

**CONTEMPORARY CONTEXTUAL ANALYSIS: ACCOUNTING FOR  
CHANGED FACTUAL CONDITIONS UNDER THE EQUAL  
PROTECTION CLAUSE**

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INTRODUCTION

The world is subject to continuous change. Ideas and practices, which were once revolutionary, become outmoded and archaic as society responds to new events, developments, and knowledge. This change places great stress on the American constitutional order and its institutions. To encourage stability and the rule of law, constitutional decisions made by courts are often characterized as permanent. However, that treatment of the results of constitutional litigation produces tension because the factual conditions on which such results are based may fade away as time passes.

The tension between an ever-changing world and a stable constitutional order is particularly prevalent when a court assesses a classification under the Equal Protection Clause of the Fourteenth Amendment.<sup>1</sup> In this situation, a court must evaluate the facts establishing the government's asserted interest and the facts demonstrating that the classification furthers the government's interest.<sup>2</sup>

Here, a question arises: Should the court examine only those factual conditions that existed at the time of the classification's creation, or should its analysis be informed by the changed factual conditions that may exist at the time of the constitutional challenge? Proper analysis under the Equal Protection Clause must be conducted in

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1 U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.")

2 *See* *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) (stating that, under strict scrutiny, "classifications are constitutional only if they are narrowly tailored to further compelling governmental interests"); *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) (stating that, under rational basis review, "the Equal Protection Clause requires only that the classification rationally further a legitimate state interest"); *Craig v. Boren*, 429 U.S. 190, 197 (1976) (stating that, under intermediate scrutiny, "classifications . . . must serve important governmental objectives and must be substantially related to achievement of those objectives").

light of the factual conditions that exist at the time of the constitutional challenge, rather than looking back to the classification's creation. This Comment refers to that assessment of the present factual conditions as "contemporary contextual analysis."

When reviewing equal protection challenges under strict scrutiny, the United States Supreme Court uses contemporary contextual analysis consistently.<sup>3</sup> However, contemporary contextual analysis is not confined to the most exacting form of review. Each level of scrutiny requires that a classification be connected to its context, though the strength of that connection may vary.

But lower courts have questioned whether contemporary contextual analysis is appropriate at the least-probing level of scrutiny—rational basis review.<sup>4</sup> Those courts argue that contemporary contextual analysis overburdens legislative bodies, forcing them to be perpetual monitors of their laws.<sup>5</sup> Such arguments shirk the judicial role and threaten the legitimacy of both courts and legislatures. Rational basis review, while more deferent, demands an examination of the present factual context, just like strict or intermediate scrutiny.

Part I discusses the conventional view that the results of constitutional adjudications should be permanent and attempts to reconcile it with contemporary contextual analysis. Part II provides an in-depth discussion of contemporary contextual analysis under the Equal Protection Clause and advocates for its use at every level of scrutiny. Part II.A provides an overview of contemporary contextual analysis. It discusses contemporary contextual analysis as a logical component of

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3 See *Grutter*, 539 U.S. at 341–43 (stating that the constitutional permissibility of race-conscious admissions policies in higher education may change over time); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 (1938) (“[T]he constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist.”).

4 *Burlington N. R.R. v. Dep’t of Pub. Serv. Regulation*, 763 F.2d 1106, 1111 (9th Cir. 1985) (“The Supreme Court has been ambivalent on whether changed circumstances can transform a once-rational statute into an irrational law.”); *Murillo v. Bambrick*, 681 F.2d 898, 912 n.27 (3d Cir. 1982) (“[T]he Supreme Court appears not to have determined definitively whether changed conditions are a relevant consideration in equal protection analysis.”); *Lerner v. Corbett*, 972 F. Supp. 2d 676, 682 (M.D. Pa. 2013) (“As a general matter, it is unclear whether consideration of changed circumstances is appropriate to an equal protection inquiry.”); *Jones v. Schneiderman*, 888 F. Supp. 2d 421, 426 (S.D.N.Y. 2012) (“[T]he Second Circuit has not expressly embraced the view that changed circumstances may be considered as part of a rational basis review.”).

5 *Murillo*, 681 F.2d at 911–12 & n.27; see *Burlington*, 763 F.2d at 1111 n.3 (“In construing statutory language, a court must ordinarily consider the circumstances at the time of passage, rather than later interpretations or statements of purpose. Where courts have invalidated archaic statutes, there is often an independent constitutional basis for so doing (i.e., a belated recognition that the statutes were unconstitutional as written).” (citations omitted)).

the decisional rules used to implement equal protection. Also, Part II.A differentiates contemporary contextual analysis from the effect of changed social values on constitutional interpretation. Part II.B uses racial classifications under strict scrutiny to demonstrate the importance of contemporary contextual analysis and its vitality in the jurisprudence of the Supreme Court. Part II.C assesses the confusion in the lower courts about whether contemporary contextual analysis should be applied in rational basis review and concludes that it must be applied at even the lowest level of scrutiny.

#### I. THE CONVENTIONAL VIEW: CONSTITUTIONAL RESULTS SHOULD BE PERMANENT

Laypersons, lawyers, and even judges tend to believe, or at least espouse the view, that the results of constitutional adjudications should be afforded some degree of permanence. A statute, once held constitutional, must be constitutional for all time. The underlying assumption of this conventional view is that results of such an important nature cannot be changed without altering the methods by which judges make constitutional determinations. The desire to conform to this conventional view stems from concerns for the rule of law and the legitimacy of the judiciary, and in particular the legitimacy of the Supreme Court.<sup>6</sup>

The Court, of course, is sheltered from the normal forces of political accountability. Unlike the legislative and executive branches, the Justices harbor no fear of being removed from the bench during the next election cycle; no election will come to redeem an ill-advised decision. Moreover, the Court is the final arbiter of federal constitutional issues. No higher court can be called upon to overrule its holdings,<sup>7</sup> and the process for amending the Constitution is so difficult that the Court's decisions will in all likelihood survive.<sup>8</sup>

Holding this great power of finality in "say[ing] what the law is,"<sup>9</sup> forces the Court to be the principal guardian of its own legitimacy.

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<sup>6</sup> See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 298–99 (1978) (“[T]he mutability of a constitutional principle, based upon shifting political and social judgments, undermines the chances for consistent application of the Constitution from one generation to the next, a critical feature of its coherent interpretation.”).

<sup>7</sup> U.S. CONST. art. III, § 1 (“The judicial Power of the United States shall be vested in *one* supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.” (emphasis added)).

<sup>8</sup> *Id.* at art. V (providing for a process that demands multiple supermajorities in Congress and the states to amend the Constitution).

<sup>9</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

With each ruling, the Justices must consider how the public and other governmental actors will perceive their institution. Justice Robert H. Jackson noted the Court's precarious position, when he explained, "We are not final because we are infallible, but we are infallible only because we are final."<sup>10</sup> While no one considers the Court infallible in fact, it is important for the Court to maintain the appearance of stability and continuity. That stability and continuity in the judicial decision-making process encourages respect for the law, compliance with the law, and support for the judiciary as an institution.

The doctrine of stare decisis,<sup>11</sup> or the strong respect for precedent, epitomizes the Court's efforts to preserve the rule of law and its institutional integrity. Under its most general definition, stare decisis suggests that once an issue has been decided in a particular way, future courts should resolve that same issue in the same way.<sup>12</sup> *Planned Parenthood of Southeastern Pennsylvania v. Casey* offers one of the Court's most thorough discussions of stare decisis.<sup>13</sup> In *Casey*, the Court reaffirmed the essential holding of *Roe v. Wade*<sup>14</sup> in the face of tremendous public pressure to reverse course.<sup>15</sup> *Roe* recognized the right of a woman to abort her pregnancy prior to viability.<sup>16</sup> When the Court decided *Casey*, a persistent and vocal opposition had challenged the *Roe* holding for nineteen years.<sup>17</sup> Nonetheless, the Court refused to overrule its previous interpretation of the Due Process Clause and used stare decisis to fend off the attack.<sup>18</sup>

The *Casey* Court began its opinion with a general declaration in favor of the stability of constitutional results: "Liberty finds no refuge in a jurisprudence of doubt."<sup>19</sup> The Court then broadly defined the boundaries of stare decisis, when it explained,

The obligation to follow precedent begins with necessity, and a contrary necessity marks its outer limit. . . . [W]e recognize that no judicial system could do society's work if it eyed each issue afresh in every case that raised it. Indeed, the very concept of the rule of law underlying our

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<sup>10</sup> *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

<sup>11</sup> "Stare decisis" is the shortened form of the Latin phrase *stare decisis et non quieta movere*, meaning "[t]o stand by things decided, and not to disturb settled points." BLACK'S LAW DICTIONARY 1537 (9th ed. 2009).

<sup>12</sup> Kermit Roosevelt III, *Polyphonic Stare Decisis: Listening to Non-Article III Actors*, 83 NOTRE DAME L. REV. 1303, 1304 (2008).

<sup>13</sup> 505 U.S. 833, 854–63 (1992).

<sup>14</sup> 410 U.S. 113 (1973).

<sup>15</sup> *Casey*, 505 U.S. at 868–69.

<sup>16</sup> *Roe*, 410 U.S. at 153, 163.

<sup>17</sup> *Casey*, 505 U.S. at 869.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 844.

own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable. At the other extreme, a different necessity would make itself felt if a prior judicial ruling should come to be seen so clearly as error that its enforcement was for that very reason doomed.<sup>20</sup>

Therefore, stare decisis is not an “inexorable command”; it contains a component of flexibility and is guided by “prudential and pragmatic considerations.”<sup>21</sup> The prudential and pragmatic inquiry of stare decisis requires the Court to assess (1) “whether the rule has proven to be intolerable simply in defying practical workability”;<sup>22</sup> (2) “whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation”;<sup>23</sup> (3) “whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine”;<sup>24</sup> and (4) “whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification.”<sup>25</sup>

The Court’s articulation of the stare decisis inquiry supports the conventional view that constitutional results should be afforded a degree of permanence. In particular, the inquiry’s second question, whether a reliance interest would be subjected to special hardship,<sup>26</sup> is bound up in the public’s perception of how the Court reaches its decisions. Those people who have relied on a previous ruling would be upset if the Court later reverses the decision and destroys the reliance interest. In their anger, those people would also likely attribute the reversal to improper, political motives—motives supposedly unfit for officers of the judiciary.

Yet, the fourth question of the stare decisis inquiry asks whether changed factual conditions have robbed the old rule of significant application or justification.<sup>27</sup> The idea of overruling a constitutional decision because the external facts have evolved appears to be in tension with the favorable treatment of reliance interests. It is conceivable that people could build an intense reliance interest on a judicial decision even though changed facts have eroded that decision’s justification. If judges must defer to the reliance interest, a true contem-

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<sup>20</sup> *Id.* at 854 (citations omitted).

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

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

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

<sup>24</sup> *Id.* at 855.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 854.

<sup>27</sup> *Id.* at 855.

porary contextual analysis under the Equal Protection Clause is doomed by stare decisis and the conventional view of constitutional results.

However, the prognosis need not be so grim; stare decisis can be reconciled to some extent with contemporary contextual analysis. There are two central arguments for reconciliation. First, one might argue that stare decisis is a prudential rule made by judges and does not itself emanate from the Constitution,<sup>28</sup> and when stare decisis conflicts with contemporary contextual analysis, the demands of the Equal Protection Clause must override the prudential consideration.<sup>29</sup>

While forceful, that argument sweeps too far in its willingness to disregard stare decisis. There is current scholarly debate about whether stare decisis is itself required by the Constitution.<sup>30</sup> To say that courts may not always be required to follow precedent is quite different from saying that courts never need to adhere to prior decisions.<sup>31</sup> At minimum, the Constitution may demand a weak form of stare decisis.<sup>32</sup> Perhaps, the constitutional grounding for stare decisis is located in the nature of Article III “judicial power.”<sup>33</sup> Stare decisis may be a feature of judicial power that distinguishes it from legislative power and legitimizes the process of adjudication.<sup>34</sup> Alternatively, the constitutional locus of stare decisis could be the Fourteenth Amendment’s Equal Protection Clause and the equal protection component of the Fifth Amendment’s Due Process Clause, which require equal

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<sup>28</sup> See *id.* at 854–55.

<sup>29</sup> See Randy E. Barnett, *Trumping Precedent with Original Meaning: Not as Radical as It Sounds*, 22 CONST. COMMENT. 257, 259 (2005) (arguing for rejecting the doctrine of stare decisis when originalism and precedent conflict); Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL’Y 23, 25–28 (1994) (explaining that federal courts are obligated to search for the true meaning of the Constitution, not the meaning ascribed to it by Congress, the President, or even precedent); Gary Lawson, *Mostly Unconstitutional: The Case Against Precedent Revisited*, 5 AVE MARIA L. REV. 1, 3 (2007) (arguing that, if the Supreme Court wants to conform to the Constitution, it must never choose precedent over an examination of constitutional meaning).

<sup>30</sup> See John Harrison, *The Power of Congress over the Rules of Precedent*, 50 DUKE L.J. 503, 513 (2000) (noting that, although some scholars think that stare decisis is constitutionally mandated, the text of the Constitution says little on the subject); Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey?*, 109 YALE L.J. 1535, 1547–48 (2000) (arguing that stare decisis is a policy judgment, not a requirement specified in the Constitution or implicit in its articles or structure); Roosevelt, *supra* note 12, at 1308–14 (arguing, in contrast to Paulsen, that some sort of respect for precedent is constitutionally required).

<sup>31</sup> Roosevelt, *supra* note 12, at 1308–12.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 1308–09.

<sup>34</sup> *Id.*

treatment for similarly situated individuals.<sup>35</sup> Without stare decisis, nothing prevents a court from treating two identical litigants in different ways.<sup>36</sup> The first litigant could benefit from a legal rule, and then the court could deny that benefit to the second litigant by refusing to apply the same legal rule.<sup>37</sup> It is difficult to conceive of a more literal denial of equal protection of the laws.<sup>38</sup> In reconciling the tension between stare decisis and contemporary contextual analysis, disregarding stare decisis as a mere prudential rule does not offer the best solution. Stare decisis may itself be rooted in the Constitution, and even if it is not, the doctrine is still integral to the legitimization of the judicial role.

The second argument for reconciliation takes a more tempered approach. Reaching a new constitutional result in a particular case based on contemporary contextual analysis does not necessitate overruling the previous, contrary decision and implicating stare decisis.<sup>39</sup> Overruling or adhering to precedent is not a unitary concept.<sup>40</sup> The Court's process is not as simple as Justice Owen Roberts asserted, "to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former."<sup>41</sup>

Rather, constitutional adjudication is better understood as a three-part process under the decisional rules model.<sup>42</sup> First, the Court must decide what operative proposition of the Constitution applies.<sup>43</sup> For instance, the operative proposition underlying the Equal Protection Clause is often stated as the government must not subject similarly situated individuals to different treatment without adequate justification.<sup>44</sup> Second, the Court must devise decisional rules to implement the operative proposition.<sup>45</sup> Here, the Court has adopted three levels of scrutiny—strict scrutiny, intermediate scrutiny, and rational basis review—as the decisional rules implementing the operative proposi-

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35 *Id.* at 1309–10.

36 *Id.*

37 *Id.*

38 *Id.*

39 *See* Roosevelt, *supra* note 12, at 1315–19 (analyzing the Court's modification of *Roe*'s trimester framework in *Casey*).

40 *Id.* at 1319.

41 *United States v. Butler*, 297 U.S. 1, 62 (1936).

42 Kermit Roosevelt III, *Constitutional Calcification: How the Law Becomes What the Court Does*, 91 VA. L. REV. 1649, 1655–58 (2005).

43 *Id.* at 1657.

44 *Id.*

45 *Id.* at 1658.

tion of equal protection.<sup>46</sup> Third, the Court must apply its decisional rules to the facts of concrete cases.<sup>47</sup>

Contemporary contextual analysis occurs at the third step of constitutional adjudication and does not alter the operative proposition or decisional rules of the Equal Protection Clause. Because contemporary contextual analysis operates at the application step, overruling a prior decision is unnecessary for reaching a different constitutional result—the precedent implicated can simply be distinguished on factual grounds. Suppose that, in 1960, the Court upheld a statute that banned a particular drug only because the legislature rationally believed that the drug caused cancer. Over the next forty years, scientists continued their research and developed a perfect fix for the carcinogenic effects. Then, in 2000, the ban is again challenged, but the plaintiff presents *conclusive* scientific evidence that dispels any link between the drug and cancer. The Court should strike down the ban because the changed factual conditions destroyed the legislature's rational basis. In holding that the ban is unconstitutional, the Court would apply the same operative proposition and decisional rule as it did in the 1960 case, but the opposite result would be reached. The Court could reconcile the new result with *stare decisis* by distinguishing the two cases based on the differences in the available facts at the time of each decision. The Court would not need to declare that the 1960 decision was incorrect, as the scientists' fix for the drug did not then exist.<sup>48</sup> Distinguishing prior rulings based on their facts allows the Court to use contemporary contextual analysis without frustrating the legitimization goals of *stare decisis*.

Beyond the doctrine of *stare decisis*, Justices repeatedly conform their reasoning to the conventional view of constitutional results.<sup>49</sup>

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46 *Id.* at 1676–80 (“That the tiers of scrutiny are not operative propositions but decisional rules is well known.”).

47 *Id.* at 1658.

48 This example is adapted from a similar hypothetical scenario offered by Scott H. Bice, which involved a food additive linked to a disease. See Scott H. Bice, *Rationality Analysis in Constitutional Law*, 65 MINN. L. REV. 1, 33–34 (1980). There is, however, a major distinction between the two illustrations. Bice's scenario states that the plaintiff showed conclusive evidence that the link between the food additive and the disease never existed, rather than that scientists developed a perfect fix after the first court challenge. *Id.* at 34. Under those circumstances, contemporary contextual analysis produces harsher results, at least in relation to *stare decisis*, because the factual premises upon which the court relied in its first decision did prove to be incorrect. The changed factual conditions had nothing to do with modifications to the food additive and, instead, concerned improvements in the ability to discern the additive's preexisting properties.

49 See *United States v. Virginia*, 518 U.S. 515, 568 (1996) (Scalia, J., dissenting) (“[I]n my view the function of this Court is to *preserve* our society's values regarding (among other things) equal protection, not to *revise* them; to prevent backsliding from the degree of re-

For example, Justice Lewis Powell's rejection of different tiers of scrutiny for anti-majority and anti-minority classifications in *Regents of the University of California v. Bakke* shows a deep concern that the Court's legitimacy will be damaged if the contents of its rulings fluctuate with shifts in political power.<sup>50</sup> In *Bakke*, the Court held that the Equal Protection Clause forbids the use of pure racial or ethnic quotas in the admissions process of a public medical school.<sup>51</sup> Instead, race or ethnicity could be considered permissibly as a "plus" factor in the individualized review of a particular applicant's admissions file.<sup>52</sup>

Justice Powell explained his opposition to the use of different tiers of scrutiny for anti-majority and anti-minority classifications, when he stated,

By hitching the meaning of the Equal Protection Clause to these transitory considerations, we would be holding, as a constitutional principle, that judicial scrutiny of classifications touching on racial and ethnic background may vary with the ebb and flow of political forces. . . . [T]he mutability of a constitutional principle, based upon shifting political and social judgments, undermines the chances for consistent application of the Constitution from one generation to the next, a critical feature of its coherent interpretation.<sup>53</sup>

Powell's statement exemplifies the conventional view in his concern that different generations should have a common experience with the Constitution. He argued that the Court and its constitutional interpretations must not appear to be swayed by fluctuations of political power in the same way that the legislative and executive branches must be swayed because they are subject to popular elections.<sup>54</sup> His words give the impression that the Court should be above the unseemly workings of politics.<sup>55</sup> While it is unrealistic to assume that the Court is not influenced by political pressure and that its Justices do not advance ideological positions on certain issues, a prevalent theme of the conventional view is that the Court and the Constitution are separate from the political battles dividing Americans. The conven-

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striction the Constitution imposed upon democratic government, not to prescribe, on our own authority, progressively higher degrees."); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 298–300 (1978) ("In expounding the Constitution, the Court's role is to discern 'principles sufficiently absolute to give them roots throughout the community and continuity over significant periods of time, and to lift them above the level of the pragmatic political judgments of a particular time and place.'" (citing ARCHIBALD COX, *THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT* 114 (1976))).

<sup>50</sup> *Bakke*, 438 U.S. at 298–99.

<sup>51</sup> *Id.* at 307.

<sup>52</sup> *Id.* at 317–18.

<sup>53</sup> *Id.* at 298–99 (citations omitted).

<sup>54</sup> *See id.*

<sup>55</sup> *See id.*

tional view portrays the Constitution and its implementing principles as constant, unifying forces—anchors of stability and legitimacy.

Though Justice Powell grounds his reasoning in the conventional view, he implicitly accepts the central concept behind contemporary contextual analysis under the Equal Protection Clause. The use of contemporary contextual analysis means that changing factual conditions could lead to different constitutional results on the same issue even though no alteration to the controlling operative proposition or decisional rule occurred. Justice Powell did not reject the idea that under one set of facts a classification may comply with the Equal Protection Clause, while under a different set of facts that same law may be an unconstitutional denial of equal protection.

Instead, Justice Powell's *Bakke* opinion rejected the notion that, as a preliminary matter, the Court should engage in a case-specific, political-power analysis to determine the controlling decisional rule.<sup>56</sup> Powell viewed such a political-power analysis as an imprudent exercise—an attempt at simplifying and synthesizing a murky subject.<sup>57</sup> Powell indicated that the Court in its role as interpreter of the Constitution was not the proper institution for such a task: "Political judgments regarding the necessity for the particular classification may be weighed in the constitutional balance, but the standard of justification will remain constant. This is as it should be, since those political judgments are the product of rough compromise struck by contending groups within the democratic process."<sup>58</sup>

The conventional view that constitutional results should be permanent plays an important role in the American constitutional system. The conventional view helps to ensure respect for the rule of law and the legitimacy of the unelected federal judiciary. At first glance, the conventional view seems to undermine contemporary contextual analysis under the Equal Protection Clause, but this initial assessment is mistaken. The conventional view is focused predominantly on the consistent application of operative propositions and decisional rules, and contemporary contextual analysis does not interfere with that focus. To be effectuated, decisional rules must be applied to the facts of concrete cases.<sup>59</sup> When factual conditions change, analysis under even the most stable decisional rule can yield a new constitutional result. Therefore, the conventional view and

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<sup>56</sup> *Id.* at 299.

<sup>57</sup> *See id.*

<sup>58</sup> *Id.* (citations omitted).

<sup>59</sup> *See* Roosevelt, *supra* note 42, at 1658.

contemporary contextual analysis can and should coexist without perceived judicial impropriety.

## II. CONTEMPORARY CONTEXTUAL ANALYSIS UNDER THE EQUAL PROTECTION CLAUSE

### A. *An Overview*

Proper analysis under the Equal Protection Clause demands that a court assess classifications in light of changed factual conditions, no matter the level of scrutiny involved. As discussed above, the initial assumption that contemporary contextual analysis cannot be squared with the conventional view and its judicial legitimacy goals is mistaken. Not only can it be reconciled with the conventional view, but taking into account current conditions promotes the legitimacy of the courts and legislatures to an even greater extent. Contemporary contextual analysis limits governmental power. In its absence, classifications may become untethered from factual reality with the passage of time. The duty to enforce this connection to reality falls upon the courts. If the judiciary fails to maintain a system of constitutional laws by engaging in contemporary contextual analysis, its inaction may be viewed as illegitimate deference to misinformed reasoning or as simple incompetence. Moreover, judicial neglect in ensuring that the law is up to date may cause the legislature to be viewed as an overreaching institution because its outmoded statutes place unjustified burdens on the public.

To comprehend the importance of contemporary contextual analysis in equal protection law, a brief overview of how courts implement the Equal Protection Clause is necessary. The Equal Protection Clause of the Fourteenth Amendment states, “No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”<sup>60</sup> While the Fourteenth Amendment only applies to the states, this guarantee of equal protection has been made applicable to the federal government as a component of the Due Process Clause of the Fifth Amendment.<sup>61</sup> Therefore, this Comment’s references to contemporary contextual analysis under the Equal Protection Clause pertain to judicial review of classifications created by state and federal law.

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<sup>60</sup> U.S. CONST. amend. XIV, § 1.

<sup>61</sup> *Bolling v. Sharpe*, 347 U.S. 497, 498–99 (1954); *see* U.S. CONST. amend. V (“No person shall . . . be deprived of life, liberty, or property, without due process of law . . .”).

Proceeding under the decisional rules model, a common statement of the operative proposition of the Equal Protection Clause is that the government cannot subject similarly situated individuals to different treatment without adequate justification.<sup>62</sup> To implement that operative proposition the Supreme Court devised three decisional rules known as the levels of scrutiny: strict scrutiny, intermediate scrutiny, and rational basis review.<sup>63</sup> The most demanding review, strict scrutiny, requires that a classification be narrowly tailored to further a compelling governmental interest.<sup>64</sup> The middle level, intermediate scrutiny, requires that a classification be substantially related to an important governmental objective.<sup>65</sup> Finally, the lowest and least-probing level, rational basis review, requires only that a classification be rationally related to a legitimate governmental interest.<sup>66</sup>

The level of scrutiny governing a particular case depends on whether the classification involved implicates certain suspect classes or fundamental interests. Strict scrutiny is applied when the classification makes distinctions based on the suspect classes of race, ethnicity, national origin, and alienage.<sup>67</sup> Strict scrutiny also governs when the classification affects a fundamental interest, such as voting and court access.<sup>68</sup> Intermediate scrutiny is used when the classification makes distinctions based on the quasi-suspect classes of gender and illegitimacy.<sup>69</sup> If the classification does not implicate any suspect classes or fundamental interests, rational basis review will control.<sup>70</sup> Ra-

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62 Roosevelt, *supra* note 42, at 1657.

63 *Id.* at 1676–80.

64 Grutter v. Bollinger, 539 U.S. 306, 326 (2003).

65 Craig v. Boren, 429 U.S. 190, 197 (1976).

66 Nordlinger v. Hahn, 505 U.S. 1, 10 (1992).

67 Grutter, 539 U.S. at 326 (“[The Court] has held that all racial classifications imposed by government ‘must be analyzed by a reviewing court under strict scrutiny.’” (quoting Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995))); Nyquist v. Mauclet, 432 U.S. 1, 7 (1977) (“The Court has ruled that classifications by a State that are based on alienage are ‘inherently suspect and subject to close judicial scrutiny.’” (quoting Graham v. Richardson, 403 U.S. 365, 372 (1971))).

68 Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 630–33 (1969) (applying strict scrutiny to a classification that limited the privilege to vote); Douglas v. California, 372 U.S. 353, 357–58 (1963) (applying strict scrutiny to a classification that limited the availability of adequate appellate review).

69 Clark v. Jeter, 486 U.S. 456, 461 (1988) (applying intermediate scrutiny to a classification based on illegitimacy); Craig, 429 U.S. at 197 (“To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.”).

70 Nordlinger, 505 U.S. at 10 (“[T]his Court’s cases are clear that, unless a classification warrants some form of heightened review because it jeopardizes exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic, the Equal Protec-

tional basis review is the predominant level of scrutiny for economic and social legislation.<sup>71</sup> The Court applies rational basis review to a vast range of classifications, including classifications based on wealth, age, and disability.<sup>72</sup>

Despite the differences among these levels of scrutiny, they all share a common element—each level of scrutiny demands that a court examine the factual context of the classification. A court cannot determine whether a state interest is compelling, important, or legitimate without looking to the circumstances surrounding that interest. Furthermore, a court cannot determine whether a classification is narrowly tailored, substantially related, or rationally related without examining the facts that create the supposed relationship between the classification and the interest. When using strict or intermediate scrutiny, a court may also need to assess the facts demonstrating potential alternatives to the classification.

This connection between factual context and review under the Equal Protection Clause is significant because facts change over time. A classification that once satisfied the requirements of equal protection could later become unconstitutional merely because the factual conditions changed.<sup>73</sup> For example, under strict scrutiny, a previously approved classification could become unconstitutional because the compelling interest no longer exists<sup>74</sup> or because a new alternative to the classification destroyed its narrow tailoring.<sup>75</sup>

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tion Clause requires only that the classification rationally further a legitimate state interest.”).

71 *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985) (“The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest. When social or economic legislation is at issue, the Equal Protection Clause allows the States wide latitude, and the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes.” (citations omitted)).

72 *Id.* at 442 (applying rational basis review to a classification based on mental disability); *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 312–14 (1976) (applying rational basis review to a classification based on old age); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 22–25 (1973) (concluding that wealth is not a suspect class and applying rational basis review).

73 Developments in the way facts are perceived or discovering new information about old facts could also have an effect. *See generally* Angelo N. Ancheta, *Science and Constitutional Fact Finding in Equal Protection Analysis*, 69 OHIO ST. L.J. 1115 (2008) (discussing the history of scientific data in the factual analyses of the Supreme Court and arguing for expanded use).

74 Heightened national security risk in wartime is a fleeting compelling interest that dissipates with the threats of war. *See Korematsu v. United States*, 323 U.S. 214, 219–20 (1944) (“Citizenship has its responsibilities as well as its privileges, and in time of war the burden is always heavier. Compulsory exclusion of large groups of citizens from their homes, ex-

Yet, some courts have failed to recognize the significance of changed factual conditions in their equal protection analyses.<sup>76</sup> Instead, these courts look only to the facts that existed at the time of the classification's creation.<sup>77</sup> This problem arises commonly when courts are conducting the most deferent form of inquiry under the Equal Protection Clause—rational basis review.<sup>78</sup> No matter the level of scrutiny involved, analyzing a classification under the factual conditions of its creation, rather than the current factual conditions, is not supported by the Supreme Court's precedent and undermines the constitutional restraints placed on legislative power.<sup>79</sup>

Before exploring contemporary contextual analysis more fully, it must be distinguished from overruling prior constitutional results based on changed social values. A change in social values can occur without a corresponding change in the factual conditions surrounding a constitutional issue.<sup>80</sup> For example, in *Lawrence v. Texas*, the Court declared unconstitutional under the Due Process Clause of the Fourteenth Amendment a Texas statute that criminalized same-sex sodomy because it infringed on the liberty of consenting adults to engage in "the most private human conduct, sexual behavior, . . . in the most private of places, the home."<sup>81</sup> *Lawrence* explicitly overruled the Court's prior decision in *Bowers v. Hardwick*,<sup>82</sup> which had upheld a

cept under circumstances of direst emergency and peril, is inconsistent with our basic governmental institutions.").

75 While diversity in higher education might remain a compelling interest, the advent of race-neutral means for achieving that diversity would destroy the narrow tailoring of racial preferences in the college admissions process. See *Gutter v. Bollinger*, 539 U.S. 306, 341–43 (2003).

76 *Burlington N. R.R. v. Dep't of Pub. Serv. Regulation*, 763 F.2d 1106, 1111 (9th Cir. 1985) ("The Supreme Court has remained ambivalent on whether changed circumstances can transform a once-rational statute into an irrational law."); *Murillo v. Bambrick*, 681 F.2d 898, 912 n.27 (3d Cir. 1982) ("[T]he Supreme Court appears not to have determined definitively whether changed conditions are a relevant consideration in equal protection analysis."); *Lerner v. Corbett*, 972 F. Supp. 2d 676, 682 (M.D. Pa. 2013) ("As a general matter, it is unclear whether consideration of changed circumstances is appropriate to an equal protection inquiry."); *Jones v. Schneiderman*, 888 F. Supp. 2d 421, 425–27 (S.D.N.Y. 2012) ("The Second Circuit has not invalidated a statute as irrational based on changed circumstances.").

77 *Burlington*, 763 F.2d at 1111; *Murillo*, 681 F.2d at 911–12; *Lerner*, 972 F. Supp. 2d at 682; *Jones*, 888 F. Supp. 2d at 425–27.

78 *Burlington*, 763 F.2d at 1110–11; *Murillo*, 681 F.2d at 910–13; *Lerner*, 972 F. Supp. 2d at 682; *Jones*, 888 F. Supp. 2d at 425–27.

79 See *supra* Parts II.B–C.

80 See *Lawrence v. Texas*, 539 U.S. 558 (2003), overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986).

81 *Lawrence*, 539 U.S. at 567, 578.

82 *Bowers*, 478 U.S. at 186.

similar Georgia anti-sodomy statute.<sup>83</sup> In reaching its conclusion, the *Lawrence* Court relied on the “*emerging awareness* that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.”<sup>84</sup> The Court referenced a number of authorities from the United States and Europe to support its insistence that the values on which *Bowers* relied no longer provided an adequate justification to place a criminal constraint on this liberty.<sup>85</sup>

The *Lawrence* Court’s decision to overrule *Bowers* did not result from changed factual conditions; it was the product of changed social values. Between 1986 and 2003, consenting homosexual adults did not alter their sexual conduct, and the definition of sodomy remained constant. What did develop over those intervening years was a broader social acceptance of the homosexual community and more liberal attitudes toward sexuality in general.

That scenario falls outside of the realm of pure contemporary contextual analysis. Contemporary contextual analysis, as discussed here, is concerned solely with changes in the hard facts needed to prove the importance of a governmental interest and the relationship between that interest and the classification. The previously offered hypothetical involving a banned drug demonstrates that contemporary contextual analysis is most effective when focused on tangible facts, rather than public perceptions, which are intangible and often difficult to divine.<sup>86</sup> While there may exist some form of contemporary contextual analysis that considers changed social values, the empirical complexities of defining social values and the question of whether current social values even ought to influence constitutional interpretation places that issue well beyond the scope of this Comment.

#### *B. Contemporary Contextual Analysis in Strict Scrutiny: A Brief Study of Racial Classifications*

The Supreme Court has followed contemporary contextual analysis consistently when reviewing racial classifications under strict scru-

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<sup>83</sup> *Lawrence*, 539 U.S. at 578 (“*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled.”).

<sup>84</sup> *Id.* at 572 (emphasis added).

<sup>85</sup> *Id.* at 572–78 (“To the extent *Bowers* relied on values we share with a wider civilization, it should be noted that the reasoning and holding in *Bowers* have been rejected elsewhere.”).

<sup>86</sup> *See supra* Part I.

tiny. The Court's exacting review of racial classifications highlights two central features of contemporary contextual analysis: (1) the often transient nature of governmental interests and (2) the potential of new factual conditions to break down the relationship between classifications and governmental interests. First, the Court's analysis of the restrictions imposed on people of Japanese descent during World War II demonstrates an emergency governmental interest that dissipated once peace was achieved.<sup>87</sup> Second, the Court's expectation that racial preferences in higher education will reach a "logical end point" illustrates that changed factual conditions, such as the development of race-neutral alternatives, could deprive such preferences of their narrowly tailored relationship to the governmental interest of diversity.<sup>88</sup>

During World War II, the United States imposed many restrictions on the liberty of people of Japanese ancestry, including curfews, exclusion from their homes, and ultimately internment.<sup>89</sup> The power to install those restrictions derived from President Franklin Delano Roosevelt's Executive Order No. 9066, issued on February 19, 1942.<sup>90</sup> Executive Order No. 9066 authorized the Secretary of War and designated Military Commanders to prescribe "military areas" from which "any or all persons may be excluded, and with respect to which, the right of any person to enter, remain in, or leave shall be subject to whatever restrictions the Secretary of War or the appropriate Military Commander may impose in his discretion."<sup>91</sup> Roosevelt granted the military those sweeping powers to provide "every possible protection against espionage and against sabotage to national-defense material, national-defense premises, and national-defense utilities."<sup>92</sup>

On February 20, 1942, the Secretary of War designated Lt. General John L. DeWitt as Military Commander of the Western Defense Command.<sup>93</sup> In March 1942, through a series of public proclama-

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87 *Korematsu v. United States*, 323 U.S. 214, 218–20 (1944); *Hirabayashi v. United States*, 320 U.S. 81, 100–01 (1943).

88 *Grutter v. Bollinger*, 539 U.S. 306, 341–43 (2003).

89 *Korematsu*, 323 U.S. at 218–19; *Hirabayashi*, 320 U.S. at 89–90. See generally Dean Masaru Hashimoto, *The Legacy of Korematsu v. United States: A Dangerous Narrative Retold*, 4 ASIAN PAC. AM. L.J. 72 (1996) (discussing the legal burdens imposed on Japanese people in the United States during World War II and the ongoing legacy of the Court's decisions regarding those burdens).

90 Hashimoto, *supra* note 89, at 74–75.

91 Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942).

92 *Id.*

93 *Hirabayashi*, 320 U.S. at 86.

tions, DeWitt established a military area for the Pacific Coast region that encompassed the entire states of Arizona, California, Oregon, and Washington.<sup>94</sup> On March 21, 1942, Congress ratified Executive Order No. 9066, and subsequent military proclamations, by passing legislation that criminalized violations of the military orders.<sup>95</sup> Under its expanded authority, the military curtailed the liberty of Japanese people living within the military areas, and in the end, it relocated approximately 120,000 people, including 70,000 American citizens, to internment camps.<sup>96</sup>

The military's actions precipitated several challenges for the Court, perhaps the most well known of which were *Hirabayashi v. United States*<sup>97</sup> and *Korematsu v. United States*.<sup>98</sup> As a preliminary matter, three common misconceptions about those cases must be dispelled. First, neither case considered directly the constitutionality of the now infamous internment program. *Hirabayashi* involved a challenge to a curfew imposed on Japanese people in the military areas,<sup>99</sup> while *Korematsu* concerned the constitutionality of an order excluding that same group from their homes.<sup>100</sup>

Second, though it is often said that strict scrutiny under the Equal Protection Clause originated in *Hirabayashi* and *Korematsu*,<sup>101</sup> neither case contained an equal protection challenge.<sup>102</sup> In *Hirabayashi* and *Korematsu*, the Court decided only that the curfew and exclusion order did not constitute impermissible delegations of legislative power, exceed Congress's war powers, or deny due process under the Fifth Amendment.<sup>103</sup> The Court did not even impose the requirements of equal protection on the federal government until a decade after it decided *Hirabayashi* and *Korematsu*.<sup>104</sup>

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94 *Id.* at 87.

95 Act of March 21, 1942, Pub. L. No. 77-503, 56 Stat. 173 (1942); Hashimoto, *supra* note 89, at 75.

96 Hashimoto, *supra* note 89, at 75.

97 320 U.S. at 81.

98 323 U.S. 214 (1944).

99 *Hirabayashi*, 320 U.S. at 83.

100 *Korematsu*, 323 U.S. at 221–23.

101 The most notable examples of the Court citing *Korematsu* to support its application of strict scrutiny are *Loving v. Virginia*, 388 U.S. 1, 11 (1967), and *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 236 (1995). See Hashimoto, *supra* note 89, at 87–89 & n.124 (discussing the frequent use of *Korematsu* to support the application of strict scrutiny to racial classifications).

102 Hashimoto, *supra* note 89, at 88–89.

103 *Korematsu*, 323 U.S. at 217–18; *Hirabayashi*, 320 U.S. at 83, 91–93, 100.

104 *Bolling v. Sharpe*, 347 U.S. 497, 499–500 (1954); Hashimoto, *supra* note 89, at 88.

Third, regardless of the Court's language, it did not subject the racial classifications in *Hirabayashi* and *Korematsu* to "the most rigid scrutiny."<sup>105</sup> Instead, the Court applied rational basis review.<sup>106</sup> The Court showed extreme deference to the government's articulated interest and raised no concerns about narrow tailoring.<sup>107</sup>

Notwithstanding the deep and recognized flaws of *Hirabayashi* and *Korematsu*, those cases illustrate an important feature of contemporary contextual analysis under the Equal Protection Clause—the transient nature of governmental interests. Though the Court in *Hirabayashi* and *Korematsu* only considered the discriminatory nature of the military's orders under the Fifth Amendment's Due Process Clause, that analysis, while certainly more deferent, is similar to modern equal protection analysis and offers useful insights about the effect of extreme emergencies on the permissibility of racial classifications.<sup>108</sup>

In *Hirabayashi*, the Court assessed the constitutionality of a curfew that required "all persons of Japanese ancestry residing in [a military] area be within their place of residence daily between the hours of 8:00 p.m. and 6:00 a.m."<sup>109</sup> The Court began its description of the government's interest by discussing the Japanese attack on Pearl Harbor.<sup>110</sup> The Court observed that the extensive damage to the largest American naval base in the Pacific, and the nation's last line of defense, placed the West Coast in serious danger of air raids and invasion by Japanese forces.<sup>111</sup> The prevention of espionage and sabotage in the threatened area aided the government's efforts to defend against any potential Japanese offensive.<sup>112</sup>

The *Hirabayashi* petitioner, who had been convicted of violating the curfew, did not contest the severity of the wartime threat or appropriateness of a curfew in thwarting espionage and sabotage, activi-

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105 *Korematsu*, 323 U.S. at 216, 218; *Hirabayashi*, 320 U.S. at 102; Hashimoto, *supra* note 89, at 88; Stephen A. Siegel, *The Origin of the Compelling State Interest Test and Strict Scrutiny*, 48 AM. J. LEGAL HIST. 355, 381–82 (2006).

106 *Korematsu*, 323 U.S. at 218 ("Here, as in the *Hirabayashi* case, 'we cannot reject as unfounded the judgment of the military authorities and of Congress . . .'" (emphasis added) (citation omitted)); *Hirabayashi*, 320 U.S. at 102 ("In this case it is enough that circumstances within the knowledge of those charged with the responsibility for maintaining the national defense afforded a *rational basis* for the decision which they made." (emphasis added)); Hashimoto, *supra* note 89, at 88; Siegel, *supra* note 105, at 382.

107 Hashimoto, *supra* note 89, at 88; Siegel, *supra* note 105, at 382.

108 See *Korematsu*, 323 U.S. at 218–20; *Hirabayashi*, 320 U.S. at 100.

109 *Hirabayashi*, 320 U.S. at 83.

110 *Id.* at 93–94.

111 *Id.* at 94.

112 *Id.* at 94–95.

ties most often conducted in “the hours of darkness.”<sup>113</sup> Rather, the petitioner contended that the application of the curfew to all people of Japanese descent constituted a denial of due process.<sup>114</sup>

The Court prefaced its analysis of that racial classification by stating, “Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. For that reason, legislative classification or discrimination based on race alone has often been held to be a denial of equal protection.”<sup>115</sup> But considerations of equality did not prevail in the Court’s final conclusion.<sup>116</sup> The Court noted that the vast majority of Japanese people living in the United States resided within the military area on the Pacific Coast.<sup>117</sup> Furthermore, the Court refused to “reject as unfounded the judgment . . . that there were disloyal members of that population, whose number and strength could not be precisely and quickly ascertained.”<sup>118</sup> The Court then invoked the special circumstances of war to support the government’s use of a racial distinction: “[T]he danger of espionage and sabotage, in time of war and of threatened invasion, calls upon the military authorities to scrutinize every relevant fact bearing on the loyalty of populations in the danger areas.”<sup>119</sup> In holding that the curfew’s application to all people of Japanese ancestry did not deny due process, the Court reasoned that “[t]he fact alone that attack on our shores was threatened by Japan rather than another enemy power set these citizens apart from others who have no particular associations with Japan.”<sup>120</sup>

In *Korematsu*, the Court returned to its reasoning in the *Hirabayashi* decision but placed greater emphasis on the wartime emergency.<sup>121</sup> The *Korematsu* petitioner argued that a military order, which excluded all people of Japanese ancestry from their homes in the West Coast military area, resulted in an unconstitutional denial of due process.<sup>122</sup> Again, the Court began its discussion by explaining the general presumption against racial classifications:

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113 *Id.* at 99.

114 *Id.* at 100.

115 *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943).

116 *Id.* at 100–01.

117 *Id.* at 96.

118 *Id.* at 99.

119 *Id.* at 100.

120 *Id.* at 101.

121 *Korematsu v. United States*, 323 U.S. 214, 218–20 (1944).

122 *Id.* at 215–16.

It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.<sup>123</sup>

Nevertheless, the Court found that, even under “the most rigid scrutiny,” the difficulties of war permitted the exclusion order.<sup>124</sup>

The Court explained that the reason for the temporary exclusion of Japanese people rested on the same ground as the curfew—the prevention of espionage and sabotage in vulnerable areas.<sup>125</sup> It then stated that investigations made subsequent to exclusion confirmed the disloyalty of certain members of the Japanese population.<sup>126</sup> In concluding that the exclusion order complied with the demands of due process, the Court highlighted the government’s vital interest in the successful prosecution of war and the intense, yet temporary, burdens citizens must bear:

[H]ardships are part of war, and war is an aggregation of hardships. All citizens alike, both in and out of uniform, feel the impact of war in greater or lesser measure. Citizenship has its responsibilities as well as its privileges, and in time of war the burden is always heavier. Compulsory exclusion of large groups of citizens from their homes, except under circumstances of direst emergency and peril, is inconsistent with our basic governmental institutions. But when under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger.<sup>127</sup>

For the purposes of contemporary contextual analysis, *Hirabayashi* and *Korematsu* demonstrate the fleeting nature of governmental interests. In its opinions, the Court placed great emphasis on the serious danger presented by World War II and the government’s need to take swift action in securing the national defense.<sup>128</sup> Given that emphasis on the government’s wartime interest, it is highly doubtful that the Court would have permitted similar racial classifications in a time of peace or the continuation of such classifications long after the

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<sup>123</sup> *Id.* at 216.

<sup>124</sup> *Id.* at 216, 218–20.

<sup>125</sup> *Id.* at 217–19.

<sup>126</sup> *Id.* at 219. To support its claims about the disloyal elements of the Japanese population, the Court referenced reports that approximately five thousand American citizens of Japanese ancestry refused to swear unqualified allegiance to the United States and that several thousand evacuees requested repatriation to Japan. *Id.* This evidence failed to account for resentment toward the United States engendered by the exclusion order and internment. Hashimoto, *supra* note 89, at 81.

<sup>127</sup> *Korematsu*, 323 U.S. at 219–20.

<sup>128</sup> *Id.* at 218–20; *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943).

war's end. Governmental interests, like a successful war effort, that are both extreme and transient illustrate how contemporary contextual analysis may produce different constitutional results without manipulating the applicable decisional rule. When a racial classification is created in response to a particular emergency and that emergency ceases, the constitutionality of the classification must cease as well. Here, contemporary contextual analysis is acting as a restraint on government power. If a court looked only to the facts that existed when the government established an emergency racial classification, the constitutionality of that classification could persist indefinitely. As the supporting emergency dissipates, such an unchecked classification will transform from a necessity to invidious discrimination.

Recognizing that a governmental interest may break down over time addresses only the first half of strict scrutiny and equal protection analysis more generally. To understand fully the importance of contemporary contextual analysis, the logical relationship between the classification and the interest it is supposed to further must be examined. Under strict scrutiny, this logical relationship is ensured through narrow tailoring.<sup>129</sup> Similar to a transient governmental interest, changed factual conditions can also cause the narrow tailoring of a classification to be lost.

*Grutter v. Bollinger* provides a prominent example of the Court's endorsement of contemporary contextual analysis in assessing whether a racial classification is narrowly tailored.<sup>130</sup> In *Grutter*, the Court concluded that the race-conscious admissions process of the University of Michigan Law School, a public institution, complied with the requirements of the Equal Protection Clause.<sup>131</sup> At the start of its strict scrutiny analysis, the Court found that the law school possessed a compelling interest in attaining a diverse student body.<sup>132</sup> The Court explained that diversity in higher education promotes racial understanding, improves learning outcomes, prepares students for the modern workplace, and opens the paths of leadership to a wider range of people.<sup>133</sup> Next, the Court determined that the law school's use of race as a single factor in an individualized, holistic review of each applicant was narrowly tailored to further the compelling interest of diversity.<sup>134</sup> This narrow tailoring rested largely on the law

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129 *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003).

130 *Id.* at 341–43.

131 *Id.* at 343.

132 *Id.* at 329.

133 *Id.* at 329–33.

134 *Id.* at 337.

school's "serious, good faith consideration" of potential race-neutral alternatives and the finding that those alternatives were unworkable.<sup>135</sup>

Having decided that the law school's admissions process passed strict scrutiny, Justice Sandra Day O'Connor closed the Court's opinion by stating that such racial preferences "must be limited in time."<sup>136</sup> Justice O'Connor explained that race-conscious admissions processes are not exempt from "the requirement that all governmental use of race must have a logical end point."<sup>137</sup> That "logical end point" will be found through "periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity."<sup>138</sup> The development of effective race-neutral alternatives or continuing increases in the number of minority applicants attaining higher grades and test scores might undermine the racial classification's narrow tailoring.<sup>139</sup> She then finished with what is now known as the sunset provision for affirmative action in higher education: "We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."<sup>140</sup>

The *Grutter* Court's discussion of a "logical end point" for racial classifications and the sunset provision are explicit endorsements of contemporary contextual analysis under the Equal Protection Clause.<sup>141</sup> The expectation that racial preferences will not be needed by 2028 should not be construed as a strict time limit on the use of affirmative action.<sup>142</sup> Instead, it is better characterized as a statement of the Court's intention to continually reassess the factual conditions on which *Grutter's* narrow-tailoring inquiry relied. Subsequent changes to the factual conditions could undermine the narrow tailoring of race-conscious admissions in a number of ways. For example, improved grades and test scores among minority applications could enable schools to achieve diversity without offering racial prefer-

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135 *Id.* at 339–40.

136 *Id.* at 342.

137 *Id.*

138 *Id.*

139 *Id.* at 342–43.

140 *Id.* at 343.

141 *Id.* at 342–43.

142 Joel K. Goldstein, *Justice O'Connor's Twenty-Five Year Expectation: The Legitimacy of Durational Limits in Grutter*, 67 OHIO ST. L.J. 83, 104 (2006) ("Grutter reflected an expectation that race-conscious admissions will be unnecessary by 2028 rather than a holding or a mere hope to that effect."). *But see Grutter*, 539 U.S. at 370 (Scalia, J., concurring in part and dissenting in part) ("The Court will not even deign to make the Law School try other methods, however, preferring instead to grant a 25-year license to violate the Constitution.").

ences, or a workable race-neutral alternative could be developed. Those potential changes may lead the Court to conclude that race-conscious admissions no longer pass constitutional muster. Here, *Grutter* demonstrates the significance of contemporary contextual analysis when testing the relationship between a racial classification and the interest it is meant to further. While diversity in higher education will likely remain a compelling interest, racial preferences may someday be an overly burdensome method for promoting that interest.

The foregoing cases demonstrate the Court's consistent use of contemporary contextual analysis under strict scrutiny. Through that analysis, the Court examines both the facts supporting governmental interests and the facts establishing a relationship between classifications and interests. While strict scrutiny provides extreme examples, it is not unique among the levels of scrutiny in containing a contextual component. Each level of scrutiny requires an assessment of the factual context at the time of the constitutional challenge. The lessons learned from the application of strict scrutiny must be carried through to the more deferent forms of review.

### *C. Contemporary Contextual Analysis in Rational Basis Review*

The acceptance of contemporary contextual analysis in strict scrutiny should be explicitly extended to rational basis review under the Equal Protection Clause. Rational basis review, which requires that a classification be rationally related to a legitimate governmental interest, contains the same contextual component as strict scrutiny. To determine whether a governmental interest is legitimate or whether a classification bears a rational relationship to a particular interest, a court must examine the factual conditions at the time of the constitutional challenge. The Supreme Court's due process jurisprudence indicates that rational basis review demands this assessment of the current facts. Moreover, contemporary contextual analysis in rational basis review restrains government power and legitimizes the actions of courts and legislatures.

While the logical structures of strict scrutiny and rational basis review share a contextual component, these levels of scrutiny diverge in their assessments of legislative purpose. A compelling interest under strict scrutiny requires that the asserted interest have been the legislature's actual purpose for the classification.<sup>143</sup> That actual purpose

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<sup>143</sup> *Shaw v. Hunt*, 517 U.S. 899, 908 n.4 (1996).

must also be supported by strong evidence.<sup>144</sup> In contrast, a legitimate interest under rational basis review requires only that the asserted interest be a conceivable purpose for the classification.<sup>145</sup> The legislative record need not evidence any consideration of the conceivable purpose; whether that conceivable purpose actually motivated the legislature is irrelevant.<sup>146</sup> That divergence creates a slight difference between applying contemporary contextual analysis in strict scrutiny and applying such analysis in rational basis review.

The focus on actual purpose in strict scrutiny causes contemporary contextual analysis to act as a greater restriction on legislative power. Once changed factual conditions eliminate a classification's compelling interest, no new compelling interest, which arose after the changed facts, can be substituted to support the classification. That substitute compelling interest could not have been the actual purpose for the classification because a legislature cannot consider factual conditions of which it is not yet aware. A court reviewing a classification supported only by a newly substituted compelling interest would be forced to strike down that classification under strict scrutiny. This result comports with the purposes of strict scrutiny. Strict scrutiny is invoked to review classifications implicating suspect classes and fundamental interests—subject matters that present the greatest potential for invidious discrimination.<sup>147</sup> A legislature should not be able to justify such dubious classifications with compelling interests that it never contemplated.

While the interplay between actual purpose and contemporary contextual analysis means that new compelling interests cannot emerge after a classification's creation, it does not prevent a legislature from establishing a classification based on multiple compelling interests, each supported by the requisite actual purpose. If changed factual conditions undermine one or more of a classification's compelling interests, the classification can still survive strict scrutiny provided that at least one of its compelling interests remains valid under the new facts and that compelling interest was an actual purpose of the legislature when it created the classification.

The restrictiveness of requiring actual purpose in strict scrutiny offers a stark contrast to the flexibility granted by the combination of conceivable purpose and contemporary contextual analysis in rational basis review. Though contemporary contextual analysis in rational

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<sup>144</sup> *Id.*

<sup>145</sup> *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313–14 (1993).

<sup>146</sup> *Id.* at 315.

<sup>147</sup> *See supra* notes 67–68 and accompanying text.

basis review allows for the uncommon situation in which changed factual conditions eliminate a legitimate interest, contemporary contextual analysis also permits substitute legitimate interests to arise from those changed facts. In rational basis review, a legislature can take advantage of substitute legitimate interests because a conceivable purpose does not require that the legislature have actually considered the interest in establishing the classification. This relaxed stance on substitute legitimate interests is consistent with the flexible and deferent nature of rational basis review. Rational basis review applies to all classifications that do not implicate suspect or quasi-suspect classes and fundamental interests, and such classifications are unlikely to be devised for invidious discrimination.<sup>148</sup>

Therefore, in both strict scrutiny and rational basis review, contemporary contextual analysis, when coupled with the corresponding model of legislative purpose, accentuates the underlying nature of each level of scrutiny. First, strict scrutiny becomes more restrictive because a legislature cannot justify its classifications with substitute compelling interests that it could not have considered. Second, rational basis review becomes more flexible because a legislature can take advantage of substitute legitimate interests that arise under changed factual conditions.

Having examined some aspects of how contemporary contextual analysis operates in rational basis review under the Equal Protection Clause, it is vital to evaluate the precedential and theoretical support for using contemporary contextual analysis at the lowest level of scrutiny. The Supreme Court's jurisprudence is filled with a long history of contemporary contextual analysis in rational basis review under the Due Process Clauses of the Fifth and Fourteenth Amendments. Some of the Court's most revered jurists recognized that once-rational laws could be rendered irrational under new and unforeseen facts. In 1924, Justice Oliver Wendell Holmes, Jr., endorsed contemporary contextual analysis by acknowledging that legislative predictions of future facts are sometimes flawed:

But even as to [declarations of the legislature,] a Court is not at liberty to shut its eyes to an obvious mistake, when the validity of the law depends upon the truth of what is declared. And still more obviously so far as this declaration looks to the future it can be no more than prophecy and is liable to be controlled by events. A law depending upon the existence of an emergency or other certain state of facts to uphold it may cease to op-

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<sup>148</sup> See *supra* notes 70–72 and accompanying text.

erate if the emergency ceases or the facts change even though valid when passed.<sup>149</sup>

Then, in 1931, Chief Justice Charles Evans Hughes followed the same reasoning, when he explained, “a police regulation, although valid when made, may become, by reason of later events, arbitrary and confiscatory in operation.”<sup>150</sup> In 1935, Justice Louis D. Brandeis also supported contemporary contextual analysis: “A statute valid as to one set of facts may be invalid as to another. A statute valid when enacted may become invalid by change in the conditions to which it is applied.”<sup>151</sup>

Though contemporary contextual analysis in rational basis review holds a prominent position in the Court’s case law, some misleading authority does exist in the equal protection field. In 1911, the Court’s opinion in *Lindsley v. Natural Carbonic Gas Co.* directed the focus of rational basis review towards the facts at the time of a classification’s creation.<sup>152</sup> The Court stated, “When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed.”<sup>153</sup> Rather than disputing the propriety contemporary contextual analysis, this language is more concerned with expressing the higher degree of deference required by rational basis review. There is no indication that the *Lindsley* Court had reason to consider changed factual conditions.

Even so, *United States v. Carolene Products Co.*<sup>154</sup> and *Minnesota v. Clover Leaf Creamery Co.*<sup>155</sup> have created the most confusion in the lower courts about whether contemporary contextual analysis should be applied in rational basis review.<sup>156</sup> *Carolene Products* provides a strong statement in favor of examining the current factual conditions in rational basis review.<sup>157</sup> The Court explained that “the constitutionality

149 *Chastleton Corp. v. Sinclair*, 264 U.S. 543, 547–48 (1924) (citations omitted).

150 *Abie State Bank v. Weaver*, 282 U.S. 765, 772 (1931); see *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 442 (1934) (Hughes, C.J.) (“It is always open to judicial inquiry whether the exigency still exists upon which the continued operation of the law depends.”).

151 *Nashville, C. & St. L. Ry. v. Walters*, 294 U.S. 405, 415 (1935) (footnote omitted).

152 *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911).

153 *Id.*

154 304 U.S. 104 (1938).

155 449 U.S. 456 (1981).

156 *Burlington N. R.R. v. Dep’t Pub. Serv. Regulation*, 763 F.2d 1106, 1111 (9th Cir. 1985); *Murillo v. Bambrick*, 681 F.2d 898, 912 n.27 (3d Cir. 1982); *Lerner v. Corbett*, 972 F. Supp. 2d 676, 682 (M.D. Pa. 2013); *Jones v. Schneiderman*, 888 F. Supp. 2d 421, 425–26 (S.D.N.Y. 2012).

157 *Carolene Prods.*, 304 U.S. at 153.

of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist.”<sup>158</sup> But *Carolene Products* also contains a more general discussion of the deference afforded to the legislature in rational basis review, unrelated to the specific point on contemporary contextual analysis:

But by their very nature such inquiries, where the legislative judgment is drawn in question, must be restricted to the issue whether any state of facts either known or which could be assumed affords support for it. Here the demurrer challenges the validity of the statute on its face and it is evident from all the considerations presented to Congress, and those of which we may take judicial notice, that the question is *at least debatable*<sup>159</sup>  
.....

Subsequent references to this “at least debatable” language have created uncertainty about whether contemporary contextual analysis operates in rational basis review.<sup>160</sup>

In *Clover Leaf Creamery*, the Court quoted the deferential language of *Carolene Products* and made it appear as though courts should always look back to the time of the classification’s creation.<sup>161</sup> The Court stated,

Although parties challenging legislation under the Equal Protection Clause may introduce evidence supporting their claim that it is irrational, they cannot prevail so long as “it is evident from all the considerations presented to [the legislature], and those of which we may take judicial notice, that the question is at least debatable.” Where there was evidence before the legislature reasonably supporting the classification, litigants may not procure invalidation of the legislation merely by tendering evidence in court that the legislature was mistaken.<sup>162</sup>

But resolving questionable issues at the time of passage in favor of the legislature’s determination is distinct from considering changed factual conditions that occur subsequent to passage. The Court emphasized that the legislature held evidence “reasonably supporting the classification,” and the case did not present the issue of whether new facts showed that the initial evidence was now irrelevant.<sup>163</sup>

With this intense focus on judicial deference to legislative decisions, it is not surprising that lower federal courts have identified the use of contemporary contextual analysis in rational basis review as an

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158 *Id.*

159 *Id.* at 154 (emphasis added).

160 *See Clover Leaf Creamery*, 449 U.S. at 464 (quoting *Carolene Prods.*, 304 U.S. at 153–54) (citations omitted).

161 *Id.*

162 *Id.* (quoting *Carolene Prods.*, 304 U.S. at 153–54) (citations omitted).

163 *Id.*

unresolved issue.<sup>164</sup> The Third Circuit and Ninth Circuit raised the question explicitly.<sup>165</sup> Those courts argued that contemporary contextual analysis overburdens legislative bodies and is beyond the institutional competence of the judiciary.<sup>166</sup>

In *Murillo v. Bambrick*, the plaintiffs brought a class action alleging that a New Jersey statute and court rule that assessed higher fees in matrimonial actions than in other civil actions violated the Equal Protection Clause.<sup>167</sup> According to the challenged provisions, matrimonial actions, even if uncontested, could not be listed for trial until the plaintiff paid an additional fifty-dollar fee.<sup>168</sup> If the matrimonial action was contested, the provision required the plaintiff to submit another ten-dollar payment to cover the cost of stenographic services.<sup>169</sup>

These fees originated as a mechanism to finance the use of special masters in resolving matrimonial actions prior to the adoption of no-fault divorce.<sup>170</sup> In 1948, the New Jersey legislature abolished the use of special masters in such proceedings, but collection of the fees persisted because the duties of the former special masters then needed to be performed by trial judges.<sup>171</sup> However, in 1971, the legislature

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164 *Burlington N. R.R. v. Dep't of Pub. Serv. Regulation*, 763 F.2d 1106, 1111 (9th Cir. 1985) (“The Supreme Court has been ambivalent on whether changed circumstances can transform a once-rational statute into an irrational law.”); *Murillo v. Bambrick*, 681 F.2d 898, 912 n.27 (3d Cir. 1982) (“[T]he Supreme Court appears not to have determined definitively whether changed conditions are a relevant consideration in equal protection analysis.”); *Lerner v. Corbett*, 972 F. Supp. 2d 676, 682 (M.D. Pa. 2013) (“As a general manner, it is unclear whether consideration of changed circumstances is appropriate to an equal protection inquiry.”); *Jones v. Schneiderman*, 888 F. Supp. 2d 421, 425–26 (S.D.N.Y. 2012) (“[T]he Second Circuit has not expressly embraced the view that changed circumstances may be considered as part of a rational basis review.”).

Several state supreme courts have explicitly recognized contemporary contextual analysis when conducting rational basis review under the equal protection clauses of their respective state constitutions. *See, e.g.*, *Estate of McCall v. United States*, 134 So. 3d 894, 913 (Fla. 2014) (“Conditions can change, which remove or negate the justification for a law, transforming what may have once been reasonable into arbitrary and irrational legislation.”); *Ferdon ex rel. Pertucelli v. Wis. Patients Comp. Fund*, 701 N.W.2d 440, 468 (Wis. 2005) (“A statute may be constitutionally valid when enacted but may become constitutionally invalid because of changes in the conditions to which the statute applies. A past crisis does not forever render a law valid.” (footnotes omitted)). This Comment does engage in an in-depth discussion of the foregoing state court authority because those decisions did not implicate the Equal Protection Clause of the U.S. Constitution. Additionally, while those state courts did accept contemporary contextual analysis, they did not engage in a more elaborate discussion of its benefits.

165 *Burlington*, 763 F.2d at 1111; *Murillo*, 681 F.2d at 912.

166 *Murillo*, 681 F.2d at 911–12; *see Burlington*, 763 F.2d at 1111.

167 *Murillo*, 681 F.2d at 900.

168 *Id.*

169 *Id.*

170 *Id.* at 906–07.

171 *Id.* at 907.

established the no-fault divorce, eliminating the requirement that a plaintiff prove a marital wrong.<sup>172</sup> Despite the no-fault reforms, the legislature made no corresponding change to the additional fees levied on matrimonial actions.<sup>173</sup>

The *Murillo* plaintiffs argued that the collection of the special fees for matrimonial actions lost its rational relationship to a legitimate governmental interest after the adoption of no-fault divorce.<sup>174</sup> They asserted that, following this reform, the legislature could not rationally believe that divorce proceedings would continue to exert a greater burden on the judicial system than other civil actions.<sup>175</sup>

The Third Circuit disagreed with this argument and held that the special fees passed rational basis review even after the establishment of no-fault divorce.<sup>176</sup> The court identified two potential rational bases relating the fees to the state's legitimate interest in maintaining its judiciary.<sup>177</sup> First, the legislature could rationally believe that divorce-related litigation would continue to impose an additional financial burden on the courts.<sup>178</sup> Second, the legislature could rationally believe that the increasing costs of civil litigation as a whole justified the recovery of additional funds and that matrimonial actions offered an appropriate starting point because litigants already expected to pay special fees.<sup>179</sup> The court concluded that, under rational basis review, the legislature held no duty to support its beliefs with empirical evidence.<sup>180</sup>

The Third Circuit's conclusions concerning the rationality of the special fees present no threat to contemporary contextual analysis. In fact, those conclusions fit quite comfortably within the deferent nature of rational basis review.

However, the court continued its discussion and questioned whether it was appropriate to consider changed factual conditions. The Third Circuit noted, "[T]he Supreme Court appears not to have determined definitively whether changed conditions are a relevant consideration in equal protection analysis."<sup>181</sup> The court further stat-

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172 *Id.*

173 *Id.*

174 *Id.* at 907–08.

175 *Id.*

176 *Id.* at 908.

177 *Id.*

178 *Id.*

179 *Id.*

180 *Id.* at 909–10.

181 *Id.* at 912 n.27 (identifying the conflicting statements in *Clover Leaf Creamery* and *Carolene Products*).

ed that considering changed conditions “impose[s] an unwarranted obligation upon legislative bodies: the obligation constantly to reassess the continuing validity of the factual premises underlying each piece of legislation enacted over the years.”<sup>182</sup> The court explained that the Constitution “neither demands nor expects” legislatures to exercise “omniscient oversight” once its laws take effect.<sup>183</sup> Finally, the court reasoned that it should only strike down a rationally enacted classification “when a statute, rendered manifestly unreasonable by changed conditions, remains in effect for many years without legislative action.”<sup>184</sup>

In *Burlington Northern Railroad v. Department of Public Service Regulation*, the Ninth Circuit confronted the issue of changed factual conditions and responded with the same concerns as the *Murillo* court.<sup>185</sup> There, the plaintiff, a railroad company, challenged a Montana statute and regulation that required railroads to maintain and staff station facilities in towns with a population of at least 1000 people.<sup>186</sup> Moreover, Montana law did not impose similar demands on other common carriers.<sup>187</sup> The plaintiff argued that changed conditions rendered this requirement irrational under the Equal Protection Clause.<sup>188</sup> In the sixteen years since the statute’s 1969 enactment, centralized, computerized service centers took over many of the duties performed by station agents.<sup>189</sup> Also, freight traffic from the small stations declined significantly in that same time period.<sup>190</sup>

The Ninth Circuit first identified the legislature’s legitimate governmental interest as serving “the public convenience and necessity.”<sup>191</sup> The court then concluded that the legislature could rationally believe that railroads are a special class of common carrier, providing a vital form of transportation, and that requiring station facilities in small communities would ensure a minimal level of service for the state’s citizens.<sup>192</sup> Even considering the plaintiff’s evidence that the railroad industry had undergone substantial changes, the court found

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182 *Id.* at 911.

183 *Id.*

184 *Id.* at 912.

185 *Burlington N. R.R. v. Dep’t of Pub. Serv. Regulation*, 763 F.2d 1106, 1111 (9th Cir. 1985).

186 *Id.* at 1108–09.

187 *Id.* at 1113.

188 *Id.* at 1111, 1113–14.

189 *Id.* at 1109.

190 *Id.*

191 *Id.* at 1109–10.

192 *Id.* at 1110, 1113–14.

that those changes were not so drastic as to transform the legislature's assumptions from rational to irrational.<sup>193</sup>

Similar to the Third Circuit's reasoning in *Murillo*, the Ninth Circuit's basic conclusions under rational basis review do not conflict with contemporary contextual analysis. The Ninth Circuit did consider the plaintiff's evidence of changed factual conditions, but that evidence failed to demonstrate that requiring station facilities in small towns had become irrational.<sup>194</sup>

Even so, the Ninth Circuit voiced its concerns about assessing classifications based on changed conditions. The court stated, "The Supreme Court has been ambivalent on whether changed circumstances can transform a once-rational statute into an irrational law."<sup>195</sup> The court then explained that the time of the classification's creation is the proper point of reference in rational basis review:

In construing statutory language, a court must ordinarily consider the circumstances at the time of passage, rather than later interpretations or statements of purpose. Where courts have invalidated archaic statutes, there is often an independent constitutional basis for doing so (i.e., a belated recognition that the statutes were unconstitutional as written).<sup>196</sup>

The *Murillo* and *Burlington* courts' dismissals of contemporary contextual analysis rely on common arguments about the institutional competence of the legislature and judiciary, but such dismissals are unwarranted. The argument that contemporary contextual analysis will place an extreme burden on legislative bodies assumes that the duty to maintain a system of constitutional laws—laws not based on outmoded factual premises—falls almost entirely to legislatures. Of course, people who believe that a particular law has become irrational should complain to their legislative representatives. Because those representatives are politically accountable, the legislature may respond to the people's concerns. But attempting to update the law through the legislative process is a complex and time-consuming endeavor.<sup>197</sup> Even if claims that a law has become irrational are meritorious, the legislature may view the problem as too insignificant to justify taking corrective action.<sup>198</sup> Business that the legislature considers more important may also stifle such a remedy.<sup>199</sup>

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193 *Id.* at 1111.

194 *Id.*

195 *Id.*

196 *Id.* at 1111 n.3 (citations omitted).

197 *See Bice, supra* note 48, at 35–36.

198 *Id.* at 36.

199 *Id.*

In light of the legislature's limited responsiveness, courts provide the best forum to evaluate the continuing rationality of laws. First, people may not realize that a particular classification applies to them until an enforcement action is brought before a court, precluding their ability to lobby the legislature for a change.<sup>200</sup> Second, courts are skilled empirical fact-finders. The judiciary's broad discovery tools allow it to gain access to a vast amount of relevant information,<sup>201</sup> and the adversarial process ensures the zealous presentation of arguments on each side.

If courts refuse to consider changed factual conditions, analyzing the rationality of classifications only at the time of creation, they will rarely find that classifications are based on implausible assumptions unless the legislature made a "clear mistake."<sup>202</sup> This focus on the point of creation turns the already deferent rational basis review into a toothless inquiry. The judiciary's failure to conduct a meaningful assessment of the constitutionality of classifications threatens its own legitimacy and the legitimacy of legislative bodies.

When courts review classifications for their rational bases, they are asking whether the state's actions adhere to the minimum requirements of the Constitution. Rational basis review often validates even those classifications that are unwise or improvident on the assumption that the political process will rectify them, but there is an important distinction between classifications that are merely unwise and classifications that are unconstitutional.<sup>203</sup> Though unwise classifications may be politically unpopular, a legislature is empowered to create them. On the other hand, a legislature lacks any power to create unconstitutional classifications. By allowing classifications that are irrational in the current factual context to remain in effect, courts abdicate their role as monitors of constitutional compliance. The public may then question the legitimacy or competence of a judiciary that permits the power of the legislature to swell beyond its constitutional bounds.

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<sup>200</sup> *Id.* at 35–36.

<sup>201</sup> *See* Fed. R. Civ. P. 26–37 (outlining the information-gathering tools available in the discovery process).

<sup>202</sup> *See* Bice, *supra* note 48, at 35.

<sup>203</sup> *See* Vance v. Bradley, 440 U.S. 93, 97 (1979) ("The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted. Thus, we will not overturn a statute unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational." (footnotes omitted)).

Additionally, the courts' neglect of contemporary contextual analysis could foster resentment of the legislature. If burdened by classifications that make no rational sense in the present context, the public may direct its disdain for those classifications toward their creator. The legislature might be viewed as an unrestrained institution, expanding its own power without check.

The Supreme Court should clarify that contemporary contextual analysis is a necessary part of rational basis review under the Equal Protection Clause. The Court's precedent supports the conclusion that previously rational classifications can become irrational as factual conditions change. Also, the judiciary holds the proper tools and experience to examine the changed factual conditions, and by conducting such examinations, it promotes the stability and visibility of constitutional restraints on government power.

#### CONCLUSION

Contemporary contextual analysis is an integral part of the Equal Protection Clause. Each level of scrutiny requires that courts examine the factual conditions surrounding a classification at the time of the constitutional challenge, rather than the time of the classification's creation. Though contemporary contextual analysis may lead to once-constitutional laws later being declared unconstitutional, it can be reconciled with the conventional view that constitutional decisions are permanent because no manipulation of operative propositions or decisional rules is necessary.

While the Supreme Court has used contemporary contextual analysis consistently in strict scrutiny, lower courts debate the applicability of such analysis in rational basis review. This debate must be resolved in favor of contemporary contextual analysis. First, the Court's precedent indicates that the rationality of laws can be affected by subsequent facts. Second, courts possess the tools and experience to engage in complex empirical fact-finding. Third, contemporary contextual analysis promotes the legitimacy of the judiciary and other government institutions.