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Leslie Yalof Garfield

Elisabeth Haub School of Law at Pace University

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The Glass Half Full: Envisioning the Future of Race Preference Policies

By Leslie Yalof Garfield¹

Abstract

Justice Breyer's concern that the Court's June 2007 ruling in Parents Involved in Community Schools v. Seattle School District, No. 1, "is a decision the Court and nation will come to regret" is not well founded. Far from limiting the constitutionally permissible use of race in education from its present restriction to higher education, the case may allow governmental entities to consider race as a factor to achieve diversity in grades K-12. In Parents Involved, which the Court decided with its companion case, McFarland v. Jefferson County Public Schools four justices concluded that school boards may never consider race when assigning students to particular schools. Justice Kennedy's concurrence in the 4-1-4 decision, like that of the dissent, acknowledged that a compelling governmental interest in achieving diversity justifies a school board's use of race conscious school assignment plans. His opinion could swing the Court to a position that is favorable to those who believe race-preference policies are paramount to achieving a society free from segregation.

The Supreme Court's fractured opinion in Parents Involved is reminiscent of the first time the Court considered an Equal Protection challenge to an academic institution employing a race-preference program. In this recent decision a divided court ruled that the Louisville and Seattle School districts could not use race as a factor in determining which school a particular student would attend. The Court split itself in a manner similar to the Court in University of California v. Bakke, where a fractured Court ruled that the University of California Medical School could not set aside a certain number of seats for minority applicants whose objective admissions criteria were not equal to that of their non-minority peers. Commentators warned that the Court's decision potentially limited educational opportunities for minorities and also vitiated the important strides of the civil rights movement.

The reality of the Bakke decision, however, unveiled itself quite differently than anyone reading the Court's opinions might have predicted. Five justices agreed that the University of California Medical School's program violated the Equal Protection Clause and four justices asserted that race could never be a factor in the admissions process. Justice Powell wrote a majority opinion in which 4 justices joined in his conclusion, but no single justice joined in his reasoning. His opinion acknowledged that in certain instances, states or their agencies could use race as a factor in ensuring diversity and that while the University of California plan violated the Constitution, not all plans that use race would meet with the same fatal result. Justice Powell's "majority of one" has had historic consequences on the race-preference legal debate. This opinion served as the leading precedent in defining the limits of constitutionally permissible government regulations aimed at remedying present effects of past discrimination and aimed at achieving racial balance. If the Bakke case is to serve as precedent in the truest sense of the word, then following Parents Involved the future of affirmative action is not necessary as gloomy as Justices, Lawyers and Commentators predict.

I argue that Justice Kennedy's concurrence supports an expansion of the permissible use of race-preference policies. My review of the Court's reliance on concurring opinions supports my conclusion that in the right instances, a future court can adopt a single justice's voice and use it to take the court in a very different direction. Thus, despite Justice Breyer's dire prediction history suggests that there is some room for optimism that governmental entities, in the proper instances, will remain free to employ race-preference programs.

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 Mary Duty, Christina Golkin and especially Megan McDonald for their wonderful research assistance and to Jane Crawford for her editorial advice.

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INTRODUCTION

Justice Breyer's concern that the Court's June 2007 ruling in *Parents Involved in Community Schools v. Seattle School District, No. 1*² "is a decision the Court and nation will come to regret"³ is not well founded. Far from limiting the constitutionally permissible use of race in education from its present restriction to higher education, the case may allow governmental entities to consider race as a factor to achieve diversity in grades K-12.⁴ In *Parents Involved*, which the Court decided with its companion case, *McFarland v. Jefferson County Public Schools*⁵ four justices concluded that school boards may never consider race when

² See *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 137 F. Supp. 2d 1224, 1226 (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 Wash. Sup. Ct.*, 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*, 126 S. Ct. 2351 (June 5, 2006), *rev'd*, 127 S. Ct. 2738 (June 28, 2007).

³ *Id.* at 2837 (Breyer, J., dissenting).

⁴ See *infra* notes 173-206 and accompanying text.

⁵ 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), *rev'd sub nom.*, *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (June 28, 2007).

assigning students to particular schools.⁶ Justice Kennedy's concurrence in the 4-1-4 decision, like that of the dissent, acknowledged that a compelling governmental interest in achieving diversity justifies a school board's use of race conscious school assignment plans.⁷ His opinion could swing the Court to a position that is favorable to those who believe race-preference policies are paramount to achieving a society free from segregation.

The Supreme Court's fractured opinion in *Parents Involved* is reminiscent of the first time the Court considered an Equal Protection challenge to an academic institution employing a race-preference program. In this recent decision a divided court ruled that the Louisville and Seattle School districts could not use race as a factor in determining which school a particular student would attend. The Court split itself in a manner similar to the Court in *University of California v. Bakke*,⁸ where a fractured Court ruled that the University of California Medical School could not set aside a certain number of seats for minority applicants whose objective admissions criteria were not equal to that of their non-minority peers.⁹ Commentators warned that the Court's decision potentially limited educational opportunities for minorities and also vitiated the important strides of the civil rights movement.¹⁰

The reality of the *Bakke* decision, however, unveiled itself quite differently than anyone reading the Court's opinions might have predicted. Five justices agreed that the University of California Medical School's program violated the Equal Protection Clause and

⁶ See *infra* notes 101-123 and accompanying text.

⁷ See *infra* notes 124-45 and accompanying text.

⁸ See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

⁹ *Id.* at 271.

¹⁰ See, e.g., Michael Selmi, *The Life of Bakke: An Affirmative Action Retrospective*, 87 Geo. L.J. 981, 1005 (1999) (quoting, *inter alia*, historian and journalist Lerone Bennett, Jr., who stated that *Bakke* would send blacks "back to the end of the line," and William T. Coleman, Chairman of the NAACP's Legal Defense and Education Fund, who said "[the] *Bakke* case turns the 14th Amendment on its head"). See also Editorial, *Resegregation Now*, N.Y. TIMES, June 29, 2007, at A28 (stating in response to the *Meredith* and *Parents Involved* decisions, "[the Court] is moving in reverse, broadly ordering the public schools to become more segregated").

four justices asserted that race could never be a factor in the admissions process.¹¹ Justice Powell wrote a majority opinion in which 4 Justices joined in his conclusion, but no single justice joined in his reasoning. His opinion acknowledged that in certain instances, states or their agencies could use race as a factor in ensuring diversity and that while the University of California plan violated the Constitution, not all plans that use race would meet with the same fatal result.¹² Justice Powell's "majority of one" has had historic consequences on the race-preference legal debate. His opinion served as the leading precedent in defining the limits of constitutionally permissible government regulations aimed at remedying present effects of past discrimination and aimed at achieving racial balance.¹³ If the *Bakke* case is to serve as precedent in the truest sense of the word, then following *Parents Involved* the future of affirmative action is not necessary as gloomy as justices, Lawyers and Commentators predict.¹⁴

This article explores the future of race-preference plans after the *Parents Involved* decision. Part I of this article reviews the *Bakke* decision and highlights its legacy on the race-preference plan debate. Part II of this article discusses the *McFarland* and *Parents Involved* decisions and pays particular attention to the dialogue between the plurality, concurrence and the dissent. Part III of this article considers the future of race-preference policies following the 2007 decisions and evaluates whether the language of Justice Kennedy's concurrence will

¹¹ See *Bakke*, 438 U.S. at 271-72.

¹² *Id.* at 320 ("the state has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race").

¹³ See, e.g., *Metro Broad., Inc. v. Fed. Comm'n Comm'n*, 497 U.S. 547 (1990) (the Court relied heavily on Justice Powell's *Bakke* opinion in upholding certain race-conscious FCC minority ownership policies); *Grutter v. Bollinger*, 539 U.S. 306 (2003) (the Court explicitly adopted Justice Powell's *Bakke* opinion in upholding the University of Michigan Law School's race-conscious admissions policy).

¹⁴ See generally *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2800 app. (Breyer, Stevens, Souter, Ginsberg, J.J., dissenting) (2007); Jonathan D. Glater & Alan Finder, *School Diversity Based on Income Segregates Some*, N.Y. Times, July 15, 2007; American Association for Affirmative Action Calls Supreme Court Decision on School Desegregation Cases "A Blow to Equal Opportunity in Education", <http://affirmact.blogspot.com> (June 28, 2007); Linda Greenhouse, *Justices, Voting 5-4, Limit the Use of Race in Integration Plans*, N.Y. Times, June 29, 2007.

have the same force and effect as Justice Powell’s concurrence in *Bakke*. Ultimately, this article concludes that Justice Kennedy’s concurrence offers a promise to extend the use of race-preference plans beyond higher education to programs aimed at achieving diversity in grades K-12.

I. BAKKE AND ITS LEGACY

A. *THE UNIVERSITY OF CALIFORNIA V. BAKKE*

The Court first considered race-preference policies aimed at achieving diversity for in the classroom when it heard *University of California v. Bakke*.¹⁵ Allen Bakke, a white male, unsuccessfully applied for admission to the University of at California at Davis Medical School in 1973 and in 1974.¹⁶ He challenged the school's 1973 admissions policy, adopted in an effort to diversify its entering class, on the grounds that it operated to exclude him from the school on the basis of his race. Bakke argued the policy as violated the Equal Protection Clause,¹⁷ the California Constitution,¹⁸ and Title VI of the Civil Rights Act of 1964.¹⁹

¹⁵ See Gail Heriot, *Thoughts on Grutter v. Bollinger and Gratz v. Bollinger as Law and as Practical Politics*, 36 LOY. U. CHI. L.J. 137, 145-146 (2004) (noting that the issue of race-based admissions policies in higher education first reached the Court in the 1974 case of *DeFunis v. Odegaard*. However, the Court dismissed the case as moot because the Italian-American student who challenged the policy had been admitted to the University of Washington Law School pursuant to a lower court order and already was preparing to graduate when the case reached the Court. Because the Court dismissed *DeFunis*, the *Bakke* case was “second in time, but first in historic significance”).

¹⁶ See *Bakke*, 438 U.S. at 266.

¹⁷ U.S. CONST. amend. XIV, § 1 (“[n]o 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”).

¹⁸ CAL. CONST. art. I, § 7(b) (“[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”).

¹⁹ Civil Rights Act of 1964, 42 U.S.C. § 2000(d) (“[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance”).

University of California admission policy divided applicants into two groups. One group was comprised of non-minority applicants who had achieved a minimum 2.5 UGPA, non-minority applicants were otherwise not considered.²⁰ A separate “special admissions” group contained all “disadvantaged” applicants in 1973 and minority applicants in 1974, regardless of undergraduate GPA or MCAT score.²¹ The school set aside a certain number of seats for applicants in each of the groups.²² Individuals from the general applicant pool could not fill seats from the “special admissions” or minority applicant pool, even if seats were available after the admissions committee considered all minority applicants.²³

When Davis rejected Bakke in 1973, four seats reserved for applicants from the “special admissions” pool were unfilled while the seats for the general admission pool were filled.²⁴ Davis rejected Bakke again in 1974 although the school accepted minority applicants with lower test scores.²⁵ Following the second rejection, Allen Bakke sued the Regents of the University of California in state court seeking an injunction to allow him admission.²⁶

The trial court found that Davis' admission policy was a racial quota and held that it violated the California and United States Constitutions, as well as Title VI.²⁷ The California Supreme Court affirmed. Applying strict scrutiny, it concluded that the program was unconstitutional. A majority of the court concluded that an entity is prohibited from considering race in programs that use government funds. Thus, the court ordered the University of California to admit Bakke into its medical school. Upon the state's appeal, the

²⁰ See *Bakke*, 438 U.S. at 273.

²¹ *Id.* at 274-75.

²² *Id.* at 275.

²³ *Id.* at 279 (“the University did not challenge the finding that applicants who were not members of a minority group were excluded from consideration in the special admissions process”).

²⁴ *Id.* at 276.

²⁵ *Id.* at 277.

²⁶ *Id.*

²⁷ *Id.* at 278-79.

Supreme Court granted *certiorari*.²⁸

The Supreme Court, while considering both the Equal Protection Clause and Title VI affirmed the California Supreme Court's decision.²⁹ The Court was sharply divided in its reasoning.³⁰ Justice Powell wrote the majority opinion³¹ in which he recognized three issues in need of resolution: First, whether the issue before it was reviewable under the 14th Amendment of the Constitution.³² Second, if it decided the case based on Constitutional grounds whether strict scrutiny was the appropriate level of review of the admissions policy.³³ Finally, whether the admissions policy met its burden under that particular level of scrutiny.³⁴

Regarding the first issue, Justice Powell wrote that “decisions based on race or ethnic origin by faculties and administrations of state universities are reviewable under the Fourteenth Amendment.”³⁵ Programs or policies with “benign” racial classifications are only permissible if they withstand the Court's exacting scrutiny; he would have permitted the University of California admission policy if it were “precisely tailored to serve a compelling

²⁸ *Id.* at 281.

²⁹ *Id.* at 271.

³⁰ *Id.* at 269-72. No other Justice joined Justice Powell's opinion. Justice Brennan, Justice White, Justice Marshall and Justice Blackmun filed an opinion concurring in the judgment in part and dissenting in part. Justice White, Justice Marshall and Justice Blackmun each filed separate opinions. Justice Stevens filed an opinion concurring in the judgment in part and dissenting in part, which Chief Justice Burger, Justice Stewart and Justice Rehnquist joined.

³¹ *Id.* at 269.

³² *Id.* at 287. While the parties differed over whether the University's program constituted a “goal” of minority representation or a “racial quota,” Justice Powell declared, “[t]his semantic distinction is beside the point: The special admissions program is undeniably a classification based on race and ethnic background. To the extent that there existed a pool of at least minimally qualified minority applicants to fill the 16 special admissions seats, white applicants could compete only for 84 seats in the entering class, rather than the 100 open to minority applicants. Whether this limitation is described as a quota or a goal, it is a line drawn on the basis of race and ethnic status.” *Id.* at 288-89.

³³ *Id.* at 287-88.

³⁴ *Id.* at 290-91.

³⁵ *Id.* at 287. Justice Powell noted that the petitioner agreed with this. *Id.* He further noted, “[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal.” *Id.* at 289-90.

governmental interest.”³⁶ This language became the genesis of the “strict scrutiny” test.³⁷ A state or state agency meets the strict scrutiny test when it demonstrates a compelling governmental interest and provides support that the program or policy it developed was narrowly tailored to meet that compelling governmental interest.³⁸

Justice Powell found a compelling governmental interest in remedying present effects of past discrimination and in “ameliorating the disabling effects of discrimination.”³⁹ In this instance, however, there was no evidence in the record that the purpose of the University of California program was to meet either of these objectives.⁴⁰ Justice Powell defined a second compelling governmental interest in creating a diverse student body.⁴¹ Justice Powell wrote, “A great deal of learning occurs informally. It occurs through interactions among students of both sexes; of different races, religion and backgrounds; who came from cities and rural areas, from various states and countries; who have a wide variety of interests, talents and perspectives; and who are able, directly or indirectly, to learn from their differences and to stimulate one another to reexamine even their most deeply held assumptions about themselves and their world.”⁴² According to Justice Powell, therefore, in

³⁶ *Id.* at 299.

³⁷ *See, e.g.,* *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 273-74 (1986) (any preference based on racial or ethnic criteria must receive a “most searching” examination to ensure it meets two criteria: it “must be justified by a compelling governmental interest,” and it must be “narrowly tailored to the achievement of that goal”); *United States v. Paradise*, 480 U.S. 149, 166-67 (1987) (a policy survives strict scrutiny when it is “narrowly tailored” to serve a “compelling purpose”); *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003) (the University of Michigan Law School’s race-conscious admissions policy passed the strict scrutiny test because “the Equal Protection Clause does not prohibit the...narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body”).

³⁸ *Bakke*, 438 U.S. at 305 (“[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”). *Id.*

³⁹ *Id.* at 310.

⁴⁰ *Id.* at 310. State may have an interest in educating minorities who will go back and serve their underrepresented communities, but there is no evidence in the record that the purpose of the admissions program is to ensure that that will happen.

⁴¹ *Id.* at 311-12. “the attainment of a diverse student body . . . is a constitutionally permissible goal for an institute of higher education.”⁴¹ *Id.* at 311-312.

⁴² *Id.* at 313 n.48

the right instances, an institute of higher education could consider race as a factor in admissions decisions without impermissibly infringing on the Constitution.

While Justice Powell found a compelling governmental interest in the University of California admission's policy goals, he did not find that the policy was narrowly tailored to meet that interest.⁴³ The University of California admission policy, which set aside a specific number of seats for students in identified minority groups, created a quota that unfairly benefited the interest of a victimized group at the expense of other innocent individuals.⁴⁴ Additionally, its practice of having separate admissions sub-committees review minority and non-minority candidates inappropriately insulated applicants from comparison against the entire admissions pool.⁴⁵ Finally, according to Justice Powell, there were other, less restrictive means by which the University of California could meet its goals. For these reasons, Justice Powell concluded that the University of California admissions policy violated the Equal Protection Clause and therefore was constitutionally impermissible.

Justices Brennan, Marshall, White and Blackmun agreed with most of Justice Powell's reasoning but disagreed with his finding that the University of California program was unconstitutional and for that reason they concurred in the judgment in part and dissented in the ruling.⁴⁶ Specifically the justices agreed that racial classifications are not per se unconstitutional under the 14th Amendment and that any race-preference programs should be subject to strict scrutiny. The four justices, however, would have voted to uphold the University of California Program since its "purpose of remedying the effects of past societal discrimination is . . . sufficiently important to justify the use of race-conscious admissions programs where there is a sound basis for concluding that minority under

⁴³ *Id.* at 320.

⁴⁴ *See id.* at 289-90, 319-320

⁴⁵ *See id.* at 319-20.

⁴⁶ *Id.* at 325-26 (Brennan, White, Marshall, Blackmun, J.J., concurring in part and dissenting in part).

representation is substantial and chronic, and that the handicap of past discrimination is impeding access of minorities to the Medical School.”⁴⁷

Justice Stevens concurred in the judgment in part and dissented in part with which Chief Justice Burger and Justices Stewart and Rehnquist joined. The justices found that the University of California program violated Title VI and therefore joined Justice Powell in his conclusion that the program was invalid. Since they were satisfied with their finding based on statutory grounds, these justices found no need to consider the constitutional issue.⁴⁸

Justice Powell’s opinion left a two-fold legacy for future case law. First, it mandated that challenges to race-preference programs be subjected to the strictest scrutiny.⁴⁹ Second, it provided support to proponents of race-preference programs by holding that there is a compelling governmental interest in the non-remedial goal of promoting diversity in the classroom. A review of post-*Bakke* challenges illustrates the profound influence of Powell’s “majority of one.”⁵⁰

B. DEFINING THE CONSTITUTIONAL PARAMETERS OF RACE-PREFERENCE POLICIES POST-*BAKKE*

1. THE STRICT SCRUTINY TEST

⁴⁷ *Id.* at 362 (Brennan, White, Marshall, Blackmun, J.J., concurring in part and dissenting in part).

⁴⁸ *Id.* at 412-13 (Burger, Stevens, Stewart, Rehnquist, C.J., J.J., (concurring in judgment in part and dissenting in part)).

⁴⁹ *See id.* at 290.

⁵⁰ *But see*, *Fullilove v. Klutznick*, 448 U.S. 448 (1980). In *Fullilove v. Klutznick*, the United States Supreme Court upheld the constitutionality of the Minority Business Enterprise (MBE) provision of the Public Works Employment Act of 1977. *Id.* The Court in *Fullilove* stated, “[t]his opinion does not adopt, either expressly or implicitly, the formulas of analysis articulated in such cases as [*Bakke*].” *Id.* at 492. Instead, the Court reasoned “that the MBE provision would survive judicial review under either ‘test’ articulated in the several *Bakke* opinions[.]” and therefore the Court deemed the provision constitutional without relying on any specific formula. *Id.* Justice Powell joined the plurality opinion in *Fullilove*; however, he also wrote a concurrence in which he applied his *Bakke* test to the instant case (and deemed that the policy met the test’s standards). *Id.* at 496 (Powell, J., concurring).

Immediately after Justice Powell's *Bakke* decision, the Court wrestled with whether Powell's articulated strict scrutiny test was the appropriate level for review for all race-preference policies. In several early cases the Court chose to defer the issue. In *Fullilove v. Klutznick*,⁵¹ Chief Justice Burger wrote that the "... opinion does not adopt, either expressly or implicitly, the formulas of an analysis articulated in such cases as [*Bakke*]."⁵² In *Local 28 of Sheet Metal Workers' International Association v. Equal Employment Opportunity Commission*,⁵³ a plurality of the Court acknowledged that they "[had] not agreed...on the proper test to be applied in analyzing the constitutionality of race-conscious remedial measures."⁵⁴ In *Wygant v. Jackson Board of Education*,⁵⁵ Justice Powell referred to his language in *Bakke* to enunciate the present strict scrutiny test.⁵⁶ Following *Wygant*, where race-based 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."⁵⁷

⁵¹ 448 U.S. 448 (1980).

⁵² *Id.* at 492.

⁵³ 478 U.S. 421 (1986).

⁵⁴ *Id.* at 480. The Sheet Metal Workers case was filed in response to a 1975 order that required the plaintiffs to end discriminatory practices. *Id.* at 426. They were also ordered to give a number of non-whites union membership. *Id.* They were later found guilty of contempt for ignoring these court orders. *Id.* They filed this suit to challenge the remedial purpose of Title VII which "empowers a district court to order race-conscious relief that may benefit individuals who are not identified victims of unlawful discrimination." *Id.* at 426. The Court found this constitutional. *Id.* at 440. Despite the justices' continued disagreement regarding the level of scrutiny to be applied when reviewing race-based policies, the plurality held that "[w]e need not resolve this dispute here, since we conclude that the relief ordered in this case passes even the most rigorous test-it is narrowly tailored to further the Government's compelling interest in remedying past discrimination." *Id.* at 480.

⁵⁵ 476 U.S. 267 (1986).

⁵⁶ *Wygant*, 476 U.S. at 273 (citing *Bakke*, 438 U.S. at 291-99). See generally Leslie Yalof 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). The *Wygant* 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. Leslie Yalof 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, 640 n. 56 (2005) (citing *Wygant*, 476 U.S. at 274).

⁵⁷ *Wygant*, 476 U.S. at 267. For an indepth discussion of the strict scrutiny test see Richard Fallon, *Strict Judicial Scrutiny*, 54 U.C.L.A. L. Rev. 1267 (2007).

The Court took the opportunity to more clearly define strict scrutiny the following year, when it decided *United States v. Paradise*.⁵⁸ The court in *Paradise* considered the constitutionality of a one-black-to-one-white promotion plan that the Alabama Department of Public Safety adopted pursuant to a district court consent decree.⁵⁹ Since its mandate to promote some state troopers based on race was a race-conscious policy, the Court applied a strict scrutiny standard.⁶⁰ The Court would uphold the decree only if Alabama could demonstrate that its policy was “narrowly tailored to serve a compelling governmental purpose.”⁶¹ The Court upheld the use of strict quotas in this case as one of the only means of combating the department's overt and defiant racism.⁶² By 1995 when the Court decided *Adarand Constructor, Inc. v. Peña*⁶³, Justice Powell’s strict scrutiny test was no longer challenged because it was now the only articulated test appropriate for review of race-preference programs.⁶⁴

⁵⁸ *Paradise*, 480 U.S. 149.

⁵⁹ Garfield, *supra* note 58, at 641 n. 59 (citing *Paradise*, 480 U.S. 149).

⁶⁰ *Paradise*, 480 U.S. at 167.

⁶¹ “Relying on Wygant, Justice Brennan acknowledged that there is a compelling governmental interest in remedying present effects of past discrimination.” Garfield, *supra* note 58 at 641 (citing *Paradise*, 480 U.S. at 183-85). “However, because the Court had not previously defined precisely what ‘narrowly tailored’ meant, it availed itself of the opportunity to provide further guidance to future courts and articulated the narrowly tailored element of the strict scrutiny test. The justices unanimously concluded that the appropriate considerations for finding whether a race-based program was narrowly tailored included: (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 and the relevant labor market; and (4) the impact of the relief on the rights of third parties. Garfield, *supra* note 58 at 641 (citing *Paradise*, 480 U.S. at 171; *Sheet Metal Workers*, 478 U.S. at 487 (Powell, J., concurring in part and concurring in judgment)).

⁶² *Paradise*, 480 U.S. at 165-66 (quoting *Paradise v. Prescott*, 767 F.2d 1514, 1532-33 (11th Cir. 1985)).

⁶³ 515 U.S. 200 (1995), *remanded to* 965 F.Supp. 1556 (D. Colo. 1997), *vacated sub nom.*, *Adarand Constructors, Inc. v. Slater*, 169 F.3d 1292 (10th Cir. 1999), *cert. granted and judgment reversed*, 528 U.S. 216 (2000), *remanded to* 228 F.3d 1147 (10th Cir. 2000), *cert. granted sub nom.*, *Adarand Constructors, Inc. v. Mineta*, 532 U.S. 941 (2001), *order amended*, 532 U.S. 967 (2001); *see also*, *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *McFarland ex rel. McFarland v. Jefferson County Pub. Schs.*, 416 F.3d 513 (6th Cir. 2005), *cert. granted sub nom.*, *Meredith v. Jefferson County Pub. Schs.*, 126 S.Ct. 2351 (2006), *rev’d and remanded sub nom.*, *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 127 S.Ct. 2738 (2007), *remanded to* No. 01-35450, 2007 WL 2379254 (9th Cir. Aug. 22, 2007); *Parents Involved in Cmty. Schs. v. Seattle Sch. Disc. No. 1*, 426 F.3d 1162 (9th Cir. 2005), *rev’d and remanded*, 127 S.Ct. 2738 (2007), *remanded to* No. 01-35450, 2007 WL 2379254 (9th Cir. Aug. 22, 2007).

⁶⁴ *Adarand*, 515 U.S. at 227.

2. THE COMPELLING GOVERNMENTAL INTEREST STANDARD

Justice Powell's ruling that there is a compelling governmental interest in considering race as a factor in race-preference programs has served to support defenders of several race-preference challenges. Where a previous governmental entity has engaged in segregate practices, the current government is always permitted to enact race-preference policies to reverse its previous wrongs. In *Bakke* Justice Powell articulated a second compelling governmental interest in promoting exposure to diverse voices in the classroom. The University of California admissions program's goal of admitting minority applicants to its medical program met the compelling governmental interest prong of the strict scrutiny test. In *City of Richmond v. Croson*⁶⁵ the Court discussed the compelling governmental interest test in the context of a non-remedial race-preference program adopted outside the classroom. The *Croson* Court, which evaluated the constitutionality of a Richmond program setting aside 30% of city construction funds for black-owned businesses, concluded that in some instances there is a compelling governmental interest in favoring one race over another.⁶⁶ The City of Richmond's goal of remedying various forms of past discrimination in and of itself was far too amorphous a goal to support a compelling governmental interest.⁶⁷

In *Grutter v. Bollinger*⁶⁸ and *Gratz v. Bollinger*⁶⁹ the only post-*Bakke* cases to consider race-preference policies in higher education, the majority "endorse[d] Justice Powell's view that student body diversity is a compelling governmental interest that can justify the use of

⁶⁵ 488 U.S. 469 (1989)

⁶⁶ *City of Richmond v. Croson*, 488 U.S. 469, 497 (1989) (citing *Bakke*, 438 U.S. at 308-09 (Powell, J.)).

⁶⁷ *Id.* at 499.

⁶⁸ 359 U.S. 306 (2003)

⁶⁹ 359 U.S. 244 (2003)

race in university admissions.”⁷⁰ Relying on Justice Powell’s words the *Grutter* Court upheld the University Michigan School of Law admissions policies. The Court would have upheld the University of Michigan School of Liberal Arts and Sciences Policy had it been narrowly tailored. Both schools’ policies supported the constitutionally recognized compelling governmental interest in attaining a diverse student body.⁷¹ The Court adopted as its own Justice Powell’s conclusion that the “nation’s future depends upon leaders trained through wide exposure to the ideas and mores of students as diverse as this Nation of many peoples.”⁷² Both “tradition and experience”, Justice O’Connor wrote, lend support to the view that the contribution of diversity is substantial.”⁷³

By 2003 Justice Powell’s majority of one had become, as Justice O’Connor referred to in *Grutter*, “the touchstone for constitutional analysis of race-conscious admissions policies.”⁷⁴ Race-preference programs challenged under the Equal Protection Clause of the Fourteenth Amendment were subject to strict scrutiny review. Such programs would sustain their challenge, however, if the state agency defending the program could prove that race was considered as a “plus” and done so in the interest of promoting diversity. Against this landscape of constitutional law the Supreme Court decided *Parents Involved*.

⁷⁰ *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003); *Gratz v. Bollinger*, 539 U.S. 244, 268 (2003) (the Court rejected the petitioner’s argument that “diversity as a basis for employing racial preferences is simply too open-ended, ill-defined, and indefinite to constitute a compelling interest capable of supporting narrowly-tailored means.”). *Id.* (quoting Brief for Petitioner at 17-18, 40-41, *Gratz v. Bollinger*, No. 02-516 (2003).

⁷¹ *Id.* at 324.

⁷² *Id.* at 324 (citing *Bakke*, 438 U.S. at 313).

⁷³ *Id.* at 323.

⁷⁴ *Grutter v. Bollinger*, 538 US 306, 323 (2005)

II. THE COURT’S MOST RECENT RACE PREFERENCE CHALLENGES: *McFARLAND V. JEFFERSON COUNTY PUBLIC SCHOOLS* AND *PARENTS INVOLVED IN COMMUNITY SCHOOLS V. SEATTLE SCHOOL DISTRICT*. No. 1

In 2004, parents⁷⁵ of students enrolled in the Jefferson County Public Schools System (Jefferson County) in Kentucky challenged the 2001 Jefferson County school assignment plan, which the courts termed the Louisville Plan, as violating the Equal Protection Clause.⁷⁶ Jefferson County originally adopted the plan in 1973 in response to the Sixth Circuit mandate that they adopt a school board integration plan.⁷⁷ 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.⁷⁸ As part of the court’s ruling, Jefferson County was ordered to stop using racial quotas and to redesign admission to its magnet schools prior to commencement of the 2002-2003 school year.⁷⁹ In response to the court’s order, the school board ended its use of racial quotas⁸⁰ and after considering public feedback

⁷⁵ 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). For a general discussion of the Meredith and PICS cases see generally, Garfield, Leslie Yalof, Adding Colors to the Chameleon: Why the Supreme Court May Adopt a New Compelling Governmental Interest Test for Race-Preference Student Assignment Plans __ Kan. L. Rev __ (2007).

⁷⁶ *McFarland*, 330 F.Supp.2d at 836.

⁷⁷ *Newburg Area Council, Inc. v. Bd. of Educ. of Jefferson County*, 489 F.2d 925, 932 (6th Cir. 1973).

⁷⁸ *Hampton v. Jefferson County Bd. Of Educ.*, 102 F. Supp.2d 358, 377-81 (W.D. Ky. 2000).

⁷⁹ *McFarland*, 330 F.Supp.2d at 841.

⁸⁰ 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.*

the board adopted the 2001 Plan, the plan that would decide student assignment for the 2002-2003 school year and beyond.⁸¹

Following the District Court's decision the school board devised the 2001 plan, with the objective of maintaining a fully integrated countywide system of schools.⁸² To achieve that goal, the plan mandated that each school seek a Black student enrollment of at least 15% and no more than 50%. Students in the system were permitted to choose the school they would like to attend.⁸³ When a particular school was "oversubscribed" the board considered a myriad of factors to decide which students should be assigned to that school, such as place of residence, school capacity, program popularity.⁸⁴ If after all other considerations, the school remained oversubscribed, the school board composed a random draw list from applicants who were arbitrarily sorted into four lists at each grade level as

⁸¹ *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.

⁸² *Id.* at 847. The 2001 Plan contained three basic organizing principles: (1) management of broad racial guidelines, (2) creation of school boundaries or "resides" areas and elementary school clusters, and (3) maximization of student choice through magnet schools, magnet traditional schools, magnet and optional programs, open enrollment and transfers. *Id.*

⁸³ Schools were divided into three types, traditional magnet schools, non-traditional magnet schools and residential type schools called reside schools. Reside schools. Each Jefferson County 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.*

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.* 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.*

⁸⁴ *Id.*

follows: Black Male, Black Female, White Male and White Female.⁸⁵ Students were selected for assignment to a school from each of the four groups depending on demographic need to meet the board's percentage goals.⁸⁶

The District Court for the Western District of Kentucky held that the portion of the plan that assigned divided applicants to traditional schools by race was unconstitutional because it was not narrowly tailored to meet the stated objective of achieving diversity in the classroom.⁸⁷ According to the court Jefferson County could maintain the balance of the plan. Additionally the court ruled 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 Jefferson County students, [plaintiff's children] may reapply for admission to a traditional school for

⁸⁵ 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.*

⁸⁶ *Id.* at 847. The Office of Demographics reviewed the principal's selection and granted final approval to guarantee the school met the Board's identified racial guidelines. 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.*

⁸⁷ At the outset, the district court made clear that the 2001 plan was subject to the strict scrutiny standard of review. *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. The court recognized that context matters in deciding whether Jefferson County 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. *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. For this reason, the Court measured the program against the analytical framework announced in *Grutter* and *Gratz*. *See, id.* at 856, 858. In evaluating the Jefferson County program, however, the Court observed that deference must be granted to local school boards, which act in a democratic way to preserve the essence of primary school education, best executed at the local level. *Id.* at 851. 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." *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.*

the upcoming academic year.”⁸⁸ 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.⁸⁹

In *Parents Involved in Community Schools v. Seattle School District No. 1*,⁹⁰ the plaintiffs, Parents Involved, challenged a city program aimed at achieving diversity in its 10 public high schools. The City of Seattle School District maintained a voluntary open choice policy for its 10 high schools. In the late 1950s’ and early 1960s’ a high school assignment was based solely on the students’ residential neighborhood. Assigning students based on neighborhoods resulted in de facto segregation in the schools, and yielded a disproportionate mix among African American, Asian American, Latino and Native American students.⁹¹

In an effort to diversify its high schools the Seattle School Board allocated the available spaces in its high schools by the individual pupils’ choice.⁹² A majority of students choose the same five schools, and disregarded the remaining high schools in the school district. When a school was oversubscribed, the Seattle School Board chose who could

⁸⁸ *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.*

⁸⁹ *McFarland ex rel. McFarland v. Jefferson County Pub. Schs.*, 416 F.3d 513, 513 (6th Cir. 2005).

⁹⁰ *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), *reb’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), *reb’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).

⁹¹ *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.*

⁹² *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.*

attend that school based on a series of four tie-breakers.⁹³ Parents Involved brought suit over the second tie-breaker; the race-preference tie-breaker,⁹⁴ which allowed the School Board to select students whose race would mitigate the imbalance of the racial make-up of a selected school.⁹⁵

Parents Involved 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, commonly referred to as Initiative 200, which provided 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.⁹⁶ Parents Involved 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 1964.⁹⁷

⁹³ *Parents Involved in Cmty. Schs.*, 426 F.3d at 1169.

⁹⁴ The first tiebreaker was the sibling tiebreaker and gave a ninth grader priority to enter a school if he or she had a sibling at that school. *Id.* Fifteen to 20 percent of admissions to the ninth grade class are a result of the sibling tiebreaker. *Id.*

⁹⁵ *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 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.*

⁹⁶ *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).

⁹⁷ *Parents Involved in Cmty. Schs.*, 426 F.3d at 1226.

The District Court decided the case in favor of the Seattle School Board on both claims.⁹⁸ Parents Involved appealed the District Court's decision to grant summary judgment, and the Ninth Circuit invalidated the racial tiebreaker preference as a violation of Initiative 200.⁹⁹ Following a subsequent tour through state and federal courts,¹⁰⁰ the Court of Appeals considered whether the School Board'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.¹⁰¹ The Court found a compelling governmental interest in the District's goals.¹⁰² The Court further found that the Program's use of a raced based tie-

⁹⁸ 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.

⁹⁹ *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).

¹⁰⁰ 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).

¹⁰¹ *Parents Involved in Cmty. Schs.*, 426 F.3d at 1166.

¹⁰² *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)).

breaker was narrowly tailored and therefore was constitutionally permissible.¹⁰³ Parents Involved appealed to the Supreme Court. On June 5, 2006 the Supreme Court granted *certiorari* in both cases.¹⁰⁴

The Court delivered its opinion on June 28, 2007. At the outset, the Court held that both *Parents Involved* and *McFarland* presented the identical issue of whether a school board could consider race in a voluntary assignment plan absent a court order.¹⁰⁵ For this reason, the Court chose to decide the cases together. A very narrow majority of the court voted to invalidate each plan.

Chief Justice Roberts delivered the “majority” opinion which Justices Alito, Scalia, Stevens and Thomas joined.¹⁰⁶ Justice Kennedy was the swing vote. He concurred in the

¹⁰³ 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.*

¹⁰⁴ *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 126 S.Ct. 2351 (2007).

¹⁰⁵ *Parents Involved in Cmty. Schs.*, 127 S.Ct. 2738.

¹⁰⁶ *Id.* at 2746-68. Justice Stevens wrote a separate dissent questioning the need for strict scrutiny. *Id.* at 2797-800 (Stevens, J., dissenting). Justice Thomas’ concurrence questioned the dissent’s wisdom as to allowing local school boards to define what is compelling. *Id.* at 2768 (Thomas, J., concurring). In Justice Thomas’ opinion, racial imbalance is not the same as segregation and racial imbalance can never justify infringing on the Equal Protection Clause. *Id.*

judgment but only agreed with part of the plurality's reasoning.¹⁰⁷ Justices Breyer, Ginsburg, Stevens and Souter dissented.¹⁰⁸

Chief Justice Roberts acknowledged that the strict scrutiny standard that Justice Powell initially articulated in *Bakke* was the appropriate standard for review.¹⁰⁹ The Court would uphold only the race-preference student assignment plans if each school district could show that there was a compelling governmental interest that supported the plan and that the plan was narrowly tailored to meet that state's interest.¹¹⁰

The Court considered whether the respondents could demonstrate a compelling governmental interest in maintaining their plans. According to Chief Justice Roberts, proponents of the Louisville and Seattle plans would succeed if they could demonstrate that their plans met one of the two compelling governmental interests that Justice Powell first identified in *Bakke*,¹¹¹ that the program was designed to remedy present effects of past discrimination and or that the program was created to ensure viewpoint diversity in the classroom. The Chief Justice quickly recognized that the first compelling governmental interest was irrelevant in this instance because the plans under consideration were voluntary and not created in response to a court order.¹¹² The Court next considered whether the plans met the Court's previously identified interest in achieving viewpoint diversity in education.¹¹³ The plurality dismissed the compelling governmental interest that Justice

¹⁰⁷ *Id.* at 2789-97 (Kennedy, J., concurring).

¹⁰⁸ *Id.* at 2800-37 (Breyer, Stevens, Souter, Ginsburg, J.J., dissenting).

¹⁰⁹ *Id.* at 2751. *See Bakke*, 438 U.S. at 290; *see also supra* note 58. "It is well established that when the government distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny" *Parents Involved in Cmty. Schs.*, 127 S.Ct. at 2751 (citing *Johnson v. California*, 543 U.S. 499, 505-06 (2005); *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 224 (1995)).

¹¹⁰ *Parents Involved in Cmty. Schs.*, 127 S. Ct. at 2753.

¹¹¹ *Id.* at 2752-53; *see also*, Adding Colors to the Chameleon: Why the Supreme Court May Adopt a New Compelling Governmental Interest Test for Race-Preference Student Assignment Plans. __ Kan. L. Rev. __ (2007).

¹¹² *Id.* at 2752.

¹¹³ *Id.* at 2753; *see also*, *Grutter*, 539 U.S. at 329; *Bakke*, 438 U.S. at 312.

Powell first stated in *Bakke* as inapplicable and asserted that the considerations first raised in *Bakke* and reaffirmed in *Grutter* and *Gratz* were unique to “institutions of higher education.”¹¹⁴

The plurality rejected the school board’s argument that a compelling governmental interest exists in achieving racial balance. According to the school boards, educational and broader socialization benefits flow from a racially diverse learning environment.¹¹⁵ In response to the school boards’ arguments the plurality found that “the Constitution is not violated by racial imbalance in the schools, without more.”¹¹⁶ Any continued use of race, the Chief Justice wrote, must be justified on some other basis.¹¹⁷ “Allowing racial balancing as a compelling end in itself would effectively assur[e] that race will always be relevant in American life, and that the ‘ultimate goal’ of eliminating entirely from governmental decision making such irrelevant factors as a human being’s race’ will never be achieved.”¹¹⁸

Justice Kennedy joined the plurality in its conclusion that the Louisville and Seattle programs were not narrowly tailored to meet their identified goals.¹¹⁹ The Jefferson County Board considered applicants merely in terms of black/white while the Seattle School Board

¹¹⁴ *Id.* at 2754 (citing *Grutter*, 539 U.S. at 329). The Court found that *Grutter* only applied to institutions of higher education and distinguished institutions of higher education from other educational facilities, stating that “in light of ‘the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition.’” *Parents Involved in Cmty. Schs.*, 127 S. Ct. at 2754 (citing *Grutter*, 539 U.S. at 329).

¹¹⁵ See generally transcript of Oral Argument, *Parents Involved in Cmty. Schs.*, 127 S.Ct. 2738 (Nos. 05-908, 05-915); transcript of Oral Argument, *Meredith*, 127 S.Ct. 2738 (Nos. 05-908, 05-915).

¹¹⁶ *Id.* at 2752 (quoting *Milliken v. Bradley*, 433 U.S. 267, 280 n. 14).

¹¹⁷ *Id.* at 2770 (Thomas, J., concurring). Justice Thomas in his concurrence spent a considerable time on racial imbalance. “Racial imbalance is not segregation. Although presently observed racial imbalance might result from past *de jure* segregation, racial imbalance can also result from any number of innocent private decisions, including voluntary housing choices.” *Id.* at 2769 (citing *Swann*, 402 U.S. 1, 25-26; *Missouri v. Jenkins*, 515 U.S. 70, 116 (1995) (Thomas, J., concurring). “Because racial imbalance is not inevitably linked to unconstitutional segregation, it is not unconstitutional in and of itself.” *Parents Involved in Cmty. Schs.*, 127 S.Ct. at 2769 (citing *Dayton Bd. of Ed. v. Brinkman*, 433 U.S. 406, 413 (1977); *Dayton Bd. of Ed. v. Brinkman*, 443 U.S. 526, 531 n. 5 (1979) (“Racial imbalance...is not *per se* a constitutional violation”); *Freeman v. Pitts*, 503 U.S. 467, 494 (1992); *Swann*, 402 U.S. at 31-32; cf. *Millikan*, 418 U.S. at 740-41 and n. 19 (Thomas J., concurring)).

¹¹⁸ *Id.* at 2758 (citing *Croson*, 488 U.S. at 495 (quoting *Wygant*, 476 U.S. at 320)).

¹¹⁹ *Parents Involved in Cmty. Schs.*, 127 S. Ct. at 2790-91 (Kennedy, J., concurring in part and concurring in the judgment).

considered applications in terms of nonwhite/white.¹²⁰ In each instance the plans were drafted based on widely-drawn categories of specific races and ethnicities. Each school boards' practices did not fit within the *Bakke* construct which promoted "a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element."¹²¹ Justice Kennedy's concurrence provided the fifth vote to invalidate both the Louisville and the Seattle programs.

Justice Kennedy began his concurrence by agreeing with the plurality that strict scrutiny was the appropriate standard for reviewing the Court's decision.¹²² He joined the plurality in concluding that the programs were not narrowly tailored and for that reason, he agreed to invalidate both the Seattle and the Louisville plans.¹²³ Justice Kennedy did not agree with the plurality's assessment which stated that diversity in education is not a compelling governmental interest and wrote that "diversity, depending on its meaning and definition, is a compelling educational goal a school district may pursue."¹²⁴

In Justice Kennedy's opinion the plurality opinion was far too restrictive since it seemed to limit a government's right to use race to instances of *de jure* segregation.¹²⁵ In Justice Kennedy's view the plurality was "...too dismissive of the legitimate interest government has in ensuring all people have equal opportunity regardless of their race."¹²⁶ The plurality's decision to reject a compelling governmental interest in creating viewpoint diversity in grades K-12 meant that school boards were prohibited from taking steps to

¹²⁰ *Id.* at 2746 (majority opinion)

¹²¹ *Id.* at 2753 (quoting *Grutter*, 539 U.S. at 325).

¹²² *Id.* at 2789 (Kennedy, J., concurring in part and concurring in the judgment).

¹²³ *Id.* at 2790-91.

¹²⁴ *Id.* at 2789.

¹²⁵ *Id.* at 2789. "The plurality is open to the interpretation that the Constitution requires school districts to ignore the problem of de facto segregation in schooling." *Id.*

¹²⁶ *Id.* at 2791.

insure integration absent a showing that the state had previously engaged in intentional school segregation.

According to Justice Kennedy, the plurality was “profoundly mistaken,”¹²⁷ in its conclusion that “the Constitution mandates that state and local school authorities must accept the status quo of racial isolation in schools. . . .”¹²⁸ In his opinion, “[t]his Nation has a moral and ethical obligation to fulfill its historic commitment to creating an integrated society that ensures equal opportunity for all its children.”¹²⁹ A compelling interest exists in avoiding racial isolation - an interest that a school district in its discretion and expertise may choose to pursue.¹³⁰ A compelling interest exists also in achieving a diverse student population and school boards may consider race as “...one component of that diversity, but other demographic factors, plus special talents and needs, should also be considered.”¹³¹ Ultimately, Justice Kennedy concluded that the decision should not prevent school districts from continuing the important work of bringing together students of different racial ethnic and economic backgrounds. “Due to a variety of factors...neighborhoods in our communities do not reflect the diversity of our Nation as a whole.”¹³² Although Justice Kennedy found a compelling governmental interest, he voted to legalize the programs because the school boards did not demonstrate that their approaches were the only means of avoiding racial isolationism.¹³³

In his dissent Justice Breyer joined by Justices Stevens, Souter and Ginsburg wrote that both the Louisville and Seattle race-conscious school board plans withstood the longstanding Court-mandated test of strict scrutiny. Both plans served a compelling

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.* at 2797.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.* at 2790-91.

governmental interest and were narrowly tailored.¹³⁴ For these reasons the dissenting justices would have voted to uphold the plans.¹³⁵

Justice Breyer described the “compelling interest” in the Louisville and Seattle plans as “the school districts’ interest in eliminating school-by-school racial isolation and increasing the degree to which racial mixture characterizes each of the district’s schools and each individual student’s public school experience.”¹³⁶ He noted that this compelling interest possesses three essential elements: “the historical and remedial element of rectifying consequences of prior segregation; the educational element of overcoming adverse educational effects produced by and associated with highly segregated schools; and the democratic element of producing an educational environment that reflects ‘the pluralistic society’ in which our children will live.”¹³⁷ After considering each element, Justice Breyer determined that the districts’ interest in eradicating primary and secondary public school school segregation involved all three elements. He asked rhetorically, “[i]f an educational interest that combines these three elements is not ‘compelling,’ then what is?”¹³⁸

In addition to concluding that the districts’ plans address a compelling interest, Justice Breyer also would have found that plans were narrowly tailored.¹³⁹ The plans limited the use of race and also strongly relied on other non-race conscious elements. The history and the manner in which the districts developed and modified their approaches further supported a finding that they were narrowly tailored. Justice Breyer cited the fact that each school board had devised a plan that imposed a more minimal burden than previously court-

¹³⁴ *Id.* at 2820 (Breyer, Stevens, Souter, Ginsburg, J.J., dissenting). Justice Breyer would have used a more lenient standard than strict scrutiny since the plans do not result in race based harm, but concluded that the plans survived even the strictest of scrutiny. *Id.*

¹³⁵ *See generally id.* at 2800-37.

¹³⁶ *Id.* at 2820.

¹³⁷ *Id.* at 2820-22, 2821 (quoting *Swann v. Charlotte-Mecklenberg Bd. of Ed.*, 402 U.S. 1, 16 (1971)).

¹³⁸ *Id.* at 2823.

¹³⁹ *Id.* at 2825.

approved plans and that the school boards had a lack of reasonably evident alternatives as support that the racial balancing programs were narrowly tailored.¹⁴⁰

Justice Breyer disagreed with the plurality's conclusion that a compelling governmental interest in instances other than in higher education is limited to remedying *de jure* rather than *de facto* segregation.¹⁴¹ He concluded that the distinction is “meaningless in the present context.”¹⁴² Irrespective of the cause, he pointed out, both school districts were “highly segregated in fact” prior to the districts’ desegregation plans and thus were in need of a remedy.¹⁴³

Justice Breyer dedicated an entire section of his dissent to a section entitled “consequences.”¹⁴⁴ “Today’s holding,” he wrote, “upsets settled expectations, creates legal uncertainty, and threatens to produce considerable further litigation, aggravating race-related conflict.”¹⁴⁵ He noted that prior to the present decision “[t]his Court understood the Constitution as affording the people, acting through their elected representatives, freedom to select the use of race-conscious criteria from among their available options” in order to eliminate segregation in schools.¹⁴⁶ To invalidate plans that incorporate such criteria, he asserted, would “threaten the promise of *Brown*.”¹⁴⁷ Therefore, he concluded, “[t]his is a decision that the Court and the Nation will come to regret.”¹⁴⁸

¹⁴⁰ *Id.* at 2829-30.

¹⁴¹ *Id.* at 2802, 2810.

¹⁴² *Id.* at 2802.

¹⁴³ *Id.* at 2802. The plurality counters that the dissent “elides this distinction between *de jure* and *de facto* segregation” and that the distinction between segregation by state action and racial imbalance caused by other factors “has been central to our jurisprudence in this area for generations” *Id.* at 2761 (majority opinion) (citing *Milliken v. Bradley*, 433 U.S. 267, 280 n. 14 (1977)). In the present cases, argues the plurality, race-conscious remedies were inappropriate because the Seattle school district never was segregated by law and the Louisville district had previously been deemed “unitary” by a federal court. *Id.* at 2761.

¹⁴⁴ *See id.* at 2831-34 (Breyer, Stevens, Souter, Ginsburg J.J. dissenting).

¹⁴⁵ *Id.* at 2836.

¹⁴⁶ *Id.* at 2834.

¹⁴⁷ *Id.* at 2837.

¹⁴⁸ *Id.* The plurality claims that Justice Breyer’s concerns regarding the ramifications of its decision exhibit “an unjustified note of alarm.” *Id.* at 2766. (majority opinion). Regarding the various laws the dissent cites as now

The fractionalized plurality of *Parents Involved* was unwilling to support programs aimed at maintaining school integration goals that civil rights founders fought so hard to achieve. The Louisville and Seattle plans reflected the ways in which school boards across the country responded to the Court’s ruling in *Brown v. Board of Education*.¹⁴⁹ Now that these programs have achieved their goals of racial balance, they face the same fate as the Louisville and Seattle plans. As a consequence, the decision of the four justice plurality coupled with Justice Kennedy’s concurrence has, in the words of Justice Ginsburg, made something that is “constitutionally required one day, constitutionally prohibited the next day?”¹⁵⁰

III. THE FUTURE OF RACE-PREFERENCE POLICIES POST-*PARENTS INVOLVED*.

A. THE VALUE OF JUSTICE KENNEDY’S CONCURRENCE

The way in which the justices divided their votes in *Parents Involved* is strikingly similar to the *Bakke* decision. In each case four justices voted that there was no room in the law to allow for a race-preference policy that favored one group based on race or ethnicity.¹⁵¹ Four other justices found that the race-preference policies designed to create viewpoint diversity in grades K-12 fit squarely within the Constitutional limits of the law.¹⁵² One Justice in each case cast a “swing vote” holding that there is a compelling governmental interest in creating viewpoint diversity in the classroom. The manner in which the University of California,

vulnerable, the plurality says that they “have nothing to do with the pertinent issues” presently before the court. *Id.* at 2766.

¹⁴⁹ *Id.* at 2767.

¹⁵⁰ Adam Liptak, *Brown v. Board of Education, Second Round*, NY TIMES, Dec. 10, 2006 (quoting Justice Ginsburg in Oral Arguments for the Meredith case).

¹⁵¹ *See supra* pp 2-4.

¹⁵² *Id.*

Seattle and Louisville plans were adopted, however, were not the most narrowly tailored to meet a constitutently permissible goal.¹⁵³

Justice Kennedy's swing vote has the potential to offer race-preference program advocates the hope that their challenged programs would survive strict scrutiny. Even such tenuous "majorities of one" like Justice Powell's plurality opinion in *Bakke* are questionable for their precedential weight.¹⁵⁴ Arguably concurrences offer less value. Supreme Court jurisprudence illustrates, however, even concurring opinions can serve as precedent for future decisions.¹⁵⁵

Several well-recognized concurrences have formed the basis for future judicial decisions. Justice Brandeis' concurrence in *Whitney v. California*¹⁵⁶ became the basis for the "imminent harm" prong of *Brandenburg v. Ohio*.¹⁵⁷ Justice Jackson's concurrence in *Youngstown Sheet and Tube Co. v. Sawyer*¹⁵⁸ laid the foundation for assessing the constitutionality of

¹⁵³ Charles Lane, *Kennedy Seen as The Next Justice In Court's Middle: Alito Expected to Tilt Conservative*, WASHINGTON POST, Jan. 31, 2006, at A04; Billy House, *Kennedy is Court's New Swing Vote*, REPUBLIC, Jul. 2, 2006; Andrew Cohen, *The Court's 'Swing Vote' Finally Swings Again*, Washingtonpost.com Blog, June 28, 2007.

¹⁵⁴ See Laura K. Ray, *The Justices Write Separately: Uses of the Concurrence by the Rehnquist Court*, 23 U.C. DAVIS L. REV. 777, 780 (1990).

¹⁵⁵ "In the wake of our fractured decision in *Bakke*, courts have struggled to discern whether Justice Powell's diversity rationale, set forth in part of the opinion joined by no other Justice, is nonetheless binding precedent under *Marks*. In that case, we explained that '[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" *Gruiter*, 539 U.S. at 325 (quoting *Marks v. U.S.*, 430 U.S. 188, 193 (1977)).

¹⁵⁶ See generally, *National League of Cities v. Usery*, 426 U.S. 833 (1976), *overruled by Garcia v. San Antonio Metro Authority*, 469 U.S. 528 (1985); *United States v. Container Corp. of America*, 393 U.S. 333 (1969); *Branzburg v. Hayes*, 408 U.S. 665 (1972); see also generally, Igor Kirman, *Standing Apart to Be a Part: The Precedential Value of Supreme Court Concurring Opinions*, 95 COLUM. L. REV. 2083 (1995).

¹⁵⁷ 274 U.S. 357 (1927).

¹⁵⁸ 395 U.S. 444 (1969).

¹⁵⁹ 343 U.S. 579 (1952). *Youngstown* considered whether President Truman exceeded his Constitutional powers when he ordered the Secretary of Commerce to take possession of and operate most of the Nation's steel mills in order to avoid a nationwide strike during the Korean conflict. Justice Black delivered the opinion for the Majority of the Court, holding that that President Truman had usurped Congress's power when he ordered the seizure of the steel mills. It was Justice Jackson's concurrence, however, that was most widely relied upon by future courts. In his concurrence, Justice Jackson formulated the following tripartite framework for assessing the constitutionality of executive action: 1) when a President acts within the express or implied authorization of Congress, his authority is "at its maximum;" 2) when a President acts in absence of Congressional grant or denial of authority, he operates in a "zone of twilight" in which he and Congress may have concurrent authority, or in which its distribution is uncertain; and 3) when a President takes measures incompatible with

executive actions and Justice Stewart's concurrence in *Jacobellis v. Ohio*¹⁵⁹ where he said of obscenity, "I know it when I see it"¹⁶⁰ has become one of the most oft-quoted lines of the Court.¹⁶¹

Concurring opinions have often exercised a greater impact on subsequent cases than the majority opinions that they accompany.¹⁶² Justice Kozinski of the 9th Circuit has said "a

the expressed or implied will of Congress, his power is at "its lowest ebb." *Id.* at 635-37 (Jackson, J., concurring).

¹⁵⁹ 378 U.S. 184 (1964).

¹⁶⁰ *Id.* at 197 (Stewart, J., concurring).

¹⁶¹ In *Nixon v. Administrator of General Services*, where the Court held that the Presidential Recordings and Materials Preservation Act did not violate principle of separation of powers, Justice Brennan wrote that the Court "embraced Mr. Justice Jackson's view, expressed in his concurrence in [*Youngstown*]." *Nixon v. Administrator of General Services*, 433 U.S. 425, 443 (1977).

Several years later, in *Dames & Moore v. Regan*, Justice Rehnquist, writing the Majority opinion, observed the longstanding influence of Justice Jackson's *Youngstown* concurrence, finding "Justice Jackson's classification of executive actions ... analytically useful." *Dames & Moore v. Regan*, 453 U.S. 654, 669 (1981).

Justice Harlan's concurrences in both *Katz v. United States* and *Terry v. Ohio* have also eclipsed the majority decisions and served to support future Court decisions. In *Katz*, Justice Stewart wrote the Majority opinion. Justice Black dissented. Justice Marshall took no part in the consideration or decision of this case. The Court held that government authorities erred when they engaged in electronic surveillance of an individual's telephone booth conversations without gaining advance authorization by a magistrate upon a showing of probable cause. *See Katz v. United States*, 389 U.S. 347, 358 (1967). As a result, the authorities engaged in unreasonable search and seizure under the 4th Amendment. In his *Katz* concurrence, Justice Harlan articulated the rule that a person is entitled to Fourth Amendment protection of privacy if he exhibits an actual (subjective) expectation of privacy, and the expectation is one that society is prepared to recognize as reasonable. *Id.* at 361 (Harlan, J., concurring).

The Court explicitly embraced Harlan's *Katz* test in subsequent decisions. As a result, Justice Harlan's *Katz* test has gained "a persuasive hold over search doctrine" on courts' evaluation of search and seizure challenges. Major Eric R. Carpenter, *Seizures without Searches: Defining Property Seizures and Developing a Property Seizure Model*, 42 GONZ. L. REV. 173, 202 n. 244 (2006-07). *See* Meghan J. Ryan, *Does Stare Decisis Apply in the Eighth Amendment Death Penalty Context?*, 85 N.C. L. REV. 847; Bridget C.E. Dooling, *Take It Past the Limit: Regulatory Takings of Personal Property*, 16 FED. CIR. B. J. 445 (2007); *but see* Matthew D. Lawless, *The Third Part Doctrine Redux: Internet Search Records and the Case for a 'Crazy Quilt' of Fourth Amendment Protection*, 2007 U.C.L.A. J. L. & TECH. 1, 41 n. 95 (2007) (quoting *Kyllo v. U.S.*, 533 U.S. 27, 34 (2001) ("The *Katz* test -- whether the individual has an expectation of privacy that society is prepared to recognize as reasonable -- has often been criticized as circular, and hence subjective and unpredictable."); *see also* 1 Wayne R. LaFare, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 2.1(d), at 393-94 (3d ed. 1996).

One year after *Katz*, Justice Harlan wrote another concurrence that even further shaped Fourth Amendment Law. In *Terry v. Ohio*, the court found a police officer did not exceed the reasonable scope of a search when he had reason to believe that the defendant was contemplating a daytime robbery. 392 U.S.1, 30-31 (1968) (Harlan, J., concurring). Justice Harlan's concurrence defined for future courts the appropriate inquiry courts should make when determining what makes a frisk reasonable. *See, e.g.*, *U.S. v. Mendenhall*, 446 U.S. 544, 553 (1980) (the Court cited Justice Harlan's *Terry* concurrence in holding that police officers enjoy the "liberty ... to address questions to other persons" but also that "the person addressed has an equal right to ignore his interrogator and walk away"); *Florida v. Royer*, 460 U.S. 491, 497-98 (1983) (the Court relied on Justice Harlan's *Terry* concurrence to support the proposal that, while a police officer is entitled to approach a citizen, the citizen "may decline to listen to the questions...and go on his way"); *U.S. v. Place*, 462 U.S. 696, 703 (1983) (the Court explicitly adopted Justice Harlan's rule, stating, "[i]n his concurring opinion in *Terry*, Justice Harlan made this logical underpinning of the Court's Fourth Amendment holding clear...the right to frisk in this case depends upon the reasonableness of a forcible stop to investigate a suspected crime").

concurring opinion can be influential, especially when authored by a swing justice.”¹⁶³

“When the concurring Justice is necessary to effect a majority, a simple concurrence often represents a concession, in the absence of which the case would be decided differently.”¹⁶⁴

In *National League of Cities v. Usery*, four members of the Court found unconstitutional “...any federal law that ‘directly displace[s] the States’ freedom to structure integral operations in areas of traditional government functions...”¹⁶⁵ Justice Blackman, concurred with the plurality, which made enough votes to strike down the 1974 amendments to the Fair Labor Standards Act. His concurrence included a balancing test which future courts adopted as the means for evaluating when a federal interest may justify state compliance.¹⁶⁶

Concurrences are most forceful when the concurring opinion offers a clear formulation for future evaluation or defines a standard by which future courts can evaluate a particular challenge. Justice Jackson’s concurrence in *Youngstown Sheet and Tube* and Justice Harlan’s concurrence in *Terry v. Ohio* provided future courts with “tests” to apply when considering constitutional challenges. Justice Powell’s language in *Bakke*, that state programs based on race must be “precisely tailored to serve a compelling governmental interest”¹⁶⁷ served as the foundation for the strict scrutiny test.¹⁶⁸ Similarly, Justice Kennedy’s swing vote offers a prescription for future race-preference challenges.

In *Parents Involved* Justice Kennedy defined a compelling governmental to include promotion of view point diversity at every educational level. School districts are free to

¹⁶² See generally, Kirman, *supra* note 157.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *National League of Cities*, 426 U.S. at 852. See also Kirman, *supra* note 157.

¹⁶⁶ See *Id.* *National League of Cities*, 426 U.S. at 856 (Blackmun, J., concurring). The Fair Labor Standards Act of 1974 extended “minimum wage and maximum hour provisions” to most state and local government employees. See *id.* at 836 (majority opinion).

¹⁶⁷ *Bakke*, 438 U.S. at 299.

¹⁶⁸ See *supra* notes 38-39 and accompanying text.

employ programs that will avoid the “status quo.”¹⁶⁹ His assertion that the Constitution does not prohibit K-12 level school authorities from taking affirmative measures to prevent racial imbalance extends the *Bakke/Grutter* context beyond higher education. Consequently, his clear formulation of the appropriate instances in which courts may find a state agency has met its burden of showing a compelling governmental interest provides future courts with the ability to uphold race-preference challenges beyond those limited to higher education.¹⁷⁰

Justice Kennedy’s opinion also identifies the right instances in which race-conscious measures can be constitutionally devised.¹⁷¹ School boards may not assign a student to a particular school based solely on his race or ethnicity, they may, however, use performance and other statistics, demographic zoning and enrollment tracking to support race-preference programs. School boards have the power to create magnet schools or may draw school zones with living patterns in mind.¹⁷² The alternatives available to school boards suggest that creative tailoring leave open the opportunity for schools to avoid a retreat to segregated schools systems.

Justice Kennedy’s opinion makes clear that there is a compelling governmental interest in remedying *de facto* segregation in instances other than achieving diversity jurisdiction in higher education. Governmental entities need not demonstrate that they were somehow instrumental in creating the segregation before they are constitutionally permitted

¹⁶⁹ See *Parents Involved* 127 S.Ct. at 2791.

¹⁷⁰ See Tony Mauro, *Court Strikes Plans That Assign Students Based on Their Race*, NEW YORK LAW JOURNAL, June 29, 2007. “The more we look at Justice Kennedy’s opinion, the more clear it is that there is an opening’ for continuing efforts to prevent the resegregation of schools, said Theodore Shaw, president of the NAACP Legal Defense and Educational Fund. He was in the courtroom as the decision was announced, just as Thurgood Marshall, his long-ago predecessor, was in the courtroom when *Brown v. Board of Education* was announced in 1954.” *Id.*

¹⁷¹ See *supra* note 135 and accompanying text.

¹⁷² Commentators argue that the limited methods of which Justice Kennedy approves will not effectively meet the needs demanded by affirmative action proponents. See e.g., Glater and Finder, *supra* note 10.

to dismantle it. The attainment of viewpoint diversity, in the right instances, is sufficient to support district wide school assignment plans.

B. THE AFTERMATH OF JUSTICE KENNEDY'S CONCURRENCE

Justice Kennedy's vote in *Parents Involved* is emblematic of his role as "middle man" on the bench during the 2006-2007 term. Decisions during the Court's 2006-2007 term were among the most conservative the nation has seen in a long while. The vacancy left by the politically moderate Sandra Day O'Connor coupled with President Bush's 2006 appointments of Chief Justice John Roberts and Justice Samuel Alito prompted a clear shift toward a more conservative ideology.¹⁷³

Justice Kennedy's moderate alliance with the right has limited the shift from its potentially seismic proportions. In several cases, *Parents Involved* among them, Kennedy's vote tipped the 5-4 balance in favor of a retreat from pro-liberal stances. In *Gonzales v. Carhart*, for example, justices in the *Parents Involved* majority voted to uphold a federal law banning middle to late trimester abortions.¹⁷⁴ Justice Kennedy provided the swing vote in this case which reversed the Court's six-year old ruling that struck down a similar law in Nebraska.¹⁷⁵ In *Morse v. Frederick*, a case that considered a high school student's right to

¹⁷³ See Adam Cohen, *Editorial Observer - Last Term's Winner at the Supreme Court: Judicial Activism*, NEW YORK TIMES, July 9, 2007; Linda Greenhouse, *In Steps Big and Small, Supreme Court Moved Right*, NEW YORK TIMES, July 1, 2007; Nina Totenberg, *A Newly Conservative Supreme Court*, NPR NEWS, Oct. 2, 2006; See also, Bill Mears, 5-4 votes nudge Supreme Court to the right - CNN.com <http://www.cnn.com/2007/US/law/07/02/scotus.review/index.html> "This has been the most overwhelmingly, consistently conservative term of the Supreme Court in recent memory," (quoting Prof. Erwin Chemerinsky, constitutional scholar at Duke University's law school.) *Id.*

¹⁷⁴ See *Gonzales v. Carhart*, 127 S.Ct. 1610, 1619 (2007).

¹⁷⁵ Congress passed the Act at issue in *Gonzales* to respond to the *Stenberg* decision, which held that a Nebraska law that banned partial birth abortion was unconstitutional. *Stenberg v. Carhart*, 530 U.S. 914, 929-30 (2000). Justice Ginsberg gave a bitter dissent in this case. "The Court's hostility to the right *Roe* and *Casey* secured is not concealed. Throughout, the opinion refers to obstetrician-gynecologists and surgeons who perform

display a banner reading “Bong Hits 4 Jesus,” the same 5 conservative justices concluded that the First Amendment right to free does not extend to speech about drugs.¹⁷⁶

While the 2006-2007 term’s conservative opinions threaten to limit previously granted individual and civil rights, history makes clear that the law is static and that a change in the make-up of the bench by even one justice can offer a new position on an old decision.¹⁷⁷ Often justices use the language of a particular case to jettison the law in a new direction.¹⁷⁸ Justice Powell’s opinion in *Bakke* is an example of where the language from a decision limiting the rights to achieve a liberal goal served to guarantee racial diversity programs under future decisions.¹⁷⁹ To the extent that a less conservative bench decides future cases Justice Kennedy’s concurrence offers optimistic hope to a pessimistic situation.¹⁸⁰

The law on the use of race-preference policies prior to *Parents Involved* was relatively clear. The Court would find a compelling governmental interest in remedying present effects of past discrimination in the workplace¹⁸¹ and in achieving diversity in higher education.¹⁸² Five of the justices deciding *Parents Involved* identified a compelling governmental interest beyond those the Court had previously stated. The dissenting and Justice Kennedy agreed that the compelling governmental interest in achieving viewpoint diversity extends to classrooms in grades K-12.

abortions not by the titles of their medical specialties, but by the pejorative label ‘abortion doctor.’ A fetus is described as an ‘unborn child,’ and as a ‘baby,’; second-trimester, previability abortions are referred to as ‘late-term,’; and the reasoned medical judgments of highly trained doctors are dismissed as ‘preferences’ motivated by ‘mere convenience.’” See *Gonzales*, 127 S.Ct. at 1650 (Ginsberg, J., dissenting) (citations omitted).

¹⁷⁶ See *Morse v. Frederick*, 127 S.Ct. 2618, 2626 (2007). At a school event, the principal observed students display a sign promoting the use of illicit drugs. The principal told the students to take the banner down. The Court ruled that the school principal acted reasonably when she tore down the students sign and suspended the student. See *id.* at 2622.

¹⁷⁷ Compare, *Bowers v. Hardwick*, 478 U.S. 186 (1986) with *Lawrence v. Texas*, 539 U.S. 558 (2003).

¹⁷⁸ See generally *Bakke*, 438 U.S. 265 (1978) (Powell, J., concurring).

¹⁷⁹ See *supra* Part I B and note 111.

¹⁸⁰ See *supra* note 147.

¹⁸¹ See *supra* text accompanying notes 42-66.

¹⁸² See *supra* note 72.

The plurality and dissent were clearly at odds as to the role racial consciousness should play in American life. According to the plurality, upholding the school board plans would perpetuate the use of race in the governmental decision making process.¹⁸³ In their opinion governments may not use race except in the most specific instances of rectifying *de jure* segregation.¹⁸⁴ To allow the use non-neutral policies beyond the strictest limitations would encourage society to continue looking at individuals based on race. In their mind America will not become a truly integrated society until governments are prohibited from taking race or ethnicity into account.¹⁸⁵

The dissent found a compelling governmental interest in ending racial isolation regardless of whether it was created *de facto* or *de jure*. The “democratic element of producing an educational environment that reflects a pluralistic society” remained a paramount goal.¹⁸⁶

The four justices suggested that there is a compelling governmental interest in creating racial

¹⁸³ See *supra* text accompanying notes 107-23.

¹⁸⁴ See *supra* note 127 and accompanying text.

¹⁸⁵ It is not likely that the Court would extend the permissible instances of using race-preference policies in the workplace beyond proof of present effect of past discrimination. The Third Circuit recently considered whether there was a compelling governmental interest in achieving racial balancing in the work place absent a demonstrated instance of *de jure* segregation. In *Lomack v. City of Newark*, 463 F.3d. 303 (3rd Cir. 2006), the Third Circuit heard a challenge that fire fighters brought against a mayoral initiative that abolished single-race fire companies. In 2002 then Mayor Sharpe James announced his own personal “mandate” to improve morale by transferring firefighters based on race. The Firefighters filed suit in federal district court challenging the case under the Equal Protection Clause and Title VII. Following a bench trial the district court found for the city. The firefighters appealed to the Third Circuit. The Third Circuit considered the issue of whether the City of Newark could employ a race-based transfer policy when current racial imbalance was not the result of past intentional discrimination on the part of the city. 463 F.3d at 305. The court reviewed the Mayor’s policy under strict scrutiny and ultimately found that the city did not meet its burden of proof. When charged with defending its plan the City advocated three compelling governmental interests that justified considering race when assigning firefighters to a particular fire company; eliminating *de facto* segregation in the fire department, securing the educational, sociological and job performance benefits that would arise from having a diverse fire company and responding to the 1980 consent decree. *Id.* at 307. The court rejected the city’s first argument and wrote that remedial justification was “wholly inapplicable” where a governmental entity did not intentionally cause the discrimination currently sought to be redressed. *Id.* The city also argued that as a governmental entity, it had a compelling interest in correcting *de facto* segregation. The court rejected this argument, finding that “[w]hile the elimination of *de facto* segregation is a laudable goal, doing so does not constitute a compelling governmental interest that can be achieved by means of racial classification.” *Id.* The court termed the policy as racial balancing and found that racial balancing may never be achieved for its own sake.

¹⁸⁶ *Parents Involved in Cmty. Schs.*, 127 S.Ct. at 2821 (Breyer, Stevens Souter, Ginsberg, J.J. dissenting)(citing *Swann v. Mecklenberg*, 402 U.S. at 16). See also, *supra* note 139 and accompanying text.

diversity even beyond the classroom, thereby asserting the need to assure governments the opportunity to redress instances of segregation regardless of how they arise.¹⁸⁷

Justice Kennedy agreed with the dissent that the Constitution permits governments to fashion remedies aimed at eliminating *de facto* segregation as a means of confronting the flaws and injustices that remain from the vestiges of a segregated society.¹⁸⁸ In Justice Kennedy's mind, today's neighborhoods do not reflect diversity as a whole and absent the use of limited race-conscious measures this country may never achieve its goal of making race irrelevant in every day life. For this reason, Justice Kennedy concluded that there is a "legitimate interest in ensuring the all people have an equal opportunity based on race."

Justice Kennedy's language stating that "diversity, depending on its meaning and definition, is a compelling educational goal a school district may pursue" offers the type of formulation on which future courts can rely when considering race-preference challenges in instances other than higher education. In *Bakke*, Justice Powell's words that "the attainment of a diverse student body . . . is a constitutionally permissible goal for an institution of higher education,"¹⁸⁹ served as a means by which courts could uphold race preference policies. Justice Kennedy's words provide a similarly clear and articulated instance when a government can take race into account beyond the scope of what is currently permissible. A court adopting the language of his concurrence will help to expand the scope of constitutionally permissible instances of the use of race beyond the Court's current definition.

¹⁸⁷ *Parents Involved in Cmty. Schs.*, 127 S.Ct. at 2791 (Kennedy, J., concurring in part and concurring in the judgment) "Our Nation from the inception has sought to preserve and expand the promise of liberty and equality on which it was founded. Today we enjoy a society that is remarkable in its openness and opportunity. Yet our tradition is to go beyond present achievements, however significant, and to recognize and confront the flaws and injustices that remain."

¹⁸⁸ *Id.*

¹⁸⁹ *Bakke*, 438 U.S. at 311-12.

The fact that Justice Kennedy's language can broaden the definition of a compelling governmental interest beyond higher education is cause for celebration, but it does not assure that States will remain free to enact race-preference policies to attain viewpoint diversity.¹⁹⁰ States defending their programs must pass the "narrowly tailored" prong of the compelling governmental interest test. Few governmental entities have been able to prove their programs are narrowly tailored, hence the reason it is considered the fatal prong of the strict scrutiny test.¹⁹¹ In his concurrence, Justice Kennedy provided solid guidelines for school boards interested in using race in a constitutionally permissible manner "including strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race."¹⁹² The guidelines are helpful, but they are also limiting, far beyond the traditional consideration of evaluating individual students based on race, ethnicity and other personal attributes.¹⁹³

State voters can also put their own limitation on the use of race-preference policies. In November, 2006 Michigan adopted Proposal 2, which prohibited state agencies, including state universities from using "discrimination or preferential treatment based on race or

¹⁹⁰ See *supra* noted 53-66 and accompanying text.

¹⁹¹ See, e.g., *Gratz v. Bollinger*, 539 U.S. 244 (2003) (Policy assigning points to University applicants based on, among other things, race, was not narrowly tailored); *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989) (Municipal set-aside program awarding contracts to minority construction companies was not narrowly tailored); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (plurality opinion) (Policy reserving space for minority applicants to Univ. of California Medical School not narrowly tailored). The strict scrutiny test has been "described as strict in theory and fatal in fact" in part because of the rigorous application of the narrowly tailored prong. See, Tonja Jacobi, *Legal Doctrine and Political Control*, 23 J. L. Econ & Org. 326 (2007) (quoting Kathleen M. Sullivan & Gerald Gunther, *Constitutional Law* 772-73 (15th ed. 2004)).

¹⁹² *Parents Involved in Cmty. Schs.*, 127 S.Ct. at 2792 (Kennedy, J., concurring in part and concurring in the judgment) (citing *Bush v. Vera*, 517 U.S. 952, 958 (1986)).

¹⁹³ See *Grutter*, 539 U.S. at 336-37 (finding that race may be used as a "plus" so long as it is not the "defining feature" of a particular individual's application) (citing *Bakke*, 438 U.S. at 318 n. 52).

gender.”¹⁹⁴ The issue as to whether the voters could prohibit race-preference policies by referendum was challenged in the courts.

The Michigan referendum required that Proposal 2 take effect beginning December 23, 2006, which fell in the middle of college recruiting and admission season.¹⁹⁵ The state’s public universities, in an action titled *Coalition to Defend Affirmative Action v. Granholm*,¹⁹⁶ filed a motion in the District Court for the Eastern District of Michigan requesting a temporary stay allowing them to “continue to use their existing admissions policies thru the end of the current admissions cycle.”¹⁹⁷ The District Court granted the universities’ request. The schools were free to keep their diversity admissions plans in tact.

Eric Russell, a white male, filed suit to stay the district Court’s decision.¹⁹⁸ The district court did not act swiftly and Russell appealed to the Sixth Circuit for an emergency stay and a Writ of Mandamus to allow him to join in the suit.¹⁹⁹ The Sixth Circuit panel granted Russell’s emergency motion for a stay since he was likely to prevail on the merits.²⁰⁰ Writing for the Court, Judge Sutton concluded that the Constitution did not prohibit states from banning the use of race preference policies in admissions. The Equal Protection

¹⁹⁴ Proposal 06-2 reads:

A ban on public institutions from using affirmative action programs that give preferential treatment to groups or individuals based on their race, gender, color, ethnicity or national origin for public employment educational or contracting purposes. Public institutions affected by the proposal include state government, local governments, public colleges and universities, community colleges and public schools.

Prohibit public institutions from discriminating against groups or individuals based on race, gender, color ethnicity or national origin.

http://www.michigan.gov/documents/Statewide_Bal_Prop_Status_145801_7.pdf

¹⁹⁵ *Coalition to Defend Affirmative Action v. Granholm*, 473 F.3d 237 (6th Cir. 2006).

¹⁹⁶ 473 F3d 237 (6th Cir. 2006)

¹⁹⁷ *Id.* at 239.

¹⁹⁸ *Id.* The group Toward a Fair Michigan joined in the action. *Id.* at 242.

¹⁹⁹ *Id.* at 243. While Russell was awaiting relief from the Sixth Circuit, the district court granted his motion to intervene. *Id.*

²⁰⁰ *Id.* at 244. In reviewing a motion for stay pending appeal, the appellate court considers: (1) the likelihood that the moving party will prevail on the merits of the appeal, (2) the likelihood that the moving party will be irreparably harmed absent a stay, (3) the prospect that others will be harmed if the court grants the stay, and (4) the public interest in granting the stay. *Id.*

Clause does not permit “official conduct aimed at discriminating on the basis of race,”²⁰¹ nor does it compel states to take measures to ensure racial diversity.²⁰² Referring to the strict scrutiny test Judge Sutton observed that the constitution never compels states to do that which “they narrowly may do.”²⁰³ For this reason, laws that ban the use of race-preference policies do not deny citizens equal protection under the law.²⁰⁴ Since it was likely that Russell would prevail on the merits, the Sixth Circuit granted Russell’s motion for a stay. Proposal 2 went into effect on December 23, 2006.²⁰⁵ While schools scramble to comply with the constitutional referendum,²⁰⁶ the parties continue to litigate the issue on the merits.²⁰⁷

Justice Kennedy would extend the *Bakke* and *Grutter* rulings to all educational institutions. His concurrence, coupled with members of the dissent, equals five justices on the current Court who would find a compelling governmental interest in ensuring against a return to segregated classrooms. *Parents Involved*, like *Bakke*, is likely to serve as an instance where a negative decision results in a positive outcome for proponents of race-preference policies.

²⁰¹ *Id.* at 248.

²⁰² *Id.* In response to the Sixth Circuit decision, the universities filed a motion to the Supreme Court to vacate the stay. On January 17, 2007, Justice Stevens denied the motion. *Coalition to Defend Affirmative Action v. Granholm*, 127 S.Ct. 1146, 166 L.Ed.2d 909, 75 USLW 3429 (U.S. Jan 19, 2007) (NO. 06A678)

²⁰³ *Id.* at 249.

²⁰⁴ *Id.* at 250 *quoting* *Coal. For Econ. Equity*, 122 F3d 692, 708 (9th Cir. 1997) at 708.

²⁰⁵ Diversity and Inclusion at Michigan State University, <http://president.msu.edu/prop2response/faqs/index.php>. In accordance with the Michigan Constitution, all amendments go into effect 45 days after the election. Mich. Const. art. XII, §2.

²⁰⁶ Kristi Jourdan, *MSU Readies for Prop. 2’s Effect – Federal Court Forcing Universities to Abide by Ban Immediately*, *The State News*, Jan. 8, 2007, *available at* http://www.statenews.com/index.php/article/2007/01/msu_readies_for_prop.

²⁰⁷ See, *Operation King’s Dream v. Connerly*, 2007 WL 2416815 (6th cir. 2007); *Action, Integration and Immigrant Rights and Fight for Equality By any Means Necessary (BAMN) v. Granholm*, 2007 WL 2492975 (6th Cir. 2007) C.A.6 (Mich.),2007. “Plaintiffs assert that Prop. 2 was intended to and will resegment the most selective Universities in the state.” *Id.*

CONCLUSION

The *Parents Involved* plurality limited the instance where a governmental entity could devise a constitutionally permissible race-preference program to instances of *de jure* segregation. More than 40 years after the beginning of the Civil Rights Movement, this nation can proudly demonstrate that much of its *de jure* segregation has been reversed. But *de facto* segregation continues to proliferate among the nation's schools and workforce. As Justice Breyer wrote in his *Parents Involved* dissent, "the potential consequences of the plurality's approach"²⁰⁸ threaten a return to the type of segregation that race-preference policies have kept at bay since it effectively limits the use of race-preference policies except in the most limited circumstances.²⁰⁹

Fortunately for those in favor of race-preference policies, history reveals that often it is a Justice's concurrence that moves courts in a desired direction. Justice Kennedy's concurrence, like Justice Powell's "majority of one" in *Bakke*, promises hope that future race-preference policies created in response to *de jure* discrimination would survive strict scrutiny. According to Justice Kennedy and four other dissenting justices, there is a compelling governmental interest in remedying instances of *de facto* segregation. Consequently, governmental entities would be permitted to enforce race-preference policies upon a showing that their policy was narrowly tailored.

As our nation moves forward, plaintiffs will continue to challenge the vestiges of programs created in response to consent decrees along with initiatives that prohibit the use of race remedial measures in any instance. Race preference programs have effectively eradicated the long-standing segregation problems that earlier plagued our country.

²⁰⁸ *Parents Involved in Community Schools v. Seattle School District No. 1*, 426 U.S. at 2832.

²⁰⁹ See *supra* note 146 and accompanying text.

Programs like the Louisville and Seattle School Board programs are the pinnacle of success, achieving the racial balance they originally sought. But a real danger in a return to *de facto* segregation lies in eliminating these programs or the ability to continue to use these programs once they achieve their goals. Fortunately, reviewing courts have some means by which to uphold race-preference policies. Justice Kennedy's conclusion that there is a compelling governmental interest in remedying *de facto* segregation provides Civil Rights optimists with hope for the future.