

THE GLASS HALF FULL: ENVISIONING THE FUTURE OF RACE PREFERENCE POLICIES

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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*¹ "is a decision the Court and the Nation will come to regret"² 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 in achieving diversity in grades K–12.³ In *Parents Involved*, which the Court decided with its companion case, *McFarland v. Jefferson County Public Schools*,⁴ four Justices concluded that community school boards may never consider race when assigning students to particular schools.⁵ Justice Kennedy's concurrence in the 4-1-4 decision, like the dissenting opinion, acknowledged that a compelling governmental interest in achieving diversity justifies a school board's use of race-conscious school assignment plans.⁶ When the Court next considers the constitutionally permissible use of race-preference policies, Justice Kennedy's opinion could swing the

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1. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 137 F. Supp. 2d 1224 (W.D. Wash. 2001), *rev'd*, 285 F.3d 1236 (9th Cir. 2002), *injunction granted*, No. 01-35450, 2002 U.S. App. LEXIS 7678, at *1 (9th Cir. Apr. 26, 2002), *reh'g granted*, 294 F.3d 1084 (9th Cir. 2002), *certifying questions to 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 (2006), *rev'd*, 127 S. Ct. 2738 (2007).

2. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2837 (2007) (Breyer, J., dissenting).

3. See *infra* notes 178–211 and accompanying text.

4. See *McFarland ex rel McFarland v. Jefferson County Pub. Sch.*, 330 F. Supp. 2d 834 (W.D. Ky. 2004), *aff'd*, 416 F.3d 513 (6th Cir. 2005), *cert. granted sub nom. Meredith v. Jefferson County Bd. of Educ.*, 126 S. Ct. 2351 (2006), *rev'd sub nom. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007).

5. See *infra* notes 171–77 and accompanying text.

6. See *infra* notes 184–97 and accompanying text.

Court to a position that is favorable to those who believe race-preference policies are paramount to achieving a society free from segregation.⁷

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 *Parents Involved*, 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.⁸ In *University of California v. Bakke*,⁹ a similarly divided Court found that the University of California Medical School could not set aside a certain number of seats for minority applicants whose objective admissions scores were less than those of their non-minority peers.¹⁰ As with *Parents Involved*, after *Bakke*, commentators warned that the Court's decision may lead to limited educational opportunities for minorities and may also vitiate the important strides of the civil rights movement.¹¹

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.¹² Justice Powell wrote a majority opinion in which four Justices joined in his conclusion but not a single Justice joined in his reasoning. His opinion acknowledged that, in certain

7. Chief Judge Danny J. Boggs of the Sixth Circuit recently criticized the courts as having done a "very bad job in [the affirmative action] area." Danny J. Boggs, *Challenges to the Rule of Law: Or, Quod Licet Jovi Non Licet Bovi*, 2007 CATO S. CT. REV. 7, 18–19 (2007) (describing efforts of local school district to distinguish among Asian subgroups for purposes of affirmative action); see also Cavalier v. Caddo Parish Sch. Bd., 403 F.3d 246 (5th Cir. 2005) (finding the school board no longer had a compelling governmental interest in its race-based student assignment plan following termination of a court-ordered decree); San Francisco NAACP v. San Francisco Unified Sch. Dist., 413 F. Supp. 2d 1051 (N.D. Cal. 2005).

8. *Parents Involved in Cmty. Sch.*, 127 S. Ct. at 2768.

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

10. *Id.* at 271.

11. 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, Jun. 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").

12. See *Bakke*, 438 U.S. at 271–72.

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 used race would meet with the same fatal result.¹³ 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 governmental regulations aimed at remedying the present effects of past discrimination and aimed at achieving racial balance.¹⁴ If the *Bakke* case is to serve as precedent in the truest sense of the word, then the future of affirmative action following *Parents Involved* is not necessarily as gloomy as judges, lawyers, and commentators predict.¹⁵

This article explores the future of race-preference plans following the *Parents Involved* decision. Part I reviews the *Bakke* decision and gives particular attention to Justice Powell's early articulation of the strict scrutiny test as it was applied to equal protection challenges and to his conclusion that there is a compelling governmental interest in achieving diversity in higher education.¹⁶ Part I also reviews post-*Bakke* challenges to race-preference programs and identifies the constitutional parameters of the Court's strict scrutiny test.¹⁷ Part II of this article discusses the *McFarland* and *Parents Involved* decisions and focuses on the dialogue between Chief Justice Roberts's plurality opinion, Justice Kennedy's concurrence, and Justice Breyer's dissent.¹⁸ Chief Justice Roberts's plurality opinion refused to extend to classrooms at every educational level the Court's long-standing principle that race could be used to ensure diversity

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

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

15. *See generally* *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2797–837 (Stevens and Breyer, JJ., dissenting) (2007); Jonathan D. Glater & Alan Finder, *Diversity Plans Based on Income Leave Some Schools Segregated*, N.Y. TIMES, Jul. 15, 2007, at A24; Linda Greenhouse, *Justices, Voting 5-4, Limit the Use of Race in Integration Plans*, N.Y. TIMES, Jun. 29, 2007, at A1; American Association for Affirmative Action Calls Supreme Court Decision on School Desegregation Cases "A Blow to Equal Opportunity in Education," <http://affirmact.blogspot.com> (Jun. 28, 2007).

16. *See infra* notes 52–58 and accompanying text.

17. *See infra* notes 69–117 and accompanying text.

18. *See infra* notes 118–211 and accompanying text.

in classrooms of higher education.¹⁹ The opinion further suggested that states or their agencies could never consider race as a factor for ensuring diversity in the absence of a finding of de jure segregation.²⁰ In contrast, Justice Breyer wrote in his dissent, in which three other Justices joined, that the use of race is permissible, and indeed necessary, to prevent a return to segregated classrooms.²¹ In his concurrence, Justice Kennedy agreed with Justice Breyer that the use of race-preference student assignment plans is permissible in certain instances and even more strongly asserted that the plurality's finding that race-preference policies could never be used to reverse de facto segregation was wrong.²² Ultimately, however, he sided with Chief Justice Roberts's holding that, in this instance, the school boards overstepped constitutionally permissible boundaries.²³

Part III considers the future of race-preference policies following the 2007 decisions. This section discusses the role that concurrences have played historically in setting precedent, particularly "concurrences in judgment" and the force of "swing votes."²⁴ This section also evaluates whether the language of Justice Kennedy's concurrence will have the same force and effect as Justice Powell's opinion in *Bakke*, the reasoning of which, like Justice Kennedy's opinion, no other Justice agreed with at the time.²⁵ Ultimately, this article concludes that Justice Kennedy's concurrence, despite striking down the school board student assignment plans challenged in *Parent Involved*, is likely to have a profound positive effect for those who believe race-preference policies are necessary to ensure diversity.²⁶ Specifically, his concurrence is likely to extend the use of race-preference plans beyond higher education to programs aimed at achieving diversity in grade school and will most likely assure that future courts do not adopt the prohibition on the use of race absent a finding of de jure segregation.

19. See *infra* notes 167–70 and accompanying text.

20. See *infra* note 175.

21. See *infra* notes 207–11 and accompanying text.

22. See *infra* notes 190–97 and accompanying text.

23. See *infra* note 197.

24. See *infra* notes 223–34 and accompanying text.

25. See *infra* notes 235–44 and accompanying text.

26. See *infra* notes 274–84 and accompanying text.

I.
BAKKE AND ITS LEGACY

The Court first considered the constitutionally permissible use of race-preference policies aimed at achieving diversity in public education when it heard *University of California v. Bakke*.²⁷ The language of Justice Powell's majority opinion represents the earliest articulation of the Court's current formulation of the strict scrutiny test for challenges under the Equal Protection Clause to race-preference policies.²⁸ Following *Bakke*, in a series of cases over the past thirty years, the Court has refined and further developed the strict scrutiny test to its present formulation: a race-preference program will pass the strict scrutiny test if the party defending the program can present evidence that the program is supported by a compelling governmental interest that is narrowly tailored to meet its goals. It was against the landscape of *Bakke* and its progeny that the Court decided the equal protection challenges of *Parents Involved*.

A. The University of California v. Bakke

The Court first considered race-preference policies aimed at achieving diversity in classrooms when it heard *University of California v. Bakke*.²⁹ Allen Bakke, a white male, unsuccessfully applied for admission to the University of California at Davis Medical School in 1973 and in 1974.³⁰ He challenged the school's 1973 admissions policy, which had been adopted in an effort to diversify the school's entering class, on the ground that it operated to exclude him on the basis of his race. Bakke argued that the policy violated the

27. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 269–70 (1978).

28. The Court first acknowledged that race, ethnicity, or nationality classifications would be subject to strict scrutiny in 1971. See *Graham v. Richardson*, 403 U.S. 365 (1971); see also *Nyquist v. Mauclet*, 432 U.S. 1, 18 (1977) (“[*Graham*] was the first case to explicitly conclude that alienage classifications . . . would be subject to strict scrutiny.”). However, according to Justice Powell, in cases prior to *Bakke*, the term “strict scrutiny” was “inexact” and in need of clarification. *Bakke*, 438 U.S. at 288.

29. 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, 145–46 (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*, 416 U.S. 312 (1974). 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 School of Law pursuant to a lower court order and was already preparing to graduate when the case reached the Court. Because the Court dismissed *DeFunis*, *Bakke* was “second in time, but first in historic significance.”).

30. See *Bakke*, 438 U.S. at 266.

Equal Protection Clause,³¹ the California Constitution,³² and Title VI of the Civil Rights Act of 1964.³³ The University of California's admissions policy divided applicants into two groups. One group comprised all non-minority applicants who had achieved a minimum 2.5 undergraduate grade point average; non-minority applicants falling short of this criterion were not considered.³⁴ A separate "special admissions" group contained all "disadvantaged" applicants in 1973 and minority applicants in 1974, irrespective of whether their undergraduate grade point average was above or below 2.5.³⁵ The school set aside a certain number of seats for applicants in each of the groups.³⁶ 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 had considered all the minority applicants.³⁷

When U.C. 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.³⁸ In 1974, U.C. Davis rejected Bakke once again, even though the school accepted minority applicants with lower test scores than his.³⁹ Following the second rejection, Bakke sued the Regents of the University of California in state court, seeking an injunction to allow Bakke admission to U.C. Davis.⁴⁰

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

32. 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.").

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

34. *See Bakke*, 438 U.S. at 273.

35. *Id.* at 274–75. The school also considered the Medical College Admissions Test (MCAT) scores of applicants. Students in the non-minority group were expected to have a higher MCAT score than those in the "special admissions" group. *See id.*

36. *Id.* at 275.

37. *Id.* at 279 ("[T]he 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.").

38. *Id.* at 276.

39. *Id.* at 277.

40. *Id.*

The trial court found that U.C. Davis's admissions policy was equivalent to a racial quota and held that it violated the California and United States Constitutions, as well as Title VI.⁴¹ A majority of the California Supreme Court affirmed the decision of the lower court and concluded that an entity is prohibited from considering the issue of race in programs that use government funds.⁴² Thus, the court ordered the University of California to admit Bakke into its medical school. Upon the state's appeal, the Supreme Court granted certiorari.⁴³

The Supreme Court considered both the Equal Protection Clause and Title VI and affirmed the California Supreme Court's decision.⁴⁴ The Court was sharply divided in its reasoning.⁴⁵ Justice Powell wrote the majority opinion,⁴⁶ in which he recognized three issues needing resolution: first, whether the issue before the Court was reviewable under the Fourteenth Amendment of the Constitution;⁴⁷ second, if it decided the case on constitutional grounds, whether the "most rigid scrutiny" was the appropriate level of review for an affirmative action admissions policy challenged by a white male;⁴⁸ and, finally, whether the admissions policy met its burden under that particular level of scrutiny.⁴⁹

41. *Id.* at 278–79.

42. *Bakke v. Regents of Univ. of Cal.*, 18 Cal.3d 34, 38 (1976), *cert. granted*, 429 U.S. 1090 (1977), *aff'd in part and rev'd in part*, 438 U.S. 265 (1978).

43. *Bakke*, 438 U.S. at 281.

44. *Id.* at 271.

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

46. *Id.* at 269.

47. *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:

This 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 289.

48. *Id.* at 290-91 (quoting *Korematsu v. United States*, 323 U.S. 214, 216 (1944)).

49. *Id.*

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.”⁵⁰ Programs or policies with “benign” racial classifications are permissible only if they withstand the Court’s exacting scrutiny.⁵¹ Justice Powell would have permitted the University of California’s admissions policy if it were “precisely tailored to serve a compelling governmental interest.”⁵² This language became the genesis of the “strict scrutiny” test.⁵³ 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 help meet that compelling governmental interest.⁵⁴

Justice Powell found a compelling governmental interest in remedying the present effects of past discrimination and in “ameliorating . . . the disabling effects of identified discrimination.”⁵⁵ In this instance, however, there was no evidence in the relevant records that the purpose of the University of California’s admissions policy was to meet either of these objectives.⁵⁶ Justice Powell

50. *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.

51. *Id.* at 291, 294–95 (“Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination.”).

52. *Id.* at 299.

53. *See, e.g.,* *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.”); *United States v. Paradise*, 480 U.S. 149, 166–67 (1987) (holding that a policy survives strict scrutiny when it is “narrowly tailored” to serve a “compelling purpose”); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 273–74 (1986) (“Any preference based on racial or ethnic criteria must necessarily 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.” (internal quotation marks omitted)).

54. *Bakke*, 438 U.S. at 305 (“[I]n 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.” (internal quotation marks omitted)).

55. *Id.* at 307.

56. *Id.* A state may have an interest in educating minorities who will go back and serve their underrepresented communities, but there was no evidence in the

defined a second compelling governmental interest in creating a diverse student body.⁵⁷ Justice Powell wrote:

A great deal of learning occurs informally. It occurs through interactions among students of both sexes; of different races, religions, and backgrounds; who come 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.⁵⁸

According to Justice Powell, therefore, in 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's admissions policy goals, he did not find that the policy was narrowly tailored to meet that interest.⁵⁹ The University of California's admissions policy, which set aside a specific number of seats for students in identified minority groups, created a quota that unfairly benefited the interests of a victimized group at the expense of other innocent individuals.⁶⁰ Additionally, Justice Powell found that the school's practice of having separate admissions sub-committees review minority and non-minority candidates inappropriately insulated applicants from comparison against the entire admissions pool.⁶¹ Finally, according to Justice Powell, there were other, less restrictive means by which the University of California could have met its goals. For these reasons, Justice Powell concluded that the University of California's admissions policy violated the Equal Protection Clause and was, therefore, constitutionally impermissible.⁶²

Justices Brennan, Marshall, White, and Blackmun agreed with most of Justice Powell's reasoning, but disagreed with his finding that the University of California's program was unconstitutional, and, for that reason, they concurred in the judgment in part and

record that the purpose of the admissions program was to ensure that that would happen. *See id.* at 310–11.

57. *Id.* at 311–12 (“The attainment of a diverse student body . . . is a constitutionally permissible goal for an institute of higher education.”).

58. *Id.* at 313 n.48.

59. *Id.* at 320.

60. *See id.* at 289–90, 319–20.

61. *See id.* at 319–20.

62. *Id.* at 324.

dissented from the ruling.⁶³ Specifically, the Justices agreed that racial classifications are not per se unconstitutional under the Fourteenth Amendment and that any race-preference programs should be subject to strict scrutiny.⁶⁴ 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 underrepresentation is substantial and chronic, and that the handicap of past discrimination is impeding access of minorities to the Medical School.⁶⁵

Justice Stevens concurred in the judgment in part and dissented in part. Chief Justice Burger and Justices Stewart and Rehnquist joined Justice Stevens's opinion. The Justices found that the University of California program violated Title VI and that therefore the program was invalid. Since these Justices were satisfied with their finding based on statutory grounds, they found no need to consider the constitutional issue.⁶⁶

The *Bakke* decision became the foundation upon which the Court would build its race-preference jurisprudence. The language of Justice Powell's reasoning in particular provided clear, identifiable rules for courts to apply when evaluating the constitutionality of race or ethnicity classifications under the Equal Protection Clause. The *Bakke* Court made clear that programs that use race as a factor must be subject to the strictest scrutiny.⁶⁷ Furthermore, courts could uphold admissions policies that consider race as a factor in the decision-making process because of the identified constitutional interest in the non-remedial goal of promoting diversity in the classroom. A review of post-*Bakke* challenges illustrates the profound influence of the *Bakke* opinion, particularly Justice Powell's "majority of one."⁶⁸

63. *Id.* at 325–26 (Brennan, J., concurring in part and dissenting in part).

64. *Id.* at 361–62.

65. *Id.* at 362.

66. *Id.* at 412–13 (Stevens, J., concurring with the judgment in part and dissenting in part).

67. *See id.* at 290 (plurality opinion).

68. *But see* Fullilove v. Klutznick, 448 U.S. 448 (1980). In *Fullilove*, the Court upheld the constitutionality of the Minority Business Enterprise (MBE) provision of the Public Works Employment Act of 1977. *Id.* at 492. The Court stated, "[t]his opinion does not adopt, either expressly or implicitly, the formulas of analysis articulated in such cases as [*Bakke*]." *Id.* 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

*B. Defining the Constitutional Parameters of
Race-Preference Policies post-Bakke*

Race-preference challenges are generally brought under the Fourteenth Amendment of the Constitution. The Fourteenth Amendment provides that “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”⁶⁹ The Court subjects state legislation or regulations challenged under the Equal Protection Clause to varying levels of scrutiny depending on the classification employed.⁷⁰ At a minimum, the Court has held that any regulation must be “rationally related to a legitimate governmental purpose.”⁷¹ Classifications based on race, however, are subject to the “strictest scrutiny.”⁷² Under the strict scrutiny test, a challenged program passes constitutional muster only if it is both supported by a compelling governmental interest and narrowly tailored to meet that interest.⁷³ The Court subjects classifications based on sex or illegitimacy to an intermediate level of scrutiny, between rational basis review and strict scrutiny.⁷⁴

1. The Strict Scrutiny Test

The strict scrutiny test has its modern origins in First Amendment and Freedom of Association challenges.⁷⁵ In the late 1950s and early 1960s, the Court used the test to protect individuals from excessive state infringement on their individual rights.⁷⁶ In 1971,

without relying on any specific formula. *Id.* (internal quotation marks omitted). 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).

69. U.S. CONST. amend. XIV, § 1.

70. *Clark v. Jeter*, 486 U.S. 456, 461 (1988).

71. *Id.*

72. *Vieth v. Jubelirer*, 541 U.S. 267, 293 (2004); see, e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989); *Loving v. Virginia*, 388 U.S. 1, 11 (1967).

73. See *infra* notes 75–86 and accompanying text.

74. *Clark*, 486 U.S. at 461.

75. See *McLaughlin v. Florida*, 379 U.S. 184, 197 (1964) (“The necessity test which developed to protect free speech against state infringement should be equally applicable in a case involving state racial discrimination.”); *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 463 (1958) (holding that an order requiring the NAACP to produce records showing members’ names and addresses substantially restrained freedom of association and that the state’s interest was not “compelling”). See generally Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267 (2007).

76. See, e.g., *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 627–33 (1969) (holding a New York statute unconstitutional where it “grants the right to

the Court in *Graham v. Richardson*⁷⁷ concluded that classifications “based on nationality or race are inherently suspect and subject to close judicial scrutiny.”⁷⁸ Seven years after *Graham*, Justice Powell pronounced that the strict scrutiny test was the appropriate standard for reviewing equal protection challenges to race-preference policies.⁷⁹

The Court took the opportunity to define strict scrutiny more clearly the following year, when it decided *United States v. Paradise*.⁸⁰ 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.⁸¹ Since its mandate to promote some state troopers based on race was a race-conscious policy, the Court applied a standard of strict scrutiny.⁸² The Court said it would uphold the decree only if Alabama could demonstrate that its policy was “narrowly tailored to serve a compelling governmental purpose.”⁸³ The Court upheld the use of

vote to some bona fide residents of requisite age and citizenship and denies the franchise to others” without a “compelling state interest”); *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969) (holding state and district statutory provisions unconstitutional where they denied welfare assistance to residents who did not live for at least one year in the jurisdiction. The Court found that “since the classification here touches on the fundamental right of interstate movement, its constitutionality must be judged by the stricter standard of whether it promotes a compelling state interest.”); *Sherbert v. Verner*, 374 U.S. 398, 403 (1963) (finding that governmental infringement on the free exercise of religion is unconstitutional unless justified by a “compelling state interest in the regulation of a subject”).

77. 403 U.S. 365 (1971).

78. *Id.* at 371–72 (footnotes omitted).

79. Fallon, *supra* note 75, at 1277–78 (citing *Bakke*, “in which Justice Powell’s controlling opinion . . . expressly applied what he called ‘strict’ or ‘the most exacting scrutiny’ to gauge the permissibility of an affirmative action program”).

80. 480 U.S. 149 (1987).

81. *Id.* at 153; see 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, 641 n.59 (2005) (citing *Paradise*, 480 U.S. at 154–55).

82. *Paradise*, 480 U.S. at 167.

83. *Id.* at 166–67 (alteration and internal quotation marks omitted). “Relying on *Wygant*, Justice Brennan acknowledged that there is a compelling governmental interest in remedying the present effects of past discrimination.” Garfield, *supra* note 81, 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

strict quotas since the quotas appeared to be the only means of combating the department's overt and defiant racism.⁸⁴ By 1995, when the Court decided *Adarand Constructor, Inc. v. Peña*,⁸⁵ Justice Powell's strict scrutiny test was no longer challenged because it was then the only articulated test appropriate for reviewing race-preference programs.⁸⁶

2. The Compelling Governmental Interest Standard

States or their agencies defending race-preference plans must demonstrate the existence of a compelling governmental interest in order to meet the rigorous demands of the strict scrutiny test.⁸⁷ The idea of a compelling governmental interest existed long before the Court began to tackle issues of race.⁸⁸ In these early cases, the Court was unwilling to uphold a state or federal law unless the reasons behind it were so necessary or compelling that they justified limiting an individual's rights.⁸⁹ Justice Powell extended the application of the compelling governmental interest prong of the strict scrutiny test to race-preference policies, writing that when "[a program] touch[es] upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest."⁹⁰

Based on Justice Powell's early determination that the government must have a compelling interest in applying racial criteria to

(4) the impact of the relief on the rights of third parties." *Id.* (citing *Paradise*, 480 U.S. at 171); see *Local 28, Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421, 487 (1985) (Powell, J., concurring in part and concurring in judgment)).

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

85. 515 U.S. 200 (1995); 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. Sch.*, 330 F. Supp. 2d 834 (W.D. Ky. 2004), *aff'd*, 416 F.3d 513 (6th Cir. 2005), *cert. granted sub nom. Meredith v. Jefferson County Bd. of Educ.*, 126 S. Ct. 2351 (2006), *rev'd and remanded sub nom. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007).

86. *Adarand*, 515 U.S. at 227.

87. See Fallon, *supra* note 75.

88. See, e.g., *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 627–33 (1969) ("compelling state interest" required where right to vote is restricted); *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969) ("compelling interest" required where fundamental right of interstate movement is impacted); *Sherbert v. Verner*, 374 U.S. 398, 403 (1963) ("compelling interest" required where free exercise of religion is infringed); *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 463 (1958) ("compelling interest" required where freedom of association is restrained).

89. See *supra* note 88.

90. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 299 (1978).

achieve particular goals, the Court has subsequently defined two distinct instances in which it will find a governmental interest compelling.⁹¹ Where a previous governmental entity has engaged in segregated practices, the then-current government is always permitted to enact race-preference policies as a means to reverse its past wrongs.⁹² As a general matter, states are successful in this instance when they can show that their program is designed to remedy the present effects of past discrimination.⁹³ Justice Powell also articulated a second compelling governmental interest in promoting exposure to diverse voices and perspectives in the classroom,⁹⁴ which was later termed “viewpoint diversity.”⁹⁵ States promoting this interest need not demonstrate evidence of de jure segregation; rather, they must show only that their policy assures that students are exposed to differing views.

Courts generally require proof of the present effects of past discrimination when race-preference policies are aimed at achieving racial equality in the workplace.⁹⁶ “A generalized assertion that there has been past discrimination in an entire industry” is not sufficient to support infringing an individual’s rights.⁹⁷ In *City of Richmond v. Croson*⁹⁸ the Court discussed the compelling governmental interest test in the context of a non-remedial race-preference program adopted in the workplace. The *Croson* Court, which evaluated the constitutionality of a Richmond program that set aside thirty

91. See Garfield, *supra* note 81.

92. *Freeman v. Pitts*, 503 U.S. 467, 498 (1992) (“[A court] should address itself to whether . . . the vestiges of past discrimination had been eliminated.”).

93. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *United States v. Paradise*, 480 U.S. 149 (1987); *Wygant v. Jackson Bd. Of Educ.*, 476 U.S. 267 (1986).

94. See *Bakke*, 438 U.S. at 311 (“The attainment of a diverse student body . . . clearly is a constitutionally permissible goal for an institution of higher education.”).

95. E.g., Paul J. Beard II, *The Legacy of Grutter: How the Meredith and PICS Courts Wrongly Extended the “Educational Benefits” Exception to the Equal Protection Clause in Public Higher Education*, 11 TEX. REV. L. & POL. 1, 25 (2006) (observing that the *Grutter* Court endorsed the law school’s stated interest in obtaining the benefits of viewpoint diversity); James R. Ryan, *Voluntary Integration: Asking the Right Questions*, 67 OHIO ST. L.J. 327, 333–35 (2006) (noting that the *Grutter* and *Gratz* Courts relied on “viewpoint diversity” in reaching their conclusions); see *Grutter v. Bollinger*, 539 U.S. 306, 307 (2003) (“[T]he diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.” (quoting *Bakke*, 438 U.S. at 315)).

96. See Garfield, *supra* note 81.

97. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 499 (1989).

98. *Id.*

percent of city construction funds for black-owned businesses, concluded that in the right instances a governmental entity may be “permitted to rectify the effects of identified discrimination within its jurisdiction.”⁹⁹ The defending party, however, must support the need for remedial measures with objective criteria, such as statistics or an identifiable number of those harmed.¹⁰⁰ In this instance, however, the City of Richmond merely put forth a general goal of remedying various forms of past discrimination. The Court found that this in and of itself was far too amorphous to support an instance of compelling governmental interest.¹⁰¹ The Court struck down the City of Richmond’s set-aside program because its goal—remedying discrimination as a general social concern—was not sufficient to justify infringing on non-minority contractors’ rights under the Equal Protection Clause.¹⁰²

The Court will find a compelling governmental interest in programs that are created in response to court orders or consent decrees.¹⁰³ In *United States v. Paradise*¹⁰⁴ the Court 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.¹⁰⁵ The decree was supported by “ample” evidence of the Department’s pervasive, systematic, and obstinate discriminatory exclusion of blacks.¹⁰⁶ Justice Brennan, writing for the majority, acknowledged that evidence of the present effects of past discrimination justifies a compelling governmental interest in remedial measures.¹⁰⁷ As a result, the Court upheld the Alabama Department of Public Safety’s promotion plan. The cases of *Croson* and *Paradise* demonstrate that in the workplace, absent an objective demonstrable finding of the present effects of past discrimination, the Court is unwilling to find an instance of compelling governmental interest.

99. *Id.* at 509.

100. *Id.* at 510–11.

101. *Id.* at 499.

102. *Id.* at 511.

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

104. *Id.*

105. *Id.* The consent decree required the Department of Public Safety to institute this plan as an interim measure to ensure the promotion of black state troopers. *Id.* The plan followed years of court battles and ineffective consent decrees in response to the Department’s “systematic and perpetual” discrimination against black state troopers. *Id.* at 153. Appellants challenged the consent decree, claiming the plan granted preferential treatment to black state troopers, thereby violating the Equal Protection Clause. *Id.* at 150.

106. *Id.* at 162.

107. *Id.* at 183–85.

Where education is concerned, the Court upholds race preference policies even where it is unable to identify present effects of past discrimination. In *Grutter v. Bollinger*¹⁰⁸ and *Gratz v. Bollinger*,¹⁰⁹ 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 state interest that can justify the use of race in university admissions.”¹¹⁰ Relying on Justice Powell’s words, the *Grutter* Court upheld the admissions policy of the University of Michigan Law School. The Court would also have upheld the admissions policy of the University of Michigan School of Liberal Arts and Sciences had it been narrowly tailored. Both schools’ policies supported the constitutionally recognized instance of a compelling governmental interest in attaining a diverse student body.¹¹¹ 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.”¹¹² “Both tradition and experience,” Justice O’Connor wrote, “lend support to the view that the contribution of diversity is substantial.”¹¹³

By 2003, Justice Powell’s “majority of one” had become, as Justice O’Connor stated in *Grutter*, “the touchstone for constitutional analysis of race-conscious admissions policies.”¹¹⁴ Race-preference programs challenged under the Equal Protection Clause of the Fourteenth Amendment were subject to strict scrutiny review. Such programs could sustain their challenge only if the state agency defending the program could prove that race was considered as a “plus” and was used in the interest of promoting diversity.¹¹⁵

The language of Justice Powell’s “majority of one” opinion had a profound influence post-*Bakke*. Courts faced with race-preference challenges after the Court rendered its *Bakke* decision neither challenged nor limited his formulation of the strict scrutiny test, illus-

108. 539 U.S. 306 (2003).

109. 539 U.S. 244 (2003).

110. *Grutter*, 539 U.S. at 325; see *Gratz*, 539 U.S. at 268 (rejecting 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” (internal quotation marks omitted)).

111. *Grutter*, 539 U.S. at 324.

112. *Id.* at 324 (quoting *Bakke*, 438 U.S. at 313) (internal quotation marks omitted).

113. *Id.* (quoting *Bakke*, 438 U.S. at 313).

114. *Id.* at 323.

115. See *infra* note 282.

trating a willingness to adopt his position wholesale.¹¹⁶ More strikingly, Justice Powell's expansive view of the permissible instances in which government could use race served to support subsequent race-preference policies against challenges.¹¹⁷ Contrary to early warnings that the *Bakke* decision would result in policies detrimental to minorities, Justice Powell's opinion, with which no other Justices fully agreed, established a basis for the use of race-preference policies in appropriate instances.

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

The *Parents Involved* case presented the Court with its first challenge to race preference policies in primary and secondary school education. Prior case law, particularly Justice Powell's ruling that there is a compelling governmental interest in achieving diversity in higher education, offered the Court the opportunity to extend its findings in *Bakke*, *Grutter*, and *Gratz* to classrooms at every educational level. Ultimately, a plurality of the Court struck down the race-preference component of the challenged student assignment plans. However, a review of the Court's opinion illustrates that the plurality's finding did not necessarily curtail the possibility that a future bench could find a compelling governmental interest in achieving diversity in grades K–12.

In 2004, the parents of students enrolled in the Jefferson County Public Schools System ("Jefferson County") in Kentucky challenged the 2001 Jefferson County school assignment plan as a violation of the Equal Protection Clause.¹¹⁸ Jefferson County origi-

116. See *supra* notes 67–68, 86 and accompanying text.

117. See *supra* notes 103–13 and accompanying text.

118. *McFarland ex rel McFarland v. Jefferson County Pub. Sch.*, 330 F. Supp. 2d 834, 836 (W.D. Ky. 2004). Four families brought suit against the Louisville School District. Plaintiff David McFarland filed on behalf of his two sons, Stephen and Daniel; both were denied entry to traditional schools. *Id.* at 838 n.3. Plaintiff Ronald Pittenger filed on behalf of his son Brandon, who was denied entry to a traditional school. Plaintiff Anthony Underwood filed on behalf of his son Kenneth Maxwell Aubrey, who was denied entry to a traditional school. Plaintiff Crystal Meredith filed on behalf of her son Joshua McDonald, who was unable to enroll in his school of residence because it was filled to capacity; he was denied admittance because it would have had an adverse effect on the racial composition of the original school he was attending. *Id.* at 837–38. The court held that the traditional school selection process was unconstitutional, finding that, with the excep-

nally adopted the plan in 1973 in response to a Sixth Circuit mandate that it adopt a school board integration plan.¹¹⁹ 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.¹²⁰ As part of the court's ruling, Jefferson County was ordered to stop using racial quotas and to redesign admissions to its magnet schools prior to commencement of the 2002–03 school year.¹²¹ In response to the court's order, the school board ended its use of racial quotas¹²² and, after taking due consideration of public feedback, the board adopted the 2001 plan, which would decide student assignment for the 2002–03 school year and beyond.¹²³

The 2001 plan mandated that each school seek a black student enrollment of at least fifteen percent and no more than fifty percent.¹²⁴ Students in the system were permitted to choose the school they would like to attend.¹²⁵ When a particular school was over-subscribed, the board considered a myriad of factors to decide which students should be assigned to that school, such as place of

tion of Meredith, none of the plaintiffs denied entry to the traditional school had proven sufficient injury to support their claims. *Id.* at 838. McFarland subsequently appealed. *McFarland ex rel McFarland v. Jefferson County Pub. Sch.*, 416 F.3d 513, 514 (6th Cir. 2005).

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

120. *Hampton v. Jefferson County Bd. of Educ.*, 102 F. Supp. 2d 358, 377–81 (W.D. Ky. 2000).

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

122. 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.*

123. *Id.* The stated mission of the 2001 plan is to provide “substantial uniform educational resources to all students and to teach basic skills and critical thinking skills in a racially integrated environment.” *Id.* at 842 (internal quotation marks omitted).

124. *Id.* at 842.

125. Schools were divided into three types: traditional magnet schools, non-traditional magnet schools, and residential type schools called “resides schools.” *Id.* The school board assigned students to a resides school based on the residence of their parent or guardian. *Id.* at 843–43. Traditional magnet schools offer the regular curriculum in a particular environment and are not considered resides schools. *Id.* at 845–46. With the exception of two schools, each traditional school has its own geographic zone. *Id.* at 846. Students may apply for admission to a traditional school in their zone. Non-traditional magnet schools offer “specialized programs and curricula.” *Id.* at 843. Students may apply for admission to any non-traditional magnet schools in the district regardless of their residential area. *Id.*

residence, school capacity, and program popularity.¹²⁶ If, after all other considerations, the school remained over-subscribed, the school board composed four random draw lists; one list each for black males, black females, white males, and white females.¹²⁷ Students were selected for assignment to a school from each of the four groups depending on the relevant demographic needs in an effort to meet the board's percentage goals.¹²⁸

The District Court for the Western District of Kentucky held that the portion of the plan that assigned applicants to traditional schools based on race was unconstitutional because it was not narrowly tailored to meet the stated objective of achieving diversity in the classroom.¹²⁹ At the outset, the district court made clear that the 2001 plan was subject to the strict scrutiny standard of review.¹³⁰ The court recognized that context mattered in deciding whether Jefferson County identified a compelling governmental interest. And, while the context of public elementary and secondary education differed from that of higher education, the court concluded that "the educational benefits of a diverse student body"¹³¹ remained the same.¹³² For this reason, the court measured the program against the analytical framework announced in *Bakke* and *Grutter*.¹³³ 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 puts Black and White applicants on separate assignment tracks, and (2) its use of the separate lists appears to be completely unnecessary to accom-

126. *Id.* at 832.

127. 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 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 principal has discretion to draw candidates from different random draw lists to fill the additional available slots. *Id.* at 847. The principal makes his or her selection in a manner that ensures the school will stay within the racial guidelines for the entire school population. *Id.*

128. *Id.* at 847. The Office of Demographics reviewed the principal's selection for compliance with the board's identified racial guidelines and granted final approval. *Id.* If students were not selected for a traditional school in one year, they could reapply to try to join the pipeline for the following year. *See id.* at 847.

129. *Id.* at 864.

130. *Id.* at 848.

131. *Id.* at 849 (quoting *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003)).

132. *Id.* at 853.

133. *See id.* at 856, 858-59.

plish the Board's goal."¹³⁴ Moreover, the use of distinct racial categories rendered race the "defining feature" of the plan, rather than merely a "tipping factor" pursuant to the type of individualized review approved under *Grutter*—according to the district court, "the Supreme Court would likely find these racial categories highly suspect."¹³⁵

With the exception of the assignment process for traditional schools, which was found not sufficiently narrowly tailored, the district court upheld the 2001 plan, permitting Jefferson County to maintain the racial balancing prescribed under the plan.¹³⁶ 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 Plaintiffs' children be admitted to the school of their choice in the upcoming year," and, "[l]ike all [Jefferson County] students, [plaintiffs' children] may reapply for admission to a traditional school for the [upcoming] academic year."¹³⁷ Plaintiff Meredith, on behalf of her daughter, Crystal, appealed to the Sixth Circuit, which held that the "well-reasoned" district court opinion should stand.¹³⁸

In *Parents Involved in Community Schools v. Seattle School District No. 1*,¹³⁹ the plaintiffs, a not-for-profit group comprised of parents and community members committed to promoting Seattle's public schools,¹⁴⁰ challenged a city program aimed at achieving diversity

134. *Id.* at 862.

135. *Id.* at 862–63.

136. *Id.* at 864.

137. *Id.* 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.*

138. McFarland *ex rel* McFarland v. Jefferson County Pub. Sch., 416 F.3d 513, 513 (6th Cir. 2005) (per curiam).

139. 137 F. Supp. 2d 1224 (W.D. Wash. 2001), *rev'd*, 285 F.3d 1236 (9th Cir. 2002), *injunction granted*, No. 01-35450, 2002 U.S. App. LEXIS 7678, at *1 (9th Cir. Apr. 26, 2002), *reh'g granted*, 294 F.3d 1084 (9th Cir. 2002), *certifying questions to 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 (2006), *rev'd*, 127 S. Ct. 2738 (Jun. 28, 2007), *vacated*, 498 F.3d 1059 (9th Cir. 2007).

140. See PICS: Parents Involved in Community Schools, <http://www.piics.org> (last visited Oct. 28, 2007). The Parents Involved mission statement provides, "We are a group of parents and community members who believe in promoting neighborhood public schools in the Seattle Public School District. Every child should have the right to attend their neighborhood school, if that is their choice." *Id.*

in its ten public high schools.¹⁴¹ The City of Seattle School District maintained a voluntary open choice policy for its 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.¹⁴²

In an effort to diversify its high schools, the Seattle School Board allocated the available spaces in its high schools according to the choice of the individual pupils.¹⁴³ A majority of students chose the same five schools and disregarded the remaining high schools in the school district.¹⁴⁴ When a school was oversubscribed, the Seattle School Board chose who could attend that school based on a series of four tiebreakers.¹⁴⁵ The Parents Involved in Community Schools organization brought suit over the second tiebreaker, the race-preference tiebreaker,¹⁴⁶ which allowed the school board to select students whose race would mitigate the imbalance of the racial makeup of a selected school.¹⁴⁷

141. *Parents Involved in Cmty. Sch.*, 137 F. Supp. 2d at 1225–26.

142. *See Parents Involved in Cmty. Sch.*, 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.*

143. *Id.* at 1169. 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. As a result, the district has historically struggled 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. Sch.*, 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.*

144. *Parents Involved in Cmty. Sch.*, 137 F. Supp. 2d. at 1226 & n.1.

145. *Parents Involved in Cmty. Sch.*, 426 F.3d at 1169.

146. The first tiebreaker was the sibling tiebreaker, which gave a ninth grader priority to enter a school if he or she had a sibling at that school. *Id.* Fifteen to twenty percent of admissions to the ninth-grade class were a result of the sibling tiebreaker. *Id.*

147. *Parents Involved in Cmty. Sch.*, 137 F. Supp. 2d. at 1226. A school is out of balance if it deviates by more than 15 percent from the overall racial breakdown of the student population attending Seattle's public schools (40 percent white and 60 percent non-white). *Id.* If not for the tiebreaker preference, the school district would be de facto segregated due to residential patterns. *See id.* The district esti-

Parents Involved in Community Schools brought an action under both state and federal law in federal district court, claiming that the racial tiebreaker preference violated the Washington Civil Rights Act, commonly referred to as Initiative 200 (passed in 1998), 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.”¹⁴⁸ 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 1964.¹⁴⁹

The district court decided the case in favor of the Seattle School Board on both claims.¹⁵⁰ 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

mated that without the racial tiebreaker preference, the non-white student populations of the 2000–01 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 non-white student populations for the 2000–01 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 three thousand students entered Seattle high schools in the 2000–01 school year, and approximately three hundred were assigned to an oversubscribed high school as a result of the racial tiebreaker preference. *Parents Involved in Cmty. Sch.*, 426 F.3d at 1170. In the third tiebreaker, distance between the student’s home to the school is measured within 1/100 of a mile, and the closest students are admitted first. *Id.* at 1171. The distance tiebreaker accounts for approximately 70–75 percent of ninth-grade admissions. *Id.* The fourth tiebreaker utilizes a lottery system to allocate the remaining seats but is “virtually never used” since the distance tiebreaker assigns nearly all of the students. *Id.*

148. *Parents Involved in Cmty. Sch.*, 137 F. Supp. 2d. at 1227 (citing WASH. REV. CODE ANN. § 49.60.400 (West 2006)).

149. *Id.* at 1226–27.

150. 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 1227–28. The court evaluated the federal claim under the strict scrutiny test and 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.

Initiative 200.¹⁵¹ Following a subsequent tour through the state and federal courts,¹⁵² 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.¹⁵³ The Ninth Circuit found a compelling governmental interest in promoting diversity in the Seattle school classrooms and an interest in avoiding the harm that results from racially concentrated schools.¹⁵⁴

The court further found that the program's use of a race-based tiebreaker was narrowly tailored, and therefore was constitutionally permissible.¹⁵⁵ In the Ninth's Circuit's view, the plan's fifteen percent plus-or-minus variance served as a goal rather than a rigid ratio.¹⁵⁶ The tiebreaker policy was necessary and the most race-neutral alternative since the tiebreaker preference allowed the realization of the compelling interests and discouraged a return to enrollment patterns based on racially segregated housing patterns.¹⁵⁷

151. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 285 F.3d 1236, 1253 (9th Cir. 2002). Law codified at WASH. REV. CODE ANN. § 49.60.400 (West 2006).

152. Following the district court's decision to uphold the district plan, *Parents Involved* appealed. *Parents Involved in Cmty. Sch.*, 285 F.3d at 1243. The Ninth Circuit granted an injunction, and the school district was prohibited from using the racial tiebreaker in making high school assignments. *Id.* at 1257. Applying state law, the Ninth Circuit found the tiebreaker violated Washington law. *Id.* at 1253 (citing WASH. REV. CODE § 49.60.400). Following reversal, withdrawal of opinion on grant of rehearing, *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist.*, 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. Sch. v. Seattle Sch. Dist.*, No. 1, 72 P.3d 151 (Wash. 2003). The Ninth Circuit reversed and remanded with instructions to issue an injunction. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 377 F.3d 949, 989 (9th Cir. 2004).

153. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 426 F.3d 1162, 1166 (9th Cir. 2005) (en banc).

154. *Id.* at 1178. "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.* (citing *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971)).

155. *But see id.* at 1192 (noting that the District's plan provided for annual review of the continuing need for racial preferences and expressing the hope that "25 years from now, the use of racial preferences will no longer be necessary" (quoting *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003))).

156. *Id.* at 1186.

157. *Id.*

Parents Involved appealed the decision to the Supreme Court. On June 5, 2006, the Supreme Court granted certiorari in both cases.¹⁵⁸

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, that is, whether a school board could consider race in a voluntary assignment plan absent a court order.¹⁵⁹ For this reason, the Court chose to decide the cases together.¹⁶⁰ A very narrow majority of the Court voted to invalidate each plan.¹⁶¹

Chief Justice Roberts delivered the “majority” opinion, which Justices Alito, Scalia, and Thomas joined.¹⁶² Justice Kennedy was the swing vote. He concurred in the judgment but agreed with only part of the plurality’s reasoning.¹⁶³ Justices Breyer, Ginsburg, Stevens, and Souter dissented.¹⁶⁴

Chief Justice Roberts acknowledged that the strict scrutiny standard that Justice Powell initially articulated in *Bakke* was the appropriate standard for review.¹⁶⁵ The Court would uphold the race-preference student assignment plans only if each school district could show that there was a compelling governmental interest that

158. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 426 F.3d 1162 (9th Cir. 2005), *cert. granted*, 126 S. Ct. 2351 (2006).

159. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007).

160. *See id.* at 2746.

161. *See generally id.* Chief Justice Roberts delivered the opinion of the Court. Justice Thomas filed a concurring opinion. Justice Kennedy concurred in part and concurred in the judgment. Justices Breyer, Stevens, Souter, and Ginsburg dissented.

162. Justice Stevens wrote a separate dissent questioning the need for strict scrutiny. *Id.* at 2797 (Stevens, J., dissenting). Justice Thomas’s 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’s opinion, racial imbalance is not the same as segregation, and racial imbalance can never justify infringing on the Equal Protection Clause. *Id.* at 2775.

163. *Id.* at 2788 (Kennedy, J., concurring in part and concurring in the judgment).

164. *Id.* at 2797 (Breyer, J., dissenting).

165. *Id.* at 2751 (plurality opinion); *see Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 290 (1978). “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. Sch.*, 127 S. Ct. at 2751 (citing *Johnson v. California*, 543 U.S. 499, 505–06 (2005)); *see also Grutter v. Bollinger*, 539 U.S. 306, 326 (2003); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 224 (1995).

supported the plan and that the plan was narrowly tailored to meet that state's interest.¹⁶⁶

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*: that the program was designed to remedy the present effects of past discrimination or that the program was created to ensure viewpoint diversity in the classroom.¹⁶⁷ The Chief Justice quickly recognized that the first compelling governmental interest was irrelevant in this instance, because the plans under consideration were voluntary and were not created in response to a court order.¹⁶⁸ The Court then considered whether the plans met the Court's previously identified interest in achieving viewpoint diversity in education.¹⁶⁹ The plurality, however, dismissed the compelling governmental interest prong of achieving viewpoint diversity in the classroom as inapplicable and asserted that such considerations, first raised in *Bakke* and then reaffirmed in *Grutter* and *Gratz*, were unique to "institutions of higher education."¹⁷⁰

The plurality, therefore, rejected the school boards' argument that a compelling governmental interest existed to achieve racial balance. According to the school boards, educational and broader socialization benefits flow from a racially diverse learning environment.¹⁷¹ In response to the school boards' arguments, the plurality found that "the Constitution is not violated by racial imbalance in the schools, without more."¹⁷² "Any continued use of race," the

166. *Parents Involved in Cmty. Sch.*, 127 S. Ct. at 2752.

167. *Id.* at 2752–53; see also Garfield, *supra* note 81.

168. *Parents Involved in Cmty. Sch.*, 127 S. Ct. at 2752.

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

170. *Parents Involved in Cmty. Sch.*, 127 S. Ct. at 2754 (citing *Grutter*, 539 U.S. at 329). The Court found that *Grutter* applied only 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." *Id.* (internal quotation marks omitted).

171. See Transcript of Oral Argument at 44, *Parents Involved in Cmty. Sch.*, 127 S. Ct. 2738 (2006) (No. 05-908); Transcript of Oral Argument at 30–31, 34, *Meredith v. Jefferson County Bd. of Educ.*, 127 S. Ct. 2738 (2006) (No. 05-915).

172. *Parents Involved in Cmty. Sch.*, 127 S. Ct. at 2752 (quoting *Milliken v. Bradley*, 433 U.S. 267, 280 n.14 (1977)).

Chief Justice wrote, “must be justified on some other basis.”¹⁷³ “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 decisionmaking such irrelevant factors as a human being’s race will never be achieved.”¹⁷⁴

The plurality suggested that the only time it would find the use of race justified would be when the governmental entities defending the policy could establish proof of *de jure* segregation.¹⁷⁵ Thus, without evidence that a previous government had taken affirmative steps to create racial segregation, or that a consent decree or court order had mandated that the state take steps to reverse identified discrimination, it would never find a compelling governmental interest.¹⁷⁶ Under the plurality’s analysis, a desire to remedy *de facto* segregation is not enough to justify the use of race-preference policies.¹⁷⁷

Justice Kennedy joined the plurality’s judgment but sharply disagreed with much of its reasoning.¹⁷⁸ His opinion essentially mirrored Justice Powell’s opinion in *Bakke*; both Justices held that the programs in the particular case were unconstitutional, but, as dis-

173. *Id.* 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 (Thomas, J., concurring) (footnote omitted). “Because racial imbalance is not inevitably linked to unconstitutional segregation, it is not unconstitutional in and of itself.” *Id.* (citing *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526, 531 n.5 (1979) (“Racial imbalance . . . is not *per se* a constitutional violation.”)).

174. *Id.* at 2758 (plurality opinion) (quoting *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 495 (1989)) (alteration in original and internal quotation marks omitted).

175. “The plurality opinion is at least open to the interpretation that the Constitution requires school districts to ignore the problem of *de facto* resegregation in schooling.” *Id.* at 2791 (Kennedy, J., concurring in part and concurring in the judgment).

176. *Id.* at 2771 (plurality opinion). Chief Justice Roberts noted that evidence of *de jure* segregation is easily identifiable since, “[i]n most cases, there either will or will not have been a state constitutional amendment, state statute, local ordinance, or local administrative policy explicitly requiring separation of the races.” *Id.*

177. *Id.* at 2761.

178. *Id.* at 2790–91 (Kennedy, J., concurring in part and concurring in the judgment) (agreeing that the Court had jurisdiction in this case, that the matter was subject to strict scrutiny and that neither school board plan was narrowly tailored).

cussed further below, disagreed with the conclusion of those striking down the policies that such policies could never pass muster or do so under only very limited circumstances.¹⁷⁹ Justice Kennedy's concurrence, therefore, served as the swing vote in favor of invalidating the race-preference student assignment plans. When combined with the dissenting opinion in *Parents Involved*, however, his concurrence represented the fifth Justice who would find instances in which race-preference school assignment plans were constitutionally permissible absent de jure segregation.¹⁸⁰

At the outset, Justice Kennedy found that the Louisville and Seattle programs were not narrowly tailored to meet their identified goals.¹⁸¹ The Jefferson County Board considered applicants merely in terms of black or white, while the Seattle School Board considered applications in terms of non-white or white.¹⁸² In each instance, the plans were drafted based on widely drawn categories of specific races and ethnicities. Each school board's 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."¹⁸³ Justice Kennedy's concurrence provided the fifth vote to invalidate both the Louisville and the Seattle programs.

Justice Kennedy agreed with the plurality that strict scrutiny was the appropriate standard for reviewing the Court's decision.¹⁸⁴ 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.¹⁸⁵ Justice Kennedy did not, however, agree with the plurality's assessment, which stated that diversity in education is not a compelling governmental interest, and instead wrote: "Diversity, depending on its meaning and definition, is a compelling educational goal a school district may pursue."¹⁸⁶

In Justice Kennedy's opinion, the plurality was far too restrictive since, under its ruling, the Court would permit a government to use race-preference policies only if it were doing so to remedy de

179. *Id.*; see *infra* notes 195–97 and accompanying text.

180. See *infra* note 187.

181. *Parents Involved in Cmty. Sch.*, 127 S. Ct. at 2795–96 (Kennedy, J., concurring in part and concurring in the judgment).

182. *Id.* at 2791.

183. *Id.* at 2753 (plurality opinion) (quoting *Grutter*, 539 U.S. at 325).

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

185. *Id.* at 2790–91.

186. *Id.* at 2789.

jure segregation.¹⁸⁷ 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."¹⁸⁸ 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 ensure integration, absent a demonstration that the state had previously engaged in intentional school segregation.¹⁸⁹

According to Justice Kennedy, the plurality was "profoundly mistaken"¹⁹⁰ in its conclusion that "the Constitution mandates that state and local school authorities must accept the status quo of racial isolation in schools . . ."¹⁹¹ 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."¹⁹² Consistent with this view, "[a] compelling interest exists in avoiding racial isolation, an interest that a school district, in its discretion and expertise, may choose to pursue."¹⁹³ A compelling interest also exists in achieving a diverse student population, and school boards may consider race as "one component of that diversity," though "other demographic factors, plus special talents and needs, should also be considered."¹⁹⁴

Although Justice Kennedy sharply disagreed with the plurality's unwillingness to find a compelling governmental interest in assuring classrooms were comprised of diverse racial groups, he was most bothered by the plurality's suggestion that future courts should prohibit the use of race absent a judicial finding of *de jure* segregation.¹⁹⁵ 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."¹⁹⁶ Although Justice Kennedy found a compelling gov-

187. *Id.* at 2791 ("The plurality opinion is at least open to the interpretation that the Constitution requires school districts to ignore the problem of *de facto* resegregation in schooling.").

188. *Id.* at 2791.

189. *Id.* at 2795–96.

190. *Id.*

191. *Id.*

192. *Id.* at 2797.

193. *Id.*

194. *Id.*

195. *Id.* at 2796.

196. *Id.* at 2797.

ernmental interest, he voted to strike down the programs because the school boards did not demonstrate that their approaches were the only means of avoiding racial isolationism.¹⁹⁷

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.¹⁹⁸ Both plans served a compelling governmental interest¹⁹⁹ and were narrowly tailored.²⁰⁰ For these reasons, the dissenting Justices would have voted to uphold the plans.²⁰¹

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.”²⁰² He noted that this compelling interest possesses three essential elements: “the historical and remedial” element of rectifying the consequences of prior segregation; the “educational” element of “overcoming the 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.”²⁰³ After considering each element, Justice Breyer determined that the districts’ interest in eradicating primary and secondary public school segregation involved all three elements. He asked rhetorically, “[i]f an educational interest that combines these three elements is not ‘compelling,’ what is?”²⁰⁴

197. *Id.* at 2790–91.

198. *Id.* at 2820 (Breyer, 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.*

199. 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. *Id.* at 2802, 2810. Both school districts were “highly segregated in fact” prior to the districts’ desegregation plans and thus were in need of a remedy. *Id.* at 2802.

200. *Id.* at 2825.

201. *See id.* at 2800–37.

202. *Id.* at 2820.

203. *Id.* at 2820–21 (quotation omitted).

204. *Id.* at 2823. Justice Breyer disagreed with the plurality’s conclusion that a compelling governmental interest in instances other than in higher education should be limited to remedying de jure rather than de facto segregation. *Id.* at 2802, 2810. He concluded that the distinction is “meaningless in the present context.” *Id.* at 2802. Irrespective of the cause, he pointed out, both school districts

In addition to concluding that the districts' plans addressed a compelling interest, Justice Breyer also concluded that the plans were narrowly tailored.²⁰⁵ 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. As support to show that the racial balancing programs were narrowly tailored, Justice Breyer cited the fact that each school board had devised a plan that imposed a lesser burden than previous court-approved plans and that the school boards had a lack of reasonably evident alternatives.²⁰⁶

Justice Breyer dedicated an entire section of his dissent to a discussion of "consequences."²⁰⁷ "[T]oday's holding," he wrote, "upsets settled expectations, creates legal uncertainty, and threatens to produce considerable further litigation, aggravating race-related conflict."²⁰⁸ He noted that, prior to the present decision, "this 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.²⁰⁹ To invalidate plans that incorporate such criteria, he asserted, would "threaten the promise of *Brown*."²¹⁰ Therefore, Justice Breyer concluded, "[t]his is a decision that the Court and the Nation will come to regret."²¹¹

The plurality opinion of *Parents Involved* threatens to dismantle *Brown*. Once a school board has achieved its desired goal of racial

were "highly segregated in fact" prior to the districts' desegregation plans and thus were in need of a remedy. *Id.* at 2802. The plurality countered 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 (plurality opinion) (citing *Milliken v. Bradley*, 433 U.S. 267, 280 n.14 (1977)). In the present cases, argued the plurality, race-conscious remedies were inappropriate because the Seattle school district was never segregated by law, and the Louisville district had previously been deemed "unitary" by a federal court. *Id.*

205. *Id.* at 2824 (Breyer, J., dissenting).

206. *Id.* at 2829–30.

207. *See id.* at 2831–37.

208. *Id.* at 2836.

209. *Id.* at 2834 (internal quotation marks omitted).

210. *Id.* at 2837.

211. *Id.* The plurality claimed that Justice Breyer's concerns regarding the ramifications of its decision exhibited "an unjustified note of alarm." *Id.* at 2766 (plurality opinion). Regarding the various laws the dissent cited as vulnerable, the plurality said they had "nothing to do with the pertinent issues" that were presented to the Court. *Id.*

balance in the classroom, the plurality's decision precludes them from retaining plans aimed at maintaining the integration goals that these plans initially secured. The Louisville and Seattle plans are emblematic of the ways in which school boards across the country responded to the Court's ruling in *Brown v. Board of Education*.²¹² Similar successful initiatives may potentially face the same fate as the Louisville and Seattle plans.²¹³ 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."²¹⁴

Only four Justices, however, constitutionally prohibited the use of race-preference student assignment plans in grades K–12 absent a history of de jure segregation.²¹⁵ Justice Kennedy agreed with the dissenters to the extent that he could find some instances in which the courts should uphold these types of plans.²¹⁶ A court adopting the language of Justice Kennedy's "swing vote" could remove the "constitutional prohibition" and could uphold the use of race to achieve diversity in classrooms at any educational level.

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

The divided voting in *Parents Involved* was strikingly similar to the voting in the *Bakke* decision. In each case, four Justices agreed, with limited exceptions, that there was no room in the law to allow for a race-preference policy that favored one group based on race or ethnicity.²¹⁷ Four other Justices found that the race-preference policies designed to create viewpoint diversity in grades K–12 fit

212. *Id.* at 2767.

213. *See id.* at 2754. Prior to *Parents Involved in Cmty. Sch.*, three courts of appeals found that race-based assignments were permissible at the elementary and secondary level, largely in reliance on *Grutter*. *See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 426 F.3d 1162, 1166 (9th Cir. 2005); *McFarland ex rel McFarland v. Jefferson County Pub. Sch.*, 416 F.3d 513, 514 (6th Cir. 2005); *Comfort v. Lynn School Comm.*, 418 F.3d 1, 13 (1st Cir. 2005), *cert. denied*, 546 U.S. 1061 (2005), *abrogated by Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 127 S. Ct. 2738 (2007).

214. Adam Liptak, *Brown v. Board of Education, Second Round*, N.Y. TIMES, Dec. 10, 2006, at 4.3 (quoting Justice Ginsburg).

215. *See supra* notes 162, 175–77 and accompanying text.

216. *See supra* note 187.

217. *See supra* notes 8–10 and accompanying text.

squarely within the constitutional limits of the law.²¹⁸ One Justice in each case cast a “swing vote,” holding that there was a compelling governmental interest in creating viewpoint diversity in the classroom. In each case, the manner in which the University of California, Seattle, and Louisville plans were adopted, however, was not the most narrowly tailored to meet a constituently permissible goal. Justice Kennedy’s opinion, like Justice Powell’s opinion in *Bakke*, straddles the plurality and the dissent.²¹⁹ As a consequence, Justice Kennedy’s position is likely to emerge as the foundation for future race-preference decisions in a manner that is strikingly similar to the function that Justice Powell’s opinion in *Bakke* has served in the area of equal protection law.²²⁰

A. *The Value of Justice Kennedy’s Concurrence*

Justice Kennedy’s swing vote potentially offers race-preference program advocates the hope that their challenged programs will survive strict scrutiny.²²¹ In the *Parents Involved* case, the four dissenting Justices agreed with his conclusion that there is a compelling governmental interest in achieving diversity in grades K–12 and that, in the right instances, school boards could narrowly tailor programs to achieve that interest. Justice Kennedy’s concurrence offered the lone opinion in the “majority” that would support a government’s use of favoring one race over another to achieve classroom diversity. Justice Kennedy’s opinion has the potential to ensure that future courts uphold the use of race-preference policies, since in many instances one Justice’s concurrence can have significant force and effect on the future of the case law.²²²

Concurring opinions have sometimes exercised a greater impact on subsequent case law than the majority opinions they accom-

218. See *supra* notes 8–10 and accompanying text.

219. See Bench Conference, <http://blog.washingtonpost.com/benchconference/> (Jun. 28, 2007, 11:53 ET).

220. See Billy House, *Kennedy is Court’s New Swing Vote*, ARIZ. REPUBLIC, Jul. 2, 2006, at 1; Charles Lane, *Kennedy Seen as The Next Justice In Court’s Middle: Alito Expected to Tilt Conservative*, WASH. POST, Jan. 31, 2006, at A4.

221. See generally Laura K. Ray, *The Justices Write Separately: Uses of the Concurrence by the Rehnquist Court*, 23 U.C. DAVIS L. REV. 777, 780 (1990) (“The concurrence as a practical matter may have a greater effect on subsequent cases than on the majority opinion that it accompanies, especially if the concurrence is one proposing an independent legal basis for the majority’s result.”).

222. See generally Nat’l League of Cities v. Usery, 426 U.S. 833, 856 (1976), overruled by Garcia v. San Antonio Metro Authority, 469 U.S. 528 (1985); Branzburg v. Hayes, 408 U.S. 665, 709–10 (1972); United States v. Container Corp. of Am., 393 U.S. 333, 338–39 (1969); Igor Kirman, *Standing Apart to Be a Part: The Precedential Value of Supreme Court Concurring Opinions*, 95 COLUM. L. REV. 2083 (1995).

panied.²²³ Judge Kozinski of the Ninth Circuit has said, “A concurring opinion can be influential, especially when authored by a swing justice.”²²⁴ The “swing vote,” by definition, results from “plurality decisions, which do not contain any single line of reasoning supported by a majority of the Court.”²²⁵ Some, which one scholar labeled “concurrence in judgment,” express agreement with the majority’s result but not with its reasoning.²²⁶ In those instances, the Justice’s judgment swings with the majority, but the reasons for reaching that judgment swing with the dissenters.

Where the “swing judge” concurs in judgment only, the language of the concurrence contains rules, principles, or findings to which the plurality does not subscribe. The language of the concurrence generally offers its own reasoning in support of its conclusion. But the “swing” Justice is not alone in his or her reasoning; as a practical matter, many dissenting Justices may agree with the language of the concurrence, making a “majority” of the Court in the sense of the ideas and principles set down in the concurrence. In some instances, therefore, reasons and arguments set out in concurrence judgments can become the basis for new law.

Justice Powell’s plurality opinion in *Bakke* is a good example of where a single Justice’s opinion can shape the future of a particular area of law. The *Bakke* Justices who agreed with his conclusion—that the Davis Policy was unconstitutional—did not agree with his reasoning that race could be considered in admissions decisions.²²⁷ Justice Powell’s concurrence in *Bakke*, however, provides an instance in which the opinion of a single Justice may go a long way to establishing a foundation for future Supreme Court decisions.²²⁸

Concurring opinions that offer tests, formulations, or prescriptions are more likely to eclipse the majority opinions they accompany. Justice Jackson’s concurrence in *Youngstown Sheet & Tube v. Sawyer*²²⁹ established the widely relied-upon “tripartite framework” for assessing the constitutionality of executive action.²³⁰ Justice

223. See generally Kirman, *supra* note 222, at 2097 (“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.”).

224. *Id.* at 2084 n.8 (internal quotation marks omitted).

225. *Id.* at 2084.

226. *Id.*

227. See *supra* note 12.

228. See *supra* note 14 (discussing precedential effect of *Bakke*).

229. 343 U.S. 579 (1952).

230. *Id.* at 635–40 (Jackson, J., concurring). *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

Harlan's concurrence in *Katz v. United States*²³¹ articulated the inquiry that courts now make when deciding whether a person is entitled to Fourth Amendment protection of privacy.²³² In *Terry v. Ohio*,²³³ Justice Harlan's concurrence further shaped Fourth Amendment jurisprudence when he outlined the appropriate standard for warrantless searches and seizures, as well as the reasonable scope of a "stop and frisk."²³⁴

Justice Kennedy's concurrence includes two ingredients that are demonstrably important to ensuring a concurrence will eclipse the majority opinion: his "swing vote" provides valid reasoning for future cases with which a majority of the court agrees and also identifies a standard for measuring the constitutionality of future race-preference challenges.

Four Justices agreed with Justice Kennedy's definition of a compelling governmental interest, which includes the promotion of viewpoint diversity at every educational level.²³⁵ School districts are free to employ programs that will avoid the "status quo."²³⁶ Justice Kennedy's assertion that the Constitution does not prohibit

mills" in order to avoid a nationwide strike during the Korean conflict. *Id.* at 582 (majority opinion).

231. 389 U.S. 347 (1967).

232. *Id.* at 361 (Harlan, J., concurring). A person must exhibit both "an actual (subjective) expectation of privacy," and such expectation must be "one that society is prepared to recognize as reasonable." *Id.* (internal quotation marks omitted).

233. 392 U.S. 1 (1968).

234. *Id.* at 32–34 (Harlan, J., concurring). 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. *Id.* at 30–31 (majority opinion). Justice Harlan's concurrence defined for future courts the appropriate inquiry courts should make when determining what makes a frisk reasonable. See, e.g., *United States v. Place*, 462 U.S. 696, 703 (1983) (adopting explicitly 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. . . . '[T]he right to frisk in this case depends upon the reasonableness of a forcible stop to investigate a suspected crime'" (quoting *Terry*, 392 U.S. at 32–33)); *Florida v. Royer*, 460 U.S. 491, 498 (1983) (relying 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"); *United States v. Mendenhall*, 446 U.S. 544, 553 (1980) (citing 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").

235. See generally *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2800–37 (2007) (Breyer, J., dissenting).

236. *Id.* at 2791 (Kennedy, J., concurring in part and concurring in the judgment).

K-12 level school authorities from taking affirmative measures to prevent racial imbalance extends the rule of *Bakke* and *Grutter* beyond higher education. Consequently, his clear formulation of the appropriate instances in which courts may find that 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 the context of higher education.²³⁷

Although not a “test” in the traditional sense of a formulation, Justice Kennedy’s opinion does identify clear benchmarks by which future courts may evaluate race-conscious policies for compliance with appropriate constitutional standards.²³⁸ School boards should not assign a student to a particular school based solely on the student’s race or ethnicity.²³⁹ School boards may, however, use performance and other statistics, demographic zoning, and enrollment tracking to support race-preference programs.²⁴⁰ School boards have the power to create magnet schools or may draw school zones with living patterns in mind.²⁴¹ The alternatives which Kennedy says are available to school boards suggest that creative tailoring leaves 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 in the context of higher education.²⁴² Governmental entities need not demonstrate that they were somehow instrumental in creating the segregation before

237. See Tony Mauro, *Court Strikes Plans That Assign Students Based on Their Race*, N.Y. L.J., Jun. 29, 2007, at 5.

“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.

238. See *Parents Involved in Cmty. Sch.* 127 S. Ct. at 2792 (Kennedy, J., concurring in part and concurring in the judgment).

239. *Id.* (“Assigning to each student a personal designation according to a crude system of individual racial classifications [demands strict scrutiny].”).

240. *Id.*; see generally *id.* at 2800–37 (Breyer, J., dissenting).

241. 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 & Finder, *supra* note 15.

242. See *Parents Involved in Cmty. Sch.*, 127 S. Ct. at 2791 (Kennedy, J., concurring in part and concurring in the judgment).

they are constitutionally permitted to dismantle it.²⁴³ The attainment of viewpoint diversity is therefore, in the right instances, sufficient to support district-wide school assignment plans.²⁴⁴

The language of Justice Kennedy's concurring opinion includes the ingredients necessary to assure its adoption by future courts. His "swing vote" presents the Court with a majority of Justices who would find a compelling governmental interest in achieving diversity in every classroom and would permit the use of race to remedy de facto segregation. Moreover, his language is clear and easily malleable, while identifying a particular standard against which challenged future race preference programs may be judged. As a result, Justice Kennedy's concurrence is likely to have a profound effect on future race-preference challenges in a manner that may equal Justice Powell's opinion in *Bakke*.

B. *The Aftermath of Justice Kennedy's Concurrence*

Justice Kennedy's role as the swing vote in *Parents Involved*, coupled with the language of his concurrence, suggest his concurrence will have a profoundly favorable effect for proponents of race-preference policies. The language of his "concurrence in judgment" was more clearly aligned with the dissenters. As a result, at least for now, a majority of the Justices would support the use of race-preference student assignment plans in certain instances.²⁴⁵ Moreover, the language of his concurrence provides the standards and factors upon which future courts may easily rely, if they so choose.²⁴⁶

Justice Kennedy's vote in *Parents Involved* is emblematic of his role as the "middle man" on the bench during the 2006–07 term. Decisions during the Court's 2006–07 term were among the most conservative the nation has seen since 1937.²⁴⁷ The vacancy left by the politically moderate Sandra Day O'Connor, followed by President Bush's appointments of Chief Justice John Roberts and Justice

243. *Id.*

244. *See id.* at 2797.

245. *See supra* note 187.

246. *See supra* notes 238–44 and accompanying text.

247. *See* Steven Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J.L. & PUB. POL'Y 769 (2005) (noting that progressives had to struggle to gain a majority until the post-1937 Roosevelt era, when conservatives lost control of the Court); Stephen A. Siegel, *Justice Holmes, Buck v. Bell, and the History of Equal Protection*, 90 MINN. L. REV. 106, 131–33 (2005) (noting that forty-six laws were struck down on equal protection grounds during the *Lochner* era between 1897 and 1937); *see also* James Henretta, *Charles Evans Hughes and the Strange Death of Liberal America*, 24 LAW & HIST. REV. 115 (2006).

Samuel Alito in 2006, prompted a clear shift toward a more conservative ideology.²⁴⁸

Justice Kennedy's moderate alliance with the more conservative members of the Court has limited the Court's rightward 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, the Justices in the *Parents Involved* majority voted to uphold a federal law banning middle- to late-second-trimester abortions.²⁴⁹ 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.²⁵⁰ In *Morse v. Frederick*, a case that considered a high school student's right to display a banner reading "BONG HiTS 4 JESUS," the same five conservative Justices concluded that the First Amendment right to free speech does not extend to student speech promoting illegal drug use.²⁵¹

The delicate makeup of the *Parents Involved* case calls into question the likeliness that it will endure as controlling law. The law on the use of race-preference policies prior to *Parents Involved*

248. See Adam Cohen, *Last Term's Winner at the Supreme Court: Judicial Activism*, N.Y. TIMES, Jul. 9, 2007, at A16; Linda Greenhouse, *In Steps Big and Small, Supreme Court Moved Right*, N.Y. TIMES, Jul. 1, 2007, at A1; Nina Totenberg, *A Newly Conservative Supreme Court?*, NPR NEWS, Oct. 2, 2006, available at <http://www.npr.org/templates/story/story.php?storyId=6180004>; see also Bill Mears, *5-4 Votes Nudge Supreme Court to the Right*, <http://www.cnn.com/2007/US/law/07/02/scotus.review/index.html> (Jul. 2, 2007) ("This has been the most overwhelmingly, consistently conservative term of the Supreme Court in recent memory." (quoting Prof. Erwin Chemerinsky, constitutional scholar at Duke Law School)).

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

250. Congress passed the Act at issue in *Gonzales* in response to the *Stenberg* decision, which held that a Nebraska law banning partial birth abortion was unconstitutional. *Stenberg v. Carhart*, 530 U.S. 914, 929-30 (2000). In *Gonzales*, Justice Ginsburg gave a bitter dissent:

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 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."

Gonzales, 127 S. Ct. at 1650 (Ginsburg, J., dissenting) (citations omitted).

251. 127 S. Ct. 2618, 2622 (2007). At a school event, the principal observed students displaying 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 one of the students. *Id.*

was relatively clear: the Court would find a compelling governmental interest in remedying the present effects of past discrimination in the workplace²⁵² and in achieving diversity in higher education.²⁵³ Five of the Justices deciding *Parents Involved* identified a compelling governmental interest beyond the higher education context the Court had previously announced. Those dissenting Justices and Justice Kennedy agreed that the compelling governmental interest in achieving viewpoint diversity extends to classrooms in grades K–12.²⁵⁴

The sharp contrast between the four Justices in the plurality and the four dissenting Justices illustrates the fragility of the *Parents Involved* decision. The plurality and dissent were clearly at odds as to the role that racial consciousness should play in American life. According to the plurality, upholding the school board plans would perpetuate the use of race in governmental decision-making processes.²⁵⁵ In the opinion of the plurality, governments may not use race except in the most specific instances of rectifying de jure segregation.²⁵⁶ To allow the use of non-neutral policies beyond the strictest limitations would encourage society to continue looking at individuals based on race. In the minds of the plurality, America will not become a truly integrated society until governments are prohibited from taking race or ethnicity into account.²⁵⁷

The dissent, however, found a compelling governmental interest in ending racial isolation, regardless of whether it was created de facto or de jure.²⁵⁸ The “democratic element of producing an educational environment that reflects a pluralistic society” remained a paramount goal.²⁵⁹ The four Justices suggested that there is a compelling governmental interest in creating racial diversity even beyond the classroom. This asserted the need to assure governments that they had the opportunity to redress instances of segregation, regardless of how they arose.²⁶⁰ The divided Court is

252. See *supra* notes 103–07 and accompanying text.

253. See *supra* notes 108–13 and accompanying text.

254. See *supra* note 193.

255. See *supra* note 174.

256. See *supra* note 176.

257. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2823–24 (2007) (Breyer, J., dissenting).

258. *Id.* at 2821.

259. *Id.* (citing *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971)).

260. *Parents Involved in Cmty. Sch.*, 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

precariously situated. The appointment of one new Justice could easily shift the Court away from the plurality's decision. To be sure, change on the bench may result in a different ideology.²⁶¹ History makes clear, however, that even a slight change in the makeup of the bench can propel the Court into a new direction. For example, in 1981, the Court ruled in *Parratt v. Taylor*²⁶² that mere negligence is sufficient to support a § 1983 action brought by an inmate against a prison official who lost his "hobby kit" sent through the mail.²⁶³ Five years later in 1986, Justice Scalia replaced Chief Justice Burger, and, in *Daniel v. Williams*,²⁶⁴ the newly reconstituted Court overruled *Parratt* to the "extent that it states that mere lack of due care by a state official may deprive an individual of life, liberty, or property under the Fourteenth Amendment."²⁶⁵

In 1971, the Court decided *Durham v. United States*.²⁶⁶ The issue for consideration was whether the Court should hear a case brought by a defendant who had died after his conviction, but before his appeal was heard.²⁶⁷ The Court issued an opinion per curiam in which five Justices ruled that death abates all appeals and proceedings, concluding that the indictment should be dismissed.²⁶⁸ Chief Justice Burger and Justice Stewart joined Justice Marshall in finding that the defendant's death rendered the appeal moot.²⁶⁹ Justice Blackmun dissented, writing that he would dismiss the appeal rather than dismiss the indictment, since the latter device "wipes the slate entirely clean of a federal conviction."²⁷⁰ Five years later, Justices Stevens and Rehnquist had replaced Justices Black and Douglas, and, as a result, only three members of the Court who had advocated abating all charges remained on the bench. When the Court heard the same issue in *Dove v. United*

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." *Id.*

261. Between 1937 and 1943, President Franklin D. Roosevelt replaced eight of the nine Justices, significantly shifting the Court to the left. See List of Supreme Court Nominees by Presidential Appointment, <http://www.supremecourthistory.org/myweb/fp/courtlist2.htm> (last visited Jan. 15, 2008).

262. *Parratt v. Taylor*, 451 U.S. 527, 535 (1981), *overruled by Daniels v. Williams*, 474 U.S. 327 (1986).

263. *Id.*

264. 474 U.S. 327 (1986).

265. *Id.* at 330–31 (internal quotation marks omitted).

266. 401 U.S. 481 (1971).

267. *Id.* at 481–82.

268. *Id.* at 482–83.

269. *Id.* at 483.

270. *Id.* at 484–85.

States,²⁷¹ eight Justices agreed to overrule *Durham*. In each instance, over a short period of time, the Court reversed its course on a particular area of law, providing clear indication of the surprisingly delicate nature of Supreme Court precedent.

A Justice's opinion or concurrence that stems from a sharply divided opinion is most likely to influence a shift in the Court when it articulates clearly supported principles, legal tests, or objective guidelines. Justice Powell's opinion in *Bakke* clearly illustrates this point. His pronouncement that "the attainment of a diverse student body . . . is a constitutionally permissible goal for an institution of higher education"²⁷² has provided the language upon which subsequent Courts have relied when upholding race preference policies.²⁷³

Justice Kennedy's concurring opinion in *Parents Involved* provides the same clear doctrine that could easily expand the Court's current limitation on the use of race-preference policies to achieve diversity. In opposition to the plurality's opinion, Justice Kennedy supports the use of race-preference policies to eradicate de facto segregation.²⁷⁴ He advocates broadening the Court's present definition of a legitimate compelling governmental interest to include achieving diversity at every educational level.²⁷⁵ He also provides solid guidelines for future challenges to race-preference student assignment plans, thereby illustrating through concrete example the parameters of a plan that would, according to him, satisfy the narrowly tailored prong of the strict scrutiny test.²⁷⁶ Adoption of his positions would expand the use of race-preference policies well beyond the *Parents Involved* plurality's limitations and would greatly favor the interests of those seeking to achieve greater diversity through the use of governmental action.

According to Justice Kennedy, the government may use race-preference policies in response to de facto or de jure segregation.²⁷⁷ Justice Kennedy refused to adopt the plurality's opinion to the extent that it held race-preference policies impermissible ab-

271. 423 U.S. 325 (1976).

272. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 311–12 (1978).

273. *See, e.g.*, *Grutter v. Bollinger*, 539 U.S. 306, 324 (2003); *Gratz v. Bollinger*, 539 U.S. 244, 257 (2003); *Adarand Constructors v. Peña*, 515 U.S. 200, 218 (1995); *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 568 (1990); *Richmond v. J.A. Croson, Co.*, 488 U.S. 469, 484 (1989); *United States v. Paradise*, 480 U.S. 149, 167 (1987).

274. *See supra* notes 191–94 and accompanying text.

275. *See supra* note 193.

276. *See supra* note 238–40 and accompanying text.

277. *See supra* note 187.

sent a finding of de jure segregation.”²⁷⁸ Instead, he wrote that it is permissible to use race-preference policies to redress de facto segregation since “[d]iversity, depending on its meaning and definition, is a compelling educational goal a school district may pursue.”²⁷⁹

Justice Kennedy’s opinion broadens the definition of a compelling governmental interest beyond higher education. According to Justice Kennedy, avoiding racial isolationism and achieving a diverse student population are constitutionally justifiable.²⁸⁰ Under his reasoning, future courts could find a compelling governmental interest in a race-preference student assignment plan.

Finally, in his concurrence, Justice Kennedy provided solid guidelines for school boards interested in using race as a factor in decision-making 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.”²⁸¹ These guidelines provide clear benchmarks against which school boards can tailor their programs, and by which courts can measure future equal protection challenges.²⁸²

Although Justice Kennedy’s opinion could judicially benefit the interests of race-preference advocates, it does not assure that state agencies or educational institutions will remain free to enact race-preference policies to attain viewpoint diversity. Voter initiatives can bar states from enacting race-preference admissions policies.²⁸³ And, where states are free to adopt such programs,

278. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2791 (2007) (Kennedy, J., concurring in part and concurring in the judgment).

279. *Id.* at 2789.

280. *Id.* at 2797.

281. *Id.* at 2792 (Kennedy, J., concurring in part and concurring in the judgment) (citing *Bush v. Vera*, 517 U.S. 952, 958 (1986)).

282. *See Grutter v. Bollinger*, 539 U.S. 306, 336–37 (2003) (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 *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 318 n.52 (1978)).

283. *See CAL. CONST.* art. 1, § 31 (“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.”). The California amendment resulted from a ballot initiative approved on November 5, 1996. *See also MICH. CONST.* art. 1, § 26 (Michigan public schools “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

defending parties must still pass the “narrowly tailored” prong of the compelling governmental interest test, which has often proved the fatal prong of the strict scrutiny test.²⁸⁴

Since Justice Kennedy would extend the *Bakke* and *Grutter* rulings to all educational institutions, the impact of his concurrence is positive for those who support the use of race-preference student assignment plans throughout education. His concurrence, coupled with members of the dissent, equals five Justices on the current Court who would find a compelling governmental interest in remedying de facto segregation in appropriate instances. On their face, the judgments of both *Parents Involved* and *Bakke* appear to be against the interest of those who favor race-preference policies because each strikes down a challenged race-preference plan. However, if *Bakke* is to serve as precedent, then Justice Kennedy’s “swing vote” is likely to serve as another instance in which a negative decision results in a positive outcome for proponents of affirmative action.

CONCLUSION

Justice Kennedy’s concurrence is likely to have an enduring effect on equal protection jurisprudence. His “concurrence in judgment”²⁸⁵ provides sound reasoning upon which courts considering race-preference student assignment plans may rely. Moreover, his “swing vote” has the capacity to shift the direction of the Court in the event that one of the more conservative members of the bench is replaced by a less conservative Justice.²⁸⁶

contracting.”). The Michigan amendment resulted from a ballot initiative approved on November 7, 2006. In two cases, *Operation King’s Dream v. Connerly*, 501 F.3d 584 (6th Cir. 2007), and *Coalition to Defend Affirmative Action v. Granholm*, 501 F.3d 775 (6th Cir. 2007), opponents of the Michigan initiative challenged the constitutionality of the resulting amendment to the state constitution; however, in both cases, the Sixth Circuit declined to grant injunctive relief.

284. See, e.g., *Gratz v. Bollinger*, 539 U.S. 244 (2003) (policy assigning points to university applicants based on race, among other things, 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) (policy reserving space for minority applicants to University of California Medical School not narrowly tailored). The strict scrutiny test has been described as “strict in theory and fatal in fact.” Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (internal quotation marks omitted) (describing emergence of “new” equal protection under the Warren Court).

285. See *supra* note 226.

286. See, e.g., *supra* note 261 and accompanying text.

The influential aftermath of Justice Powell's reasoning in *Bakke*, with which only the dissenting Justices in *Bakke* agreed, sets an historical example that Justice Kennedy's concurrence in *Parents Involved* has the potential to emulate. Justice Powell's conclusion that in some instances race could be a legitimate factor, and that there is a compelling governmental interest in achieving diversity in higher education, became the foundation for future case law.²⁸⁷ In *Grutter* and *Gratz*, the only post-*Bakke* decisions to consider the use of race-preference policies in higher education, the Court specifically endorsed Justice Powell's conclusion that the government has a compelling interest in ensuring diversity in education.

Many concerned with the *Parents Involved* ruling, including the four dissenting Justices, fear that the plurality's decision threatens the vitality of *Brown v. Board of Education*.²⁸⁸ In their judgment, *Parents Involved* could force a retreat to racial segregation in the nation's public schools.²⁸⁹ The more accurate view, however, is quite contrary. The force of Justice Kennedy's concurrence is most likely to have the same effect on the use of race preference policies as did Justice Powell's opinion in *Bakke*. Consequently, Justice Kennedy's finding that a "compelling interest exists in avoiding racial isolation"²⁹⁰ will serve to benefit those interested in using race-preference policies to remedy instances of segregation and discrimination in public schools.

287. See *supra* note 14.

288. See *supra* notes 207–14.

289. See *supra* notes 207–14.

290. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2797 (2007) (Kennedy, J., concurring in part and concurring in the judgment).

