

Pace University

DigitalCommons@Pace

Pace Law Faculty Publications

School of Law

4-18-2007

Adding Colors to the Chameleon: Why the Supreme Court Should Adopt a New Compelling Governmental Interest Test for Race-Preference Student Assignment Plans

Leslie Yalof Garfield

Elisabeth Haub School of Law at Pace University

Follow this and additional works at: <https://digitalcommons.pace.edu/lawfaculty>



Part of the [Civil Rights and Discrimination Commons](#), [Constitutional Law Commons](#), [Education Law Commons](#), and the [Law and Society Commons](#)

Recommended Citation

Leslie Yalof Garfield, Adding Colors to the Chameleon: Why the Supreme Court Should Have Adopted A New Compelling Governmental Interest Test for Race-Preference Student Assignment Plans, 56 U. Kan. L. Rev. 277 (2008), <http://digitalcommons.pace.edu/lawfaculty/301/>.

This Article is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Pace Law Faculty Publications by an authorized administrator of DigitalCommons@Pace. For more information, please contact dheller2@law.pace.edu.

Adding Colors to the Chameleon: Why the Supreme Court Should Adopt a New Compelling Governmental Interest Test for Race-Preference Student Assignment Plans.

By Leslie Yalof Garfield¹

When the Supreme Court ordered the City of Birmingham to desegregate its schools in 1954,² it failed to consider the long range implications of its mandate. School districts across the country have responded to the Court's order by adopting race-preference school assignment plans, which they created to designate the particular public elementary or secondary school a student should attend. Now that these plans have successfully achieved their goals of desegregating classrooms, the question has become whether the continuation of the very programs that helped achieve those goals remain legal? In other words, as Justice Ginsburg recently said in arguments before the Supreme Court, could it now be that "what's constitutionally required one day gets constitutionally prohibited the next day?"³ This very issue is currently under consideration in the Supreme Court.⁴

¹ Leslie Yalof Garfield, Prof. of Law, Pace Law School (B.A. Fla. 1982; J.D. Fla 1985) The author would like to express deep gratitude to Alison Kronstadt and Megan McDonald for their wonderful research assistance and to David Stuart, for his unselfish willingness to provide outstanding research and sound editorial assistance on a moments notice. Finally, I would like to thank Prof. Bennett Gershman for his continued support, guidance and creative thought.

² *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

³ Adam Liptak, *Brown v. Board of Education, Second Round*, NY TIMES, Dec. 10, 2006 (quoting Justice Ginsburg).

⁴ See *McFarland v. Jefferson County Pub. Schs.*, 330 F. Supp. 2d 834 (W.D. Ky. 2004), *aff'd sub nom.*, *McFarland ex rel. McFarland v. Jefferson County Pub. Schs.*, 416 F.3d 513 (6th Cir. 2005), *cert. granted sub nom.*, *Meredith v. Jefferson County Bd. of Educ.*, 126 S. Ct. 2351 (June 5, 2006); *Parents Involved in Cmty. Schs. v. Seattle Sch. Disc. No. 1*, 137 F. Supp. 2d 1224 (W.D. Wash. 2001), *rev'd*, 285 F.3d 1236 (9th Cir. 2002), *injunction granted*, No. 01-35450, 2002 U.S. App. LEXIS 7678, at *1 (9th Cir. Apr. 26, 2002), *reh'g granted*, 294 F.3d 1084 (9th Cir. 2002), *certifying questions to Washington Supreme Court*, 294 F.3d 1085 (9th Cir. 2002), *certified questions answered*, 72 P.3d 151 (Wash. 2003), *rev'd*, 377 F.3d 949 (9th Cir. 2004), *reh'g granted en banc*, 395 F.3d 1168 (9th Cir. 2005), *aff'd*, 426 F.3d 1162 (9th Cir. 2005), *cert. granted*, No. 05-908, 2006 U.S. LEXIS 4349, at *1 (June 5, 2006).

In December 2006, the court heard arguments on *Meredith v. Jefferson County Board of Education*⁵ and on *Parents Involved in Community Schools (PICS) v. Seattle School District*,⁶ In each case petitioners challenged long standing school placement plans, which allowed limited consideration for racial preference when assigning students in grades K-12 to a particular school.⁷ The Jefferson County Board of Education plan's genesis rests in a court ordered desegregation.⁸ When petitioners challenged the plan, in 2002, however, the evidence showed that, in fact, the schools were successfully integrated.⁹ Since there were no present effects of past discrimination, they argued, the plan was no longer permissible.¹⁰ The Seattle School Board adopted its plan because assigning students to schools based on their residential neighborhood resulted in de facto segregation in the schools.¹¹ Opponents challenged the Seattle Plan as violative of the Equal Protection Clause since it unfairly favored one group based on race.¹²

Justice Breyer, in the *Meredith* hearings, articulated the grave danger of striking down the Jefferson County BOE plan when he asked: "How could the Constitution the day that the decree is removed tell the school board it cannot make efforts any more, it can't do what its been doing and we'll send the children back to their black schools and

⁵ See generally Transcript of Oral Argument, *Meredith*, No. 05-915 (Dec. 4, 2006), available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/05-915.pdf. See also, Transcript of Oral Argument, *Parents Involved in Community Schools (PICS) v. Seattle School District* available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/05-908.pdf.

⁶ *Parents Involved in Cmty. Schs. v. Seattle Sch. Disc.* No. 1, 285 F.3d 1236 (9th Cir. 2002), *injunction granted*, No. 01-35450, 2002 U.S. App. LEXIS 7678, at *1 (9th Cir. Apr. 26, 2002), *reh'g granted*, 294 F.3d 1084 (9th Cir. 2002), *certifying questions to Washington Supreme Court*, 294 F.3d 1085 (9th Cir. 2002), *certified questions answered*, 72 P.3d 151 (Wash. 2003), *rev'd*, 377 F.3d 949 (9th Cir. 2004), *reh'g granted en banc*, 395 F.3d 1168 (9th Cir. 2005), *aff'd*, 426 F.3d 1162 (9th Cir. 2005), *cert. granted*, No. 05-908, 2006 U.S. LEXIS 4349, at *1 (June 5, 2006).

⁷ *McFarland*, 330 F. Supp. 2d at 836.

⁸ *Id.* The plan was developed in response to a 1975 federal court order. The school chose to continue the program of integration after the end of the court mandate. *Id.*

⁹ See *id.* at 841-42.

¹⁰ See *McFarland*, 330 F.Supp. at 835,

¹¹ *Parents Involved in Cmty Schs*, 426 F.3d at 1169.

¹² *Id.*

white schools?”¹³ Yet, current law supports doing just that, since the Court has held that absent proof of present effects of past discrimination, a court may strike down race preference programs.¹⁴

As a general matter, the Court can only uphold Equal Protection challenges to race-preference plans if the plan survives the strict scrutiny test.¹⁵ Under the current law, plans will survive if the defending group can show a compelling governmental interest in achieving the plans’ goals, which the Court has found can be supported by evidence of present effects of past discrimination or by proof that the program will create “viewpoint diversity.”¹⁶

Neither the Jefferson County BOE Plan nor the Seattle Plan are likely to survive strict scrutiny under the Court’s current compelling governmental interest tests. First, neither defendant can produce evidence that their plans are in place to remedy present effects of past discrimination. Second, while there clearly is viewpoint diversity in integrated classrooms, several appellate court judges have raised concern that there is little need for viewpoint diversity at the K-12 grade levels since the learning experience in elementary and secondary schools is distinguishable from the learning experience at the university level.¹⁷

Because the race-preference student assignment plans currently under consideration before the Court potentially fail to withstand strict scrutiny, the Court may be forced to identify a new socially correct interest that overrides the Equal Protection

¹³ See Transcript of Oral Argument, *supra* note 4, at 12.

¹⁴ See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 363 (1978) (citing *Teamsters v. United States*, 431 U.S. 324, 357-62 (1977)).

¹⁵ *Bakke*, 438 U.S. at 291.

¹⁶ *Parents Involved in Cmty. Schs. v. Seattle Sch. Disc. No. 1*, 426 F.3d 1162, 1200-01 (9th Cir. 2005),

¹⁷ See *infra* notes 114-117 and notes 171-186 and accompanying text; see also, *Cavalier ex rel. Cavalier v. Caddo Parish Sch. Bd.*, 403 F.3d 246, 259 n. 15 (5th Cir. 2005); *Hopwood v. Tex.*, 78 F.3d 932, 948 (5th Cir. 1996); *but see Parents Involved in Cmty. Sch. v. Seattle Sch. Dist.*, No. 1, 377 F.3d 949 (9th Cir. 2004).

violation even though those programs were arguably created in same educational context as previously considered race-preference admissions plans.¹⁸ In *Grutter v. Bollinger*,¹⁹ Justice O'Connor wrote that "context matters" in evaluating the constitutionality of race-preference programs.²⁰ The Court must distinguish the context of the plans challenged in Meredith and PICS, therefore, in order to justify a new compelling governmental interest.

The Court can cast the education race-preference plans at the K-12 level in a different context than those at the graduate school level since the educational goals of attaining diversity at grades K-12 is easily distinguishable from attaining diversity in classrooms of higher education. Under *Grutter*, identifying a new context justifies defining a new compelling governmental interest.

The Court must articulate a third compelling governmental interest upholding race-preference plans or programs where the programs abolishment would threaten a return to the de facto segregation that the plans originally sought to cure. Part I of this article will define the historical evolution of the strict scrutiny test and the Court's willingness to allow the context of a particular race-preference issue to drive the definition of a compelling governmental interest. Part II of this article will consider appellate court responses to the applicability of the Court's two articulated compelling governmental interests particularly in cases considering challenges to race-preference student assignment plans. Finally, Part III will argue that the Court must create a new compelling governmental interest for evaluation of race-preference student assignment plans, since invalidation of these School Board plans would cause a return to the social conditions that originally necessitated their creation.

¹⁸ See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), *Grutter v. Bollinger*, 539 U.S. 306 (2005).

¹⁹ *Grutter v. Bollinger*, 539 U.S. 306 (2005).

²⁰ *Grutter*, 539 U.S. at 327.

1. The Supreme Court's Application of the Strict Scrutiny Test

The Supreme Court has long held that any race-preference policy must be subject to the strictest scrutiny.²¹ A policy passes the strict scrutiny test if the governmental body defending the policy can demonstrate that there is a compelling governmental interest in using the policy and that the policy is narrowly tailored to meet that interest.²² The Court first used the strict scrutiny test to evaluate a race-preference policy in *Regents of the University of California at Davis v. Bakke*.²³

The *Bakke* case considered an equal protection challenge to the University of California at Davis Medical School's ("Davis") 1973 admissions policy, which the school adopted in an effort to diversify its entering class.²⁴ Allen Bakke, a white male who had been rejected from the school, claimed that the policy, which set aside a number of seats for students in identified minority groups,²⁵ violated the Equal Protection Clause,²⁶ the California Constitution,²⁷ and Title VI of the Civil Rights Act of 1964 ("Title VI").²⁸

²¹ See *City of Richmond v. Croson*, 488 U.S. 469 (1989); *Adarand v. Peña*, 515 U.S. 200 (1995); *United States v. Paradise*, 480 U.S. 149 (1987); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986).

²² *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003).

²³ *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

²⁴ *Id.* at 265.

²⁵ *Id.* Davis utilized a bifurcated admissions policy. One committee considered nonminority applicants who had achieved a minimum 2.5 undergraduate GPA ("UGPA"). *Id.* at 275. A separate committee considered all minority applicants, regardless of their objective scores. *Id.* at 274-75. The school maintained a certain number of seats for applicants from each of the groups. *Id.* at 275. Bakke claimed that the policy, which allowed the school to reserve a certain amount of places for minority applicants with lower objective scores than his own, was tantamount to a quota. *Id.* at 277-78.

²⁶ U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

²⁷ CAL. CONST. art. I, § 7 ("A citizen or class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens. Privileges or immunities granted by the Legislature may be altered or revoked.").

²⁸ Civil Rights Act of 1964, tit. VI, 42 U.S.C. § 2000d (2000) ("No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.").

Bakke filed suit in the Superior Court of California, which held that Davis' admission policy was a racial quota and therefore violated the California and United States Constitution, as well as Title VI. The California Supreme Court affirmed, and upon the State's appeal, the Supreme Court of the United States took

Petitioner, the Regents of the University of California, argued that the Davis program should not be subject to the strict scrutiny test for two reasons. First, Petitioner argued, white males are not members of a discrete and insular minority group and as such do not require extraordinary protection.²⁹ Secondly, petitioner pointed out that in instances where race was a factor, such as school and employment desegregation, the Court did not always subject the challenged program or policy to strict scrutiny.³⁰ The *Bakke* case was the first of its kind to raise the issue of reverse discrimination. The court concluded that because the Davis program involved the use of an explicit racial classification the program's preferential treatment potentially disregarded individual rights as guaranteed by the Fourteenth Amendment.³¹ When a program touches upon "an individual's race or ethnic background," Justice Powell wrote, "he is entitled to a judicial determination that the burden he is asked to bear . . . is precisely tailored to serve a compelling governmental interest."³²

The Court's language became the embodiment of the strict scrutiny test.³³ Any program or policy that had a direct impact on an individual because of race, regardless of membership in a minority class, would be subject to the most exacting review. Under

certiorari. The Supreme Court, considering both the Equal Protection Clause and Title VI, eventually affirmed the California Supreme Court's decision. *Bakke*, 438 U.S. at 271.

²⁹ *Id.* at 278.

³⁰ The Davis special admissions program involves the use of

an explicit racial classification never before countenanced by this Court. It tells applicants who are not Negro, Asian, or Chicano that they are totally excluded from a specific percentage of the seats in an entering class. No matter how strong their qualifications, quantitative and extracurricular, including their own potential for contribution to educational diversity, they are never afforded the chance to compete with applicants from the preferred groups for the special admissions seats. At the same time, the preferred applicants have the opportunity to compete for every seat in the class.

Id. at 319-20.

³¹ *Id.* at 320 (citing *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948)).

³² *Bakke*, 438 U.S. at 299 (citing *Shelley*, 334 U.S. at 22); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 351 (1938). In "order to justify the use of a suspect classification, a State must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is 'necessary . . . to the accomplishment' of its purpose or the safeguarding of its interest." *In re Griffiths*, 413 U.S. 717, 721-22 (1973).

³³ *Bakke*, 438 U.S. at 300 (citing *Shelley*, 334 U.S. at 22).

Bakke, the party promoting the challenged race-preference program would have to demonstrate that there was a compelling governmental interest in the program and that the program was narrowly tailored to meet that interest.³⁴

The Court, in a highly fractionalized opinion, struck down the Davis policy. Justice Powell, writing for the majority, concluded that the Davis program violated both Title VI and the Equal Protection Clause.³⁵ Applying the strict scrutiny test,³⁶ Justice Powell found that there was a compelling governmental interest in attaining a diverse student body.³⁷ However, while the Constitution does not bar admission policies from introducing race as a factor in the selection process, Justice Powell concluded that the program was not narrowly tailored and that preferring members of any one group for no reason other than race or ethnic origin is discrimination on its own.³⁸ The Davis admissions policy, which set aside a specific number of seats for students in identified minority groups, unfairly benefited the interest of a victimized group at the expense of other innocent individuals, and therefore, violated the Equal Protection Clause.³⁹ Justice Powell, therefore, concluded that the Davis admissions policy was constitutionally impermissible.

The *Bakke* Court was the first to conclude that programs designed to achieve diversity at the graduate school level served a compelling governmental interest.⁴⁰ Indeed, a majority of the *Bakke* Court recognized the University's Constitutional right to

³⁴ See *Bakke*, 438 U.S. at 299.

³⁵ *Id.* at 270-71.

³⁶ *Id.* at 299.

³⁷ *Id.* at 311-12. A diverse student body contributing to a robust exchange of ideas is a constitutionally permissible goal on which a race-conscious university admissions program may be predicated. *Id.*

³⁸ *Id.* at 307.

³⁹ *Id.* Additionally, its practice of having separate admissions subcommittees review minority and non-minority candidates inappropriately insulated applicants from comparison against the entire admissions pool. *Id.* at 315.

⁴⁰ *Id.* at 317.

select students who would best contribute to the “‘robust exchange of ideas.’”⁴¹ Ethnic diversity, however, is one element in a range of factors a university may properly consider in attaining the goal of a heterogeneous student body.⁴² Justice Powell’s edict would come to be called “viewpoint diversity”⁴³ and would hold that evidence that a race-preference admission program was designed to create viewpoint diversity was sufficient to support a court finding of a compelling governmental interest.

Almost a decade after *Bakke*, the Court began reviewing a series of challenges to race-preference policies in the workplace.⁴⁴ These cases, read together, articulated clear guidelines for the application of the strict scrutiny test⁴⁵ and confirmed that a reviewing court could only uphold an affirmative action program or policy in the work place if it was aimed at ameliorating present effects of past discrimination and if the program was narrowly tailored to meet that goal.⁴⁶

⁴¹ *Id.* at 312-13 (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)).

⁴² *Bakke*, 438 U.S. at 314. Chief Justice Burger and Justices Stevens, Stewart, and Rehnquist joined in Justice Powell’s opinion that the program was invalid because it violated Title VI, and thus, there was no need to evaluate the program under the Equal Protection Clause. *See id.* at 420 (Stevens, J., concurring in the judgment in part and dissenting in part). Justices Brennan, White, Marshall, and Blackmun were in the minority, concluding that Title VI permits federally-funded entities to enact programs or policies that assist minority groups to gain equal access to programs more easily available to Caucasians. *Id.* at 328 (Brennan, J., concurring in the judgment and dissenting in part). However, Title VI and the Civil Rights Act do not take precedence over the constitutional protection of the Equal Rights Clause, and thus, such programs or policies are valid only to the extent that they are coterminous with the Fourteenth Amendment. *See id.* at 340 (Brennan, J., concurring in the judgment and dissenting in part.) Thus, because four Justices chose to limit the extent of their agreement with Justice Powell’s conclusion, Justice Powell’s scrutiny of the Davis Policy under the Equal Protection Clause became, in a sense, a majority of one.

⁴³ Judge Friedman, writing for the The District Court for the Eastern District of Michigan, first identified the term “viewpoint diversity” in the context of race-preference programs. Diversity viewpoint means “a diversity of viewpoints, experiences, interests, perspectives, and backgrounds which creates an atmosphere most conducive to learning.” *Grutter v. Bolinger*, 137 F. Supp 821, 849

⁴⁴ *See, e.g., Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *United States v. Paradise*, 480 U.S. 149 (1987); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986).

⁴⁵ *See generally Paradise*, 480 U.S. 149; *see also id.* at 171 (citing *Local 28 of Sheet Metal Workers’ Intern. Ass’n v. E.E.O.C.*, 478 U.S. 421, 481 (1986)) (listing several factors to consider in determining the appropriateness of race-conscious guidelines, “including the necessity for the relief and the efficacy of alternative remedies; the flexibility and duration of the relief, including the availability of waiver provisions; the relationship of the numerical goals to the relevant labor market; and the impact of the relief on the rights of third parties.”).

⁴⁶ *See Croson*, 488 U.S. 469 (holding that courts must apply the strict scrutiny test to judicial review of state and

In the first post-*Bakke* decision to consider the constitutionality of affirmative action admission policies, Justice Powell, again writing for the plurality, took the opportunity to reaffirm the requirement that these programs pass the strict scrutiny test before a court may pronounce them as constitutional.⁴⁷ In *Wygant v. Jackson Board of Education*,⁴⁸ the Court considered a collective bargaining agreement between the Board of Education and a teachers' union that provided for layoffs by seniority where the percentage of minorities laid off would exceed the percentage of minorities employed at the time.⁴⁹ In this instance, the Court found, that the government's interest in reversing the trend of societal discrimination was not sufficient to support a compelling governmental interest.⁵⁰ The Court struck down the policy for violating the Fourteenth Amendment, holding that "some showing of prior discrimination by the governmental unit involved" is required before limited use of racial classifications is allowed in order to remedy discrimination.⁵¹

The Court took the opportunity to reaffirm its position on what evidence would support a compelling governmental interest in the next Equal Protection challenge to a race preference policy, when it decided *United States v. Paradise*.⁵² The court in *Paradise* considered the constitutionality of a one-black-to-one-white promotion plan that

local government affirmative action programs); see also *Adarand*, 515 U.S. 200 (mandating the use of the strict scrutiny test for federal race-preference programs). See generally Leslie Yalof Garfield, *Squaring Affirmative Action Admissions Policies with Federal Judicial Guidelines: A Model for the Twenty-First Century*, 22 J.C. & U.L. 895 (1996).

⁴⁷ *Wygant*, 476 U.S. at 274. Justice Powell widely cited *Bakke* in his decision.

⁴⁸ *Wygant*, 476 U.S. 267, 314-15 (Stevens, J., dissenting).

⁴⁹ *Wygant*, 476 U.S. at 274. Justice Powell wrote that where race-preference programs are concerned, the racial classification must be justified by "a compelling state purpose . . . [and] the means chosen by the State to effectuate that purpose must be narrowly tailored." *Id.* at 274. The school board's policy of extending preferential protection against layoffs to some employees because of their race violated the Fourteenth Amendment.

⁵⁰ *Id.* at 274-75.

⁵¹ *Id.* at 274.

⁵² *United States v. Paradise*, 480 U.S. 149 (1987).

the Alabama Department of Public Safety adopted pursuant to a district court consent decree.⁵³ Relying on *Wygant*, Justice Brennan wrote that the court will always find a compelling governmental interest where the entity promoting the policy can demonstrate that it is designed to remedy present effects of past discrimination.⁵⁴

Following *Paradise*, the Court was faced with several more challenges to affirmative action programs aimed at eradicating discrimination in the workplace and in each instance..⁵⁵ In *City of Richmond v. Croson*,⁵⁶ which considered a municipal plan that required a primary city contractor to award 30% of the amount of its contract to Minority Business Enterprises (MBEs), defined as subcontractor businesses owned by members of certain minority groups.⁵⁷ In *Adarand Constructors, Inc. v. Peña*⁵⁸ the Supreme Court extended the strict scrutiny standard of review to federal race-preference preference programs.⁵⁹ Both *Adarand* and *Croson* confirmed that there is a compelling

⁵³ *Id.* at 154-55.

⁵⁴ *Id.* at 183-85. In *Wygant*, the Majority also turned its attention to the definition of “narrowly tailored, acknowledging that it had not previously defined precisely what “narrowly tailored” meant. , In evaluating whether a program was narrowly tailored, the court must look at: (1) “the necessity for the relief and the efficacy of alternative remedies;” (2) “the flexibility and duration of the relief;” (3) “the relationship between the numerical goals to the relevant labor market;” and (4) “the impact of the relief on the rights of third parties.” *Id.* at 171 (citing *Sheet Metal Workers v. EEOC*, 478 U.S. 421, 481 (1986) and *Sheet Metal Workers*, 478 U.S. at 486 (Powell, J., concurring in part and concurring in judgment)); *see also* *Sheet Metal Workers*, 478 U.S. at 487 (Powell, J., concurring in part and concurring in judgment). The Court would not uphold a benign race-preference remedial policy unless the policy was the least intrusive and most effective means to achieve the goals of the entity’s program. *See generally* *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 266 (1978); *but see* *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003) (where the Court said that “narrow tailoring does not require exhaustion of every race neutral alternative.”).

⁵⁵ *See, e.g.*, *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *Croson*, 488 U.S. 469; *see also*, *Garfield*, *supra* note 47.

⁵⁶ *Croson*, 488 U.S. 469.

⁵⁷ *Id.* at 478. Justices Rehnquist, White, Kennedy and Scalia agreed with that portion of the opinion, concurring. *Id.* at 475.

⁵⁸ *Adarand*, 515 U.S. 200.

⁵⁹ *Id.* *Adarand* considered the constitutionality of a federal statute that granted financial incentives to prime contractors who awarded subcontracts to companies controlled by socially and economically disadvantaged individuals. *Id.* at 206-07. Prior to *Adarand*, *Metro Broad. v. F.C.C.*, 497 U.S. 547 (1990), was the precedent. *Metro Broadcasting* held that “benign” federal racial classifications need only satisfy intermediate scrutiny. *See Metro Broad.*, 497 U.S. at 564-65. Justice O’Connor suggested that the need for intermediate scrutiny may have evolved from the principle that the Fifth Amendment does not protect individual rights to the same extent as the Fourteenth Amendment. *Adarand*, 515 U.S. at 213. This was in sharp contrast to the Court’s requirement

governmental interest in eradicating present effects of past discrimination.

In 2003, the Court, for the first time in 25 years, revisited the constitutionality of race-preference programs aimed at achieving diversity in the classroom. *Grutter v. Bollinger* and its companion case *Gratz v. Bollinger*⁶⁰ considered the constitutionality of affirmative action admission programs at the University of Michigan School of Law (Law School) and the University of Michigan Literature Science and Arts School (LSA) respectively. In each instance, the Supreme Court concluded that the particulars of the strict scrutiny test it applied in *Wygant* and *Paradise* was ill-suited for evaluating the present challenges.

Plaintiffs in *Gratz*⁶¹ challenged LSA's admissions policy, alleging that it improperly used race as a factor, in violation of sections 1981 and 1983 of the Civil Rights Act,⁶² and the Equal Protection Clause of the Fourteenth Amendment.⁶³ The school used a 150-point scale, to rate applicants. Applicants were assigned a number of points for scholarship, curriculum, under-represented minority status, geographical location, and alumni relation. Students were assigned twenty points if they were under-represented minorities.⁶⁴ The admissions committee limited its review to applicants who

that the Equal Protection Clause demands strict scrutiny of "benign" state or local race-preference preference policies. *See id.* at 222. A majority of the *Adarand* court overruled *Metro Broadcasting*, holding that the more stringent standard should apply to all race-preference preference policies, regardless of who implements the policy. *Id.* at 227. The strict scrutiny test "ensures that the personal right to equal protection of the laws has not been infringed." *Id.*

⁶⁰ *Gratz v. Bollinger*, 539 U.S. 244 (2003).

⁶¹ Jennifer Gratz and Patrick Hamacher "both applied for admission to the University of Michigan's (University) College of Literature, Science, and the Arts (LSA) as residents of the State of Michigan. Both petitioners are Caucasian." *Gratz*, 539 U.S. at 251. Both were told that they were qualified but not sufficiently to be admitted for "first review." *Id.* (citing App. to Pet. for Cert. 109a). Both were later denied admission and attended alternate universities. *Gratz*, 539 U.S. at 251.

⁶² 42 U.S.C. §§ 1981, 1983 (2006).

⁶³ *Gratz v. Bollinger*, 183 F.R.D. 209, 210 (E.D. Mich. 1998). The complaint was filed on October, 14, 1997. *Id.*

⁶⁴ *Gratz v. Bollinger*, 122 F. Supp. 2d 811, 827 & n. 27 (E.D. Mich. 2000). LSA did not set aside a fixed number of seats for applicants. *Id.* at 827.

attained a certain SCUGA number.⁶⁵ The District Court upheld the program and plaintiffs appealed to the Supreme Court.⁶⁶

Concurrent with the court's consideration of *Gratz*, Barbara Grutter challenged the Law School's admissions policy, whose mission statement called for enrollment of a "critical mass of minority students" as a means of ensuring a diverse student body.⁶⁷ Under the written policy, those reviewing applications for admission were encouraged to consider factors including recommendations, quality of one's undergraduate institution, essays, course selection, and whether the applicant had a perspective or experience that would contribute to a diverse student body.⁶⁸ The District Court struck down the Law

⁶⁵ See *Gratz*, 539 U.S. at 255. Once an applicant earned enough points to make it to the individual review phase of the admissions policy, the committee disregarded the applicant's SCUGA score. *Id.* Rather, it paid particular attention to the qualities that would make the candidate a suitable student for matriculation at the school. *Id.* LSA also had a policy of allowing counselors to "flag" applications of certain students who would otherwise not have passed the first selection procedure, allowing for a limited number of applicants, who did not have the necessary SCUGA score, to be considered in the individual review phase of the admissions proceedings. *Id.* The SCUGA factors were: S-socioeconomic status, C-curriculum, U-underrepresented minority, G-geography, A-alumni. *Id.*

The faculty at the University of Michigan had adopted its admissions policy to accomplish its stated goal of admitting a diverse class, for the benefit of all students in the classroom. See *Gratz*, 122 F. Supp. 2d at 814. From 1995 to 1998, LSA's admissions policy specifically "protected" a certain number of spots for minority candidates. *Id.* at 831. In 1999, LSA modified its admissions program to the challenged program. *Id.* at 827. Applicants with SCUGA scores below a threshold number were automatically rejected from the school. See *id.* at 827.

⁶⁶ *Gratz v. Bollinger*, 539 U.S. 244 (2003). The Supreme Court found that the school's program was not narrowly tailored to meet a compelling governmental interest of achieving a diverse classroom. *Id.* at 275.

⁶⁷ *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 832 (E.D. Mich. 2001). The Law School's admissions policy was adopted in 1992 and it expresses the school's desire "to admit a group of students who individually and collectively are among the most capable students applying to American law schools in a given year Collectively, we seek a mix of students with varying backgrounds and experiences who will respect and learn from each other." *Id.* at 825. The law school hoped that "[b]y enrolling a 'critical mass' of minority students, we have ensured their ability to make unique contributions to the character of the Law School." *Id.* at 828.

⁶⁸ *Id.* at 826-28. The Law School gave considerable weight to the objective factors of an applicant's undergraduate GPA and LSAT scores. See *id.* at 827. The rationale for admitting students with lower scores was that they "may help achieve that diversity which has the potential to enrich everyone's education and thus make a law school class stronger than the sum of its parts." *Id.* at 827. The law school hoped that "[b]y enrolling a 'critical mass' of minority students, we have ensured their ability to make unique contributions to the character of the Law School." *Id.* at 828. According to the Law School's written policy, those who could offer varying perspectives, including a concert pianist, someone who spoke five languages, or a member of an underrepresented minority group, were considered for admission despite their low objective scores. *Id.* at 826-27.

School policy finding that it did not survive the strict scrutiny test.⁶⁹ In response to the District Court decision, the Law School petitioned the Sixth Circuit, which reversed the lower court.⁷⁰

The Supreme Court granted petitions for *certiorari* in both the *Grutter* and *Gratz* cases.⁷¹ Because the plaintiffs in each case challenged the respective affirmative action admissions policies as violating the Equal Protection Clause, the Court reviewed each policy under the strict scrutiny test.⁷² The Court in both *Grutter* and *Gratz* swiftly accepted, as binding, Justice Powell's majority opinion in *Bakke*, and presumed that there was a compelling governmental interest in achieving a diverse entering class.⁷³

The majority in *Grutter* upheld the Law School's affirmative action policy. Justice O'Connor, early pronouncement that "context matters" when reviewing race-preference governmental action under the Equal Protection Clause set the stage for distinguishing its findings in these decision from those in the most recently considered

⁶⁹ The District Court concluded that Justice Powell's plurality opinion in *Bakke* was not binding, and therefore the Law School's mission of admitting a diverse class was not a compelling governmental interest to justify including race in the list of non-objective factors that could contribute to an applicant's success. *See id.* at 847-48. The court held that *Bakke* is not binding, because Justice Powell's opinion was not joined by any other Justices, and recent Supreme Court cases have not looked favorably on racial classifications. *Id.* at 844-46. The court agreed that diversity does have important educational benefits, but felt that a distinction needs to be drawn between viewpoint diversity and racial diversity. *Id.* at 849. The court felt that viewpoint diversity provides benefits but that the connection between race and viewpoint is tenuous. *Id.* Therefore, racial diversity is not a compelling interest. *Id.* at 850. The U.S. District Court further found that the admissions policy was not narrowly tailored, concluding that the policy failed under the third prong of the narrowly tailored test since the Law School's goal of admitting a "critical mass" was practically indistinguishable from a quota, and was such an amorphous figure that a program could never be narrowly tailored to achieve it. *Id.* at 850-51.

⁷⁰ *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2002), *cert. granted*, 537 U.S. 1043 (2002), *aff'd*, 539 U.S. 306. (2003). The main issue before the Sixth Circuit was whether the District Court erred in concluding that Justice Powell's definition of a compelling governmental interest was binding. *Grutter*, 288 F.3d at 738-39.

⁷¹ *Gratz*, 537 U.S. 1044 (2002) (granting cert.); *Grutter*, 537 U.S. 1043 (2002) (granting cert.).

⁷² *Gratz*, 539 U.S. 244, 270 (2003); *Grutter*, 539 U.S. at 325. The policies, , would only withstand a constitutional challenge if the schools could "demonstrate that the use of race in [their] current admissions program[s] employ 'narrowly tailored measures that further compelling governmental interests.'" *Gratz*, 539 U.S. at 270 (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995)).

⁷³ Despite all of the controversy and varying opinions among the lower courts, the Supreme Court did not spend a significant amount of time addressing the issue in their opinion. The Court simply stated that "today we endorse Justice Powell's view that student body diversity is a compelling state interest that can justify the use of race in university admissions." *Grutter*, 539 U.S. at 325.

cases of *Wygant*, *Adarand* and the like.⁷⁴ Justice O'Connor justified the different test as permissible because, she wrote, "not every decision influenced by race is equally objectionable and strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the governments reasons for using race in a particular context."⁷⁵

The *Grutter* majority reaffirmed Justice Powell's conclusion in *Bakke*, that achieving diversity in education supports a finding of a compelling governmental interest.⁷⁶ It then turned its attention to whether the policy was narrowly tailored to meet that interest. The majority acknowledged the need for a modified version of the *Paradise* test, holding that the "inquiry must be calibrated to fit the distinct issues raised by the use of race to achieve student body diversity in public higher education."⁷⁷ Consequently, the Court found that it was perfectly appropriate for courts to fashion a unique narrowly tailored prong of the strict scrutiny test in light of the particular context of the challenged program. In this instance, the Court held, in order to more fairly in order to pass the narrowly tailored test, the party defending an affirmative action admissions program need only demonstrate that the program was flexible and non-mechanical, and limited in its duration.⁷⁸ Ultimately, the Court found that the Law School program was not violate the Equal Protection Clause.⁷⁹

⁷⁴ *Id.* at 327; see also Jeremy R. Green, *Affirmative Action: Challenges and Opportunities*, 2004 BYU EDUC. L.J. 139, 149-151 (2004).

⁷⁵ *Grutter*, 539 U.S. at 327.

⁷⁶ *Id.* "Attaining a diverse student body is at the heart of the Law School's proper institutional mission, and that 'good faith' on the part of a university is 'presumed' absent [in] a showing to the contrary." *Id.* at 330. "Skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas and viewpoints." *Id.* at 330.

⁷⁷ *Grutter*, 539 U.S. at 333-34.

⁷⁸ *Id.*

⁷⁹ *Id.*

In contrast, the *Gratz* Court struck down LSA's admissions policy because it was not narrowly tailored to meet the compelling governmental interest of achieving a diverse student body.⁸⁰ LSA's policy went beyond the spirit of Justice Powell's edict that race can be considered a factor in admissions, since it failed to allow for interpretation of "individual qualities or experience not dependent upon race but sometimes associated with it."⁸¹ Therefore, the program was not narrowly drawn in a constitutionally permissible way.⁸²

The Court clearly articulated the permissibility of fashioning a compelling governmental interest test that was best suited for evaluating affirmative action policies aimed at achieving diversity in institutes of higher education. Consequently, the Court can evaluate a race-preference action against a test that is best suited to evaluate the particular

⁸⁰ *Gratz*, 539 U.S. at 268-69. Before the Supreme Court addressed the merits of the case, they spent considerable time discussing whether the plaintiff had standing to bring the case. *Id.* at 260-68. In his dissenting opinion, Justice Stevens—who was joined by Justice Souter—contended that the case should be dismissed because the plaintiff's lacked standing. *Id.* at 282 (Stevens, J., dissenting). In reaching its conclusion, the Supreme Court chose not to apply the four-pronged narrowly tailored test it had previously articulated in *Paradise*.

⁸¹ *Id.* at 272 (quoting *Bakke*, 438 U.S. at 324). Chief Justice Rehnquist rejected LSA's argument that the policy's individual review system, which was triggered after the points were assigned, satisfied the Court's requirement that a narrowly tailored policy allow for individual review. *Gratz*, 539 U.S. at 273-76. See generally, The Cost of Good Intentions: Why the Supreme Court's Decision Upholding Affirmative Action Admission Programs is Detrimental to the Cause, 27 PACE L. REV. 15 (Fall 2006).

⁸² *Id.* at 275. Writing for the majority, Chief Justice Rehnquist found that the fatal flaw in the University's admissions policy was its failure to provide an individual review of each candidate. *Id.* at 272-74. LSA's policy of automatically distributing 20 points to every applicant from the "under-represented minority" applicant pool had the result of treating race as an absolute, which could jettison a member of an underrepresented group into the accepted category, regardless of the experiences or qualities that race had contributed to the development of the individual. *Id.* at 274. See also, (O'Connor, J., concurring) (writing that LSA's practice of assigning points to applicants merely because they are members of a particular class precluded the committee from considering the effect race had on the individual, and his or her ability to contribute to meaningful class discussion.) *Id.* at 278-80 (O'Connor, J., concurring); Justice Thomas, in his concurring opinion, (Thomas, J., concurring). The policy failed to permit admissions counselors the ability to identify and consider non-racial distinctions among underrepresented minority applicants. *Id.* (Thomas, J., concurring) (finding that found LSA's policy flawed because "it awards all underrepresented minorities the same racial preference.") *Id.* at 281. But see, (Souter, J., dissenting). Justice Souter chose not to address the issue of whether LSA's policy was narrowly tailored, and criticized the rest of the Court for passing on that issue. According to Justice Souter, (the issue before the Court was essentially moot because the Plaintiff who brought the suit was a transfer student, and not subject to LSA's entering class admissions policy.) *Id.* at 393; (Ginsburg, J. dissenting) (arguing that there is a compelling need for such policies, and wide latitude should be given when interpreting whether the policies are narrowly tailored.) *Id.* at 302-03

interest sought to be accomplished by a governmental entity.⁸³ The Court's decision to uphold the Law School's policy not only identified for the first time a permissible affirmative action policy in the context of education but it also gave the lower courts license to design different "frameworks" for evaluating affirmative action policies depending on the need for a particular program.

In 2005, in *Johnson v. California*,⁸⁴ Court concluded that the context in which a policy is applied will dictate an appropriate definition of strict scrutiny.⁸⁵ The *Johnson* court considered whether the strict scrutiny test applies to an Equal Protection challenge to the California Department of Correction's (CDC) "unwritten policy of racially segregating prisoners in double cells in reception centers for up to 60 days each time they enter a new correctional facility."⁸⁶ Without reaching the merits,⁸⁷ the Court clearly stated that "all racial classifications imposed by government must be analyzed by a reviewing court under strict scrutiny," even when their effects equally burden or benefit the members of the races involved.⁸⁸ The Court rejected CDC's argument that it should be exempt from a strict scrutiny analysis because prisoners are equally segregated.⁸⁹

⁸³ *Id.* Justice O'Connor wrote that "not every decision influenced by race is equally objectionable." *Id.*

⁸⁴ *Johnson v. California*, 543 U.S. 499 (2005).

⁸⁵ Summary Judgment granted for CDC and defendant appealed claiming that the District Court's failure to apply strict scrutiny was an inappropriate review. The Ninth Circuit recognized that in this case the standard of review is paramanout but ultimately held that because this case considered the constitutional right of prisoners, a more deferential review was appropriate. *Johnson v. California*, 321 F.3d 791, 794 (9th Cir. 2003); see *Turner v. Safley*, 482 U.S. 78 (1987) (holding that when a prison regulation infringes on an inmate's constitutional rights, the defending party need only show that the regulation is reasonably related to some legitimate penalogical interest.) *Id.* at 89. *but see, id.* at 100 (Stevens, J., concurring in part and dissenting in part) (writing that a reasonableness standard gives prison officials too much discretion in determining what regulations to impose.)

⁸⁶ *Id.* at 502. Garrison Johnson, an African American inmate, brought suit against CDC. In every instance of incarceration, Johnson was placed in a double cell with another African American inmate. The CDC houses Japanese-American inmates and Chinese Americans separately, as well as, Northern Hispanics and Southern Hispanics. In each instance, the inmates were held for not more than 60 days.*Id.* The CDC justified this policy as necessary to prevent gang violence. *Id.*

⁸⁷ "We do not decide whether the CDC's policy violates the Equal Protection Clause." *Id.* at 505.

⁸⁸ *Id.* at 505 (citing *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995).

⁸⁹ *Johnson*, 543 U.S. at 506.

Although the Court did not define the what evidence might justify a compelling governmental interest in dividing inmates by race, or evidence that CDC's program was narrowly tailored it held that "strict scrutiny applies in every context, "even for so-called 'benign' racial classifications, such as race conscious university admissions policies."⁹⁰ The Court's language suggests that a different strict scrutiny test might be appropriate for evaluating a race-preference policy in the context of prisoner's rights.

Justice Ginsburg wrote a concurrence with which Justices Souter and Breyer joined. Justice Ginsburg disagreed with the Court that strict scrutiny properly applies to any and all racial classifications.⁹¹ Citing her opinions in *Grutter* and *Gratz*, Justice Ginsburg held that "the same standard of review ought not to control judicial inspection of every official race classification."⁹² In her opinion, actions aimed at ameliorating present effects of past discrimination (actions designed to burden group's long denied full citizenship stature)⁹³ should be subject to a more exacting scrutiny than those measures that are adopted as a result of the "after effects" of discrimination.⁹⁴ Under this analysis, not only does context dictate a governmental entities justification for the compelling governmental interest, it would dictate whether the strict scrutiny test was applicable at all.

As a general matter, Courts considering Equal Protection Challenges to race-preference policies have only found compelling governmental interests in two instances,

⁹⁰ *Id.* at 505 (citing *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003)).

⁹¹ *Johnson*, 543 U.S. at 516 (Ginsberg, J., concurring).

⁹² *Id.* (Ginsberg, J., dissenting).

⁹³ *Id.* (Ginsberg, J., dissenting).

⁹⁴ *See id.* at 516 (Ginsberg, J., dissenting). Justice Stevens dissented writing that the CDC program violates the Equal Protection clause under any test. *Id.* at 523 (Stevens, J., dissenting). Justice Thomas, with whom Justice Scalia joined in dissenting, wrote that "the Constitution has always demanded less within the prison walls," and for this reason, he would apply *Turner's* less stringent deferential test. *Id.* at 524, 530 (Thomas, J., dissenting). However, in reaching his conclusion, Justice Thomas was not without criticizing the majority for ruling in a manner that contradicted its findings in *Grutter* and *Gratz*. *See id.* at 543 (Thomas, J., dissenting).

where programs are aimed at ameliorating present effects of past discrimination in the workplace, and where programs are aimed at creating a diverse learning environment in the classroom. The *Johnson* opinion, particularly Justice Ginsburg’s finding that “the same standard of review ought not to control judicial inspection of every official race classification,”⁹⁵ suggests it is permissible to broaden acceptable findings of a compelling governmental interest. As a result, the body of case law that considered Equal Protection challenges to race-preference programs leaves room for lower courts to conclude that the present strict scrutiny test can be even further reconstituted. As lower courts begin to consider challenges beyond those programs that are created for the workplace or for higher education, Justice O’Connor’s edict that “context matters” has arguably, opened a pandora’s box, allowing courts define compelling governmental interests that best suit their desired results

III. Lower Court evaluation of Race Preference Policies.

Scholars observing the Court’s evaluation of affirmative action admission policies could easily argue that the Court neatly divided treatment of policies into two categories.⁹⁶ When evaluating affirmative action policies in the workplace, the Court has applied the *Paradise* test. When evaluating affirmative action for higher education, the Court has applied the *Grutter* test.⁹⁷ The *Johnson* court’s holding, however, suggests that when the context changes, so can the strict scrutiny test, even beyond these two neatly fashioned groups.⁹⁸

⁹⁵ *Id.* at 516 (Ginsburg, J., concurring).

⁹⁶ See, e.g., Leslie Garfield, *Back to Bakke: Defining the Strict Scrutiny Test for Affirmative Action Policies Aimed at Achieving Diversity in the Classroom*, 83 NEB. L. REV. 631 (2005).

⁹⁷ See *id.*

⁹⁸ Although the circuits seem to adhere to the *Wygant/Paradise* construct when considering affirmative action in the workplace, recent district court decisions indicate that these courts recognize that the context of a particular challenge does drive the strict scrutiny definition. Both the District Court of Florida and the District Court of

Recent decisions in the several circuits confirm that the *Paradise* “narrowly tailored” test remains the controlling law when evaluating Equal Protection challenges to affirmative action policies aimed at promoting diversity in the workplace.⁹⁹ In *Dean v. City of Shreveport*, appellants, two white males to whom the Shreveport Fire Department denied employment, challenged the fire department’s hiring process, which placed applicants into separate lists according to race and sex.¹⁰⁰ The fire department policy, which it adopted to comply with a Department of Justice consent decree issued by the Department of Justice required the department to have the same proportion of blacks in its department, “as blacks . . . bear to the appropriate work force in the particular jurisdiction.”¹⁰¹ Considering whether the District Court wrongly granted summary judgment, the Fifth Circuit held that remedying past discrimination is a compelling government interest and thus the City met the first prong of the strict scrutiny test. The Court remanded, however, for findings of whether the program was narrowly tailored.¹⁰²

Illinois have heard equal protection challenges to minority set aside programs within the context of the construction industry. See, *Hersbell Gill Consulting Engineers, Inc. v. Miami Dade County, Fla.*, 333 F. Supp 2d 1305 (S.D. Fla. 2004) (holding that “context matters” and recognizing the difference in context between the *Grutter* and *Gratz* decisions and the instant case. (“context [nevertheless] matters” when reviewing such classifications under the Equal Protection Clause.” Citing *Grutter* 123 S.Ct. at 2338. The same goes for gender preferences. See, e.g., *Hogan*, 458 U.S. at 725-26, 102 S.Ct. 3331.”) *Id.* at 1326; See also *Builders Ass’n of Greater Chicago v. City of Chicago*, 298 F. Supp. 725 (N.D. Ill. 2003)

⁹⁹ See, e.g., *Dean v. City of Shreveport*, 438 F.3d 448, 464 (5th Cir. 2006); *Sherbrooke Turf, Inc. v. Minn. Dept. of Transp.*, 345 F.3d 964, 971 (8th Cir. 2003).

¹⁰⁰ *Dean*, 438 F.3d at 452.

¹⁰¹ *Id.* at 459.

¹⁰² *Id.* In *Biondo v. City of Chicago*, 2002 U.S. Dist. LEXIS 3463 (N.D. Ill. 2002), *witness excluded by* 2002 U.S. Dist. LEXIS 9816 (N.D. Ill. 2002), *judgment entered by* *Cloud v. City of Chicago*, 2002 U.S. Dist. LEXIS 9817 (N.D. Ill. 2002), *judgment vacated and remanded by* *Biondo v. City of Chicago*, 382 F.3d 680 (7th Cir. 2004), *reb’g denied and reb’g en banc denied by* 2004 U.S. App. LEXIS 20402 (2004), *cert. denied by* 543 U.S. 1152 (2005), the fire department argued that its use of lists separating whites and minorities was in an effort to comply with federal regulations that discouraged the use of standardized tests for promotions in strict sequence. *Biondo*, 382 F.3d at 683. The *Biondo* court rejected the City’s compelling government interest, highlighting that racial quotas would be commonplace in public employment if preventing disparate impact by the use of a minorities only list served a compelling government interest. See *id.* at 684. The court ultimately held that the fire department’s practices did not pass strict scrutiny. *Id.* In one of the most recent cases, *Kohlbeck v. City of Omaha, Neb.*, 447 F.3d 552 (8th Cir. 2006), the Eighth Circuit held that an affirmative action plan that considered race for promotional decisions was not narrowly tailored because the use of racial classifications applied in instances where there was no identified past discrimination. *Id.* at 556. In the narrowly tailored analysis, the *Kohlbeck* court

Relying on the *Wygant/Paradise* strict scrutiny test, the Eighth Circuit in *Sherbrooke Turf, Inc. v. Minnesota Dept. of Transportation*.¹⁰³ concluded that the Transportation Equity Act (TEA) did not violate equal protection as applied in the states of Minnesota and Nebraska. Plaintiffs in *Sherbrooke* challenged the constitutionality of the TEA, which authorizes the use of race-preference preferences in federally funded transportation contracts.¹⁰⁴ The circuit court found a compelling government interest in ensuring that government funding was not distributed in a fashion that perpetuated the effects of discrimination in the transportation contracting industry. Applying the *Paradise* factors, the court further concluded that the TEA was narrowly tailored based on the states' findings. As a result, the act, as applied, passed constitutional muster.¹⁰⁵

The circuits seem to adopt the *Grutter* narrowly tailored test when evaluating affirmative action admission policies used to create a diverse classroom environment.¹⁰⁶ The Ninth Circuit determined the law school admissions policy at the University of Washington was narrowly tailored to achieve the compelling interest of educational diversity in *Smith v. University of Washington*.¹⁰⁷ In deciding the case, the *Smith* court

considered the following factors set forth in *Paradise*: “ efficacy of alternative remedies, the flexibility and duration of the race-conscious remedy, the relationship of the numerical goals to the relevant labor market, and the impact of the remedy on third parties.” *Id.* at 555 (citing *Sherbrooke Turf*, 345 F.3d at 971).

¹⁰³ *Sherbrooke Turf*, 345 F.3d 964.

¹⁰⁴ *W. States Paving Co. v. Wash. State Dept. of Transp.*, 407 F.3d 983 (9th Cir. 2005), *cert. denied by sub nom. City of Vancouver v. Washington*, 126 S.Ct. 1332 (2006), *on remand to sub nom. W. States Paving Co., Inc. v. Washington State Dept. of Transp.*, No. C00-5204 RBL, 2006 WL 1734163 (W.D. Wash. June 23, 2006); *Sherbrooke Turf*, 345 F.3d 964.

¹⁰⁵ *Sherbrooke Turf*, 345 F.3d 964. The Court was particularly comfortable with the relationship between the numerical goals and the relevant labor market; by focusing on the statistical evidence provided by the states. *Id.* at 973-974; *see also, W. States Paving Co.*, 407 F.3d 983 (finding that there was not sufficient evidence demonstrating that minorities suffer or have suffered discrimination in the Washington transportation contracting industry and concluding that the TEA as applied in the state of Washington was not narrowly tailored).

¹⁰⁶ *Smith v. University of Washington*, 923 F.3d 367; but see, *Hopwood v. Texas* 78 F.3d 932 (C.A.5 1996) (*Hopwood I*) (holding that diversity is not a compelling state interest)

¹⁰⁷ *Smith v. Univ. of Wash.*, 392 F.3d 367 (9th Cir. 2004). For the relevant years, the law school received approximately 2,000 applications for 165 positions. *Id.* at 370. The top 250-300 applicants based on undergraduate grade point average and LSAT score were considered “presumptive admits.” *Id.* The remaining

performed an extensive analysis of the *Grutter* decision, explaining that the University of Michigan Law School's admissions policy provided a template for an admissions plan that passed constitutional muster.¹⁰⁸

Plaintiffs in *Smith* argued that the law school's admissions policy was not narrowly tailored because (1) the admissions office supposedly sent an "ethnicity substantiation letter" to some minority applicants,¹⁰⁹ (2) application evaluators gave Asian Americans a plus,¹¹⁰ and (3) a large number of white applicants were referred to the Admissions Committee as opposed to being admitted directly by an administrator.¹¹¹

The court addressed each of these arguments and ultimately rejected them finding that the

applicants were considered "presumptive denies." *Id.* Presumptive admits were reviewed by the admissions coordinator and were either admitted or referred to the Admissions Committee for further consideration. *Id.* The presumptive denies were reviewed by the assistant dean who either admitted, denied, or referred applicants to an Admissions Committee. *Id.* The Admissions Committee ranked the top 250 to 300 candidates requiring committee referral, and the top picks were admitted. *Id.*

¹⁰⁸ *Id.* at 372.

¹⁰⁹ The law school sent an ethnicity substantiation letter to some applicants who identified themselves as minorities on their application. *Id.* at 376-77. The letter asked applicants to provide additional information on "family background (including country of origin), languages spoken, official or governmental status (for Native Americans), and cultural activities and associations." *Id.* at 377. The school argued this information was used to ascertain whether the applicant's race or ethnicity should be considered a plus factor. *Id.* The court held that the letter allowed the school to give preference to those minority students whose race had made a significant impact on their lives, rather than giving preference to minority students based solely on race. *Id.* The court concluded that the letter supported, rather than undermined, the constitutionality of the admissions program. *Id.*

¹¹⁰ The plaintiffs further argued that the school's plan was not narrowly tailored since Asian Americans were given a plus, and the school could have attracted a critical mass of Asian American students (7-9%) without the plus. *Id.* at 378. The court rejected this argument and deferred to the school's interest in achieving diversity among Asian Americans for its preeminent Asian law program. *Id.* The court further noted that *Grutter* did not establish a number or range of percentages that constituted a critical mass, and the plaintiffs did not provide any support that critical mass is achieved at 7-9%. *Id.* at 379. The court concluded the admissions policy was not unconstitutional simply because Asian Americans were given a plus. *Id.*

¹¹¹ *Id.* at 370. Lastly, the plaintiffs argued that the plan was not narrowly tailored since a large number of white applicants were referred to the Admissions Committee rather than being directly admitted by an administrator. *Id.* at 380. In 1994, 22 minority only applications were pulled from the discretionary group that was supposed to be sent to the Admissions Committee. *Id.* While the court said this was suspect on its face, the school provided a reasonable explanation - to make an expedited decision and actively recruit these minority students. *Id.* Notably, the school abandoned this practice after 1994 because it was unsuccessful. *Id.* The court further concluded that it was not surprising that a large number of white applicants were sent to the Admissions Committee rather than being directly admitted since white applicants were approximately 69-74% of total applicants. *Id.* at 381. Moreover, applicants sent to the Admissions Committee were not at a disadvantage since they received an additional holistic review of their application. *Id.* Thus, the law school's system of review did not establish a constitutional violation of equal protection, and the court affirmed the district court's ruling. *Id.* at 382.

law school's admissions program was narrowly tailored to serve the school's compelling interest in attaining a diverse student body.¹¹²

The most problematic cases concerning the "context matters" language are recent cases in the circuit courts that concern affirmative action admission policies in elementary and secondary education.¹¹³ The circuit courts in these cases have used the context matters language of *Grutter* to justify the use of a strict scrutiny test that is distinct from the Supreme Court's test it used for evaluating affirmative action admission policies in higher education. This dichotomy is troublesome because it suggests that courts will further splinter affirmative action challenges, currently segregated by workplace and education into even smaller subsets in the educational arena.

In *Comfort v. Lynn School Committee*, the First Circuit upheld a voluntary race-preference transfer policy for elementary and secondary public schools.¹¹⁴ Parents of Lynn Massachusetts School children challenged the Massachusetts Racial Imbalance Act (RIA), which took race into account when determining a student's ability to transfer out of a neighborhood school.¹¹⁵ Students were permitted to make desegregative transfers;¹¹⁶ students were not permitted to make segregative transfers. If a transfer request was denied, a student had the opportunity to appeal.¹¹⁷ Given its structure, the Lynn School

¹¹² *Id.* "...the program was not rendered violative of the Equal Protection clause because of the school's use of an "ethnicity substantiation letter," *id.* at 377; "awarding preference to Asian applicants did not violate the equal protection clause" *id.* at 379-380; and a "separate track" procedure for "discretionary" applicants did not violate the equal protection clause." *Id.* at 381.

¹¹³ *Comfort v. Lynn Sch. Comm.*, 418 F.3d 1, 6 (1st Cir. 2005); *Parents Involved in Cmty. Schs. v. Seattle Sch. Disc.*, No. 1, 426 F.3d 1162, 1166 (9th Cir. 2005); *Smith v. Univ. of Wash.*, 392 F.3d 367, 371 (9th Cir. 2004).

¹¹⁴ *Comfort*, 418 F.3d at 6.

¹¹⁵ *Id.* at 7.

¹¹⁶ *Id.* at 8. Desegregative transfers allow for a white student to transfer out of a racially isolated school and into a racially imbalanced school or for a nonwhite student to transfer out of a racially imbalanced school and into a racially isolated school. *Id.*

¹¹⁷ *Id.* Successful appeals often involve medical concerns, safety issues, and the prevention of siblings in separate schools. *Id.* Approximately half of all appeals are granted. *Id.*

District's implementation of the RIA had the possibility of resulting in the unequal treatment of students based solely on race.¹¹⁸

In challenging the RIA, plaintiff's argued that the *Grutter* definition of a compelling governmental interest was inapplicable since the *Grutter* Court considered diversity in the context of higher education, which supported a compelling governmental interest in "viewpoint diversity."¹¹⁹ The benefits of viewpoint diversity, plaintiff's argued, did not flow to racial diversity in the context of elementary and secondary education.¹²⁰ The court rejected this argument, noting that there is no basis for concluding the benefits of racial diversity are limited to viewpoint diversity or that these benefits are stronger in higher education.¹²¹ The differences do not negate a compelling government interest; rather, they are the "logical result of context."¹²² Using *Grutter* as an analytical framework, the court upheld the Lynn plan.¹²³

In his concurring opinion, Judge Boudin noted that the Lynn Plan was substantially different from almost anything that the Supreme Court has previously addressed and therefore, the context was different than that of the *Grutter* and *Gratz* decisions. The Lynn Plan was adopted to promote student safety and attendance, where

¹¹⁸ *Id.* In the following example, a white student and an African-American student are assigned to the same "racially isolated" neighborhood school. *Id.* If both students request a transfer to a racially imbalanced school, the white student will be allowed to transfer, and the African-American student will not be allowed to transfer. *Id.*

¹¹⁹ *Id.* at 16. See *supra* note ____.

¹²⁰ *Id.* at 15 (citing *McFarland v. Jefferson County Pub. Schs.*, 330 F. Supp. 2d 834, 852-53 (W.D. Ky. 2004)).

¹²¹ See *Comfort*, 418 F.3d at 15.

¹²² *Id.* at 16. "But it is natural that safety and attendance issues will loom larger in elementary and secondary schools than in graduate schools. Conversely, lively classroom discussion is a more central form of learning in law schools (which prefer the Socratic method) than in a K-12 setting. These differences do not negate a compelling interest in racial diversity in a K-12 setting. Instead, they are the logical result of context." *Id.*

¹²³ *Id.* at 22. Applying the strict scrutiny test, the court found a compelling government interest in the educational benefits of a diverse student body and that the program was narrowly tailored because it did not pursue a quota, did not "unduly harm members of any racial group," and monitors demographics for diversity in order to uphold the durational requirement mandated by *Grutter*. *Id.*

as the graduate school programs were adopted to promote “viewpoint diversity.”¹²⁴ “Where the outcome in the Supreme Court is uncertain and past pronouncements were made in contexts different than the [context] now presented,” he wrote, “the appellate court must exercise its own judgment on whether the local plan is constitutionally forbidden.”¹²⁵ Because the Court had not yet considered a constitutional challenge to a voluntary race-preference transfer policy for elementary and secondary schools, Judge Boudin looked to Grutter and Gratz to “provide some guidance for our narrow tailoring inquiry into the use of race to obtain the educational benefits of diversity”¹²⁶ agreeing with the majority that the plan was narrowly tailored.¹²⁷

In 2004, parents¹²⁸ of students enrolled in the Jefferson County Public Schools System (JCPS) in Jefferson County, Kentucky challenged the 2001 JCPS school assignment plan (Jefferson County BOE plan) as violative of the Equal Protection Clause.¹²⁹ In essence, the plan allowed students to choose between residential based schools (“resides schools”),¹³⁰ traditional magnet schools,¹³¹ and non-traditional magnet

¹²⁴ See *id.* at 16-18.

¹²⁵ *Id.* at 28.

¹²⁶ *Id.* at 17.

¹²⁷ *Id.* at 18. The Judge cited the plurality opinion of *Paradise*, where the requirements of narrow tailoring included requiring “...the proponent to show that a plan or practice is (i) necessary to the declared purpose, (ii) proportional to the declared purpose, and (iii) not more burdensome than necessary on third parties.” *Id.* at 16 (citing *United States v. Paradise*, 480 U.S. 149, 171 (1987)).

¹²⁸ Plaintiff David McFarland filed on behalf on his two sons, Stephen and Daniel; both were denied entry to traditional schools. *McFarland v. Jefferson County Pub. Schs.*, 330 F. Supp. 2d 834, 838 n. 3 (W.D. Ky. 2004). Plaintiff Ronald Pittenger filed on behalf on his son Brandon, who was denied entry to a traditional school. *Id.* Plaintiff Anthony Underwood filed on behalf of his son Kenneth Maxwell Aubrey, who was denied entry to a traditional school. *Id.* Plaintiff Crystal Meredith filed on behalf of her son Joshua McDonald, who was unable to enroll in his resides school because it was filled to capacity; he was assigned to Young school, and applied for a transfer to Bloom school that was not in his assigned cluster. *Id.* He was denied admittance because it would have had an adverse effect on the racial composition of the original school he was attending. *Id.* The Court held that the traditional school selection process was unconstitutional, *id.* at 838, but because the court held that none of the Plaintiffs who were denied entry to the traditional schools had proven they were injured by the race selection process, it was only Meredith, whose son was not affected by the traditional schools, who appealed. *McFarland ex rel. McFarland v. Jefferson County Pub. Schs.*, 416 F.3d 513, 514 (6th Cir. 2005).

¹²⁹ *McFarland*, 330 F.Supp.2d at 836.

¹³⁰ Geographic boundaries have significant impact on determining where most students will be assigned to school. *Id.* at 842. Except for Central, duPont Manual and YPAS, Male and Butler high schools, the Brown

schools.¹³² JCPS originally adopted the plan in 1973 in response to the Sixth Circuit mandate that they adopt a school board integration plan.¹³³ The plan continued in many incarnations until June 2000 when the United States District Court for the Western District of Kentucky dissolved the desegregation decree.¹³⁴ As part of the court's ruling, JCPS was ordered to stop using racial quotas and to redesign admission to its magnet schools prior to commencement of the 2002-2003 school year.¹³⁵ In response to the court's order, the school board ended its use of racial quotas¹³⁶ and after considering public feedback the board adopted the 2001 Plan.¹³⁷

Although the plan has many aspects, the part of the plan that is the subject of the Equal Protection challenge concerns selection for traditional schools, which admitted students by application.¹³⁸ The district initially selected students for kindergarten spots

School, Brandeis Elementary, and the traditional programs at Foster and Maupin, each JCPS school has a "resides area", and, based on the residence of their parent or guardian, each student is assigned to a "resides school". *Id.* The non-magnet elementary schools are grouped into twelve clusters. *Id.* Each student has a designated "cluster resides schools" which includes the resides school for that students. *Id.* The clusters were designed so that they would produce populations within the racial guidelines. *Id.* There are no clusters for the non-magnet middle and high schools and each has its own resides area. *Id.* at 843. The only selection criteria for any student's admission to his or her resides school or a school within the cluster are age, completion of the previous grade, and residence. *Id.*

¹³¹ There are nine traditional magnet schools. *Id.* These schools offer the regular curriculum in a particular environment and are not considered resides schools, even though students may only apply to most of the schools based on place of residence, because all students must apply to gain admission. *Id.*

¹³² There are four non-traditional magnet schools. *Id.* They do not have a resides area, so any student is eligible to apply. *Id.* These schools offer specialized programs and curricula. *Id.* There are also eighteen magnet programs (small specialized programs within regular schools), as well as optional programs in twenty-two schools, (small programs with unique attributes). *Id.* Resides area is not taken into account for these two programs. *Id.* Additionally, there are magnet career academies at the high school level which offer programs concentrated in a technical career. *Id.* Students must apply to the magnet program at these high schools. Thirteen are resides schools and one is not. *Id.*

¹³³ *Newburg Area Council, Inc. v. Bd. of Educ. of Jefferson County*, 489 F.2d 925, 932 (6th Cir. 1973).

¹³⁴ *Hampton v. Jefferson County Bd. Of Educ.*, 102 F. Supp.2d 358, 377-81 (W.D. Ky. 2000).

¹³⁵ *McFarland*, 330 F.Supp.2d at 841.

¹³⁶ The Board stopped using quotas at Central High School and at three magnet schools, including DuPont Manual High School (which included the Youth Performing Arts School), the Brown School, and Brandeis Elementary. *Id.* The Board concluded that the Court's order did not include magnet traditional schools. *Id.*

¹³⁷ *Id.* The stated missions of the 2001 plan is to provide "substantial uniform educational resources to all students' and to teach basic skills and critical thinking 'in a racially integrated environment.'" *Id.* at 840.

¹³⁸ Traditional schools offer the same comprehensive curriculum as other non-magnet schools but they emphasize "basic skills in a highly structured educational environment" and demand strong parent involvement. *Id.* at 846. The traditional program is offered at certain JCPS elementary, middle and high schools.

in the traditional program based on place of residence and random draw lists. The Board composed the random draw list of random applicants to the traditional school, who are randomly sorted into four lists at each grade level, Black Male, Black Female, White Male and White Female.¹³⁹ The Office of Demographics reviews the principal's selection to guarantee the school meets the racial guidelines and gives final approval.¹⁴⁰

At the outset, the district court made clear that the 2001 plan was subject to the strict scrutiny standard of review.¹⁴¹ The court recognized that context matters in deciding whether JCPS identified a compelling governmental interest. And while the context of public elementary and secondary education differs from that of higher education, the court concluded that “the educational benefits of a diverse student body” remain the same.¹⁴² For this reason, the Court measured the program against the analytical framework annunciated in *Grutter* and *Gratz*.¹⁴³ In evaluating the JCPS program, however, the Court observed that deference must be granted to local school

Id. at 841. Under the complicated plan, students have the potential to choose the school they will attend at the elementary, middle and high school level. JCPS schools are divided into traditional schools, magnet schools, non-traditional magnet schools and option schools. At the elementary school and middle school level, students are assigned a choice of schools within their “resides area,” which is the geographic area in which the student’s parent(s) or guardian lives. Each student may choose from one of several “resides schools” within his or her “resides area.” Students have the choice of selecting a traditional or non-traditional magnet school. Students who do not choose to select a school are assigned to the “resides school” in the student’s resides area. Administrators, in consultation with school principals jointly determine school assignments based on student choices, available space and racial guidelines. *Id.* at 842-43.

¹³⁹ Once students are selected for the traditional program in kindergarten, they are guaranteed a place in the traditional school program for each continuing year, should they choose to elect to remain in the program. *Id.* at 846. These students become the “pipeline” for the program. *Id.* The pipeline increases each year after kindergarten – through the first year of High School. *Id.* at 846-47. After the schools fill their slots from students in the pipeline, the principle has discretion to draw candidates from the different random draw lists to fill the additional available slots. *Id.* at 847. The principal makes his or her selection in a manner that assures the school will stay within the racial guidelines for the entire school population. *Id.*

¹⁴⁰ *Id.* at 847. If students are not selected for a traditional school in one year, they may reapply to try to join the pipeline for the following year. *Id.*

¹⁴¹ *Id.* at 848. The court wrote, however, that this case was distinguishable from *Grutter* and *Gratz*, but applied strict scrutiny none-the less. *Id.* at 848.

¹⁴² *Id.* at 849 (citing *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003). “The historical importance of the deference accorded to local school boards goes to the heart of our democratic form of government. It is conceptually different, though more accepted than the defense discussed in *Grutter* and *Bakke*.” *McFarland*, 330 F.Supp.2d at 850.

¹⁴³ *See, id.* at 856, 858.

boards, which act in a democratic way to preserve the essence of primary school education, best executed at the local level.¹⁴⁴ The Court ultimately concluded that the 2001 Plan for assigning students to traditional schools failed. The plan was not narrowly tailored because “(1) the assignment process put Black and White applicants on separate assignment tracks and (2) the use of the separate lists appeared completely unnecessary to accomplish the Board’s goals.”¹⁴⁵

Ultimately, the court held that if JCPS struck down the portion of the plan that divided applicants to traditional schools by race, it could maintain the rest of the plan. Furthermore, the court found that none of the children whose parents challenged the 2001 Plan were entitled to relief since “equity does not require the Plaintiff’s children be admitted to the school of their choice in the upcoming year, and like all other JCPS students, [plaintiff’s children] may reapply for admission to a traditional school for the [upcoming academic year.]”¹⁴⁶ Plaintiff Meredith, on behalf of her daughter Crystal, appealed to the Sixth Circuit, which, per curium, held that the “well reasoned” district court opinion should stand.¹⁴⁷

In *Parents Involved in Community Schools (PICS) v. Seattle School District No. 1*,¹⁴⁸ PICS challenged a city program aimed at achieving diversity in its 10 public high

¹⁴⁴ *Id.* at 851.

¹⁴⁵ *Id.* at 852, “The process is more like the program that was objectionable in affirmative action admission programs of *Gratz* and *Bakke* than like the use of race as a tipping factor, which the court found permissible in *Grutter*.” *Id.*

¹⁴⁶ *Id.* at 864. Plaintiff McFarland’s children were enrolled in a traditional school at the time of the ruling, making their request for injunctive relief moot. *Id.* Plaintiffs Pittenger and Underwood have not proved that their children were denied admission to a traditional school based solely on their race, nor did their children reapply to the traditional program. *Id.* at 864..

¹⁴⁷ *McFarland ex rel. McFarland v. Jefferson County Pub. Schs.*, 416 F.3d 513, 513 (6th Cir. 2005).

¹⁴⁸ *Parents Involved in Cmty. Schs. v. Seattle Sch. Disc. No. 1*, 137 F. Supp. 2d 1224 (W.D. Wash. 2001), *rev’d*, 285 F.3d 1236 (9th Cir. 2002), *injunction granted*, No. 01-35450, 2002 U.S. App. LEXIS 7678, at *1 (9th Cir. Apr. 26, 2002), *reh’g granted*, 294 F.3d 1084 (9th Cir. 2002), *certifying questions to Washington Supreme Court*, 294 F.3d 1085 (9th Cir. 2002), *certified questions answered*, 72 P.3d 151 (Wash. 2003), *rev’d*, 377 F.3d 949 (9th Cir. 2004), *reh’g granted en banc*, 395 F.3d 1168 (9th Cir. 2005), *aff’d*, 426 F.3d 1162 (9th Cir. 2005), *cert. granted*, No. 05-908, 2006

schools. The City of Seattle School District (the District) maintains a voluntary open choice policy for its 10 high schools. In the late 1950s and early 1960s, high school assignment was based solely on the students' residential neighborhood. Assigning students based on neighborhood resulted in de facto segregation in the schools, yielding a disproportionate mix among African American, Asian American, Latino and Native American students.¹⁴⁹

In an effort to diversify its high schools, the District allocated the available spaces in its high schools by choice.¹⁵⁰ A majority of students choose the same five schools and when a school is oversubscribed, the District chooses who shall attend that school based on a series of four tiebreakers.¹⁵¹ The first tiebreaker is the sibling tiebreaker and gives a ninth grader priority to enter a school if he or she has a sibling at that school.¹⁵² The second tiebreaker, and the one over which PICS brought suit, is considered the race-preference tiebreaker. The race-preference tiebreaker allows the District to select students whose race will mitigate the imbalance of the racial makeup of the selected school.¹⁵³

U.S. LEXIS 4349, at *1 (June 5, 2006).

¹⁴⁹ See *Parents Involved in Cmty. Schs.*, 426 F.3d at 1166. Approximately 70 percent of Seattle residents are white, and approximately 30 percent are nonwhite. *Id.* Seattle's public school system students are approximately 40 percent white and 60 percent nonwhite. *Id.* The majority of Seattle's white public school students live north of downtown. *Id.* The majority of Seattle's nonwhite public school students live south of downtown, including approximately 84 percent of all African American students, 74 percent of all Asian American students, 65 percent of all Latino students, and 51 percent of all Native American students. *Id.*

¹⁵⁰ *Id.* at 1168. A majority of the city's nonwhite students live south of downtown, and as a result, the schools located in those neighborhoods were disproportionately segregated. See *Id.* at 1166. The district responded to this because of an historic struggle with racial isolation among its individual neighborhoods. *Id.* Students list the high school they would like to attend in order of preference. *Parents Involved in Cmty. Schs.*, 137 F. Supp. 2d. at 1226. Approximately 82 percent of students entering high school in 2000 selected one of five schools as their first choice. *Id.*

¹⁵¹ *Parents Involved in Cmty. Schs.*, 426 F.3d at 1169.

¹⁵² *Id.* Fifteen to 20 percent of admissions to the ninth grade class are a result of the sibling tiebreaker. *Id.*

¹⁵³ *Parents Involved in Cmty. Schs.*, 137 F. Supp. 2d. at 1226. A school is out of balance if it deviates by more than 15% from the overall racial breakdown of the population of students attending Seattle's public schools (40% white/60% nonwhite). *Id.* If not for the tiebreaker preference, the school district would be de facto segregated due to residential patterns. See *id.* The district estimated that without the racial tiebreaker preference, the

PICS brought both a state law action and a federal law action in Federal District Court claiming that the racial tiebreaker preference violated the Washington Civil Rights Act, called Initiative 200, which provides that the state government, including school districts, may not discriminate against, or grant preferential treatment to any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of ... public education.¹⁵⁴ PICS further claimed that the race-preference tiebreaker violated the Equal Protection Clause of the Constitution and Title VI of the federal Civil Rights Act of 1964.¹⁵⁵

nonwhite student populations of the 2000-2001 ninth grade class would have been 79.2 percent at Franklin, 30.5 percent at Hale, 33 percent at Ballard, and 41.1 percent at Roosevelt. *Id.* Utilizing the racial tiebreaker preference, the nonwhite student populations for the 2000-2001 ninth grade class were 59.5 percent at Franklin, 40.6 percent at Hale, 54.2 percent at Ballard, and 55.3 percent at Roosevelt. *Id.* Approximately 3,000 students entered Seattle high schools in the 2000-2001 school year, and approximately 300 were assigned to an oversubscribed high school as a result of the racial tiebreaker preference. *Parents Involved in Cmty. Schs.*, 426 F.3d at 1170. In the third tiebreaker, distance of the student's home to the school is measured, distance is calculated within 1/100 of a mile, and the closest students are admitted first. *Id.* at 1170. The distance tiebreaker accounts for approximately 70 to 75 percent of ninth grade admissions. *Id.* The fourth tiebreaker utilizes a lottery system to allocate the remaining seats. *Id.* The lottery tiebreaker is "virtually never used" since the distance tiebreaker assigns nearly all of the students. *Id.*

¹⁵⁴ *Id.* at 1227. In 1998, Washington voters passed Initiative 200, the Washington Civil Rights Act. *Id.* Initiative 200 is codified at Washington Revised Code Annotated section 49.60.400. *Id.* at 1226. Section 49.60.400 declares that "the state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." WASH. REV. CODE ANN. § 49.60.400 (West 2006).

¹⁵⁵ *Parents Involved in Cmty. Schs.*, 426 F.3d at 1226.

The District Court found in favor of the District on both claims.¹⁵⁶ PICS appealed the District Court's decision to grant summary judgment, and the Ninth Circuit invalidated the racial tiebreaker preference as violative of Initiative 200.¹⁵⁷ Following a subsequent tour through state and federal courts,¹⁵⁸ the Court of Appeals considered whether the District's use of the race-preference tiebreaker in the open choice, non-competitive high school assignment plan violated the Equal Protection Clause of the Constitution.¹⁵⁹

Citing *Johnson*, *Grutter* and *Adarand*, Judge Fisher, writing for the Majority,¹⁶⁰ concluded that it would uphold the policy if the District could prove that there was a

¹⁵⁶ As to the State claim, the court found "a duty to construe Initiative 200, if possible, in a way that makes the initiative consistent with state and federal constitutions." *Id.* The authority to use race to provide a "general and uniform system of public schools," interpreted by the courts to mean racially integrated schools, is an authority granted by the Washington Constitution. *Id.* at 1228. Application of Initiative 200 to the tiebreaker preference, therefore, would impermissibly effect an amendment to the state constitution. *Id.* at 1227. The state claim was a matter of first impression since Initiative 200 had not yet been construed by the Washington Supreme Court. *Id.* The Court had to predict how the state's highest court would apply Initiative 200. *Id.* (citing *Comm'r v. Estate of Bosch*, 387 U.S. 456, 465 (1967)). The Court evaluated the federal claim under the strict scrutiny test. *Parents Involved in Cmty. Schs.*, 426 F.3d at 1232. The Court found as a matter of law a compelling governmental interest in "achieving racial diversity and mitigating the effects of de facto residential segregation..." *Id.* at 1235. The Court further held that the racial tiebreaker preference was narrowly tailored. *See id.* at 1239. The race-preference tiebreaker only applies to schools deemed out of balance. *Id.* at 1238. When the entering class of the school is balanced, the District abandons the use of race assignments to that school and will not use race to assign the remaining spaces in the school. *Id.* Moreover, the plan is sound since it utilizes a 60/40 plan and allows a 15% deviation from those numbers. *Id.* The Court concluded that the racial tiebreaker passed strict scrutiny. *See id.* at 1240.

¹⁵⁷ *Parents Involved in Cmty. Schs. v. Seattle Sch. Disc. No. 1*, 285 F.3d 1236 (9th Cir. 2002). Law codified at WASH. REV. CODE ANN. § 49.60.400 (West 2006).

¹⁵⁸ Following the Court's decision to uphold the district plan, *Parents Involved in Community Schools* appealed. *Parents Involved in Cmty. Schs.*, 285 F.3d at 1243. The Court granted an injunction, and the District was prohibited from using the racial tiebreaker in making high school assignments. *Id.* at 1256. Applying state law, the Court found the tiebreaker violated Washington law. *Id.* at 1253 (citing § 49.60.400). Following reversal, withdrawal of opinion on grant of rehearing, *Parents Involved in Cmty. Schs. v. Seattle Sch. Disc. No. 1*, 294 F.3d 1084 (9th Cir. 2002), and certification of question to the Supreme Court of Washington, the Supreme Court of Washington issued an answer to the certified question. *Parents Involved in Cmty. Schs. v. Seattle Sch. Disc. No. 1*, 72 P.3d 151 (Wash. 2003). The Court of Appeals reversed and remanded with instructions to issue an injunction. *Parents Involved in Cmty. Schs. v. Seattle Sch. Disc. No. 1*, 377 F.3d 949, 989 (9th Cir. 2004).

¹⁵⁹ *Parents Involved in Cmty. Schs.*, 426 F.3d at 1166.

¹⁶⁰ Chief Judge Schroeder and Judges Pregerson, Hawkins, W. Fletcher, and Rawlinson joined the majority opinion. *Id.* at 1166. Judge Kozinski concurred in the result; however, Judge Kozinski opined that the issue before the Court was "fundamentally different from almost anything that the Supreme Court has previously addressed." *Id.* at 1193 (Kozinski, J., concurring). *See infra* note 50 Judge Bea, joined by Judges Kleinfeld, Tallman, and Callahan, dissented. *Id.* at 1196 (Bea, J., dissenting).

compelling governmental interest in adopting the policy and that the policy was narrowly tailored to meet that interest.¹⁶¹ The Majority noted early in the decision that “context matters”¹⁶² and therefore, defined both the compelling governmental interest test and the narrowly tailored test in a manner consistent with the education-based test outlined by the Supreme Court in *Grutter* and *Gratz*.¹⁶³ However, the Court also required the District to prove that the policy seeks to avoid the harms that result from racially concentrated schools.¹⁶⁴ The Court, however employed the five-prong “education based” narrowly tailored test as outlined in *Grutter* and *Gratz*.¹⁶⁵

In evaluating the compelling governmental interest, the Court recognized the affirmative educational and societal benefits that flow from racial diversity.¹⁶⁶ Judge Fisher wrote that these interests are similar to the interests set forth in *Grutter*, yet the contextual differences are significant. *Grutter* noted the importance in higher education to prepare students for “work and citizenship,”¹⁶⁷ and Judge Fisher opined that “public secondary schools have an equal if not more important role in this preparation.”¹⁶⁸ Nevertheless, the Court still found a compelling governmental interest in the District’s

¹⁶¹ *Id.* at 1166.

¹⁶² *Id.* at 1173 (quoting *Grutter v. Bollinger*, 539 U.S. 306, 327 (2003) (“[c]ontext matters when reviewing race-preference governmental action under the Equal Protection Clause.”)).

¹⁶³ *Id.* at 1180.

¹⁶⁴ *Id.* at 1174.

¹⁶⁵ *Id.* at 1174. The Court would only uphold the policy if the racial tiebreaker met the following conditions: (1) an individualized consideration of applicants, (2) the absence of quotas, (3) serious, good faith consideration of race-neutral alternatives to the affirmative action program, (4) no member of any racial group was unduly harmed, and (5) the program had a sunset provision or some other end point. *Id.*

¹⁶⁶ *Id.* at 1175. At trial, expert testimony established the following benefits: “improved critical thinking skills,” “socialization and citizenship advantages of racially diverse schools,” and opportunities to network in areas of higher education and employment. *Id.*

¹⁶⁷ *Id.* (citing *Grutter v. Bollinger*, 539 U.S. 306, 331 (2003)).

¹⁶⁸ *Id.*

goals.¹⁶⁹ The Court further found that the Program's use of a raced based tie-breaker was narrowly tailored and therefore was constitutionally permissible.¹⁷⁰

Judge Kozinski wrote a concurring opinion that challenged the wisdom of applying the Supreme Court's *Grutter/Gratz* strict scrutiny test to a case concerning a race-preference policy aimed at achieving diversity in secondary school.¹⁷¹ He analogized the Majority's application of the *Grutter/Gratz* strict scrutiny test to pounding square pegs into round holes.¹⁷² In Judge Kozinski's opinion, context clearly matters, and there are meaningful differences when the government seeks racial classifications to oppress blacks or other minorities¹⁷³ as opposed to teaching children how to deal

¹⁶⁹ *Id.* The Court also found a compelling government interest in avoiding the harms that result from racially concentrated schools. *Id.* at 1180. In furtherance of that interest, the District is entitled to pursue the benefits of racial diversity and avoid the harms of segregation in the absence of a court order deeming it in violation of the Constitution. *Id.* at 1179. This entitlement is derived from *Swann v. Charlotte-Mecklenburg Board of Education*, where the court referenced the voluntary integration of schools as "sound educational policy within the discretion of local school officials." *Id.* (quoting *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971)).

¹⁷⁰ The Court first considered the individualized evaluation of each applicant. *Parents Involved in Cmty. Schs.*, 426 F.3d at 1180. The Court found that this prong of the test was not totally relevant in the current context since there was no competition issue, unlike *Grutter* and *Gratz*. *See id.* More importantly, since race itself is the relevant consideration when curing de facto segregation, the tiebreaker preference "must necessarily focus on the race of its students." *Id.* at 1183 (citing *Comfort v. Lynn Sch.Comm.*, 418 F.3d 1, 18 (1st Cir. 2005)). For these reasons, the district need not conduct an individualized consideration of each student since the plan is otherwise narrowly tailored. *See Parents Involved in Cmty.Schs.*, 426 F.3d at 1183.

The Court then turned to the absence of quotas and found that the 15% plus/minus variance is not a quota because it does not reserve a fixed number of spots for students based on race. *Id.* at 1184. The District seeks to enroll a critical mass of white/nonwhite students in its oversubscribed schools to reach its compelling interests. *Id.* The 15% plus/minus variance is a goal rather than a rigid ratio. *See id.* at 1186. The Court found that the tiebreaker policy was necessary and the most race neutral alternative since the tiebreaker preference allows the realization of the compelling interests and discourages a return to enrollment patterns based on racially segregated housing patterns. *See id.* at 1187. Here, as in *Grutter*, the Court deferred to the District's judgment in evaluating race neutral alternatives. *See id.* at 1188.

Concerning the fourth prong, the Court found that the policy did not create undue harm because "(1) the District is entitled to assign all students to any of its schools, (2) no student is entitled to attend any specific school and (3) the tiebreaker does not uniformly benefit any race or group of individuals to the detriment of another..." *Id.* at 1192. Finally, the Court had no issue with the sunset provision that Justice O'Connor, writing in *Grutter*, found essential to the viability of any race-preference policy. *See id.* In this instance, the District reviews the plan annually and is responsive to choice patterns and constituents' concerns. *Id.* The Court shares O'Connor's hope in *Grutter* that in 25 years, racial preferences will no longer be necessary. *Id.*

¹⁷¹ *See id.* at 1193 (Kozinski, J., concurring).

¹⁷² *Id.* (Kozinski, J., concurring).

¹⁷³ *Id.* (Kozinski, J., concurring).

respectfully and collegially with their peers during their formative years.¹⁷⁴ Further, he wrote, the Supreme Court's strict scrutiny tests have been more reactive than proactive, changing definitional course in response to the context of each issue presented.¹⁷⁵ For these reason, the plan should be evaluated under a rational basis standard of review. Specifically, he would employ a "robust and realistic rational basis review...where courts consider the actual reasons for the plan in light of the real-world circumstances giving rise to it."¹⁷⁶

Justice Kozinski concluded that the Seattle Plan is far from the original evils at which the Fourteenth Amendment was addressed.¹⁷⁷ Rather, it gives "the American Melting Pot a healthy stir" without benefiting any group.¹⁷⁸ For this reason, Judge Kozinski would leave the decision to those in charge, namely local officials, and therefore, affirm the decision of the district court.

Judge Bea, joined by three other judges, wrote a strong dissent.¹⁷⁹ Judge Bea rejected the *Grutter* court's definition of a compelling governmental interest, writing that

¹⁷⁴ *Id.* at 1194 (Kozinski, J., concurring).

¹⁷⁵ *See id.* at 1195 (Kozinski, J., concurring). Comparing this case to past Supreme Court decisions, Judge Kozinski noted that "the Seattle plan carries none of the baggage the Supreme Court has found objectionable in cases where it has applied strict scrutiny." *Id.* at 1194 (Kozinski, J., concurring) "[The] plan at issue . . . is fundamentally different from almost anything that the Supreme Court has previously addressed. It is not, like old-fashioned racial discrimination laws, aimed at oppressing blacks..." *Id.* at 1193 (Kozinski, J., concurring) (quoting *Comfort v. Lynn School Committee*, 418 F.3d 1, 27 (1st Cir. 2005) (Boudin, C.J., concurring)). Unlike modern affirmative action, the plan does not "give one racial group an edge over another." *Parents Involved in Cmty. Schs.*, 426 F.3d at 1193 (Kozinski, J., concurring) (quoting *Comfort*, 418 F.3d at 27 (Boudin, C.J., concurring)). "The plan does not segregate persons by race." *Parents Involved in Cmty. Schs.*, 426 F.3d at 1193.(Kozinski, J., concurring) (quoting *Comfort*, 418 F.3d at 27 (Boudin, C.J., concurring)). The plan does not involve racial quotas. *Parents Involved in Cmty. Schs.*, 426 F.3d at 1193 (quoting *Comfort*, 418 F.3d at 27 (Boudin, C.J., concurring)). "These are meaningful differences." *Parents Involved in Cmty. Schs.*, 426 F.3d at 1193.

¹⁷⁶ *Id.* at 1194 (citation omitted); *see City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 446 (1985) (holding that the "[S]tate may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational" (citing *Zobel v. Williams*, 457 U.S. 55, 61-63 (1982); *U.S. Dept. of Agric. v. Moreno*, 413 U.S. 528, 535 (1973)).

¹⁷⁷ *Parents Involved in Cmty. Schs.*, 426 F.3d at 1195 (quoting *Comfort*, 418 F.3d at 29 (Boudin, C.J., concurring)).

¹⁷⁸ *Parents Involved in Cmty. Schs.*, 426 F.3d at 1196.

¹⁷⁹ *See id.* at 1196-1222 (Bea, J., dissenting).

the case is not about the right to be educated in a racially diverse academic setting.¹⁸⁰ Rather, according to Judge Bea, the case issue was whether the government can impose on students the decision to be educated in a diverse setting.¹⁸¹ According to Judge Bea, the District's plan was nothing more than racial balancing, based on quotas and, must, therefore be struck down.¹⁸²

Judge Bea essentially accused the majority of gerrymandering the strict scrutiny test to fit its desired goal.¹⁸³ The Majority's reliance on *Grutter* was inappropriate since in that case, the court recognized that there were a host of factors, race being one of them, to which a candidate for admission in the law school can bring to a classroom.¹⁸⁴ In contrast, the Seattle plan merely focused on race, and focused on such in a large context, not just for an individual.¹⁸⁵ Ultimately, Judge Bea agreed with Judge Kozinski that context matters and wrote that the *Grutter* case was limited in its precedential weight to

¹⁸⁰ *Id.* 1196 (Bea, J., dissenting).

At the outset, it is important to note what this case is *not* about. The idea that children will gain social, civic, and perhaps educational skills by attending schools with a proportion of students of other ethnicities and races, which proportion reflects the world in which they will move, is a notion grounded in common sense. It may be generally, if not universally, accepted. But that is not the issue here.

Id. at 1196 (Bea, J., dissenting).

¹⁸¹ *Id.* at 1196 (Bea, J., dissenting).

¹⁸² *Id.* at 1202 (Bea, J., dissenting). Judge Bea opined that the *Grutter* diversity interest pursued "genuine diversity" in the student body, where race was considered as a single plus factor among many factors. *Id.* (Bea, J., dissenting). Here, the District pursues a diversity interest which considers solely racial diversity, specifically a predefined grouping of races in the schools. *Id.* (Bea, J., dissenting). The District's interest is not a valid compelling interest and violates equal protection. *Id.* (Bea, J., dissenting).

¹⁸³ *Id.* at 1198 (Bea, J., dissenting). Judge Bea held that the majority and concurring opinions tried to distinguish past Supreme Court cases by focusing on the effects of discrimination rather than the fact of discrimination. *Id.* (Bea, J., dissenting). This allowed the majority and concurring opinions to create two categories distinguishing the Seattle plan: "(1) the effects of other race discrimination plans were much *worse* than Seattle's and (2) the effects were visited on *certain races*." *Id.* (Bea, J., dissenting). Judge Bea concluded, however, that these differences are irrelevant because "there is no de minimis exception to the Equal Protection Clause." *Id.* (Bea, J., dissenting) (citing *Monterey Mechanical Co. v. Wilson*, 125 F.3d 702, 712 (9th Cir. 1997)). Additionally, equal protection protects the rights of individuals, not the rights of certain races or groups. *Id.* (Bea, J., dissenting). Judge Bea further wrote that not calling the Seattle's plan a quota does not make it something other than a quota – the quota is the percentage by which the particular school's racial imbalance differs from the District's target. *Id.* "A rose by any other name...etc." *Id.*

¹⁸⁴ *Id.* at 1202.

¹⁸⁵ *Id.*

decisions concerning challenges to affirmative action admission programs in higher education.¹⁸⁶

III. Creating a New Compelling Governmental Interest in Order to Uphold Race Preference Programs in Grades K-12

Race-preference programs at the K-12 level are essential to ensuring fairness and equality in education as well as the spirit and the goals of the civil rights movements.¹⁸⁷ Legally, however, their constitutional durability is questionable. As a general rule, race preference policies only survive if the defending party can show the policy is necessary to remedy present effects of past discrimination or if it has adopted a mission statement or other policy statement that explains that the purpose of the program is to achieve “viewpoint diversity.”¹⁸⁸ Today, few school districts suffer from the effects of past discrimination.¹⁸⁹ Further, many believe that the educational benefits that graduate students derive from viewpoint diversity are not equally valuable to children in grades K-12. Thus, neither of the Court’s two demonstrated compelling governmental interests in supporting race-preference programs exist in either the *Meredith* or the *PICS* case. For this reason, the Court must find a third compelling governmental interest that would

¹⁸⁶ *Id.* at 1207. “The ‘academic freedom’ of a university allows it ‘to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.’” *Id.* (quoting *Regents of the University of California v. Bakke*, 438 U.S. 265, 312 (1978)). High schools do not have these freedoms. *Parents Involved in Cmty. Schs.*, 426 F.3d at 1207. High schools are not permitted to decide who may teach based upon racial grounds. *Id.* (citing *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986)). High schools may not decide who “may be admitted to study.” *Parents Involved in Cmty. Schs.*, 426 F.3d at 1207. When the government provides public education in secondary schools, it “must be made available to all on equal terms.” *Id.* (quoting *Plyer v. Doe*, 457 U.S. 202, 221 (1982)). Additionally, there are no U.S. Supreme Court cases providing high schools with the same “academic freedoms” afforded to universities by the First Amendment. *Parents Involved in Cmty. Schs.*, 426 F.3d at 1207 (quoting *United States v. Fordice*, 505 U.S. 717, 728-29 (1992) (observing that “a state university system is quite different in very relevant respects from primary and secondary schools”)).

¹⁸⁷ See *infra* notes ____

¹⁸⁸ See *supra* notes ____

¹⁸⁹ But see *infra* at note 234.

survive strict scrutiny in order to ensure that the Jefferson County BOE program or Seattle Plan remain constitutionally permissible.

While carving out a new compelling governmental interest is not out of the realm of judicial precedent it is problematic for other reasons.¹⁹⁰ First, it suggests that the court will expand its definition of permissible compelling governmental interests in the interest of ensuring that programs created in response to a particular problem remain viable. Second, it will send a message to the lower courts that result oriented jurisprudence is preferable in the area of affirmative action law, thereby granting lower courts permission to fashion their own definition of what supports a compelling governmental interest.¹⁹¹

Deciding the *Meredith* and *PICS* cases comes during a highly charged period for proponents of affirmative action. Currently, no less than four states have banned race preference in education, including the two states with the highest profile race-preference challenges.¹⁹² In 1996, California adopted Proposition 209 (“Prop 209”), which banned discrimination and preferential treatment in the State’s government and education institutions.¹⁹³ Proponents of race-preference education programs, however, cite

¹⁹⁰ See, *Grutter v. Bollinger*, 539 U.S. 306, 327 (2003)(O’Connor, J)(writing that the context of a particular program should dictate the definition of the strict scrutiny test.)

¹⁹¹ See supra note 126. “where the outcome in the Supreme Court is uncertain and past pronouncements were made in contexts different that the context now presented, the appellate court must exercise its own judgment.” 418 F.3d at 17 (Boudin, J. concurring)

¹⁹² In 2006 Michigan voters passed Proposition 2 banning affirmative action in higher education. California voters passed Proposition 209 in 1996 limiting affirmative action policies in all government agencies, including higher education. Florida also passed a law called “One Florida” limiting anti-affirmative action policies in all state universities. See FLA. ADMIN. CODE ANN. r. 6C-6.001, .002 (2007). Washington State passed Initiative 200 banning affirmative action in 1998. See WASH. REV. CODE ANN § 49.60.400 (LexisNexis 2007). See generally Stuart Silverstein, *Connerly still targets racial preferences; The ex-UC regent, at USC to speak at a forum, says he plans to put bans on affirmative action on ballots in as many as five more states next year*, LA Times, Jan. 17, 2007, B2.

¹⁹³ Proposition 209 (1996), CAL. CONST. art. 1, § 31(a); see also *Coalition for Economic Equality v. Wilson*, 122 F.3d 692 (9th Cir. 1997) (holding that proposition 209 was constitutional in that it did not violation the equal protection clause).

Proposition 209 as evidence of the need for race-preference programs.¹⁹⁴ Failure to use race-preference admissions policies, they argue, results in reduced minority enrollment at elite educational institutions.¹⁹⁵ Their opponents cite several recent studies and various graduate school responses to anti-affirmative action, claiming that despite recent chokeholds on attempts to diversify, schools are creating new, legally sound ways to “socially engineer racial proportionality.”¹⁹⁶

Regardless of which side of the race-preference debate one takes, it is clear that whether it is Justices of the Supreme Court,¹⁹⁷ Presidents of elite academic institutions,¹⁹⁸ or social commentators,¹⁹⁹ there exists a clear belief that the absence of

¹⁹⁴ See Heather MacDonald, *Elites to Anti-Affirmative Action Voters: Drop Dead*, 17 CITY JOURNAL 15, 15-28 (Winter 2007), available at http://www.city-journal.org/html/17_1_prop209.html (claiming that elite California schools are engineering ways to get around affirmative action bans).

¹⁹⁵ See generally Kevin R. Johnson & Angela Onwuachi-Willig, *Cry Me a River: The Limits of “Systematic Analysis of Affirmative Action in American Law Schools,”* 7 AFR.-AM. L. & POL’Y REP. 1 (2005) (criticizing Sander’s article/study as statistically narrow and offering opposing reasons for low minority success rates in law school); Jeffery Rosen, *How I Learned to Love Quotas*, NY TIMES, June 1, 2003, Magazine Ed., p. 54; Marisa Schultz, *Prop 2’s effects; Minority admissions drop slightly at U-M*, OFFICIALS: *It’s too early to blame ban for dip*, DETROIT NEWS, Feb. 17, 2007, 3A (finding that minority enrollment has dropped at U. Mich. after prop. 2 passing); Eleanor Yang Su, *UC’s diversity threatened, educator says; Atkinson promotes affirmative action*, SAN DIEGO UNION-TRIBUNE, Feb. 1, 2007, B3 (former U. of Cal. President warned in a speech that if more states pass anti-affirmative action laws minority enrollment would plummet, citing effects of prop. 209 in California); but see Heather MacDonald, *Elites to Anti-Affirmative Action Voters: Drop Dead*, 17 CITY JOURNAL 15, 15-28 (Winter 2007), available at http://www.city-journal.org/html/17_1_prop209.html (claiming that elite California schools are engineering ways to get around affirmative action bans).

¹⁹⁶ See Richard Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STANFORD LAW REVIEW 367 (2004) (claiming that affirmative action programs in higher education may actually harm minority success rates, rather than help because the programs admit unqualified students); MacDonald, *supra* note 194, at 15; see also Shikha Dalmia, *Blacks and Hispanics Don’t Need Racial Preference Laws: As California shows, minorities get into good schools all the same*, CHICAGO SUN TIMES, Nov. 26, 2006, B2; Rich Lowry, *They Want to Discriminate*, NATIONAL REV. ONLINE, Nov. 3, 2006; see generally Ellis Cose, *The Color of Change; Why are we still debating whether race should be a factor in college admissions?*, NEWSWEEK November 13, 2006, p.52.

¹⁹⁷ See Transcript of Oral Argument at 8, *Meredith v. Jefferson County Bd. of Educ.*, No.05-915, 126 S. Ct. 2351 (June 5, 2006) (comments of Justice Ginsburg (“What’s constitutionally required one day gets constitutionally prohibited the next day. That’s very odd.”)); *id.* at 12 (comments of Justice Souter (“How could the Constitution the day that the decree is removed tell the school board it cannot make efforts any more, it can’t do what its been doing and we’ll send the children back to their black schools and white schools”)).

¹⁹⁸ Responding to the Michigan vote to ban racial preference, Mary Sue Coleman, President of U. of Michigan said, “I am standing here today to tell you that I will not allow this University to go down the Path of Mediocrity.” MacDonald, *supra* note 195, at 29.

¹⁹⁹ See, e.g., Johnson & Onwuachi-Willig, *supra* note __; Charles R. Calleros, *Law, Policy, and Strategies for Affirmative Action in Higher Education*, 43 CAL. W. L. REV. 51 (2006) (providing a guide for university admissions policy and strategy); Leslie Garfield, *The Cost of Good Intentions: Why the Supreme Court’s Decision Upholding*

race-preference programs in academia—at any level—will result in a return to the disproportionately white classrooms of the Fifties and Sixties. Data confirms this concern. A recent study at the Civil Rights Project at Harvard University found that as “desegregation plans have been dismantled across the South, the proportion of black students in majority white schools has decreased by 13 percentage points.”²⁰⁰ Several other studies confirm an increase in residential isolation among racial groups.²⁰¹

The concerns that Justices Ginsburg and Breyer raised that abandoning the race-preference programs that the Jefferson County School Board created in response to a court ordered desegregation plan, might result in a return to segregated schools seem a real possibility.²⁰² To the extent that other Justices agree with them,²⁰³ there is little room under the current law to uphold the race-preference school assignment plans in the *Meredith* and *PICS* cases. Under the current law, since the Jefferson County BOE program has its genesis in a court ordered mandate, it can only be upheld if the court finds that present effects of past discrimination remain in Jefferson County.²⁰⁴ The

Affirmative Action Admission Programs is Detrimental to the Cause, 27 PACE L. REV. 15 (2006); Rosen, *supra* note 195; For an interesting discussion on the compatibility and efficacy of the non-legal social movement and legal movement supporting affirmative action, in the context of the *Grutter* case, see Tomiko Brown-Nagin, *Elites, Social Movements, and the Law: The Case of Affirmative Action*, 105 COLUM. L. REV. 1436 (2005) (reasoning that the affirmative action movement only achieved minimal gains through legal means, as evidenced by the *Grutter* decision).

²⁰⁰ Frankenberg, Erica, et. al., *A Multiracial Society with Segregated Schools Are We Losing the Dream?*, Civil Rights Project at Harvard University (January 2003); see also, Kozol, Jonathan, *Still Separate, Still Unequal: America's Educational Apartheid*, 311 Harper's Magazine 1864 (Sep. 2005).

²⁰¹ See, Traub, James, *Return to Segregation* New York Times Magazine (Dec. 21 2001) reprinted at Race Matters, <http://www.racematters.org/returntosegregation.htm>. (2000 census report confirms that Hispanics and Asians are living in more heavily Hispanic and Asian neighborhoods than they were 10 years ago, while whites and blacks are only slightly more exposed to one another than they were in 1990); *Separate but Unequal: A New Study Documents a Return to Segregation*, 118 Amer. School Bd. J. 10 (2001)

²⁰² See Transcript of Oral Argument at 8, 12, *Meredith v. Jefferson County Bd. of Educ.*, No.05-915, 126 S. Ct. 2351 (June 5, 2006); see also *supra* note 217 and accompanying text (discussing comments at oral argument).

²⁰³ To be fair, at least three justices (Kennedy, Scalia, and Thomas) on the court have voted against affirmative action policies, finding no compelling governmental interest in “viewpoint diversity.” See *Grutter v. Bollinger*, 539 U.S. 306, 346 (2003) (Rehnquist, J., dissenting).

²⁰⁴ See *Parents Involved in Cmty. Schools*, 426 F.3d 1162, 1197 (Bea, J., dissenting) (citing *Freeman v. Pitts*, 503 U.S. 467 (1992)).

recent testimony makes clear that such is not the case.²⁰⁵ Alternatively, given the Court’s contextual approach to race-preference programs, the Court could clearly find that the interest in “viewpoint diversity” supports a compelling governmental interest in the Jefferson County BOE program or in the Seattle Plan, however, there are compelling arguments against merging race-preference policies at the K-12 level with those created for graduate school admissions.²⁰⁶

To be sure, the Court has various options and legal theories at its disposal for reaching conclusions it finds socially correct. Where a program violates an individual’s rights as guaranteed by the Equal Protection Clause, the Court may always find a socially correct interest that overrides the Equal Protection violation.²⁰⁷ The Court, therefore, has the power to identify new evidence which, if presented, would justify a permissible infringement.²⁰⁸ Ideally, however, creating a new compelling governmental interest would be a last resort and the Court should first consider whether it could uphold a challenged race-preference plan under existing identified compelling governmental interests.

A. Evaluating Race-Preference Student Assignment Plans in the context of the Court’s Already Defined Compelling Governmental Interests.

Where the party defending a race-preference plan, created in response to a court ordered desegregation program, can no longer produce evidence of present effects of past

²⁰⁵ See Transcript of Oral Argument at 38, *Meredith v. Jefferson County Bd. of Educ.*, No.05-915, 126 S. Ct. 2351 (June 5, 2006) (comments of Mr. Mellen (“We do not contend . . . that the purpose of the plan is to remediate past discrimination against black students.”)).

²⁰⁶ See *infra* at notes 227-232.

²⁰⁷ See *supra* at notes 44-95.

²⁰⁸ The Court has significant precedent behind it to support any legal reasoning based on shifting societal views. See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973) (finding Texas anti-abortion laws unconstitutional); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (overruling *Plessy v. Ferguson*, 163 U.S. 537 (1896) on segregation); *Lawrence v. Texas*, 539 U.S. 558 (2003) (overruling sodomy in *Bowers v. Hardwick*)

discrimination, the Court must strike the plan down.²⁰⁹ Present effects of past discrimination, sufficient to support a compelling governmental interest, have been established by judicial findings, as evidenced by court ordered consent decrees,²¹⁰ Congressional, State or city council findings²¹¹ or any other substantiated statistics or other evidentiary indicia.²¹² The proof, however, must be specific and narrowly tailored to the remedial program it seeks to remedy.²¹³ Thus, when the City of Richmond provided only a generalized assertion that there had been past discrimination in the entire construction industry, the court found it was too broad to support a compelling governmental interest in requiring prime contractors awarded city construction contracts to subcontract at least 30% of the dollar amount of each contract to one or more “Minority Business Enterprises.”²¹⁴ In *Paradise*, the Court held that a court order was justified by a finding of a compelling governmental interest in a race-preference promotion plan.²¹⁵

²⁰⁹ See *Parents Involved in Cmty. Schools*, 426 F.3d at 1197 (Bea, J., dissenting) (citing *Freeman v. Pitts*, 503 U.S. 467 (1992)).

²¹⁰ See *United States v. Paradise*, 480 U.S. 149, 164 (1987) (consent decrees).

²¹¹ See, e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 484 (1989) (the majority at the Circuit Court level “found that national findings of discrimination in the construction industry, when considered in conjunction with the statistical study concerning the awarding of prime contracts in Richmond, rendered the city council’s conclusion that low minority participation in city contracts was due to past discrimination ‘reasonable.’”). But see *id.* at 504 (“While the States and their subdivisions may take remedial action when they possess evidence that their own spending practices are exacerbating a pattern of prior discrimination, they must identify that discrimination, public or private, with some specificity before they may use race conscious relief. Congress has made national findings that there has been societal discrimination in a host of fields. If all a state or local government need do is find a congressional report on the subject to enact a set-aside program, the constraints of the Equal Protection Clause will, in effect, have been rendered a nullity.”).

²¹² See *J.A. Croson Co.*, 488 U.S. at 501; *Paradise*, 480 U.S. at 172-74.

²¹³ See *J.A. Croson Co.*, 488 U.S. at 493 (“The test also ensures that the means chosen “fit” this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.”); *Paradise*, 480 U.S. at 183-84.

²¹⁴ *J.A. Croson Co.*, 488 U.S. at 510-11.

²¹⁵ *Paradise*, 480 U.S. at 185-86. The Supreme Court, Justice Brennan, held that the 50 percent promotion requirement was permissible under the equal protection clause of the Fourteenth Amendment, in that it was justified by compelling governmental interest in eradicating discriminatory exclusion of blacks from positions and was narrowly tailored to serve its purposes. *Id.*

Jefferson County originally adopted its court ordered desegregation plan in response to a Sixth Circuit directive, called the *Haycraft* desegregation decree.²¹⁶ In June 1999, the same court found that the *Haycraft* plan was still legally in effect.²¹⁷ The following year, however, the court dissolved the desegregation decree and ordered JCPS to “cease using racial quotas”²¹⁸ and to redesign and reevaluate admissions procedures at the grammar schools.²¹⁹ The current plan, which is under Court review, is a voluntary extension of the court’s desegregation plan.²²⁰ The Seattle plan, which is the subject of the PICS challenge, was adopted in response to an identified imbalance in school registration and the racial tension that resulted there from.²²¹ In fact, the Seattle Plan, was the first comprehensive desegregation plan adopted voluntarily and without a court order.²²²

In both the *Meredith* and the *PICS* cases, the proponent of the race preference program could not present evidence of present effects of past discrimination. Indeed, the Sixth Circuit has already concluded that there is no longer a need to legally mandate desegregation, or any program that would promote integration in public schools.²²³ And despite Seattle’s long running voluntary desegregation program, the City never has, nor would it be likely to provide credible evidence of present effects of past

²¹⁶ *Newburg Area Council, Inc. v. Bd. of Educ. of Jefferson County*, 489 F.2d 925, 932 (6th Cir. 1973) (Gordon, J.).

²¹⁷ *Hampton v. Jefferson County Bd. of Educ.*, 72 F. Supp. 2d 753, 774 (W.D. Ky. 1999) [hereinafter *Hampton I*].

²¹⁸ *Hampton v. Jefferson County Bd. of Educ.*, 102 F. Supp. 2d 358, 377-81 (W.D. Ky. 2000) [hereinafter *Hampton II*].

²¹⁹ *Id.*

²²⁰ *McFarland v. Jefferson County Bd. of Educ.*, 330 F. Supp. 2d 834, 842 (W.D. Ky. 2004).

²²¹ *Parents Involved in Cmty. Schools v. Seattle School Dist., No. 1*, 426 F.3d 1162, 1167-1169 (9th Cir. 2005).

²²² *Id.* at 1168

²²³ *See McFarland*, 330 F. Supp. 2d at 851-52 (quoting *Deal v. Cincinnati Bd. of Educ.*, 369 F.2d 55, 61 (6th Cir. 1966) (discussing the active role of democratically elected school boards in promoting diversity and the court’s deference toward their decisions))

discrimination.²²⁴ Consequently, a reviewing Court would not be able to find a compelling governmental interest based on an historic need to right past vestiges of segregation.²²⁵ However, as Judge Heyburn recognized in *Meredith*, as many school systems escape the mandate of desegregation decrees, they face a choice of direction.²²⁶ As an analysis of *Meredith* and *PICS* illustrate the constraint of the Equal Protection Laws seem to confine such a direction in light of its treatment of race-preference policies adopted in response to desegregation decrees. The Court's application of the compelling governmental interest prong as it relates to education based race-preference policies, however, seems to offer another means by which programs with their roots in desegregation plans can be upheld.

Even if the Court cannot find present effects of past discrimination, it can find a compelling governmental interest on another identifiable ground. The Court has held that there is a compelling governmental interest in attaining "viewpoint diversity."²²⁷ Justice Powell, writing for a fractionalized majority in *Bakke*, was the first to recognize that there was a compelling governmental interest in hearing different voices in the classroom.²²⁸ In both *Grutter* and *Gratz*, the Court echoed Justice Powell's conclusion.²²⁹ In *Grutter*,

²²⁴ The dissent pointed out that both parties concede that the plan does not attempt to remedy past effects discrimination in the school district or community. *Parents Involved in Cmty. Schools*, 426 F.3d at 1197. At the District Court level, it was established that the Seattle Choice Plan was created for the sole purpose of "mitigate[ing] the historical effects on its high schools of the residential segregation of Seattle's neighborhoods, and to allow all students the opportunity to benefit from the pedagogical and socio-cultural values a racially diverse school offers." *Parents Involved in Cmty. Schools*, 137 F. Supp. 2d 1224, 1233 (W.D. Wash. 2001). The District Court concluded that convincing evidence was presented that segregated housing patterns existed in the Seattle School District which caused the school systems to be racially concentrated. *Id.* at 1235.

²²⁵ *Bakke*, 438 U.S. at 305-06. The Supreme Court subsequently has agreed with that position. See *Wygant*, 476 U.S. at 274-76 (plurality opinion).

²²⁶ See *McFarland*, 330 F. Supp. 2d at 850-51. "It would seem rather odd that the concepts of equal protection, local control and limited deference are now only one-way streets to a particular educational policy, virtually prohibiting the voluntary continuation of policies once required by law." *Id.* at 851.

²²⁷ See *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003); *Regents of the Univ. of Ca. v. Bakke*, 438 U.S. 265, 311-12 (1978).

²²⁸ *Bakke*, 438 U.S. at 311-12.

²²⁹ *Grutter*, 539 U.S. at 325; *Gratz v. Bollinger*, 539 U.S. 244, 268 (2003).

Justice O'Connor wrote, "today we endorse Justice Powell's view that student body diversity is a compelling state interest that can justify using race in university admissions."²³⁰ For this reason, the Court in *Grutter*, found that the Law School's mission statement, which stated that admitting a "critical mass" of underrepresented minority students was essential to its educational mission.²³¹ Evidence of a mission statement that highlights a program's goal of attaining diversity for its educational benefits is sufficient to support a compelling governmental interest.²³²

The value of "viewpoint diversity" at the college and post-graduate level is two fold. First, the Court has held that to the extent that undergraduate and graduate schools are engaged in training future leaders, there is a significant value in those leaders understanding contrary viewpoints.²³³ These viewpoints may bring "outlooks and ideas that enrich the training of its student body and better equip its graduates to render with understanding their vital service to humanity."²³⁴ Creating diversity in the classroom is equally important to civil tolerance.²³⁵ Second, the Court stated that "diversity promotes learning outcomes and better prepares students for an increasingly diverse work force, for society, and for the legal profession."²³⁶ Ultimately, however, the Court held that the

²³⁰ *Grutter*, 539 U.S. at 325.

²³¹ *Id.* at 340.

²³² *Id.*; see also Leslie Garfield, *The Cost of Good Intentions: Why the Supreme Court's Decision Upholding Affirmative Action Admission Programs is Detrimental to the Cause*, 27 PACE L. REV. 15 (2006);

²³³ See *Sweatt v. Painter*, 339 U.S. 629, 634 (1950). In *Sweatt*, the Court made a similar point with specific reference to legal education:

The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts. Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned.

Id. at 634.

²³⁴ *Bakke*, 438 U.S. at 314.

²³⁵ *Cf. Grutter*, 539 U.S. at 330.

²³⁶ *Id.* at 330-32. Note also that the court relied heavily on the Amicus Brief of the Army. *Id.* at 330. High-ranking retired officers and civilian military leaders assert that a highly qualified, racially diverse officer corps is

stated mission of the law school to admit a “critical mass” of diverse voices in the classroom so that various points of view could be heard and understood, was sufficient to support its finding that achieving student diversity in the context of public higher education is a compelling governmental interest.²³⁷

The Grutter Court placed significant emphasis on the law school’s stated mission. Indeed, the Court held that the Law School could only achieve its mission by admitting a critical mass of diverse students.²³⁸ Under this analysis, if the *Meredith* or *PICS* defendants are able to show that their mission in adopting the voluntary race-preference plans is to create a diverse student body so that students can benefit from various voices, the Court might find that student body diversity is a compelling governmental interest in the context of education at the K-12 level. However, neither the JCPS nor the City of Seattle are likely to be able to provide such evidence.²³⁹ Each program was created to erase segregation from their school districts.²⁴⁰ The Supreme Court’s edict in *Brown v.*

essential to national security. *Id.* at 331. American businesses have made clear that the skills needed in today’s increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints. *Id.* at 330. “Moreover, because universities, and in particular, law schools, represent the training ground for a large number of the Nation’s leaders . . . the path to leadership must be visibly open to talented and qualified individuals of every race and ethnicity.” *Id.* at 331 (citing *Sweatt v. Painter*, 339 U.S. 629, 634 (1950)). Thus, the Law School has a compelling interest in attaining a diverse student body.

²³⁷ *Id.* at 330-31. The court also noted that:

the Law School’s admissions policy promotes ‘cross-racial understanding,’ helps to break down racial stereotypes, and ‘enables [students] to better understand persons of different races.’ These benefits are ‘important and laudable,’ because ‘classroom discussion is livelier, more spirited, and simply more enlightening and interesting’ when the students have ‘the greatest possible variety of backgrounds.’

Id. at 330 (citations omitted).

²³⁸ *Id.* at 333. diminishing the force of such stereotypes is both a crucial part of the Law School’s mission, and one that it cannot accomplish with only token numbers of minority students. The Court also considered the U.S. military’s mission of meeting the needs of national security as support for finding a compelling governmental interest in the context of higher education. “[B]ased on [their] decades of experience,” a “highly qualified, racially diverse officer corps . . . is essential to the military’s ability to fulfill its principle mission to provide national security.” *Id.* (citing, Brief for Julius W. Becton, Jr., et al. as *Amici Curiae* 5.)

²³⁹ See *Parents Involved in Cmty. Schools v. Seattle School Dist., No. 1*, 426 F.3d 1162, 1197 (9th Cir. 2005); *McFarland v. Jefferson County Bd. of Educ.*, 330 F. Supp. 2d 834, 851-51 (W.D. Ky. 2004).

²⁴⁰ *Parents Involved in Cmty. Schools*, 426 F.3d at 1167-1169; *McFarland*, 330 F. Supp. 2d at 842.

Board of Education that racial discrimination in education is wrong,²⁴¹ was likely the more sufficient reason to compel the voluntary integration plans that produced diversity in the classroom.

Thus, unlike the Law School’s mission of creating a diverse student body so that future lawyers can appreciate various viewpoints, the Seattle Plan and the Jefferson County BOE plan are designed to provide learning opportunities at the “best schools in the district” for students who might otherwise have the opportunity to attend such schools if the school districts were drawn along neighborhood lines.²⁴² Therefore, because the missions of the Jefferson County BOE and Seattle Plan do not state a goal of enhancing the learning experience of all in the classroom, the notion of “viewpoint diversity” is likely not to support a compelling governmental interest. In fact “the educational benefits [do not] remain the same”²⁴³

The majority opinions in both *McFarland*²⁴⁴ and *PICS* wrestled with the notion of relying on the findings of *Grutter* that the educational benefit of diversity in higher education extends to students in grades K-12 but ultimately came out in favor of finding viewpoint diversity was a sufficient compelling governmental interest in the context of grade K-12 education, thereby extending Justice Powell’s definition beyond the limits of public higher education.²⁴⁵ Judge Fisher in *PICS* was comfortable finding that “the affirmative educational benefits that flow from racial diversity”²⁴⁶ sufficiently exist in grade school, and thus the court was comfortable in finding a compelling governmental

²⁴¹ *Brown v. Board of Education*, 347 U.S. 483 (1954).

²⁴² See *Parents Involved in Cmty. Schools v. Seattle School Dist. No. 1*, 423 F.3d 1162 (9th Cir. 2005); *McFarland v. Jefferson County Bd. Of Educ.* 330 F.Supp 2d 834,851 (W.D. Ky. 2004)

²⁴³ *McFarland*, 330 F. Supp. 2d at 841.

²⁴⁴ See supra note ____

²⁴⁵ *Parents Involved in Cmty. Schools*, 426 F.3d at 1175; *McFarland*, 330 F. Supp. 2d at 852, 856.

²⁴⁶ *Parents Involved in Cmty. Schools*, 426 F.3d at 1175.

interest. The *McFarland* court similarly found that the educational benefits identified in *Grutter* were sufficiently present to support a compelling governmental interest in the instance case.²⁴⁷ But the court decisions seem to gloss over the seemingly important differences between educational benefits at primary and secondary school level and the benefits in post-secondary schools.

Several appellate court judges disagreed with the appropriate application of Justice Powell's findings in *Bakke* to K-12 program. In concurring and dissenting opinions respectively, Judges Boudin, Kozinski and Bea suggested that while viewpoint diversity was a sufficient compelling governmental interest, there was no demonstrable evidence of the need for viewpoint diversity in the cases before them.²⁴⁸ Judge Boudin wrote that the context of a plan adopted to promote safety and student attendance was so distinct from anything the Court had previously considered, that it was wrong of the *Comfort* majority to apply the Court's previously stated compelling governmental interests in the case before him.²⁴⁹ In his *PICS* concurrence, Judge Kozinski was critical of the majority for failing to recognize the differing contexts of education in a child's formative years as opposed to the graduate school level. To Judge Kozinski, applying *Grutter* to the case before him was tantamount to "pounding square pegs into a round hole."²⁵⁰ Judge Bea, joined by three other judges, wrote that it was wholly inappropriate to consider the Seattle Plan in the same context as public higher education programs.²⁵¹

Indeed, Justice Boudin correctly points out that to date, the Court has only stated that there is a compelling governmental interest in viewpoint diversity in the context of

²⁴⁷ *McFarland*, 330 F. Supp. 2d at 856.

²⁴⁸ *Parents Involved in Cmty. Schools*, 426 F.3d at 1194 (Kozinski, J., concurring); *id.* at 1203-04 (Bea, J., dissenting).

²⁴⁹ See *supra* at notes 122-128.

²⁵⁰ See *supra* at notes 172-177

²⁵¹ See *supra* at notes 180-185.

public higher education.²⁵² Should the Supreme Court following the reasoning of the appellate court judges who reject the application of viewpoint diversity to grades K-12, it must find a different constitutionally acceptable compelling governmental interest in the use of race-preference student assignment plans or it must abolish the program.²⁵³

B. Constructing a New Compelling Governmental Interest

Some members of the Supreme Court are clearly concerned with abolishing programs that have attained their goals.²⁵⁴ As Justice Breyer said in the *Meredith* case oral arguments, it would be difficult to tell a school district “it cannot make efforts any more, it can’t do what its been doing and we’ll send the children back to their black schools and white schools?”²⁵⁵ For this reason the Court could define a third compelling governmental interest which would be the need to preserve programs whose abolishment threatens a return to the de facto segregation the program originally sought to cure.

The Court, however, has never stated a compelling governmental interest in assuring that programs created in response to de facto segregation remain constitutional once they attain their goal of integration.²⁵⁶ The Court has, however, appeared to reach a conclusion to assure that the societal goals of abolishing racism or discrimination were met. In *Katzenbach v. McClung*,²⁵⁷ the Court found that a local, family-owned barbeque restaurant that refused to serve Black patrons was in violation of the 1964 Civil Right

²⁵² *Bakke*, 438 U.S. at 315; *Gratz*, 539 U.S. 238; *Grutter*, 539 U.S. at 308. See generally, *supra* at notes 101-152.

²⁵³ Even if the Court were to find a compelling governmental interest, it could still strike down the program if it was not narrowly tailored to meet that interest. See,

²⁵⁴ See *supra* at note 21.

²⁵⁵ See Transcript of Oral Argument, *supra* note 4, at 12.

²⁵⁶ To the contrary, it has considered the government’s likelihood and ease of ending a race-preference program when evaluating whether that constitutionality of a particular race-preference program. See, *Grutter*, 539 U.S. at 346 (Ginsburg, J., Breyer, J., concurring.)

²⁵⁷ 379 U.S. 294 (1964).

Act.²⁵⁸ The Court considered the Constitutionality of Title II of the Act, which Congress enacted through its powers under the Commerce Clause, and “which requires hotels and motels to serve transients without regard to their race or color.”²⁵⁹ Ollie’s Barbeque, which did not generally serve out of state patrons, purchased 46% of its meat from a local supplier who procured the meat from outside the State. The Court found the Act was constitutional as applied to anyone who served food or used merchandise that traveled through interstate commerce.²⁶⁰ Based on this reasoning, the Court found that despite the failure of the government to show evidence of a direct impact on interstate commerce, the owners of Ollie’s Barbeque violated the Act.²⁶¹ In *McClung*, the Court displayed its willingness to hold one small restaurant, which was “trivial by itself” accountable for the greater good of ensuring the abolishment of segregated establishments.²⁶² The *McClung* ruling illustrates Court’s paramount interest in attaining the societal goals of reversing discrimination.²⁶³

Where race-preference student assignment plans are concerned, the Court is faced with a similar challenge of constructing a means to uphold these programs, in light of the fact that they are not supported by previously identified compelling governmental interests. The most recent race-preference cases, *Johnson*, *Grutter* and *Gratz*, and the Court’s history or responding to societal needs, support the idea that the Court may stretch its Constitutional boundaries to define a new compelling governmental interest

²⁵⁸ *Id.*; See, 42 U.S.C. ss 2000a to 2000a-2 (1964 ed.).

²⁵⁹ 379. U.S. at 298.

²⁶⁰ *Id.* at 305.

²⁶¹ *Id.*

²⁶² *McLung*, 379 U.S. at 301 (quoting *Wickard v. Filburn*, 317 U.S. 111, 127-1-28 (1942). See, Jim Chen, *Filburn’s Legacy*, 52 EMORY L.J. 1719 (2003).

²⁶³ *Id.* See also, *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964) (upholding the constitutional validity of Title II of the Civil Rights Act of 1964 against an attack no hotels, motels, and like establishments.)

when the context of a particular program is distinguishable from those the Court has previously considered.²⁶⁴

The Seattle School Board adopted the Seattle Plan because assigning students to schools based on neighborhoods resulted in de facto segregation. The same was true of the Lynn School Board which was challenged in the *Comfort* decision and with the Jefferson County Board of Education.²⁶⁵ In each instance, the School Board was driven by the need to achieve the constitutional guarantees of *Brown v. Board of Education*,²⁶⁶ which held that schools that learning in a segregated school environment is “inherently unequal.”²⁶⁷ Abolishment of these programs would, arguably, result in a return to neighborhood assignment plans, which would, in turn, yield in de facto segregation again.²⁶⁸ Given these circumstances, the Court would best serve the needs of school districts to retain hard-earned gains of equal education at the K-12 level by finding a compelling governmental interest in assuring that programs created in response to de facto segregation remain constitutional once they attain their goal of integration.²⁶⁹ A party defending a race-preference student assignment plan could support this compelling governmental interest by presenting evidence that abolishment of the program would result in a return to unequal school for different racial groups.

There is ample evidence available to support the assertion that abolishment of race-preference student assignment plans could result in a return to de fact segregation.

²⁶⁴ See *supra* at notes 60-95 and accompanying text.

²⁶⁵ See *supra* at notes 114-126 and accompanying text.

²⁶⁶ 347 U.S. 483 (1954).

²⁶⁷ *Id.* at 495.

²⁶⁸ See Justice Ginsburg, (concurring) “it remains the current reality that many minority students encounter markedly inadequate and unequal educational opportunities.”

²⁶⁹ To the contrary, it has considered the government’s likelihood and ease of ending a race-preference program when evaluating whether that constitutionality of a particular race-preference program. See, *Grutter*, 539 U.S. at 346 (Ginsburg, J., Breyer, J., concurring.)

Neighborhood school assignment plans remain the most race-neutral means of assigning students to particular schools at the K-12 level.²⁷⁰ It is also the means by which most schools assign students. The flaw in neighborhood assignment plans, however, is that to date, many neighborhoods remain racially segregated.²⁷¹ Thus assignment by neighborhood would result in segregated schooling.

The Court has long recognized that American's live in segregated areas and that housing patterns require congressional and judicial intervention in order to assure racial equity. Congress enacted the Voting Rights Act to "prevent discrimination in the exercise of the electoral franchise and to foster our transformation to a society that is no longer fixated on race."²⁷² One purpose of the act was to "adopt devices that [States] used to thwart the will of congress to secure franchise for blacks"²⁷³ such as racial "gerrymandering," which is "[t]he practice of dividing a geographic area into electoral districts, often of highly irregular shape, to give one political party an unfair advantage by diluting the opposition's voting strength."²⁷⁴ State legislatures would draw boundaries by neighborhood, extending lines so that particular groups would be included together. Implicit in this guard against racial gerrymandering is that racial groups tend to live in neighborhoods that are segregated from other racial groups. Since evidence supports that

²⁷⁰ Ryan, James and Heise, Michael, *The Political Economy of School Choice*, 111 Yale L.J. 2043, 2050 (June 2002)(recognizing that physical boundaries yielded segregated schooling); see also, Huffman, Kevin, *Charter Schools, Equal Protection Litigation and the New School Reform Movement*, 73 N.Y.U.L.Rev. 1290 (October 1998)(noting that neighborhood school assignments were most common to public schools).

²⁷¹ Downey, K, Segregation Persists in Housing, Study Says, The Washington Post, April 6, 2005 p. EO2; Keen, C. Housing Segregation Persists in Many Parts of the Nation, Sutdy Shows, www.law.fsu.edu/Journals/landuse/Vol141/seit.htm (May 2004)

²⁷² *Georgia v. Ashcroft*, 539 U.S. 461, 490 (2003); cf. *post*, at 2662 (opinion of ROBERTS, C. J.).

²⁷³ S.Rep. No. 417, 97th Cong., 2d Sess. 193 (1982) U.S.Code Cong. & Admin.News 1982 p. 177 (hereinafter S.Rep. No. 97-417).

²⁷⁴ Black's Law Dictionary 708 (8th ed. 2004).

current segregated housing patterns remain the norm, school assignment plans based on living patterns could yield de facto segregation.

The School Boards in the *Meredith* and *PICS* cases could most likely meet this burden of showing that their race-preference student assignment plans were adopted in response to concerns of potential de facto segregation and that abolishment of their programs could result in a return to the very evil the plans sought to cure. In *Meredith*, JCPS put forth evidence that the Jefferson County BOE plan was developed as a means to retain the gains JCPS made through its court ordered desegregation plan. After the district court ruled that racial quotas were no longer necessary to achieve equal education, JCPS held public hearings and devised a means to ensure its desegregation efforts would not be thwarted.²⁷⁵ Defendant's in the *PICS* case presented evidence that the Seattle Plan was created because high school assignment based solely on a student's residential neighborhood resulted in de facto segregation.²⁷⁶

A third compelling governmental interest in ensuring that gains made from a race-preference plan will not be undone is appropriate in light of the need to maintain the equality strides made over the past four decades. This interest is better suited for consideration of student assignment plans at the K-12 level than is the applicability of "viewpoint diversity." At the outset, the race-preference student assignment plans were not created to ensure students hear from different voices in the classroom. They were created to guarantee that all students receive the same quality education.²⁷⁷ The need for diversity in the elementary classroom is mandated by the understanding that there is a

²⁷⁵ See *supra* notes 135-139 and accompanying text.

²⁷⁶ See *supra* notes 149-152 and accompanying text.

²⁷⁷ See *supra* at notes 213-220.

link between segregated schools and academic achievement.²⁷⁸ The driving notion of access to equal education is wholly different from hearing diverse viewpoints. For this reason, it is appropriate to consider the compelling governmental interest in programs aimed at grades K-12 in a different context from programs for institutes of higher learning.

Opponents may argue that there is no reason to create a contextual divide between race-preference policies in graduate schools and those in K-12 programs. The Court could find that viewpoint diversity is helpful to students in public area grammar and high schools. In *Grutter*, the Court found that “the educational benefits that diversity was designed to produce were substantial, including to promote cross-racial understanding, to help break down racial stereotypes and to enable students to better understand persons of different races, to promote learning outcomes, to better prepare students for an increasingly diverse workforce and society and to better prepare students as professionals.”²⁷⁹ Clearly it is never too early to learn those lessons. Alternatively, the Court could choose to find that the since there is no compelling interest in attaining viewpoint diversity in grades K-12 the programs do not pass constitutional muster.

As recently as 2005, however, in the *Johnson* case, the Court reaffirmed its commitment to letting the context of a particular program drive a court’s evaluation. The arguments in favor of distinguishing the context of diversity in grade schools – that they are designed to accomplish different programmatic goals, for one – seem most compelling and therefore necessitate that the Court consider plans that admit students to

²⁷⁸ See Orfield, Gary, *Schools More Separate: Consequences of a Decade of Desegregation*, The Harvard Civil Rights Project (July 2002) reprinted at http://www.civilrightsproject.harvard.edu/research/deseg/separate_schools01.php; See also, *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

²⁷⁹ *Grutter*, 539 U.S. 308.

various elementary and secondary schools in a context distinct from plans that admit students to institutes of higher education.

Conclusion:

The Court's contextual approach to evaluating the constitutionality of race-preference programs allows courts to tailor their decision making process to ensure that the societal goals of remaining a racially diverse society are fully achieved. Arguably, the Court has already defined the compelling governmental interest test for challenged educational programs. According to the Court, there is educational value in achieving viewpoint diversity in the classroom. Challenged race-preference student assignment plans do not necessarily survive the compelling governmental interest prong of the strict scrutiny test, when it is considered against the context of past Court decisions, which are limited to considering race-preference programs at the graduate level. For this reason, the Court might have to strike down race-preference student assignment plans for school at the K-12 level.

Striking down race-preference student assignment plans, however, will yield an undesirable result. It will extinguish programs that secure educational equality to students in a particular district and threaten a return to de facto segregation. For this reason, the Court should recognize educational programs at the elementary and secondary school level should be considered in a different context than programs at institutes of higher learning.

It is perfectly appropriate and indeed justifiable for the Court to find a compelling governmental interest in preserving programs whose abolishment threatens a return to the de facto segregation the programs originally sought to cure. Under this test, a court can

uphold a race-preference plan if the defending party can show that invalidating the plan would result in a return to the segregation or racial discrimination that existed before the government put the program in place.

“Interpretation is a chameleon that takes its color from its context.”²⁸⁰ Where race-preference plans or programs are concerned, the Court has recognized that the context of a program can drive the result. In this instance, the Court would be well advised to interpret the context of race-preference programs for grades K-12 as something wholly separate from that at the graduate level. Doing so would result in a continuation of the strides toward a color-blind society that school districts across the Country have fought so hard to achieve.

²⁸⁰ *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1111 (D.C. Cir. 1992)