and the other unconstitutional with only one Justice joining both opinions, did little to alleviate the perplexity.[4] Predictably, judges attempting to apply *Gratz* and *Grutter* have been sharply divided.[5] Recently, the Ninth Circuit's decision in *Parents Involved in Community Schools v. Seattle School District, No. 1*,[6] which upheld a high school racial balancing plan,[7] demonstrated the difficulty in applying *Gratz* and *Grutter* in a way that both adheres to Supreme Court precedent and achieves sensible results. This difficulty stems from two doctrinal tensions that emerged from *Gratz* and *Grutter*: first, a fundamental inconsistency between the holding in *Grutter* and the strict scrutiny standard it purported to apply, and second, the ill-conceived formulation of "narrow tailoring" explicated in the two cases. To resolve these tensions, the Supreme Court should shift from strict scrutiny to "robust rational basis review" for race-based affirmative action programs.

Since the 1960s, Seattle has experimented with a variety of voluntary desegregation programs to correct its longstanding problem with racially imbalanced public schools.[8] During the 2001–2002 school year, it employed a program in which students bid on their preferred high schools. If a school was oversubscribed, the district used four tiebreakers to determine which students would be assigned to it, one of which was race if the school was racially imbalanced.[9] A group of

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[1] 539 U.S. 244 (2003).

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

[3] *See* J. Kevin Jenkins, Grutter*, Diversity, and Public K–12 Schools*, 182 EDUC. L. REP. 353, 353 (2004) (describing the jurisprudence of affirmative action in public university admissions as "decidedly unclear").

[4] *See Grutter*, 539 U.S. at 348 (Scalia, J., concurring in part and dissenting in part) ("[T]oday's *Grutter-Gratz* split double header seems perversely designed to prolong the controversy . . . .").

[5] *Compare* Comfort v. Lynn Sch. Comm., 418 F.3d 1, 6–8 (1st Cir.) (en banc), *cert. denied*, 126 S. Ct. 798 (2005), *with id.* at 30 (Selya, J., dissenting).

[6] 426 F.3d 1162 (9th Cir. 2005) (en banc).

[7] *Id.* at 1192–93.

[8] *See id.* at 1167–69.

[9] *See id.* at 1169–70. This tiebreaker was used only if the racial balance of the school would deviate from that of the district by more than fifteen percent. In 2000–2001, approximately ten percent of students were assigned to schools based on a similar racial tiebreaker. *See id.* at 1170.

parents of public school students sued the district, charging that the plan violated Washington state law, federal law, and the Fourteenth Amendment.[10]

The district court, hearing the case before *Grutter*, upheld the plan against all three challenges.[11] On appeal, and evaluating the case in light of *Grutter*, a divided panel of the Ninth Circuit ruled that the plan violated the Equal Protection Clause because it failed the narrow tailoring requirement of strict scrutiny.[12]

On rehearing en banc, the Ninth Circuit affirmed the district court by a 7–4 vote.[13] Writing for the court, Judge Fisher[14] held that Seattle's plan withstood strict scrutiny, finding that Seattle had a compelling interest in establishing diverse high schools and that the plan was narrowly tailored to serve this objective.[15] The court first considered whether Seattle had demonstrated a compelling state interest.[16] In *Grutter*, the Supreme Court held that achieving diversity in a law school student body could be a compelling state interest because of its educational and social benefits.[17] Applying *Grutter*, Judge Fisher noted that these benefits are arguably more significant in high schools due to the role of high schools in inculcating values, the fact that many high school students will not attend college and thus never encounter the benefits of collegiate diversity programs, and the particular impressionability of younger students.[18] Therefore, the court found that the district had a compelling interest in avoiding de facto segregation.[19]

The court then considered whether the district's racial tiebreaker was narrowly tailored to its compelling interest. It gleaned from *Grutter* five factors to consider when evaluating whether a plan is narrowly tailored: "(1) individualized consideration of applicants; (2) the absence of quotas; (3) serious, good-faith consideration of race-neutral alterna-

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[10] *Id.* at 1171.

[11] *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 137 F. Supp. 2d 1224, 1232–40 (W.D. Wash. 2001).

[12] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., No. 1, 377 F.3d 949, 980, 988–89 (9th Cir. 2004). The panel had previously ruled that the plan violated Washington state law. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., No. 1, 285 F.3d 1236, 1252 (9th Cir. 2002). However, it subsequently certified the question for the Washington Supreme Court, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., No. 1, 294 F.3d 1085, 1085 (9th Cir. 2002), which declared the plan permissible, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., No. 1, 72 P.3d 151, 166 (Wash. 2003). For a nuanced analysis of the Ninth Circuit's 2004 decision, see Recent Case, 118 HARV. L. REV. 1387 (2005).

[13] *Parents*, 426 F.3d at 1166, 1176.

[14] Judge Fisher was joined by Chief Judge Schroeder and Judges Pregerson, Hawkins, William Fletcher, and Rawlinson.

[15] *Parents*, 426 F.3d at 1166.

[16] *Id.* at 1173.

[17] *See* Grutter v. Bollinger, 539 U.S. 306, 327–33 (2003).

[18] *See Parents*, 426 F.3d at 1175–76.

[19] *Id.* at 1177–79.

tives . . . ; (4) that no member of any racial group was unduly harmed; and (5) that the program had a[n] . . . end point."[20] The court appeared to acknowledge that the plan did not use individualized consideration.[21] It pointed out, however, that one purpose of individualized consideration in universities is to avoid the stigma associated with rigid racial preferences. This stigma is less salient in the context of high school assignments because merit is not considered.[22] Moreover, contextual differences between law school and high school suggest that individualized consideration is less important in the latter.[23] The court then found that the Seattle plan satisfied the other four *Grutter* factors. The plan sought to achieve a critical mass rather than enact a rigid quota.[24] Race-neutral alternatives would have been ineffective as a result of Seattle's de facto residential segregation.[25] No racial group was unduly harmed because no student was entitled to attend any specific school and because the tiebreaker did not uniformly benefit any group to the detriment of another.[26] Finally, despite the lack of a sunset plan, the court "expect[ed] that the District will continue to review its Plan."[27] Accordingly, the court held that the Seattle plan was narrowly tailored to serve Seattle's compelling interest in diversity and thus satisfied the Equal Protection Clause.[28]

Judge Kozinski concurred in the result. He argued that the Seattle plan suffered from none of the defects of other programs employing racial classifications: it did not oppress minorities, segregate the races, give preferences to a race, or create the possibility for racial stigma.[29] Consequently, the plan should have been evaluated under a "robust and realistic rational basis review."[30] Under this standard, the plan was constitutional: it was rational to want to teach children to deal with peers of other races.[31] Judge Kozinski also noted that the plan was "far from the original evils at which the Fourteenth Amendment was addressed."[32]

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[20] *Id.* at 1180.
[21] *See id.* at 1180–81.
[22] *Id.* at 1181.
[23] *Id.* at 1181–84. One such contextual difference is a high school's interest in ensuring that high school assignments do not replicate segregated housing patterns. *Id.* at 1183.
[24] *See id.* at 1184–86.
[25] *See id.* at 1187–91.
[26] *See id.* at 1191–92.
[27] *Id.* at 1192.
[28] *Id.* at 1192–93.
[29] *See id.* at 1194 (Kozinski, J., concurring in the result).
[30] *Id.* (citing City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985)).
[31] *Id.* at 1194–95.
[32] *Id.* at 1195 (quoting Comfort v. Lynn Sch. Comm., 418 F.3d 1, 29 (1st Cir. 2005) (en banc) (Boudin, C.J., concurring)) (internal quotation mark omitted).

Judge Bea dissented.[33] He argued that "the District [was] engaged in simple racial balancing, which the Equal Protection Clause forbids."[34] He noted that the Supreme Court has permitted race classifications to remedy racial imbalances in only two circumstances — to correct past de jure segregation and to attain student body diversity in universities — and that neither exception was applicable in this case.[35] Moreover, the asserted state interest in *Grutter* was diversity across a multitude of characteristics, rather than merely racial diversity. In contrast, Seattle's interest was limited to racial balancing and as such perpetuated the stereotype that all members of a racial group express the same viewpoints.[36] In sum, Judge Bea concluded that the interest in racial balancing did not qualify as compelling.[37] Judge Bea also argued that the plan was not narrowly tailored.[38] He used the five-part framework outlined by the majority and concluded that the plan failed all five factors, noting that "[t]he differences between university and secondary education do not justify denial of individualized equal protection of the law to secondary school students."[39] Judge Bea concluded with the admonishment that "[t]he way to end racial discrimination is to stop discriminating by race."[40]

The seeds of the deep division between the majority and the dissent in *Parents* were sown in *Grutter*. *Grutter* is irreconcilable both with the Court's broader strict scrutiny jurisprudence and with the specific holding in *Gratz*. These doctrinal tensions materialized in *Parents*. The Ninth Circuit was forced to choose between a pragmatic application of *Grutter*'s commitment to affirmative action and a straightforward application of the strict scrutiny standard; it is no surprise that the judges could not agree. The best way to reconcile these positions would be to downgrade the standard of review for affirmative action cases to the "robust rational basis" test that Judge Kozinski endorsed.

One reason for the disagreement in *Parents* was *Grutter*'s highly unusual application of the strict scrutiny standard. Strict scrutiny has traditionally been a powerful scythe that the Court has wielded to declare racial preferences insufficiently narrowly tailored.[41] However,

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[33] Judge Bea was joined by Judges Kleinfeld, Tallman, and Callahan.

[34] *Parents*, 426 F.3d at 1197 (Bea, J., dissenting).

[35] *Id.* at 1200–02.

[36] *See id.* at 1202–05.

[37] *Id.* at 1209.

[38] *Id.*

[39] *Id.* at 1210.

[40] *Id.* at 1222.

[41] *See, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469, 508 (1989); *see also* Fullilove v. Klutznick, 448 U.S. 448, 507 (1980) (Powell, J., concurring) (stating that the Court's jurisprudence "has led some to wonder whether [its] review of racial classifications has been strict in theory, but fatal in fact").

faced in *Grutter* with an interest — viewpoint diversity in law school — that is important but not monumentally compelling, the Court still upheld the program while purporting to apply the same strict scrutiny it had always used.[42]

This doctrinal asymmetry led to the disagreement in *Parents*. From a pragmatic perspective, the *Parents* majority's arguments are eminently reasonable. Under the compelling interest prong, influencing children at a young age, many of whom will never go to college, seems easily as compelling as creating viewpoint diversity among law students. Under the narrow tailoring prong, the race-neutral balancing plan seems far less controversial than a one-way race preference. Holding the interest in *Parents* uncompelling or the tailoring insufficiently narrow appears counter to the spirit of *Grutter*.[43]

And yet, under the traditional strict scrutiny standard, the dissent's reasoning is convincing. The majority's holding comes down to the intuition that if the plan in *Grutter* was compelling and narrowly tailored, the plan in *Parents* must be compelling and narrowly tailored too. But this is only an intuition. The two programs *are* different — one used individualized consideration with one-way preferences in law school, and the other used racial balancing without one-way preferences in high school — and declaring that one is as compelling or as narrowly tailored as the other comes down to an exercise of intuitive judgment. At the same time, the Supreme Court has repeatedly declared the strict scrutiny standard to be formidable.[44] Judge Bea's dissent correctly observed that the jurisprudential terrain is littered with racial classifications struck down by the Court.[45] Moreover, *Gratz* demonstrated the continuing post-*Grutter* vitality of the strict scrutiny standard. Thus, the dissent's approach was simple: under strict scrutiny, an appellate court should decline to announce new compelling state interests or new forms of constitutionally permissible narrow tai-

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[42] *See* Grutter v. Bollinger, 539 U.S. 306, 326, 343 (2003). The *Grutter* dissenters remarked on this incongruity, *see id.* at 379–80 (Rehnquist, C.J., dissenting), as did numerous scholars, *see, e.g.*, Robert C. Post, *The Supreme Court, 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 58 (2003) (stating that "[t]he Court can shape the intense controversies about affirmative action by manipulating the definition of a 'compelling' state interest or by construing the meaning of 'narrow tailoring'"); Kermit Roosevelt III, *Constitutional Calcification: How the Law Becomes What the Court Does*, 91 VA. L. REV. 1649, 1707 (2005) (referring to the strict scrutiny standard employed in *Grutter* as "unusually enervated").

[43] For elaboration on this argument, see James Nial Robinson II, *Trying To Push a Square Peg Through a Round Hole: Why the Higher Education Style of Strict Scrutiny Review Does Not Fit When Courts Consider K–12 Admissions Programs*, 2004 BYU EDUC. & L.J. 51.

[44] *See, e.g.*, Miller v. Johnson, 515 U.S. 900, 920 (1995) (characterizing strict scrutiny as "our most rigorous and exacting standard of constitutional review").

[45] *See Parents*, 426 F.3d at 1200–01 (Bea, J., dissenting) (citing, among other cases, Shaw v. Hunt, 517 U.S. 899, 909–12 (1996) (rejecting racial classifications to mitigate "the effects of general societal discrimination")).

loring. This approach may produce a result inconsistent with the spirit of *Grutter*'s embrace of affirmative action, but its logic accords with the overall arc of the Court's strict scrutiny decisions. The disparity between the standard of review and the result in *Grutter* thus created conflicting precedents that predictably led to divergent opinions in *Parents*.

A second reason for the Ninth Circuit's disagreement stems from the incoherence of the *Gratz/Grutter* split. In addition to *Grutter*'s general incongruence with the Court's strict scrutiny jurisprudence, its explication of narrow tailoring was incompatible with *Gratz*'s analysis. In these two cases, the Supreme Court held that a system giving a rigid boost to minority applicants was unconstitutional, but a program that employed individualized consideration, although still providing a substantial boost to minority applicants, was constitutional.[46] One possible explanation for these outcomes is that the Court (or, more specifically, Justice O'Connor[47]) wanted to chart a moderate course: affirmative action is acceptable sometimes, but not always. But because the only salient distinction between the programs was that one used individualized consideration and the other used rigid preferences, the only way to chart a moderate course between the two cases was to declare that distinction dispositive.[48] Holding all other facts constant, this distinction might make sense. However, it is senseless to strike down a program that employs explicit racial balancing rather than individualized consideration but still is less intrusive than those in *Gratz* and *Grutter* — arguably the situation in *Parents* — by making the absence of individualized consideration the single dispositive factor. If the Court were a common law court, able to develop its jurisprudence case by case without needing to announce categorical rules, it would not have reached this illogical outcome. For any such less intrusive program, it could create a new rule, and a flexible affirmative action doctrine could evolve. But because the Court hears only a limited number of cases and must create clear rules for lower courts, it was forced to use *Gratz* and *Grutter* to create a widely applicable rule.[49] And lower courts now face the specter of applying this logic to cases in which it is not appropriate.

Regardless of the Supreme Court's motivations, *Parents* aptly illustrates the tension between *Gratz* and *Grutter*. As Judge Kozinski pointed out, even though the plan in *Parents* uses race explicitly, it

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[46] *See* Gratz v. Bollinger, 539 U.S. 244, 275 (2003); *Grutter*, 539 U.S. at 343.

[47] Justice O'Connor was the only Justice to join both majority opinions.

[48] *See Grutter*, 539 U.S. at 330 ("[O]utright racial balancing . . . is patently unconstitutional.").

[49] *See* Richard A. Posner, *The Supreme Court, 2004 Term—Foreword: A Political Court*, 119 HARV. L. REV. 31, 37 (2005).

seems far more palatable than other affirmative action programs.[50] For instance, it provides no preferential treatment for one race over another.[51] But under *Gratz*, the magnitude of the preferential treatment appears to be irrelevant if the program uses racial balancing. *Gratz* and *Grutter* thus left the Ninth Circuit with two choices. It could have taken the Court's language seriously and struck down any program employing rigid racial balancing, regardless of whether other considerations made it seemingly more narrowly tailored than the *Grutter* program, or it could have treated *Grutter* as a context-specific case and permitted express racial classifications in certain circumstances. The first strategy seems inconsistent with the spirit of *Grutter*. The second virtually restricts *Grutter* to its facts. Neither route is appealing, and the majority and the dissent might be said to have disagreed on which was the lesser evil.

To resolve the tensions in *Gratz* and *Grutter*, the Supreme Court should evaluate affirmative action under what Judge Kozinski termed a "robust and realistic rational basis" test.[52] Under this level of scrutiny, courts could scrutinize programs both for questionable purposes[53] and for particularly unpalatable features. But courts would be able to take all aspects of the plan into account and err on the side of deferring to legislatures rather than remain pigeonholed by the strict scrutiny framework.[54] Scholars have offered a variety of justifications for

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[50] *See Parents*, 426 F.3d at 1194 (Kozinski, J., concurring in the result).

[51] *Id.*

[52] *Id.* This proposed position is somewhat broader than Judge Kozinski's position, which appeared to advocate a lower standard of review only for programs without one-way preferences. The extent of the reduced scrutiny depends on the precise definition of an affirmative action program. Of course, another way to resolve the tensions would be to hold all affirmative action programs unconstitutional. This approach has the benefit of being easily applicable, but it also has the unappealing result of judicially overriding well-intentioned programs like the one in Seattle. There is a certain irony in the fact that the champions of this approach, Justices Scalia and Thomas, are traditionally associated with an originalist approach to constitutional interpretation. Yet certain scholars have suggested that from an originalist perspective, affirmative action appears constitutionally permissible: the framers of the Fourteenth Amendment do not seem to have had absolute colorblindness in mind. *See, e.g.*, Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753, 753–88 (1985). Justice Scalia's and Justice Thomas's *Grutter* opinions, 539 U.S. at 346 (Scalia, J., concurring in part and dissenting in part); *id.* at 349 (Thomas, J., concurring in part and dissenting in part), although both passionate and compelling, are conspicuously devoid of any attempt to link their views to this mode of constitutional interpretation.

[53] For instance, in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), the Court addressed a plan in which a majority African American local government enacted a very broad affirmative action plan for a majority African American populace. *See id.* at 477–78, 485. This scenario might raise alarm bells under a robust rational basis framework.

[54] This proposal has received considerable treatment in the literature. *See, e.g.*, Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 20–48 (1972); *see also* Robinson, *supra* note 43 (arguing in favor of a judicial standard of review that gives greater deference to

a relaxed standard of review for affirmative action programs, including arguments based on ethics,[55] political process theory,[56] classical liberalism,[57] and the history of the Fourteenth Amendment.[58]

Parents illustrates the pragmatic benefit of such a recategorization. Rather than being forced to choose between striking down affirmative action programs far more appealing than the one upheld in *Grutter* and applying strict scrutiny in a nontraditional manner, judges could evaluate affirmative action programs in a straightforward way: determine whether the plan is particularly noxious or is motivated by self-dealing, and, if not, defer to elected officials.

Of course, robust rational basis would not be a panacea. Undoubtedly, the creation of a new standard of review would not engender judicial consistency. Indeed, one remarkable aspect of *Parents* is the sheer scope of the disagreement between the majority and the dissent: of the five prongs of the narrow tailoring test, all of which involved distinct questions, the majority found that four were met and one was inapplicable, whereas the dissent found that zero were met.[59] Such sharp disagreement does not bode well for judicial consistency under a vague and unfamiliar new standard of review.[60] Moreover, such a weak standard of review would likely sweep in programs, like the one in *Gratz*, for which the Justices showed a great distaste. However, to the extent that a moderate course between permitting all affirmative action and banning all affirmative action is desirable, robust rational basis review would at least force judges to ask the right questions. Rather than trying to force the facts of the case into the *Grutter*/strict scrutiny doctrinal straitjacket, judges could "consider the actual reasons for the plan in light of the real-world circumstances that gave rise to it."[61] The result would be a more sensible, if not more consistent, affirmative action jurisprudence.

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school districts). A more nuanced approach to strict scrutiny is offered in Angelo N. Ancheta, *Contextual Strict Scrutiny and Race-Conscious Policy Making*, 36 LOY. U. CHI. L.J. 21 (2004).

55 *See* Richard Lempert, *The Force of Irony: On the Morality of Affirmative Action and* United Steelworkers v. Weber, 95 ETHICS 86, 89 (1984) ("It would be ironic indeed if evils visited on blacks had lent enough force to the moral claims of whites to prevent what appears to many at this point to be the most effective means of eliminating the legacy of those evils.").

56 *See* John Hart Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723, 736 (1974) ("Whether or not it is more blessed to give than to receive, it is surely less suspicious.").

57 *See* Richard A. Epstein, *A Rational Basis for Affirmative Action: A Shaky but Classical Liberal Defense*, 100 MICH. L. REV. 2036 (2002).

58 *See* Schnapper, *supra* note 52, at 789–98.

59 *See Parents*, 426 F.3d at 1179–92; *id.* at 1209–20 (Bea, J., dissenting).

60 At the very least, however, a new standard would mollify the inconsistency that already occurs in practice when courts manipulate standards of review.

61 *Parents*, 426 F.3d at 1194 (Kozinski, J., concurring in the result).